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

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

v.

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

APPENDIX VOLUME I

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S.C. SUPREME COURT

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S.C. SUPREME COURT

The South Carolina Court of Appeals

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

v.

Pickens Roofing and Sheet Metals, Inc., Appellant.

Appellate Case No. 2014-000821

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

John D. Peatte J.

Stephanie P. McDonald J.

Columbia, South Carolina

FILED

October 21, 2016

cc:
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NOV 21 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Pickens Roofing and Sheet Metals, Inc., Appellant.

Appellate Case No. 2014-000821

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 5433
Heard December 8, 2015 – Filed August 3, 2016

AFFIRMED

Lyndey Ritz Zwingelberg and Kirby Darr Shealy, III, both of Adams and Reese LLP, of Columbia, for Appellant.

Zachary Mason Jett and Peter W. Vogt, both of Butler Weihmuller Katz Craig, LLP, of Charlotte, for Respondent.

MCDONALD, J.: In this case arising from an extensive roof fire, a jury awarded the Winthrop University Trustees for the State of South Carolina (Winthrop) $7,223,343.14 in damages against Pickens Roofing and Sheet Metals, Inc. (Pickens). On appeal, Pickens argues the circuit court erred in (1) denying its

motion for a new trial absolute based on the court's refusal to strike a juror for cause; (2) denying its directed verdict motion as to liability; (3) failing to properly recharge the jury on proximate cause; (4) bifurcating the liability and damages phases of trial; (5) denying its directed verdict motion as to damages; and (6) failing to adjust the jury's damages verdict to reflect Winthrop's comparative negligence. We affirm.

FACTS & PROCEDURAL HISTORY

On March 6, 2009, a fire erupted on the roofs of Bancroft Hall and Owens Hall, two buildings on the campus of Winthrop University. Bancroft Hall, a U-shaped building, was originally constructed in 1909; Winthrop built Owens Hall adjacent to Bancroft Hall in 2007. Connecting Bancroft Hall and Owens Hall is a flat roof (the flat roof), which is situated lower than the pitched roofs of the two adjoining buildings.[1]

In 2009, Winthrop sought bids for the Bancroft Hall reroofing project, which involved removing asbestos-containing shingles and updating the roof's appearance to be consistent with that of newly constructed Owens Hall. Winthrop hired Stafford Consulting Engineers (Stafford) to design and prepare specifications for the project. After Winthrop awarded the construction bid to Pickens, Stafford prepared a construction contract, incorporating the specifications into the contract terms. One specification required Pickens to maintain worksite safety precautions and "[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."[2] Additionally, the following specification applied to storage areas for work materials: "Prior to starting work, obtain approval from Owner [Winthrop] for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved

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[1] The flat roof measures approximately twenty to twenty-five feet long by twelve feet wide on one side and three to four feet wide on the other side.

[2] The International Fire Code, which includes standards of the National Fire Protection Association (NFPA), is incorporated by reference in South Carolina municipal and county building codes. *See* S.C. Code Ann. § 6-9-50(A) (Supp. 2015). Of importance in this appeal, section 8.3.3 of NFPA 241 prohibits the "yard storage" of combustible materials within thirty feet of a structure during construction.

locations." Pursuant to the agreement, Winthrop approved storage of materials in (1) a "lay down" area on the ground in front of Bancroft Hall and (2) a nearby parking lot.

During the week of March 1–5, 2009, a three-man Pickens metal crew installed copper on the dormer windows of the Bancroft Hall roof. No other construction crews worked on Bancroft Hall or Owens Hall that week. The Pickens crew stored some roofing materials on the flat roof and did not remove them when they finished work around 4:00 p.m. on Friday, March 5. The following afternoon, a student noticed smoke emerging from the Owens Hall roof; campus police and the fire department responded to the scene. The fire burned for over twenty-four hours into the early evening of March 7. Despite using a stream of approximately 300 gallons of water per minute, the fire department had difficulty extinguishing the fire within the insulation layer of the Owens Hall roof.

On August 31, 2012, Winthrop filed a complaint against Pickens for (1) breach of contract, (2) breach of implied warranty of workmanship, and (3) negligence. Winthrop alleged that Pickens's storage of combustible construction materials on the flat roof—negligently and in violation of the contract terms—caused its fire-related damages. The case was tried by jury from March 17–21, 2014.

Before trial, the circuit court conducted voir dire of the potential jurors. During the jury selection process, the circuit court asked if any jurors or their family members had worked for or had a business relationship with Winthrop. Juror 25 stated, "I am a student researcher at Winthrop and I do know about this. . . . I was there during the fire, the incident, so I know people who were affected by it." When asked if she could remain impartial despite her experience and relationships, Juror 25 responded, "I could do that. I could do that. That's not a problem. It's just I wanted to say that I knew things that occurred." When asked what specific knowledge she had, Juror 25 responded, "The fire, the incident, things that were said about how it occurred, and so forth." Juror 25 asserted that she could be impartial despite her knowledge of the fire.

The circuit court also asked if any jurors or their family members were Winthrop graduates. Juror 25 stated she was a "recent graduate" but could remain impartial. Additionally, the circuit court asked if any member of the jury pool had heard about the case through media coverage. Juror 25 again responded, noting, "I watched it on the news. I am friends with students who were affected by the fire. They discussed some things that they knew and the school website and then some

[of] the professors talked about it, but I don't live on campus so I don't know any specifics, but I have watched it." The circuit court then stated:

> This is very important. . . . Could you put aside anything you may have heard about the case before coming here to court today or anything about it that happened, and render your decision solely on the sworn testimony and evidence that comes in during the trial and the court's instruction on the law that applies and [render] a decision which is fair and impartial to both sides based solely on that evidence that applies. Could you do that or not do that?

Juror 25 responded affirmatively.

The court selected a twenty-person strike panel, which included Juror 25. During a recess before the parties exercised their peremptory strikes, Pickens apparently requested in chambers to strike Juror 25 for cause. Subsequently, Pickens exercised a peremptory strike on Juror 25. After the jury was sworn, Pickens placed its motion to strike Juror 25 for cause on the record, arguing the circuit court should strike Juror 25 because she "is a student at Winthrop University" who indicated she had watched the fire on the news and discussed it with students and faculty. Pickens argued, "I felt that that gave her a perspective on this case that other jurors would not have."

The circuit court denied Pickens's motion, finding that even though Juror 25 was a Winthrop graduate, she did not know any more specifics about the case than other jurors who knew about it had learned through news coverage. The circuit court also emphasized that Juror 25 responded affirmatively that she could be impartial when asked if she could put aside any prior knowledge and decide the case based on the evidence presented at trial. The circuit court noted that this decision differed from its decision to strike another juror who had a connection as a current employee, stating, "You demonstrated no cause to strike her solely [based] on whatever connection she might have known about the case before. . . . In any event, you struck her. You are not prejudiced by that. She is not on the jury obviously."

Before trial, Winthrop filed a motion in limine requesting bifurcation of the trial into liability and damages phases pursuant to Rule 42(b), SCRCP. Winthrop

asserted the damages testimony could add several days to the trial and argued there were no genuine issues as to the extent of its damages. Pickens opposed the motion for bifurcation, and the parties discussed bifurcation in chambers. Pickens did not put its arguments in opposition to bifurcation on the record, but stated, "I understand that we had a conversation in chambers with Your Honor. Your Honor[] has reached a decision on that. I just wanted to state that we did oppose that for the record."

The circuit court granted the motion to bifurcate, explaining, "I questioned [Winthrop] very closely about that because I was not inclined to bifurcate if . . . the same witnesses [would] testify in the second trial with regard to damages . . . ." Determining most of the damages witnesses would not be called to testify during the liability phase, the circuit court reasoned,

> It makes sense to me to bifurcate because if the jury were to return a verdict for [Pickens] we wouldn't have to spend all that time with all those witnesses on damages.
>
> On the other hand, if they return a verdict against [Pickens] then with regard to damages the witnesses pretty much are different witnesses. . . . So we won't lose any time or have to put witnesses up to testify basically to the same things twice.

During the liability phase of trial, Otis Driggers, a certified fire investigator, was qualified as an expert in the field of fire investigation and cause and origin investigation. He testified he could not locate the source of ignition during his investigation, but determined that the fire originated on the flat roof. The parties also stipulated that the fire originated on the flat roof. In his investigation, Driggers interviewed Randall Pruitt (Randall), Matthew Pruitt (Matthew), and Brandon Lusk (Lusk), three Pickens employees who worked on the Bancroft Hall roof project the week before the fire. According to Driggers, the crew reported leaving materials such as rolls of felt paper, metal louvers, and copper flashing on the flat roof when they left work at 4:00 p.m. on Friday, March 5.

Randall, the sheet metal foreman for the project, supervised Matthew and Lusk. Randall worked under his boss, Bobby Pickens (Bobby), and the project manager, Clint Robinson (Robinson). Randall, Matthew, and Lusk used the flat roof for breaks and for storing materials; Lusk and Matthew recalled going back and forth

to the flat roof several times on March 5 to get materials for installing copper on the dormers. Randall testified he only stored copper flashing and other metal materials on the flat roof, and he recalled transporting roofing paper to his truck when he left work. However, in a deposition and interview with Driggers, Randall acknowledged that he left rolls of roofing paper on the flat roof. Lusk recalled storing copper panels, louvers, metal screws, and metal clips on the flat roof, but denied storing felt paper or wooden pallets on the flat roof. When Winthrop impeached Lusk with his post-fire interview with Driggers in which he stated they stored felt paper on the flat roof, Lusk asserted Driggers misunderstood him about paper storage. Matthew testified they stored shingles, copper, metal pieces, and felt paper on the flat roof. All three Pickens metal workers testified they did not smoke or use any soldering materials the week before the fire.

Robinson testified no contract provision allowed for roof storage of materials and that Pickens did not receive permission from Winthrop to store materials on the flat roof. Robinson recalled Pickens stored sheet metal, metal fasteners, and rolls of felt paper on wooden pallets on the flat roof during his project inspections, but he did not go on the roof the day before the fire. Robinson admitted he did not know about the requirements of NFPA 241 addressing storage of materials and was not familiar with the regulations, even though he acknowledged the contract required Pickens to comply with all applicable codes.

Similarly, Bobby testified that the specifications allowed for storage of materials in only two locations on the ground and that Pickens did not have specific permission from Winthrop for roof storage. Bobby also acknowledged that the South Carolina Fire Code applied to the project, stating he was familiar with material storage rules, although he did not know the particular NFPA standard prohibiting yard storage of materials within thirty feet of a structure. He testified Randall and Robinson should have known the applicable laws for the storage of combustible materials.

Additionally, Stafford engineer Vu Nguyen testified Stafford was not aware that Pickens stored materials on the flat roof and that Pickens did not get approval for this storage space at the pre-construction meeting. Wesley Love, Winthrop's project manager for the Bancroft Hall reroof, testified Pickens did not ask to store material on the flat roof, Winthrop did not provide permission, and Winthrop did not know about the overnight storage of materials. Love also testified he did not monitor Pickens's work for safety, and he did not consider himself a fire prevention program superintendent for the Bancroft Hall roof project, nor did he designate any

other Winthrop employee with the title.[3] Walter Hardin, Winthrop's vice president of facilities management, testified that no Winthrop employee was designated with the title of fire prevention program superintendent. Hardin explained, "That was handled through our specifications through Stafford which puts that responsibility on [Pickens]." Hardin stated Winthrop relied on Pickens to comply with applicable roofing laws.

Finally, Daniel Arnold, who was qualified as an expert in fire safety and fire spread analysis, testified he visited Winthrop three or four days after the fire and interacted with origin investigator Driggers. Arnold found the evidence from the fire was consistent with the conclusion that the fire started on the flat roof between Bancroft Hall and Owens Hall. Arnold testified about pictures depicting the height the flames reached, opining that the flame height demonstrated that the fire spread from the flat roof to the pitched roofs. According to Arnold, the flames could not have reached the height of the pitched roofs without the presence of combustible materials on the flat roof. Arnold maintained it was possible to analyze how the fire spread without knowing the ignition source of the fire. He explained that a fire would have self-extinguished on the flat roof and would not have spread if other combustible materials were not stored on the roof because the roof by itself was designed to withstand the spread of fire. Arnold opined to a reasonable degree of engineering certainty that the fire would not have spread from the flat roof to the adjoining pitched roofs but for the presence of combustible materials. Arnold also testified that the International Fire Code and NFPA 241 were adopted in the South Carolina Code; the NFPA provided guidelines for minimizing fire damage during construction or renovation projects and contained a specific provision restricting the storage of combustible materials within thirty feet of a construction project. He confirmed that roofing paper and wooden pallets were combustible materials, and that any materials stored on the flat roof would have been less than thirty feet from the Bancroft Hall construction project.

After Winthrop closed its case, Pickens moved for a directed verdict on the issue of liability, arguing Winthrop failed to prove causation. Specifically, Pickens argued Winthrop introduced no evidence of how the fire began. Pickens claimed that

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[3] Section 7.2 of NFPA 241 provides for the responsibilities of an owner—here, Winthrop—in ensuring fire safety: "The owner shall designate a person who shall be responsible for the fire prevention program and who shall insure that it is carried out to completion."

Winthrop relied on a "spread theory" of liability to prove its case, which is not recognized in South Carolina. Because Winthrop failed to provide evidence that the fire would not have occurred but for Pickens's actions, Pickens argued that Winthrop failed to meet its burden of proof as a matter of law. Pickens further contended that it was unforeseeable that the storage of materials that would be installed on the roof would cause a fire because they were no more combustible than the roof itself or other building components.

The circuit court denied the directed verdict motion, reasoning that there was evidence from which the jury could find Pickens's negligence or breach of contract proximately caused Winthrop's damages. The circuit court further held there was evidence from which the jury could find the fire would not have caused such extensive damages but for the presence of combustibles. Initially, the circuit court stated this was "an issue of novel impression probably in South Carolina," and the case was not a "spread theory" liability case because it involved a contract for a worksite and a statutory duty, not the common law duty of a landowner to prevent the foreseeable spread of fire to neighboring landowners. The circuit court further found the ignition source insignificant because the fire started on the flat roof, the statutes were designed to prevent the spread of fire by prohibiting the storage of combustible materials in certain areas near construction sites, and there was evidence from which a jury could find the combustible materials caused most of the damage because the expert testified the fire would not have spread from the flat roof but for the presence of combustible materials.

After closing arguments as to liability, the circuit court charged the jury on the applicable law. As part of its charge, the circuit court instructed the jury on the definition of proximate cause, foreseeability, and direct cause:

> Proximate cause requires proof of both causation [in] fact and legal cause. Causation [in] fact is proved by establishing the plaintiff's damages would not have occurred but for the defendant's negligence. Legal cause is proved by establishing foreseeability. The touchstone of proximate cause in South Carolina is foreseeability. That is the foreseeability of some damage from a negligent act or omission is a prerequisite to it being a proximate cause of the damage for which recovery is sought. The test for foreseeability is whether some damage to another is the natural and probable

> consequence of the complained of act. A defendant may be held for anything which appears to have been a natural and probable consequence of its negligence. For an act to be [a] proximate cause of damages[,] the damages must be a foreseeable consequence of the act. Foreseeability is not determined from hindsight, but rather from the defendant's [perspective] at the time of the complained of act. The law requires only reasonable foresight. When the damages complained of are not reasonably foreseeable in the exercise of due care[,] there is no liability.

After some deliberation, the jury sent the circuit court a note requesting to be recharged on the "definition of proximate cause." The circuit court gave the following recharge on proximate cause, which repeated a portion of its earlier charge:

> Now, as to proximate cause, I charged you previously that even if you find that the plaintiff has proved the defendant to have been negligent they would not be entitled to a verdict unless you further found that the defendant's negligence was the proximate cause of the plaintiff's injuries. Proximate cause does not mean the soul [sic] cause. The defendant's conduct can be a proximate cause if it was at least one of the direct concurring causes of the injury. The law defines proximate cause to be something that produces a natural chain of events which in the end brings about the injury . . . or damage. In other words proximate cause is a direct cause without which the damage would not have occurred. Okay. Anything else that you need while we are out?

The foreperson replied, "No, that answers it."

Pickens objected, arguing the circuit court erred in failing to include a discussion of foreseeability in the recharge on proximate cause. The circuit court responded the jury "didn't ask for that" and explained that because the jury asked for a definition of proximate cause, it did not complicate the definition by including

foreseeability. The circuit court also stated, "They heard it all the first time. They asked me to [define] proximate cause and when I finished reading the forelady was shaking her head yes, so I figured that is all they want. I asked do you want any more than that."

The jury found against Pickens on both the breach of contract and negligence causes of action. The jury also determined that Winthrop was forty percent comparatively negligent. Pickens moved for judgment notwithstanding the verdict (JNOV), arguing again that the case should not have been submitted to the jury because Winthrop did not present any evidence on the issue of causation. The circuit denied the motion.

The trial continued into the damages phase. Six witnesses testified about the fire and water damages resulting from the fire as well as the payments to contractors completing the repairs.[4] Pickens did not present any evidence as to damages but again moved for a directed verdict, arguing Winthrop failed to prove how its breach of duty made the damages worse. Pickens argued the evidence showed only that Pickens caused the fire to spread, and Winthrop failed to connect Pickens's actions to the damages. The circuit court denied the directed verdict motion, ruling that evidence existed from which the jury could determine that Pickens's actions caused all of the damages. The court based its reasoning on the testimony that the fire would have been contained in the flat roof area but for the improper combustible material storage and the testimony that substantial damages resulted from the firefighters' inability to extinguish the fire after it spread.

The jury returned a damages verdict in the amount of $7,223,343.14. Pickens raised several post-trial motions. Pickens again moved for JNOV, asserting Winthrop failed to provide adequate proof of the cause of the fire during the liability phase. Pickens also renewed its directed verdict motion as to damages, arguing Winthrop failed to prove which damages were caused by the spread of the fire. Additionally, Pickens moved for a new trial absolute based on the circuit court's error in bifurcating the trial, arguing it was inappropriate for the jury to consider proximate cause and damages separately. Pickens also moved for a new trial absolute based on the denial of its motion to strike Juror 25 for cause. In the alternative, Pickens requested that the circuit court enter a judgment governed by the jury's comparative negligence determination, advancing the theory that the

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[4] Winthrop also admitted into evidence a binder documenting its specific damages by category.

breach of duty supporting the negligence verdict was the same as that existing in the contract. Thus, it was proper for the court to apportion comparative negligence under both the negligence and breach of contract causes of action.

The circuit court denied the motion for a new trial absolute on the juror issue, explaining that the juror did not have a close connection that required it to strike her for cause and that Pickens failed to show prejudice because it struck the juror with a peremptory strike. The circuit court found the bifurcation proper, denied Pickens's JNOV motions, and determined Winthrop had a right to elect its remedy. Winthrop elected to recover for breach of contract, and the circuit court entered judgment in the amount of $7,223,343.14.

ISSUES ON APPEAL

I. Did the circuit court err in denying Pickens's motion for a new trial based on the court's refusal to strike Juror 25 for cause?

II. Did the circuit court err in denying Pickens's directed verdict motion as to liability because Winthrop failed to present evidence of causation?

III. Did the circuit court err in failing to repeat a jury charge on foreseeability following the jury's request for additional instruction on proximate cause?

IV. Did the circuit court err in bifurcating the liability and damages phases of the trial?

V. Did the circuit court err in denying Pickens's directed verdict motion as to damages because Winthrop failed to present evidence establishing Pickens's conduct worsened the damages resulting from the fire?

VI. Did the circuit court err in failing to adjust the jury's damages verdict according to its comparative negligence finding?

ANALYSIS

I. Juror Strike

Pickens argues the circuit court erred in denying its motion for a new trial based on the court's refusal to strike Juror 25 for cause. Specifically, Pickens asserts the

circuit court should have struck Juror 25 for cause—despite her statement that she could remain impartial—because she was a "student researcher" and a "recent graduate" of Winthrop who knew about the fire and knew people affected by the fire. Pickens argues the failure to strike Juror 25 mandated a new trial because Pickens did not have a panel of impartial jurors and was forced to use a peremptory strike on a biased juror. We disagree.

"A litigant's right to an impartial jury is a fundamental principle of our legal system." *Burke v. AnMed Health*, 393 S.C. 48, 52, 710 S.E.2d 84, 86 (Ct. App. 2011). "[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury." S.C. Code Ann. § 14-7-1050 (Supp. 2015). "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*, 393 S.C. at 53, 710 S.E.2d at 86. A court should disqualify a juror "[i]f it appears to the court that the juror is not indifferent in the cause." S.C. Code Ann. § 14-7-1020 (Supp. 2015). "The decision [to disqualify a juror] is within the sound discretion of the [circuit court]." *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986).

In *Abofreka*, our supreme court found that a prior business relationship between a juror and a party does not disqualify the juror as a matter of law. *Id.* at 125, 341 S.E.2d at 624. Thus, the circuit court did not abuse its discretion in failing to disqualify challenged jurors who had been patients of Abofreka because the jurors stated they could be fair to both sides. *Id.*

In *Hollins v. Wal-Mart Stores, Inc.*, the circuit court denied Hollins's request to strike for cause a juror whose brother worked at the Wal-Mart where the incident occurred. 381 S.C. 245, 248–49, 672 S.E.2d 805, 806 (Ct. App. 2008). This court held that the circuit court did not abuse its discretion in refusing to strike the juror because Hollins had the opportunity to fully question the juror, who responded that she had no knowledge of the matter, had not discussed it with her brother, and could be fair and impartial. *Id.* at 252, 672 S.E.2d at 808.

We hold that the circuit court did not abuse its discretion in failing to strike Juror 25 for cause. Initially, we find that Pickens's 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 to and ruled on by the trial court. *See 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."). As to Pickens's preserved objections to Juror 25, we do not find that Juror 25's status as a Winthrop graduate required her removal because she stated the relationship would not interfere with her ability to remain impartial. *See Abofreka*, 288 S.C. at 125, 341 S.E.2d at 624. Although Juror 25 had been on campus when the fire occurred and knew people affected by it, she did not appear to have any special knowledge about the fire, and she affirmed that she could decide the case impartially based upon the evidence presented at trial. Based on her responses to the voir dire questions, we cannot say the circuit court abused its discretion in refusing to strike this juror for cause. *See Burke*, 393 S.C. at 53, 710 S.E.2d at 86 ("[P]rospective jurors must be excused for cause when . . . the [circuit] court determines that the juror cannot be fair and impartial.").

Moreover, as Juror 25 was not empaneled, Pickens did not suffer prejudice from any error in failing to strike the juror. *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 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))).

II. Directed Verdict—Liability

Pickens next argues that the circuit court erred in denying its directed verdict motion during the trial's liability phase because Winthrop failed to present evidence of causation. Specifically, Pickens asserts Winthrop's causes of action fail as a matter of law because it could not prove, even with circumstantial evidence, that Pickens caused the fire to ignite. Pickens claims Winthrop relied on a "spread theory" of liability to support causation because it had no evidence of an ignition source, noting South Carolina has never recognized liability under a "spread theory." Further, Pickens asserts Winthrop failed to prove causation because "its storage of the very materials that would shortly be installed on the roof of Bancroft Hall does not create a foreseeable risk of fire ignition that is any greater than that borne by the building generally." Pickens contends that the absence of foreseeability is fatal to Winthrop's causes of action because foreseeability is crucial in fire cases in which the ignition source is unknown.

"A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)). "On appeal from a circuit court's denial of a motion for a directed verdict or a JNOV, we apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* "We will not reverse the circuit court's ruling on a JNOV motion unless there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Id.* (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)).

To recover in breach of contract and negligence actions, a plaintiff must show the defendant's actions caused its damages. *See Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010) (providing that to establish a breach of contract, the plaintiff must prove the contract, its breach, and the damages that "follow as a natural consequence and a proximate result of such breach") (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 146, 638 S.E.2d 650, 662 (2006) ("Negligence is not actionable unless it is a proximate cause of the injury."); *Dropkin v. Beachwalk Villas Condo. Ass'n, Inc.*, 373 S.C. 360, 363, 644 S.E.2d 808, 810 (Ct. App. 2007) (providing a plaintiff must prove a causal connection between the defendant's violation of a statute and its injury to be entitled to damages for negligence per se).

"Proximate cause requires proof of both causation in fact and legal cause." *Madison*, 371 S.C. at 146, 638 S.E.2d at 662. "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability." *Id.* at 147, 638 S.E.2d at 662. "The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause*, 403 S.C. at 150, 742 S.E.2d at 649. "Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." *Id.* (quoting *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972)).

"Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." *McQuillen v. Dobbs*, 262 S.C. 386, 392, 204 S.E.2d

732, 735 (1974) (quoting *Chaney v. Burgess*, 246 S.C. 161, 143 S.E.2d 521 (1965)). In *McQuillen*, after a fire destroyed his personal possessions, a mobile home tenant sued the owner for negligence in failing to properly inspect and maintain a fuel oil furnace. *Id.* at 388, 204 S.E.2d at 735. The owner moved for a directed verdict, arguing the plaintiff provided no evidence that his negligence proximately caused the fire or resulting damages. *Id.* 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. *Id.* at 391–93, 204 S.E.2d at 735–36.

In *Thorburn v. Spartanburg Theatres, Inc.*, the plaintiff sued for negligent maintenance of an electrical system, and the defendant argued the circuit court erred in submitting the issue to the jury because there was no direct testimony as to the cause of a fire and the jury's conclusion that it was an electrical fire was speculative and unsupported by the evidence. 263 S.C. 165, 168–69, 208 S.E.2d 919, 920 (1974). Our supreme court was "convinced that the evidence warranted a reasonable inference that the fire was caused by defendant's failure to properly maintain the electrical system, which required submission of the case to the jury, even though the evidence did not exclude all possibility of some other cause of plaintiff's injury." *Id.* at 169, 208 S.E.2d at 920.

We are likewise convinced that the circuit court properly submitted this issue to the jury. To establish proximate cause, Winthrop needed to provide evidence that Pickens's breach of duty—here, the storage of combustible materials on the flat roof—was a cause in fact of the damages and was a legal cause.

Here, there was evidence that the fire would not have occurred but for Pickens's negligence. The parties stipulated that the fire began on the flat roof. Arnold provided expert testimony that the flames on the flat roof would not have reached the height they reached and consequently spread to the pitched roofs but for the presence of combustibles. Arnold also testified that the fire would have self-extinguished on the flat roof without the presence of combustibles. Viewing the evidence in the light most favorable to Winthrop, this constitutes evidence warranting 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's acts.

Moreover, we find there was evidence to submit to the jury that the damages were foreseeable. Like the circuit court, we find unpersuasive Pickens's 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. The fire code specifically prohibits the storage of combustible materials near a construction site, and one of the stated purposes of the fire code is to prevent the spread of fire. Because a reasonable inference could be drawn that the storage of prohibited combustible materials near a construction project could cause the quick spread of a fire, the question of foreseeability was properly submitted to the jury. *See id.* ("Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." (quoting *Player*, 259 S.C. at 606, 193 S.E.2d at 533)).

Pickens argues that Winthrop's claims failed as a matter of law because Winthrop could not identify the specific ignition source for the roof fire. However, here, as in *Thorburn*, "the circumstances under which the fire originated and its destructive effect precluded direct proof of its cause." 263 S.C. at 168, 208 S.E.2d 920; *see also Scavens v. Macks Stores, Inc*, 577 F.2d 870, 872 (4th Cir. 1978) (stating direct testimony of fire chief, expert testimony, and "circumstantial evidence tending to indicate a gas fire had occurred" provided sufficient factual basis from which jury "could have reasonably concluded that the fire resulted from the ignition of a combustible mixture of air and natural gas. The jury could also have reasonably concluded that any one of the identified potential sources of ignition could have ignited the fire and that, since the store contained no other source of natural gas, a leak in the gas heater line provided the natural gas."). Accordingly, 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.

III. Jury Charge

Pickens argues the circuit court erred in failing to give the jury a complete charge on proximate cause following the jury's request for a recharge. Pickens complains the circuit court prejudiced it by omitting the "touchstone" of the definition of proximate cause—foreseeability. Pickens asserts that the charge was particularly important because the cause of the fire was the primary issue in the case, and the circuit court's failure to give a complete instruction on both elements of proximate cause misguided the jury, led to potential juror confusion, and prejudiced Pickens. We disagree.

"In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court's decision absent an abuse of discretion." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 414, 717 S.E.2d 765, 770 (Ct. App. 2011). "In order to warrant reversal for refusal of the [circuit court] to give requested jury instructions, such refusal must have been both erroneous and prejudicial." *Horry Cty. v. Laychur*, 315 S.C. 364, 368, 434 S.E.2d 259, 262 (1993). "When the jury requests additional charges, it is sufficient for the 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). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* "Moreover, an alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial." *Id.*

Here, the circuit court's original charge contained a lengthy explanation of proximate cause, which included an explanation of foreseeability. When the jury requested additional instruction on the definition of proximate cause, the circuit court gave a more succinct definition, defining proximate cause as "something that produces a natural chain of events which in the end brings about the injury" and "a direct cause without which the damage would not have occurred." This is an accurate statement of the law. *See McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998) ("Proximate cause is the efficient or direct cause of an injury."). The portion charged was responsive to the jury's recharge request. *See Rauch*, 284 S.C. at 597, 327 S.E.2d at 378 ("When the jury requests additional charges, it is sufficient for the court to charge only the parts of the initial charge which are necessary to answer the jury's request."). Accordingly, we find no error in the circuit court's recharge.

IV. Bifurcation

Pickens contends the circuit court erred in bifurcating the trial because causation and damages were inextricably intertwined. Pickens asserts considerations of judicial economy and convenience should not have outweighed its right to a fair trial in which the jury could have considered causation and damages together.

"This court must review a trial judge's decision to bifurcate the issues of liability and damages under an 'abuse of discretion' standard." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Rule 42(b), SCRCP, provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

Rule 42(b), SCRCP. "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." *Creighton*, 334 S.C. at 108, 512 S.E.2d at 516. "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." *Id.*

We find the circuit court properly exercised its discretion in bifurcating the trial. Because most of the damages witnesses would not be called during the liability phase, the circuit court reasoned it would save time and resources by trying the liability phase separately. We find the bases for the circuit court's ruling—convenience and judicial economy—are legitimate reasons for bifurcation. *See* Rule 42(b), SCRCP.

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.

V. Directed Verdict—Damages

Pickens argues the circuit court erred in denying its directed verdict motion in the damages phase because Winthrop failed to provide evidence for the jury to determine with reasonable certainty the damages caused by Pickens. Specifically, Pickens asserts that the jury did not have any evidence of the cost of repairs for Winthrop absent Pickens's breach of duty and erroneously held Pickens liable for all of Winthrop's losses in the fire even though under Winthrop's theory, Pickens's actions merely aggravated the fire damages. We disagree.

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation." *Pope*, 395 S.C. at 434, 717 S.E.2d at 781. "Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant." *Mellen v. Lane*, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008). "An owner can recover for property destroyed or damaged by fire such damages as will restore him to the same property status that he occupied before his property was burned." *Nelson v. Coleman Co.*, 249 S.C. 652, 659, 155 S.E.2d 917, 921 (1967).

Viewing the evidence in the light most favorable to Winthrop, we find the circuit court did not err in submitting the damages issue to the jury. *See Pope*, 395 S.C. at 434, 717 S.E.2d at 781. Pickens does not challenge the evidence of the amount of damages Winthrop suffered from the fire. Rather, Pickens complains about a lack of evidence of causation of the damages, asserting Winthrop's evidence did not enable the jury to determine with reasonable certainty the amount of damages attributable to Pickens's actions. 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.

VI. Comparative Negligence and Breach of Contract

Finally, Pickens argues the circuit court erred in failing to adjust the jury's damages verdict for breach of contract in accordance with its comparative negligence determination. Pickens asserts the breach of contract claim is coextensive with the negligence claim because the contract merely acknowledged certain duties imposed by statute rather than imposing new obligations on Pickens. Pickens contends it would violate public policy for "a contracting party to essentially incorporate by reference the duties to which the opposing party is otherwise bound

by law into a contract and thereby escape an apportionment of liability for his own contributions to a particular loss." We disagree.

"Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts." *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990). "It is a fundamental rule of law in this state that there can be no double recovery for a single wrong." *Id.* "Plaintiffs may only recover once for their actual damages." *Id.* "If multiple causes of action are raised on the same set of facts, the plaintiff may be required to elect his remedy to prevent a double recovery for a single wrong." *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 429, 450 S.E.2d 112, 115 (Ct. App. 1994).

In *Ritter & Associates, Inc. v. Buchanan Volkswagen, Inc.*, Ritter sued BVW for breach of contract, negligence, and negligent supervision for damages it caused in a check kiting scheme. 405 S.C. 643, 648, 748 S.E.2d 801, 804 (Ct. App. 2013). The special referee found in favor of Ritter on its breach of contract claim and awarded $434,000 in damages, but granted judgment in favor of BVW on the negligence causes of action because the "allegations of negligence and negligent supervision were merely examples of the nonperformance of the contractual obligations between the parties." *Id.* On appeal, BVW argued the special referee erred in failing to apportion liability to Ritter based on its own negligent business practices, asserting "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." *Id.* at 651, 748 S.E.2d at 805. However, this court held the apportionment theory inapplicable because comparative negligence applies only to a plaintiff in a negligence action, and Ritter recovered under a breach of contract theory. *Id.*

Pickens argues comparative negligence should govern the damages award "because there [was] truly no legal distinction in the breach of the duty that [was] occasioned in the breach of contract cause of action and the negligence cause of action in this particular case." Pickens asserts *Ritter* is distinguishable because only contract liability existed in that case; thus, it did not involve an election of damages, whereas the jury here found Pickens liable in contract and tort. We agree that the situation is distinguishable; however, we nonetheless find Winthrop could properly elect to recover the non-apportioned damages awarded for breach of contract. *See Ritter*, 405 S.C. at 651, 748 S.E.2d at 805 ("[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging

negligence as a cause of action."). South Carolina's precedent that comparative negligence is inapplicable to a breach of contract theory governs this situation. Although Pickens argues this case presents a unique factual situation requiring an exception to the rule, it cites no persuasive authority to support its public policy argument. Accordingly, we affirm the ruling of the circuit court.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

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.

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

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[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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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

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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August 26, 2016

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

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

RECORD ON APPEAL VOLUME I

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603151

Winthrop University	Pickens Roofing And Sheet Metals Inc
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

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YORK COUNTY C.C.P.

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: SEE ATTACHED VERDICT FORM

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge — 2113 Judge Code — 3/20/13 Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **March** 21, **2014**, and a copy mailed first class or placed in the appropriate attorney's box on **March** 21, **2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Zachary Jett Butler Pappas 11620 N Community House Road Charlotte, NC 28277
Peter Vogt Butler Pappas Weihmuller Katz Craig Llp 11620 N Community House Road Charlotte, NC 28277

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kirby Darr Shealy III PO Box 2285 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter : Aileen Butler

David Hamilton

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
		CIVIL ACTION NO. 2012-CP-46-315
The Winthrop University Trustees for the State of South Carolina, Plaintiff,	)	**VERDICT FORM**
v.	)	
Pickens Roofing and Sheet Metals, Inc.,	)	
Defendant.	)	

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2014 MAR 21 AM 8:32
DARLENE HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

INSTRUCTIONS: Please respond to the following questions in writing. All of the jury's answers must be unanimous.

1. Do you, the jury, find that Pickens Roofing breached the terms of its contract with Winthrop and that this breach was a proximate cause of Winthrop's damages?

   (*check one*) ___✓___ YES _____ NO

2. Do you, the jury, find that Pickens Roofing was negligent and that such negligence proximately caused the Winthrop's damages?

   (*check one*) ___✓___ YES _____ NO

(If you answered "NO" to Questions 1 and 2, stop here and sign and date the verdict form on page 2.)

3. Do you, the jury, find that Winthrop was negligent and that such negligence proximately caused its damages?

   (*check one*) ___✓___ YES _____ NO

   (If you answered "YES," proceed to Question 4.)

4. *(Only answer Question 4 if your answers to both Question 2 and Question 3 were "YES.")*

Taking the combined negligence that proximately caused Winthrop's damages as one hundred percent (100%), what percentage of negligence is attributable to Pickens Roofing and what percentage is attributable to Winthrop?

(The percentages must add up to 100%.)

Pickens Roofing	60 %
Winthrop	40 %
TOTAL	100%

Please sign and date the verdict form.

Janice R. McCartney
FOREPERSON

Date: March 20, 2014.

York, South Carolina

WHEN YOU HAVE COMPLETED THE VERDICT FORM, NOTIFY THE BAILIFF.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2014 MAR 21 PM 2:17
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603151

PLAINTIFF(S)	DEFENDANT(S)
Winthrop University	**Pickens Roofing And Sheet Metals Inc**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: See attached Verdict Form (Damages)

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Winthrop University	Pickens Roofing and Sheet Metals Inc	$1,223,343.14

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Lee S. Alexander — **Circuit Court Judge**

2113 — **Judge Code**

3/21/14 — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on March 21 2014, and a copy mailed first class or placed in the appropriate attorney's box on March 21 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Peter Vogt Butler Pappas 11620 N Community House Road Charlotte, NC 28277
Zachary Jett Butler Pappas Weihmuller Katz Craig Llp 11620 N Community House Road Charlotte, NC 28277

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Kirby Darr Shealy III PO Box 2285 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter: Aileen Butler

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
		CIVIL ACTION NO. 2012-CP-46-3151
The Winthrop University Trustees for the State of South Carolina,	)	
Plaintiff,	)	**VERDICT FORM**
v.	)	
Pickens Roofing and Sheet Metals, Inc.,	)	
Defendant.	)	

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C.C.C.P. & GS
YORK COUNTY, SC

We the Jury find damages in the amount of $ 1,223,343.14.

Please sign and date the verdict form.

Janice R. McCartney
FOREPERSON

Date: March 21, 2014.

York, South Carolina

WHEN YOU HAVE COMPLETED THE VERDICT FORM, NOTIFY THE BAILIFF.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.:
2012 CP 46 3151

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

****

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2012 SEP -5 AM 8:38
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

COMPLAINT

Plaintiff, THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA, (hereinafter "Plaintiff"), by and through its undersigned counsel, respectfully allege and show the Court as follows:

PARTIES

1. Plaintiff, THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA (hereinafter "Plaintiff" and/or "Winthrop") is a South Carolina corporation authorized to do business in Rock Hill, York County, South Carolina.

2. Defendant PICKENS ROOFING AND SHEET METALS, INC., (hereinafter "Defendant" and/or "Pickens") is a South Carolina corporation doing business in Spartanburg, South Carolina. At all times relevant herein, Defendant Pickens was engaged in the business of subcontracting services and roofing services.

JURISDICTION AND VENUE

3. This Court has jurisdiction over Defendant because Defendant performed services in the State of South Carolina which gave rise to this claim and at all relevant times was a South Carolina citizens. Further, York County is the proper venue because the work was performed in York County and the property is located in York County.

FACTUAL BACKGROUND

4. Winthrop owns and operates a university located at 2040 Alumni Drive, Rock Hill, South Carolina 29733.

5. Prior to March 6, 2010, Winthrop contracted with Pickens for the roof replacement of Bancroft Hall and The Annex at Winthrop University. A copy of said contract is attached here as Exhibit A.

6. On or about March 6, 2010 a fire occurred at Winthrop University, specifically Bancroft Hall, The Annex and Owens Hall.

7. As a result of the fire, Winthrop sustained damage to its real and personal property including expenses related to clean-up, repair and loss of business.

COUNT I – BREACH OF CONTRACT

8. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 7 as if fully set forth herein.

9. Defendant Pickens entered into a contract for the roof replacement of Bancroft Hall and The Annex at Winthrop University.

10. In contracting with the Defendant to perform work on the Property, Plaintiff relied on the Defendant's representation that it was qualified to perform the services that it agreed to perform.

11. Plaintiff alleges the damage to the Property was the proximate and direct result of the breach of contract by Defendant Pickens in one or more of the following particulars:

a. failing to properly perform the contract;

b. failing to properly plan the work to the Plaintiff's property to conform to applicable building codes and industry standards including improperly storing combustible roofing materials on a flat roofed area on an adjacent building,

c. failing to properly perform the work by deviating from applicable codes and industry standards including improperly storing combustible roofing materials on a flat roofed area on an adjacent building,

d. failing to employ practices and methods of construction conforming with accepted industry standards including the improperly storing combustible roofing materials on a flat roofed area on an adjacent building,

e. installing materials not in accordance with the plans and specifications, or in violation of manufacturer's instructions;

f. failing to properly supervise the subcontractors and/or other trades; and/or

g. performing work in violation of the applicable building codes including improperly storing combustible roofing materials on a flat roofed area on an adjacent building.

12. As a direct and proximate result of the Defendant's breach of contract, there was resulting damages to the Property in an amount in excess of the jurisdictional limit of this Court.

COUNT II - BREACH OF IMPLIED WARRANTY OF WORKMANSHIP

13. Winthrop realleges and incorporates by reference the allegations contained in Paragraphs 1-7 above as if fully restated herein.

14. Defendant Pickens is a roofing contractor who, among other things, reroofs commercial buildings.

15. Defendant Pickens contracted to reroof two buildings at Winthrop University, specifically Bancroft Hall and Owens Hall.

16. Pickens holds itself out as a roofing contractor having knowledge, skill and experience regarding the reroofing of commercial buildings.

17. Winthrop relied upon Pickens's knowledge, skills and background to assure that the work was completed in a safe, workmanlike manner.

18. Pickens' failure to complete its work in a safe, workmanlike manner constitutes a breach of its implied warranty of workmanship.

19. Pickens, its employees, agents, servants, subcontractors and/or representatives breached its implied warranty of workmanship with Winthrop in that, inter alia, it:

a. during the reroofing project, improperly stored combustible roofing materials on a flat roofed area on an adjacent building, specifically, in such a manner that it caused a fire to occur and damage Plaintiff's buildings and business property;

b. failed to undertake the terms and conditions of the contract with Winthrop in a safe, prudent and professional manner;

c. improperly stored combustible roofing materials, in such a manner as to damage Plaintiff's property;

d. failed to ensure that its employees, agents, representatives and/or subcontractors performed their services in a safe, workmanlike and prudent manner; and

e. in other ways that may be learned during discovery.

20. As a direct and proximate result of Pickens' breach of its implied warranty of workmanship, Winthrop suffered the damages described herein.

COUNT III- NEGLIGENCE

21 Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1-7 above as if fully restated herein.

22. Pickens was in the process of reroofing Bancroft Hall and The Annex at Winthrop University.

23. Pickens had the duty to use due care in the reroofing and storage of roofing materials in a professional and workmanlike manner.

24. The fire and resulting damages were directly and proximately caused by the negligent acts and/or omissions of Pickens and its agents, subcontractors or servants in that it:

a. improperly storing combustible roofing materials on a flat roofed area on an adjacent building;

b. created or permitted a dangerous condition to exist when Pickens knew or should have known that such condition would create an unreasonable risk of damage and/or destruction to Plaintiff's property;

c. failed to hire and/or employ competent agents, servants, employees, vendors, contractors or subcontractor to install and store the roofing materials during the reroofing of the Bancroft Hall and Owens Hall;

d failed to properly, adequately and safely supervise and instruct the activities of its agents, servants, employees, vendors, contractors or subcontractors during the installation and reroofing of Bancroft Hall and Owens Hall;

e. failed to properly, adequately and safely inspect the work of its agents, servants, employees, vendors, contractors or subcontractors, which inspection would have revealed the existence of a dangerous and/or defective condition;

f. failed to warn Plaintiff of the aforesaid dangerous and/or defective condition which Pickens knew or should have known existed and which created an unreasonable risk of harm to Plaintiff's property;

g. failed to comply with all applicable local, state and/or national safety codes; and

h. otherwise failed to use due care in ways that may be disclosed in discovery.

25. As a direct and proximate result of the negligence, carelessness and negligent omissions of Pickens, its agents, servants, contractor or subcontractors and employees, Plaintiff suffered the damages described herein.

WHEREFORE, Plaintiffs demand judgment against the Defendants in an amount in excess of the jurisdictional limit of this Court and, further, requests the Court award the costs and attorneys' fees that Plaintiffs incur in this action, and such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff requests a trial by jury to the extent there are issues triable by a jury.

Dated this 31st day of August, 2012.

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

L. Andrew Watson
SC Bar No.: 100322
11620 N. Community House Road
Charlotte, North Carolina 28277
Telephone: (704) 543-2321
Facsimile: (704) 543-2324
awatson@butlerpappas.com
Attorneys for Plaintiff

AIA® Document A101™ – 1997

Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a STIPULATED SUM

R1001062
Yapad 4 TS
11-2-09

AGREEMENT made as of the 10th day of August in the year of 2009
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name, address and other information)

Winthrop University
2040 Alumni Drive
Rock Hill, SC 29733

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

This document has been approved and endorsed by The Associated General Contractors of America.

and the Contractor:
(Name, address and other information)

Pickens Roofing & Sheet Metals, Inc.
P. O. Box 2508, 300 South Avenue
Spartanburg, SC 29304

The Project is:
(Name and location)

Bancroft Hall (Roof Replacement)
Winthrop University
Rock Hill, South Carolina 29733
State Project No. H47-N052-CA

The Architect is:
(Name, address and other information)

Stafford Consulting Engineers
9115 Harris Corners Parkway, Suite 230
Charlotte, North Carolina 28269

Refer to Section 01100-SUMMARY, Paragraph 1.2B and 1.2C of the specifications.

The Owner and Contractor agree as follows.

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ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 8.

See Attachment A

ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

See Attachment A

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

See Attachment A

If, prior to the commencement of the Work, the Owner is required to furnish bonds, mortgages, mechanic's liens and other security interests, the Owner's time requirements shall be as follows:

See Attachment A

§ 3.2 The Contract Time shall be measured from the date of this Agreement.

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than 120 calendar days from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. Unless stated elsewhere in the Contract Documents, insert any requirements for earlier Substantial Completion of certain portions of the Work.)

, subject to adjustments of this Contract Time as provided in the Contract Documents.

(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be Three Hundred Fifty Eight Thousand Four Hundred Forty Eight Dollars ($ 358,448.00), subject to additions and deductions as provided in the Contract Documents.

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§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:
(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires)
N/A

§ 4.3 Unit prices, if any, are as follows:

See Attachment A (Exhibit 1)

ARTICLE 5 PAYMENTS
§ 5.1 PROGRESS PAYMENTS
§ 5.1.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.
See Attachment A
§ 5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

See Attachment A

§ 5.1.3 Provided that an Application for Payment is received by the Architect not later than the day of a month, the Owner shall make payment to the Contractor not later than the day of the month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than See Attachment A) days after the Architect receives the Application for Payment.

§ 5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.1.5 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.
See Attachment A

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§ 5.1.6 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

.1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of three and one-half percent (3.5 %). Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.8 of AIA Document A201–1997;

.2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of three & one-half percent (3.5 %);

.3 Subtract the aggregate of previous payments made by the Owner; and

.4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201–1997.

§ 5.1.7 The progress payment amount determined in accordance with Section 5.1.6 shall be further modified under the following circumstances:

.1 add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Architect shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and
(Section 9.8.5 of AIA Document A201–1997 requires release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)

.2 add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201–1997.

See Attachment A

§ 5.1.8 Reduction or limitation of retainage, if any, shall be as follows:
(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)

See Attachment A

§ 5.1.9 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 5.2 FINAL PAYMENT

§ 5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

.1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201–1997, and to satisfy other requirements, if any, which extend beyond final payment; and

.2 a final Certificate for Payment has been issued by the Architect.

§ 5.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

See Attachment A

ARTICLE 6 TERMINATION OR SUSPENSION

§ 6.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201–1997.

See Attachment A

§ 6.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–1997.

See Attachment A

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ARTICLE 7 MISCELLANEOUS PROVISIONS

§ 7.1 Where reference is made in this Agreement to a provision of AIA Document A201–1997 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

§ 7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.
(Insert rate of interest agreed upon, if any.)

See Attachment A

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

§ 7.3 The Owner's representative is:
(Name, address and other information)

Mr. Walter Hardin
Winthrop University
2040 Alumni Drive
Rock Hill, South Carolina 297331
Phone: 803.323.2261
Fax: 803.323.4295

§ 7.4 The Contractor's representative is:
(Name, address and other information)

Mr. Clint Robinson
Pickens Roofing & Sheet Metals, Inc.
P. O. Box 2508, 300 South Avenue
Spartanburg, SC 29304
Phone: 864-582-3485
Fax: 864-585-4352

§ 7.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days written notice to the other party.

§ 7.6 Other provisions:

See Attachment A

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ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS

§ 8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

See Attachment A

§ 8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101–1997.

§ 8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201–1997.

See Attachment A

§ 8.1.3 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated , and are as follows:

Document	Title	Pages
00811-OSE	Standard Supplementary Conditions	20

§ 8.1.4 The Specifications are those contained in the Project Manual dated as in Section 8.1.3, and are as follows:
(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section	Title	Pages
00201-OSE	Standard Supplementary Instructions to Bidders	9
00501-OSE	Standard Modifications to AIA A101-1997	4

§ 8.1.5 The Drawings are as follows, and are dated 6/18/09 unless a different date is shown below:
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number	Title	Date
1	Cover Sheet	
2	Code Sheet	
3	Campus Map	
4	Roof Plan	
5	Roof Details	
6	Roof Details	
7	Roof Details	
8	Roof Details	
9	Roof Details	
10	Roof Details	

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§ 8.1.6 The Addenda, if any, are as follows:

Number	Date	Pages
1	July 10, 2009	2
	Attached Prebid Minutes	7

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 8.

§ 8.1.7 Other documents, if any, forming part of the Contract Documents are as follows:
(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201-1997 provides that bidding requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)

Table of Contents
Invitation for Construction Bids (SE-310)
Instructions to Bidders (AIA Document A701-1997 Edition)
Contractor's Bid (Completed SE-330)
Construction Change Order (SE-460)
Attachment A - 00501-OSE, Standard Modifications to AIA A101-1997

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies, of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.

OWNER *(Signature)*

J.P. McKee
V.P. Finance And Business
(Printed name and title)

CONTRACTOR *(Signature)*

B R Pickens Jr. V. P.
(Printed name and title)

CAUTION: You should sign an original AIA Contract Document, on which this text appears in RED. An original assures that changes will not be obscured.

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ATTACHMENT A

EXHIBIT 1

NO.	ITEM	UNIT	ADD/DEDUCT
1.	Replacement of wood blocking	BF	$5.00
2.	Replacement of deteriorated wood plank decking.	BF	$3.50
3.	Replace gypsum plank deck.	each NONE BID	$0.00
4.	Secure loose wood plank deck.	fastener	$2.50
5.	Replace wood rafters.	BF	$7.00
6.	Scab onto wood rafters.	BF	$5.00
7.	Replace plywood sheathing.	unit	$3.50

00811-OSE
2008 Edition

STANDARD SUPPLEMENTARY CONDITIONS

1 GENERAL CONDITIONS

1.1 The *General Conditions of the Contract for Construction*, AIA Document A201, 1997 Edition, Articles 1 through 14 inclusive, is a part of this Contract and is incorporated as fully as if herein set forth. For brevity, AIA Document A201 is also referred to in the Contract Documents collectively as the "General Conditions."

2 STANDARD SUPPLEMENTARY CONDITIONS

2.1 The following supplements modify, delete and/or add to the General Conditions. Where any portion of the General Conditions is modified or any paragraph, subparagraph or clause thereof is modified or deleted by these Supplementary Conditions, the unaltered provisions of the General Conditions shall remain in effect.

2.2 Unless otherwise stated, the terms used in these Standard Supplementary Conditions which are defined in the General Conditions have the meanings assigned to them in the General Conditions.

3 MODIFICATIONS TO A201-1997

3.1 ***Delete Clause 1.1.2(2) and substitute the following:***

(2) between the Agency and a Subcontractor or Sub-subcontractor, except as set forth in Paragraph 5.4.

3.2 ***Add the following Subparagraph 1.1.8:***
1.1.8 THE MANUAL. The Manual is the *"Manual for Planning and Execution of State Permanent Improvements – Part II"* as published by the Office of State Engineer (OSE).

3.3 ***Add the following Subparagraphs 1.1.9 and 1.1.10:***

1.1.9 AGENCY. The State Agency, institution or department that is a party to the Contract. For purposes of the Contract, the term Owner shall include such Agency, whether or not the Agency owns the site or the building.
1.1.10 NOTICE TO PROCEED. A document (SE-390) issued by the Agency to the Contractor (with a copy to A/E) fixing the date on which the Contract time will commence for the Contractor to begin the prosecution of the Work in accordance with the requirements of the Contract Documents.

3.4 ***Add the following to Subparagraph 1.2.1:***
In the event of inconsistencies within or between parts of the Contract Documents or between the Contract Documents and applicable standards, codes, and ordinances, the Contractor shall:
1.2.1.1 provide the better quality or greater quantity of Work; or,
1.2.1.2 comply with the more stringent requirement; either or both in accordance with the A/E's interpretation.

3.5 ***Delete Subparagraph 1.5.1 and substitute the following:***
1.5.1 The A/E shall assist the Agency and Contractor with the execution of the Contract in accordance with the requirements of the Manual. The A/E shall identify and assist in the correction of any incomplete, missing or unsigned documents upon request of the Agency.

3.6 ***Delete Subparagraph 1.5.2 and substitute the following:***

1.5.2 The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Agency, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Agency.
1.5.3 The Agency assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Agency. Nor does the Agency assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this Contract, unless that understanding or representation is expressly stated in this Contract.

3.7 ***Add the following to the end of Subparagraph 1.6.1***

The Agency shall retain all common law, statutory and other reserved rights, in addition to the limited use copyright, in accordance with the contract between the Agency and the A/E for this Project.

3.8 ***Delete the first sentence of Subparagraph 2.1.2 and substitute the following:***
The Agency, upon reasonable written request, shall furnish to the Contractor in writing such information which is in the Agency's possession and which is necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights.

3.9 ***Delete the second sentence of Subparagraph 2.2.3 and substitute the following:***

Subject to the Contractor's obligations, including those in Subparagraphs 1.5.2 and 3.2.1, the Contractor shall be entitled to rely on the accuracy of information furnished by the Agency pursuant to this Subparagraph, but shall exercise proper precautions relating to the safe performance of the Work.

3.10 ***Delete the word "...under..." in the last sentence of Subparagraph 2.2.4 and substitute*** "...which is within...". ***Add the following sentence at the end of Subparagraph 2.2.4:***

Neither the Agency nor the A/E shall be required to conduct investigations or to furnish the Contractor with any information concerning subsurface characteristics or other conditions of the areas where the Work is to be performed beyond that which is provided in the Contract Documents. The Contractor shall not be entitled to rely on the accuracy of any information or services provided pursuant to this Subparagraph.

3.11 ***Delete Subparagraph 2.2.5 and substitute the following:***
2.2.5 The Contractor will be furnished, free of charge, ten (10) sets of the Drawings and Project Manual and will be furnished, at actual cost to the Agency, as many additional copies as he may require.

3.12 ***Delete Subparagraph 2.4.1 and substitute the following:***
2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents, and fails, within a seven-day period after receipt of written notice from the Agency, to provide the resources needed to achieve correction of such default or neglect with diligence and promptness, the Agency may, without prejudice to other remedies the Agency may have, proceed to correct such deficiencies. In such case an appropriate Change Directive shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Agency's expenses and compensation for the A/E's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor or its Surety shall pay the difference to the Agency.

3.13 ***Add the following Subparagraph 2.4.2:***
2.4.2 If, after achieving Substantial Completion, the Contractor then defaults, or neglects to complete or fails to provide resources adequate to complete the Project within the adjusted Contract Time for Final Completion as defined in Subparagraph 8.2.5, the Agency may carry out the work after giving the Contractor a single seven-day written notice of the Contractor's default or neglect. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Agency's expenses and compensation for the A/E's additional services made necessary by such default, neglect or failure. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor or its Surety shall pay the difference to the Agency.

3.14 ***Delete the word "....design... " and insert the word*** "inconsistencies,..." ***after "Any... " in the first sentence of Subparagraph 3.2.2.***

3.15 ***Change the last sentence of Subparagraph 3.3.1 to read as follows:***

If the Contractor is then instructed by the Agency in writing to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Agency shall be solely responsible for any resulting loss or damage.

3.16 ***Add the following clauses to Subparagraph 3.4.1:***
3.4.1.1 The Contractor shall not allow the use of asbestos containing products, whether temporary or permanent and whether or not incorporated or to be incorporated in the work, even if the products are nonfriable and/or contain minimal amounts of asbestos, and even though such products may still be legally installed.
3.4.1.2 The Contractor shall not allow the use of lead materials in public water applications. Lead free solder, flux and pipe must be used in all public drinking water and waste water applications. Lead free solder and flux are defined as containing less than 0.2% lead, while valves, pipes and appurtenances must contain less than 8.0% lead.

3.17 ***Delete Subparagraph 3.5.1 and substitute the following:***

3.5.1 The Contractor warrants to the Agency and the A/E that all materials and equipment furnished under the Contract shall be in first class condition, and new unless otherwise required or permitted by the Contract Documents; that the Work will be free from defects not inherent in the quality required or permitted; and that the Work will conform to the requirements of the Contract Documents. If required by the Agency or the A/E, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor further warrants that all workmanship shall be of the highest quality and in accordance with the Contract Documents, and shall be performed by persons well-qualified at their respective trades.

Unless caused by the Contractor, the Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not performed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Agency or the A/E, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.18 ***Add the following Subparagraph 3.6.2:***

3.6.2 The Contractor's attention is directed to Title 12, Chapter 9, SC Code of Laws, as amended, concerning withholding tax for nonresidents, employees, contractors and subcontractors.

3.19 ***Delete the words "...building permit and other" in Subparagraph 3.7.1.***
Add the following to Subparagraph 3.7.1:

Pursuant to §10-1-180 of the SC Code of Laws, as amended, no local general or specialty building permits are required for state buildings; however, the Contractor is required to obtain, at its own cost, all state and local business licenses and general building and specialty inspection services as required by the Contract Documents. The Contractor shall be responsible for payment of any charges imposed for reinspection.

3.20 ***Delete the last sentence of Clause 3.8.2.3 and substitute the following:***
The amount of the Change Order shall reflect the difference between actual costs under Clause 3.8.2.1, as documented by invoices, and the allowance amounts.

3.21 ***Insert the word "...unreasonable ..." between "...avoid..." and "...delay..." in Subparagraph 3.8.3.***

3.22 ***Add the following Subparagraph 3.9.2:***
3.9.2 The Contractor's superintendent and necessary assistants shall be acceptable to the Agency. The Contractor shall notify the Agency, in writing, of any proposed change in superintendent, including the reason therefore, prior to making such change. The superintendent shall not be changed except with the consent of the Agency, unless the superintendent ceases to be in the Contractor's employ.

3.23 ***Add the following Clauses to Subparagraph 3.10.1:***
This schedule shall:
3.10.1.1 indicate the dates for the start and completion of the various elements of the Work, and shall be affirmed or revised monthly as required by the conditions of the Work and upon execution of a Change Order that affects time.
3.10.1.2 provide a graphic representation of activities and events that will occur during performance of the Work in sufficient detail, and as acceptable to the Agency, to show the sequencing of the various trades for each floor level, wing or work area;
3.10.1.3 identify each phase of construction and occupancy; and,
3.10.1.4 set forth dates that are critical in ensuring the timely and orderly completion of the Work in accordance with the requirements of the Contract Documents (hereinafter referred to as "Milestone Dates").

3.24 ***Delete Subparagraphs 3.10.3 and insert the following:***
3.10.3 The Contractor shall perform the Work in accordance with the most recent schedules submitted to and approved by the Agency.
3.10.3.1 If the Contractor submits a schedule or schedule progress report indicating, or otherwise expresses an intention to achieve Substantial or Final Completion of the Work or any portion thereof, prior to any completion date required by the Contract Documents or to the expiration of the Contract Time, no liability to the Agency for any failure of the Contractor to do so complete the Work shall be created or implied. The Contractor shall not be entitled to an adjustment in the Contract Sum or the Contract Time for failure to achieve such early completion dates.

3.25 ***Add the following sentence to Subparagraphs 3.11.1:***

Prompt delivery to the A/E of the materials and items specified above, in good order, shall be a condition precedent to the Contractor receiving a Certificate of Substantial Completion.

3.26 ***After the word "...instructions,..." insert "...training and operations manuals,..." in Subparagraph 3.12.2.***

3.27 ***Add the following Clauses to Subparagraph 3.12.5:***

3.12.5.1 Sprinkler shop drawings shall be prepared by the licensed sprinkler Contractor. The sprinkler shop drawings shall be reviewed and approved by the A/E's engineer of record before submittal to the State Fire Marshal or other authorities having jurisdiction.
3.12.6.2 The Contractor shall submit a copy of the State Fire Marshal's approval letter to the A/E and the OSE.

3.28 ***Delete Subparagraph 3.12. 10 and substitute the following:***

3.12.10 When professional certification of materials, systems or equipment is required by the Contract Documents, the A/E shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

3.29 ***In the first sentence of Subparagraph 3.18.1 delete the phrase beginning "...and to the extent...with Paragraph 11.3...".***

In the first sentence of Subparagraph 3.18.1 after the word "...itself)..." delete the phrase "..., but only to the extent caused..."and Insert "...including loss of use resulting therefrom, but only to the extent caused in whole or in part by...".

3.30 ***Add the following Subparagraph to Paragraph 3.18:***

3.18.3 The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the A/E, the A/E's consultants, and agents and employees of any of them arising out of: (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications; or (2) the giving of or the failure to give directions or instructions by the A/E, the A/E's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

3.31 ***Delete Subparagraph 4.1.1 and substitute the following:***

4.1.1 The term "Architect," "Architect/Engineer," or "A/E" is the entity named as such in the SE-310, "Invitation For Construction Bids". The "Architect" or "A/E" may be the Agency, if so designated in the SE-310. In the absence of a licensed design professional, these terms mean the Agency.

3.32 ***Insert the following before the last sentence of Subparagraph 4.2.1:***

Not withstanding these responsibilities, no act or omission by the A/E shall be considered a waiver of any of the Agency's rights or interests.

Add the following Clause to Subparagraph 4.2. 1:

4.2.1.1 Any reference in the Contract Documents to the A/E's taking action or rendering a decision within a "reasonable time" is understood to mean no more than fourteen (14) days, unless otherwise specified in the Contract Documents or otherwise agreed to by the parties.

3.33 ***Delete the first paragraph of Subparagraph 4.2.2 and substitute the following:***

The A/E, as a representative of the Agency, shall visit the site as necessary to fulfill its obligations to the Agency for inspection services, if any, and, at a minimum, to assure conformance with the A/E's design as shown in the Contract Documents and to observe the progress and quality of the various components of the Contractor's Work. The A/E shall: (1) keep the Agency informed about the progress and quality of the Work completed; (2) endeavor to guard the Agency against defects and deficiencies in the Work; and (3) determine if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents.

3.34 ***After the word "...of..." insert the words "...the Work completed and correlated with the..." in Subparagraph 4.2.5.***

3.35 ***Delete Subparagraph 4.2.11 and substitute the following:***

4.2.11 The A/E will, in the first instance, interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Agency or Contractor. Upon receipt of such request, the A/E shall promptly notify the non-requesting party in writing of the details of such request. The A/E's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the A/E shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the A/E to furnish such interpretations until fourteen (14) days after written request is made for them.

4.2.11.1 Subject to review pursuant to Paragraphs 4.3, 4.4 and 4.5, as appropriate, the Contractor shall proceed diligently with performance of the Contract in accordance with the A/E's written interpretations or decisions and the Agency shall continue to make payments in accordance with the Contract Documents.

3.36 ***In the first sentence of Subparagraph 4.2.12 change "...intent of..." to "...design as indicated in...".***

Add the following to Subparagraph 4.2.12:

The A/E's interpretations and initial decisions may be, but need not be, accorded any deference in any review conducted under the terms of the Contract or in law. Any such review shall be *de novo*.

3.37 ***Add the following Subparagraph 4.2.14:***

4.2.14 In the Specifications or on the Drawings, where the words "as directed," "as required," "as approved," "as permitted" or words of like effect are used, it is to be understood that direction, requirement, approval or permission of the A/E is intended. Similar words, such as "approved," "acceptable," "satisfactory," or words of like import mean approved by, acceptable to, or satisfactory to the A/E.

3.38 ***Delete the words "...or interpretation..." from the first sentence of Subparagraph 4.3.1.***

Delete the words "...and matters in question..." from the second sentence of Subparagraph 4.3.1.

Insert the following after the second sentence of Subparagraph 4.3.1:

A voucher, invoice, payment application or other routine request for payment that is not in dispute when submitted is not a Claim under this definition.

3.39 ***Delete the first sentence of Subparagraph 4.3.2 and substitute the following:***

Time Limits for Filing Claims. Claims by either party arising prior to the date final payment is due must be initiated within twenty-one (21) days after occurrence of the event giving rise to such Claim or within twenty-one (21) days after the claimant first recognizes the condition giving rise to the Claim, whichever is later, except as stated for adverse weather days in Clause 4.3.7.2.

Add the following to Subparagraph 4.3.2:

By failing to give written notice of a Claim within the time required by this Subparagraph, a party expressly waives its claim.

3.40 ***After the word "...Claim..." in the first sentence of Subparagraph 4.3.3, insert*** **"...including any administrative review allowed under Paragraph 4.5...".**

3.41 ***In SubClause (2) of Subparagraph 4.3.4, change the words "...which differ materially..." to*** **"...that existed at the time of bidding and that differ materially...".**

Add the following Clause to Subparagraph 4.3.4:

4.3.4.1 Any adjustment, including reasonable overhead and profit, in the Contract Sum, or to the Contract Time made pursuant to this Subparagraph shall be determined in accordance with Paragraphs 7.5 and 4.3.7 of this Contract, respectively.

3.42 ***Add the following to Subparagraph 4.3.7:***

Claims for an increase in the Contract Time shall be based on one additional calendar day for each full calendar day that the Contractor is prevented from working.

3.43 ***Add the following Subclauses to Clause 4.3.7.2:***

(1) Claims for adverse weather shall be based on actual weather conditions at the job site or other place of performance of the Work, as documented in the Contractor's job site log.
(2) For the purpose of this Contract, a total of five (5) calendar days per calendar month (non-cumulative) shall be anticipated as "adverse weather" at the job site, and such time will not be considered justification for an extension of time. If, in any month, adverse weather develops beyond the five (5) days, the Contractor shall be allowed to claim additional days to compensate for the excess weather delays only to the extent of the impact on the approved construction schedule. The remedy for this condition is for an extension of time only, not money.
(3) The Contractor shall submit monthly with their pay application all claims for adverse weather conditions that occurred during the previous month. The A/E shall review each monthly submittal in accordance with Paragraph 4.4 and inform the Contractor and the Agency promptly of its evaluation. Approved days shall be included in the next Change Order issued by the A/E. Adverse weather conditions not claimed within the time limits of this Subparagraph shall be considered to be waived by the Contractor. Claims will not be allowed for adverse weather days that occur after the scheduled (original or adjusted) date of Substantial Completion.

3.44 ***Delete Subparagraph 4.3.9 and substitute the following:***

4.3.9 Quantity Variations. If the quantity of a unit-priced item in this Contract is an estimated quantity and the actual quantity of the unit-priced item varies more than fifteen (15) percent above or below the estimated quantity, an adjustment, including overhead and profit, in the Contract Sum shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below

85 percent of the estimated quantity. Any adjustment in the Contract Sum made pursuant to this Subparagraph shall be determined in accordance with Paragraph 7.5. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, as set forth in Subparagraph 4.3.7. Pursuant to Paragraph 13.13, the A/E shall determine the actual quantities of a unit-priced item used by the Contractor.

3.45 ***Delete Subparagraph 4.3.10 in its entirety and substitute the following:***

4.3.10 CLAIMS FOR LISTED DAMAGES.

Notwithstanding any other provision of the Contract Documents, including Subparagraph 1.2.1, but subject to a duty of good faith and fair dealing (S.C. Code Ann §11-35-30), the Contractor and Agency waive Claims against each other for Listed Damages arising out of or relating to this Contract. The Listed Damages are:

4.3.10.1 Damages incurred by the Agency for rental expenses, for losses of use prior to Final Completion, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and for attorney's fees, insurance and interest (excluding post-judgment); and;

4.3.10.2 Damages incurred by the Contractor for principal office expenses and overhead, including, but not limited to, the compensation of personnel stationed there, rent, utilities and office equipment; for losses of financing, business and reputation; for loss of profit except anticipated profit arising directly from the Work; and for attorney's fees, insurance and interest (excluding post-judgment).

4.3.10.3 This mutual waiver is applicable, without limitation, to all Listed Damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.1 0 shall be deemed to preclude an award of liquidated damages (including Listed Damages) when applicable, in accordance with the requirements of the Contract Documents. This Subparagraph does not apply to Paragraph 3.18.

3.46 ***Insert the following Subparagraph 4.3.11:***

4.3.11 Waiver of Claims Against the A/E. Notwithstanding any other provision of the Contract Documents (including paragraph 1.2.1), but subject to a duty of good faith and fair dealing, the Contractor waives all claims against both the A/E and any other design professionals who provide design and/or project management services to the Agency, either directly or as independent contractors/subcontractors to the A/E, for Listed Damages arising out of or relating to this Contract. The Listed Damages are damages incurred by the Contractor for principal office expenses and overhead (including, but not limited to, the compensation of personnel stationed there, rent, utilities, and office equipment), for losses of financing, business and reputation, for loss of profit other than anticipated profits arising directly from the Work, and for attorney's fees, insurance, and interest (excluding post-judgment).

3.47 ***Delete Subparagraph 4.4.1 and substitute the following:***

4.4.1 DECISIONS OF THE A/E. Claims, including those alleging an error or omission by the A/E, shall be referred initially to the A/E for decision. An initial decision by the A/E shall be required as a condition precedent to resolution (pursuant to Paragraph 4.5) of all claims between the Contractor and Agency arising prior to the date Final Payment is due, unless thirty (30) days shall have passed after the Claim has been referred to the A/E, with no decision by the A/E. The A/E will not decide disputes between the Contractor and persons or entities other than the Agency.

3.48 ***Delete Subparagraph 4.4.3 in its entirety.***

3.49 ***Add the words "...in accordance with Subparagraph 4.4.5..." at the end of Subparagraph 4.4.4.***

3.50 ***Insert the following after the first sentence of Subparagraph 4.4.5:***

The A/E's initial decision will be delivered to the parties within two weeks of receipt of any response or supporting data requested pursuant to Subparagraph 4.4.4, or within such longer period as may be mutually agreeable to the parties. If the A/E's initial decision is accepted by the parties, the A/E shall prepare a Change Order with appropriate supporting documentation for the review and approval of the parties and the OSE.

Delete the words "...mediation and arbitration..." from the second sentence of Subparagraph 4.4.5 and substitute **"...resolution pursuant to Paragraph 4.5. Any review of the A/E's written decision or determination shall be *de novo*."**

3.51 ***Delete Subparagraph 4.4.6 in its entirety and substitute the following:***

4.4.6 If the A/E renders its initial decision after proceedings pursuant to Paragraph 4.5 have been initiated, such decision may be entered as evidence, but shall not supersede such proceedings unless the decision is acceptable to all parties concerned.

3.52 ***Delete Subparagraph 4.4.8 in its entirety.***

3.53 *Delete Paragraph 4.5 in its entirely and substitute the following:*

4.5 DISPUTE RESOLUTION

4.5.1 Without limiting Subparagraph 4.5.2, any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the A/E or thirty (30) days after submission of the Claim to the A/E, be subject to resolution pursuant to Subparagraph 4.5.2.

4.5.2 Contractor consents to be governed by Title 11, Chapter 35 of the South Carolina Code of Laws, as amended, and agrees that it applies to and governs the Agreement. Contractor waives any objection it may have now or hereafter to the administrative process required by Title 11, Chapter 35, Article 17. To the extent that Article 17, by its own terms, does not govern a claim or controversy between the parties, Contractor agrees that any suit, action or proceeding arising out of or relating to the Agreement shall be instituted and maintained only in a state or federal court located in Richland County, State of South Carolina. Contractor agrees that any act by the State regarding the Agreement is not a waiver of either the State's sovereign immunity or the State's immunity under the Eleventh Amendment of the United States Constitution. As used in this paragraph, the term "Agreement" means any transaction or agreement arising out of, relating to, or contemplated by the Contract Documents.

4.5.3 Any administrative review of any determination, certification or other decision by the A/E shall be *de novo.*

3.54 *Delete Paragraph 4.6 in its entirely.*

3.55 *In the first sentence of Subparagraph 5.2.1 change "...award of the Contract..." to* "...posting of the 'Notice of Intent to Award' of the Contract, or a Request for Substitution pursuant to Subparagraph 5.2.4...".

In the second sentence of Subparagraph 5.2.1, delete the words "...or the Architect".

In the third sentence of Subparagraph 5.2.1, delete the words "...or Architect...".

3.56 *In the first sentence of Subparagraph 5.2.2, delete the words "...or Architect...".*

3.57 *In the first sentence of Subparagraph 5.2.3, delete the words "..or Architect..." in both instances where they appear.*

3.58 *In Subparagraph 5.2.4, delete the words "...or Architect...".*

Add the following sentence to Subparagraph 5.2.4:

The Contractor's Request for Substitution must be made to the Agency in writing, accompanied by supporting information.

3.59 *Add the following Subparagraph 5.2.5:*

5.2.5 To the extent it applies, the substitution of a subcontractor is governed by Title 11, Chapter 35, paragraph 3020(2)(b) of the South Carolina Code of Laws, as amended ("statute"). Paragraph 5.2 shall be construed as complementary to the statute.

3.60 *Delete all words after "...prejudice such rights ..." in the second sentence of Subparagraph 5.3.1.*

3.61 *Add the following Subparagraph 5.3.2:*

5.3.2 Without limitation on the generality of the foregoing, each Subcontract agreement and each Sub-subcontract agreement shall include, and shall be deemed to include, the following:

5.3.2.1 An agreement that the Agency is a third-party beneficiary of the Subcontract (or Sub-subcontract), entitled to enforce any rights thereunder for its benefit, and that the Agency shall have the same rights and remedies against the Subcontractor (or Sub-subcontractor) as the Contractor (or Subcontractor) has, including but not limited to the right to be compensated for any loss, expense, or damage of any nature whatsoever incurred by the Agency resulting from any breach of representations and warranties, expressed or implied, if any, arising out of the agreement and any error, omission, or negligence of the Subcontractor (or Sub-subcontractor) in the performance of any of its obligations under the agreement; and,

5.3.2.2 A requirement that the Subcontractor (or Sub-subcontractor) promptly disclose to the Contractor (or Subcontractor) any defect, omission, error, or deficiency in the Contract Documents or in the Work of which it has, or should have had, knowledge; and,

5.3.2.3 The following Paragraphs, or Subparagraphs as appropriate, of the Conditions of the Contract: 3.2, 3.5.1, 3.18, 4.3.10, 5.4, 13.1.1, 13.13, 14.3 and 14.4; and,

5.3.2.4 Paragraphs 4.4, 4.5 and 4.6 of A201-1997 *Conditions of the Contract* as originally issued by the American Institute of Architects and without the amendments included in this Article 12.

3.62 ***Insert the following Subparagraph 5.3.3:***
5.3.3 The Contractor shall assure the Agency, by affidavit or in such other manner as the Agency may approve, that all agreements between the Contractor and its Subcontractor incorporate the provisions of Subparagraph 5.3.1 as necessary to preserve and protect the rights of the Agency and the A/E under the Contract Documents with respect to the work to be performed by Subcontractors so that the subcontracting thereof will not prejudice such rights.

3.63 ***Insert the following Subparagraph 5.3.4:***
5.3.4 Upon request, the Contractor shall provide to the Agency copies of all executed or issued subcontracts, purchase orders and other documents related to the Work.

3.64 ***Insert the following new Clause to Subparagraph 5.4.1:***
5.4.1.3 Subcontractors assigned to the Agency agree to perform assigned portions of the Work in accordance with the Contract Documents.

3.65 ***Add the following sentence to the end of Subparagraph 5.4.2:***
The equitable adjustment shall be limited to direct costs.

3.66 ***Insert the following new Subparagraph 5.4.3:***
5.4.3 Each subcontract shall specifically provide that the Agency shall only be responsible to the Subcontractor for those obligations of the Contractor that accrue subsequent to the Agency's exercise of any rights under this conditional assignment.

3.67 ***Delete Subparagraph 6.1.4 in its entirety.***

3.68 ***Add the following Clauses to Subparagraph 7.2.1:***

7.2.1.4 The Contractor shall not proceed with the Work of the Change Order until the Change Order is approved the Agency. If the amount of the Change Order exceeds the limit of the Agency's Construction Change Order Certification, it must be approved by the State Engineer before any work is performed. The amount of the Agency's certification authority is set forth in the Agreement. Any adjustment in the Contract Sum made pursuant to this Paragraph 7.2 shall be determined in accordance with Paragraph 7.5 of this Contract.
7.2.1.5 All Change Orders shall be submitted on Form SE-480 "Construction Change Order" with appropriate documentation attached.

3.69 ***Delete Subparagraph 7.2.2 in its entirety.***

3.70 ***Add the following Subparagraph 7.2.3:***
7.2.3 Agreement on any Change Order shall constitute a release by the Contractor of the Agency for any and all liability under this Contract attributable to such facts or circumstances giving rise to the Change Order.

3.71 ***Delete the first sentence of Subparagraph 7.3.1 and substitute the following:***
A Construction Change Directive is a written order which directs a change in the Work and states a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both, and which is prepared by the A/E on AIA Document G714 and signed by the A/E, the Contractor, if it agrees with the terms of the Directive, and the Agency.

3.72 ***Delete Subparagraph 7.3.3 and substitute the following:***

7.3.3 Any adjustment in the Contract Sum, including reasonable overhead and profit made pursuant to Paragraph 7.3 shall be determined in accordance with Paragraph 7.5 of this Contract.

3.73 ***Delete Subparagraph 7.3.6 and substitute the following:***

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the A/E as provided in Clause 7.5.1.5, on the basis of reasonable expenditures and savings to those performing the Work attributable to the change, including allowances for reasonable overhead and profit.

3.74 ***Delete the Subparagraph 7.3.7 in its entirety.***

3.75 ***In the first sentence of Subparagraph 7.3.8, change the word "...Payment ..." to "...Payment." and delete the remainder of the sentence.***

3.76 ***Insert the following Subparagraph 7.3.10:***
7.3.10 If the Contractor defaults or neglects to execute a Change Directive, the Agency may carry out the Work in accordance with Paragraph 2.4 and Article 6.

3.77 *Insert the following Paragraph 7.5:*

7.5 PRICE ADJUSTMENTS

7.5.1 METHODS OF ADJUSTMENT. Any adjustment in the Contract Sum made pursuant to this Paragraph 7.5 shall be consistent with this Contract and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the Contractor:

7.5.1.1 by agreement on a fixed price adjustment;
7.5.1.2 by unit prices specified in the Contract or subsequently agreed upon;
7.5.1.3 by the costs attributable to the event or situation covered by the relevant clause, including profit if otherwise allowed, all as specified in the Contract; or subsequently agreed upon;
7.5.1.4 in such other manner as the parties may mutually agree; or,
7.5.1.5 in the absence of agreement by the parties, through a unilateral initial determination by the A/E of the costs attributable to the event or situation covered by the clause, including profit if otherwise allowed, all as computed by the A/E in accordance with Clause 7.5.3.2, and subject to review under the provisions of Paragraph 4.5 of this Contract.

7.5.2 FINAL AGREEMENT. When any adjustment in the Contract Sum made pursuant to clauses in this Contract becomes final (e.g., by agreement or dispute resolution), the adjustment shall be computed and documented on a Change Order.

7.5.3 DOCUMENTATION OF COST REASONABLENESS

7.5.3.1 CONTRACTOR'S CHANGE ORDER PROPOSAL. The Contractor shall submit a written proposal for review by the A/E and the Agency. The proposal shall be submitted to the Agency's representative within the time limits specified in Subparagraph 4.3.2. All costs claimed by the Contractor shall be justifiable compared with prevailing industry standards, as adjusted for local cost conditions. Costs shall be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon thereafter as practicable.
7.5.3.2 CONSTRUCTION CHANGE DIRECTIVES. For a Construction Change Directive wherein the proposed method of compensation is actual costs, and pending the collection and evaluation of actual costs as required by Clause 7.5.1.3, the Contractor shall estimate the value of the changed work. The Contractor shall itemize the estimated cost into building components and shall use the labor, material and equipment unit direct costs as listed in the most current issue of the Construction Cost Data Book most applicable to the nature of the changed work, as published by R.S. Means, with a cost index adjusted for the project locale. The Contractor shall also be permitted to add overhead and profit as shown in Subparagraph 7.5.4. Where the Contractor does not properly itemize the proposed costs as requested, the A/E shall provide the Agency with the itemization and this amount shall be the initial basis for compensation under Subparagraph
7.3.8. Upon conversion of the Construction Change Directive to a Change Order, the A/E's cost for providing this itemization shall be deducted from the final adjustment in the Contract Sum as described in Clause 7.3.9.

7.5.4 AGREED OVERHEAD AND PROFIT RATES

7.5.4.1 For any adjustment to the Contract Sum for which overhead and profit may be recovered, other than those made pursuant to Subparagraph 4.3.9, the Contractor agrees to charge and accept, as full payment for overhead and profit, the following percentages of costs attributable to the change in the Work. The percentages cited below shall be considered to include all indirect costs including, but not limited to: field and office managers, supervisors and assistants, incidental job burdens, small tools, and general overhead allocations. The allowable percentages for overhead and profit are as follows:

(1) To the Contractor on work performed by his own forces, 17% of the cost;
(2) To each Subcontractor involved, on work performed by their own forces, 17% of the cost;
(3) For the Contractor, for work performed by his subcontractors, 10% of the amount due the Subcontractor.

7.5.4.2 Using the percentages stated in Clause 7.5.4.1, any adjustment to the Contract Sum for deleted work shall include any overhead and profit attributable to the cost for the deleted Work.
7.5.4.3 If the Contractor initiates a Change Order proposal and the Agency is not obligated to pay for all or any part of the proposal, then the Contractor shall be responsible for any A/E's fees to evaluate and process that Change Order proposal. Compensation shall be based on the Agency's contract with the A/E and the rates for Additional Services contained therein, and shall be withheld from the final payment to the Contractor.

7.5.5 COST OR PRICING DATA

7.5.5.1 The Contractor shall submit cost or pricing data for any element of changed work (other than Unit Price Work) which exceeds $25,000.00, and shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of the pricing. This data shall be itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent Work, or as soon thereafter as practicable, and shall be justifiably compared with prevailing industry standards. As requested by the A/E or the Agency, the Contractor's submittal shall provide an itemized breakdown of all increases and decreases in the Contract for the Contractor and each subcontractor (at any tier) in at least the following detail: material, equipment and supply quantities and costs; direct labor hours and rates for each trade; the associated FICA, FUTA, SUTA, and Worker's Compensation Insurance; equipment hours and rates, and costs of premiums for bonds and insurance, permit fees and sales, use or similar taxes related to the Work.

7.5.5.2 Any Change Order or Change Directive for which certification is required shall contain a provision that the price to the Agency, including profit or fee, shall be adjusted to exclude any significant sums by which the Agency finds that such price was increased because the cost or pricing data furnished by the Contractor was inaccurate, incomplete or not current as of the date agreed upon between parties. Notwithstanding Subparagraph 9.10.4, such adjustments may be made after final payment to the Contractor.

3.78 ***Delete Subparagraph 8.1.2 and substitute the following:***

8.1.2 The Date of Commencement of the Work is the date established in the SE-390, "Notice to Proceed." The date shall not be postponed by the failure to act of the Contractor or of persons or entities for which the Contractor is responsible.

3.79 ***Delete the last sentence of Subparagraph 8.2.2.***

3.80 ***Add the following Subparagraph 8.2.4:***

8.2.4 Failure by the Contractor to commence actual physical work on the project within seven (7) days from the Date of Commencement, as established in the Notice to Proceed, will entitle the Agency to consider the Contractor in substantial breach of its obligations under this Contract. In this event, the Agency may withdraw the Notice to Proceed and terminate the Contract in accordance with the Contract Documents.

3.81 ***Change "...mediation and arbitration..." to "...dispute resolution..." in Subparagraph 8.3.1.***

3.82 ***Insert the following new Subparagraph 8.3.4:***

8.3.4 The Contractor shall be permitted an adjustment in the Contract Sum, determined in accordance with Paragraph 7.5, only if the Delays, either individually or taken in the aggregate, cause the Contract Time to be increased by more than seven (7) days.

3.83 ***Insert the following new subparagraph 9.2.2:***

9.2.2 As requested by the A/E, the Contractor and each Subcontractor shall prepare a trade payment breakdown for the Work for which each is responsible, such breakdown being submitted on a uniform standardized format approved by the A/E and Agency. The breakdown shall be divided in detail sufficient to exhibit areas, floors, and/or sections of the Work, and/or by convenient units and shall be updated as required by either the Agency or the A/E as necessary to reflect:

9.2.2.1 the description of Work (listing labor and material separately);
9.2.2.2 the total value;
9.2.2.3 the percent and value of the Work completed to date;
9.2.2.4 the percent and value of previous amounts billed; the current percent completed and amount billed; and,
9.2.2.5 the current percent completed and amount billed.

Any schedule of values or trade breakdown that fails to include sufficient detail, is unbalanced, or exhibits "front-loading" of the value of the Work, shall be rejected. If either the schedule of values or trade breakdown had been initially approved and subsequently used, but later was found improper for any reason, then sufficient funds shall be withheld from future Applications for Payment to ensure an adequate reserve (exclusive of normal retainage) to complete the Work.

3.84 ***In the first sentence of Subparagraph 9.3.1 change "... ten days..." to "...twenty-one (21) days...".***

Add the following sentence to Subparagraph 9.3.1:

The Contractor's Application for Payment shall be in a form acceptable to the Agency. The A/E will authorize, as provided in Paragraph 9.4 and until the final pay request, monthly payments equal to ninety-six and one-half percent (96½%) of the portion of the Contract Sum properly allocable to labor, material and equipment incorporated in the Work, and allocable to material and equipment suitably stored.

3.85 ***Add the following to Subparagraph 9.3.2:***
Rental equipment such as, but not limited to, mobile equipment, pans, forms, scaffolding, compressors, etc., shall not be considered material stored.

3.86 ***Add the following Clauses to Subparagraph 9.6.1:***

9.6.2.1 Contractor's attention is directed to §11-35-3030(4) of the SC Code of Laws, as amended, and the Manual concerning release of retained funds.
9.6.2.2 Contractor's attention is directed to Title 29, Chapter 7, SC Code of Laws, as amended, concerning laborers' liens.
9.6.2.3 Contractor shall properly disburse money received from all payments to all laborers, subcontractors or materialmen in accordance with Title 29, Chapters 6 and 7 of the SC Code of Laws, as amended.

3.87 ***Delete Subparagraph 9.6.7 in its entirety.***

3.88 ***Delete Subparagraph 9.7.1 and substitute the following:***

9.7.1 If (a) the A/E does not issue a Certificate for Payment to the Agency, through no fault of the Contractor, within seven (7) days after receipt of the Contractor's Application for Payment, or (b) the Agency does not pay the Contractor within seven (7) days after the date established in the Contract Documents, the amount of the Contractor's Application for Payment certified by the A/E, or (c) the Agency does not pay the Contractor the amount awarded by a dispute resolution order within the time limit established by such order, or within seven (7) days if no time limit is stated in such order, then the Contractor may, upon seven (7) additional days' written notice to the Agency and A/E, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and startup, which shall be accomplished as provided in Paragraph 7.5. As used in this Subparagraph, the phrase "dispute resolution order" includes any decision rendered pursuant to Paragraph 4.4.

3.89 ***Add the following Clause to Subparagraph 9.8.2:***

9.8.2.1 The Contractor's list shall be in writing and attached to the "Contractor's written Request for Full or Partial Substantial Completion inspection. The request shall be submitted at least ten (10) days in advance of the proposed date of inspection and shall be forwarded through the A/E, who will attach its written endorsement as to whether or not it concurs with the Contractor's statement that the Work will be ready for inspection and testing on the date given. The A/E's endorsement is a convenience to the Agency only and shall not relieve the Contractor of its responsibility in the matter, nor shall the A/E's endorsement be deemed to be evidence that the Work was substantially complete and ready for inspection and testing. In the event that the A/E does not concur with the Contractor's statement, the A/E shall inform the Contractor of the basis for the A/E's non-concurrence. The Contractor may then, at its sole option, (1) defer the inspection; or, (2) request the inspection be performed in accordance with Subparagraph 9.8.3.

3.90 ***Add the following Clauses to Subparagraph 9.8.3:***

9.8.3.1 Inspection and testing shall take place at a time(s) mutually agreeable to the Contractor, Agency, the OSE and the A/E.
9.8.3.2 The inspection shall include a demonstration by the Contractor that all equipment, systems and operable components of the Work function properly and in accordance with the Contract Documents. The Contractor shall furnish access for the inspection and testing as provided in this Contract. The inspection and testing shall determine whether Substantial Completion has been accomplished and shall result in the A/E's issuance of a written list of Unfinished Work and Defective Work, commonly referred to as a "punch list", each item of which must be finished and corrected prior to Final Completion.
9.8.3.3 The A/E and its Consultants shall conduct all Substantial Completion inspections. The Agency may elect to have other persons of its choosing also participate in the inspections. Representatives of the State Fire Marshal's Office, the Office of State Engineer and other authorities having jurisdiction may be present, at their sole discretion, at the Substantial Completion inspection or otherwise inspect the completed Work and advise the Agency whether the Work meets their respective requirements.
9.8.3.4 If the inspection discloses any item which is not in accordance with the requirements of the Contract Documents and will prevent the Agency from occupying or utilizing the Work for its intended use, the Contractor shall complete or correct such item upon notification by the A/E. The Contractor shall then submit a request for a follow-up inspection by the A/E to determine Substantial Completion.
9.8.3.5 The Contractor shall proceed promptly and diligently to complete and correct items on the list of Unfinished or Defective Work. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.
9.8.3.6 If more than one Substantial Completion inspection is required, the Contractor shall reimburse the Agency for all costs of reinspection or, at the Agency's option, the costs may be deducted from payments due to the Contractor.

Delete the last sentence of Subparagraph 9.8.5 and add the following Clauses:

9.8.5.1 Upon such acceptance of Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the A/E, the Agency shall make payment for such Work or portion thereof as provided in the Contract Documents. The balance payable shall include the retainage of three and one half percent (3.5%) of the Contract Sum, less any retainage released under conditions of Subparagraph 9.6.2, plus an amount equal to the cost to complete or to correct, as determined by the A/E of the Uncompleted or Defective Work, plus the full amount of Liquidated Damages, if any. Retainage shall continue until Final Completion and Final Payment.

9.8.5.2 Notwithstanding the foregoing, the payment of retainage shall be consistent with §11-35-3030(4) of the SC Code of Laws, as amended.

3.91 ***Add the following Clauses to Subparagraph 9.10.1:***

9.10.1.1 Final Completion shall be achieved no later than thirty (30) days after Substantial Completion unless otherwise stated in the Contract Documents or modified by a Change Order. Failure of the Contractor to achieve Final Completion within the time allowed under this Subparagraph shall entitle to Agency to consider the Contractor in substantial breach of its obligations under this Contract.

9.10.1.2 The Contractor shall notify the Agency, in writing, of the date when the Work has reached or will reach Final Completion and will be ready for final inspection and testing. The notice shall be given at least ten (1 0) days in advance of said date and shall be forwarded through the A/E, who will attach its endorsement as to whether or not it concurs in the Contractor's statement that the Work will be ready for inspection and testing on the date stated. The A/E's endorsement is a convenience to the Agency only and shall not relieve the Contractor of its responsibility in the matter, nor shall the A/E's endorsement be deemed to be evidence that the Work was finally complete and ready for inspection and testing. In the event that the A/E does not concur with the Contractor's statement, the A/E shall inform the Contractor of the basis for the A/E's non-concurrence. The Contractor may then, at its sole option, (1) defer the inspection; or, (2) request the inspection be performed in accordance with this Subparagraph. The final inspection and testing shall be conducted in the same manner as the inspection for Substantial Completion, including, but not limited to, the requirements of Clauses 9.8.3.3, 9.8.3.4, 9.8.3.5 and 9.8.3.6 of this Contract.

9.10.1.3 Representatives of the State Fire Marshal's Office, the Office of State Engineer and other authorities having jurisdiction may be present at the Final Completion inspection or otherwise inspect the completed Work and advise the Agency whether the Work meets their respective requirements for the Project.

9.10.1.4 The Contractor shall then submit a request for a follow-up inspection to determine Final Completion. If more than one Final Completion inspection is required, the Contractor shall reimburse the Agency for all costs of reinspection or, at the Agency's option, the costs may be deducted from payments otherwise due to the Contractor.

9.10.1.5 Approval of Work at or as a result of any inspection required herein shall not release the Contractor or its surety from responsibility for complying with the Contract.

3.92 ***Add the following Clause to Subparagraph 9.10.4:***

9.10.4.4 faulty or defective Work appearing after the date of Substantial Completion.

3.93 ***In Subparagraph 9.10.5, after the word "...those..." insert the phrase*** **"...specific claims in stated amounts that have been...".**

3.94 ***In Subparagraph 10.3.1 after the word "...persons ..." , insert the words*** **"...or serious losses to real or personal property...".**

Add the following Clause to Subparagraph 10.3. 1:

10.3.1.1 The Agency and Contractor hereby agree that this Paragraph shall apply only to hazardous, toxic or radioactive materials or substances subject to the regulations of agencies having jurisdiction, such as, but not limited to, the S.C. Department of Health and Environmental Control (SCDHEC), the U.S. Environmental Protection Agency (USEPA) and the U.S. Nuclear Regulatory Commission (USNRC).

3.95 ***Add the following Clauses to Subparagraph 10.3.2:***

10.3.2.1 Any adjustment in the Contract Sum, including reasonable overhead and profit, made pursuant to this Subparagraph shall be determined in accordance with Paragraph 7.5 of this Contract.

10.3.2.2 The Work in the affected area shall be resumed immediately following the occurrence of any of the following events: (a) the Agency causes remedial work to be performed that results in the absence of materials or substances; or (b) the Agency and the Contractor, by written agreement, decide to resume performance of the Work; or (c) the Work may safely and lawfully proceed, as determined by an appropriate governmental authority or as evidenced by a written report to both the Agency and the Contractor, which is prepared by an environmental engineer reasonably satisfactory to both the Agency and the Contractor.

10.3.2.3 For the purposes of this Contract, the term "rendered harmless" shall be interpreted to mean that measured levels of verified hazardous, toxic or radioactive materials or substances are less than the applicable standards established by authorities having jurisdiction. In no event, however, shall the Agency have any responsibility for any substance or material that is brought to the Project site by the Contractor, any Subcontractor, any material supplier, or any entity for whom any of them is responsible, unless such materials or substances were expressly required by the Contract Documents. The Contractor agrees not to use any fill or other materials to be incorporated into the Work that are hazardous, toxic, or radioactive, or made up of any items that are hazardous, toxic, or radioactive.

3.96 ***Delete Subparagraph 10.3.3 in its entirety.***

3.97 ***Delete Paragraph 10.4 in its entirety.***

3.98 ***Delete Paragraph 10.5 in its entirety.***

3.99 ***Add the following to Subparagraph 10.6.1:***
Written notice of the emergency, including an estimate of cost and probable effect of delay on the progress of the Work, must be given by the Contractor to the A/E as soon as possible, but in no case more than ten (10) days after the start of the emergency.

3.100 ***Change the second sentence of Subparagraph 11.1.2 to read:***

Coverage shall be written on an occurrence basis and shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

Add the following Clauses to Subparagraph 11.1.2:

11.1.2.1 Liability Insurance shall include all major divisions of coverage and be on a Commercial basis including the following:

(1) Premises - Operations.
(2) Independent Contractor's Protective.
(3) Products and Completed Operations.
(4) Personal and Advertising Injury.
(5) Contractual, including specified provision for Contractor's obligations under Paragraph 3.1 8.
(6) Broad Form Property Damage including Completed Operations.
(7) Owned, Non-Owned and Hired Motor Vehicles.

11.1.2.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than the following limits, or greater if required by law or other provisions of this Contract:

(1) COMMERCIAL GENERAL LIABILITY:	
(a) General Aggregate (per project)	$ 1,000,000
(b) Products/Completed Operations	$ 1,000,000
(c) Personal and Advertising Injury	$ 1,000,000
(d) Each Occurrence	$ 1,000,000
(e) Fire Damage (Any one fire)	$ 50,000
(f) Medical Expense (Any one person)	$ 5,000
(2) BUSINESS AUTO LIABILITY (including All Owned, Non-Owned, and Hired Vehicles):	
(a) Combined Single Limit	$ 1,000,000
OR	
(b) Bodily Injury & Property Damage (each)	$ 750,000
(3) WORKER'S COMPENSATION:	
(a) State	Statutory
(b) Employer's Liability	$100,000 Per Accident
	$500,000 Disease, Policy Limit
	$100,000 Disease, Each Employee

3.101 ***Add the following Clause to Subparagraph 11.1.3:***

11.1.3.1 Certificates of Insurance shall be in the form of the latest edition of the ACORD 25S and shall be filed with the Agency prior to commencement of the Work. In addition to Certificates of Insurance, the Contractor shall supply a written endorsement to the Contractor's general liability insurance policy that names the Agency as an additional insured. The endorsement shall provide that the Contractor's liability insurance policy shall be primary, and that any liability insurance of the Agency shall be secondary and noncontributory.

3.102 *Add the following Subparagraph 11.1.4:*

11.1.4 For informational purposes, the Contractor is advised that Worker's Compensation Insurance is required for all Owners and executive officers of entities incorporated in the State of South Carolina.

3.103 *Add the following Subparagraph 11.1.5:*

11.1.5 The Aggregate Limits of Insurance required by Subparagraph 11.1.2 shall apply, in total, to this Contract only. This shall be indicated on the insurance certificate or an attached policy amendment.

11.1.5.1 The insurance policies and Certificates of Insurance required by this Contract shall contain a provision that no material alteration, cancellation, non-renewal, or expiration of the coverage contained in such policy or evidenced by such Certificates of Insurance shall have effect unless the Agency has been given at least thirty (30) days' prior written notice. The Contractor shall provide a minimum of thirty (30) days written notice to the Agency of any proposed reduction of coverage limits, including every coverage limit identified in Subparagraph 11.1.2, or any substitution of insurance carriers.

11.1.5.2 In no event shall any failure of the Agency to receive certified copies or certificates of policies required under this Article or to demand receipt of such certified copies or certificates prior to the Contractor's commencing the Work be construed as a waiver by the Agency of the Contractor's obligations to obtain insurance pursuant to this Article 11. The obligation to procure and maintain any insurance required by this Article 11 is a separate responsibility of the Contractor and independent of the duty to furnish a certified copy or certificate of such insurance policies.

3.104 *Delete Paragraph 11.3 in its entirety.*

3.105 *Delete the first sentence of Subparagraph 11.4.1 and in its place insert the following:*

"Unless otherwise provided, the Contractor shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles."

Add the following sentence to the end of Subparagraph 11.4.1:

"The Owner shall be a named insured on the policy."

Delete Subparagraph 11.4.1.2.

Delete Subparagraph 11.4.1.3

Delete Subparagraph 11.4.2, and in its place insert the following:

"11.4.2 **Boiler and Machinery Insurance.** The Contractor shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall both be named insureds."

Delete Subparagraph 11.4.3.

Delete Subparagraph 11.4.4 and in its place insert the following:

"11.4.4 If the Owner requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Contractor shall, if possible, include such insurance, and the cost thereof shall be charged to the Owner by appropriate Change Order."

Delete Subparagraph 11.4.5.

Delete Subparagraph 11.4.6 and in its place insert the following:

Delete Subparagraph 11.4.6 and in its place insert the following:

"11.4.6 Before an exposure to loss may occur, the Contractor shall file with the Owner a copy of each policy that includes insurance coverages required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has be given to the Owner."

Delete the first full sentence Subparagraph 11.4.7(after the words "Waivers of Subrogation.") and in its place insert the following:

"The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent the property insurance provided by the Contractor pursuant to this Article 11.4 covers and pays for the damage, except such rights as they have to proceeds of such insurance held by the Contractor as fiduciary."

Delete Subparagraph 11.4.8 and in its place insert the following:

"11.4.8 In the event of a loss, the Contractor shall replace the damaged property and shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payment to their Sub-subcontractors in similar manner."

Delete Subparagraph 11.4.9.

Delete Subparagraph 11.4.10.

3.106 ***Delete Subparagraph 11.5.1 and substitute the following:***

11.5.1 If required as stated in the SE-310, the Contractor shall provide Performance and Labor and Material Payment Bonds, each in the amount of 100% of the Contract Sum.

11.5.1.1 The Surety shall have, at a minimum, a "Best Rating" of "A" as stated in the most current publication of "Best's Key Rating Guide, Property-Casualty". In addition, the Surety shall have a minimum "Best Financial Strength Category" of "Class V", and in no case less than five (5) times the contract amount.

11.5.1.2 The Performance Bond shall be written on Form SE-355, "Performance Bond" and the Payment Bond shall written on Form SE-357, "Labor and Material Payment Bond", and both shall be made payable to the Agency.

11.5.1.3 The Performance and Labor and Material Payment Bonds shall:

(1) be issued by a surety company licensed to do business in South Carolina; and,

(2) be accompanied by a current power of attorney and certified by the attorney-in-fact who executes the bond on the behalf of the surety company; and,

(3) remain in effect for a period not less than one (1) year following the date of Substantial Completion or the time required to resolve any items of incomplete Work and the payment of any disputed amounts, whichever time period is longer; and,

(4) display the Surety's Bond Number. A rider including the following provisions shall be attached to each Bond stating that:

(a) The Surety hereby agrees that it consents to and waives notice of any addition, alteration, omission, change or other modification of the Contract Documents. Any addition, alteration, change, extension of time, or other modification of the Contract Documents, or a forbearance on the part of either the Agency or the Contractor to the other, shall not release the Surety of its obligations hereunder, and notice to the Surety of such matters is hereby waived.

(b) The Surety agrees that it is obligated under the bonds to any successor, grantee, or assignee of the Agency.

(5) Notwithstanding the foregoing, any bonds required by this Contract shall meet the requirements of the SC Code of Laws, as amended.

3.107 ***Add Subparagraph 11.5.3 as follows:***

11.5.3 The Contractor shall furnish the required bonds to the Agency before execution of the Contract.

3.108 ***Add Subparagraph 11.5.4 as follows:***

11.5.4 The Contractor shall keep the Surety informed of the progress of the Work, and, where necessary, obtain the Surety's consent to, or waiver of:

11.5.4.1 notices of changes in the Work;
11.5.4.2 requests for reduction or release of retention;
11.5.4.3 requests for final payment; and
11.5.4.4 any other item required by the Surety.

The Agency may, in the Agency's sole discretion, inform the Surety of the progress of the Work and obtain consents as necessary to protect the Agency's rights, interest, privileges, and benefits under and pursuant to any bond issued in connection with the Work.

3.109 *Delete Subparagraph 12.1.1 and insert the following:*

12.1.1 If a portion of the Work is covered contrary to the requirements specifically expressed in the Contract Documents, including inspections of work-in-progress required by all authorities having jurisdiction over the Project, then the portion of Work so covered shall, upon demand of the A/E or the authority having jurisdiction, be uncovered for observation and be replaced at the Contractor's expense without change in the Contract Time.

3.110 *Add the following to Clause 12.2.1.1:*

If, prior to the date of Substantial Completion, the Contractor, a Subcontractor, or anyone for whom either is responsible, uses or damages any portion of the Work, including, without limitation, mechanical, electrical, plumbing, and other building systems, machinery, equipment, or other mechanical device, the Contractor shall cause such item to be restored to "like new" condition at no expense to the Agency.

3.111 *In the third sentence of Clause 12.2.2.1, delete the phrase "...and to make a claim for breach of warranty...".*

3.112 *At the end of Clause 12.2.2.3, add the phrase* **"...unless otherwise provided in the Contract Documents."**

3.113 *Delete Subparagraph 13.1.1 and substitute the following:*

13.1.1 The Contract shall be governed by and construed in accordance with the laws of the State of South Carolina, and any suit, action or proceeding arising out of or relating to the Contract shall be governed by the laws of the State of South Carolina.

13.1.2 As required by §10-1-180 of the SC Code of Laws, as amended, the Office of State Engineer shall determine the enforcement and interpretation of all building codes and referenced standards on state buildings. The Contractor shall refer any questions, comments or directives from local officials to the Agency and the Office of State Engineer for resolution.

3.114 *In the second sentence of Subparagraph 13.2.1, delete the phrase "Except as provided in Subparagraph 13.2.2,..." and capitalize "...neither...".*

3.115 *Delete Subparagraph 13.2.2 in its entirety.*

3.116 *Delete Subparagraph 13.3.1 and substitute the following:*

13.3.1 Unless otherwise permitted herein, all notices contemplated by the Contract Documents shall be in writing and shall be deemed duly given:

13.3.1.1 upon actual delivery to the person identified in the A101, if delivery by hand; or,
13.3.1.2 upon receipt by the transmitting party of confirmation or reply, if delivery is by facsimile, telex or telegram; or,
13.3.1.3 upon receipt by the person identified in the A101, if delivery is by deposit into the United States mail, certified mail, return receipt requested.

3.117 *Add Subparagraph 13.3.2 as follows:*

13.3.2 Each such notice shall be sent to the respective party at the address provided in the A101, or to any other address as the respective party may designate by notice delivered pursuant hereto.

3.118 *Add Subparagraph 13.4.3 as follows:*

13.4.3 Termination of the Contract by either party for any reason shall not relieve the parties of any obligation theretofore accorded under this Contract. Notwithstanding Subparagraph 9.10.4, and without limiting the foregoing sentence, the following provisions (as amended) of the Contract Documents shall survive termination for whatever cause, expiration or completion:

1.6	Ownership and Use of Drawings, Specifications and Other Instruments of Service;
3.5	Warranty
3.17	Royalties, Patents and Copyrights
3.18	Indemnification
3.10	Waiver of Listed Damages
3.11	Waiver of Claims Against the A/E
4.5	Dispute Resolution
7.5.5	Cost or Pricing Data
11.1	Contractor's Liability Insurance
11.5	Performance and Payment Bond
12.2	Correction of Work
13.1	Governing Law
13.4	Rights and Remedies
13.12	Retention and Audit of Contractor's Records

3.119 *Add the following to Subparagraph 13.5.5:*

The Contractor shall give the A/E timely notice in advance of tests, inspections or approvals.

3.120 *Delete Subparagraph 13.6.1 and substitute the following:*

13.6.1 Payments made under the Contract Documents are subject to the requirements of Title 29, Chapter 6 of the South Carolina Code of Laws, as amended.

3.121 *Delete Paragraph 13.7 in its entirety.*

3.122 *Add the following Paragraph 13.9:*

13.9 DRUG-FREE WORKPLACE

The Contractor certifies to the Agency that Contractor will provide a Drug-Free Workplace, as required by Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.

3.123 *Add the following Paragraph 13.10:*

13.10 CANCELLATION AFTER AWARD

Pursuant to §11-35-1520 of the SC Code of Laws, as amended, and South Carolina Regulation 19-445.2085, this Contract may be canceled after award, but prior to issuance of the Notice to Proceed. In such event, the Contractor shall recover, as its sole remedy, its reasonable bid preparation costs.

3.124 *Add the following Paragraph 13.11:*

13.11 BANKRUPTCY

In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to the Agency. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to the bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of all State contracts against which final payment has not been made. This obligation remains in effect until final payment under this Contract.

3.125 *Add the following Paragraph 3.12:*

13.12 RETENTION AND AUDIT OF CONTRACTOR'S RECORDS

The Contractor and all subcontractors shall comply with all applicable obligations of §11-35-2220 of the SC Code of Laws, as amended. Accordingly, the Agency shall be entitled, at reasonable times and places, to audit the books and records of both the Contractor and any subcontractor who has submitted cost or pricing data pursuant to either this Contract or to §11-35-1830 to the extent that such books and records relate to such cost or pricing data. If any cost or pricing data is required for this Contract or any Modification, the Contractor and any subcontractor shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer; provided, however, that such records shall be retained for additional periods of time beyond this three-year period upon request of the Chief Procurement Officer. If this Contract or any Modification (other than a firm fixed price contract) is negotiated, the Agency shall be entitled to audit the books and records of the Contractor and any subcontractor to the extent that such books and records relate to the performance of the Contract or any Modification. Such books and records shall be maintained by the Contractor for a period of three years from the date of final payment under the prime contract and by any subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing by the Chief Procurement Officer. As used in the paragraph, the phrase "Chief Procurement Officer" shall have the definition given that phrase in §11-35-310.

3.126 *Add the following Subparagraph 13.13:*

13.13 UNIT PRICE WORK

13.13.1 Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, the initial Contract Sum will be deemed to include an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as identified in the Contract. The estimated quantity for each item of Work represents the Agency's best estimate of the amount of each item to be required of the Contractor, but the amounts are not guaranteed, and are solely for the purpose of comparison of Bids and determining an initial Contract Sum. Determinations of the actual quantities and classifications of Unit Price Work performed by the Contractor will be made by the A/E as described below.

13.13.2 Subject to an adjustment pursuant to Subparagraph 4.3.9, each unit price will be deemed to include an amount considered by the Contractor to be adequate to cover the Contractor's total costs, including overhead and profit, for each separately identified item.

13.13.3 The A/E will determine the actual quantities and classifications of Unit Price Work performed by the Contractor. The A/E will review with the Contractor its preliminary determinations on such matters before rendering a written decision or issuing a recommendation on the Contractor's Applications for Payment. The A/E's written decisions or recommendations will be final and binding on the Agency and the Contractor, except as modified by the A/E to reflect changed factual conditions or more accurate data, and subject to Paragraph 4.4. For purposes of Paragraph 4.4, the A/E's written decisions or recommendations shall serve as the A/E's initial decision.

3.127 *Add the following Subparagraph 13.14:*

13.14 PROCUREMENT OF MATERIALS BY AGENCY.

The Contractor accepts assignment of all purchase orders and other agreements for procurement of materials and equipment that are identified as part of the Contract Documents. The Contractor shall, upon delivery, be responsible for the storage, protection, proper installation, and preservation of such pre-purchased items, if any, as if the Contractor were the original purchaser. The Contract Sum includes, without limitation, all costs and expenses in connection with delivery, storage, insurance, installation, and testing of items covered in any assigned purchase orders or agreements. All Contractor warranty of workmanship and correction of the Work obligations under the Contract Documents shall apply to any pre-purchased items, unless the Contract Documents specifically provide otherwise.

3.128 *In Subparagraph 14.1, change "...30..." to "...sixty (60)".*

3.129 *Delete Clauses 14.1.1.3 and 14.1.1.4.*

3.130 *In Subparagraph* 14.1.3, *delete all words after "...Work executed..." and add "...*Any adjustment to the Contract Sum made pursuant to this Subparagraph shall be made in accordance with the requirements of Paragraph 7.5."

3.131 *Delete Subparagraph 14.2.1 and substitute the following:*

14.2.1 The Agency may terminate the Contract, or any separable part of it, if the Contractor:

14.2.1.1 fails to complete the Work within the time specified in the Contract Documents, including any authorized adjustments; or,
14.2.1.2 fails to prosecute the Work, or any separable part of the Work, with the diligence, resources and skill that will ensure its completion within the time specified in the Contract Documents, including any authorized adjustments; or,
14.2.1.3 fails to make payment to Subcontractors for materials or labor in accordance with Title 29, Chapter 6 of the South Carolina Code of Laws, as amended, and the respective agreements between the Contractor and the Subcontractors; or,
14.2.1.4 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or,
14.2.1.5 fails to proceed as required by Subparagraph 4.3.3 pending final resolution of a Claim; or,
14.2.1.6 fails to comply with any of the other material provisions of this Contract.

3.132 *Delete Subparagraph* 14.2.2, *but not the subordinate Clauses and substitute the following:*
14.2.2 The Agency's right to terminate this Contract under Subparagraph 14.2.1 may be exercised if the Contractor does not cure such failure within seven (7) days (or more if authorized in writing by the Agency) after receipt of the notice from the Agency specifying the general nature of the failure. The Agency shall notify the Contractor's surety within a reasonable time. When terminating pursuant to Paragraph 14.2, the Agency may, without prejudice to any other rights or remedies of the Agency, and subject to any prior rights of the surety:

3.133 *Insert "...*including Liquidated Damages, if any,..." *after the phrase "...other damages..." In the first sentence of Subparagraph 14.2.4.*

3.134 *Insert the following to Subparagraph 14.3.2 after the second sentence:*
Any adjustment to the Contract Sum made pursuant to this Subparagraph shall be made in accordance with the requirements of Paragraph 7.5.

3.135 *Delete Subparagraph* 14.4.1 *and substitute the following:*
14.4.1 The Agency may, at any time, terminate the Contract, or the Contract Work, in whole or in part, for the Agency's convenience and without cause.

14.4.1.1 Upon written consent of the Contractor, the Agency may reinstate the terminated portion of this Contract or Contract Work in whole or in part by amending the notice of termination if it has been determined that
14.4.1.2 circumstances clearly indicate a requirement for the terminated work; and,
14.4.1.3 reinstatement of the terminated work is advantageous to the Agency.

3.136 *Add the following Clause to Subparagraph 14.4.2:*

14.4.2.4 complete the performance of the Work not terminated, if any.

3.137 *In Subparagraph 14.4.3 delete the phrase "...along with reasonable overhead and profit on the Work not executed.", and substitute* "Any adjustment to the Contract Sum made pursuant to this Subparagraph shall be made in accordance with the requirements of Paragraph 7.5.

3.138 *Add the following Article 15:*

ARTICLE 15 PROJECT-SPECIFIC REQUIREMENTS AND INFORMATION

15.1 Project Number: _____

15.2 Project Name: _____

15.3 Inspection Requirements: *(Indicate the inspection services required by the Contract)*

☐ Special Inspections are required and are not part of the Contract Sum. *(see section 01400)*

☐ Building Inspections are required and are not part of the Contract Sum. *(see section 01400)*

☐ Building Inspections are required and are part of the Contract Sum. The inspections required or this Work are : *(Indicate which services are required and the provider)*

- ☐ Civil
- ☐ Structural
- ☐ Mechanical
- ☐ Plumbing
- ☐ Electrical
- ☐ Gas
- ☐ Other *(list)*

Remarks:

_____

_____

15.4 List Cash Allowances, if any. *(Refer to attachments as needed. If none, enter NONE)*

_____

_____

_____

15.5 Requirements for Record Drawings, if any. *(Refer to attachments as needed. If none, enter NONE)*

_____

_____

_____

15.6 Requirements for Shop Drawings and other submittals, if any, including number, procedure for submission, list of materials to be submitted, etc. *(Refer to attachments as needed. If none, enter NONE)*

_____

_____

_____

15.7 Requirements for signage, on-site office or trailer, utilities, restrooms, etc., in addition to the Contract, if any. *(Refer to attachments as needed. If none, enter NONE)*

_____

_____

_____

15.8 Requirements for Project Cleanup in addition to the Contract, if any. *(Refer to attachments as needed. If none, enter NONE)*

15.9 List all attachments that modify these General Conditions. *(If none, enter NONE)*

00201-OSE

STANDARD SUPPLEMENTAL INSTRUCTIONS TO BIDDERS

1 STANDARD SUPPLEMENTAL INSTRUCTIONS TO BIDDERS

1.1 These Standard Supplemental Instructions To Bidders amend or supplement Instructions To Bidders (AIA Document A701-1997) and other provisions of Bidding and Contract Documents as indicated below.

1.2 Compliance with these Standard Supplemental Instructions is required by the Office of State Engineer (OSE) for all State projects when competitive sealed bidding is used as the method of procurement.

1.3 All provisions of A701-1997, which are not so amended or supplemented, remain in full force and effect.

1.4 Bidders are cautioned to carefully examine the Bidding and Contract Documents for additional instructions or requirements.

2 RELATED DOCUMENTS

2.1 AIA Document A701-1997, hereby incorporated by reference.

2.2 Document SE-310, *Invitation For Construction Bids*

2.3 Document SE-330, *Bid Form*

2.4 Document 00811-OSE, *Standard Supplementary Conditions*

2.5 Other documents that may be identified in the Bidding and Contract

3 MODIFICATIONS TO A701-1997

3.1 *Delete Paragraph 1.1 and insert the following:*

1.1 **BIDDING DOCUMENTS** include the Bid Requirements and the proposed Contract Documents.

1.1.1 **Bid Requirements** consist of the SE-310, *Invitation for Construction Bid*, AIA Document A701-1997, *Instructions to Bidders*, this Section 00201-OSE, *Standard Supplemental Instructions to Bidders*, the SE-330, *Bid Form* and any supplemental Instructions to Bidders included in the Bidding Documents, and all Addenda issued prior to the receipt of Bids.

1.1.2 **Contract Documents** consist of the AIA Document A101-1997, *Standard Form of Agreement Between Owner and* Contractor, AIA Document A201-1997, *General Conditions of the Contract for Construction*, 00811-OSE, *Standard Supplementary Conditions*, Additional Supplementary Conditions, the Scope of Work as indicated on the Plans and the Specifications, the Contractor's Bid and Contract Modifications issued after execution of the Contract. All forms shall be referenced hereafter by the form number only. The Contract Documents shall govern the Work under all Divisions and Sections the same as if incorporated therein.

1.1.3 **Contract Modifications** may be one of the following:

1.1.3.1 A written amendment to the Contract signed by both parties;

1.1.3.2 A Change Order.

1.1.3.3 A Construction Change Directive;

1.1.3.4 A written order for a minor change in the Work issued by the A/E.

3.2 *Delete Paragraph 1.8 and insert the following:*

1.8 **BIDDER** is a person or entity who submits a Bid to the Agency.

3.3 *Add the following subparagraph:*

1.10 **ARCHITECT/ENGINEER (A/E)** - A person or firm who performs professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture and interior design pertaining to construction, as defined by the SC Code of Laws, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals and other related services. In the absence of an A/E, the Agency assumes the role of the A/E.

3.4 *Add the following subparagraph:*

1.12 Wherever the word "Architect" or "A/E" appears in the INSTRUCTIONS TO BIDDERS and herein, the intent is the design professional with whom the Agency has a contractual agreement.

3.5 *Add the following subparagraph:*

1.13 Wherever the word "Owner" or "Agency" appears in the INSTRUCTIONS TO BIDDERS and herein, the intent is the Agency with whom the successful Bidder will have a contractual agreement

3.6 *Add the following subparagraph:*

1.14 Wherever the phrase "in the form of" or similar appears in the Contract Documents, that phrase shall be taken to permit the use of alternative forms, provided all information required by the referenced form is submitted in a format acceptable, in their sole discretion, to the Agency and the OSE. Where the Bidder or Contractor is directed to use a specific form, that form shall be used without exception.

3.7 *Delete Subparagraph 2.1.3 and insert the following:*

2.1.3 The Bidder has visited the site, become familiar with local conditions under which the Work is to be performed, has correlated the Bidder's personal observations with the requirements of the proposed Contract Documents and has accepted full responsibility for any pre-bid existing conditions that would affect the Bid that were obvious and could have been ascertained by a site visit.

3.8 *Add the following subparagraph:*

2.1.5 The workplace will be maintained drug-free in accordance with Title 44, Chapter 107 of the SC Code of Laws, as amended.

3.9 *Add the following paragraph:*

2.2 If a Mandatory Pre-Bid Conference is specified in the SE-310, then:

2.2.1 Prospective Bidders are required to be represented at a Mandatory Pre-Bid Conference, at the specified time, date and place;

2.2.2 Only those prospective Bidders that are represented and are listed on the sign-in sheet will be allowed to submit Bids on the Work;

2.2.3 When it is in the best interest of the Agency, the Agency shall have the right to schedule more than one Mandatory Pre-Bid Conference. All prospective Bidders shall be represented and listed on the sign-in sheet of at least one Mandatory Pre-Bid Conference to be eligible to bid the Work.

3.10 *Add the following paragraph:*

2.3 If the Agency has scheduled only one Mandatory Pre-Bid Conference and only one prospective Bidder is represented at the Conference, then either:

2.3.1 The Pre-Bid Conference will be canceled and rescheduled for a later date to be advertised in the *South Carolina Business Opportunities (SCBO);* or,

2.3.2 An additional Mandatory Pre-Bid Conference will be scheduled at a later date to be advertised in *SCBO* and which must be attended by at least one additional prospective Bidder; or,

2.3.3 A non-mandatory Pre-Bid Conference will be scheduled at a later date as advertised in *SCBO;* or,

2.3.4 The project will be re-advertised in *SCBO* for open bidding under the conditions specified in the new advertisement.

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STANDARD SUPPLEMENTAL INSTRUCTIONS TO BIDDERS

3.11 *Add the following paragraph:*

2.4 The A/E will publish, prior to the Bid opening, an Addendum to the Contract Documents listing, the prospective Bidders that were represented and signed-in at the Mandatory Pre-Bid Conference(s).

3.12 *Delete paragraph 3.1 and substitute the following:*

3.1 COPIES OF BIDDING DOCUMENTS

3.1.1 Bidders and Sub-bidders may obtain complete sets of the Bidding Documents from the office designated in the SE-310 for the sum stated therein.

3.1.2 If the deposit is listed as refundable on the SE-310, then:

3.1.2.1 The deposit will be refunded to all plan holders that return the Bidding Documents in good condition within ten (10) days; or

3.1.2.2 The cost of replacement of missing or damaged documents will be deducted from the deposit; and,

3.1.2.3 A Bidder receiving a Contract Award may retain the Bidding Documents and the Bidder's deposit will be refunded.

3.1.3 Bidders and sub-bidders shall use complete sets of Bidding Documents in preparing Bids or sub-Bids; neither the Agency nor A/E assumes responsibility for errors or misinterpretations resulting from the use of incomplete sets of Bidding Documents. Partial sets of Bidding Documents will not be issued.

3.1.4 The Agency and A/E have made copies of the Bidding Documents available on the above terms for the purpose of obtaining Bids on the Work. No license or grant of use is conferred by issuance of copies of the Bidding Documents.

3.13 *Delete subparagraph 3.2.1 and substitute the following:*

3.2.1 The Bidder and each sub-Bidder shall carefully study and compare the Bidding Documents with each other, and with other work being bid concurrently or presently under construction to the extent that it relates to the Work for which the Bid or sub-Bid is submitted. The Bidder and each sub-Bidder shall examine the site and local conditions, such as, but not limited to, location, accessibility, general character of the site or building and the extent of existing work within or adjacent to the site, and shall incorporate the impact, if any, of such conditions into the Bid submitted.

3.14 *Delete subparagraph 3.2.2 and substitute the following:*

3.2.2 Bidders and sub-Bidders requiring clarification or interpretation of the Bidding Documents shall make a written request which shall reach the A/E at least ten (10) days prior to the date for receipt of Bids. No oral interpretations in regard to the meaning of Plans and Specifications will be made and no oral instructions will be given prior to the award of the Contract.

3.15 *Delete subparagraph 3.3.1 and substitute the following:*

3.3.1 The materials, products and equipment described in the Bidding Documents establish a standard of required function, dimension, appearance and quality to be met by any proposed substitution. Reference in the Bidding Documents to the words "or equal" and "or approved equal" shall be interpreted as establishing a standard of quality and shall not be construed as limiting competition.

3.16 *Delete subparagraph 3.3.4 and substitute the following:*

3.3.4 No substitutions during construction for specified items shall be allowed unless they are recommended by the A/E and approved by the Agency.

3.17 *Delete subparagraph 3.4.3 and substitute the following:*

3.4.3 No Addenda will be issued later than the fifth (5th) calendar day prior to the date set for receipt of Bids, except to:

3.4.3.1 withdraw the request for Bids; or,

3.4.3.2 postpone the date for receipt of Bids.

3.18 Add the following subparagraph:

3.4.5 When the date for receipt of Bids is to be postponed and there is insufficient time to issue a written Addendum prior to the original Bid Date, prospective Bidders shall be notified by telephone, fax or other appropriate means with immediate follow up with a written Addendum. This Addendum shall verify the postponement of the original Bid Date and establish a new Bid Date. The new Bid Date shall be no earlier than the fifth (5th) calendar day after the date of issuance of the Addendum postponing the original Bid Date.

3.19 *Add the following subparagraph:*

3.4.6 Bid Forms wherein the Bidder fails to acknowledge all issued Addenda by number shall be rejected as non-responsive, except for the following:

3.4.6.1 The Addendum only gives clarifications or lists attendees at a Mandatory Pre-Bid Conference; or,

3.4.6.2 The Bid received clearly indicates that the Bidder received the Addendum, such as where the Addendum added another item to the Invitation for Construction Bids and the Bidder submitted a Bid thereon; or,

3.4.6.3 The Addendum clearly would have had no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery, and does not affect the relative standing of the Bidders. Under no circumstances can the Bid Amount be changed or modified.

(1) **Trivial Or Negligible Effect** shall be defined as an increase in the Base Bid amount of the apparent low bidder, not to exceed one percent (1%) of the Base Bid amount. There shall be no percentage limitation if the Addendum decreases the cost of the Work. The cost of the Addendum shall be determined by the A/E or by the Agency's procurement officer.

(2) **Relative Standing Of The Bidders** shall mean that the order of the Bidders would be the same regardless of the Addendum. If the estimated cost of the Addendum (regardless of the percent of increase) exceeds the difference between the Bids of the apparent low bidder and the second-low bidder, then the Bid of the apparent low bidder shall be rejected as non-responsive.

3.20 *Delete subparagraph 4.1.1 and substitute the following:*

4.1.1 Bids shall be submitted on the SE-330 included in the Bidding Documents, or on true copies thereof, and signed in ink or other indelible media. The Bidder shall make no stipulations or qualify its Bid in any manner not permitted on the Bid Form.

3.21 *Delete subparagraph 4.1.4.*

3.22 *Delete subparagraph 4.1.5 and substitute the following:*

4.1.5 All requested Alternates must be bid.

4.1.5.1 Indicate either a dollar amount or the words "zero" or "No Change"

4.1.5.2 Indicate "ADD TO" or "DEDUCT FROM" for each Alternate,

3.23 *Delete subparagraph 4.1.6.*

3.24 *Delete subparagraph 4.1.7.*

3.25 *Add the following subparagraph:*

4.1.8 Unsigned Bids shall be rejected; provided however, that an unsigned Bid shall not be rejected when it is accompanied by a properly prepared Bid Security or by other material indicating the Bidder's intention to be bound by the unsigned document, such as the submission of a Bid Guarantee with the Bid or a letter with the Bid signed by the Bidder, referring to and identifying the Bid itself.

3.26 *Add the following subparagraph:*

4.1.9 Subcontractor(s) listed on page BF-2 of the SE-330 to perform Alternate Work may be used for both the Alternate and Base Bid Work, if the Alternate is accepted.

3.27 *Delete paragraph 4.2 and substitute the following:*

4.2 **BID SECURITY**

4.2.1 If required as stated in the SE-310, each Bid shall be accompanied by Bid Security in the dollar amount, if any, listed on the SE-330, or in an amount of not less than five percent (5%) of the Base Bid. The Bid Security shall be:

4.2.1.1 Written on SE-335, *Bid Bond*, made payable to the Agency; or,

4.2.1.2 An electronic Bid Bond authorization number issued by a firm or organization authorized by the surety to receive, authenticate and issue binding electronic Bid Bonds on behalf the surety; or,

4.2.1.3 In the form of a certified cashier's check.

4.2.2 By providing an electronic bid bond authorization code and signing the Bid Form, the Bidder is certifying that an electronic bid bond has been executed by a Surety meeting the standards required by the Bidding Documents and the Bidder and Surety are firmly bound unto the State of South Carolina under the conditions of the SE-335 provided in the Bidding Documents.

4.2.3 To be acceptable, a Bid Bond shall:

4.2.3.1 Be issued by a surety company licensed to do business in South Carolina;

4.2.3.2 Be issued by a surety company having, at a minimum, a "Best Rating" of "A" as stated in the most current publication of "Best's Key Rating Guide, Property-Casualty". In addition, the surety shall have a minimum "Best Financial Strength Category" of "Class V, and in no case less than five (5) times the contract amount.

4.2.3.3 Be accompanied by a certified and current power of attorney by the attorney-in-fact who executes the bond on the behalf of the surety company; and,

4.2.3.4 Be enclosed in the bid envelope at the time of Bid Opening, either in paper copy or as a Bid Bond authorization number provided on the Bid Form.

4.2.4 By providing Bid Security, the Bidder pledges to enter into a Contract with the Agency on the terms stated in the Bidding Documents and will, if required, furnish bonds covering the faithful performance of the Contract and payment of all obligations arising thereunder. The Bidder shall forfeit to the Agency as liquidated damages the amount of the Bid Security if the Bidder fails to:

4.2.4.1 Correct any Bid deficiency as required by the Bidding Documents and allowed by law; or,

4.2.4.2 Enter into such Contract; and,

4.2.4.3 Furnish such bonds, if required.

4.2.5 The Agency shall have the right to retain the Bid Security of any or all Bidders until such time as one of the three conditions listed below has been met.

4.2.5.1 The Contract for Construction has been executed and both Labor and Material Payment and Performance Bonds, if required, have been furnished; or,

4.2.5.2 The specified time has elapsed so that Bids may be withdrawn; or,

4.2.5.3 The Agency has rejected all Bids.

4.2.6 Bidders submitting a Bid Security not meeting the required amount, surety rating or financial strength rating shall have one working day from the Bid Opening to cure the deficiency or the Bid shall be considered non-responsive. The Bid Security amount submitted with the Bid must be at least 80% of the required amount to be eligible for correction.

3.28 *Delete Subparagraph 4.3.1 and substitute the following:*

4.3.1 All copies of the Bid, the Bid Security, if any, and all other documents required to be submitted with the Bid should be enclosed in a sealed opaque envelope. The Bid Envelope should be addressed to the party receiving the Bids and shall be identified with the Project Name, the Bidder's name and address and, if applicable, the designated portion of the Work for which the Bid is submitted.

3.29 *Delete subparagraph 4.3.3 and substitute the following:*

4.3.3 The Bidder shall assume full responsibility for timely delivery at the location designated for receipt of Bids.

4.3.3.1 Bidders attending the Bid Opening should bring Bids to the place of the Bid Opening as shown in the SE-310. The Bids should be given to the procurement officer of the Agency or his designee (includes the A/E) prior to the time of the Bid Opening.

4.3.3.2 Bids sent by mail or special delivery service (UPS, Federal Express, etc.) should be labeled "SEALED BID ENCLOSED", and shall be addressed to the Agency designated purchasing office as shown in the SE-310. Delivery of Bids to the above location shall be prior to the time of Bid Opening. Bids not received at the above location or Agency's mail room, prior to the time of Bid Opening, will be rejected.

3.30 *Add the following subparagraph:*

4.3.5 Any other or special documents requested of the Bidder in these Bidding Documents shall be included in the Bid Envelope. If they are not included with the Bid Envelope, the Bidder shall have twenty-four (24) hours from the time of the Bid Opening to provide these documents or its Bid shall be considered non-responsive.

3.31 *Add the following subparagraph:*

4.3.6 The official time for receipt of Bids shall be determined by reference to the clock designated by the Agency procurement officer or his designee. The procurement officer conducting the Bid Opening shall determine and announce that the deadline has arrived and no further Bids or bid modifications will be accepted. All Bids and bid modifications in the possession of the procurement officer at the time the announcement is completed shall be considered timely, whether or not the bid envelope has been date/time stamped or otherwise marked by the procurement officer.

3.32 *Delete subparagraph 4.4.2 and insert the following:*

4.4.2 Prior to the time and date designated for receipt of Bids, a Bid submitted may be modified or withdrawn by notice to the party receiving Bids at the place designated for receipt of Bids. Such modification shall be in writing on the Bid Form contained in the Bidding Documents or a true copy thereof, and over the signature of the Bidder.

3.33 *Delete Article 5 in its entirety and substitute the following:*

ARTICLE 5 CONSIDERATION OF BIDS

5.1 COMPLIANCE WITH REQUIREMENTS. To be considered, Bids shall be made in accordance with these Instructions to Bidders. Failure to comply with these bidding requirements may cause a bid to be rejected.

5.2 OPENING OF BIDS

5.2.1 Bids received on time will be opened publicly and read aloud. Bids that are determined, as the time of opening, to be non-responsive shall not be read. If all Bids are to be rejected, the Agency shall announce the reason(s) therefore.

5.2.2 The date and location of the posting of the SE-370, *Notice of Intent to Award* as listed in Article 9 of this 00201-OSE will be announced.

5.2.3 The Agency shall send a copy of the final Bid Tabulation to all Bidders within ten (10) working days of the Bid Opening.

5.2.4 If the Project is to be awarded, the Agency shall send a copy of the SE-370 to all Bidders after posting.

5.2.5 If only one Bid is received, the Bid shall be opened and considered.

5.3 REJECTION OF BIDS

5.3.1 The Agency shall have the right to reject any or all Bids, reject a Bid not accompanied by a required Bid Security or by other data required by the Bidding Documents, or reject a Bid which is in any way incomplete or irregular.

5.3.2 Bids shall be rejected for any of the following reasons, which include, but are not limited to:

5.3.2.1 Failure by a Bidder to be represented at a Mandatory Pre-Bid Conference or site visit; or,

5.3.2.2 Failure to deliver the Bid on time; or,

5.3.2.3 Failure to comply with Bid Security requirements, except as allowed herein; or,

5.3.2.4 Listing an invalid electronic Bid Bond authorization number on the bid form; or,

5.3.2.5 Failure to Bid on Alternate; or,

5.3.2.6 Failure to list qualified Subcontractors as required by law, or,

5.3.2.7 Showing any modification(s) or exception(s) qualifying the Bid; or,

5.3.2.8 Faxing a Bid directly to the Agency or their representative; or,

5.3.2.9 Failure to include in the Bid Envelope all items required by the Bidding Documents; or,

5.3.2.10 Failure to include a properly executed Power-of-Attorney with the bid bond.

5.3.3 Bids shall not be rejected for the following reasons, which include, but are not limited to:

5.3.3.1 Failure to write "Sealed Bid Enclosed" on the outside of the mailing envelope; or,

5.3.3.2 Failure to seal the Bid envelope; or,

5.3.3.3 Listing a modification to the Bid on the outside of the Bid envelope, provided however that such modifications will not be considered; or,

5.3.3.4 Failure to list any information on the envelope other than that which may be required by law; or,

5.3.3.5 Providing a fax copy or other reproduction of any or all Bidding Documents in the Bid envelope: or,

5.3.3.6 Failure to indicate "ADD TO" or "DEDUCT FROM" on an Alternate, but only when the adjustment is obvious; or,

5.3.3.7 Failure to provide an Incremental Price or a Unit Price when requested on the SE-330; or,

5.3.3.8 Providing additional listings of "Subcontractor Specialty" beyond those listed on the SE-330; or,

5.3.3.9 Failure of the Bidder to sign the Bid, provided it is accompanied by a properly prepared Bid Security, or other information, as required by this Section; or,

5.3.3.10 Providing a reproduction of a signature on any or all Bidding Documents; or,

5.3.3.11 Failure of the corporation to include its seal on the Bid; or,

5.3.3.12 Bid Bond not signed by the bidder but only if the bond has been properly executed and signed by the bonding company or agent.

5.3.3.13 Immaterial variation from the exact requirements of the Bidding Documents.

5.3.4 Bidders shall have one (1) working day from the time of Bid opening to correct the following deficiencies:

5.3.4.1 Failure to provide five percent (5%) Bid Security when required, provided that the Bidder did furnish Bid Security in the proper form equal to at least eighty (80) percent of that required in the SE-310; and,

5.3.4.2 Failure to provide a Bid Bond with the proper surety rating and financial strength, provided that the Bidder did furnish Bid Security in the proper form equal to at least eighty (80) percent of that required in the SE-310.

5.4 ACCEPTANCE OF BID (AWARD)

5.4.1 **INTENT TO AWARD.** It is the intent of the Agency to award a Contract to the lowest evaluated responsive bid submitted by a responsible Bidder. The Agency reserves the right to conduct discussions with apparent responsive bidders for the purpose of clarification to assure full understanding of the requirements of the Invitation for Bid.

5.4.2 **MULTIPLE BASE BIDS.** When the bid documents solicit multiple base bids, it is the intent of the Agency to award a Contract to the responsible Bidder submitting the lowest responsive bid on the accepted base bid. For an example of this procedure, see Chapter 5.2, Part 5.2.6 of the Manual for Planning and Executing State Permanent Improvement Projects – Part II [see OSE Web Site http://www.mmo.sc.gov/MMO/osc/MMO-ose-manual.phtml]. Each base bid is a separate, independent bid and not an add to another bid. Award will only be made on one of the multiple base bids.

5.4.3 **REJECTION OF BIDS.** The Agency shall have the right to reject all Bids; to reject Unit Prices proposed in a Bid without invalidating other portions of the Bid; to waive informalities or irregularities in a Bid received and to accept that Bid which, in the Agency's judgment, is in the Agency's own best interests. Failure by the Bidder to correct any deficiency as requested may cause the Bid to be rejected as non-responsive.

5.4.4 **CONTRACT EXECUTION.** The Agency shall not enter into a Contract in excess of $50,000 to the lowest responsible and responsive Bidder before the eleventh (11th) day after the SE-370, *Notice of Intent to Award* is posted. If only one bid is received and determined to be both responsive and responsible, award may be made and the contract executed after posting the SE-370 without the ten-day waiting period.

3.34 *Delete Article 6 in its entirety and substitute the following:*

ARTICLE 6 CONTRACTOR'S QUALIFICATIONS

6.1 STANDARDS OF RESPONSIBILITY. A prospective Contractor shall be considered as meeting the State's standards of responsibility when the firm has:

6.1.1 Appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements; and,

6.1.2 A satisfactory record of performance; and,

6.1.3 A satisfactory record of integrity; and,

6.1.4 Is qualified legally to contract with the State; and,

6.1.5 Has supplied all necessary information in connection with the inquiry concerning responsibility.

6.2 ADDITIONAL INFORMATION. Each Bidder submitting a Bid shall, upon request, submit a Contractor's Statement of Qualifications in the form specified by the Agency and all additional information as required by the Agency to support the Agency's evaluation of the responsibility of the Bidder.

6.2.1 Each Bidder, by submitting a Bid, agrees to waive any claim it has or may have against the State, the Agency, the A/E and their respective employees arising out of or in connection with the administration, evaluation or recommendation of any bid.

3.35 *Delete Article 7 in its entirety and substitute the following:*

ARTICLE 7 PERFORMANCE AND PAYMENT BONDS

7.1 BOND REQUIREMENTS

7.1.1 When required by the SE-310, the Contractor shall provide and pay the cost of Performance and Labor and Material Payment Bonds as described and defined in Paragraph 11.5 of 00811-OSE, *Standard Supplementary Conditions.*

7.2 TIME OF DELIVERY

7.2.1 When bonds are required by the SE-310, the Contractor shall have a maximum of twenty-one (21) days from the date of posting of the SE-370, to deliver the Performance and Labor and Material Payment Bonds, Certificate of Insurance and the Contract (signed by Contractor only). Failure to deliver these documents as required shall entitle the Agency to consider the Bidder non-responsible and to declare the Bid Security forfeited.

STANDARD MODIFICATIONS TO AIA A101-1997

1 STANDARD MODIFICATIONS TO AIA A101-1997

1.1 These Standard Modifications amend or supplement the *Standard Form of Agreement Between Owner and Contractor* (AIA Document A101-1997) and other provisions of Bidding and Contract Documents as indicated below.

1.2 Compliance with these Standard Modifications is required by the Office of State Engineer (OSE) for all projects when competitive sealed bidding is used as the method of procurement.

1.3 All provisions of A101-1997, which are not so amended or supplemented, remain in full force and effect.

1.4 These Standard Modifications shall be attached to the AIA A101-1997 upon execution of the Agreement. Refer to the OSE Document *Instructions for Completion of Standard Form of Agreement Between Owner and Contractor* (AIA Document A101-1997) for additional guidance on the proper completion of the A101.

2 RELATED DOCUMENTS

2.1 AIA Document A101-1997 hereby incorporated by reference and referred to hereafter as A101.

2.2 AIA Document A201-1997 hereby incorporated by reference and referred to hereafter as A201.

2.3 Document 00811-OSE, Standard Supplementary Conditions, 07/01 Edition.

2.4 Other documents that may be identified in the Bidding and Contract Documents.

3 MODIFICATIONS TO A101

3.1 *Delete the first sentence of Article 1 and substitute the following:* The Contract Documents consist of this Agreement, 00501-OSE, Conditions of the Contract for Construction (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in Article 8 of this Agreement and Modifications issued after executions of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein.

3.2 *Delete Article 2 and insert the following:* The Contractor shall fully execute the Work described in the Contract Documents or reasonably inferable by the Contractor as necessary to produce the results indicated by the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others.

3.3 *Delete Paragraph 3.1 and substitute the following:* The date of commencement of the Work shall be established in the SE-390, "Notice to Proceed." The Notice to Proceed will be issued to the Contractor in writing, no less than seven (7) days prior to the Date of Commencement. Nothing in this provision precludes the contractor from commencing work immediately after receipt of the Notice to Proceed.

3.4 *Add the following new Paragraphs 3.4 and 3.5 to the end of Article 3:*

3.4 The Contractor acknowledges and recognizes that the Agency is entitled to full and beneficial occupancy and use of the completed Work following expiration of the Contract Time. It is hereby mutually agreed by and between the parties that time shall be an essential part of the Agreement and the Contractor further acknowledges and agrees that if the Contractor fails to complete substantially or cause the Final Completion of any portion of the Work within the Contract Time, the Agency will sustain damages and loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. Therefore, the Agency and the Contractor agree as set forth below in this Paragraph 3.4.

3.4.1 If the Contractor fails to achieve Substantial Completion of the Work within the Time for Completion allowed in the Agreement, the Agency shall be entitled to retain or recover from the Contractor and its Surety, as Step One liquidated damages and not as a penalty, the following per diem amounts commencing upon the first day following expiration of the specified or adjusted time of performance and continuing until the actual

Date of Substantial Completion. Such liquidated damages are hereby agreed to be a reasonable estimate of damages the Agency will incur as a result of delayed completion of the Work: *(Insert a breakdown of per diem amounts shown on the SE-330.)*

$100.00 - Liquidated damages are reasonable estimates of damage the Agency will incur as a result of delayed completion of the work. The building is currently occupied.

3.4.2 If Final Completion of the Work is not achieved within the time allowed in the SE-330 for work after Substantial Completion, and if the Agency and OSE have not granted any extension of time, the Contractor shall owe to the Agency, not as a penalty but as Step Two liquidated damages, the sum stated below as Step Two liquidated damages for each and every partial or total calendar day of delay in Final Completion: *(Insert a breakdown of per diem amounts shown on the SE-330.)*

$100.00 - Liquidated damages are reasonable estimates of damage the Agency will incur as a result of delayed completion of the work. The building is currently occupied.

3.4.3 The Agency may deduct liquidated damages described in Subparagraphs 3.4.1 and 3.4.2 from any unpaid amounts then or thereafter due the Contractor under this Agreement. Any liquidated damages not so deducted from any unpaid amounts due the Contractor shall be payable to the Agency by the Contractor or its Surety at the demand of the Agency.

3.5 The Contractor shall be entitled to an Early Completion Award in the amount of N/A per day if the Contractor achieves Substantial Completion of the entire Work before the original Time for Completion; provided, however, that the Award shall not be payable until the time of final payment. If the Contractor has earned an Award with respect to the Work, the Agency shall have the right, at the Agency's election, to deduct from the Award any amounts due from the Contractor to the Agency. The Contractor shall include a provision in each of its subcontracts in excess of N/A ("Major Subcontracts") that requires the Contractor to pay such Major Subcontractor a share of any Award that bears the same ratio to the total Award as the amount of the Major Subcontract bears to the Contract Sum. In no event shall the Contractor be awarded any portion of the Award if the entire Work is not Substantially Complete on or before expiration of the original Contract Time for Substantial Completion. *(Insert the amount of any Early Completion Award per diem as shown on the SE-330 and the minimum dollar value for any Subcontractor to be eligible for a pro rata share of the Award.)*

3.5 *Add the following to Paragraph 4.3:*

4.3.1 Unit prices are set forth in the "Schedule of Unit Prices" attached hereto and made a part hereof as Exhibit (1). Such unit prices are considered complete and include: (1) all materials, equipment, labor, delivery, installation, overhead, and profit; and, (2) any other costs or expenses in connection with, or incidental to, the performance of that portion of the Work to which such unit prices apply.

3.6 *Delete Subparagraph 5.1.1 and substitute the following:*

5.1.1 Based on Applications for Payment, including all supporting documentation, submitted to the Agency and the A/E by the Contractor and Certifications for Payment issued by the A/E, the Agency shall make progress payment on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

3.7 *Delete Subparagraph 5.1.3 and insert the following:*

5.1.3 An Application for Payment, including all supporting documentation, for the period of time established in Subparagraph 5.1.2 shall be received by the A/E and the Agency not later than (7) days after the end of the period for which the Contractor is making application for payment. Payment on approved amounts shall be made by the Agency not later than twenty-one (21) days after the A/E and the Agency receive the Application for Payment. *(Insert the expected number of days required by the Contractor to prepare its Applications for Payment.)*

3.8 *Add the following sentence to Subparagraph 5.1.5:*

Each Application for Payment shall include such other information, documentation, and materials as the Agency or the A/E may require to substantiate the Contractor's entitlement to payment.

3.9 *Delete Clause 5.1.7.1 and substitute the following:*

Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to ninety-six and one half percent (96.5%) of the Contract Sum, less any amounts the A/E shall determine for incomplete and unacceptable Work, retainage applicable to such work, unsettled claims, Step One liquidated damages then due, and anticipated Step Two liquidated damages, if any.

3.10 *Add the following Clause to Subparagraph 5.1.8:*

5.1.8.1 Refer to Subparagraphs 9.6.2 and 9.8.5 of the General Conditions. Any reduction or release of retainage, or portion thereof, however, shall not be a waiver of: (1) any of the Agency's rights to retainage in connection with other payments to the Contractor; or, (2) any other right or remedy that the Agency has under the Contract Documents, at law or in equity.

3.11 *Delete Subparagraph 5.2.2 and insert the following:*

5.2.2 Final payment shall be made within twenty-one (21) days from the date the Agency (or A/E) receives the final undisputed Application for Payment, including all supporting documentation, from the Contractor. All conditions stipulated in the General Conditions shall have been met before final payment is made.

3.12 *Insert the words "... as amended." after "... 1997" in paragraph 6.1.*

3.13 *Insert the words "... as amended." after "... 1997" in paragraph 6.2.*

3.14 *Add the following to Paragraph 7.2:*

Refer to Subparagraph 9.6.2 of the General Conditions.

3.15 *Add the following Subparagraphs:*

7.6.1 Contractor shall not incur any expense chargeable to the Agency on or about the Work of this Agreement until the Notice to Proceed is issued.

7.6.2 The Contractor represents and warrants the following to the Agency (in addition to any other representations and warranties contained in the Contract Documents), as an inducement to the Agency to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement, any termination of this Agreement, and the final completion of the Work:

7.6.2.1 that it and its Subcontractors are financially solvent, able to pay all debts as they mature, and possessed of sufficient working capital to complete the Work and perform all obligations hereunder;

7.6.2.2 that it is able to furnish the plant, tools, materials, supplies, equipment, and labor required to complete the Work and perform its obligations hereunder;

7.6.2.3 that it is authorized to do business in the State of South Carolina and properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the Work and the Project;

7.6.2.4 that its execution of this Agreement and its performance thereof is within its duly authorized powers;

7.6.2.5 that its duly authorized representative has visited the site of the Project, familiarized himself with the local and special conditions under which the Work is to be performed, and correlated his observations with the requirements of the Contract Documents; and

7.6.2.6 that it possesses a high level of experience and expertise in the business administration, construction, construction management, and superintendence of projects of the size, complexity, and nature of this particular Project; and it will perform the Work with the care, skill, and diligence of such a contractor. The foregoing warranties are in addition to, and not in lieu of, any and all other liability imposed upon the Contractor by law with respect to the Contractor's duties, obligations, and performance hereunder. The Contractor acknowledges that the Agency is relying upon the Contractor's skill and experience in connection with the Work called for hereunder.

7.6.3 The Agency reserves the right, pursuant to Article 7 of the General Conditions to modify the Work of the Contractor. The Agency has been certified to approve Change Orders to the Contract, where the value of each procurement is $25,000 or less.
(Insert the amount of Agency's Construction Change Order Certification)

3.16 *Insert the words* "... as amended by 00501-OSE and as otherwise stated herein." *after* "... 1997" *in Subparagraph 8. 1. 1.*

3.17 *Insert the words* "... as amended." *after* "... 1997" *in Subparagraph 8.1.2.*

3.18 *In Subparagraph 8.1.3 insert the Project Manual issue date and list the following:*

		Pages
00811-OSE	Standard Supplemental Conditions	20

3.19 *List the following in Subparagraph 8.1.4:*

00201-OSE	Standard Supplemental Instructions to Bidders	9
00501-OSE	Standard Modifications to AIA A101-1997	4

3.20 *List the following in Subparagraph 8.1.7:*

Table of Contents
Invitation for Construction Bids (SE-310)
Instructions to Bidders (AIA Document A701-1997 Edition)
Contractor's Bid (Completed SE-330)

END OF DOCUMENT

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
2012 CP 46 3151

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

v.

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

ANSWER
TO PLAINTIFF'S COMPLAINT
(JURY TRIAL DEMANDED)

FILED-RECEIVED
2012 OCT -5 AM 9:18
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

NOW COMES the Defendant, Pickens Roofing and Sheet Metals, Inc. (hereinafter "Pickens Roofing"), and answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE
(RESPONSE TO INDIVIDUAL ALLEGATIONS)

1. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 1 and, as such, denies the same.

2. The allegations contained in Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are legal conclusions to which no response is required.

4. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 4 and, as such, denies the same.

5. The allegations contained in Paragraph 5 are admitted on information and belief. The attached contract speaks for itself.

6. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 6 and, as such, denies the same.

7. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 7 and, as such, denies the same.

8. In response to Paragraph 8, this answering Defendant incorporates by references its responses to the proceeding paragraphs of the Complaint as if repeated herein verbatim.

9. In response to Paragraph 9, this answering Defendant incorporates by references its response to Paragraph 5 of the Complaint.

10. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 10 and, as such, denies the same.

11. Defendant Pickens Roofing denies the allegations of Paragraph 11 of the Complaint and all of its subparts.

12. Defendant Pickens Roofing denies the allegations of Paragraph 12 of the Complaint.

13. In response to Paragraph 13, this answering Defendant incorporates by references its responses to the proceeding paragraphs of the Complaint as if repeated herein verbatim.

14. The allegations contained in Paragraph 14 are denied. The contract speaks for itself.

15. The allegations contained in Paragraph 15 are denied. The contract speaks for itself.

16. The allegations contained in Paragraph 16 are denied as stated.

17. This answering Defendant is without sufficient knowledge or information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 17 and, as such, denies the same.

18. Defendant Pickens Roofing denies the allegations of Paragraph 18 of the Complaint.

19. Defendant Pickens Roofing denies the allegations of Paragraph 19 of the Complaint and all of its subparts.

20. The allegations of Paragraph 20 are denied.

21. In response to Paragraph 21, this answering Defendant incorporates by references its responses to the proceeding paragraphs of the Complaint as if repeated herein verbatim.

22. The allegations of Paragraph 22 are denied as stated.

23. The allegations contained in Paragraph 23 are denied. The contract speaks for itself.

24. The allegations of Paragraph 24 of the Complaint and all of its subparts are denied.

25. The allegations of Paragraph 25 of the Complaint are denied.

FOR A SECOND DEFENSE
(RULE 12(b)(6) - FAILURE TO STATE A CLAIM)

The Plaintiff's Complaint fails to state a claim upon which relief should be granted and, therefore, should be dismissed, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, including but not limited to the fact that this lawsuit is not brought in the name of the real party in interest.

FOR A THIRD DEFENSE
(STATUTES OF LIMITATION)

Plaintiff's claims may be barred by the applicable statutes of limitation.

FOR A FOURTH DEFENSE
(DOCTRINE OF *LACHES*)

Plaintiff's claims may be barred, in whole or in part, by the Doctrine of *Laches*.

FOR A FIFTH DEFENSE
(INTERVENING NEGLIGENCE)

If it is determined that this answering Defendant was negligent, as alleged in the Plaintiff's Complaint or otherwise, which has been and is once again expressly denied, then it is alleged that the intervening and superseding negligence on the part of Plaintiff or other persons or parties insulated any negligence on the part of this answering Defendant; and that such insulating negligence is pled in bar of any purported right of Plaintiff to recover anything of this answering Defendant in this action.

FOR A SIXTH DEFENSE
(PRIOR RELEASE)

Plaintiff's claims are barred, in whole or in part, by Prior Release.

FOR A SEVENTH DEFENSE
(WAIVER)

Plaintiff's claims are barred, in whole or in part, by Waiver.

FOR AN EIGTH DEFENSE
(ACQUIESCENCE AND RATIFICATION OF PLAINTIFF)

Plaintiff's claims are barred, in whole or in part, by Plaintiff's acquiescence and ratification.

FOR A NINTH DEFENSE
(FAILURE TO MITIGATE DAMAGES)

If the Plaintiff was injured as a result of the Defendant's negligence which has been denied above, and is herein denied again, the Defendant alleges that the Plaintiff has failed to use ordinary care to see that the alleged injuries were treated and cared for and as such has failed to

try to recuperate from those injuries. As a result of the Plaintiff's failure to use reasonable care and diligence in order to mitigate the results of her/his/their alleged injuries, the Defendant pleads that the Plaintiff's failure to mitigate bars its right of recovery in this action.

FOR A TENTH DEFENSE
(ACTS OR OMISSIONS OF THIRD PARRTIES)

Plaintiff's claims against this answering Defendant are barred, in whole or in part, because Plaintiff's injuries, if any, were caused, in full or in part, by acts or omissions of third parties.

FOR AN ELEVENTH DEFENSE
(RESERVATION OF RIGHTS)

Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant Pickens Roofing prays the Court as follows:

1. That the Plaintiff have and recover nothing of this answering Defendant in this action, and that this action be dismissed;

2. That all issues of fact be tried before a jury;

3. That the costs of this action be taxed against the Plaintiff; and

4. For such other and further relief as the Court may deem just and proper.

THIS THE 4TH DAY OF OCTOBER, 2012.

HEDRICK GARDNER KINCHELOE & GAROFALO, LLP

By: _____

JEREMY T. CANIPE
SC Bar No. 70316
Attorney for Defendant
P.O. Box 30397
Charlotte, NC 28230
(704) 366-1101

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-46-3151

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

MOTIONS IN LIMINE

NOW COMES Plaintiff, The Winthrop University Trustees for the State of South Carolina, by and through undersigned counsel, and hereby respectfully requests that this Honorable Court grant the following motions in limine as detailed below.

1. Enter an order in limine barring Defendant, their counsel or witnesses from presenting any testimony or evidence showing that either party is or was covered by a policy of insurance, and/or was reimbursed in part for damages suffered as a result of this incident. SC Rules of Evid., Rule 411.

Pursuant to South Carolina Rule of Civil Procedure 17(a), The Winthrop University Trustees for the State of South Carolina is the sole Plaintiff and real party in interest in the above captioned matter, as it has not been fully reimbursed for all losses stemming from the events described in Plaintiff's Complaint. "The action *must* proceed in the name of the insured, if ... the insurer is only partially subrogated." *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 62, 416 S.E. 2d 655, 665 (Ct.App. 1992). There is no dispute that this lawsuit was properly brought in the name of Winthrop University Trustees for the State of South Carolina. The fact that

Winthrop was partially reimbursed for its damages should not be disclosed to the jury, as it may create undo bias, just as the disclosure of the Defendant's liability insurance coverage could also create undo bias. Such a ruling is also mandated by the collateral source rule: "According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source." *Atkinson v. Orkin Exterminating Co., Inc.*, 604 S.E.2d 385 (S.C. 2004).

Plaintiff further requests that any document to be used at trial be redacted so that any reference to insurance is excised.

2.A. Enter an order in limine taking judicial notice that as of March 6, 2010, the date of the fire that is the subject matter of the lawsuit, South Carolina had adopted the 2006 editions of the International Fire Code.

The basis of the request is as follows: Title 6 Chapter 9 of the Code of Laws of South Carolina sets forth the State's Building Code Adoption Procedure and provides that the "Building Council" is authorized to adopt nationally recognized codes and standards. Section 6–9–50 provides that the Building Council may adopt by reference nationally recognized codes and standards. Exhibit 1. On November 28, 2007, the Building Council adopted the 2006 editions of the International Fire Code and International Building Code.[1] Exhibit 2. See 26 S.C. Code Ann. Regs. 71-3200.2A. Also in support of Plaintiff's request, attached is the Affidavit of John Dunlap, the Deputy State Fire Marshal responsible for York County. Per Plaintiff's Motion in Limine below, the State Fire Marshal's Office is the authority having jurisdiction over state buildings as to code enforcement. Exhibit 3.

[1] 26 S.C. Code Ann. Regs. 71-8200.2A provides that the requirements of the Code 2006 edition . . .shall constitute minimum standards for fire prevention and life safety for construction, occupancy, and use of all buildings and structures.

2.B. Enter an order in limine taking judicial notice that Chapter 14 of the International Fire Code, 2006 Edition, titled "Fire Safety During Construction and Demolition" applies to the demolition and re-roofing of Winthrop's Bancroft Hall, the subject matter of this lawsuit. In support of Plaintiff's request, 14.01.1 of the International Fire Code states:

> SCOPE. This Chapter shall apply to structures in the course of construction, alteration or demolition, including those in underground locations. Compliance of NFPA 241 is required for items not specifically addressed herein.

Chapter 14 of the International Fire Code does not address yard storage of combustible construction materials. Exhibit 4. NFPA 241, 2006 Edition, does address that issue. Exhibit 5. The scope of NFPA 241 is identical to the IFC's. Section 1.2 sets forth the purpose of the NFPA standard, and is as follows:

> The standard is intended to prescribe minimum safeguards for construction, alteration, and demolition operations in order to provide reasonable safety to life and property from fire during such operations.

Plaintiff requests that the Court take judicial notice of Section 8.3.3 relating to the storage of combustible construction materials. That section states in its entirety:

Yard storage of equipment to be installed or combustible construction material shall not be stored closer than 30 ft. (9 m.) from the structure under construction or alteration.

2.C. Enter an order in limine taking judicial notice that the State Fire Marshal is the authority having jurisdiction over state buildings as to code enforcement, including those at Winthrop University. The basis of Plaintiff's request for judicial notice is based on the following South Carolina statutes:

South Carolina Statute Section 6-9-110(B) grants the State Fire Marshal authority to interpret and enforce the adopted codes as it pertains to the state buildings. Exhibit 6. South

Carolina Statute Section 23-9-40 provides it is the duty of the State Fire Marshal to enforce all laws relating to the prevention of fires, the storage, sale and use of combustibles, et al. Exhibit 5. Finally, South Carolina Statute Section 23-9-30 provides that the State Fire Marshal may vest its powers in its designated deputy fire marshals. Exhibit 7.

3. Enter an order in limine pursuant to South Carolina Rule of Civil Procedure 42(b) bifurcating the issues of liability and damages. "Trial judges have discretion as to whether to bifurcate a trial." *Wright v. Hiester Const. Co., Inc.* 389 S.C. 504, 698 S.E.2d 822 (Ct.App. 2010). Plaintiff anticipates calling no less than six additional witnesses for direct testimony regarding damages, and numerous additional rebuttal witnesses, as necessary. Plaintiff submits there is no genuine issue as to the extent of Plaintiff's damages. Given the amount of damages and the number of contractors involved, the damages testimony may add several days or more to the expected length of trial.

WHEREFORE, Plaintiff, The Winthrop University Trustees for the State of South Carolina, respectfully requests entry of an order granting its motions *in limine* herein.

This the 16th day of March, 2014.

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

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Code of Laws of South Carolina 1976 Annotated
Title 6. Local Government--Provisions Applicable to Special Purpose Districts and Other Political Subdivisions (Refs & Annos)
Chapter 9. Building Codes

Code 1976 § 6-9-50

§ 6-9-50. Adoption by reference of nationally recognized codes and standards; outdoor burning exception.

Effective: July 1, 2009
Currentness

(A) The council shall adopt by reference and amend only the latest editions of the following nationally recognized codes and the standards referenced in those codes for regulation of construction within this State: building, residential, gas, plumbing, mechanical, fire, and energy codes as promulgated, published, or made available by the International Code Council, Inc. and the National Electrical Code as published by the National Fire Protection Association. The appendices of the codes provided in this section may be adopted as needed, but the specific appendix or appendices must be referenced by name or letter designation at the time of adoption. However, the provisions of the codes referenced in this section which concern the qualification, removal, dismissal, duties, responsibilities of, and administrative procedures for all building officials, deputy building officials, chief inspectors, other inspectors, and assistants do not apply unless they have been adopted by the municipal or county governing body.

(B) The governing body of a county may not enforce that portion of a nationally recognized fire prevention code it has adopted which may regulate outdoor burning for forestry, wildlife, and agricultural purposes as regulated by the South Carolina Forestry Commission.

Credits
HISTORY: 1962 Code § 14-400.585; 1972 (57) 2607; 1984 Act No. 481, § 2; 1997 Act No. 123, § 1; 1998 Act No. 381, § 1; 1999 Act No. 44, § 2; 2003 Act No. 83, § 1, eff July 2, 2003; 2009 Act No. 46, § 2, eff July 1, 2009.

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Code 1976 § 6-9-50, SC ST § 6-9-50
Current through End of 2013 Reg. Sess.

End of Document

Building Codes in Effect for South Carolina

Every municipality and county in South Carolina that does not legally "Opt out" of the Code Enforcement Program, must enforce the mandatory building codes referenced in Section 6-9-50 of the South Carolina Code of Laws, 1976 as Amended (SC Code), after they are reviewed and adopted by the Building Codes Council (Council). Municipalities and counties are restricted from promulgating their own building codes, in whole or in part or adopting and enforcing building codes other than those referenced in Section 6- 9-50 of the SC Code. Unless modified by the Council, all chapters (except the Administrative Chapter) of all codes must be enforced in their entirety.

Only the mandatory building codes listed below are adopted by the Council and enforced at the local level. Any code used to regulate the construction or alteration of buildings or structures, including their systems or components, not listed below are not valid and cannot be legally promulgated, adopted or enforced by a local jurisdiction.

On November 28, 2007, the Council updated the mandatory building codes to be used within South Carolina. The Council established the implementation date for local jurisdictions as July 1, 2008 for all codes. The implementation date for the International Residential Code, however, was reestablished as July 1, 2009 by 2008/2009 budget proviso 182 (65.10). All local jurisdictions must enforce the mandatory codes, and may adopt and enforce the permissive codes.

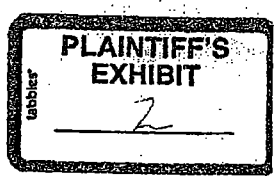
Mandatory Building Codes adopted for current use in South Carolina and which must be enforced by all municipalities and counties include the:
2006 International Building Code with SC modifications;
2006 International Residential Code with SC modifications;
2006 International Fire Code with SC modifications;
2006 International Plumbing Code;
2006 International Mechanical Code;
2009 International Energy Conservation Code;
2006 International Fuel Gas Code with SC modifications; and,
2008 National Electrical Code.

The latest edition of ICC/ANSI A117.1, Accessible and Useable Buildings and Facilities, is adopted by the Accessibility Act and mandatory for use in all municipalities and counties within the state. Although other standards for building accessibility exist, the latest published edition of the ICC/ANSI A117.1 is the only accessibility document required by state law to be enforced by the local building officials. All plan reviews and inspections conducted by local Building Inspection Departments, therefore, will be based on ICC/ANSI A117.1. It is important to note, however, that other accessibility documents are also law and cannot be ignored. Legal action can be taken against a building owner, manager or any person involved in design or construction/renovation of a building or structure requiring accessibility, under any of the accessibility laws. Therefore, before construction or renovation of a building or structure that requires accessibility, all applicable accessibility laws should be considered.

Additional accessibility laws that must be considered and their enforcement entities include the:
Americans With Disabilities Act (ADA) published and enforced by the US Department of Justice (DOJ);
Fair Housing Act Amendments of 1988, published and enforced by the US Department of Housing and Urban Development (HUD), and,
South Carolina Fair Housing Law published and enforced by the SC Human Affairs Commission.

The Building Energy Efficiency Standards Act is adopted by statute and mandatory for use in all jurisdictions within the state.

The codes are to be used in conjunction with the latest code modifications authorized by the Council. Only the modifications authorized and listed on this website are valid for use in the state. Building code modifications that have not received prior approval by the Council are invalid and cannot be adopted, employed or enforced by local jurisdictions.



As permitted by Section 6-9-60 of the SC Code, "permissive codes" may be used as needed by a local jurisdiction, but the codes must first be adopted by ordinance before enforcement can begin. The permissive codes are the latest editions of the International Property Maintenance Code; International Existing Building Code; International Performance Code for Buildings and Facilities; and, International Swimming Pool Code.

Adoption of the mandatory and permissive codes does not include the chapters, sections or provisions addressing administrative policies or procedures. Administrative policies and procedures are the sole responsibility of each local jurisdiction. If the governing body of a local jurisdiction desires to use the administrative provisions in one or more of the adopted building codes, it must first adopt the chapters or sections by ordinance. In lieu of adopting the administrative provisions contained in the adopted building codes, the governing body of a local jurisdiction may develop specific administrative policies and procedures for the operation of its Building Inspection Department. If administrative policies and procedures are developed at the local level, they must be adopted by ordinance before they can take effect.

Appendixes to the mandatory codes may not be used at the local level unless specifically adopted or authorized as a local modification, by the Building Codes Council. Currently, no appendixes are adopted for use statewide. Greenville County was authorized a local modification to use Appendix F in the 2009 International Residential Code. No other jurisdictions are authorized to use appendixes to the mandatory codes.

Order copies of the International Codes, the National Electrical Code or the ICC/ANSI A117.1 document.

Jurisdiction that are currently, legally opted out of the code enforcement program:
None.

Code Adoption History:
The following information is provided for research purposes and may used to verify the official dates for which local jurisdictions were or are required to enforce certain editions of the mandatory building codes.

The International Code Series was developed as a joint project by the Southern Building Code Congress, International, the International Conference of Building Officials and the Building Officials and Code Administrators, International (referred to as model code organizations) and replaced the Standard, National and Uniform Building Code Series. The 1997 Editions of the Standard, National and Uniform Codes (which were regional), and the 1995 Edition of the CABO One and Two Family Dwelling Code (which was national) were the last to be published. The International Building Code Series replaced those documents and provided a single set of National Codes. Simultaneously, the three model code organizations merged and created the International Code Council. All codes training and Code Enforcement Officer Certification examinations for the State of South Carolina are now based on the International Code series.

Prior to June 13, 1997, local jurisdictions that desired to adopt building codes were permitted to do so by local ordinance. If a jurisdiction did adopt building codes, it was required to adopt only the codes authorized by the Building Codes Act. Once adopted, the jurisdiction was obligated to continue adoption of each new edition within one year after it was made available by the publisher. The implementation date for enforcement was established by the local jurisdiction.

Starting July 13, 1997, all local jurisdictions that did not legally "opt out" of the mandatory building code program were required to adopt building codes by local ordinance, after they were authorized by the Council. The Council was also required to establish the date of implementation for each of the adopted codes.

Starting July 2, 2003, the Council was charged with the responsibility for adopting all mandatory building codes and establishing the date of implementation for the local jurisdictions.

Starting with the 2006 code adoption cycle, the Council local jurisdictions no longer adopt appendices.

Building codes authorized or adopted by the Building Codes Council, and their corresponding implementation dates, starting with the current codes and going back to the 2000 International Code Series include the following.

Codes Adopted	Adoption Date	Implementation Date
2012 International Residential Code	August 29, 2012	July 1, 2013
2012 International Building Code	August 29, 2012	July 1, 2013
2012 International Fire Code	August 29, 2012	July 1, 2013
2012 International Plumbing Code	August 29, 2012	July 1, 2013
2012 International Mechanical Code	August 29, 2012	July 1, 2013
2012 International Fuel Gas Code	August 29, 2012	July 1, 2013
2009 International Energy Conservation Code [1]	April 2, 2012	January 1, 2013
2011 National Electrical Code [2]	August 29, 2012	July 1, 2013
2009 International Residential Code	March 22, 2010	Not Implemented [3]
2009 International Building Code	March 22, 2010	Not Implemented [3]
2009 International Fire Code	March 22, 2010	Not Implemented [3]
2009 International Plumbing Code	March 22, 2010	Not Implemented [3]
2009 International Mechanical Code	March 22, 2010	Not Implemented [3]
2009 International Fuel Gas Code	March 22, 2010	Not Implemented [3]
2008 National Electrical Code	March 30, 2009	July 1, 2009
2006 International Residential Code [4]	November 28, 2007	July 1, 2009
2006 International Building Code	November 28, 2007	July 1, 2008
2006 International Fire Code	November 28, 2007	July 1, 2008
2006 International Plumbing Code	November 28, 2007	July 1, 2008
2006 International Mechanical Code	November 28, 2007	July 1, 2008
2006 International Fuel Gas Code	November 28, 2007	July 1, 2008
2006 International Energy Conservation Code [1]	November 28, 2007	July 1, 2008
2005 National Electrical Code	February 22, 2006	July 1, 2007
2003 International Residential Code	May 26, 2004	July 1, 2005
2003 International Fuel Gas Code	May 26, 2004	July 1, 2005
2003 International Building Code	May 26, 2004	January 1, 2005
2003 International Fire Code	May 26, 2004	January 1, 2005
2003 International Plumbing Code	May 26, 2004	January 1, 2005
2003 International Mechanical Code	May 26, 2004	January 1, 2005
2003 International Energy Conservation Code	May 26, 2004	January 1, 2005
2002 National Electrical Code	May 22, 2002	July 1, 2002
2000 International Residential Code	May 24, 2000	July 1, 2002
2000 International Energy Conservation Code	May 24, 2000	July 1, 2001
2000 International Building Code	May 24, 2000	July 1, 2001
2000 International Fire Code	May 24, 2000	July 1, 2001
2000 International Plumbing Code	May 24, 2000	July 1, 2001
2000 International Mechanical Code	May 24, 2000	July 1, 2001
2000 International Fuel Gas Code	May 24, 2000	July 1, 2001

Footnotes:

[1] The 2006 International Energy Conservation Code (IECC) was adopted by the SC Legislature as the minimum standard for compliance with the State Energy Standard, thus removing it from the normal adoption process. The legislature updated the IECC to the 2009 Edition during the 2012 legislative session (Act 143) with an effective date of January 1, 2013. Future updated versions must also be adopted by statutory amendment.

[2] The Building Codes Council included the adoption of the National Electrical Code with the International Code Series, starting with the 2012 Code Adoption Cycle.

[3] The 2009 International Code Series was formally adopted by the Building Codes Council May 10, 2010. Implementation did not occur, however, due to a request to remove the regulations from the administrative procedures process by the South Carolina House Labor, Commerce and Industry Committee.

[4] The implementation date for the International Residential Code was delayed until July 1, 2009 by 2008/2009 budget proviso 182 (65.10).

History of the SC Energy Standards

The SC Energy Standards started as House Bill 2863 (Act 156) and became effective 7/6/79. The standards were adopted as state law and were applicable and mandatory in every municipality and county in South Carolina.

In 1979, the state standard referenced "the current addition of Appendix J Energy Conservation' of the 1979 edition of the Standard Building Code, which in turn referenced the "Code for Energy Conservation in New Buildings" (published jointly by the Southern Building Code Congress, International Conference of Building Officials and Building Officials, Code Administrators International and National Conference of States for Building Codes and Standards) and "ASHRAE Standard 90" as methods of compliance with state law.

In 1982, the state standard automatically updated to reference Appendix J of the 1982 edition of the Standard Building Code, which referenced the "Code for Energy Conservation in New Buildings" and "ASHRAE Standards 90A and 90B" as methods of compliance.

In 1985, the state standard automatically updated to reference Appendix J of the 1985 edition of the Standard Building Code, which referenced the "CABO Model Energy Code" (published by the Council of American Building Officials) and "ASHRAE Standards 90A and 90B" as methods of compliance.

In 1988, the state standard automatically updated to reference Appendix J of the 1988 edition of the Standard Building Code, which referenced the "CABO Model Energy Code" and "ASHRAE Standards 90A and 90B" as methods of compliance.

In the 1991 edition of the Standard Building Code, the Energy Conservation provisions were moved from Appendix J to Appendix E. The state standard, however, continued to reference Appendix J of the Standard Building Code. Appendix E referenced the "CABO Model Energy Code" and "ASHRAE Standards 90.1" as methods of compliance.

In the 1994 edition of the Standard Building Code, the Energy Conservation provisions remained in Appendix E. The state standard continued to reference Appendix J of the Standard Building Code. Appendix E referenced the "CABO Model Energy Code" and "ASHRAE Standards 90.1" as methods of compliance.

In the 1997 edition of the Standard Building Code, the Energy Conservation provisions remained in Appendix E. The state standard continued to reference Appendix J of the Standard Building Code. Appendix E referenced the "CABO Model Energy Code" and "ASHRAE Standards 90.1" as methods of compliance.

On July 1, 2001 the state implemented the 2000 edition of the International Building Code and on July 1, 2002; the state implemented the 2000 edition of the International Residential Code. The state standard, however, continued to reference Appendix J of the Standard Building Code.

In 2005, the state implemented the 2003 editions of the International Building and Residential Codes. The state standard continued to reference Appendix J of the Standard Building Code.

In 2008 the state implemented the 2006 edition of the International Building Code and in 2009; the state implemented the 2006 edition of the International Residential Code. The state standard, however, continued to reference Appendix J of the Standard Building Code.

On July 1, 2009, by Act 46 (H3550) The SC Energy Standard was updated to the 2006 International Energy Conservation Code for all commercial and residential buildings.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-46-3151

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

AFFIDAVIT OF JOHN M. DUNLAP

John M. Dunlap, first being duly sworn, deposes and says:

1. I am above the age of eighteen (18) years, am under no disability, and make this Affidavit from personal knowledge.

2. I am a Deputy State Fire Marshal for the State of South Carolina, which is part of the Division of Fire & Life Safety of the South Carolina Department of Labor, Licensing and Regulation.

3. I am familiar with the South Carolina adopted 2006 edition of the International Building Code, the International Fire Code, and NFPA 241, 2000 edition applicable at the time of the fire.

4. Part of my responsibilities includes the interpretation and enforcement of the South Carolina adopted International Building and Fire Code, and the State Fire Marshal's statutes and regulations.

5. I am aware of a fire that occurred at Winthrop University on March 3, 2010.

6. At the time of the March 3, 2010 fire, the applicable provisions of the South Carolina adopted 2006 edition of the International Fire Code and the referenced NFPA 241, 2000 edition, *Standard for Safeguarding Construction, Alteration, and Demolition Operations* prohibits *the* storage of combustible construction materials closer than 30 feet from the structure under construction or alteration.

7. The storage of combustible construction materials on the roof adjoining a building under construction does not comply with the South Carolina adopted 2006

PLAINTIFF'S EXHIBIT 3

edition of the International Fire Code and specifically, NFPA 241, 2000 edition, Section 8.3.3.

Further Affiant sayeth not.

Subscribed and sworn to before
me this 3rd day of September, 2013.

Notary Public

My Commission expires: 02/14/15

A Member of the International Code Family®

INTERNATIONAL FIRE CODE®

2006

PLAINTIFF'S
EXHIBIT
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CHAPTER 3
GENERAL PRECAUTIONS AGAINST FIRE

SECTION 301
GENERAL

301.1 Scope. The provisions of this chapter shall govern the occupancy and maintenance of all structures and premises for precautions against fire and the spread of fire.

301.2 Permits. Permits shall be required as set forth in Section 105.6 for the activities or uses regulated by Sections 306, 307, 308.3, 308.4, 308.5 and 315.

SECTION 302
DEFINITIONS

302.1 Definitions. The following words and terms shall, for the purposes of this chapter and as used elsewhere in this code, have the meanings shown herein.

BONFIRE. An outdoor fire utilized for ceremonial purposes.

HI-BOY. A cart used to transport hot roofing materials on a roof.

OPEN BURNING. The burning of materials wherein products of combustion are emitted directly into the ambient air without passing through a stack or chimney from an enclosed chamber. Open burning does not include road flares, smudgepots and similar devices associated with safety or occupational uses typically considered open flames or recreational fires. For the purpose of this definition, a chamber shall be regarded as enclosed when, during the time combustion occurs, only apertures, ducts, stacks, flues or chimneys necessary to provide combustion air and permit the escape of exhaust gas are open.

POWERED INDUSTRIAL TRUCK. A forklift, tractor, platform lift truck or motorized hand truck powered by an electrical motor or internal combustion engine. Powered industrial trucks do not include farm vehicles or automotive vehicles for highway use.

RECREATIONAL FIRE. An outdoor fire burning materials other than rubbish where the fuel being burned is not contained in an incinerator, outdoor fireplace, barbeque grill or barbeque pit and has a total fuel area of 3 feet (914 mm) or less in diameter and 2 feet (610 mm) or less in height for pleasure, religious, ceremonial, cooking, warmth or similar purposes.

SECTION 303
ASPHALT KETTLES

303.1 Transporting. Asphalt (tar) kettles shall not be transported over any highway, road or street when the heat source for the kettle is operating.

Exception: Asphalt (tar) kettles in the process of patching road surfaces.

303.2 Location. Asphalt (tar) kettles shall not be located within 20 feet (6096 mm) of any combustible material, combustible building surface or any building opening and within a controlled area identified by the use of traffic cones, barriers or other approved means. Asphalt (tar) kettles and pots shall not be utilized inside or on the roof of a building or structure. Roofing kettles and operating asphalt (tar) kettles shall not block means of egress, gates, roadways or entrances.

303.3 Location of fuel containers. Fuel containers shall be located at least 10 feet (3048 mm) from the burner.

Exception: Containers properly insulated from heat or flame are allowed to be within 2 feet (610 mm) of the burner.

303.4 Attendant. An operating kettle shall be attended by a minimum of one employee knowledgeable of the operations and hazards. The employee shall be within 100 feet (30 480 mm) of the kettle and have the kettle within sight. Ladders or similar obstacles shall not form a part of the route between the attendant and the kettle.

303.5 Fire extinguishers. There shall be a portable fire extinguisher complying with Section 906 and with a minimum 40-B:C rating within 25 feet (7620 mm) of each asphalt (tar) kettle during the period such kettle is being utilized. Additionally, there shall be one portable fire extinguisher with a minimum 3-A:40-B:C rating on the roof being covered.

303.6 Lids. Asphalt (tar) kettles shall be equipped with tight-fitting lids.

303.7 Hi-boys. Hi-boys shall be constructed of noncombustible materials. Hi- boys shall be limited to a capacity of 55 gallons (208 L). Fuel sources or heating elements shall not be allowed as part of a hi-boy.

303.8 Roofing kettles. Roofing kettles shall be constructed of noncombustible materials.

303.9 Fuel containers under air pressure. Fuel containers that operate under air pressure shall not exceed 20 gallons (76 L) in capacity and shall be approved.

SECTION 304
COMBUSTIBLE WASTE MATERIAL

304.1 Waste accumulation prohibited. Combustible waste material creating a fire hazard shall not be allowed to accumulate in buildings or structures or upon premises.

304.1.1 Waste material. Accumulations of wastepaper, wood, hay, straw, weeds, litter or combustible or flammable waste or rubbish of any type shall not be permitted to remain on a roof or in any court, yard, vacant lot, alley, parking lot, open space, or beneath a grandstand, bleacher, pier, wharf, manufactured home, recreational vehicle or other similar structure.

313.2 Group R occupancies. Vehicles powered by flammable liquids, Class II combustible liquids, or compressed flammable gases shall not be stored within the living space of Group R buildings.

SECTION 314
INDOOR DISPLAYS

314.1 General. Indoor displays constructed within any occupancy shall comply with Sections 314.2 through 314.4.

314.2 Fixtures and displays. Fixtures and displays of goods for sale to the public shall be arranged so as to maintain free, immediate and unobstructed access to exits as required by Chapter 10.

314.3 Highly combustible goods. The display of highly combustible goods, including but not limited to fireworks, flammable or combustible liquids, liquefied flammable gases, oxidizing materials, pyroxylin plastics and agricultural goods, in main exit access aisles, corridors, covered malls, or within 5 feet (1524 mm) of entrances to exits and exterior exit doors is prohibited when a fire involving such goods would rapidly prevent or obstruct egress.

314.4 Vehicles. Liquid- or gas-fueled vehicles, boats or other motorcraft shall not be located indoors except as follows:

1. Batteries are disconnected.
2. Fuel in fuel tanks does not exceed one-quarter tank or 5 gallons (19 L) (whichever is least).
3. Fuel tanks and fill openings are closed and sealed to prevent tampering.
4. Vehicles, boats or other motorcraft equipment are not fueled or defueled within the building.

SECTION 315
MISCELLANEOUS COMBUSTIBLE MATERIALS STORAGE

315.1 General. Storage, use and handling of miscellaneous combustible materials shall be in accordance with this section. A permit shall be obtained in accordance with Section 105.6.

315.2 Storage in buildings. Storage of combustible materials in buildings shall be orderly. Storage shall be separated from heaters or heating devices by distance or shielding so that ignition cannot occur.

315.2.1 Ceiling clearance. Storage shall be maintained 2 feet (610 mm) or more below the ceiling in nonsprinklered areas of buildings or a minimum of 18 inches (457 mm) below sprinkler head deflectors in sprinklered areas of buildings.

315.2.2 Means of egress. Combustible materials shall not be stored in exits or exit enclosures.

315.2.3 Equipment rooms. Combustible material shall not be stored in boiler rooms, mechanical rooms or electrical equipment rooms.

315.2.4 Attic, under-floor and concealed spaces. Attic, under-floor and concealed spaces used for storage of combustible materials shall be protected on the storage side as required for 1-hour fire-resistance-rated construction. Openings shall be protected by assemblies that are self-closing and are of noncombustible construction or solid wood core not less than 1.75 inches (44.5 mm) in thickness. Storage shall not be placed on exposed joists.

Exceptions:

1. Areas protected by approved automatic sprinkler systems.
2. Group R-3 and Group U occupancies.

315.3 Outside storage. Outside storage of combustible materials shall not be located within 10 feet (3048 mm) of a property line.

Exceptions:

1. The separation distance is allowed to be reduced to 3 feet (914 mm) for storage not exceeding 6 feet (1829 mm) in height.
2. The separation distance is allowed to be reduced when the fire code official determines that no hazard to the adjoining property exists.

315.3.1 Storage beneath overhead projections from buildings. Combustible materials stored or displayed outside of buildings that are protected by automatic sprinklers shall not be stored or displayed under nonsprinklered eaves, canopies or other projections or overhangs.

315.3.2 Height. Storage in the open shall not exceed 20 feet (6096 mm) in height.

CHAPTER 14
FIRE SAFETY DURING CONSTRUCTION AND DEMOLITION

SECTION 1401
GENERAL

1401.1 Scope. This chapter shall apply to structures in the course of construction, alteration, or demolition, including those in underground locations. Compliance with NFPA 241 is required for items not specifically addressed herein.

1401.2 Purpose. This chapter prescribes minimum safeguards for construction, alteration, and demolition operations to provide reasonable safety to life and property from fire during such operations.

SECTION 1402
DEFINITIONS

1402.1 Terms defined in Chapter 2. Words and terms used in this chapter and defined in Chapter 2 shall have the meanings ascribed to them as defined therein.

SECTION 1403
TEMPORARY HEATING EQUIPMENT

1403.1 Listed. Temporary heating devices shall be listed and labeled in accordance with the *International Mechanical Code* or the *International Fuel Gas Code*. Installation, maintenance and use of temporary heating devices shall be in accordance with the terms of the listing.

1403.2 Oil-fired heaters. Oil-fired heaters shall comply with Section 603.

1403.3 LP-gas heaters. Fuel supplies for liquefied-petroleum gas-fired heaters shall comply with Chapter 38 and the *International Fuel Gas Code*.

1403.4 Refueling. Refueling operations for liquid-fueled equipment or appliances shall be conducted in accordance with Section 3405. The equipment or appliance shall be allowed to cool prior to refueling.

1403.5 Installation. Clearance to combustibles from temporary heating devices shall be maintained in accordance with the labeled equipment. When in operation, temporary heating devices shall be fixed in place and protected from damage, dislodgement or overturning in accordance with the manufacturer's instructions.

1403.6 Supervision. The use of temporary heating devices shall be supervised and maintained only by competent personnel.

SECTION 1404
PRECAUTIONS AGAINST FIRE

1404.1 Smoking. Smoking shall be prohibited except in approved areas. Signs shall be posted in accordance with Section 310. In approved areas where smoking is permitted, approved ashtrays shall be provided in accordance with Section 310.

1404.2 Waste disposal. Combustible debris shall not be accumulated within buildings. Combustible debris, rubbish and waste material shall be removed from buildings at the end of each shift of work. Combustible debris, rubbish and waste material shall not be disposed of by burning on the site unless approved.

1404.3 Open burning. Open burning shall comply with Section 307.

1404.4 Spontaneous ignition. Materials susceptible to spontaneous ignition, such as oily rags, shall be stored in a listed disposal container.

1404.5 Fire watch. When required by the fire code official for building demolition that is hazardous in nature, qualified personnel shall be provided to serve as an on-site fire watch. Fire watch personnel shall be provided with at least one approved means for notification of the fire department and their sole duty shall be to perform constant patrols and watch for the occurrence of fire.

1404.6 Cutting and welding. Operations involving the use of cutting and welding shall be done in accordance with Chapter 26.

1404.7 Electrical. Temporary wiring for electrical power and lighting installations used in connection with the construction, alteration or demolition of buildings, structures, equipment or similar activities shall comply with the ICC *Electrical Code*.

SECTION 1405
FLAMMABLE AND COMBUSTIBLE LIQUIDS

1405.1 Storage of flammable and combustible liquids. Storage of flammable and combustible liquids shall be in accordance with Section 3404.

1405.2 Class I and Class II liquids. The storage, use and handling of flammable and combustible liquids at construction sites shall be in accordance with Section 3406.2. Ventilation shall be provided for operations involving the application of materials containing flammable solvents.

1405.3 Housekeeping. Flammable and combustible liquid storage areas shall be maintained clear of combustible vegetation and waste materials. Such storage areas shall not be used for the storage of combustible materials.

1405.4 Precautions against fire. Sources of ignition and smoking shall be prohibited in flammable and combustible liquid storage areas. Signs shall be posted in accordance with Section 310.

1405.5 Handling at point of final use. Class I and II liquids shall be kept in approved safety containers.

(98) NFPA 241, 2000 Edition, *Standard for Safeguarding Construction, Alteration, and Demolition Operations*
Modifications: None

NFPA 241

Standard for

Safeguarding Construction, Alteration, and Demolition Operations

2000 Edition

This edition of NFPA 241, *Standard for Safeguarding Construction, Alteration, and Demolition Operations*, was prepared by the Technical Committee on Construction and Demolition and acted on by the National Fire Protection Association, Inc., at its World Fire Safety Congress and Exposition™ held May 14–17, 2000, in Denver, CO. It was issued by the Standards Council on July 20, 2000, with an effective date of August 18, 2000, and supersedes all previous editions.

This edition of NFPA 241 was approved as an American National Standard on August 18, 2000.

Origin and Development of NFPA 241

Work on the subject of construction, alteration, and demolition operations began in 1930 when the NFPA Committee on Construction Operations developed the *Recommended Good Practice Requirements for Building Construction Operations*. This text was adopted by the NFPA, with revisions, in 1939. In 1942, a tentative revision was submitted, and, while no official action was taken, the revision was published subsequently for information purposes in Volume III of the *National Fire Codes®* published by the NFPA.

The NFPA Committee on Building Construction had jurisdiction over this standard when a tentative text prepared by that committee was adopted at the 1957 NFPA Annual Meeting. That text was unanimously approved by the NFPA in 1958. Complete revisions were adopted by the NFPA in 1968 and 1973. An editorial revision was approved in 1975 that brought the standard into conformance with the NFPA *Manual of Style*. The standard was substantively reconfirmed in 1980.

The 1986 edition represented a complete rewrite. That rewrite was the result of a comprehensive review by the Technical Committee on Construction and Demolition. When the document was reconfirmed in 1980, it came under the Technical Committee on Building Construction.

The 1986 update changed the format in which the safeguards were presented. Chapters 1 through 5 were general in nature and applied to both construction and demolition processes. Chapter 6 presented the specifics associated only with construction processes. Chapter 7 addressed the specifics of demolition. A new Chapter 8 included mandatory references with which various provisions of the standard were required to comply. Nearly 20 NFPA codes and standards were referenced in a mandatory fashion.

That revision expanded the treatment of items related to an overall construction and demolition fire safety plan. Definitions were expanded and added to cover terms with meanings that are unique to the standard. Temporary heating equipment was required to be listed. The section on smoking was expanded. Trash disposal was broadened to include housekeeping. Outside chutes, fire cutoffs, and explosives used in demolition were addressed. Material on temporary standpipes was included in this edition.

The 1989 edition included a complete rewrite of the section on roofing operations and greatly expanded the associated appendix items to address torch-applied roofing in additional detail. A new chapter on underground operations was added.

In the 1993 edition, extensive editing by the committee was undertaken to clarify and update the standard.

In the 1996 edition, the committee revised and reorganized Chapter 9.

The 2000 edition changes consist of reformatting the entire document and clarification of requirements for hotwork and torch-applied roofing.

PLAINTIFF'S EXHIBIT
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NFPA 241

Standard for

Safeguarding Construction, Alteration, and Demolition Operations

2000 Edition

NOTICE: An asterisk (*) following the number or letter designating a paragraph indicates explanatory material on that paragraph in Appendix A.

Changes other than editorial are indicated by a vertical rule in the margin of the pages on which they appear. These lines are included as an aid to the user in identifying changes from the previous edition. Where one or more complete paragraph(s) has been deleted, the deletion is indicated by a bullet between the paragraphs that remain.

Information on referenced publications can be found in Chapter 2 and Appendix B.

Chapter 1 Administration

1.1* Scope. This standard shall apply to structures in the course of construction, alteration, or demolition, including those in underground locations.

1.2 Purpose. This standard is intended to prescribe minimum safeguards for construction, alteration, and demolition operations in order to provide reasonable safety to life and property from fire during such operations.

1.3 Application.

1.3.1* This standard provides measures for preventing or minimizing fire damage during construction, alteration, and demolition operations.

1.3.2* The public fire department and other fire protection authorities also shall be consulted for guidance.

1.3.3 Alteration activities shall be permitted to require the use of both the demolition and construction activity requirements, as applicable.

1.3.4 A fire safety program shall be included in all construction, alteration, or demolition contracts, and the right of the owner to administer and enforce this program shall be established, even if the building is entirely under the jurisdiction of the contractor.

1.4 Equivalency. Nothing in this standard is intended to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, effectiveness, durability, and safety over those prescribed by this standard. Technical documentation shall be submitted to the authority having jurisdiction to demonstrate equivalency. The system, method, or device shall be approved for the intended purpose by the authority having jurisdiction.

Chapter 2 Referenced Publications

2.1 The following documents or portions thereof are referenced within this standard as mandatory requirements and shall be considered part of the requirements of this standard. The edition indicated for each referenced mandatory document is the current edition as of the date of the NFPA issuance of this standard. Some of these mandatory documents might also be referenced in this standard for specific informational purposes and, therefore, are also listed in Appendix B.

2.1.1 NFPA Publications. National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101.

NFPA 10, *Standard for Portable Fire Extinguishers*, 1998 edition.

NFPA 13, *Standard for the Installation of Sprinkler Systems*, 1999 edition.

NFPA 14, *Standard for the Installation of Standpipe, Private Hydrant, and Hose Systems*, 2000 edition.

NFPA 30, *Flammable and Combustible Liquids Code*, 2000 edition.

NFPA 31, *Standard for the Installation of Oil-Burning Equipment*, 1997 edition.

NFPA 51, *Standard for the Design and Installation of Oxygen-Fuel Gas Systems for Welding, Cutting, and Allied Processes*, 1997 edition.

NFPA 51B, *Standard for Fire Prevention During Welding, Cutting, and Other Hot Work*, 1999 edition.

NFPA 54, *National Fuel Gas Code*, 1999 edition.

NFPA 58, *Liquefied Petroleum Gas Code*, 1995 edition.

NFPA 70, *National Electrical Code®*, 1999 edition.

NFPA 70E, *Standard for Electrical Safety Requirements for Employee Workplaces*, 2000 edition.

NFPA 80, *Standard for Fire Doors and Fire Windows*, 1999 edition.

NFPA *101®, Life Safety Code®*, 2000 edition.

NFPA 130, *Standard for Fixed Guideway Transit and Passenger Rail Systems*, 2000 edition.

NFPA 211, *Standard for Chimneys, Fireplaces, Vents, and Solid Fuel-Burning Appliances*, 2000 edition.

NFPA 495, *Explosive Materials Code*, 1996 edition.

NFPA 701, *Standard Methods of Fire Tests for Flame Propagation of Textiles and Films*, 1999 edition.

NFPA 1963, *Standard for Fire Hose Connections*, 1998 edition.

2.1.2 Other Publications.

2.1.2.1 ACGIH Publication. American Conference of Governmental Industrial Hygienists, 6500 Glenway Avenue, Bldg. D-7, Cincinnati, OH 45211.

ACGIH *Threshold Limit Values and Biological Exposure Indices for 1992–1993*.

Chapter 3 Definitions

3.1 General. For the purpose of this standard, the following terms shall be defined as provided in this section.

3.2 NFPA Official Definitions.

3.2.1* Approved. Acceptable to the authority having jurisdiction.

3.2.2* Authority Having Jurisdiction. The organization, office, or individual responsible for approving equipment, materials, an installation, or a procedure.

7.5.6 Stairs.

7.5.6.1 In all buildings over one story in height, at least one stairway shall be provided that is in usable condition at all times and that meets the requirements of NFPA *101®, Life Safety Code®*.

7.5.6.2 This stairway shall be extended upward as each floor is installed in new construction and maintained for each floor still remaining during demolition.

7.5.6.3 The stairway shall be lighted.

7.5.6.4 During construction, the stairway shall be enclosed where the building exterior walls are in place.

7.5.7 Hoists and Elevators. Where hoists and elevators provide the only efficient means of transporting hose and other cumbersome fire-fighting equipment to upper floors, they shall be available to the fire department whenever necessary.

7.5.8 Hydrants.

7.5.8.1 Free access from the street to fire hydrants and to outside connections for standpipes, sprinklers, or other fire extinguishing equipment, whether permanent or temporary, shall be provided and maintained at all times.

7.5.8.2 Protective pedestrian walkways shall not be constructed so that they impede access to hydrants.

7.5.8.3 No material or construction shall interfere with access to hydrants, siamese connections, or fire extinguishing equipment.

7.6 Standpipes. In all new buildings in which standpipes are required or where standpipes exist in buildings being altered or demolished, such standpipes shall be maintained in conformity with the progress of building construction in such a manner that they are always ready for use.

7.7* First-Aid Fire-Fighting Equipment.

7.7.1* The suitability, distribution, and maintenance of extinguishers shall be in accordance with NFPA 10, *Standard for Portable Fire Extinguishers.*

7.7.2 Wherever a toolhouse, storeroom, or other shanty is located in or adjacent to the building under construction or demolition, or where a room or space within that building is used for storage, a dressing room, or a workshop, at least one approved extinguisher shall be provided and maintained in an accessible location.

Exception: This requirement shall be permitted to be waived where the structure does not exceed 150 ft² (14 m²) in floor area or is equipped with automatic sprinklers or other approved protection.

7.7.3 At least one approved fire extinguisher also shall be provided in plain sight on each floor at each usable stairway as soon as combustible material accumulates.

7.7.4 Suitable fire extinguishers shall be provided on self-propelled equipment.

7.7.5* Free access to permanent, temporary, or portable first aid fire equipment shall be maintained at all times.

7.8 Means of Egress. The means of egress shall be provided in accordance with 4.6.10 of NFPA *101, Life Safety Code.*

Chapter 8 Safeguarding Construction and Alteration Operations

8.1 General. In addition to the specific requirements of this chapter, the provisions of Chapter 1 and Chapters 3 through 7 shall be followed, as applicable, for all construction.

8.2* Scaffolding, Shoring, and Forms.

8.2.1 Accumulations of unnecessary combustible forms or form lumber shall be prohibited.

8.2.2 Combustible forms or form lumber shall be brought into the structure only when needed.

8.2.3 Combustible forms or form lumber shall be removed from the structure as soon as stripping is complete.

8.2.4 Those portions of the structure where combustible forms are present shall not be used for the storage of other combustible building materials.

8.2.5* During forming and stripping operations, portable fire extinguishers or charged hose lines shall be provided to protect the additional combustible loading adequately.

8.3 Construction Material and Equipment Storage.

8.3.1 Temporary storage of equipment to be installed, combustible construction materials, or combustible packing materials shall not be permitted in unprotected structures under construction or alteration.

Exception: Where authorized by the authority having jurisdiction.

8.3.2* Storage shall not be permitted in protected structures until protection is in service.

8.3.3 Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 ft (9 m) from the structure under construction or alteration. *(See 4.1.1.)*

8.4 Permanent Heating Equipment. The permanent heating equipment for a new building shall be installed and put into operation as soon as practicable.

8.5 Utilities.

8.5.1 General. The provisions of Chapter 6 shall apply in addition to the specific requirements of this section.

8.5.2 Gas.

8.5.2.1 The installation of gas piping for construction purposes, or modifications to existing gas piping, gas utilization equipment, or accessories, shall be performed only by a qualified agency.

8.5.2.2 All such work shall be in accordance with NFPA 54, *National Fuel Gas Code.*

8.5.2.3 All modifications to existing gas piping systems normally shall be performed with the gas turned off.

Exception: Hot taps shall be permitted to be made, provided they are installed by a trained and experienced crew utilizing equipment specifically designed for such purpose.

Code of Laws of South Carolina 1976 Annotated
Title 6. Local Government--Provisions Applicable to Special Purpose Districts and Other Political Subdivisions (Refs & Annos)
Chapter 9. Building Codes

Code 1976 § 6-9-110

§ 6-9-110. Ordinances or regulations requiring purchase or acquisition of permit or license; inapplicability to certain state and school district projects; jurisdiction of deputy state fire marshals and certified State Engineer's Office of the Budget and Control Board personnel.

Currentness

(A) A county, municipal, or other local ordinance or regulation which requires the purchase or acquisition of a permit, license, or other device utilized to enforce any building standard does not apply to a:

(1) state department, institution, or agency permanent improvement project, construction project, renovation project, or property; or

(2) school district facility, permanent improvement project, construction project, renovation project, or property which is reviewed and approved by the State Department of Education; except that the State Department of Education or a local school district may direct that the local ordinance or regulation apply to a particular facility, project, or property.

(B) After successful completion of all requirements, the State Fire Marshal shall certify personnel of the State Engineer's Office of the Budget and Control Board designated by the State Engineer. The certified personnel and deputy state fire marshals, including resident state fire marshals, have exclusive jurisdiction over state buildings, including schools, in the exercise of the powers and jurisdictional authority of the State Fire Marshal under Sections 23-9-30, 23-9-40, and 23-9-50.

Credits

HISTORY: 1982 Act No. 466 Part II § 28; 1984 Act No. 481, § 2; 1986 Act No. 347, § 6; 1997 Act No. 123, § 1; 2003 Act No. 83, § 1, eff July 2, 2003.

Notes of Decisions (3)

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PLAINTIFF'S EXHIBIT 6

Code of Laws of South Carolina 1976 Annotated
Title 23. Law Enforcement and Public Safety
Chapter 9. State Fire Marshal
Article 1. State Fire Marshal

Code 1976 § 23-9-40

§ 23-9-40. Duty of State Fire Marshal to enforce certain laws and ordinances.

Currentness

It shall be the duty of the State Fire Marshal to enforce all laws and ordinances of the State, and the several counties, cities, and political subdivisions thereof, with reference to the following:

(a) The prevention of fires;

(b) The storage, sale and use of combustibles and explosives;

(c) The installation and maintenance of automatic or other fire alarm systems and fire extinguishing equipment;

(d) The construction, maintenance and regulation of fire escapes;

(e) The means and adequacy of exits, in case of fire, from factories, asylums, hospitals, churches, schools, halls, theaters, amphitheaters and all other places in which numbers of persons work, live or congregate from time to time for any purpose;

(f) Investigation of the cause, origin and circumstances of fire.

Credits
HISTORY: 1962 Code § 37-81; 1952 Code § 37-81; 1947 (45) 322; 1960 (51) 1646; 1963 (53) 557.

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PLAINTIFF'S EXHIBIT 7

Code of Laws of South Carolina 1976 Annotated
Title 23. Law Enforcement and Public Safety
Chapter 9. State Fire Marshal
Article 1. State Fire Marshal

Code 1976 § 23-9-30

§ 23-9-30. Resident fire marshals; persons who may act under authority of State Fire Marshal.

Currentness

(a) The chief of any organized fire department or county fire marshal is ex officio resident fire marshal; however, this chapter does not repeal, amend, or otherwise affect Chapter 25 of Title 5.

(b) All powers and duties vested in the State Fire Marshal may be exercised or discharged by any deputy state fire marshal, county fire marshal, or resident fire marshal within the area of his service, or any state or local governmental employee certified by the State Fire Marshal whose duties include inspection and enforcement of state or local fire safety codes and standards, acting under the authority of the State Fire Marshal.

Credits
HISTORY: 1962 Code § 37-80; 1958 (50) 1862; 1963 (53) 557; 1973 (58) 793; 1986 Act No. 347, § 3; 1987 Act No. 155, § 12.

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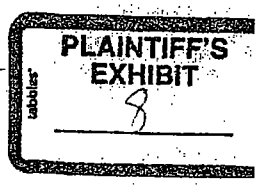

STATE OF SOUTH CAROLINA

----------x

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

-against-

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

----------x

Case No. 2012-CP-46-3151

March 17-21, 2014

York County, S.C.

B E F O R E:

HONORABLE LEE S. ALFORD

A P P E A R A N C E S:

BUTLER & PAPPAS

BY: PETER W. VOGT AND

ZACHARY M. JETT

Attorneysfor the Plaintiff

ADAMS AND REESE, LLP

BY: KIRBY D. SHEALY, III

Attorney for the Defendant

Aileen Butler

Official Court Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	Voir Dire
Otis Driggers					
Mr. Vogt	180		220		
Mr. Shealy		205			
Randall Pruitt					
Mr. Vogt	223		262		
Mr. Shealy		255			
Brandon Lusk					
Mr. Vogt	266				
Clint Robinson					
Mr. Vogt	306		339		
Mr. Shealy		338			
Robert Pickens					
Mr. Vogt	341		384		
Mr. Shealy		378			
James Howe					
Mr. Vogt	387				
John Dunlop					
Mr. Vogt	408				
Mr. Shealy					414
Wesley Love					
Mr. Jett	422		442		
Mr. Shealy		439			

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	Voir Dire
Larry Renner					
Mr. Vogt	442				
Mr. Shealy		476			
Walter Hardin					
Mr. Vogt	482		499		
Mr. Shealy		491			
Vu Nguyen-Depo					
Mr. Jett	503				
Proffer Dan Arnold					
Mr. Vogt	579				
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Mr. Jett	799				
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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Prescott May				
Mr. Jett	833			
Jay Summer				
Mr. Jett	839			
Mac Leitner				
Mr. Jett	843			
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(WHEREUPON, there were exhibits premarked before the commencement of the trial.

NO.	DESCRIPTION	I.D.	EVD.
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P 61	NFPa 2000 Edition	premarked	
P 62	IFC - 2006	premarked	
P 64B-64GG	Photographs	premarked	650
P 67	Damages composition		832
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THE COURT: All right, ladies and gentlemen of the panel, again if you give me your attention please we are about to go to trial in the case of the Winthrop University Trustees for the the State of South Carolina plaintiff, versus Pickens Roofing and Sheet Metals, Incorporated.

This case is about a fire which occurred at Winthrop University, on or about March the 6th of 2010 and I tell you where it occurred and when it occurred in the event you would have any prior knowledge about this case before coming hear to court today. Now, the plaintiff is represented in this case by attorney Zachary M. Jett and Peter W. Vogt.

Counsel please stand so the jury can see who you are. Is anyone on the jury panel related by blood or marriage, friends with or have any social business or professional relationship with, that is to say currently or formerly represented by or any other relationship to Zachary M. Jett or Peter W. Vogt if so please stand.

The defendant, Pikens Roofing and Sheet Metal Incorporated represented by attorneys Kirby D. Shealy, III and Lyndey Ritz Zwing. Miss Zwing is not here today. Please stand sir. She may be here later. Thank you. You may be seated.

Is anyone on the jury panel related by blood or marriage, friends with or have any other type of social, business or professional relationship with Kirby D. Shealy III or Lyndey Ritz Zwing, if so please stand.

Now, I will go through a list of potential witnesses in this case. All these of witnesses may not be called but they may be call. It is a long list of witnesses and again, I tell you they may not all be called. It's going to scare to you death to have this large number of witnesses, but what I am going to ask you to do as I go through the list of potential witnesses in this case if you are related by blood or marriage, friends with, have any type of social business or professional relationship with any of these named potential witnesses when I call their names I will I would ask that you please stand, Dan Arnold, A-r-n-o-l-d; Sergeant James Howe, H-o-w-e; Battalion Chief Otis Driggers; Deputy Fire Chief Marshal John Dunlap.

Please stand, ma'am. How do you know Mr. Dunlap.

JUROR: My son is a fire fighter with Tega Cay, where he is fire fighter.

THE COURT: Okay, and how do you know Mr. Dunlap.

JUROR: Through my son.

THE COURT: And ma'am, is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case if he would be called as a witness by either side.

JUROR: No.

THE COURT: Thank you, ma'am. Anyone else.

MR. SHEALY: Your Honor could we get the juror's name and number?

THE COURT: I'm sorry, I should have done that. Ma'am, please give us your name and number.

MR. SHEALY: Tracy Piper, 102.

THE COURT: Thank you. Fire Chief Mike Blackmon. All right. Ma'am, you don't need to stand back up. We are on the record, so we have do it every time. You are juror 102, give us your name again.

JUROR: Tracy Piper.

THE COURT: Okay, and do you know him the same way through your son, is that correct?

JUROR: Yes, sir.

THE COURT: Again ma'am, is there anything about that relationship that would interfere with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Anyone else? Rusty Myers, M-y-e-r-s. Cotton Howell, who is with emergency services with the county. Does anyone know Cotton Howell?

Officer James Troyan, T-r-o-y-a-n; Officer Frank Zebedis, Z-e-b-e-d-i-s; I believe he is an officer with Winthrop. Allen Mayfield; Walter Hardin, H-a-r-d-i-n; Wesley Love; Ben Roach; Mike Davis; Richard Hargis; H-a-r-g-i-s, Hargis; Randy Pruitt; Matthew Pruitt; Brandson Lusk, spelled L-u-s-k; Clint Robinson; Ben Pickens Jr.; Bert Pickens; Robert Bobby Pickens; Jim Pickens; Larry Renner, spelled R-e-n-n-e-r.

I am not sure about the pronunciation of this. Vu T. Nguyen. First name V-u, initial T, N-g-u-y-e-n, Roy Joseph Scruggs; Jay Summer; Mac Leitner; Jack Leitner.

Please give us your name and number, ma'am.

JUROR: 129, Carol Stevenson. He is a customer of ours. We sell to him.

THE COURT: You sell to him. Is there anything about that relationship that would interfere with your ability to give both sides a fair and impartial trial if he were to be called as a witness on other side.

JUROR: No, I don't know him personally.

THE COURT: Thank you, ma'am. Anyone else?

Jack Leitner.

JUROR: Same thing.

THE COURT: Please stand up. You have to give your name again.

JUROR: Carol Stevenson, 129. Same thing. The Leitners we work with their company.

THE COURT: Thank you, ma'am.

Karen Jones; Terry Sexton; Bob Reid, R-e-i-d; Wes Love; Stephanie Eaton, spelled E-a-t-o-n; John Murphy; Prescott May; Tracy Bouye, B-o-u-y-e; Alex Tisdale; Allison Angel; Dave Reutscheer, spelled R-e-u-t-s-c-h-e-e-r; Manning Gibson; Keith Williams; J.P. McKee, Jr.; Larry Renner; Troy McCall; Scott Arnett; Guy Lydia, L-y-d-i-a; Dan Smith.

Has any member of the jury panel ever been represented -- I asked you about the lawyers in this case and also the law firm of Butler Pappas, P-a-p-p-a-s, know any of these attorneys socially, if so please stand.

Is there any member of the jury panel ever been represented by any lawyers in the law firm of Adams Reese or know any of the lawyers in that firm socially or otherwise?

Have you ever been a party or a witness in a civil lawsuit, if so please stand. Please stand.

JUROR: I have question.

THE COURT: Ma'am, give us your name.

JUROR: Shannon Denise Wilson, 136.

THE COURT: Yes, ma'am.

JUROR: I was sued before but when they actually came here to the Moss Justice Center the other individual didn't actually show up and it was dropped so we didn't actually stand in front of a jury, so does that count?

THE COURT: Yes, ma'am. Were you the plaintiff of the defendant?

JUROR: I was the one that was sued.

THE COURT: You were the defendant in the suit. Okay. And the type of case it was ma'am?

JUROR: Civil disagreement, possession over property.

THE COURT: Property dispute?

JUROR: Uh-huh.

THE COURT: All right. Thank you, ma'am.

JUROR: Thank you.

THE COURT: Yes, sir, please give us your name and number sir.

JUROR: Bernard Sanders Jr., 118.

THE COURT: Yes, sir. You were involved in a lawsuit, civil lawsuit?

JUROR: Yes, sir, I have been involved in a couple.

THE COURT: Were you the plaintiff or the defendant.

JUROR: Defendant.

THE COURT: And what type of suit was it.

JUROR: One was over a faulty tire that I bought and refused to pay for it and the other was property line dispute on a track of timber.

THE COURT: Thank you sir. Anyone else?

Has any member about of the jury panel ever been a juror before, if so please stand. If you previously served on a jury please stand.

JUROR: You are talking about any jury?

THE COURT: Yes.

We got a lot. I'll tell you what I am going to do. Let me start on this side because it will be easier and you all can be seated until I get through with them and I will ask you to stand back up.

Let me begin with my left, sir, give us your and number Ronald d. Tickle, juror 133.

THE COURT: Yes, sir, what were you in criminal or civil?

JUROR: Criminal.

THE COURT: All right. Thank you sir, you may be

seated.

Yes, sir.

JUROR: Jeffrey Burris, 17, it was down in Rock Hill City.

THE COURT: City Court. Was it civil or criminal case?

JUROR: It was Municipal Court, I think it was criminal.

THE COURT: Criminal. Thank you sir.

Yes, ma'am.

JUROR: Janet Harding, juror 46. Civil.

THE COURT: Okay, and where was that ma'am?

JUROR: Florence.

THE COURT: Okay, let me ask you the type of case it was, was it civil?

JUROR: It involved mail fraud and insurance fraud.

THE COURT: Okay, and was that a criminal case or civil case?

JUROR: It was civil. They were suing for restitution.

THE COURT: And what was the result of the case ma'am?

JUROR: The person who was accused of doing the fraud and mailing the things was found guilty and had

to repay money.

THE COURT: All right, thank you ma'am.

Yes ma'am, give us your name and number.

JUROR: Susan Houston, 54. Mine was in another State, does that count?

THE COURT: Yes, ma'am, it counts. I am sorry I didn't get your name and number.

JUROR: Susan Houston.

THE COURT: And what was your number?

JUROR: Fifty-four.

THE COURT: Okay. All right, and was it a civil or criminal case?

JUROR: It was criminal.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR: Thomas Marr, number 82, and it was an assault.

THE COURT: Criminal case.

JUROR: Yes, sir.

THE COURT: Thank you, sir. All right now back on this side if you all stand back up please. I will go left to right. Yes ma'am, your name?

JUROR: Tracy Piper, 102.

THE COURT: Yes, ma'am.

JUROR: It was criminal.

THE COURT: Thank you, ma'am. Yes ma'am.

JUROR: Carol Stevenson, 129, Magistrate Court, like ten years ago, York, Fairfield County.

THE COURT: Was it civil or criminal?

JUROR: I guess it was civil.

THE COURT: Civil, and what was the result of those cases.

JUROR: It was something with boating accident or trailer, I think. It was ten years ago.

THE COURT: Was a verdict for the plaintiff or the defendant.

JUROR: I guess it was for the plaintiff.

THE COURT: Thank you. Yes sir, give us your name and number please.

JUROR: Ira Davis, number 30. I've served on two juries both criminal.

THE COURT: Thank you sir. Yes, ma'am.

JUROR: Denise Prescott, 104.

THE COURT: Yes, ma'am. Was it a civil or criminal case?

JUROR: It was criminal.

THE COURT: Criminal. Thank you, ma'am.

Back to my left, yes ma'am.

JUROR: Norma Ligon, juror 72 (sic)I believe it was criminal.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Kelly Andrew, juror number three. It was in New Jersey. It was civil for property damages in a car accident and then they settled outside of court.

THE COURT: Thank you.

JUROR: Yes, sir.

THE COURT: Yes, ma'am.

JUROR: Sandy Ayers, number seven, and it was criminal.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Lisa Young, 150. It was criminal.

THE COURT: Thank you. Yes, ma'am.

JUROR: Janice McCartney, 85, and mine was civil.

THE COURT: And what was it about?

JUROR: It was about property damage.

THE COURT: And what was the result?

JUROR: Plaintiff won.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Terri Kissiah, and my number is 68 and it was civil and it was in York and it was settled after a couple of days. After we sat for a couple of days it was settle.

THE COURT: Thank you, ma'am. Back to my left, yes, ma'am.

JUROR: Stephanie Williamson, juror 144, it was civil.

THE COURT: And what was the result of that?

JUROR: She was found not guilty.

THE COURT: Not guilty. That was a criminal case?

JUROR: It was civil case.

THE COURT: Okay, so found for the defendant?

JUROR: Well, she was accused of -- she was the office manager and she was accused of stealing money from the company.

THE COURT: All right. Thank you ma'am. Yes, sir.

JUROR: Bernard Sanders, 118. Served on criminal and civil case.

THE COURT: Okay, and what happened in the civil case? What was it about?

JUROR: The civil cause involved a lady and her husband who were going to take over a nursing home from an another lady and they went and they did property improvement to it before and after the property was improved the lady changed her mind and didn't sell and the jury decided for the plaintiff in the case.

THE COURT: Thank you. You may be seated. Yes, sir.

JUROR: Craig Smith, 124, two and both criminal.

THE COURT: Thank you, sir. Anyone else?

Has any member of the jury panel ever been a foreperson of a jury, if so please stand.

Ladies and gentlemen of the jury panel this case is expected to last all week. Slight possibility that it can go a day or two longer than a week. Is that going to cause any special problems for anyone to have to serve on this case all week long, if so please stand.

Yes, sir. Please give us your name and number.

JUROR: My name is Muhammad Davis and I do have a small business. I'm a personnel trainer and so, once again I am my only employer and so I would have to tend to my business. If I was to be selected that is my only source of income and of course I we be the.

THE COURT: Okay, I believe you said your wife works though?

JUROR: No, she stay at home mom and part time student.

THE COURT: Okay, all right, give my your number I didn't get it.

JUROR: It's number 31.

THE COURT: Will it be helpful to you to be transferred to another week of court?

JUROR: Well, I work every day.

THE COURT: Most people in here work every day. I

can't release. I am trying to accommodate you by transferring you to another week if you want me to do that.

JUROR: That's fine, I will just stay here.

THE COURT: Thank you, sir. Anyone else?

Has any member of the jury panel ever experienced a fire loss, whether it be business, residence, or personnel property, if so please stand.

Yes, ma'am, please give us your name and number women.

JUROR: Tracy Piper, 102.

THE COURT: Yes, ma'am.

Juror: I had a vehicle stolen that was found in South Carolina burned.

THE COURT: Okay, that you ma'am. I will go to front, yes, ma'am.

JUROR: I am number 44, Erin Hamel. This is going to seem kind of obvious but I lived the experience of this particular case. So I had students who were displaced -- -

THE COURT: Okay. All right. You are employed at Winthrop, are you not?

JUROR: Yes.

THE COURT: All right. Let me get you to do this in just a minute. I will get you come down front with

us and talk to you in just a minute. Let me get to the other two persons. Sir, your name and number.

JUROR: Thomas Marr, number 82. I had a fire in a storage unit in the back of the house.

THE COURT: Thank you, sir. Yes, ma'am.

JUROR: Susan Robinson, juror number 113. Office building that I worked at was actually it exploded from a gas leak and everything was lost. It was pretty much flattened.

THE COURT: Let me ask you was anything about your experience in that regard that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. All right, jury number 44, can you come down please and answer a question for us.

Come around here up here. I believe we'll be asking this anyway, but I want to go on the record since you stood up. You work at there. Let me ask you since Winthrop is actually bringing the law suit in this case, would that interfere with your ability to be fair to both sides, not only to Winthrop, but also to the other side?

Could you be fair and unbiased in the case or not?

JUROR: Your know, I would like to say yes, but I definitely have experiences that other people aren't going to say that they have had. You know, disgruntled employees, disgruntled students. So I do have a perceptive that probably gives me bias.

THE COURT: Okay. I want you to be as honest at you can. All right. I am not going to require you to serve on this particular case because whoever is picked needs to be unbiassed. Fair to both sides and they don't need to be bringing anything into the jury box with them.

JUROR: I understand.

THE COURT: Thank you, ma'am.

Ma'am, please stay with the jury for right now. Does any member of the jury panel have any knowledge or experience with roofing systems? If so please stand.

JUROR: David King, number 66, at Catawba that is one of my areas I manage projects, roofing.

THE COURT: All right. Well, let me ask you whether is there anything about your experiences in that regard that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you. Yes, ma'am, please give us your name.

JUROR: Denise Smith, 125, and I was in customer service at Bridgestone Fire,a rubber roofing company.

THE COURT: Ma'am, is there anything about your experiences in that regard that would interfere in any with your ability to give both sides a fair and impartial trial in this case?

JUROR: No.

THE COURT: Thank you, ma'am. Anyone else.

Does any member of the jury panel have any experience in interpreting or applying building code provisions, if so please stand.

JUROR: Sir, does HOA president count because we have to know some of the building codes, but not get into it.

THE COURT: Well, how would you be involved in building code as homeowner association, how would be involved?

JUROR: We have certain restrictions that they have to make sure they got permits for things.

THE COURT: But do you actually interpret the building code provisions or do you make.

JUROR: No, we sort of know a little bit about them.

THE COURT: Okay. All right. Thank you, ma'am.

Yes, sir, please stand and give us your name and number.

JUROR: Kevin Hayes, number 49, I supervise for a construction company. I'm constantly talking to inspectors throughout the process.

THE COURT: You have to deal with building codes in your business?

JUROR: Yes, sir.

THE COURT: All right. Let me ask you whether there is anything about your experience in that regard that would interfere in any way with your ability to give both sides a fair or impartial trial in this case?

JUROR: No.

THE COURT: Thank you, sir. Anyone else?

All right. At the end of this trial you will be instructed by the Court on the law. It may be different then what you may have thought the law was. Can each of you put aside any prior understanding of the law and apply the law that the judge gives to you, if not please stand.

Had any member the jury panel or any member of your immediate family that have worked for or have any business relationship with Winthrop University, if so

please stand. And ma'am, I excused you, I understand your connection.

All right, let me begin from the right side. Your name and number again.

JUROR: Carol Stevenson, number 129.

THE COURT: Yes, ma'am.

JUROR: Our company just sells building materials, rock.

THE COURT: Let me ask you whether there is anything about that relationship that would interfere in any way with your ability to give both the State -- excuse me, the plaintiff and the defendant a fair and impartial trial in this case?

JUROR: No, I just know the name. I don't know faces and stuff.

THE COURT: Thank you, ma'am.

Yes, ma'am, give us your name and number.

JUROR: Sharon Hinton, number 52.

THE COURT: Yes, ma'am.

JUROR: My mom worked at Winthrop.

THE COURT: Is there anything about that relationship that would interfere in any way with your ability to give both the plaintiff and the defendant a fair and impartial trial in this case?

JUROR: No.

THE COURT: Thank you. Yes, ma'am, on my left,

JUROR: Sandy Ayers, juror number seven.

THE COURT: Yes, ma'am.

JUROR: My daughter-in-law is a member of Winthrop PD.

THE COURT: Winthrop --

JUROR: Police department.

THE COURT: Police department. Ma'am, is there anything -- have you discussed this case at all with her.

JUROR: No, sir.

THE COURT: Is there anything about that relationship that you would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. You may be seated. Yes, ma'am.

JUROR: Leslie Miller, juror number 91. I work at Winthrop.

THE COURT: What do you do there now?

JUROR: I'm in the office that coordinates help for struggling students.

THE COURT: Ma'am, have you had any personnel knowledge about this case before coming to court?

JUROR: No.

THE COURT: Ma'am, is there anything about that work relationship that would interfere in any way with your ability to give both the plaintiff and the defendant a fair and impartial trial in this case?

JUROR: Not that I know of.

THE COURT: Pardon?

JUROR: No.

THE COURT: Okay.

THE COURT: All right. Thank you, ma'am. You may be seated.

Yes, ma'am.

JUROR: Shanon Wilson 146. I actually graduated from Winthrop.

THE COURT: That may be another question. While you are standing there is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No.

THE COURT: Yes, ma'am.

JUROR: My name is Joy Campbell, my husband works with Diebold Incorporated and they do some of the electronic security on the ATM's at Winthrop.

THE COURT: Ma'am, is there anything about that

relationship that would interfere in any way with your ability to give both the plaintiff and the defendant a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am.

Yes, ma'am, please give us your name and number.

JUROR: Vitta Clawson, number 25, I am a student researcher at Winthrop and I do know about this.

THE COURT: All right.

JUROR: Would you like me to step up?

THE COURT: Yes, please come down front.

(Juror comes up front and speaks privately to the judge and counsel.)

THE COURT: Come right here. Yes, ma'am, what do you know about it?

JUROR: I was there during the fire, the incident, so I know people who were affected by it.

THE COURT: Have you discussed it with them?

JUROR: No, sir.

THE COURT: You know people that were affected by this, is that what you are saying?

JUROR: Yes, sir.

THE COURT: Let me ask you whether your experiences in that regard and those relationships would interfere in any way with your ability to give

both sides, that is not only the plaintiff, who is Winthrop, but also the defendant in this case a fair and impartial trial? Could you do that or not to do that?

JUROR: I could do that. I could do that. That's not a problem. It's just I wanted to say that I knew things that occurred.

THE COURT: Well, let me ask you, when you say you knew things that occurred, that's what I want to hear about. What do you know?

JUROR: The fire, the incident, things that were said about how it occurred, and so forth.

THE COURT: Okay. Would that affect your ability despite what you heard, could you listen to the testimony and evidence that actually comes in during the course of the trial and then of course the Court's instruction on the law that applies and render a decision which is fair and impartial based solely on that testimony and evidence alone?

JUROR: Yes, sir.

THE COURT: Thank you. You may take your seat.

I think most of you this question will apply to have already stood up on previous questions, but let me ask it anyway just in case.

Has any member of the jury panel or member of your

immediate family obtained a degree or attended classes at Winthrop University, if so please stand.

We got a few more standing. All right. Let me begin up front and go back.

Yes, ma'am.

JUROR: Denise Prescott, 104, my daughter is a student at Winthrop University.

THE COURT: Ma'am is there anything about that relationship that would interfere in any way with your ability to give both sides a fair or impartial trial in this case?

JUROR: No.

THE COURT: Thank you ma'am. To my left.

JUROR: Lisa Young, number 150, graduated from the Winthrop University.

THE COURT: Is there anything about that relationship that would interfere in any way with your ability to give both the plaintiff and the defendant a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am.

Yes, ma'am, give us your name and number please.

JUROR: My name is Sara Beth Anglin, I'm juror number four. I graduate from Winthrop but actually it was Winthrop College then.

THE COURT: Ma'am, is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Lasinda Orr, juror 100. I graduated from Winthrop.

THE COURT: Ma'am, is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: My name is Terry Kissiah. My number is 68 and I have two daughters who graduated from Winthrop.

THE COURT: Is there anything about that relationship that would interfere in any way with your ability to give both sides a fair or impartial trial in this case?

JUROR: No, sir.

THE COURT: Yes, ma'am, on my left.

JUROR: Sherry Hernandez, 51. I graduated from the University.

THE COURT: Ma'am, is there anything about that relationship that would interfere in any way with your

ability to give both sides a fair or impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Shannon Wilson, 146. I graduated from Winthrop in summer of 2010 and then also my mom also graduated from there.

THE COURT: Is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Janet Harding, juror number 46. I graduated from Winthrop and I have sister and aunt who also graduated.

THE COURT: Is there an anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Melinda Robinson, I have taken graduate level classes there.

THE COURT: Ma'am, is there anything about that

relationship that would interfere in any way with your ability to give both sides a fair or impartial trial in this case?

JUROR: No, sir.

THE COURT: Yes, ma'am.

JUROR: Vitta Clawson, number 25, recent graduate.

THE COURT: Again ma'am, anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: You may be seated. Anyone else?

JUROR: I am sorry, I forgot. I did take some classes there myself.

THE COURT: Again, would that relationship interfere in any way with your ability to to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: And you name and number.

JUROR: Terry Kissiah, number 68.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: I'm Gladys McClain. I don't know whether this matters, but my son took a few classes there at Winthrop several years ago.

THE COURT: Ma'am, is there anything about that

relationship that would interfere in any way with your ability to give both sides a fair and impartial trial?

JUROR: No.

THE COURT: Thank you, Ma'am.

Has any member of the jury panel ever worked for or had any business relationship with Pickens Roofing and Sheet Metal Incorporated doing business in Spartanburg, South Carolina, if so please stand.

Has any member of the jury panel or any member of your immediate family ever worked for or have any business relationship with the City of Rock Hill Fire Department or Winthrop University Police Department, if so please stand.

Ma'am, let me get you first please.

JUROR: I'm Janet Harding, juror number 46. My son worked with Rock Hill Fire Department. Its been 15 years.

THE COURT: Okay, ma'am. Is there anything about that relationship -- let me ask you, have you discussed this case at all with him?

JUROR: No, sir.

THE COURT: Is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: My name is Terry Kissiah, number 68. My niece was married to a Winthrop Police Officer. I haven't seen them in years, so I think we are good.

THE COURT: Ma'am, is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

THE JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Sandy Ayers, number seven. My daughter-in-law is a member of the Winthrop Police Department.

THE COURT: That's right. Ma'am again, is there anything about that -- did you discuss this case? I don't think I asked you this before.

JUROR: You did ask and no we haven't.

THE COURT: Okay. Is there anything about that relationship that would interfere in any way with your ability to give both sides a fair and impartial trial in this case.

JUROR: No, sir.

THE COURT: Thank you. You may be seated.

Anyone else?

Has any member the jury panel or member of your immediate family ever had a dispute with Winthrop University or Pickens Roofing and Sheet Metals Incorporated? If so please stand.

Has any member of the jury panel or member of the immediate family had a lawsuit brought against him or her? If so please stand.

Yes, ma'am, please give us your name and number.

JUROR: Stephanie Williamson, number 144. My husband was the defendant in a case. It was an automobile accident. He was sued.

THE COURT: Ma'am, is there anything about your experience in that regard that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR: Bernard Sanders Jr, 118. I have had two lawsuits brought against me. One for a tire that I bought and the other for a property dispute property line dispute.

THE COURT: Let me ask you whether there is anything about your experiences in that regard that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you. Anybody else?

Has any member of the jury panel or any member of your immediate family -- I'm sorry, yes ma'am, give us your name and number please.

JUROR: Valerie Klafehn, number 69.

THE COURT: Yes, ma'am.

JUROR: I was involved in a lawsuit about a business dispute.

THE COURT: A dispute?

THE COURT: In business.

THE COURT: And were you the defendant?

JUROR: Yes.

THE COURT: And was there anything about your experience in that regard that would interfere in way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am. Any member of the jury panel or any member of the immediate family ever made a claim against another person or entity seeking money damages, if so please stand.

Any member of the jury panel been involved in a dispute that resulted in a claim being brought against you or your business for money, if so please stand.

Give us your name and number.

JUROR: Carol A Stevenson, number 129. My mother-in-law owns Stevenson Weir and there is probably several things brought, things against the business. Insurance.

THE COURT: Is there anything about your experience in that regard that would interfere with your ability to give both sides a fair and impartial trial in this case?

JUROR: No, sir.

THE COURT: Thank you, ma'am, you may be seated. Anyone else?

Has any member of the jury panel or member of your immediate family ever had a dispute with a contractor, if so please stand.

JUROR: 129, Carol Stevenson, probably the same thing. We deal with builders and contractors and they don't pay.

THE COURT: Let me ask you again, is there anything about your experience in that regard that would interfere in any way with your ability to give both sides a fair and impartial trial in this case?

JUROR: No.

THE COURT: Thank you, ma'am. Anyone else?

Has any member of the jury panel or any one of

your immediate family ever worked in the construction industry or been employed by a roofing contractor, if so please stand. Okay.

Yes, ma'am, please give us your name and number.

JUROR: Tracy A. Piper, my son was employed in construction.

THE COURT: Give us your number again, ma'am.

JUROR: 102.

THE COURT: Ma'am, is there anything -- never mind. Thank you. You may be seated.

Yes, ma'am.

JUROR: Gladys McClain, 86. My son was in construction. He use to build decks.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Lisa Young, 150. My husband is self-employed. He is independent sale's rep for various products in the commercial construction industry.

THE COURT: Thank you, ma'am, you may be seated.

Yes, sir.

JUROR: Kevin Hayes, 49. I was superintendant for a construction company for ten years. Plumbing before that, and my father was a roofer also.

THE COURT: Thank you, sir. Yes, ma'am.

JUROR: My husband he worked in like a did like a

punch list for builders. That is when he was younger. I wasn't married to him at the time.

THE COURT: Ma'am, give us your number.

JUROR: Number 85, Janice McCartney.

THE COURT: Thank you. Yes, ma'am.

JUROR: Denise Smith, 125. My father and brother worked in a construction company building houses.

THE COURT: All right. Thank you, ma'am, you may be seed. Yes, ma'am.

JUROR: Stephanie Williamson, 144. My father is consultant HG rentals which does a lot of construction for schools.

THE COURT: Thank you ma'am. Yes, sir.

JUROR: Craig Smith, 124. I have been in and around construction.

THE COURT: Thank you, sir. You may be seated. Yes, ma'am.

JUROR: Janet Harding, juror number 46. My son and husband have residential contractor license in custom home business and he and my husband both work with that.

THE COURT: Thank you, ma'am. Yes, sir.

JUROR: Jeffrey Galvin, number 42, my company that I work for does industrial sound and electronics, so they do a lot of business.

THE COURT: Thank you, sir.

Is any member of the jury panel or any member of your immediate family a licensed civil or mechanical engineer or architect? If so please stand. You or a member or your immediate family.

Has any member of the jury panel ever worked as fire or police responder whether paid or as volunteer. If so please stand.

Yes, ma'am, give us your name and number.

JUROR: Tracy Piper, number 102. My son is both a paid and volunteer firefighter.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Sandy Ayers, juror number seven. My daughter-in-law is a police officer.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: My name is Terry Kissiah, I'm number 68 and my brother-in-law was a volunteer fireman in Fort Mill.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Valerie Klafehn, number 69. My father was a volunteer fireman.

THE COURT: Thank you. Yes, ma'am.

JUROR: Janet Harding, number 46. My son is a battalion chief for Charlotte Fire Department.

THE COURT: Thank you. Yes, ma'am.

JUROR: Susan Robinson, 113. My husband was a volunteer fireman for both military and locally.

THE COURT: Thank you, ma'am. Yes, ma'am.

JUROR: Janice McCartney, juror number 85. I forgot got my dad was chief of police in West Virginia for 45 years.

THE COURT: Thank you, ma'am. Anyone else?

Has any member of the jury panel or any member of your immediate family ever worked as fire investigator. If so please stand.

Ladies and gentlemen of the jury panel, I am now going to ask you a series of three questions. The responses to these questions I will take down in front next to the court reporter if someone needs to respond to them, if it applies. So listen to these questions. If you think one or more of them may apply to you and you need to respond to one or more of these three questions please come forward at the appropriate time. Any member of the jury panel have any bias or prejudice directed toward the judicial system that would prevent you from being a fair or impartial juror in this case in being able to reach a verdict based solely on the evidence that is presented and the law given by the Court on this charge? That's the first question.

Any member of the jury panel that believes there is too many lawsuits filed in the United States?

Does any member the jury panel hold beliefs or opinions whether political or social, religious or otherwise which might affect your ability to serve as a fair or impartial juror in this case or to base your decision solely on the evidence presented during the courtroom during the trial of this case?

If any of these three questions apply to you and you need to respond to one or more of these three questions I would ask you to come to the center isle at this time.

COURT CLERK: Number 86, Gladyus McClain, 86.

THE COURT: Come here please, ma'am. Yes, ma'am.

JUROR: You said something about too many lawsuits against you. I don't know if that is really fits in, but I do believe a lot of people just personally would sue for anything, just for money. I don't really think it is going to judge me.

THE COURT: Okay. That is my next question then. Despite your concern about that could you listen to the testimony and evidence that comes in during the course of this trial and instruction given by the Court on the law and render a decision which is fair and impartial based on the evidence and the law.

Could you do that or not do that in this case?

JUROR: I can do that absolutely.

THE COURT: Thank you. You may return to your seat.

Thank you for your patience. Just a couple more questions here. Has any member of the jury panel had any prior knowledge about this case from any source before coming here to court today? That would include any media courage or anything else of this case that you are aware of before coming here to Court today, if so please stand.

I will get all of you to come to the center isle, if you will. I will take your responses down front.

COURT CLERK: Number 21, Joy Campbell.

THE COURT: Come over here. Yes, ma'am, tell me what you heard about this case.

JUROR: Well, I haven't heard a lot except newspaper articles and my husband, because he's involved with the electronic security and they do fire and alarm security with Diebold. Typically anything that comes up like this he offers opinions and things of that nature.

THE COURT: All right. Let me ask you whether you could put aside anything that you may have heard before coming to court today and render a decision

solely on the sworn testimony and evidence that comes in during the course of the trial and the Court's instruction on the law that applies and rely solely on that and put aside anything you may have heard about the case before coming to court, could you do that or not do that?

JUROR: Yes, sir, I could.

THE COURT: All right. Thank you, ma'am. Return to your seat.

COURT CLERK: Juror 13, Linda Brinson. Juror number 13.

THE COURT: Come on up. Tell us what you heard about this case.

JUROR: I remember reading about it in the paper, but its been so long ago I don't remember names. I just know that damage was done and that's it.

THE COURT: Let me ask you whether you could put aside anything you may have heard about this case before coming to Court today and render your decision solely on the swore on testimony and evidence that comes during the trial the Court's instruction on the law that applies and base your solely on that and not from anything you may have heard. Could you do that?

JUROR: Definitely, yes.

THE COURT: Thank you, ma'am.

THE CLERK: Number 150, Lisa Young.

THE COURT: Yes, ma'am. Tell us what you heard about this case.

JUROR: Just what I read in the paper. It was a while back. Nothing recently.

THE COURT: Okay. Let me ask you whether you could put aside anything you may have read about this case before coming to court and render a decision solely on the sworn truly and evidence that comes in during the trial and the Court's instruction on the law that applies and render a decision solely on that and not from anything you may have heard about the case prior to coming to court. Could you do that or not do that?

JUROR: Yes, sir, absolutely.

THE COURT: Thank you.

THE CLERK: Number 91, Leslie Miller.

THE COURT: Yes, ma'am. Tell us what you know about this case.

JUROR: I just knew that a fire had happen because I have neighbors who worked at Winthrop.

THE COURT: Did you discuss the case at all with them.

JUROR: I remember talking about there being a fire.

THE COURT: No details. Let me ask you whether you could put aside anything you may have heard about this case before coming to court and render a decision solely on the sworn testimony and evidence that comes in during the trial and the Court's instruction on the law that applies and render a decision solely on that and put aside anything you may have heard?

JUROR: Sure.

THE COURT: Thank you, ma'am.

COURT CLERK: Juror 146, Shannon Wilson.

THE COURT:: Yes, ma'am. Tell us what you heard?

JUROR: I was actually at Winthrop at the time. It was the beginning of 2010. I graduated in December 2010, so I knew there was I fire. I thought it was wiring. I don't actually know any details. It wouldn't affect me as long as the evidence is actually properly showed, but since I did hear that I wanted to make sure.

THE COURT: Well, let me ask you this question so I understand what you are saying. Could you listen to and put aside anything you may have heard before coming to court today?

JUROR: Yes, I could.

THE COURT: And render a decision solely on the sworn testimony and evidence that comes in during the

trial and instructed by the Court and remember a decision which is fair and impartial to both sides in this case. Could you do that?

JUROR: Yes, sir, I could.

THE COURT: Thank you.

COURT CLERK: Juror number 25, Vitta Clawson.

THE COURT: Tell us what you heard about it the case. I know we talked about this a little bit before but I will ask you again.

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

THE COURT: Okay. This is very important.

JUROR: Yes, sir.

THE COURT: Could you put aside anything you may have heard about the case before coming here to court today or anything about it that happened, and render your decision solely on the sworn testimony and evidence that comes in during the trial and the court's instruction on the law that applies and remember a decision which is fair and impartial to both sides based solely on that evidence that applies.

Could you do that or not do that?

JUROR: Yes, sir.

THE COURT: All right. Thank you, ma'am. You may return to your seat.

COURT CLERK: Number 73, James Lampkin.

THE COURT: Come up here please, sir. Tell us what you heard about this case.

JUROR: Actually, to be honest with you I never heard anything much about the case, but if I'm not mistaken I remember seeing -- I worked part time for Domino's Pizza and it was at the building over there.

THE COURT: You were at Winthrop after the fire?

JUROR: Well, if that is the building I do remember seeing that, but have no knowledge.

THE COURT: Let me ask you whether -- of course you don't really know anything except there was a fire apparently. Could you put aside that and render a decision that is solely on the sworn testimony and evidence that comes in during the trial and instruction by the Court on the law that applies and render a decision which is fair and impartial to both sides in this case, could you do that?

JUROR: I think so, yes, sir.

THE COURT: All right.

Any member of the jury panel formed or expressed

an opinion about any issue in this case? If so please stand.

Is any member of the jury panel aware of any bias or prejudice towards either the plaintiff or the defendant in this case? If so please stand.

Does any member of the jury panel know of any reason whatsoever why he or she should not serve as a juror in this particular case? If so please stand.

Can each member of the jury panel give both the plaintiff and the defendant a fair and impartial trial in this case? If not please stand.

Any additional questions requested of the jury panel from the plaintiff.

MR. VOGT: No, Your Honor.

THE COURT: Defendant?

MR. SHEALY: No, Your Honor.

THE COURT: Thank you. Madame clerk, please give us a jury and we will select two alternates in this case.

MR. SHEALY: Your Honor, may we approach?

THE COURT: Yes, sir.

(WHEREUPON, there was an off the record discussion held at the bench.)

THE COURT: Ladies and gentlemen of the jury panel, we have been at it a good little while this

morning. We will take a short break at this time before we pick a jury. It will be a very short break. If you need to take a restroom break if you go straight there and come back. We will take about ten minutes.

(WHEREUPON, court was in recess.)

THE COURT: Counsel ready to proceed?

MR. VOGT: Yes, Your.

MR. SHEALY: Your Honor, one matter I have to take up with the Court.

THE COURT: Approach just a minute.

(WHEREUPON there was an off the record discussion held at the bench.)

THE COURT: All right. We will proceed with the strikes. Plaintiff strikes first.

MR. VOGT: Plaintiff strikes juror number 40.

THE COURT: Counsel, approach just a minute.

(WHEREUPON, there was an off the record discussion held at the bench.)

MR. VOGT: Plaintiff strikes number one.

MR. KIRBY: The defendant strikes number 11, Your Honor.

MR. VOGT: Plaintiff strikes juror number five, Your Honor.

MR. KIRBY: Defendant strikes number two.

MR. VOGT: Plaintiff strikes number eight.

MR. SHEALY: The defendant strikes number seventeen.

MR. VOGT: The plaintiff strikes number eighteen.

MR. SHEALY: The defendant strikes number nine.

THE COURT: And for the first alternate.

MR. VOGT: The plaintiff strikes number twenty-three.

MR. SHEALY: Defendant strikes number twenty-one.

THE COURT: And for the second alternate?

MR. VOGT: The plaintiff strikes number twenty-five.

MR. SHEALY: The defendant strikes number twenty-four.

COURT CLERK: I will verify. For the plaintiff I have the following strikes; number one, five, eight, eighteen. As your alternates, number twenty-three and number twenty-five; is this correct?

MR. VOGT: That is correct.

COURT CLERK: For the defendant I have number eleven, two, seventeen, nine, and your alternates strikes are number twenty-one and twenty-four; is this correct?

MR. SHEALY: That'S correct.

THE CLERK: Thank you.

COURT CLERK: Ladies and gentlemen, if I call your name please take your personal belongings and come down to my right to the front hear at the direction of the bailiff and have a seat in the jury box.

Juror number 113, Susan M. Robinson; juror 104, Denise R. Prescott; juror 144, Stephanie W. Williamson; juror 73, James J. Lampkin; juror 76, Norma S. Ligon; juror number 54, Susan S. Houston; juror number 125, Denise A. Smith; juror 13, Linda R. Brinson; juror number one, Michael R. Adams; juror 112, Melinda M. Robinson; juror 85, Janice R. McCartney; Juror 42, Jeffrey M. Galvin.

Serving as the first alternate, juror 65, Tara C. Joyner; and serving as second alternate juror 97, Jeffery R. Burris.

THE COURT: Any questions concerning the selection process from the plaintiff?

MR. VOGT: No, Your Honor.

THE COURT: From the defendant?

MR. SHEALY: None other than the matter taken up at the bench.

THE COURT: We will take it up at the appropriate time. Any others?

MR. SHEALY: None.

THE COURT: Ladies and gentlemen of the jury panel

who were not selected for this particular case, this will conclude your service, not only on this case, but will also conclude your service for the week. It will also count for a service week so you will not have to serve again for a period of three years if you should be called.

I want to thank you for your patience and for your service this week. You are free to go at this time with our thanks. A check will be put in the mail for your service in the near future.

Does anyone need anything else to take to your employer showing you needed to be here. If not, thank you very much. You are free to go at this time.

(WHEREUPON, jurors leave the courtroom)

THE COURT: Counsel, we had some pretrial matters, that we got to get into before we get started with the case. I think I am going to go ahead and excuse the jurors for lunch at this time and give them a longer then normal lunch hour, so we can do these pretrial matters in there absence. I think we will start back about three is what I am looking at. It is ten after one now. That should give us time to get lunch and do these pretrial matters between now and then. All right.

Ladies and gentlemen of the jury panel, as I was

speaking to the counsel there are some pretrial matters that we need to address before we actually get started with the trial of the case. We wanted to go ahead and get a jury picked so the jurors who will not be needed we can go ahead and release them, so they wouldn't be sitting around. And so, what I am going to do is I will excuse you at this time for lunch and we will give you a longer than normal lunch hour so you won't be sitting around back here.

I'll ask you to be back in the jury room ready to go at three o'clock today. Three p.m. and the bailiff will show you where to go and how to get back in.

There is a couple of instructions I want to give you before you leave though. Please do not discuss this case among yourselves or with anyone else you might see on the recess of court. That is very important. I will explain the reason for that when you come back and go over that with you.

If anyone should deliberately try to discuss the case with you, please do not discuss it with them. Get the best description of that person. You can give it to the bailiff or the clerk's office upon your return. They'll let you know and I will deal appropriately with that person. No one should try to discuss the case with you and if they do I certainly

wish to be made aware of it.

Please enjoy your lunch and be back in the jury room ready to go at three o'clock. Three o'clock. Thank you.

(WHEREUPON, the jury leaves the courtroom.)

THE COURT: Let me hear you first on the motion with regard to the juror that you wanted me to excuse for cause.

MR. SHEALY: May it please the Court. Your Honor, my motion related to the eleventh juror listed on this strike sheet, juror number 25. That motion was based on the fact that that juror 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 other jurors would not have and respectfully moved to have her stricken from the jury list for cause.

THE COURT: Plaintiff wish to be heard on that motion?

MR. VOGT: No, Your Honor.

THE COURT: Let me -- I did not strike her for cause and for this reason; she actually came up a couple of times and that's on the record what she said at the time. It seemed like to me I thought was graduate of Winthrop. I might be mistaken about that. She was going back and forth on the -- with some other kind of course or something up there, but I thought she said she graduated from Winthrop. In any event if she is a student at Winthrop. I didn't make notes of that, but the record will speak for itself. She did indicate that she had been up there I think when this was going on and she had talked to some other people about it. That is professors had said something about the fire. She had talked to some other students. That they were kind of inconvenienced by the fire and caused them some problems in that regard. She did say that. And she did have some connection with Winthrop.

However, she stated when I asked her specifically about whether she could put aside anything she had heard about the fire. She didn't say she heard anything about the case. Just that there was a fire and it displaced people and the building was burned. And I think anybody that went to Winthrop at that time would be aware of that and a lot of other people were

aware of that at the time because it was in the paper and that sort of thing, as did some other people come up and say they read about it in the paper but they couldn't recall exactly what was said in the paper and certainly couldn't remember anything about the case. But she specifically said when I asked her, despite what you may have heard about the case from somebody else could you put aside anything you knew about the case or heard about the case before coming to Court today? Could you put that aside and decide this case according to the sworn testimony and evidence that comes in during the course of the trial, the Court's instruction given to you with regard to the law that applies and she said she could do that. I am satisfied with that.

And there were other people in here that graduated from the Winthrop. They said the same thing. You didn't object to them. There was another student at the time. I don't know if she was called up. Maybe she wasn't called up. In any he event maybe she wasn't on the list. Maybe she was struck. But in any event, she was a student and she was going back and forth. She couldn't the specific. But in any event, this witness said she could be fair and impartial, could listen to testimony and evidence and the law

that comes in and could render a decision and be fair and impartial to both sides. That is what she said. I don't see any connection. She is not an employee.

On your motion to strike for cause an employee at Winthrop once I looked back and realized she was an employee at Winthrop I did strike her for cause. I granted your motion to strike her for cause. This witness had no such connection and said she could be fair and impartial, listen to the sworn testimony and base it solely on that. The Court was satisfied with that, so I denied your motion to strike for cause.

As I said at the time you got four strikes. You know, based on her having a connection to Winthrop and if I was a defendant in the case I don't know that I would want her on the jury either. I think I would use one of my peremptory strikes and strike her and that's what you did. That's why you have strikes. You strike people that you think might not be totally fair, but I did not see cause to strike her and so I didn't strike her for that reason. You demonstrated no cause to strike her solely because on whatever connection she might have known about the case before. And the Court was satisfied that she stated clearly she could be fair and impartial and so just like a number of other people on the jury who graduated from

Winthrop and had kids that graduated from Winthrop and attended Winthrop. So I denied your motion to strike and I think it was appropriate.

In any event, you struck her. You are not prejudiced by that. She is not on the jury obviously. Okay. My reason is on the record as well.

Anything else now? How do you want to proceed on your preliminary motions? Do you want to try do some of them now or do you want to get some lunch.

MR. VOGT: Whatever suits the Court, Your Honor.

MR. SHEALY: If we could do that after lunch that would be be helpful to me.

THE COURT: I will. Let's do this, we will get some lunch. Let's be back at about ten minute after two. That is about fifty minutes. Not quite an hour, but let's be back ten minutes after two. That will give us fifty minutes to argue your pretrial motion and your first witness you can kind of let them know at least three o'clock. As a matter of fact I will give them preliminary instruction before we get started, so you couldn't call your first witness until about 3:30.

MR. VOGT: Thank you, Your Honor.

THE COURT: WE will start back then at ten after two.

MR. SHEALY: Thank you, Your Honor.

(WHEREUPON, court was in recess for lunch)

THE BAILIFF: All rise.

THE COURT: Thank you. Be seated.

Do you want to proceed on plaintiff's motion first.

MR. VOGT: Thank you, Your Honor, we have three, Motions in Limine. I think the Court has already ruled on one, which is the third regarding bifurcation.

THE COURT: Right.

MR. VOGT: The first, I don't believe there is any dispute between the parties but because of the nature of the evidence I want to make sure it's crystal --

THE COURT: Lets back up. Let defense counsel object to the ruling on the bifurcation.

MR. VOGT: I am sorry.

MR. SHEALY: May it please the Court.

THE COURT: Yes, sir.

MR. SHEALY: Yes, we do oppose the plaintiff's request for bifurcation. I understand that we had conversation in chambers with Your Honor. Your Honor, has reached a decision on that. I just wanted to state that we did oppose that for the record.

THE COURT: And again, I need to make a record of

it. And the basis for it was, I questioned plaintiff's counsel very closely about that because I was not inclined to bifurcate if I was going to have the same witnesses testify in the second trial with regard to damages, but since apparently the only witnesses who will be testifying about the damages their testimony would be a lot shorter in the liability phase and most of the these witnesses on damages will not be called during the liability phase. It makes sense to me to bifurcate because if the jury were to return a verdict for the defendant we wouldn't have to spend all that time with all those witnesses on damages.

On the other hand, if they return a verdict against the defendant then with regard to damages the witnesses pretty much are different witnesses. Not the same witnesses. So we won't lose any time or have to put witnesses up to testify basically to the same things twice. That will be my only concern because that would be a waste of time. But in light of the fact that witnesses are going to be different most of them on the damages than the liability, it makes sense to get the liability determined.

Again, if they find for the defendant on that that will be the end of it. If they find for the plaintiff

on that then we can get into the damage, but we won't have a repeat of the testimony which is what I was concerned about. This is an appropriate case. I do not do that very often, but I think this is an appropriate case for bifurcation.

All right, next motion.

MR. VOGT: The first Motion in Limine, Your Honor, is to enter an Order restricting anyone from testifying -- any witness from testifying about the existence of insurance on either side, the plaintiff or the defendant. Winthrop is insured in part here, however they are the real party at interest and under the collateral source rule evidence that they were partially reimbursed would not be admissible anyway. A lot of these witnesses are aware of the insurance on both sides, investigators, that type of thing. So I think it is very important that an Order be issued to instructing the witnesses not to divulge that information.

MR. SHEALY: We of course have no opposition to that.

THE COURT: Just make sure your witnesses, they don't know. Some times they forget and they answer a response to some question in some long rambling kind of statement, so just make sure they not mention

anything about insurance.

MR. SHEALY: Yes, sir.

MR. VOGT: And the second Motion in Limine, judge, I don't think there is a dispute between the parties as to what the law is in South Carolina as far as fire code, but I want to make sure that because there is going to be a significant amount of expert testimony and also fact testimony regarding the codes and the violation of codes, the alleged violation of the codes. So if I can just give you a quick background on this fire.

Winthrop had a contract with Pickens to demolish and reroof a building at Bancroft Hall. Asbestos roof was removed and a new roof was being put on. A fire originates on a Saturday on a flat roof between the two buildings. The fire spreads from that flat roof up to these pitches roofs. We believe the evidence plaintiff will offer is that there were materials stored there by the defendant. They included combustible construction materials; they included shingles, roofing paper and the plaintiff's evidence will be that is a violation of the State Fire Code. Specifically a provision of the International Fire Code which was adopted by South Carolina and also NFPA 241 which prohibits the storage of combustible

construction materials within thirty feet of a building that is undergoing construction or alteration.

So I don't think based on the Motion in Limine filed by the defendant that there is really any argument about that's the law in South Carolina and I think we are going to talk a lot when the defendant's motion is heard about attempts to limit the experts and attempts to limit questioning in that area. But I think the law is crystal clear that the International Fire Code and the NFPA 241 were in effect as of the date of this fire.

MR. SHEALY: May it please the Court. Your Honor, under Rule 201 of the Rules of Evidence there are certain situations in which the Court can take judicial notice of adjudicative facts and that's my only point in bringing this up, is we don't contest that the 2006 Edition of the International Fire Code was the law, but that is not something you take judicial notice of. Because it was the law and because NFPA 241, a standard that Mr. Vogt mentioned is referred to in that law by reference, it has the force of law and so what we will be saying when we are arguing our motion is that only the Court instructs the jury on what the law is. And so, that's our only

-- we do not contest the applicable law that applies to this case, but because that law is not a fact, we just say that it is not appropriate for this motion of taking judicial notice.

THE COURT: Well, I don't think the Court should be taking judicial notice of it. I think it is something you got to prove. If you are saying it is a violation of code and what the code is and how it is violated, but I think you can do that by expert testimony and if you going to offer expert testimony to the effect that this was the fire code and they are not in compliance with the code by doing this. There may be a dispute to the facts, but he can take that fact into consideration in his opinion and give his opinion, if somebody has a different opinion or a question about the facts. But I don't think it's a matter for judicial notice. May be something we instruct what the law is when I instruct the jury, but I do think it's something that an expert can be questioned on.

MR. SHEALY: Your Honor, that gets into a subject of our Motion in Limine which I am happy to --

THE COURT: Let's go ahead and finish the first one.

MR. SHEALY: Yes, sir.

MR. VOGT: Your Honor, I don't have -- I think you are absolutely right as far as how you frame the issue. My concern, this really grew out of discussions between counsel about limitations on expert testimony and limitations as far as questions to the roofers regarding their understanding of code and perhaps I was just again trying to get a consensus to try and eliminate some of those lines of questioning before hand, and if the Court rules that's not proper, I will certainly introduce the code through the State fire marshal and other experts.

THE COURT: Yes, there is no reason for the Court to take judicial notice. I can instruct them on the law when we get to the part where I give instruction on the law to the jury and charge the jury at the end of the trial. Certainly I can charge them whatever you request to charge, if I think it is appropriate I will charge it.

The experts, including the fire marshal, can testify as to what the law is, I think. Of course when you get right down to it of course the issue is even if you agree that they violated the code that doesn't necessary mean that was the cause of the fire. And so, you know, that's a whole different issue.

You can be driving down the street and you can be

doing 65 miles an hour in a 45 mile an hour zone and somebody can be doing 75 and run into you in the back, and that's not the cause of the accident. Or you can be driving along and the regulation required you to have a driver's license and if you drive and have a wreck Just the fact that you don't have a driver's license doesn't make it your fault. You see what I'm saying. You can be cited for not having one, but so, just because even if you are in violation it doesn't necessarily establish that it's the cause of the fire and so that's the bridge we have to cross. That's an issue that will have to be decided, correct?

MR. VOGT: It is one of them, yes, sir.

THE COURT: All right. What else?

MR. VOGT: That is all the plaintiff has, Your Honor, and then really that particular motion anticipates it is kind of hand and glove with the defendant.

THE COURT: I will hear your motion.

Let's go with the one about the expert testimony, first.

MR. SHEALY: Your Honor, we raised five issues in our Motion in Limine. There are a couple that pertain to the opinions about expert witnesses. The first is -- and I want to be clear that we are not seeking to

exclude these expert witnesses from testifying. We are just seeking a ruling that provides some parameters as to what they can testify to and what they can not.

The expert witnesses in this case -- there is no question, or there is no evidence and there is no disagreement among the parties that no one knows the cause of the fire; the source of ignition for the fire. The plaintiff's experts are in agreement. The expert we have, no one can determine the cause. But the plaintiff's experts have been willing to say that, but for the defendant's storage of combustible materials on the roof there would have been no fire, and Your Honor this is a flat roof that is had some dimensions to it. There is a general area of origin that has been ascertained by the experts but in terms of where -- the evidence is very conflicting as to whether there were any such materials on the roof by this defendant or not, but assuming that there were, there is no evidence that precisely locates those. There is no evidence that says that was the only combustible material on the roof. There is just isn't any evidence to say that's everything that was on the roof. In fact the roof itself has an insulation layer covered by a membrane. All of which admittedly is

combustible.

So, we are just seeking an Order that says that they can't go that far; that but for our materials being there would have been no fire. Certainly all of the experts can say you wouldn't have a fire without combustible materials because you have to have fuel. Got no problem with that. But it is the notion that it is our materials when there is just not enough -- well, there is no testimony that says okay, this is the sum total of the materials on that roof. We believe that is where it gets into the area of speculation. It goes beyond what these experts can reasonably opine to based on the record that has been adduced in discovery.

MR. VOGT: Your Honor, no one knows the source of the ignition of this fire. The plaintiff will prove the cause of the fire was the defendant storing combustible roofing materials in that area because if those materials weren't in that area a fire -- it would be very difficult to start a fire on a flat rubber roof to begin with assuming that were the case. That fire with just a TPO rubber roof could never reach the height necessary to spread to the adjoining roofs and that's what the expert testimony is about. Everything but metal is essentially combustible. But

what the code provides is you don't pile, you don't store combustible construction materials during a project to avoid the risk of fire. That's the purpose of the code.

There is evidence that the defendant stored the materials. They told the fire marshal. They testified under deposition. They said shingles, rolls of roofing paper, those types of things were stored in that area. That's the only evidence. The defendant is trying to make the plaintiff rule out a negative. The plaintiff will show the roof was not accessible by anyone else. When the fire department came they were let in to the attic through locked doors. The fire department then had to go out a roof hatch. There's no mechanic rooms on that roof. It's four stories up. The roofers took their ladders the day before.

This roof is inaccessible. There are no other projects going on. The only people that were working in this area were the roofers. Immediately after the fire they admit we've been going back and forth to that flat roof that day. And so to suggest that there is no evidence of combustibles is wrong. There is plenty of evidence there is combustibles there, by that witness testimony, but also by the expert testimony. Because what you have here, Your Honor, is

a fire that leaps up this flat roof and gets high enough to spread to adjoining roofs. That can't happen unless there is sufficient fuel load combustibles in that area and the only evidence of anyone having combustibles there is the defendant. All right. Now that is the exactly what expert testimony, scientific technical testimony under 702, 703, 704 is designed to do. It is designed to help the jury understand the evidence of the case. No lay person could help a jury understand that issue and that's exactly what an expert will testify too.

Now, in addition, the state fire marshal who is responsible for interpreting the code for state buildings, enforcing the code for state buildings, will testify that the storage of those materials violated code. Plaintiff's expert will do the same. They are not saying what the law is. The Court will do that. They are saying if this applies there was a violation. Of course the jury will determine whether that was a proximate cause of the fire.

MR. SHEALY: Your Honor, I want to be clear because I am not taking the position that there is no evidence that Pickens roofing had stored materials. There will be evidence that Pickens had stored materials there. I am just saying that when the

expert says but for Pickens' storage there would be no fire that's when it crosses the line.

What I am trying to avoid is our getting into res ipsa loquitur. We were not the -- we were not given charge of this area to the exclusion of Winthrop. This is their campus. When we leave work almost 24 hours before this fire started this is Winthrop's property to safeguard and so, who knows what happens in that 24-hour period. Yes, I don't contest Mr. Vogt's discussion of what witnesses have said, but all I am trying to do is keep experts from saying, but for our storage of combustibles on the roof there would be no fire.

THE COURT: Can't they testify in their opinion based on the facts before them and give a basis for that opinion that there was nothing else that could have caused the fire. There had to be some source of combustible materials to allow it to get high enough to get to this other roof. Can they not testify to that, some combustible material?

MR. SHEALY: I have no quarrel with their saying there has to be some combustible material there for a fire -- for a fire to occur. It's just that saying it's the stuff that we got there that provides that fuel.

THE COURT: That's an inference you have to draw, the jury would have to draw, but if they had combustible materials there in violation of the code and there was a fire, there is also some combustion, combustible materials. I certainly think they can reach the opinion that that was most probably the cause.

MR. SHEALY: And Your Honor, I am not saying that the jury couldn't make that inference. It's the testimony -- because there is not enough to -- there is not enough testimony to say all right, the fire started here and this is precisely where our combustible material were, because the roof is a large place.

THE COURT: I will hear it. The facts speak for themselves.

MR. SHEALY: Sure.

THE COURT: When it comes out, we will see what the testimony is. I don't know what the testimony is going to be until we get down the road here, but they can't say specific five-foot square area may be the fire started, is that what you are saying?

MR. VOGT: They can say it's in a general five-foot area, but that is a subset, a small subset of the whole flat roof. I mean, they have a general

area of origin, I don't necessarily know if it is five-foot radius or what. We kind of have an idea. I have picture in my mind of what it is, but it's not the whole flat roof.

So, Your Honor, all I'm seeking is just an Order precluding them from saying, but for our storage there would be no fire. No quarrel with their saying, but for the presence of combustible materials on that roof there would be no fire because that's absolutely a scientific --

THE COURT: How about a conclusion? What they are saying is that your expert can't say it had to be these particular combustible materials that caused the fire. That's what he is saying, but for. That is what he is saying. He is saying it could have been some other combustible materials up there that you all haven't been able to eliminate that all together.

MR. VOGT: Well, Your Honor, an expert can rely on things within it's chosen profession that they typically rely on.

THE COURT: I think so. They can't speculate.

MR. VOGT: So they have witness statements in this case that were taken immediately after the fire by the fire marshal that indicates that the combustibles, the only combustibles on the roof were the roofers. There

is no other evidence of any other combustibles. Again, he is trying to make us prove -- disprove a negative.

THE COURT: Well, it has to be proved by inference, I guess.

MR. VOGT: And 704 allows an expert to give an opinion as to the ultimate issue.

THE COURT: As long as they got the facts. As long as he can -- the facts that he is allowed to testify to, he can be cross examined about those facts, but if the facts are, if and assume, these were the only combustible materials then that would be the cause of the fire, that's certainly subject to cross examination, his knowledge of what was up there and what was not up there.

MR. VOGT: The speculative evidence in this case is what Mr. Shealy is suggesting, that there were other combustibles there because there is no evidence of that. And all the inferences drawn from the --

THE COURT: Yeah, I see what you are saying and he would have the burden of being able to show that there was some other reasonable explanation other than combustible materials being on the roof in violation of the code.

You have the burden of proof as to causation,

proximate cause, but if he wants to allege that no facts or evidence to show there was anything else up there to could have been combustible enough to cause this fire then certainly the jury can infer, draw an inference that these were the combustible materials that caused fire. I can't say what the facts are going to be. I will not limit what the expert is going to testify. You can object to it at the time they start getting into it, but I can't say what the facts and evidence is going to be at this point.

They can't speculate any more than anybody else can speculate. They got to have a reason for their opinion. They will be subject to cross examination obviously about that opinion, about what facts that went in to their opinion, the basis of their opinion. You can attack that obviously through cross examination and by other experts who testify differently who reached a different conclusion. Obviously you can attack and impeach their testimony with the testimony of the others. They can't say, unless it can be conclusively shown that there was no other combustibles up there on the roof, then they can't say that there is no other possible explanation. I think they can say that assuming given these facts, that these were combustible materials left up there

and it took some combustible material other than the regular roof while it was up there. I think they can go from that and reach an opinion.

MR. SHEALY: And again, Your Honor, obviously I don't have any quarrel if its put in that fashion then I don't -- I don't -- that's a hypothetical that would be put to the expert.

THE COURT: Your argument is the expert shouldn't be able to testify there is no other possible explanation, but for these.

But you know, that is something that is subject to whatever each side can show as to what the facts are. I don't know what you will be able to show. I'm not going to limit the expert at this point as long as there is a basis, legitimate basis, for his or her opinion. So we will see. But can you make your objection at the proper time and I will look at it again if he hasn't laid the ground work for that -- his opinion.

MR. SHEALY: Yes, sir.

Your Honor, our second Motion in Limine does pertain to the earlier discussion, because the code sections, the fire code and the standard that it incorporates by reference were the law at the time. This is not a situation where an expert is called upon

to explain to the jury what the standard of care was. Were we relying upon a common law standard of care. At times experts are called upon to say this is what the standard of care requires.

THE COURT: Well, isn't that what the code is for?

MR. SHEALY: Well, the code Your Honor, sets forth bright-line rules. The code says here is what it is and that because those rules are set forth in the code then you are the only one that should be able to tell the jury what that standard is, is my point here. And secondarily, the law is clear under Rule 704 that an expert can testify about something that bears upon the ultimate issue of fact. But the law is clear that an expert can not testify as to the ultimate issue of law. We set forth numerous authorities that say that the expert can't say this conduct was a violation of the law. That's what the jury has to decide. And we have lots of examples. We don't let police officers come up and testify that, you know, I charged so and so with a violation of the law. The jury has got to decide if the facts --

THE COURT: That's not a very good example. They can testify I issued a warrant and arrested him on this and put him in jail. Why can't they do that? They absolutely can do that.

MR. SHEALY: In a civil case, Your Honor, in traffic situation there is a statute that prohibits that.

THE COURT: Well, I mean, no they can't say he violated this section and therefore it is the cause of the accident. In a civil case where you are trying to determine the cause of an accident they don't allow them to get into that. You're right. But they get in to what they charged somebody who was at fault, charged him with a law that they charged him with.

MR. SHEALY: In a criminal situation certainly.

THE COURT: But you can get in to the law requires in this area there is a 55 mile an hour speed limit and somebody doing 65 you can certainly argue that's the cause of the accident. But this is the law, it's 55. I say he was doing 65 according to -- I checked him on radar he was doing 65. So he can say he was certainly exceeding the speed limit.

MR. SHEALY: Well, Your Honor, in that situation and I don't mean to go too far afield here, but what the police officer is saying something that he or she observed. I clocked so and so going 60 miles an hour. That is a factual observation.

THE COURT: Right.

MR. SHEALY: What we are saying here, Your Honor

is --

THE COURT: Can't the officer also say this is a 55 mile an hour limit zone. The zone is posted 55 mile an hour. Can't he say that?

MR. SHEALY: Well, Your Honor, I think that is something that is observable as well. That's -- I mean, a photograph can tell you that. It's again a physical observation.

THE COURT: Right.

MR. SHEALY: But here what I am trying to explain to the Court is, if say the state fire marshal is asked was that a violation of code to store materials under that roof, the state fire marshal is not allowed to say yes, that was a violation of code. That is what the jury has got to decide in this situation.

It's clear, if you look Your Honor, in the O'Quinn versus Beach Associates, the circuit judge --

THE COURT: Is that what you handed me up?

MR. SHEALY: It is within our motion. It's page 14. And rather than to read it to Your Honor, the judge there said, I can't let an expert witness provide his interpretation of the law. That's the Court's responsibility. And that general rule has been cited in Shields versus South Carolina of Highways and Public Transportation. As a general rule

a witness will not be permitted to state a conclusion or opinion of law and that's what we are seeking to prohibit.

THE COURT: Let me ask you this, I see your point. Of course you don't give me the facts on any of these cases and I don't think any expert witnesses are going to be able testify to what the law is. Even the lawyers can't testify, called as an expert witness without approval of the court first to see if that would be helpful. I don't disagree with that. But the difference being though that an expert can testify this is what the code says which prohibits putting combustible materials in an area where there is construction going on. But he can't say the defendants putting those in there is a violation of code or violation of the law. That part I would agree with, but why couldn't he testify if they were put there that will be a violation of the code?

MR. SHEALY: Your Honor, if the code were just this is -- this is what the industry recognizes as the standard.

THE COURT: Right.

MR. SHEALY: But the code is the law. You are the only one that tells them what the law is. And so, if we have an expert telling them --

THE COURT: Can't an expert say in my opinion if these were put in a certain place in violation of the code that is a violation of the code. He has got to interpret to cite people for violation of the code.

MR. SHEALY: Your Honor, I don't think he can say that is a violation of the code. That's what the jury has got to decide. Is that a violation of the code.

THE COURT: I'm not saying that the defendant in this case violated the code. I'm simply saying that if combustible materials were put in an area prohibited by the code then that would be a violation of the code.

MR. SHEALY: Your Honor, that is precisely what I am saying is telling them what the law is and what the legal issue is that they are to decide. I mean, when they say it is a violation of the code that's saying it is a violation of the law to do that.

The jury has got to decide was this a violation of the law based on upon you instructing them on what the law is, and we don't need an expert. In fact it should not come in.

THE COURT: The point I am trying to make is, why can't an expert say that you are prohibited from putting these on there. He doesn't have to say this defendant violated the code. He can simply say if

combustible materials were put on this roof in a construction area if that were done it is a violation of the code. Why can't he say that?

MR. SHEALY: Because Your Honor there is no logical ---

THE COURT: It's like somebody driving down the road at 65 miles an hour in a 55 zone, the police officer can say I charged him with doing 65 in a 55 because he violated the statute. Why can't he say that?

MR. SHEALY: Well, Your Honor, in a --

THE COURT: He does say that.

MR. SHEALY: In a civil case --

THE COURT: Yeah, he says that in a civil case because that can be the cause of the accident. Speed can be cause of the accident. Police officer says the speed limit here was 55 miles per hour and I clocked him at 65, so he was exceeding the lawful speed limit. That is violation of the law. They do it all the time. He ran the stop sign.

MR. SHEALY: But Your Honor, again, this -- what you are describing though is a police officer that is an eye-witness to behavior and so the police officer is testifying to what he or she observed. This is not that situation at all. This is a -- and what the

police officer observed were facts. There is a posted speed limit. That's a fact. There is a I clocked that person doing this. That is something I observed.

THE COURT: What if there is combustible materials on the the roof and that was observed. What about that? Somebody testifies as to that and the expert takes that into consideration in his opinion. If there were combustible materials there then that would be in violation of the code. He is not suppose to have them there.

MR. SHEALY: Your Honor again, I think if an experts says there were combustible materials there -- well, I think the experts have to say that a fire would not have occurred without combustible materials there. That's within their expertise, but in terms of deciding whether or not the presence of those materials violated code, that is something the jury has got to decide based on your instructing what does the code say.

THE COURT: Well, if the code said you can not have combustible materials in an area where construction site is going on. If the code says that and somebody testifies that there were combustible materials in that area then that's a violation of the code. Anybody can see that.

I don't understand where you are going with this.

MR. SHEALY: Well, Your Honor, because no expert and no eye-witness can say that there were combustible -- that our stuff was there.

THE COURT: Why can't he say if it was there. They say they got testimony that it was there.

MR. SHEALY: If it was there it violated code is what the problem is. If it was there. I mean, again, it is not going to be if it is was there. It's going to be there had to be something there or there would be no fire. And that's again where I don't have an issue. It's having the fuel to therefore have a fire is what the expert can say.

The violation of code making this negligence per se is something that you have to instruct the jury about. The jury can decide whether or not it was there or not and then if it was there whether it violated code.

There are words in the code that you have got to tell the jury what they mean because it is all a part of what the law is. I mean, the code says yard storage of combustible construction materials. Well, we are not down on the ground and there are reasons why there would be a rule for yard storage that don't apply to something that is up off the ground.

According to Winthrop it is away from being molested by anybody and so, that's not something -- that is not an argument that I get in to with an expert. That is a colloquy I have with the Court as to whether or not the evidence here actually arises to a violation of a statutory standard.

I mean, you may interpret that and decide that because it is the law this doesn't apply actually. But an expert is not helping the jury. You are the one that tells the jury what the law is and what those words mean.

THE COURT: I don't disagree with you on that. I am just saying that why can't they testify concerning a hypothesis if there were combustible materials up there it would be a violation of code without saying there was combustible materials up there.

MR. SHEALY: Because saying it is a violation of codes is a legal opinion. It is a legal opinion and that's what they can not do and that is what the case law says. They can not give legal opinions.

Your Honor, again, going back to if this were a common law standard and we are talking about what is reasonable then an expert can say here is what is reasonable because that is subject to interpretation. There is no defined standard. The law in this case,

there is a bright-line rule, a defined standard set forth in the code which is the law which has to be given to this jury by you.

THE COURT: You see this O'Quinn case, that's a whole different ball game. They are talking about they wants to to have a professor be able to testify, give his opinion about whether a offering I guess of sales or stock or public offering, whatever, violated the federal law. Naturally he can't do that.

MR. SHEALY: But Your Honor, I don't see the distinction. The storage of combustible materials is a violation of code. Offering of securities or whatever you said is a violation of federal law. Those are practically the same statement, just slightly different context, but it's the same issue.

THE COURT: The federal securities law and all the case law that goes with it, is the same as interpreting a worded code that everybody has to go by.

MR. SHEALY: The law --

THE COURT: It's the same thing. The law is the law. It's a different place in the law, in the body of law, but it's the law. The law is the law.

THE COURT: Well, I don't agree with that statement.

MR. VOGT: Your Honor, can I hand a case --

THE COURT: Yes.

MR. VOGT: --- that I think might be helpful. It is Knoke versus South Carolina Department of Parks Recreation and Tourism, 1996, Supreme Court of South Carolina case.

In that case the justice, specifically, violations of code with respect to a fire case and the lack of smoke detector. The problem that trying to use the O'Quinn case is exactly what Your Honor pointed out. It was a State Court case where a professor was trying to tell the judge what the federal law was. In this case and I dare to say any case involving contractors where there are violations of code anything that assist the trier of fact is admissible.

So, Your Honor, the state fire marshal will say this is the code. The plaintiff's expert will say this is the code. The evidence will be there is combustibles on the roof placed there by the defendant.

The ultimate issue in this case was whether that code was violated. Rule 704 allows precisely that. It allows an expert to testify to the ultimate issue and that's an ultimate issue of fact. There is no ultimate issue of law here that we are arguing about.

He has already conceded that these fire code provisions apply, and like Your Honor said earlier those are minimum standards that everybody must meet. This isn't a case about a security law or anything like that. So Your Honor, I am trying to picture because I was very confused by this Motion in Limine. I have a construction defect case and I'm trying to show an electrician improperly wired my condominium building. How in the world can I prove my case without an expert to testify that this was the code in force at the time the building was built and this in my opinion is how the code was violated.

That doesn't enter the problems of the jury. It doesn't enter the problems of the Court because the Court will say this is the law. Ladies and gentlemen, of the jury you have heard the evidence. Does it violate the law. That's their question. That is proximate cause, whether it be a breach of contract or negligence case. This is precisely what the new rules of 702, 703, 704 point to. The case that they cited is pre 702, 703, 704 -- the case in your hand is pre 702, 703, 704. However, it is consistent with the new rule. The -- where we pulled that out of, Judge Anderson's book, Nuts and Bolts of South Carolina Substantive and Procedure Law, that Knoke case.

The plaintiff's experts here aren't testifying as to the ultimate issue as far as proximate -- they are allowed the issue as of proximate cause. Testify as to proximate cause. They are not saying this is the law. The Court has already decided that. The defendant has already admitted it.

MR. SHEALY: Your Honor, I will just briefly say that Knoke is completely inapplicable because we are not challenging the qualifications of the expert. That's what's going on in that case. I mean, that's clearly the defendant challenged the admission of the testimony on the grounds that the plaintiff's expert was not qualified to render such an opinion. We are not saying that the person is unqualified. We are just saying that it goes beyond what the expert can talk about. It is the expert giving an opinion of law and that is what is not allowed under the case law.

MR. VOGT: Your Honor, I will read the paragraph. The department challenges the above evidence on the ground these opinions were rendered on matters within province of the jury. That's exactly what Mr. Shealy is arguing. Expert testimony is proper if it will assist the trier of fact in understanding the evidence. That is exactly what the rules provide.

This testimony was pertinent to help the jury

determine whether the lack of a smoke detector contributed to Jeremy's death.

Expert testimony is not rendered inadmissible simply because it embraces an ultimate issue to be decided by the trier of the fact. And that's exactly what the plaintiff's experts will do in this case; both Mr. Arnold, and as a basis of Mr. Arnold's opinion the testimony of the state fire marshal.

THE COURT: How about the Knoke case? Paragraph ten. I don't know what page it is, but in any event, it states that Schultz testified he was a member of at least four professional associations that promulgated model codes regarding fire safety. He is a co-author of the National Fire Code. He is a member of the professional association that promulgates the Standard Building Code which has been adopted in South Carolina. He offers comments and votes on proposed revisions of that Code. Based on the evidence, trial judge did not abuse his discretion in qualifying Schultz as an expert on the national and state requirements regarding fire safety.

Doesn't that mean he can testify concerning those?

MR. SHEALY: Well, Your Honor, I think, again, the way this was framed is whether the expert --

THE COURT: I understand. But I mean, obviously

he was testifying concerning those things and he was found as an expert to testify on those things. He said based on this evidence, the trial judge did not abuse his discretion qualifying itself Schultz as an expert on the national and state requirements regarding fire safety.

Doesn't that mean he was allowed to testify within his expertise as to what standards are regarding the fire safety?

MR. SHEALY: Forgive me, Your Honor, I just had to pull the case up on the computer.

Your Honor, here is what I can't tell just from my cursory -- I remember the case. I think I helped with the appeal when I was in law school. But what I don't know is whether the requirements that are being talked about are codified in the law or whether -- I don't know from this case whether what he is being asked to testify to has the force of law or whether it's just requirements imposed.

THE COURT: Well, let me read it to you. He is a member of the professional association that promulgates the Standard Building Code which has been adopted in South Carolina, and he offers comments and votes, etc, on revising it which has been adopted in South Carolina.

MR. VOGT: If I may, I have another case. It is a Court of Appeals case from 2007 that is another example where an expert was allowed to testify, both plaintiff and the defendant as to violation of code. The ultimate case was decided on an issue of a plaintiff had to prove the proximate cause. But in this case it's Dropkin versus Beachwalk Villas Condominium Association and the experts testified as to violations of the standard building code.

MR. SHEALY: Your Honor, as I read that case again, the issue is not really before the Court as to whether or not the expert can testify there. It is just not framed that way.

The whole issue is just whether a directed verdict was properly denied or not.

THE COURT: Well, if you read this paragraph it says Beachwalk was constructed in approximately 1980. Prior to trial the parties stipulated 1979 Standard Building Code applied at the time of construction. The 1979 Standard Building Code required the staircase to include a handrail located between 30 and 34 inches above the stair tread. The parties do not dispute the handrail failed to meet the code.

I don't see anything here about expert testimony.

MR. VOGT: Your Honor, if I see highlighted

portions of it, Doctor Bryan Durig and Allen Campbell were the experts in that case and both of them testified as to whether there was a code violation and whether it was a contributing cause to the slip and fall.

The Court ultimately ruled that there was insufficient basis for the proximate cause issue, but that the case clearly allowed, and the Court clearly allowed, both experts to testify as to the violation or non-violation of code.

MR. SHEALY: Your Honor, I would just point you to Kirkland versus People's Gas Company in which Justice Ness held that the trial Court did not abuse its discretion refusing to allow opinion testimony and interpreting regulations of the South Carolina Department of Transportation.

THE COURT: When was that?

MR. SHEALY: 1977.

MR. VOGT: Again prior to the adoption of Rule 704 and it is discretionary.

MR. SHEALY: This was cited with approval in 1991 in Shields versus South Carolina Department of Highways and Transportation.

MR. VOGT: Which is still pre-rule, Your Honor.

THE COURT: What?

MR. VOGT: That is still pre-rule.

THE COURT: They don't specifically address the issue about what experts are allowed to testify. Apparently they did testify in this case, but it was in relation to cross examination.

MR. VOGT: It's still pre-rule.

THE COURT: What are the code sections you are referring to?

MR. VOGT: I am sorry, Your Honor. These were actually part of the plaintiff's Motion in Limine. This is the International Fire Code, and the International Fire Code adopts 241 and the section of 241 that we believe applies is 8.3.3, and Your Honor we have also submitted the affidavit of John Dunlop who is the Deputy State Fire Marshal responsible for York County which sets forth the statutory basis as to the International Fire Code and the NFPA being part of the South Carolina International Fire code.

THE COURT: This says yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration. Yard storage.

MR. VOGT: Yes, sir.

THE COURT: This is not yard storage is it?

MR. VOGT: Well, these are materials that were suppose to be store in the yard. There is a fenced in area next to the building, where the defendant had its porta pot, it's dumpster, its lift and also at times its construction materials, including shingles, roofing paper, those types of things.

What they choose to do is put those materials up on the roof because I think the evidence will show it saved money. So they converted what was yard storage --

THE COURT: What you are saying is if they were a danger when they were prohibited from having them in the yard they are certainly prohibited from having them stored on the roof.

MR. VOGT: Yes. The danger is if a fire starts in those materials and attacks --

THE COURT: Well, I understand. The point I am trying to make, I am trying to read the statute so I can rule.

MR. VOGT: Yes.

THE COURT: It doesn't say you can't store them on the roof.

MR. VOGT: Well, yard is define in the NFPA as open air storage of commodities. That is what the NFPA will say.

THE COURT: That's what I'm trying to figure out. Exactly what your position is and how it applies.

MR. VOGT: And that's what the state fire marshal also opined, Your Honor, in that affidavit, that it applies in this very situation.

THE COURT: Who is John Dunlop?

MR. VOGT: John Dunlop is the assistant state fire marshal, Your Honor. The fire marshal appoints a number of deputy state fire marshal. I think they call them assistants. He's the deputy state fire marshal and among his other areas he covers York County.

THE COURT: My question to you counsel is, why could he not testify it says I am familiar with South Carolina adopted 2006 Edition of the International Building Code, International Fire Code, NFPA 241, 2000 edition applicable at the time of the fire. Part of my responsibilities includes interpretation and enforcement of South Carolina Adopted International Building and Fire Codes, the State Fire Marshal Statutes and Regulations.

At the time of March 3rd, 2010 fire the applicable provisions of South Carolina adopted 2006 Edition of the Internation Fire Codes and reference NFPA 241, 2000 Edition, Standard for Safeguarding Construction,

Alteration, and Demolition Operations prohibits the storage of combustible construction material closer than 30 feet from the structure under construction and alteration. The storage of combustible construction material on the roof adjoining a building under construction does not comply with the South Carolina adopted 2006 fire code and specifically in NFPA 241.

Why can't he say that?

MR. SHEALY: Well, Your Honor, for two reasons. Most of what you just said is no longer relevant to have testimony for that because we are not contesting, again, what version of the code applied and we don't need to look to some other source as to tell us what the law is. We agree on what the law is. So he is not helpful to say here is what the law is. We agree and so that -- you tell the jury what the law is and then --

THE COURT: I can't tell the jury if a storage is combustible material or is a violation of the law?

MR. SHEALY: No, Your Honor, but you can tell them what the standard is, what the law says, that yard storage of combustible construction materials close -- yard storage of combustible construction materials may not be placed closer than 30 feet from the building under construction or alteration. That's what the law

says and you can you tell them that, and they can decide did we violate that, and then ultimately did then if we did violate that was that the proximate cause of this fire. So they determine the element of breach and the determine the element of proximate cause.

MR. SHEALY: Your Honor, clothing this with the State Fire Marshal this is the danger. The jury looks at that and says there is nothing for us to decide here. The State Fire Marshal has made its decision. It is the same reason why we have that statute that prohibits from introducing the accident report and who the officer found at fault in a traffic case, is because the jury naturally looks at this the police officer clothed with the authority of the law. Well, he found -- we get those questions all the time in those kinds of cases, who did the police officer find at fault. Can't tell you that because that takes -- that takes away your profits. And if we have the Deputy State Fire Marshal saying that --

THE COURT: I don't disagree with you on what you just said. We don't allow the police officer to testify who was at fault.

MR. SHEALY: Right.

THE COURT: The police officer can testify about a

violation of the law. It helps the jury understand in that regard. But he is not testifying as an expert, but he is testifying as to the speed limit there is 55. This person was clocked at 65, and you know, then it is obvious that they violated the statute. They are in violation of the statute.

MR. SHEALY: Well, Your Honor, it's apples and oranges there because the police officer can testify to factual observations that the police officer made. Can not contest that. The police officer saying I found so and so at fault. When the police officer says that he is saying, okay, he breached a standard and that breach was the proximate cause of the accident. Same two elements that are at play here.

THE COURT: I don't disagree with you, but we don't need -- the problem is we don't need an expert to tell us the speed limit is 55 and they find this guy doing 65 and he is exceeding the speed limit and it is a breach of duty carried over. We don't need an expert to tell us what that means.

With all these codes don't we need an expert to tell us what it means?

MR. SHEALY: No. We need the judge to tell us what it means, because it's the law. You tell the jury what negligence is. You tell the jury all kinds

of things that are viewed with legal significance, and I got jury charges to hand up to you at the appropriate time for to you explain to the jury these -- the applicable code sections because we agreed that those apply in this case.

MR. VOGT: Judge, I am really confused by that argument. The whole point of Rule 702 is to allow scientific, technical testimony by experts in that field to explain the application of the code. They are not saying this is the law. Of course the judge says that. But they are allowed to testify that this storage of materials falls within this code because, and they can explain it.

I think Mr. Shealy is suggesting that it would be inappropriate for me to ask the witness if Pickens Roofing stored combustible materials on the roof would that violate this code. I think Rule 704 says they can testify as to the ultimate issue of fact because he is not testifying to the law. He is testifying to the violation of law which is exactly what the jury will find. That is a question of fact. I think Mr. Shealy keeps jumping from the question of proximate cause, the question of breach of contract, and trying to say that is law. That is not the law. The jury hears all the evidence and they apply those facts. I

don't know how the plaintiff can possible try this case if it doesn't have experts to explain these issues. This is far beyond the understanding of any lay witness. This is exactly what expert testimony is suppose to do. As it's still going to be up to the jury to decide. One, like Mr. Shealy suggests, well, maybe there were other combustibles there. That's an issue of fact. Two, well, we don't really believe that the storage of combustibles in this case violated the code. They can find that after they hear the code provisions. They can identify an expert who will disagree. They haven't. They don't like the law. The law said -- they are trying to do exactly what they did in their Motion for Summary Judgement by now attacking the underpinnings of the expert testimony. It is really the same argument that they made in the Motion for Summary Judgement which was denied.

The plaintiff can't prove foreseeability. There is not enough evidence to prove foreseeability. There is not enough evidence to prove legal cause. That motion was denied. This is just another way of attacking plaintiff's evidence.

THE COURT: I am trying to hear you out. I want to make the right decision. It just appears to me there is a difference between an expert telling the

jury what the law is and telling whether certain facts are in violation of the regulations of the code and whether then it is up to the jury to decide. Whether certain facts that the plaintiff have to prove -- have to prove those facts, and the jury finds those and if the expert says, given these facts it's a violation of the code if you find that these -- you know, these facts would constitute a violation of the code.

Do you see where I am trying to go there. There is a difference between that and telling the jury what that the code means. There is a difference between the two. In saying that the code was designed to prohibit storage of materials, you know, and -- and -- and the storage of materials within proximity are prohibited by regulations. Why can't they say that and what the reasons why are prohibited are.

MR. SHEALY: Your Honor, I fail to see a distinction when you say the jury -- the expert, can not tell them what the law is, if the code is the law then how can the -- how can the expert tell about the code if the code is the law, if the expert can not tell them, okay, this constitutes a violation of the law and then what is the difference between saying this is a violation of the code. I mean, that's the issue. The code is the law. It is not just some

standard that the industry recognizes or that -- and the standard is not -- it's not shall do "X" in a reasonable way and so we need the expert to say what is reasonable under these circumstances. It is a bright line rule and the expert is saying, okay, the defendant in this case crossed the bright line rule and violated the law. I don't see the logical distinction between that and the cases that we cited whether it's security law or the law that applies to the construction. It's the law and, so I just don't see that the expert gets to do that.

I absolutely think the expert gets to say, gets to opine that without combustible materials being up there over and above the combustible materials that constitute the flat roof itself, there would not have been a fire of the magnitude that there was. We need an expert to tell us that. But when the expert starts talking about what violates the code that is where the expert is crossing that line, and I very much respect my learned opponent, I just disagree with him.

THE COURT: I am trying to make this distinction. You won't allow me to make this distinction. You just ride right over it and overlook it.

If he says this occurred this will be a violation of the code without saying they violated the code, in

my opinion, and therefore they were negligent there at fault. He is not saying that. If he says if these were stored there that would be a violation, that would prohibited by the code. Why can't he say that?

MR. SHEALY: Your Honor, the if, does not take that out of the -- that conditional statement does not take it out of the realm of the -- I mean, the expert is saying here is what the law says you can do and can't do. That's an opinion of law. If you do that, that's okay. If you do this that is not okay. That is an opinion of law.

THE COURT: I understand what you are saying. Why can't I say this is prohibited by the statute?

MR. SHEALY: Because that's an opinion. That it is prohibited. Prohibited means it's illegal. It is an opinion of law.

MR. VOGT: Judge, I guess what I am struggling with is we are going round and round here, but every time Mr. Shealy starts saying it is a question of law and then a paragraph later he says there is no dispute what the law is here and so I don't really -- and that's why, that was the impetus of taking judicial notice of the law in this case, so we can instruct the jury on that. If we can't do that that's fine. But what Mr. Arnold and what Mr. Dunlop and what all the

other experts are doing, they are assisting the trier of fact in understanding if behavior violated the law. They are not saying this is the law. Everybody agrees this is the law. That's exactly what expert testimony says.

THE COURT: He is saying to make a statement that this violated the law requires him to interpret the law and say what the law is in order for him to say this conduct violated it.

MR. VOGT: But that's not saying what the law is. You are saying this conduct violated it. That's a question of fact that the jury is going to determine and that's precisely what 704 allows. It allows an expert to opine as the ultimate issue of fact.

The violation of code is a question of fact because what the code is is a question of law. There is no dispute here what the law is. It's whether they violated it. That's a question of fact and that's exactly what these experts will help the jury understands.

THE COURT: I am just trying to figure out how the jury would understand if the Court were to instruct them that the International Code of this particular section was in force and effect at the time this happened. That's basically taking judicial notice, if

you want to call it judicial notice, but just instruct them to that affect and then tell them -- and then charge them with regard to those sections. How they would understand. That's the problem I got. The one I am dealing with. How will they understand without some explanation from someone other than the Court because I'm not allowed to charge them on the facts.

MR. SHEALY: Your Honor, I think --

THE COURT: I am not saying you can't go more than 55 miles an hour in a 55 mile an hour speed limit, if you do it's in violation of the statute. I can't say that. I can say that, but I can't in this case you can't say something that simple to them. So if I just say yard storage of equipment to be installed or combustible materials shall not be stored closer than 30 feet why wouldn't they understand that?

MR. SHEALY: Your Honor, I think some of those terms to the extent that they have legal significance have to be defined by you.

THE COURT: How will I define storage on the ground to include rooftop?

MR. SHEALY: Well, that's what we got to argue about as to what the law means and you got to decide what the law means, but that's not anything that a jury -- that an expert tells you. It's a legal

determination.

THE COURT: The only way I can do that is charge them on the facts. There is no other way.

MR. SHEALY: I disagree.

THE COURT: Tell me how you would do it, judge?

MR. SHEALY: Well, Your Honor, I would be happy to hand up a proposed --

THE COURT: No, just tell me how you would do it.

MR. SHEALY: Well, Your Honor, to the extent that yards storage has a definition, then we give them that definition. If to the extent that combustible has a definition we give them that definition. The other words you charge them are to be given there plain and ordinary meaning. That's what the law says.

THE COURT: I can't interpret it, the statute for them based on the facts of this case. I can't do that.

MR. SHEALY: No, I don't think you interpret it based on the facts of this case, just based upon what the definitions are that are contained within the law.

THE COURT: If I tell them that storage, yard storage of equipment and combustibles also includes roof.

MR. SHEALY: No, sir, you just give them the -- the --

THE COURT: Oh, you love that, wouldn't you? You'd absolutely love that, wouldn't you?

MR. SHEALY: Actually, I would not like that at all.

THE COURT: Of course you would. Because the jury would say well it wasn't in the yard, so it doesn't apply to this case. Of course you would.

MR. SHEALY: Well, Your Honor --

THE COURT: Well, if someone has to explain it to them I can't explain it to them based on the facts of this case. That would be a charge on the facts. How are they to know what this means.

MR. SHEALY: Because there is a definition and you give them the definition. The definition doesn't make any reference to a roof.

THE COURT: The problem I got in reading this statute is it says yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration. And literarily that means in the yard. Yard material.

MR. VOGT: Material that is suppose to be stored --

THE COURT: How does the jury know that?

MR. VOGT: Well, exactly judge. That's exactly

right.

THE COURT: How does the jury know about yard materials. They are talking about all this stuff that is stored just away from the construction site that includes all the stuff. How does the jury know that?

MR. VOGT: How would they know without an expert, I agree, and that is precisely the problem.

MR. SHEALY: How does the jury know what the definition of proximate cause is?

THE COURT: Well, they don't. They are going to figure that out. Proximate cause, you not only had to be negligence but that negligence had to be cause the accident. You can be negligent and not cause an accident. I just went through that with you.

MR. SHEALY: But we define proximate cause for the jury in the charge.

THE COURT: Yeah. Yeah.

MR. SHEALY: We define words all the time with legal significance in instructing the jury what the law is to apply.

THE COURT: Tell me how you are going to charge this then?

MR. SHEALY: Your Honor, I have a proposed charge that perhaps need to have some additions to it.

THE COURT: No, kidding. No kidding. Why am I

not surprised that it now needs some additions based on the conversations that we just had on the record.

MR. SHEALY: Your Honor, would you permit me to hand up defendant's proposed Charge 12.

THE COURT: Hand it to the other side as well.

MR. SHEALY: Yes, sir.

THE COURT: I wouldn't even charge this. First part, I might charge the second part.

This doesn't have anything to do with this case whatsoever that I can see, unless some facts come up.

MR. VOGT: Which one Your Honor?

THE COURT: Well, about the first four paragraphs.

MR. VOGT: Well, there is a section of IFC, Your Honor, 315.3.1 that the plaintiff's expert will also opine was in force and also violated because these are eaves, Your Honor.

THE COURT: Well, see that hasn't come before me yet.

MR. VOGT: Exactly.

THE COURT: And I don't have all the facts.

The so call argument now, we are talking about now on the record and have this discussion about it doesn't come in to play on any of those.

MR. SHEALY: And Your Honor there is material in here and reason I haven't handed it up before now is

because of the very things --

THE COURT: Well, hear we go. Here is what you want me to charge. Exactly what I thought; Chapter 241, the very last paragraph in this request to charge, Chapter 241 also requires that yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration. That's the same thing I just read.

That's what the code section says. How does the jury know what that means, that is what I am asking you. I believe you don't want them to know what it means, but what does it mean to the jury.

MR. SHEALY: Your Honor, I am not trying to hide the meaning.

THE COURT: Well, of course you are.

MR. SHEALY: Your Honor, I promise I'm not. To the extent that yard storage carries a definition, it's been offered by plaintiff's counsel, I can't rattle it off like he can -- then that needs to be included to help the jury understand what yard storage means. I am not trying to -- I'm not hoping that the jury says, hah, yard storage, and that can't be on the roof, if that's not what the law defines yards storage as.

If it doesn't have a definition however, then we got the colloquy between the parties and with the Court has got to be, okay, what does yard storage mean in its plain and ordinary terms and does it legally cover this.

MR. VOGT: And that's exactly why you need expert, judge.

THE COURT: That's my point. Do you not need something to explain to the jury what that means.

MR. SHEALY: Your Honor, we don't have experts come tell us what the meaning of the statutes are. I mean, this the same thing as statute. We decide and we look at case law and other authorities to tell us what that is and if yard storage is defined in the code then we give them the definition in the code.

MR. VOGT: Your Honor, if I can just use an example. If my house burned down because allegedly an electrician mis-wired it, certainly I would be able to identify an expert who can say this is the code which required a circuit to be run in a certain manner and code provisions in the National Electrician Code like these are not easy for lay witnesses to understand. Certainly an expert could testify, well, this electrical circuit was not in accordance with code because it wasn't the proper size, because it wasn't

attached properly, because it was run next to other circuitry. All things within the expertise and technical knowledge. That's exactly what the jury needs to hear. This case is no different.

MR. SHEALY: Your Honor, and I appreciate you letting us continue to argue this point. Were we arguing as to whether a particular code section applied or not, if we had conflicting testimony as to no, that doesn't actually apply because of this situation, or this situation happens and no, it does apply. It's a different situation.

This is not a situation where anybody is saying that code section does not apply here. So we don't need an expert to say why it does or doesn't. It is the law that --

THE COURT: What we need an expert to say is what yard storage is and why this violates that section. Yards storage, materials normally stored in yard storage away from construction site, at less thirty feet away from construction site, whether that also includes the roof for construction going on. That's the concern that I got that the jury is going to be totally confused and mislead if in fact yard storage includes the roof, it's within thirty feet. So does it include the roof. And I'm sure you would love to

get up there and argue to them, oh no, this is yard storage, it doesn't have anything to do with the roof. They're arguing there's nothing in this code that prevents them from storing it up on the roof. You just can't store it in the yard within thirty feet and he can argue that to the jury.

I mean, you look at the language of the code. But if yard storage means a lot more than it includes certain things that are suppose to be in yard storage. I don't know what yard storage includes, what it is suppose to include.

Are you saying that's defined in here somewhere?

MR. SHEALY: I have not provided the Court at this time with the definition.

MR. VOGT: Your Honor, there is no definition in NFPA 241 for yard or storage. In the glossary there is a definition for yard storage, and I don't have the appropriate edition of the glossary, but the yard storage is open air storage of commodities. It isn't regulated to on the ground. Open air storage of commodities would include shingles, roofing paper, et cetera. And if I could, Your Honor, the entire point of these code provisions is, these were sprinklered buildings, so they are of protected from fire within, but if you have an exterior fire the sprinkler systems

don't do anything. So that's the purpose of these safety rules as far as construction, alteration, is make sure a fire that starts away from the building doesn't travel to it and engulf the building because then the sprinkler system doesn't do anything and that's exactly what happened here.

THE COURT: And what section here helps the jury understand what yard storage is?

MR. VOGT: Your Honor, there is no definition in NFPA 241 of what yard storage is. There is a glossary of terms that apply to certain sections of the NFPA. Certain words are picked out.

I think John Dunlop indicated in his testimony that that if it is not defined in a particular statute, as in his opinion the glossary didn't apply. Mr. Arnold may have a different opinion then that.

There is nothing in that specific chapter that defines yard storage.

THE COURT: I don't see anywhere in here where it talks about roofs or buildings under construction, I don't see anything in here about it.

MR. VOGT: Your Honor, if you look at the chapter heading, I think I cited these in my Motion in Limine.

THE COURT: Which one are you talking about?

MR. VOGT: Plaintiff's Motion in Limine, the

second one. The IFC, the scope of the IFC is 1401.1, "This chapter shall apply to structures in the course of construction, alteration, or demolition, including those in underground locations. Compliance with NFPA 241 is required for items not specifically addressed herein. NFPA 241 states in section 1401.2 the standard is intended to prescribe minimum standards for construction, alteration and demolition operations in order to provide reasonable safety, to life and property from fire during such operations.

Winthrop hired Pickens to demolish the asbestos roof and reinstall a new roof.

THE COURT: Having said that what section applies having combustible materials on the roof under construction.

MR. VOGT: 83.3 for per both fire marshal -- Deputy State Fire Marshal and our expert.

THE COURT: They don't get to say what the law is.

MR. VOGT: Your Honor, there is no question in the case that this code is adopted to by the State.

THE COURT: I don't have a problem with that.

MR. VOGT: They are testifying --

THE COURT: What authority does he have to give a meaning to the section in here that doesn't have it on its face?

MR. VOGT: Well, Your Honor, the State Fire Marshal is the authority having jurisdiction over state buildings in the state that is also set forth in our Motion in Limine, and as part of of those duties they have to enforce the code. Enforcement of the code requires interpretation of the code.

THE COURT: Someone doesn't agree to the interpretation they come here.

MR. VOGT: I am sorry Your Honor.

THE COURT: If somebody does not agree with that interpretation they come here.

MR. VOGT: If somebody doesn't agree with his interpretation they certainly could have an expert who can dispute his interpretation of the code.

THE COURT: They come to the Court to get that interpretation, right?

MR. VOGT: Well, it's the application of the code to a specific set of facts, Your Honor, that's the issue.

The Deputy Fire Marshal is, the State Fire Marshal is the authority that has --

THE COURT: You say they can solely interpret what these mean?

MR. VOGT: Not solely. They interpret it for code enforcement purposes. They are charged with that

under the statute.

THE COURT: They are not the final authority.

MR. VOGT: No, of course not, the Court is absolutely.

THE COURT: Have you got code section 4.1.1?

MR. VOGT: 4.1.1 Your Honor, of the International Fire Code?

THE COURT: Of NFPA, right. I got sections one through three and then seven to eight.

MR. VOGT: I have it on power point, Your Honor. I have it on my laptop.

THE COURT: Read it to me.

MR. SHEALY: Your Honor, I got a copy.

MR. VOGT: 4.1.1, separation distances between buildings under construction and construction-related structures, such as temporary offices, trailers, sheds --

THE COURT: Never mind, I got it here. Not much help. It is talking about the building and temporary shelter and the distance that is required for those. It's not really any help here I don't think.

MR. VOGT: You had asked, Your Honor, about the definition of yard storage. I have 2013 glossary of terms. The code obviously was much earlier then that. Yards storage is defined in it as the storage of

commodities in outdoor areas. There is no limitation there to ground.

THE COURT: That is what I am asking. How are we going to get to yard storage -- from yard storage outside somewhere to a rooftop, unless you say it's outside storage.

MR. VOGT: It's outside storage.

THE COURT: Yard storage, what includes that? What definition of language includes that, outdoor.

MR. VOGT: It says storage commodities in outdoor areas. That's the limit of the definition. So outdoor area certainly would include the rooftop and I think that's what our experts will tell you. Because Your Honor, they have to be able to testify for the purpose of these code provisions is to protect the building from fire starting in stored combustible. It doesn't matter what the source of ignition is. If it's in that close proximity that allows the fire to spread to those buildings and that's exactly what happened here. I mean the jury can hear that. Doesn't mean they have to accept it, but that is precisely what is 702, 703, 704, allow an expert to do.

THE COURT: You just quoted 2013 version.

MR. VOGT: This is just, Your Honor, and again, I

don't want to mislead you. This was a 2013 glossary of terms.

THE COURT: It may not be broad enough.

I am trying to you think this through. I had building code inspectors testify concerning building codes whether something is a violation of building code or not, but I don't know that there is any objection to them being able to do that based on the law. Testifying about their opinion of the law. But certainly I have building codes inspectors testify in court before, on civil cases. I don't remember if anybody objected to it.

Let me of suggest we do this. I will think about it more if we can. I am leaning toward allowing it, although I got some question about it myself. I got to make sure the language can be fit in there myself.

MR. VOGT: Your Honor, can I hand up this. We got the motion Friday night and Mr. Jett put this together late yesterday. We have supplied Mr. Shealy a copy as well.

I think it covers any new ground in what we talked about. I just want to make sure it's part of the record.

THE COURT: It quotes the same cases. I don't find the case is particularly helpful, to be honest

with you. I would like to have something a lot more on point. But in any event, my suggestion would be perhaps that we go ahead and bring the jury in. Swear them and let me give them a preliminary charge. We could probably get through the opening statements if we can stay away from the alleging -- well, you can allege it. I guess you can certainly argue to the jury that they violated, allege or argue -- not argue, but allege that they violated the code without saying anything about expert witnesses, et cetera. What expert witness is going to testify to.

Do you see what I am saying? Stay away from that in opening statements so can I reserve that.

MR. VOGT: So I could -- I am sorry Your Honor, so you obviously anticipated my opening statement. I can argue -- I can tell the jury they can expect to hear expert testimony that this fire would not have occurred and spread --

THE COURT: No.

MR. VOGT: But that has nothing to do with the code. This fire would not have occurred and spread if there weren't combustibles there.

THE COURT: Yeah, I guess if they are going to testify to that I guess they can do that. It's not an interpretation of the law. I think you can also just

in your opening statement allege that it violates the code, but you couldn't testify an expert is going to testify to a violation of the code, yet.

MR. VOGT: Okay. Can I -- and again I just want clarification, Your Honor. The Deputy State Fire Marshal is going to testify in this case to the points raised in that affidavit. So I can't identify, I can't say the Deputy State Fire Marshal is going to testify as to the code that was enforced at the time of the fire and that the storage of combustibles on a flat roof would violate that code. Something to that effect.

THE COURT: No, if I rule you can't do it then what is going to look like for the jury.

MR. VOGT: I am trying to make sure I understand the parameters.

THE COURT: I am just asking you to stay away from that. I know in your opening statement you could state that you have experts testify. I wouldn't go so far as interpreting the code. I may let you do that. I just haven't decided yet.

MR. VOGT: Okay.

THE COURT: But before we get into it it's too late to do anything about it once we get into it and I prefer to stay away from it in opening statement if we

can.

MR. VOGT: For instance, Your Honor, I intended to state something to the effect that Pickens breached its contract -- which I know you don't have a problem with and was negligent when it violated the fire code by storing materials.

THE COURT: You can argue that. That's got nothing to do with experts. You can say -- you can alleged in your opening statement they violated the fire code, whatever code you want --

MR. VOGT: Okay.

THE COURT: -- that you intend to. I don't want you to say that we are going to put up an expert who is going to testify they violated the fire code.

MR. VOGT: Okay.

THE COURT: Yet.

MR. VOGT: Okay.

THE COURT: I want to try get as much done as we can and still have an opportunity to think about this a little bit more.

MR. SHEALY: Your Honor, there are two other items that are in our Motion in Limine that -- there are actually three, but one of them I don't think needs to be argued because of the bifurcation.

THE COURT: What else is there?

MR. SHEALY: Your Honor, the third issue that we raised is we were seeking an Order precluding plaintiff from questioning the defendant's employees or representatives about their familiarity with the International Fire Code and National Fire Prevention Association, chapter 241 or any other applicable code or standard, and simply because it is not relevant. Everyone is presumed to know the law. Whether they are familiar with the details of it is not an issue. It's not relevant even if it has any relevance. Its out weighed substantially by the risk of unfair prejudice. The law is again the law, and we are presumed to know what it is.

MR. VOGT: Your Honor, I think what Mr. Shealy is arguing is that ignorance is no defense when it comes to the law. However, he is trying to use it as shield so the plaintiff can't demonstrate to the jury roofers who are required to meet minimum standards, knowledge or lack of knowledge regarding basic safety procedures.

THE COURT: You can ask them about safety procedures and what they have been instructed. Management, includes supervisor, I think you can ask him whatever you want to about the code because they are in charge of supervising and directing everybody

else and they can't do that without knowledge and be within the code if they don't have knowledge of it. So what I am saying is the workers, individual workers, roofers, can be asked about what they have been instructed with regard to safety, et cetera, but then the supervisor or management can certainly be questioned about their understanding about the code. You don't disagree with that do you?

MR. SHEALY: I disagree partly, Your Honor.

THE COURT: How?

MR. SHEALY: Your Honor, their understanding of the code now we are asking lay people what they understand the law to be.

THE COURT: What they are required to do and what they are required to do on the job site and at least management is going to be directing these people as to what they do certainly ought to be knowledgeable about the code, what the code requires. All of them you say are presumed -- everybody is presumed to know the law, but the truth of the matter these are very technical things and we don't expect lay people, workers, laborers, what have you, to know what the law is or what the regulations are here. But somebody should know who is contracted for business in the state; a supervisor and management certainly should know. They

got no excuse for not knowing to make sure that the workers do what they are suppose to do.

MR. SHEALY: Your Honor, I can't argue with the point that you are raising. My point is that I don't believe a trial is a pop quiz on what your knowledge of the law.

THE COURT: I don't care what you think a trial is counsel. That's ridiculous. A trial is to get the truth and see what people knew or didn't know.

MR. SHEALY: I agree completely.

THE COURT: And if they weren't trained or they weren't given safety precautions they are allowed to bring that out. You know that.

MR. SHEALY: I certainly do. Yes, sir.

THE COURT: And management, even if I preclude them from getting into too much about the code they can ask them generally what they have been instructed to do.

MR. VOGT: Your Honor, the contract required Pickens to conform with all the codes.

THE COURT: I understand. Management is going to be stuck with that. Okay.

MR. SHEALY: Yes, sir.

THE COURT: Supervisors and management can certainly be asked about those things. Do you

understand me. It's ridiculous to say that they can't. I don't even know why you take that position. That's a ridiculous position in my opinion.

Saying people go out to do contract work for this size and their management, supervisors, don't have to know what code requirements they got to meet to make sure they are doing something according to the code. That's ridiculous. Why do you even have a code.

MR. SHEALY: Your Honor, I'm not -- certainly I want the record to be clear that I am not arguing that they are not required to know. It's just that the questioning of how well they can recite chapter and verse.

THE COURT: I'm not going to expect them to do that. I will allow them to ask a question, to quote, but I'm saying did you know that this section requires this or did you know it requires that. Yeah, they can ask them that.

MR. SHEALY: Understood.

THE COURT: I'm not going to say you understand every word of the code. That would be ridiculous. But they can say this code provision requires you to do this, are you aware of that. They say yes or no. And they can ask about safety precautions and what they been instructed and what the company does insofar as

safety instructions and training. They can ask them that. You know they can do that. Management does. Certainly you should be able to ask them about their knowledge about the code. Not quote it chapter and verse cause nobody can do that I don't think. Not even probably the fire marshal who interprets and enforces it every day. But they should be able to ask general questions to make sure that they are in compliance otherwise there is no need to have it.

MR. SHEALY: Understood.

THE COURT: And so the people that are in management and supervisory positions certainly ought to know the important parts of the code as far as to what they are doing on that job site. I think they certainly can be asked about that. Not chapter and verse, but whether they are aware of certain sections.

MR. SHEALY: Yes, sir.

Your Honor, finally and this really relates back to what we talked about previously. In the course of Discovery lots of witnesses were asked about the definition of combustibles; lay people, experts. Combustible again is a term that is --

THE COURT: Need an expert?

MR. SHEALY: No, sir.

THE COURT: Yeah, I know you don't want an expert

to testify to that. Why can't they ask that?

MR. SHEALY: Because it doesn't matter what their interpretation of combustible means. It matters what the Court's interpretation of combustible means as it instructs that.

THE COURT: I'm the one that has got to say what combustibles mean now.

MR. SHEALY: Well, Your Honor, if combustible is word, a term of art that appears in the law then the jury needs to rely on the Court to tell the jury what that term means, and we've indicated that it indeed is used in sections that have the force of law in this case. So ---

MR. VOGT: Your Honor, can I just give you an example of how this came up during the course of Discovery?

THE COURT: Yes, sir

MR. VOGT: Mr. Roofer, employed, are you familiar with FDA 8.3.3 which prohibits yard storage of combustible construction materials? No. As part of your standard of practice, is it appropriate for you to store combustible materials on an adjoining roof to knowing it's under alteration and demolition. Some of them said no, but anything that is spontaneous -- essentially anything that is spontaneous combustion

shouldn't be on the roof.

So the question is, what is your understanding of combustion? If they said spontaneous combustion, I said, well, how about something that burns which is combustion. Then the answer changed. They wanted to call that flammable. It was just the lines of questioning are just to understand what they believed is allowed to be stored on the roofs.

They don't have -- they didn't have a understanding of the code. They think -- some of them -- combustion means spontaneous combustion. Combustible construction materials is something that can burn at its simplest form. And that's all these lines of questions were.

I don't understand why that would be an issue, Your Honor, when you are talking about roofers and roofer's employees and I am asking, well, what can you store on a roof.

THE COURT: Well, I think you can certainly ask them that, what can be stored on the roof. Combustion -- I agree with defense counsel that they shouldn't be required to define that. You go to the code and see what it says.

MR. VOGT: Combustion says -- a couple different versions, but capable of undergoing combustion,

capable of reacting with oxygen and burning if ignited.

Combustible materials, is any material that in the form in which it is used and under the conditions anticipated will ignite and burn, or will add appreciable heat to adequate fire.

THE COURT: Seems like to me that would be helpful on to the jury.

Well, I wouldn't be beating up on laborers or people who go up there. They are not expected to know, to be able to define these terms and that sort of thing. They should know what they have been instructed what they can and can't do in safety instructions and other instructions they have had. They should be able to certainly testify to that and management certainly should be able to testify concerning the understanding of the code. I think they can be required to be able to answer questions about that.

I don't think anybody should be out there taking on jobs at this site without an understanding what the code is, what you can and can't do. So I think it is reasonable to expect them to know that. I think they probably have to do know that to get their contractor's license.

All right, anything else?

MR. SHEALY: Nothing further from the defendant at this time, Your Honor.

MR. VOGT: Nothing, Your Honor.

THE COURT: All right. Let's be careful with opening statements. This is something I wish you would have sent to me. I think these Motions in Limine certainly would have been helpful to me to look at ahead of time. So, I mean, here we spend the whole day in here and we are trying to do a case in a week and we spend a whole day in here discussing Motions in Limine without me having any idea what they are until we get in here.

All right, let's stay away from that. Let's bring the jury in and I will swear them and I will give them a preliminary statement and then we will have opening statements.

MR. VOGT: Your Honor, can we have a moment to set up a power point for the opening?

THE COURT: Yeah, if we have a couple more minutes it will probably be tomorrow.

MR. VOGT: Mr. Jett is pretty fast, and I will -- I will endeavor to take out a lot of stuff.

Okay. I think we are ready, Your Honor.

Your Honor, we had submitted stipulations as to

evidence and value. Do we want to make those part of the record now as far as exhibits?

THE COURT: Can somebody do that while somebody else is setting this up?

MR. JETT: It is ready.

MR. VOGT: The parties jointly have agreed to the stipulation of the following Plaintiff's exhibits; one, two, four through eleven, thirteen through sixteen, eighteen, twenty -- three through thirty-one, thirty-five, thirty-six, forty, forty-A, forty-one through forty-eight, fifty-one, fifty-two, fifty-four, fifty-six, fifty-eight, fifty-nine A through F and sixty. The parties have also stipulated and agreed that the pre-fire values of Bancroft Hall and Owens's Hall exceeded the cost of repairs to those buildings cause by the March 6, 2010 fire.

MR. SHEALY: Your Honor, the parties have also stipulated to the authenticity and admissibility of defendant's exhibits one through forty-two. Several of those will not be introduced because they are in fact duplicative of the plaintiff's. I have handed to our court reporter the exhibits that we will be introducing.

THE COURT: My understanding there is no objection to the admissibility, is that what you are saying?

MR. VOGT: No objection to the admissibility or authenticity and some of those plaintiff's exhibits may not actually be used as well depending on the court's rulings.

The other thing, judge, before we start openings we talked about bifurcation. Can we just simply advise the jury of the dollar amount of the claim and that that issue will be decided after the hearing as to liability.

THE COURT: I don't have any problem with telling them about the amount that you are seeking, you claim as damages.

MR. VOGT: Okay. Pardon me, judge, sorry for interrupting you.

THE COURT: Yes.

MR. VOGT: Judge, may I release Chief Driggers for the day.

THE COURT: Yes.

Please bring the jury in.

(Jury enters the courtroom.)

THE COURT: Ladies and gentlemen of the jury panel, I apologize for the long delay in getting you out here, but we got into some pretrial matters as I told you before that we had to get into and it took much longer then anybody anticipated it would take and

so for that reason that is why we had to keep you back there. I apologize for that. I don't like to do that, keep jurors back in the jury room waiting.

We have been out here working the whole time, since a few minutes after two we have been in here working, at any rate we are now ready I think to get started with trial. I am going to ask the clerk if she will to please swear the jury panel.

(Whereupon, the jury panel was sworn by the Clerk.)

THE COURT: Ladies and gentlemen of the jury panel, I am going to give you what I call a preliminary instruction about the trial and how we are going to proceed in this trial, a format of what you can expect as we go along. I suspect that most of you have not served on a jury in Circuit Court before and might be unfamiliar with it. I hope this will make you a little more familiar with your surroundings and a little more comfortable.

The first thing that will happen after I completed my instruction to you is that an attorney for the plaintiff will make an opening statement to you and then the attorney for the defendant will have the same opportunity to address you in an opening statement. These opening statements by the attorneys are not

evidence, but you should pay close attention because they are in essence going to identify to you what they perceive or say the issues in the case are. After they made their opening statements to you then the plaintiff will proceed by presenting testimony and evidence they want you to consider. The reason the plaintiff goes first is that the plaintiff has the burden of proving their cause of action against the defendant. Defense counsel will have the opportunity to cross examine plaintiff's witnesses. When the plaintiff has finished presenting his witnesses and evidence the defendant will have the same opportunity. Likewise the plaintiff's attorney will be allowed to cross-examine the defendant's witnesses.

Let me explain to you what evidence in the case is. Evidence is the sworn testimony you will hear from the witness stand here to my right, exhibits admitted into the record for your consideration by me, the presiding judge, and any stipulation of counsel which will be made known to you and may be considered by you as an agreed fact in your deliberations. Give such consideration and weight as you deem appropriate in those deliberations. Exhibits may take many forms such as documents, pictures, video tapes, maps, diagrams and so forth. Sworn testimony, exhibits and

stipulations are the only evidence you may consider in your deliberations in this case. You may not consider anything you heard from any other source about this case as evidence in making your decision.

After you heard all the evidence and the attorneys for the plaintiff and the defendant will once again appear before you and make what we call final or closing argument. We call them arguments because the attorneys are allowed at that time to argue their positions to attempt to persuade you as to their view or position as to the facts.

Following the final arguments of counsel I will then charge you which simply means to instruct you as to the law which applies to the issues in this case. You will then retire to the jury room to deliberate and reach your verdict. That is how a case is tried in common pleas or civil court whether it be this case or any other case. Some cases take a half a day or a day, some cases take weeks. But the same format applies in every case.

As a trial judge I have three functions to perform during the trial. I am the presiding officer and therefore must see that the trial is carried out in an orderly manner. I decide based on the rules of civil procedure whether testimony and other evidence

are admissible into the record for your consideration. And at the conclusion of the trial I instruct you as to the law you must apply to the facts in this case in reaching your verdict.

You, ladies and gentlemen are also judges in this case. You are the judges of the facts. In other words you determine the truth of the facts in this case. Under our constitution I'm not permitted as the judge of the law to have opinion about the facts, so I do not get into whether I believe a witness or not. That is not my function. I am not even permitted to express an opinion if I had one as to the facts in this case. So you the jury weigh the evidence and determine the truth of the facts.

Now, I do not permit jurors to take notes during the trial because my experience is that while writing notes you may miss something very important for you to hear and you may fail to observe a witness when testifying. It is important that you pay careful attention to all testimony since you must judge the credibility or believability of each of the witnesses and weigh all of the evidence in order to determine the truth of the facts. Now during the trial the attorneys may object to the admissibility of certain testimony or other evidence. I will either sustain

the objection, which means I agree and the evidence may not be made part of the record for your consideration, or I will overrule the objection which means as the judge of the law I have determined that it is admissible as part of the record for your consideration. The mere fact that I have admitted it does not mean that you must believe it or disbelieve it. I simply determine that it is admissible under our rules. It is up to you to believe or disbelieve it and to assign such weight to it as you determine to be appropriate.

At the conclusion of the trial when I send you to the jury room every exhibit that is admitted into evidence will be sent to the jury room for you to examine further and to consider.

Ladies and gentlemen, whatever your verdict in this case it must be your unanimous verdict. All 12 jurors must agree on the verdict which the foreperson will be authorized to write on behalf of the jury.

Ladies and gentlemen, you are not to discuss this case at any time during the trial until I tell you and that will not occur until you have received all of the evidence and I have instructed you upon the law. You should not discuss the case among yourselves and you should not discuss it with your family, friends or

anyone else you might see on recess from Court. You might say well, what's wrong with our discussing the case among ourselves as we go along or what's wrong if somebody finds I'm on the jury and they want to know something about the case, what's wrong with discussing it. The problem with discussing the case among yourselves and with anyone else is that once you start discussing a case you start forming opinions and you wouldn't be fair to both sides of this case if you didn't wait until you heard all the testimony and evidence from both sides and I've instructed you on the law that applies before you start forming opinions. Until then keep an open mind, wait until you have all information you need before you start forming an opinion in deciding the case.

If you should overhear the parties, their attorneys or witnesses talking about the case outside of the courtroom you should move away from them and not listen to those discussions. Again, if anyone should deliberately try to discuss the case with you you should not discuss it with them but leave and report that attempt to me through the bailiff or the clerk of court. Give the best description you can of that person. They will let me know and I will deal appropriately with that person. No one should try to

discuss the case with you. If they do I certainly wish to be made aware of it.

If there should be any media courage of this trial please do not read, listen or watch any media account of this trial until after the trial is over and the verdict is in. If there should be any media coverage of the trial, I don't know of any at the present time but we never know about that. If there should be any media coverage of this trial please do not read, listen to or watch any media account. If there should be media coverage and someone wanted to save it for you until after the trial is over you are welcome to read, listen or watch any media account of the trial after the trial is over and the verdict is in.

It is very important that you make your decision solely on the sworn testimony and evidence that comes in through the trial and not from any other source. There is no way we can guarantee the accuracy of any other account of this trial and the facts of this trial. You need to base your decision solely on the sworn testimony and evidence that comes in during the trial. Please do not -- I am well aware that a lot of people these days get information from electronic devices such as computers, ipads, etc, smart phones and that sort of thing. Please do not go on to any

kind of electronic device and try to find out anything about this case, or if there should be media coverage about this please do not go on to read any media account. Please do not go on those to try and find out anything about this case. Again, we can't guarantee the accuracy of that information. After the trial is over that is fine, but in the meantime please do not do that.

I'm concerned about your ability to see and hear the testimony and evidence so you can properly do your job. I try to take a break about every hour and a half. If you need a break before a break is taken, please raise your right hand and let me know and I will take a break as quickly after that as I can. If you can not see or hear something you need to hear or see I will try to anticipate that but some of you are much further away from the witness stand and where the attorneys may be standing, so if you can not hear or see something you need to hear or see during the course if the trial please do not hesitate to raise your right hand and let me know. I will make sure that you are able to hear or see so you can properly do your job.

If you wish to communicate with the Court other then needing a break or the inability to see or hear

please right the message down on a tablet that will be provided for you back in the jury room. Give that to bailiff. The bailiff will bring it to me. I will either correspond in a like manner or I will bring you back out in the courtroom and respond if the case need be. That is how we should communicate now that you have been sworn as jurors in this case.

A couple of things. I want to explain the role of the two alternates in this case. Miss Joyner and Mr. Burris. You are alternates in this case. Your role is the same as the first 12 jurors chosen and that is to listen carefully to the testimony and evidence so you will be in a position to deliberate and help reach a verdict in this case because if an emergency should develop with regard to other jurors in the case and we had to excuse those jurors you would automatically fill in for the missing jurors. You could not do that if you hadn't listened carefully to testimony and evidence and be in a position to deliberate and reach a verdict in this case. As your first official act I will ask you once you go back into the jury room and that will probably be when we adjourn for the day, go back in the jury room and elect from the first 12 jurors chosen, not the two alternates, but from the first 12 jurors chosen, a foreperson. And I will

explain the role of the foreperson.

The foreperson is asked to serve as spokesperson for the jury back to the Court. So if there is a matter that needs to come to the Court the from the jury we ask that the foreperson write the message down on the tablet, again give it to bailiff. The bailiff will bring it to me and I will correspond appropriately. We also ask that foreperson serve as monitor once we reach at deliberating stage of the trial to make sure to maintain some or and deliberations and make sure you every one is allow to participate and be heard in the deliberations and finally once a unanimous verdict is reached by the jury you record that verdict on the verdict form which will be provided to you and explained to you at the conclusion of the trial.

The primary role of the foreperson is the same as every other juror and that is to listen carefully to the testimony and evidence so you will be in a position to deliberate and help reach verdict in this case. Once a foreperson is elected from the first 12 jurors that person will write their name and juror number down, give it to bailiff and the bailiff will bring it to me so I will have it. We ask that alternates keep the same seats throughout the trial.

The foreperson will sit on the first seat of the front row once that person has been selected. We ask the foreperson to also keep the same seat throughout the trial. All the other seats are interchangeable so it really does not matter where you sit. So we like to have the foreperson and alternates in the same seat.

One other matter, if you have something to drink back in the jury room that you want to bring in the jury box the Clerk of Court allows to you do that and so do I. So if you have water, coke, tea, something like that you are welcome to bring in the jury box you are welcome to do that. Counsel, myself will be sipping on water as we go through the trial. If you want to bring something to drink you are allowed to do that.

Thank you for you kind attention, ladies and gentlemen. We are to that part of the trial where counsel make opening statements to you. I will ask that you listen attentively while counsel addresses you in opening statements.

Counsel, you may proceed.

MR. VOGT: Thank you, Your Honor. May it please the Court, ladies and gentlemen of the jury, for those of you who forgot, my name is Peter Vogt. I am representing Winthrop University. With me is Zachery

Jett. Also here to is Walter Hardin, Vice President of the facility management of Winthrop University.

For over one hundred years Winthrop has provided education and training to the young men and woman of South Carolina. What started out as a teaching college for woman now serves over 6,000 students and offers a variety of graduate and undergraduate degrees. Over time the campus has been transformed especially in the last two decades. Winthrop has built new buildings, rehabilitated old, all in order to provide its students the best possibly facilities and education. Through all it's growth Winthrop has tried to retain it's small town college atmosphere and to carry out it's mission to educate it's students to become leaders in the community and profession.

On March 6, 2010 a fire significantly damaged two of Winthrop buildings. This is an overview. Could you turn the lights down. Thank you.

The yellow hi-lighted building is what is known as Bancroft Hall. That is an academic building with some administrative offices. The red building is Owens Hall, completed in the summer of 2007. A State of the art academic building with lots of class rooms. The evidence in this case will be that the fire started on a flat roof located between those two buildings. You

can see the flat roof in the circle on the slide. That flat roof was a TPO or plasticized rubber roof over metal decking. The elevation of flat rubber roof was below adjoining building roofs which were pitched. This is the photo of the flat roof after the fire, after the fire and investigation. You can see the pitched roof is coming from the sides above the flat roof.

The fire was on Saturday. Thankfully there were no students, no employees injured. However, Winthrop suffered seven and a half million dollars in damage. I am not going to kid you. That is a lot of of money unless you're an NFL quarterback or a CEO of a bank, or something like that. This part of the trial is not about those damages, but I do think it is important for you to know the amount so you will listen to all the evidence carefully.

Now, throughout the course of this trial you will hear the testimony of many witnesses including the fire marshal who investigated the fire. Winthrop employees, defendant Pickens Roofing and Sheet Metal employees who were in the mist of a reroofing project on Bancroft Hall at the time of the fire. You will also hear from Dan Arnold, a professional engineer who is expected to testify how the fire occurred and

spread to both Owens and Bancroft Halls. Through that testimony Winthrop will prove that this fire was caused by the breach of contract by Pickens Roofing and Sheet Metal, Inc., a South Carolina corporation, and by its negligence.

Now, in just a minute I will walk you through some of that evidence. But it is important as you sit here for the week to remember we live in a society based on rules. Some of those rules are safety rules that are intended to keep us safe from harm. For instance, a simple example; a stop sign is suppose to alert a driver to stop. A speed limit is intended to keep drivers driving at a safe speed. Often time people roll through stop signs. Often time people exceed speed limits and there is no consequences because there is no harm. This case is no different. There is a fire code in the State of South Carolina. Plaintiff's proof will be that Winthrop (sic) violated that fire code. That code is intended to protect the life and property of citizens of the State which includes Winthrop University.

This is our proof. The Saturday, March 6th fire was discovered by students who saw smoke coming from the building. Sorry, I should have told you that. This is one of the earliest photographs that was taken

by a student who saw the fire in a distance. 911 was call and the Rock Hill Fire Department responded. When they arrived they were let into the building by Winthrop policeman, James Howell. This is what the fire looked at it's earliest stage. You can see the fire on the right hand part of the slide. That's flat roof. This is close-up of that flat roof area.

Now, what is interesting when the fire department arrived the fire department didn't find any fire in the building. They went all the way up Owens Hall, all way the to attic, which is essentially four stories. There is no fire. No smoke in the first three floors. When officer Howell unlocked the doors to let them into the attic there was a little bit of smoke, but until the fire fighters climbed out onto the roof hatch onto the roof they didn't see any fire, and what they saw was fire spreading from this flat roof to these adjoining pitched roofs. All right. The fire spread in that manner because of the construction of Owens Hall is such that the fire got underneath the roof and that made it very difficult for the fire department to find all the fire and extinguish it. So this is early pictures of the fire fighter with the ladders out. It took hours to put this fire out. The next slide shows a hose stream in

the middle of the night still trying to put the fire out. So eventually after a lot of water, a lot of damage, a lot of smoke the fire was controlled. Now I already told you that Pickens Roofing was in the mist of a reroofing project on Bancroft Hall. The first thing Pickens had to do with tear off an existing asbestos roof.

Bancroft was originally built in the early 1900's and they still used asbestos back then. All right, so this was the demolition of the building. Again, that is the yellow hi-lighted area. So what Pickens did after they torn off the old roof, they put on a new roof which is a shingled roof which is; plywood, roofing paper, shingles. They started -- let me see if I can work my pointer -- at this end and worked their way around a U-shaped building. At the time of the fire they were about 80 to 95 percent done. All right. At the time of the fire they were working on this side of the building. The day prior to the fire in close proximity to the flat roof. Now as you might suspect there was a written contract between Pickens and Winthrop. The terms of that contract are not in dispute. The contracts also included specifications. Setting forth the manner in which the work was to be done by Pickens. The terms of those specifications

aren't in dispute. One of the terms of that contract was Pickens could store its materials, the stuff it was going to put on the roof, shingles, roofing paper, metal for the copper dormers, in two places. One was about half mile away in a parking lot. All right. The other was at the front of the building on the ground and that area you will see pictures of it during the course of the testimony it was a fence, and in that fence, an area Pickens had a porta potty, a lift to lift their materials up onto the roof, a dumpster and at times construction materials; shingles, roofing paper, metal. They bring those materials up from the main parking lot, store it in there, put them up on the roof. There is nothing in the contract that allowed Pickens to store its materials any place other than those two places; the front of the building on the ground and the parking lot a half a mile away.

The evidence will be that no one from Winthrop ever told Pickens well, go ahead you can store your construction materials any place else. Don't worry about it. Don't use the packing lot. It is okay not to use the lay down area. In fact the proper storage of materials was a topic of discussion before the work actually started. You see initially the contract

called for three storage areas; half mile away at the parking lot, the one at the front of the building and initially they wanted one out in this area. (Indicating) okay. But Winthrop didn't want it because what this is is a pedestrian walkway for all the students. There was other construction going on as well, so Winthrop said you know what, that is not a good area to do it. We will limit you to temporary storage at the front of the building. So a change order was issued. All right. That change order became part of the contract. That change order was negotiated between Winthrop and Clint Robinson. Client Robinson is Pickens project manager. So in that change order Pickens received an additional $19,300. The contract was about $350,000 initially. That paid for the increase in labor cost that Pickens would incur for having to bring the materials only from this one location, to this end, to that end. All right. Winthrop agreed, that is reasonable. We are limiting your storage, we will pay you more money.

Now, I told you that this fire started on the flat roof and you will hear the testimony in that regard from the Rock Hill Fire Marshal, Otis Driggers. Chief Driggers investigated the fire a part of his duties. He will tell you about the method that he

used to investigate the fire and how he came to the determination that the fire started on the flat roof. He also will testify during his investigation he interviewed three Pickens employees, the last people who were known to be on the roof prior to fire.

Now, to be clear there were no Pickens employees on the roof the day of the fire. The fire was Saturday. The Pickens employees, their crew left Friday about four o'clock. So when Chief Driggers interviewed Randy Pruitt, Matthew Pruitt, Brandon Lust, the three Pickens employees. He asked if they had been on the flat roof and what was there and what they told him, Matthew Pruitt said I had gone back and forth a few times a day to get materials and in that area Mr. Lust and Mr. Randy Pruitt testified there would have been sheets of roofing paper. Matthew Pruitt also said in addition to that there were roofing shingles. I told you about Clint Robinson earlier.

Now, during a project this large there is lots of people on the roof from Pickens. Clint Robinson was on this roof because he was the project manager. He was the one if you remember that negotiated the change order. He was the one who knew that they were going to get more money. Pickens was going to get more

money because they were limited to two storage areas, a parking lot and front of the building. However, Mr. Robinson is expected to testify that despite that there were two pallets of materials stored in that area. That area, that flat roof area, was used as a temporary storage area by Pickens. He is expected to testify the reason that was, was well, it reduced Pickens costs and it's common sense. Reduce cost and it was common sense. It will be up to you to judge after all the evidence is here in this case whether that made any sense.

Now, you are also going to here testimony of Dan Arnold. Dan Arnold is a professional engineer from the State of South Carolina. He was retained by Winthrop to analyze how this fire spread and codes. He is expected to testify that this fire would not have occurred or spread to Owens and Bancroft but for combustibles being stored on the flat roof. Now that is very important, so I will state that again. Mr. Arnold is going to testify, is expected to testify that but for the storage of combustible construction materials on the flat roof, this fire would not have occurred or spread. You will hear all the basis of his opinion, his background, his expertise, his understanding of the materials involved. All right.

Essentially, the heart of his testimony is that if there is nothing but a TPO, plasticized rubber roof, there are no other combustibles, the flame height would have been so short it would never have reached. So assuming that there was a fire without all these other combustibles the fire can't get high enough off the flat roof to reach the pitched roofs. And he will explain all that testimony through a series of photographs and series of illustrations.

Now, plaintiff will also prove that the storage of combustibles on the flat roof violated code. Again very important testimony. Now the defendant has not identified any expert who can contest Chief Driggers area of origin. The defendant has not identified any expert who contests Mr. Arnold's opinion as to the fire spread.

Now of course, ladies and gentlemen, you are going to hear Pickens Roofing and Sheet Metal's side of the story. And it is important to remember that Winthrop isn't here saying Pickens Roofing is a bad company. The people that work for Pickens are bad people. In fact Pickens hired -- I'm sorry -- Winthrop hired Pickens on a number of occasions before the fire and they continue to work with Pickens after the fire. Likewise, Pickens continues to bid for and receive

work at Winthrop. This lawsuit is not about that ongoing business relationship. This lawsuit is about the March 6, 2010 fire which caused all this damage and who was responsible for that.

So, you will hear the testimony of some of the Winthrop employees, Mr. Hardin who is here with me today and Wes Love who works for him. They will testify that the only project that was going on at the time of this fire on these roofs was Pickens reroofing. There were no other projects. Moreover, the access to the roof was limited by locked doors to the attic and the roof hatch.

Now, Winthrop had hired a company called Stafford Engineering as its project engineer. In particular a person named Vu Nguyen. You heard his name during the jury selection. Now, Mr. Hardin and Mr. Love are expected to testify about the roll of Stafford Engineering. In particular they were suppose to prepare the bid, send the bid out to all the prospective companies who wanted to bid on the project, make sure the bids that came back met the specifications, select the contractor and also perform occasional inspections to make sure that the work met specifications; to make sure that the shingles are put on the properly, to make sure the flashing was put on

properly. The last time -- the testimony will be, the last time anyone from Stafford Engineering was on the roof was February 4, 2010, Ken Ford of Stafford Engineering was on the roof at that time had been done to date. The last time anybody from Winthrop was on the roof was Mr. Wes Love. He was on the roof approximately a week before, Monday before the Saturday fire. Mr. Love will testify that he saw nothing on the flat roof at that time. There was nothing out of order.

Now, the other issue I expect you will hear a lot about is, well, Winthrop can't prove the source of ignition of this fire. That's absolutely true. No one can determine the precise source of ignition of this fire. However, it is critical for you to listen and consider carefully the testimony of the experts because that testimony is, but for the storage of combustible construction materials on the flat roof this fire doesn't occur and doesn't spread. And I explained earlier to you the basis of that opinion. So, if there hadn't been shingles and roofing paper present on the roof the fire doesn't occur and doesn't spread. Every fire takes takes three things; oxygen, source of ignition and fuel. We know there is plenty of oxygen to start a fire. We know there was a source

of ignition for this fire. We also know there was enough fuel for this fire, enough fuel so the fire spread from the flat roof up to the adjoining pitched roof. That is the linchpin of Winthrop's proof, fuel for the fire. Without Pickens having stored combustibles on the roof this fire would not have occurred and spread. There is no other evidence that anyone else stored anything on that roof. In fact if you can picture two pallets on the roof in the pictures you will see later it will be hard to fit anything else.

So finally ladies and gentlemen, I expect you to hear something to effect that this is what roofers do. We've always done it this way. It is okay, we always do this type of thing. Well, ladies and gentlemen, the contract did not allow Pickens to store those materials on the flat roof. We will have evidence that the code did not allow Pickens to store materials on the flat roof and they did it. It was suppose to store its materials in two places; the parking lot half mile away or the lay down area at the front of the building. It failed to do that.

In short, that's kind of like that stop sign, kind of like that speed limit that we talked about earlier. Sometimes there is consequences, sometimes there is

not and in this case there are drastic consequences.

At the end of this case as in every lawsuit the injured party, in this case Winthrop, has to prove it's case by what is known as preponderance of the evidence. Winthrop will do so in this case and I told you in this opening statement seven things, seven critical items that Winthrop will prove.

First, the fire originated on the flat roof between Bancroft and Owens. Second, the flat roof was a rubber roof and TPO. Third, Pickens Roofing and Sheet Metals, Inc. stored combustible roofing materials on the flat rubber roof between Bancroft and Owens. Fourth, the contract between Winthrop and Pickens required Pickens to comply with all applicable codes, ordinances, laws and regulations. Fifth, the contract between Pickens and Winthrop identified only two areas that Pickens could use for the storage of materials, a parking lot half a mile from the building and a lay down area on the ground at the front of the building. And sixth, Pickens breached its contract and was negligent when it violated the fire code by storing its materials on the flat rubber roof. Seven, but for the storage of those combustibles on this flat rubber roof this fire would not have occurred and spread to Bancroft and Owens.

At the conclusion of this case I want you to hold me to that. I want you to make sure Winthrop has proven those seven things. If Winthrop has met its burden at the conclusion of this case I will ask that you find in Winthrop's favor.

Thank you and happy Saint Patrick's day.

THE COURT: Counsel.

MR. SHEALY: May it please the court.

THE COURT: Yes, counsel.

MR. SHEALY: Ladies and gentlemen, I am Kirby Shealy. This is Burt Pickens. He is a member of the Pickens family that owns Pickens Roofing and Sheet Metal. This is my paralegal, Victoria Moody who is helping me with all this paper.

I represent Pickens, the defendant in this case. I am going to be brief because I know you all had a long day and you have got a long week ahead of you. Pickens is a family roofing company. It has been in operation for about one hundred years. It is still owned and managed by a group of brothers and their children. You will see several of them throughout the week come. One or two of them will testify, others will just be here because this is very important trial to them. Pickens has enjoyed a excellent reputation. I think you will hear witnesses say that as Mr. Vogt

indicated Winthrop University has done business with Pickens for many years and continues to do that today.

Evidence is going to show that Pickens is being made a scapegoat in this case for what is unquestionable a really bad fire. When fire happens the potential for loss of life is great, potential for property damage is great and we have here fortunately no injury or loss of life, but we have a massive amount of property damage and so when that happens it is natural that we look for who do we blame. Who is assigned this responsibility. And the law is clear that there are some times things that happen for which no one is to blame. That accidents happen and there is no one to blame. But Pickens is the scapegoat in this case because it is the most convenient entity to point to. But the evidence will show that Pickens was not there when the fire broke out. Had not been there for 23 hours when the fire broke out. No one that was on the crew of three people that was working the day before is a smoker. No one was doing anything with hot tools or anything that might have a fire risk associated. They were working. They were crimping copper panels on a dormer about 75 feet from where this flat roof was. They weren't doing any soldering or anything that had to do with flame or things that

are hot at all. And they left. Knocked off work about four o'clock on Friday and then it was almost three o'clock in the afternoon the next day that fire -- that smoke is seen by students and there is indeed no evidence that anyone can point to as to how the fire started. That is not in dispute that no one knows how the fire started and so what Pickens is being blamed for is it allegedly it had shingles and roofing paper on this flat roof. The very same shingles and roofing paper that were going to go on to Bancroft Hall. You will see some photographs that were taken the last day that we worked before the fire. You will see that there are shingles laid along the ridge of Bancroft Hall because that's the way roofers set them up when they are shingling. They lay them on the ridge. Those were still there after the fire. They are on Bancroft Hall now. That's the last evidence that we have. That the last photographs we have of anywhere close to where this fire broke out.

Now, you will hear evidence, testimony, that Pickens employees used that flat roof area to store pieces of metal, for two reasons. Metal tends to slide off of a pitched roof. You can't secure it and it can blow, it can slide off and it could hurt somebody, and when it is on the ground particularly

cooper tends to walk off. In attracts thieves, and so metal was stored on that flat roof and there is no debate, there is no denial by Pickens that it stored pieces of metal. There is going to be testimony that at times Pickens employees had other things on that flat roof. The question is what was on the flat roof the day when Pickens employees left and pay careful attention to that as to whether or not Pickens had materials there on the flat roof when they left.

Winthrop is going to try to prove that because there were shingles and roofing paper that the fire would not have occurred in that flat roof area and Mr. Vogt quite rightfully talked about the three things you need to have a fire. Well, we got two of those three things in this room with us right now. You got oxygen. Certainly you got lawyers in the room, you got lots of oxygen. And you got fuel everywhere. But you got no fire because you don't have a source of ignition and that's where their case is fatality flawed. There is no source of ignition. No one can point to it, and certainly no source of ignition that you can say Pickens Roofing was responsible for. So, that's ultimately what this whole case comes down to. Even if you disbelieve what you hear from the Pickens witnesses about the condition of that roof when they

leave, its unquestionably going to be the case that no one knows what the source of ignition was and remember that this is not a situation where Winthrop turned over a work site to a contractor and said, you know, you all have control of this area while the construction project is going on. No. Bancroft Hall was in operation. Was being used at the time. It was full of professors' offices and other things. Its was being used the entire time and when we leave on Friday, the evidence will show its Winthrop facility to supervise maintain and make sure that nothing happens to it.

So, ladies and gentlemen at the end of this case I am going to ask for you to render a verdict for Pickens. This is a significant case and the evidence here is very important. So all either of us can ask you for is to give us your undivided attention because this is a significant case and you will have to decide in your mind at the end of this case whether Pickens whether -- Winthrop has carried it's burden of proof that Pickens is responsible for this fire. We just believe that the evidence that they are able to put in front of you just won't establish that, and so we will be asking you for a verdict for Pickens Roofing at the end of this case.

Thank you very much.

THE COURT: You don't have a short witness you want to put up do you?

MR. VOGT: I am sorry, Your Honor, I sent him home.

THE COURT: All right.

THE COURT: Well, I told him it was okay. I didn't think we would get to him. We'll probably work a good bit this week. We will be working late some but we won't be able to do that tonight. In any event I got drug court in this courtroom in about 30 minutes or so tonight so we won't be able to go late tonight.

Thank you for your patience ladies and gentlemen. We will go ahead and adjourn for the evening. I will ask you be back in the jury room ready to go in morning at nine o'clock. At nine o'clock. Please again be mindful of my instruction to you not to try and find out anything about this case through electronic device, you are not read or listen to or discuss the case among yourselves or anyone else on the overnight break. I will ask you as your first official act to go back in to the jury room before you leave and elect a foreperson from the first 12 jurors chosen. Once you do that that person will write their name and juror number give it to the bailiff. Once

you have done that you will be free to go for the evening.

Hope you have a pleasant evening and will you see you back in the morning at nine o'clock.

(WHEREUPON, the jury leaves the courtroom.)

THE COURT: Counsel, Is there anything we need to take up out of the presence of jury from either side?

MR. VOGT: I am sorry I didn't hear you.

THE COURT: Is there anything we need to take up out of the presence of the jury at this time from either side?

MR. VOGT: Not as far the plaintiff, Your Honor.

MR. SHEALY: No, Your Honor.

THE COURT: All right. I will try and look at this tonight a little bit more and try to be ready to make a ruling on this with regard to whether I will allow the expert witness to testify about the code. I will try to be able to do that in the morning.

MR. VOGT: What time shall we be here in the morning, Your Honor?

THE COURT: I would say probably I'll be here a little before nine. I usually don't start until 9:30. I'll try to get all we can out of these days. I'll plan to work a little bit late, so you all can expect to do that as well. And so I would say as long as you

are hear about ten minutes to nine.

MR. VOGT: Thank you.

MR. SHEALY: Thank you.

(COURT ADJOURNED FOR THE DAY.)

(TRIAL CONTINUES ON MARCH 18, 2014)

THE COURT: Thank you. Please be seated. Any matter we need to take up at this time out of the presence of the jury?

MR. VOGT: Your Honor, I neglected to ask yesterday about an Order sequestering the witnesses who are going to be testifying.

THE COURT: A little late to be doing it now. What is your position?

MR. SHEALY: Your Honor, if he asks for it I don't have any opposition to that. I have two representatives here from the company either one could be a witness.

MR. VOGT: I have no objection to that, as well as the Winthrop representatives. I am talking about the other factual witnesses.

THE COURT: All right. I will grant the motion to sequester if there is no opposition to it. You can have your representatives here representing your defendant and you can have your representatives with regard to the plaintiff. All the other witnesses then will not be allowed in the courtroom until after they testify. Even after they testify they can't go discuss their testimony with anyone who has not yet testified.

Now, as officers of the Court it is your responsible to make sure they are not in the courtroom. I do not know who the witnesses are. I wouldn't recognize them if I saw them. It is your responsibility to make sure they are not in the courtroom.

MR. SHEALY: Your Honor, there are two witnesses in the courtroom that I need to excuse.

THE COURT: Okay. That's fine.

I will try to rule on this motion now if there is nothing else from yesterday that I took under advisement.

It is kind of unusual call. We don't have any direct cases on it, I think, and so I will have to go by my past experience and to some extent I am going on the Knoke, K-n-o-k-e case, to some extent because I think it more parallels this case. Certainly more than what the law is with regard to securities under federal laws recited by the defense as to whether somebody can testify about the law and give an opinion about law.

My past experiences are that witnesses are allowed to testify concerning building codes, et cetera, whether it is a violation of building code or not or what is prohibited or allowed under the building code.

I think they have been allowed to do that in past cases, not only my cases but other cases as well. In looking at this, scrutinized this very carefully and in reading it over last night and looking back over everything last night, I think the jury would have a very difficult time understanding these safety regulations -- fire safety regulations and the import of them and the purpose for them. I think the jury would have a very difficult time understanding that without some explanation. I think an expert under 702 and 703 their testimony concerning that, much as in the Knoke case with somebody explaining with regard to a fire detector and how that might have effected a person -- that child's ability to get out of a fire or how that worked out. That it violated national and state safety codes. He was allowed to testify concerning that and the Court allowed that. And so -- and I think this one fits with that. I think it would be very difficult for the jury to understand these technical terms and I do not believe that I could adequately charge them so that they would understand without charging on the facts of this case and so because of that I think expert testimony would be beneficial and I will allow it in under 702 and 703. Under 704 an expert can not testify concerning a

conclusion of law. They are not allowed to do that under 704. Under 704 they are allowed to testify concerning conclusions of fact. Opinions as to fact. So they can do that. What they can't do is give an opinion about the law. So what I am not going to allow the experts to do in this case is I will not allow the fire marshal to testify anything with regard to causation in this case. I think that he can -- the fire marshal can testify as to the code sections, the purpose of the sections, why these regulations are as they are and what's prohibited under the regulation and therefore he can testify that if there were combustible materials stored up on that roof he can testify in his opinion that that violates the fire safety regulations that apply in South Carolina. He can testify to that. He can testify that if there were combustible materials stored up on the roof that would be a violation of that section. That would be prohibited by that section, but he would not be able to testify concerning the causation, proximate cause and that sort of thing.

There are a couple reasons for that. One is we don't have anything I don't think, any factual evidence to show what started the fire. And just hold on a minute. I see you looking at me. But let me

finish up. He can't testify concerning as to what was on the roof because he doesn't know. He wasn't up there. And when the fire got through there was nothing up there basically. Everything burned up. And so as I read everything and the briefs and that's all I had so far. I haven't heard any testimony yet. So I think that would be the extent of the fire marshal's testimony. He can explain the code section. What's prohibited by the code sections and that if there were materials -- combustible materials stored up there that would have been -- that section prohibits storing of those materials on that roof, if that's his opinion, subject to cross examination by the defense and subject to being attacked by another expert we would not disagree with that. But I'm going to allow him to do that, and I don't think that he's reaching a conclusion of law in that case. I think that's his job. That's what he is required to do.

Building code inspectors are allowed to testify about violations of building code whether something violates it or not, what's prohibited or allowed under the building code. So I think that would be allowed in this case.

In so far as the expert is concerned, if rthey are properly qualified. I don't know what their

qualifications are yet, but if they are properly qualified I think experts can testify that the position of the plaintiff is that once this fire started that if combustible materials that were on the roof in violation of the regulations of the fire and safety regulations made the fire worse and the combustible materials -- there would have been some combustible materials to allow this fire to get as high as it did to get to the adjoining buildings and the reason for the regulations are that you can't have these stored materials within whatever it is, 20 or 30 feet of a structure they're working on, another structure is for that reason. I think he can testify to that.

Now, however, once the fire started the combustible materials would have made the fire worse. And I think that he can testify to that, if that's his testimony as I understand the pretrial briefs that is basically what he would testify to. And if he's properly qualified with expertise in that area I think he can testify to that.

However, the Court is not going to allow him to testify on proximate cause. He can testify that if there are combustible materials up there which were prohibited that these combustible materials would have

made the fire worse in allowing it to spread, to get as high as they did to get on the adjoining roofs. As I understand it that's the plaintiff's position and on a flat roof not allowed to have the materials and once there are combustible materials that is what caused the fire to be at bad as it was. I think he can testify concerning that, but he can't testify concerning proximate cause because he doesn't know what was on the roof and so, that's the problem I see in the plaintiff's case. I don't think he can testify as to proximate cause in this case. He can't testify but for this materials up there this fire would not have occurred. That's basically the position of the defense. I don't think he can testify to that.

Now, I think you could argue to the jury that you can infer that from the fact that these materials were there and they were prohibited from being up there and there is nobody else up there and, et cetera, and any other evidence you got about what other material might have been up there. You can argue that. That's basically circumstantial evidence. You can also argue that the fire would not have spread to the buildings without these combustible materials being up there. You can argue that. And he can testify to that subject to cross examination and any other expert

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

MR. VOGT: Your Honor, if I may, and in terms of offer of proof from Mr. Arnold, the testimony will be that this fire could not have occurred but for those combustibles being there.

THE COURT: How does he reach that conclusion?

MR. VOGT: Well, how he reaches that conclusion, Your Honor, is the nature of the TPO, flat rubber roof surface is such that it doesn't sustain a flame height high enough to reach the other buildings. Putting aside the issue of the source of ignition.

THE COURT: Could he say with certainty there was no other combustible materials on that roof.

MR. VOGT: He can rely on the testimony and the statements given by --

THE COURT: What testimony?

MR. VOGT: Well, the testimony will be from the fire marshal that there were combustibles up there from roofers and that's the only evidence is that the fire marshal --

THE COURT: Fire marshal can't testify to that

because he didn't see it. The only thing he can testify is they were prohibited from being up there.

MR. VOGT: The investing fire marshal -- that's the Deputy State Fire Marshal, is going to talk about the code. The investigating Rock Hill Fire Marshal, Mr. Driggers, will testify during the course of his investigation he interviewed the roofers after the fire and they told him there was roofing paper on that roof on that flat roof. There is also deposition testimony.

THE COURT: Well, I think he can testify to that.

MR. VOGT: Right.

THE COURT: But I am talking about your expert as to causation.

MR. VOGT: And my expert as to causation can rely on those statements as well because that's the type of -- because of the nature of fire.

THE COURT: Okay. I concede to you if their witnesses and I haven't seen it, but I am going by the pretrial and your briefs and what have you. If the defendant's witnesses testify, the employees testified that there are combustible materials on there they can rely on it.

MR. VOGT: Right.

THE COURT: But the fire marshal can only testify

that they were prohibited from being up there.

MR. VOGT: The Deputy State Fire Marshal, yes.

THE COURT: And the investigating experts can testify.

MR. VOGT: Your Honor, the other part of fire spread experts testimony --

THE COURT: What I am trying to get at is, I don't see just because combustible materials are up there doesn't establish causation and you are saying because -- what if there are other materials up there?

MR. VOGT: There is no evidence of any other materials up there.

THE COURT: I understand. There is no evidence there was not either.

MR. VOGT: Experts can rely on actual evidence in the case, Your Honor. If the jury wants to infer there were other combustibles that's up to the jury, but that's a question for the jury to weigh that evidence. The other part of my expert -- the fire spread -- Dan Arnold's testimony is that the burn patterns on the flat roof are indicia of there had to be additional combustibles on that roof because the manner in which the fire progressed. That there is also scientific evidence, not just the testimony of the roofers or the fire marshal's statements. There

is science behind it as well as far as damage for instance to with a fan that was close by to the roof, damage to coping, damage to flashing. Those type of materials.

THE COURT: I can't anticipate every single thing an expert is going to testify to. I will not try to do that. So we will just have to play it by ear then, when the expert testifies and the defense can make whatever objection they want to make and I will rule on the objection at the time.

I am trying to give you some general guidelines to get started.

MR. VOGT: Sure.

THE COURT: My concern is, you know, if there is enough evidence to establish possible causation maybe we can go there. But just merely having combustible materials stored on the roof would not be in and of itself causation. It might be negligent to do it in violation of statute, but it would not be causation. If an expert can testify -- we will see what they testify to. We will see.

Anything else?

MR. VOGT: No, Your Honor.

THE COURT: Please bring the jury in.

(WHEREUPON, the jury enters the courtroom.)

Good morning, ladies and gentlemen of the jury panel. I hope you had a pleasant night last night. We had an additional matter to take up this morning so we are a little later you getting out. We are starting a little later then we anticipated, but we ready to start now.

I had your note yesterday indicating that you had elected Janice McCartney, juror number 85 as your foreperson. Ma'am, that is you sitting in the front in the foreperson's seat. If you please keep that seat throughout the trial.

All right, we are ready to reassume with the trial now.

Counsel please call your next witness.

MR. VOGT: The plaintiff calls Otis Driggers of the Rock Hill Fire Department.

THE COURT: I will state for the jury the witnesses have been sequestered in this case which means they stay out of the courtroom until they testify, so we will have to get them in one at time as we call them.

OTIS DRIGGERS, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q Good morning. Could please tell us your name.

A Otis Driggers.

Q Mr. Driggers, how are you currently employed?

A I am a with the City of Rock Hill Fire Department.

Q What position do you hold?

A I am the Chief Fire Marshal.

Q How long have you been the Chief Fire Marshal?

A I ever been the Chief Fire Marshal since 2011.

Q Was are the duties as Chief Fire Marshal?

Q I supervise code enforcement and investigations?

Q In 2010 what was your position with the Rock Hill Fire Department?

A At that time I was the captain, the fire prevention captain.

Q Would your duties at that time also include investigating fires?

A It did.

Q If you could, please outline for the jury the extent of your education and training and background as a fire investigator?

A As fire investigator, in 1994 I became a fire investigator. I had training through the criminal justice academy. I am a graduate of criminal justice academy in basic law enforcement. I have attended arson investigation, fire

investigation through the criminal justice academy, fire and arson investigation through the national fire academy, fire and and investigation through the federal law enforcement training center and I have attended annual conference training through the South Carolina International Association of Arson Investigators from 1995 to present.

Q So almost 20 years in the field of fire investigation?

A A little over 20 years.

Q In the course of your career how many fires have you investigated?

A Over five hundred.

Q And do you currently hold any professional certifications with respect to the investigation of fires?

A I am certified fire investigator through the International association of arson investigators.

Q What is that association?

A That association is an international association. It is a group of investigators from public, private, federal, investigators from municipalities.

Q Do you hold any designations with respect to fire investigator?

A I am a certified fire investigator.

Q Certified. Okay. Have you ever testified at trial before as to the cause and origin of a fire?

A Yes I have.

Q On how many occasions?

A Multiple times.

Q All right.

MR. VOGT: Your Honor, at this time I tender Chief Driggers of the Rock Hill Fire Department as expert in the field of fire investigation and cause of origin investigation?

MR. SHEALY: Without objection. Your Honor.

THE COURT: All right. Without objection he is so qualified. Counsel, let me give the jury a explanatory instruction with regarding expert witnesses.

Madame forelady and members of the jury panel, I will give you an instruction with regard to expert witnesses. This will apply not only to this witness but any other witness who may be qualified as an expert in the particular field. So I will just give you this one charge, but it applies to0 all expert witnesses.

I charge you that although lay witnesses are limited to testifying by the facts within their knowledge, not allowed to give opinions. Certain witnesses who by training, education or experience are considered as experts in a particular field may give opinions in that field based upon the facts of the

matter and their conclusions and these opinions constitute evidence to be considered by you in connection with all of the other evidence and testimony in the case and it is for you to the jury to give it such weight as you and your experience and discretion may determine. By this I mean that you must weigh such evidence and accept or reject it in the same manner that you treat all other evidence in the case. The value of expert testimony does not depend on upon the skill and knowledge confessed by experts but upon the skill and knowledge they actually possess. Expert testimony is given for the purpose of enlightening you and not for the purpose of controlling your judgement.

You may proceed.

MR. VOGT: Your Honor, may I approach the witnesses.

THE COURT: You may.

Q Chief, I am just going to put these in front of you as we will talk about some of them as we go along.

MR. SHEALY: Your Honor, I hate to interrupt. Can we approach?

THE COURT: Yes, sir.(WHEREUPON, there was an off the record discussion.)

Q Chief, before we start talking about the March 6, 2010

fire -- well, first of all do you recall the March 6, 2010 fire at Winthrop?

A Yes, sir, I do.

Q So before we start talking about the details of that fire I would like to get oriented if I can.

Madame clerk, can you dim the lights please. Does the photograph on the screen before you depict Bancroft Owens Hall?

A Yes, sir, it does.

Q The yellow hi-light, is that Bancroft?

A Yes, sir, it is.

Q Okay. And the red is that Owen's Hall?

THE COURT: Excuse me just a minute. Counsel, I think maybe one of the witnesses just came in.

MR. SHEALY: May it please the court.

THE COURT: Yes, sir.

Some of the witnesses that come in may not know they are sequestered.

Q So this shows Bancroft in yellow, Owens in red and then a flat roof in between. Is that the proper orientation of the buildings?

A Yes, sir.

Q How did you first learn of the March 6,2010 fire?

A I was dispatched, notified by the emergency operation center.

Q And when approximately did you first arrive at the

site?

A I first arrived I believe it was approximately 1329 being 1:29 in the afternoon.

Q Do you know what time approximately the first alarm was as to the fire?

A Yes, sir, and that is error there. It is not 1:29, it was 1529, meaning 3:29. The fire alarm came in at 2:51.

Q Okay. So you were on site approximately a little bit more than an hour after the first alarm?

A That's correct.

Q And what did you see when you first arrived?

A When I arrived on my way in heavy traffic, of course, of everyone coming by to see what is going on. Heavy traffic. I parked a ways away from Owens building. As I was walking in I met with Officer Howe who was directing traffic and then I seen smoke coming from Owens building. Fire apparatus were on the scene and fire fighters were engaged in suppression activities.

Q And Officer Howe. Who is he employed by?

A Officer Howe is employed by Winthrop University.

Q He is a police officer with the Winthrop University?

A Yes, sir.

Q And what did he tell you, if anything, that was important with respect to your investigation?

A Officer Howe and I know each other. He saw me walking in. He spoke with me. He advised that he was the first officer

in. He seen the fire.

MR. SHEALY: Your Honor, objection. Calls for hearsay.

MR. VOGT: Your Honor, this is part of his official investigation as Rock Hill Fire Marshal. I believe that is within the exception of the hearsay exception.

THE COURT: All right, I will allow it. Proceed.

A Officer Howe informed me that he was the first officer in. He went in to the building with the objection of looking for fire and making sure that there were no occupants inside. He said he ran through pretty quickly. Didn't see any fire and came back out and he had notified his dispatch to notify the fire department.

Q Did Officer Howe tell you what he did when the fire fighters first arrived?

A Yes, sir. He escorted the fire fighters in to the building all the way into the attic area?

Q How many floors were in Owens Hall?

A This is a three-story building but it does have at attic area so the fire fighters classify this as a four-story building.

Q And did Officer Howe relate to you the conditions within the building as he walked through it?

A Officer Howe informed me that there was no fire. He

observed no smoke until I believe that was when he opened the doors to the attic area and there was a little smoke.

Q And he allowed the fire fighters into the attic. Do you know how he did that?

A There were two double doors right there at the attic area. He said that he had to unlock them. Which was confirmed by the fire fighters as well.

MR. SHEALY: Your Honor, I am going to object.

THE COURT: Well, I think it is going a little far a field about what everybody said with regard to hearsay, counsel, so I will sustain the objection as to any other hearsay.

MR. VOGT: And we can move along, Your Honor.

Q Let me show you another photograph, Chief, if I can. You took a number of photographs during your investigation. You were also provided with photographs during your investigation, correct?

A Yes, sir.

Q And these two CD's are approximately 180 photographs. We marked some of them including the photograph that is before you and that is exhibit number 52-A.

MR. VOGT: Your Honor, as the Court knows we stipulated as to the admissibility and authenticity of the exhibits. Do we need to do anything other than mention them?

THE COURT: Well, if you are offering them at this time, there is no objection they are admitted without objection, proceed.

(Plaintiff's Exhibit 1-60, Binder, received in evidence as of this date.)

Q Can you describe what you are seeing in exhibit 52-A?

A Yes, this is an area that is -- well, you are looking at the flat roof area where the smoke is and that is the area in front of Owens and then you have the area of Bancroft. So that flat roof area is where the smoke is.

Q 52-B is another photograph from your file and what does that depict?

A That also is the flat roof area where you see the smoke and now you are seeing flames there at that area.

Q So this area right in here is the flat roof?

A Yes, sir.

Q And is this another close up of that area?

A Yes, sir.

THE COURT: Refer to them by exhibit number.

MR. VOGT: I am sorry, that is 52-C, Your Honor.

THE COURT: Just for the record we need it.

MR. VOGT: Yes, thank you.

Q Now, how long did it take the fire department to extinguish this fire?

A This fire burned through the day of the 6th. It was

also burning on the 7th and so the fire apparatus cleared, if I am not mistaken at approximately 6:45 p.m. on the 7th.

Q And exhibit 52-D, what is that a photograph of?

A That's the front area of Owens Hall. The fire fighters are laddering the building or they place ladders to ladder the building on each corner.

Q And 53-E?

A I'm sorry. That is 54-D, I am sorry, 54-D. Does that -- what does that depict?

A That depicts the night time on the 6th and the fire apparatus is still in place and they are employing a master stream, which is a fire stream of approximately 300 gallons a minute onto the roof of Owens.

Q And did you determine why it took such a significant amount of time to extinguish the fire?

A It was due to the construction material of the roof. The material on this roof was not your typical roof as we would think of your residence. This had a metal roof decking and then on top of that you had a panel of plywood, insulation material, foam insulation and then more wood and it also provided a channel between the roof decking and the construction material. So just a kind of a space of approximately an inch and a half, two inches which allow fire, smoke, heat and gasses, as well as air to flow through. And so that was the area where the fire was burning, so it was difficult to get down to the area where

the fire was burning. And the fire fighters had to use chain saws to try to get to these areas. They used shingle removing equipment to try to remove the shingles to get to the fire.

Q Now Chief, is it part of your official duties to investigate -- was it part of your official duties to investigate this fire as to area of origin and the cause of the fire?

A Yes, sir.

Q Are you familiar with NFPA 921?

A Yes, sir.

Q Can you tell us what that is?

A NFPA 921 is a guide that we use in the field of fire investigations.

Q And what does NFPA stand for?

A National Fire Protection Association.

Q And did you adhere to that guide when you carried out your investigation?

A Yes, sir, I did.

Q Can you walk the jury through the steps you took to investigate this fire?

A Sure.

Q And I may stop you as you go along with some questions.

A Sure. I was the on call investigator on this particular weekend. I receive a call it was approximately 3:29. My investigation started at that moment. I was directed to come in

to conduct an investigation for this particular fire. I came in -- I reported in I think I arrived on the scene approximately 4:16. There was apparatus in place, firefighters, heavy traffic as I mentioned earlier. I had to walk in. I notified incident command that I was on the scene.

Incident command is the individual who is in charge of the emergency. All personnel report to them, or to their designee. So incident command was directing fire fighters activities on this day. I reported to them that I was on scene and I was directed to wait. I could not enter the building. So I begun exterior examination of the building. I observed smoke coming from the roof and I took the photographs that you have seen.

Q Is that a standard part of investigation is you start on the exterior and work your way to the interior?

A Yes, sir, it is.

Q And what did you do after you examined the exterior?

A I waited until I was permitted to enter the building. Fire fighting activities were going on. I did get a break. Incident command allowed me to go into the building. So I moved fairly quickly through the building. I went floor by floor. Went in. Tried to observed what had taken place. I didn't see any fire activity in the building until I got to the third floor. I'd seen in a small room on the third floor where some fire had occurred. Then looking in to the attic area. I did not go out on the roof. And fire fighters were in that area as

well. They explained some -- gave me some information and then I came back out.

Q What information did you gain from the fire fighters at that stage?

A Well --

MR SHEALY: Objection. Calls for hearsay.

MR. VOGT: Again, Your Honor, this is --

THE COURT: I will sustain the objection. He can talk about his investigation, what it revealed and that sort of thing. He can't testify what somebody told him. They need to come in and testify to that.

MR. VOGT: I just asked what information he gained from that investigation.

THE COURT: Well, no you didn't. You wanted to know how he got that information and if somebody told him that is hearsay. Proceed.

Q What did you do next?

A I observed where a fire had occurred in a small room. I am going to call that room a utility room. It could be an electrical room. I am going to call it utility room. It was small utility room right beside the elevator on the third floor. There are was a little fire that had burned up on the roof area as you enter the door on the left side. So I looked at that area and I knew that was not my area of origin.

Q How how did you know that?

A It appeared to me based on the burn patterns that fire had burned from the outside in.

Q Can you explain what burn patterns are?

A When fire destroys wood, burns wood or anything it is going to leave a pattern. And you may see this in maybe burning of a log. You see fire that burns on one side and not the other. That's a burn pattern. So as it consumes the wood it leaves a pattern and some of these have names. This particular pattern I am going to call it and arrow pattern. It depicts the direction to the source.

Q And where did that arrow lead you in this case?

A To beyond the wall of that utility room.

Q And at some point did you go beyond the wall and find out what that area was?

A I did, which led me to the flat roof area on Owens.

Q And that is the area that was depicted on the first slide overview, just so we are oriented; is that correct?

A That's correct.

Q Now, as you at some point did you go out on the roof?

A Yes, sir, I did.

Q And what did you see when you first went out on the roof?

A Heavy destruction from the fire and fire fighting activities.

Q Exhibit 54-B what does that that photo depict?

A That depicts --

Q And Chief, you have those in front of you as well.

A Do you mind if I go ahead and look at that?

Q Sure, that's 54-B.

A That depicts the flat roof area as I'd seen it on that day.

Q So that is before you did any sort of investigation on the flat roof?

A Yes, sir.

Q And the next exhibit is 54-C, is that another photograph of the flat roof before you began --

A Yes, sir.

Q -- your processing of the scene?

A Yes, sir.

Q And I will show you one more, 54-D, what does that photograph depict?

A That depicts the ridge area of the roof as you are standing on top and you are just taking an overall picture. So just mainly the amount of destruction there and the layout of roof.

Q So once you used this arrow that you found pointing you to the area of origin what did you do next?

A At that time I went to that flat roof area and began an examination of that area.

Q How do you examine that area?

A By removing layers of debris and seeing what was there and getting down to the floor level of that area.

Q Okay. And as a result of -- would that be called processing the fire scene?

A Yes, sir.

Q Okay. As a result of your processing of the fire scene did you determine an area of origin?

A Yes, sir. That was my area of origin, the flat roof area more towards -- you had an area at approximately 12 by 12 of a large area and then you had an area that was kind of went off of that 12 by 12 area which was approximately 4 by 10, 4 by 12.

Q Why don't we look at 54-C. That is one of the first ones before you process the scene. We are trying to get to 54-c but we are having some -- I am sorry, 54-E rather, technical difficulties here.

Sorry for the delay. So describe where you standing when this photograph was taken?

A Okay. I am standing on a ridge of Owens Hall and I am looking away from the building where the flat roof area is.

Q And the material that is on the adjoining pitch roof that is above the flat roof is that the material you processed from the flat roof?

A Yes, sir, that is correct.

Q And I think you were trying to describe earlier your

area of origin. First do you have the approximate dimensions of that flat roof?

A The flat roof area, the large portion that we can see to that break area to that area right there (indicating) is approximately 12 by 12 section and then the small section that juts out away from that is approximately 3 1/2 by 10 maybe 12 feet.

So the area of origin that I identified is from around that break area, go around to the the tail area. So, if I could be more specific.

Q Sure. Chief, during the course of your investigation did you determine what the flat roof was made of?

A It is corrugated metal on the bottom and on top of that corrugated metal there was nothing else there.

Q At the time you investigated --

MR. SHEALY: Object to -- objection. This witness has no foundation for that response and I move to strike it.

THE COURT: Counsel, approach just a minute.

(WHEREUPON, there was an off the record discussion.)

Q So Chief, this photograph, 54-E depicts the surface of the flat roof after you processed the scene, correct?

A That is correct.

Q And at this point I think you said it was a metal roof,

is that right?

A Yes, sir.

Q Did you during the course of your investigation learn if there had been any covering over the metal roof prior to the fire?

A Yes, sir, I was informed that there was a rubber material.

Q Now during the course of your investigation did you conduct any interviews?

A I did.

Q And do you recall who you interviewed?

A It was the roofing employees.

Q How did you come to find out there were roofing employees that you wanted to interview?

A Well, I knew there was roofing activities going on. There were shingles on the roof. I had met with a representative with Winthrop University, Mr. Ben Roach. He also said there was roofing activities going on.

Q Do you recall who you interviewed?

A I interviewed I think Mr. Pruitt, Randal Pruitt and witness, and I believe Brandon Lusk.

Q And as part of your investigation did you prepare summaries of those interviews?

A I did.

Q Did you also prepare an investigative report?

A I did.

Q Is exhibit 40-A a copy of that report?

A That is correct, yes, it is.

Q And is is that report prepared in the ordinary course of your duties as a fire investigator for the Rock Hill Fire Department?

A Yes, it is.

Q Did you list the area of origin on your fire report?

A Yes, I did.

Q Can you read for us your findings as to the area of the fire origin?

A The fire originated on the roof in the flat roof area of Owens Hall.

Q Now, are the summaries of the interviews you conducted part of your investigative report?

A Yes, sir, they are.

Q Now, did you ask the Pickens employees if they had been on the flat roof prior to the fire?

A I am sure I did.

Q And what did they tell you?

A They had. They'd been engaged in roofing activities for some time.

Q And did you ask the Pickens employees what, if anything, was on the flat roof prior to the fire?

A Yes, I asked what was on the flat roof.

Q What did they tell you?

A Roofing materials.

Q Can you describe roofing materials?

A If I could see this in the report.

Q Sure.

A From Mr. Lusk, he advised me that several things was on the flat roof which were rolls of felt paper, louvers, copper flashing and other hip-ridge flashing materials.

Q And we hi-lighted the interview summary from Mr. Lusk that is part of 41-A. Did he also tell you anything else?

A Yes, sir. He also stated that he nor any of the crew members smoked.

Q What did Mr. Pruitt tell you? And that's Randy Pruitt, right?

A Yes, sir. Mr. Pruitt, he stated they had stopped work at approximately four o'clock on March the 5th. They had stored roofing materials in the area of the flat roof such as copper flashing, rolls of roofing paper, metal flashing. That they also used this area for breaks. Mr. Pruitt advised that he had warmed his hands on an exhaust fan in the area and Mr. Pruitt stated that he nor any of his crew members smoked?

Q Did the either Mr. Lusk or Mr. Randy Pruitt indicate to you that there was anything else on the flat roof other then the materials they described to you?

A They never mentioned anything other.

Q If they had reported anything else to you would you have put it in your report?

A I would have.

Q Did the -- either Mr. Lusk or Mr. Randy Pruitt indicate that they had seen anyone else on the roof the day prior to the fire?

A No, sir.

Q If they had told you that would you have put that in your report?

A I would have.

Q Now, as a result of your investigation after you determined the area of fire origin did you attempt to identify the source of ignition for this fire?

A Can you ask that again, sir?

Q That was poor question. As a result of your investigation did you identify any potential source of ignition for this floor?

A No, sir, I did not.

Q All right. And again I don't think I asked you a clear question. Did you look for any potential -- not the source of ignition -- did you look for any potential source of ignition?

A Yes, sir, I did.

Q On the roof -- on the flat roof, did you identify any source of potential source of ignition?

A I observed a appliance fan on the roof that I had

looked at.

Q And exhibit number 54-F, does that depict the fan that you are referencing?

A Yes, sir.

Q And was that fan -- did you determine where that fan was located prior to the fire?

A The fan as you can see where it was housed there is a square box right in front of the fan with a cord hanging from it. It appeared to be attached to that area.

Q I am sorry to interrupt, is that the area that you are talking about?

A Yes, sir.

Q And the next photograph 54-G, is that a close-up of the fan?

A Yes, sir, it is.

Q And did you make a determination whether the fan caused the fire?

A I ruled the fan out. I don't believe the fan had anything to do with the fire.

Q And why is that?

A The wiring to the fan appeared to have -- it was in good shape. I didn't observe any melting of the wires. Any type of arcing that I could observe in the fan. It that the fan was in place probably during the time of the fire and because of the wiring being in good shape it had to be unexposed, meaning

that that probably occurred during fire suppression activity.

Q So other than the fan which you ruled out as a potential source of ignition, were there any other sources of ignition that you identified on the flat roof?

A I did not.

Q Okay. Did you examine the mechanic systems in the building for instance?

A I looked through the mechanic systems. There was no fire inside of the building other than in that utility room that I had mentioned.

Q So does that rule out the building mechanical systems as a cause of ignition in this case?

A It would. If I could add something other as well. If the fire occurred in the building we would have gotten early warning because the building was equipped with a sprinkler system as well as an alarm system. Those items had not gone off even on the arrival of the fire department. It was shortly after fire fighters engaged in fire suppression activities that the sprinkler system activated and in the report the fire fighter pulled the fire alarm.

Q So the building fire protection systems operated properly they were just not designed to detect an exterior fire?

MR. SHEALY: Objection to leading, Your Honor.

THE COURT: Sustained.

Q Did the building fire protection system operate

properly?

A To my knowledge, yes, sir.

Q Did you also examine any of the buildings wiring.

A I looked at wiring in the utility room where the fire was up on the roof.

A The wiring there was not exposed. Still encased in its casing. However, the casing was melted a little bit but not to the point that the bear wire was exposed.

Q So did you rule out the building wiring as potential source of ignition?

A In that particular area, yes.

Q Ultimately did you determine the source of ignition of this fire?

A I did not.

Q Is that unusual for a fire investigation?

A No, it is not.

Q Why is that?

A You can have a situation in this area of the flat roof. This fire burned throughout March the 6th and burned until March the 7th, so you can imagine that there was heavy fire damage in this particular area. If there was ignition source there it could potentially be destroyed by fire.

Q So you completed your investigation and determined the area of origin and you couldn't find the source of ignition. Now Chief, what does combustible mean?

A Combustible --

MR. SHEALY: Objection. Calls for a legal conclusion.

THE COURT: Overruled. You may answer.

A The definition of combustible is anything that can be ignited and burned.

Q Is roofing paper combustible?

A It is.

Q Based on your investigation and your professional expert opinion can you identify any way this fire could start on a flat rubber roof without other combustibles present such as roofing paper?

MR. SHEALY: Objection, calls for speculation.

THE COURT: Sustained. Approach just a minute.

(WHEREUPON, there was an off the record discussion.)

Q Chief, I think I am done here. I just want you to restate for the record your opinion as to the area of fire origin.

A The fire started on the flat roof area of Owens Hall.

Q Is there any you doubt in your mind that is where the fire started?

A No, sir.

MR. VOGT: Thank you, Chief.

MR. SHEALY: If it please the Court.

THE COURT: Yes, sir.

MR. SHEALY: Your Honor we need to switch apparatus.

CROSS EXAMINATION

BY MR. SHEALY:

Q Chief, you were off duty when this fire occurred, correct?

A That is correct.

Q All right. And so that is why it took about an hour for you to get there after the first alarm came in?

A Yes, sir, that is correct.

Q And you talked at length about the two things that you are looking for when you investigate a fire. The area of origin and the cause of ignition, correct?

A Yes.

Q Cause and origin. We use those terms, correct?

A Correct.

Q No question you determined the origin of fire on the flat roof?

A Correct.

A But you were not able to determine what caused the fire to start, right?

A Correct.

Q Now, you mentioned there is an electrical room or mechanical room that's next to that flat roof, correct?

A It is inside of the building.

Q Right.

A Yes, sir. On the outside of the room is that flat roof area.

Q There is also an elevator next to that flat roof, correct?

A That is correct.

Q Now, you mentioned in your direct testimony that one of the things that the Officer Howe said was that he escorted the fireman into the building when they arrived, correct?

A That's correct.

Q And you also said he had to unlock the door to the attic to let them into that area and this is the attic of Owens Hall, correct?

A That is correct.

Q Now, your handwritten notes of your conversation with Officer Howe don't exactly reflect that particular detail about his having to unlock the door do they?

A I don't -- can you advice where that may be?

Q If you will look at plaintiff's exhibit 41. Its in the book that is up there.

A That's correct.

Q All right. So, its not mentioned in your handwritten note, correct?

A That's correct.

Q I believe it is coming up now. If the machine will work. Okay. These are your hand written notes that you are looking at, that is Plaintiff's Exhibit 41?

A Yes, sir.

Q All right.

MR. SHEALY: Your Honor, this is marked as plaintiff's 41 because of the sort of joint stipulations we made, but I will move to admit it into evidence at this time.

THE COURT: There is no objection. It would be without objection.

(Plaintiff's Exhibit 41, handwritten notes, received in evidence as of this date.)

Q And also, Officer Howe gave you a statement, a written statement of what happened some time later of his -- his activities as the fire was being reported and as he was entering the building, correct?

A Yes, he did.

Q If you look at plaintiff's 42. There is no mention of that detail about having to unlock doors in that statement, is there?

A No, there doesn't appear to be.

Q Okay. All right, you were shown pictures of the flat roof as you saw it after the fire was out before you ever began excavating, correct?

A Correct.

Q All right. That was Plaintiff's Exhibit 54, correct?

A Would that be 54 with a letter A or --

Q 54-B I will show you this is one of those pictures?

A Yes, sir.

Q There were several pictures taken that you took, correct?

A Yes, sir.

Q And this is the way that flat roof area looked when you were standing up looking down into it when you first got there, correct?

A That's correct.

Q Okay. What I am showing you is actually marked as Defendant's 36, but it is similar to the earlier picture. I show you Defendant's 37. You took several pictures of this area, correct?

A Yes, sir, I did.

Q All right and the material that is shown down in the well of the flat roof, most of that was actually thrown down in there by the fire fighters themselves, correct?

A I can't say that it was thrown into that area. Material could have been there or it could have been due to fire suppression activities.

Q Well, do you remember your deposition was taken in this case?

A I do.

Q Okay.

MR. SHEALY: Your Honor, plaintiff's counsel is the custodian of the original of that deposition. I would ask that the original be presented to Chief Driggers.

THE COURT: You may.

Q Chief, I have handed you the original of your deposition. This may help refresh your recollection. If you will turn to page 55 with me. And this was taken on November 26, 2013, correct?

A Yes, that's correct.

Q And looking at line six the question that was posed, "Do you know whether or not that debris was thrown down into the flat roof section by fire fighters who in the course of fighting the fire on Owens Hall", your answer then was --

A "Yes, it was." Can I elaborate on that a little bit?

THE COURT: Yes, sir.

Q Yes, sir.

A Now, the meaning of "thrown down" in there, it could be with master streams we had -- actually the course of suppression of this fire we had two ladder trucks on the front of the building that were spraying a minimum of 300 gallons per minute from each ladder truck, so the two front ladders were spraying over 700 gallons per minute.

We also called in another ladder truck from Newport Fire Department to come in and they were placed on another area of this building also spraying approximately 300 gallons per minute. So, debris did end up in this flat area, but it was it thrown -- it was probably due to fire suppression activities.

Q Thank you. And thank you for the clarification. You mentioned that on Owens Hall the roofing has a metal deck, right?

A Yes, sir.

Q And then there is this layer of insulation maybe four inches think?

A Approximately.

Q And then shingles on top of that.

A You have the insulation. There is photo of it that you have, but it has the insulation. Then there is plywood on top of that and there is normal roofing material on top of that.

Q And so the fire fighters, to get at the fire because the fire really burned in that space, didn't it?

A It did.

Q They were trying to get to it and so they to rip the shingles off and the plywood to try and get to the fire, right?

A That's correct.

Q Okay. And so what you encountered then down here was pieces of that insulation that had been pulled off to get to the fire, is that correct?

A That is correct.

Q Okay. In fact they had to get a special tool to remove shingles, correct?

A That is correct.

Q In fact, looking at Defendant's 37 that box right there is a box for a shingle removal tool isn't it?

A Yes, sir, it is.

Q So that was something the fire fighters used and they just left the box there?

A Yes, sir. That's correct.

Q Okay. Now, the fan that you pointed to earlier, this is that fan right there? (Indicating)

A Yes, sir.

Q Okay. And you ruled that out as the source of ignition, right?

A Yes, sir, I did.

Q Now, you did learn that was an exhaust fan for the elevator shaft, correct?

A That is an exhaust fan, but I don't know if it is the elevator shaft or did it come from the utility room. I don't recall.

Q Okay. Bottom line is you ruled the fan out as source of ignition?

A Correct.

Q And in your opinion you just could not determine the

cause of the fire?

A That is correct.

Q Okay. Now, you mentioned that you talked to several Pickens employees a couple of days after the fire had been put out, correct?

A Yes, sir.

Q And you didn't have those conversations up on the roof, did you?

A No, sir, I did not.

Q You are down on the ground?

A Yes, sir.

Q And you asked them what had been in the area of the roof, correct?

A Yes, sir.

Q Okay. You never even asked any Winthrop employees if they had any materials on the roof, did you?

A No, sir, I didn't.

Q All right. And you don't have any photographs or documentary evidence of everything that was on the roof before the fire started, do you?

A No, sir, I don't.

Q Now, even assuming that Pickens' employees had left roofing materials, paper, other roofing materials on the flat roof you can't tell where those were situated on the flat roof, can you?

A No, sir, I can't.

Q All right. In excavating that flat roof the only evidence of roofing materials that you found was metal, correct?

A That is all that remained there, yes, sir.

Q All right, flashing, louvers, the things that were mentioned by the Pickens employees, the metal items?

A Yes, sir.

Q All right. You found no evidence or remains of pallets or rolls of tar paper or packs of shingles? You didn't see any remains of those things, correct?

A That's correct.

Q Now, you learned that the flat roof was on top of the metal that was exposed after you did your excavation, on top of that you learned there was rubber membrane, correct?

A That's correct.

Q You also learned there was a layer of insulation underneath the rubber membrane, correct?

A Ask that again sir.

Q On top of the metal on the flat roof and below the rubber membrane was a layer of insulation, correct?

A I don't know that sir.

Q Okay. But you are familiar generally with roofing materials that you typically find in a flat roof situation?

A Can you ask that again?

Q Well, and if you are not your not. Investigating fires

I imagine you gain some familiarity with the sort of building materials that buildings are made of?

A Yes, sir.

Q And are you generally familiar with the fact that in a flat roof situation like this that you will have a layer of insulation on top of the metal and then below the rubber membrane?

A I don't know what material would be there, but I do know there are times when there are other things there.

Q You can't say that was the case here because you just don't know?

A I don't know.

Q Okay. But roofing insulation is a material that will burn, correct?

A Some will burn, yes.

Q And -- but they are not volatile like gasoline, are they?

A Not to my knowledge.

Q All right. They are not known to ignite spontaneously like some substances we know, correct?

A That's correct.

Q So shingles aren't known to ignite spontaneously, are they?

A That's correct.

Q And roofing paper isn't either?

A Correct.

Q Okay. And in they are designed to stable and not to start burning just by being exposed to heat, right?

MR. VOGT: Objection to the form.

There is no foundation for that question.

THE COURT: He can answer if he knows.

A Could you ask the question again, sir?

Q Shingles and roofing paper are designed to be stable and not to start burning just by being exposed to heat, right?

A That's correct.

Q Most roofs get pretty hot on a sunny day wouldn't you agree?

A Yes, sir.

Q And yet we don't see roofs just catching fire without some event that ignites the fire, right?

A That's correct.

Q As part of your investigation you interviewed a student at Winthrop, Stephanie Eaton, correct?

A Yes, sir, that is correct.

Q And did not she report to you that she was the one that called 911 when she saw smoke?

A Yes, sir, she was.

Q All right. And she provided you several of the pictures many of which you have identified. The first picture showing the smoke coming from the building, correct?

A That is correct.

Q And I want to make sure, those were not pictures that you took?

A That's correct.

Q You were not there at the time, correct?

A That's correct.

Q Okay. And then there was another fellow, Evan Russo another Winthrop student?

A I don't know if Evan Russo was a student or a member with Winthrop.

Q All right. I will show you --

A But I am familiar with his photos.

Q Okay. Defendant's 13, is similar to what you were looking at previously, correct?

A Yes, sir.

Q And those photos were given to you by the students, correct?

A That's correct.

Q And in fact a couple of them depict -- and I am showing you Defendant's 14, but if we get to a couple of them they actually show when they were taken, don't they?

A They do.

Q Amazingly there is a clock in the picture, correct?

A That's correct.

Q If we look at Defendant's Exhibit 15, there is a clock,

right?

A That's correct.

Q And that indicates that the picture was taken right before three o'clock?

A That's correct.

Q And fire department had not gotten there yet, correct?

A I think -- well, in this particular photo you are not seeing the front of the building. At some point I believe you will see in another photo with that clock you will see the apparatus there or the Battilion One's vehicle, the incident commander.

Q Let's see if we can get to that. Because you are correct. There is one of these photos that has, I believe, a fire truck in it, correct?

A Yes, sir I believe so.

Q And here we are. This is Defendant's exhibit 27, shows the ladder up there and the clock reads about 12 minutes after three, correct?

A Correct. Can't see the clock that well, but I'm familiar with the photo.

Q The firemen were there pretty quickly?

A Yes, sir.

Q But this tells us in time really that fire began right before three o'clock and fire suppression activities were taking place within 15 minutes, correct?

A That's correct.

Q And in fact we have some additional photos taken. You were shown this area of the flat roof and we have one of photographs that shows -- let's see, I skipped over it. Shows the firemen up on the roof. Here is one of another view of that, exhibit 33, 32. Let me back up one. All right. Here this is the one I wanted to indicate to you. So you got firemen up on the roof. This is exhibit 29 that I am showing you. That shows -- can we dim that light so the jury can see.

The item on the left side of this photograph is actually the bucket delivering the firemen up on to the roof, correct?

A That is correct.

Q And these photographs contained time stamps, didn't they?

A I don't recall.

Q All right. They were digital photographs that if you looked at the time stamps on them they will tell exactly when they were taken, correct?

A Okay.

Q And this indicates it was taken at 3:43, correct?

A I am not seeing that on your photo. I don't know.

Q Does that say 3:43 p.m.?

A It does.

Q All right.

MR. SHEALY: Chief, thank you very much. I have

no further questions.

Your Honor, I move to admit all of the photographs that I mentioned by numerical designation during the course of this examination. They have all been stipulated to by the parties?

THE COURT: It will be without objection.

(Defendants's Exhibits 13, 14, 27, 29, 32, 33, 36, and 37, pictures, were received in evidence as of this date.)

MR. VOGT: Just a few on redirect Your Honor.

THE COURT: Yes, sir.

MR. VOGT: While Mr. Kirby is getting -- Mr. Shealy is getting his thing together, Your Honor. Mechanically, I just want to make sure as far as exhibits, all the Plaintiff's exhibits are already entered into evidence, correct? There is no need for me to --

THE COURT: There is no objection to any of those?

MR. SHEALY: No objection at all.

THE COURT: All of them admitted without objection.

REDIRECT EXAMINATION

BY MR. VOGT:

Q Chief, you were asked a series of questions about well, did you find roofing paper, did you find wooded pallets, did you

find shingles in your area of origin and your response was no. Given the extent of this fire would you have expected to find combustibles such as roofing paper, wooden pallets or shingles in the area of origin?

MR. SHEALY: Objection, calls for speculation.

MR. VOGT: Your Honor. This is well within --

THE COURT: He can answer it if he knows.

A No, sir, I would not expect to find that.

Q Why is that?

A I would expect that to be destroyed by the fire.

Q And that is not unusual. That no different then many cases you investigated, correct?

MR. SHEALY: Objection. Leading.

THE COURT: Overruled.

A That's correct.

Q In your official report which was 41-A, exhibit 41-A, on the forth page.

A Forty-A?

Q I am sorry, 40-A?

A Yes, sir.

Q On your fourth page of 40-A, we are not going to pull it up. Could you read aloud for us your summary down to the parenthesis.

A Is page four of four.

Q Four of four starting the "fire originated"?

A "The fire originated on the flat section roof of Owens Hall building. There were roofing supplies that were stored in the area. The connecting buildings were in the process of being roofed by contractors from Pickens Roofing and Sheet Metal Incorporated. The contractors begun roofing in September of 2009 and had completed Kinard Hall, Bancroft and were working on the Annex building which joins Owens Hall. Access to the roof area was secured."

Q Let me just stop you there. You were asked a series of questions about whether that information was in your notes. What was the source of information that you relied upon to put in your official report that access to the roof area was secured?

MR. SHEALY: Your Honor, object. Hearsay.

THE COURT: Overruled.

A Officer Howe informed me that the area was secured. Also the first in fire fighters from Engine Two --

MR. SHEALY: Objection, calls for hearsay or the witness is getting ready to --

THE COURT: Well, I am not sure what his answer is going to be. If it's what somebody else told him it would be hearsay.

MR. VOGT: I am asking what information he learned during the course of his investigation.

THE COURT: He can say what information he got.

He can't say who told him what.

A Well, the information that I received from Officer Howe was the area was secured as well as the fire fighters were escorted by Officer Howe and observed him unlock the doors.

MR. SHEALY: Objection. Hearsay.

THE COURT: I think he already testified to that, but I sustained the objection. Lets move on.

MR. VOGT: Thank you, Chief.

THE COURT: Any other questions of this witness.

MR. VOGT: No, Your Honor.

THE COURT: Thank you, sir. You may stand down sir.

Do wish to have him excused?

MR. VOGT: Yes, subject to recall for rebuttal.

THE COURT: Thank you, sir, you are excused at this time.

THE WITNESS: Thank you, sir.

THE COURT: You got a lengthy witness, the next witness?

MR. VOGT: I would expect the witness will take at least an hour, Your Honor.

THE COURT: Let's go ahead and take a short recess then.

Madame forelady and members of the jury panel we will take a short recess at this time. You may

refresh yourselves. The break will be about ten minutes or so. Thank you.

(WHEREUPON, a recess was taken.)

THE COURT: All right bring the jury in please sir.

(WHEREUPON the jury enters the courtroom)

THE COURT: All right, please call your next witness.

MR. VOGT: The plaintiff calls Randall Pruitt.

RANDALL PRUITT, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q Please tell us your name, sir?

A Randall Pruitt.

Q Mr. Pruitt, there may be times when I you direct you to that book that is next to you just so you know it is there. It has a number of different exhibits. Okay?

A Yes, sir.

Q Where do you live, Mr. Pruitt?

A I live at 128 Larch Circle, Spartanburg.

Q And are you related to Matthew Pruitt?

A Yes, sir.

Q How are you related to him?

A He's my nephew.
Q And are you related to Brandon Lusk?
A He's married to my niece.
Q So nephew by marriage?
A Yes, sir.
Q How old are you sir?
A Fifty.
Q And how far did you go in school?
A 10th grade.
Q And are you currently employed by the Pickens's Roofing and Sheet Metal Inc.?
A Yes, sir.
Q How long you worked for Pickens?
A Since '92.
Q What do you do for Pickens?
A I'm a sheet metal foreman.
Q What does that mean?
A I put on sheet metal.
Q Prior to working for Pickens what did you do?
A I done shingling when I first started out. I basically started shingling since I was 16.
Q So since you got out of school you have been in roofing in one form or the other?
A Yes, sir.
Q And how long have you been a foreman at Pickens?

A I don't remember how long it has been. It's been a while.

Q What are the duties of a foreman?

A Foreman -- just to make sure everything goes properly, you know, make sure my job goes right.

Q Do you supervise the members of your crew?

A Yes, sir.

Q Are there any other responsibilities that you have?

A Make sure everything at the end of the day is cleaned up, stored properly.

Q Now, at any time during your long employment with Pickens had you ever received any training or taken any courses on building or fire codes as they apply to roofing?

A I been trained from OSHA, and yes, sir, CPR training and all that.

Q In any of this training that you received did it relate to material storage?

A Yes, sir.

Q Okay. What type of training did you receive with respect to material storage?

A Basically proper way to store material.

Q What type of materials?

A Basically like combustible materials. Stuff like that.

Q Now, you said the word combustible. I want to make sure we are using the same definition. What is your

understanding of combustible?

A My understanding of combustible is, you know, it's a flammable -- inflammable substance. That's all I know about that.

Q Inflammable meaning it won't catch fire?

A No, sir.

Q And I am sorry. Do you know what it means for something to combust?

A It's ---

Q Something to burn?

A Yeah, burn.

Q All right. Did you ever receive any specific training while you were at Pickens or at any time regarding how best to store materials that burned or could burn?

A Yes, sir.

Q Could you describe that for us?

A Basically just put the material up properly. That's all I know.

Q What's that? And I am sorry, but I'm not sure what you are saying when you say "put the material up". What does that mean?

A Store it properly.

Q Store it properly in certain locations?

A Yes, sir.

Q What type of locations should they be stored at?

A In locked location. Locked down.

Q And who gave you that training?

A OSHA training.

Q And that's through the company?

A Yes, sir.

Q Did you ever receive any training with respect to either the International Fire Code or the National Fire Protection Association Code 241?

A Like I say the only training I had was through Pickens and they did CPR training. They have been trained on how to put out fires and stuff like that.

Q Okay. That is fine. And you are not familiar with the NFPA or International Fire Code?

A If I need to know anything about that I have to ask Larry.

Q Who is Larry?

A Larry is safety man.

Q What is his last name?

A Renner.

Q And he works for Pickens?

A Yes, sir.

Q And what's his job?

A Safety.

Q Now, do you recall working on the reroofing job at Bancroft Hall at Winthrop?

A Yes, sir.

Q Do you recall when that job started?

A It's been a long time.

Q The fire was in March of 2010 if that helps. And you don't have to guess if you don't recall.

A I was out there a while. I'm pretty sure it's been a good while because I went from one job to the other because I was working right across from that job.

Q Pickens was also reroofing other buildings at Winthrop at the time, right?

A Yes, sir, right a across from there.

Q Campus center?

A Yes, sir.

Q And you say a good long time. Now this job it included the demolition of the existing roof, the Bancroft Hall job?

A I don't remember.

Q Did you ever receive the project specifications?

A Project specifications --

Q And if you want to look it is exhibit one, Plaintiff's Exhibit one.

Let me help with you that book. It's a big book.

Did you ever review all or part of the exhibit one prior to or at any time during the Bancroft Hall project?

A Say that again.

Q Sure. We are just trying to understand what your roll

as foreman is?

A Yes.

Q Who was the project manager. May be that's an easier way. Who was the project manager?

A Project manager that was -- I think --

Q Was that Clint Robinson?

A Yes, Clint Robinson.

Q Clint Robinson was the project manager and who did you report to?

A Bobby Pickens.

Q The gentlemen sitting with us today?

A Yes, sir.

Q And then you had a crew of two that you worked with for the metal sheet -- sheet metal crew?

A I had one person that day. I mean working for me. Matt was with me that day.

Q And we will get to that day, but what I am just trying to understand as a Foreman can you read something like the specifications which are part of the contract for this job?

A Yes, sir.

Q You read these, exhibit one -- a part of exhibit one or any part of it?

A Yes, sir.

Q Okay. So if you can, you see there is a yellow tab there, on that document?

A Yes, sir.

Q Who at Pickens -- well, let me ask you this. If you turn to 1500-3 of exhibit number one. Do you see that?

A Yes, sir.

Q If you look at 1.9(L) there is a section that states initiate, maintain and supervise all safety precautions and programs in connection with the work.

Do you see that?

A I ain't got my reading glasses on.

Q Oh, you don't?

A No, sir.

Q Are they here with you?

A No, sir.

Q Well, I guess what we'll do since you can't see without your glasses I will just read it to you.

Among the other specifications there is one that states and this is exhibit one, page 1500-3 subpart L, "Initiate, maintain and supervise all safety precautions and programs in connection with the work. Take all necessary precautions for the safety of, and provide the necessary precaution to prevent damage, injury or loss to:" and then there is a listing of items. Subpart 4 says, "Comply with all applicable laws, rules and regulations and orders of any public body having jurisdiction for the safety of persons or property and to protect them from damage, injury or loss."

Did you read that or any specification like that prior to the job starting or during the job?

A Yes.

Q You did?

A Yes, sir.

Q Okay. Who at Pickens was responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Bancroft Hall job?

A It would be Larry Renner.

Q Anybody else?

A No, sir.

Q Just Larry Renner. Okay.

Prior to starting work did Pickens obtain approval from Winthrop for locations of work, operations at ground level such as material storage?

A Yes, sir, I think so.

Q And what I was reading from was exhibit number 1500-2 1.9 (D)

Who obtained approval from Winthrop for locations of work such as material storage?

A I guess that would be Bobby or Clint, whoever was over the job.

Q And again, I'm not trying to -- if this wasn't within your area that is fine?

A Yes.

Q I will move on. But if you were involved in these types of things that is what we were trying to find out. You weren't involved in those communications with Winthrop, is that right?

A Right.

Q Now, you told us that that you had a sheet metal crew and you told us that you reported to Bobby Pickens, right?

A Yes, sir.

Q And Clint Robinson was the project manager, right?

A Yes, sir.

Q Did Mr. Bobby Pickens or Mr. Robinson or anyone else ever tell you where the material for this job could be stored?

A Yes, sir.

Q And where were was that location or locations?

A It was on the flat roof right beside the job where we was at.

Q If we can go to the overview.

MR. VOGT: Can you dim the lights?

Q Do you recognize this as an overview of the Bancroft Hall and Owens Building at Winthrop?

A Yes, sir.

Q And is the flat roof that you just referred to is that small bright green area that is in that white circle?

A Yes, sir.

Q Who told you -- who told you, that your crew could

store materials on that flat roof?

A My boss man.

Q And who is that?

A Bobby Pickens.

Q When did he tell you that?

A Before we started the job.

Q And what type of materials did you store on the flat roof?

A Copper flashing.

Q Anything else?

A No, sir, that would be it.

Q Do you recall being interviewed by Chief Otis Driggers after this fire?

A Yes, sir.

Q And do you recall reading a summary of your interview with Chief Driggers?

A Yes, sir.

Q Okay, let's pull that up.

Do you recall that Chief Driggers indicated that you stated that in addition to copper sheeting there was also rolls of roofing paper?

A Felt paper. Felt paper stuff was already on the roof.

Q So you didn't tell Chief Driggers that there were rolls of roofing paper on the flat roof?

A I don't remember if I did or not. I don't think I did.

I told him there was felt paper up there on the roof.

Q Okay. Now sir, do you remember your deposition was taken in this case?

A Sir?

Q Do you remember when we took your deposition in this case?

A Yes, sir.

Q You were under oath?

A Yes, sir.

Q I asked you a series of questions that day?

A Yes, sir.

MR. VOGT: Your Honor, if I can hand the witness the original deposition.

THE COURT: You may open it.

Q Can you turn to page 27 of your deposition, Mr. Pruitt. Can you read without your glasses?

A I am trying sir.

MR. VOGT: Judge, is it permissible for me to read it to him given he doesn't have his glasses.

THE COURT: Counsel, do you have a copy?

MR. SHEALY: I do have a copy and I do not object to that.

Q If you look at line three, line three page 27, which I believe is a summary if a interview that you gave to Captain Otis Driggers after this fire that was referring to exhibit 13.

Do you see that line?

A Yes, sir.

Q And here is exhibit 13 if you want to reference that. You said, "Yes, sir." You recognize that as a summary and then the next question was do you recall giving an interview after the fire, answer "Yes, sir."

A Yes, sir.

Q Okay. The summary indicates and states "they", which I believe refers to your crew "had stored roofing materials in the area of the flat roof such as copper flashing, rolls of roofing paper, metal flashing? Your answer was?

A "Yes, sir".

Q So you told Chief Driggers after the fire that rolls of roofing paper were on the flat roof, correct?

A No, sir. I said we carried rolls of paper up. Which -- excuse me. We use red felt paper, rosilin (phonetics)paper that go up under our copper. That's what I took up and I can't leave it on the roof because if it gets wet it won't be no good.

Q If you stay with your deposition, page 27, I said "Do you recall telling Captain Driggers that?" Answer "yes". Question, "Is that adequate? Yes, sir."

So the rolls of roofing paper were they stored by your crew or some other crew." Answer, "They were stored by me." I am confused today you testified --

A I don't remember carrying no roll roofing up because it

was all ready up there.

Q Today you testified that there was not rolls of roofing paper on the flat roof, but in your deposition you testified they were there and both times you were under oath, correct?

A Yes, sir.

Q Which one is accurate?

MR. SHEALY: Your Honor, I would object. I believe that is a mischaracterization of the witness's answer.

THE COURT: I don't think so. He can ask the question.

MR. SHEALY: Yes, sir.

THE COURT: And instruct the witness, don't look for the defense table for answers. Just answer his questions.

THE WITNESS: Yes, sir.

A Material was up there, but I did put felt -- I mean red paper up with me. That's the only thing I carried up.

Q Is the the red paper -- you are calling red paper in a roll?

A Yes, sir.

Q Was that roll on the flat of roof along with the copper flashing and metal flashing?

A No, sir.

THE COURT: Counsel, approach just a second

(Whereupon, there was an off the record discussion.)

Q Now Mr. Pruitt, let me ask you this in a different way. The interview summary which you read and said was accurate in your deposition, it states, "They", meaning your crew "Had stored roofing materials in the area of the flat roof, such as copper flashing, rolls of roofing paper, metal flashing."

What I am asking you today is is that accurate?

A No, sir. No, sir.

Q So Chief Driggers was wrong when he wrote that down?

A Evidently. I told him that day the only thing I took was a roll of red paper.

Q Now, we are not asking what you took up with you that day. The question was what was on the flat roof the day prior to the fire?

A Copper flashing.

Q Only copper flashing?

A Yes, sir.

Q So Chief Driggers is just wrong?

A He must have misunderstood me.

Q And when I asked in your deposition whether this summary was accurate and you said "Yes, sir" that was incorrect?

A It's been such a long time since this fire. I can't remember everything exactly, but I do know I carried red paper up with me.

Q Sure. And your deposition was June of last year. Closer to the fire, right?

A Yes, sir.

Q Was your memory better then?

A Probably.

Q Did you ever talk to Matthew Pruitt about what was on that flat roof the day prior to that fire?

A No, sir.

Q Never spoken to him about it?

A No, sir.

Q Did you ever speak to Brandon Lusk about what was on the flat roof the day prior to the fire?

A No, sir. They just done what I done told them to do. That is what they are there for.

Q Now, I understand that during the day when you are working, but I am asking you at any time after this fire did you discuss what was on the roof, on that flat roof, on the day prior to the fire with Mr. Lusk or your nephew Matthew?

A No, sir. I ain't talked to them till today.

Q Okay. Now, do you smoke?

A I use to years ago. I quite about 15, 16 years ago.

Q Did you use the flat roof area for breaks?

A Yes, sir. I did.

Q Why did you use that area for breaks?

A Because you can't stand on the roof where I'm at

because it is on an incline like this (indicating), and that was a flat area where you could rest.

Q So these roofs that surround the flat roof are steeply pitched?

A Yes, sir.

Q And they are up above the flat roof, right?

A Yes, sir.

Q Is roofing paper, can that burn?

A Felt paper, no, sir. Only if it I guess gets hot enough. I don't know. As long as I have been roofing I've never seen it catch on fire.

Q Now, I'm not asking you if it would spontaneous combust. I am asking you if roofing paper -- that's the stuff you put under the shingles, right?

A Yes, sir.

Q Can that burn?

A I don't know. I've never, you know, seen it. Unless it's in a house fire or something, get enough heat behind it I guess it could.

Q Okay. Now, let me show you -- well, first off, describe the work that you were doing the day before the fire?

A I was putting panel on a dormer.

Q And where was that dormer located?

A On Bancroft.

Q Exhibit six, do you see that photograph it is also in

front of you in that booklet?

A Yes, sir.

Q Does that depict you on the did prior to the fire with your crew?

A Yes, sir.

Q Okay. And is Matthew Pruitt and Brandon Lusk depicted in that photograph?

A Yes, sir.

Q Where is that dormer in relation to the flat roof?

A It's on the opposite side of it.

Q So this area (indicating)?

A It's on the other side.

Q This area here (indicating)?

A Yes.

Q Do you want to use the pointer and show us?

A No, sir.

Q You can turn the lights back on. Thank you.

Now, let's go back to exhibit six. Let me show you in that photograph and you have better copy of it in front of you. It appears that your arm was in a sling, is that right?

A Yes, sir.

Q What had happened?

A I got hurt and I had to wear a sling.

Q How did you get hurt?

A I fell.

Q Where did you fall?

A Fell on my arm.

Q Where?

A On Bancroft over there. There was ice on the roof and I was in a valley and I was going down and I slipped and fell on that.

Q Were you were injured. Were you wearing a safety rope at the time?

A No, sir. I was going to the roof. My safety equipment is already up there.

Q Now, this photograph -- is one of the requirements at Pickens that you wear a safety rope while you are roofing?

A Yes, sir.

Q Are you wearing a safety rope in exhibit six?

MR. SHEALY: Objection. Relevance.

MR. VOGT: Your Honor, this goes to the standard of practice as to Pickens safety procedures and whether they are followed.

THE COURT: I don't think it is relevant to this case. I will sustain the objection.

MR. VOGT: I am trying to remember the question that was objected to. Was the question, are you wearing a safety rope, is that the one he was objecting to.

THE COURT: Yes, sir. Well, I think it was the

series of questions about whether he had a safety rope on and what the policy was with regard to the safety rope.

Q Well, remember when I was reading to you from the specifications about safety programs and that type of thing and you told me Mr. Renner was in charge of that at Pickens, is that correct?

A Yes, sir.

Q And part of the training provided by Mr. Renner at Pickens did it include fall protection?

A Yes, sir.

Q And is that a safety rule that was promulgated by Pickens that you are suppose to follow?

MR. SHEALY: Objection, relevance.

MR. VOGT: I will tie it up in a second.

THE COURT: I'll allow you a little leeway, but make it relevant please.

Q You are suppose to follow that rule, right?

A Yes, sir.

Q Are there any safety rules relate to material storage?

A Yes, sir.

Q Do you follow those rules?

A Yes, sir.

Q So what were you actually doing that day if your arm is in a sling?

A I'm making sure Brandon and Matthew is doing the job correctly.

Q And at any time during that day did you go to the flat roof?

A Yes, sir. Break time.

Q How many times?

A A couple of times for break and if I needed a piece of copper I sent one of them to go get it. That's about it.

Q Now, did you send one of them or did you send just Brandon?

A Just one.

Q Excuse me.

A Just one.

Q During the course of the day did you direct Brandon Lusk to go to the flat roof and get supplies?

A It was either Brandon or Matt, I forget.

Q Okay. If you turn to your deposition, again page 30, line 19. The question was, "Any other members of your crew -- were any other member of your crew on the flat roof were the materials were stored on the day prior to the fire other than yourself?" Answer, "Yes, sir, my helper Brandon. If, you know, if I needed something or run out I would send him down and get it. Anybody else?" Answer, "No."

Question, "So Matthew Pruitt was not on the flat roof at all that day?" Answer, "No, sir."

Does that refresh your recollection?

A Yes, sir, it does.

Q So the only you sent down to the flat roof was Brandon Lusk and what was he suppose to do down there?

A Get materials.

Q So how many times did you send him down there?

A It depends on what I needed.

Q Now, at any time did you tell the fire marshal who interviewed you that there were other people on the roof on the day prior to the fire?

A No, sir.

Q Were there any other people on the roof prior to the fire, the day prior to the fire?

A I don't remember that day.

Q If you will return to your deposition, page 35, line ten. All right. The question, "Any time when you went over there to where the storage was -- you said you were there two or three times at least -- did you see anybody else on the roof?" Answer, "no, sir." And I said, "Okay" and your answer was, "Not at that time."

Did you see anybody on the roof the day before the fire?

A No, sir, not at the time.

Q Now, Bobby Pickens was on the roof the day before the fire, right?

A Yes, sir.

Q And he is your boss and what was he out there doing?
A Taking pictures.
Q Do you know if Mr. Pickens went to the flat roof?
A I am too busy working. I can't see where Bobby is at.
Q What were you doing other than getting some materials with your arm in a sling?
A Making sure they were doing there job right.
Q So you are just watching them do the work?
A Yes, sir.
Q Okay. Now did the metal work require any torching?
A No, sir
Q Do you know how to torch?
A No, sir.
Q Does anybody on your crew know how to torch?
A No, sir.
Q What is a torch used for?
A We don't use torches. They do all the metal work and stuff at the shop. Anything that needs to be soldered or anything like they do that at the shop. Especially with that.
Q Are you certain of that there is no soldering, that no torching takes place on the roof ?
A Only time it does that is when I get it ready and Robert come up there and he soldered on the roof.
Q Who is Robert?
A That's my boss man. One of my boss man.

Q That is another Pickens?
A Yes, sir.
Q And just so Bobby Pickens is with us today. Who is Robert Pickens?
A That's his son.
Q And what is his position?
A He is a boss man, as far as I know.
Q Did anyone from Winthrop ever tell you that you could store materials on the flat roof?
A They didn't tell me, no, sir.
Q How did you access the roof?
A Set up a forty-foot ladder in front of Bancroft.
Q So if you look at exhibit four, is that how the Pickens employees would access the roof?
A Yes, sir, with a ladder. That ain't where we get up at.
Q Where did you get up at?
A In front of Bancroft.
Q Okay. And so at the end of the day was it part of Pickens safety procedures to take the ladders down?
A Yes, sir.
Q And why is that? What's the purpose behind that?
A To keep kids or anybody going up on the roof.
Q Where did you put the ladders when you were done with them?

A On the truck.

Q Did you ever put them in the laydown area?

A No, sir, I didn't. I always loaded my ladders and stuff up at the end of the day.

Q Now, if I can show you the overview again. Do you know where the material storage sites were for this job?

A Yes, sir. It was also in front of Bancroft.

Q The one in front of Bancroft is here, right?

A Yes, sir.

Q And was there another one about a half mile away?

A I am not sure. All I know is the one that was right there in front.

Q Let me show you a series of photographs that are marked 60-A through -- I am sorry, 59-A through 59-E. Okay. The first one, does that depict the area where we were just pointing to? Is that where the laydown area was?

A I think so, yes, sir.

Q Okay. We will show you an another close-up of it, 59-B and 59-C, 59-D, and then 59-E, is that laydown area?

A That's in front of Bancroft, yes, sir.

Q And that area was fenced in, correct?

A Yes, sir.

Q And I see in here what looks appears to be a dumpster?

A Yes, sir.

Q Porta potty?

A Yes, sir.

Q People that parked there cars in there, right, and I think there is another photograph, the next one, there is a lift in there, right?

A Yes, sir.

Q And that's the lift that your company used to bring things like shingles and roofing paper and metal up on the roof, right?

A I reckon. I wasn't there when they were getting that material up.

Q Okay. So it wasn't part of your job to get the material on. It was stored on the roof and you used whatever was stored on the roof?

A Yes, sir.

Q So where were the rolls of paper that you used? I though you said you brought up paper with you?

A I did. It was red paper that we use to put up under copper. I brought it up at the beginning of the day and I took it down with me at the end of the day.

Q How about -- when you do a dormer you put the metal over the dormer, right?

A Yes, sir.

Q And then you also have to shingle around it then, right?

A Yes, sir.

Q And when you put shingles down you don't put it right on to the plywood, right?

A No, sir.

Q You use roofing paper, right?

A That's already on.

Q So if for instance Matthew Pruitt testified that there were rolls of roofing paper that he used for the shingles in this case was he wrong?

MR. SHEALY: Your Honor, objection. Pitting.

THE COURT: Sustained counsel.

Q Okay. Did you determine if any other Pickens' crew had stored materials on the flat roof?

A I did not.

Q So you said you just had metal there, right, that's what you said?

A Yes, sir.

Q When you went to get the metal did you look around to see if anything else was there?

A No, sir. I just went to get material what I needed.

Q How big is that area?

A I am going to say I guess about a 5 by 20. Something like that.

Q Fairly small area?

A Yes, sir.

Q You had to climb a ladder to get on to it?

A Yes, sir.

Q And when climbed down on to it you didn't look around to see what else is on the roof?

A No, sir.

Q Have you ever been inside of Owens Hall?

A I have been in so many of them I don't -- it's right there, the one connected to Bancroft.

Q Have you been in that building?

A Yes, sir, I have been through there when they were doing work on it, come out the little cubbyhole out there.

Q Is that after the fire?

A Yes, sir.

Q Okay. So after the fire you accessed the roof through a roof hatch, right?

A Before the fire had you ever gone in to Owens and gone out on the roof through the roof hatch.

A Yes, sir, a time or two before.

Q You did?

A Yes, sir.

Q Who authorized you to do that?

A I went up through there with Jared from -- I mean -- he was showing me some leaks around that scuttle up there. I do remember that.

Q Jared who?

A I don't know his last name. He worked for Leitner.

Q Leitner wasn't on this job, was they?

A They was doing work on it, yes, sir.

Q Wait a second. Bancroft Hall was a reroofing project, correct?

A Yes, sir.

Q What role did Leitner Construction that's who you talking about?

A Yes, sir.

Q What role did Leitner have on the reroofing project?

A All I know is they had me up there looking at some leaks.

Q Where were these leaks?

A Around the scuttle hole up there.

Q On Owens?

A On Bancroft. This is -- it might be after. I think it was afterwards.

Q After the fire Leitner was the general contractor for the rebuilt of Owens, right?

A Yes, sir.

Q And your company performed roofing work during the rebuilt?

A Yes, sir.

Q At any time prior to the fire had you ever been up on the --

A No, sir, I don't think so.

Q At any time prior to the fire had you ever gone in to Owens up the three floors, in to the attic and out through that hatch?

A I don't think so. No, sir. That was afterwards. It just come to me. It was afterwards.

Q All you do is metal work, right?

A Yes, sir.

Q There is a separate shingle crew, right?

A Yes, sir.

Q Who ran the shingle crew?

A Dan Fister.

Q Fister?

A Yes.

Q Does he still work for Pickens?

A Yes, sir.

Q Okay. Do you know how many times you were on the roof the week of the fire?

A No, sir, I do not.

Q Okay. Do you keep time sheets?

A Yes, sir. Bobby and them keep up with their time and stuff.

Q Bobby Pickens does?

A Yes, sir.

Q So if you turn to exhibit 11 in that book. Is this the job sheet that -- I am sorry, I thought were you there.

A I can't see without my glasses. I'm sorry.

Q If I had mine I would lend them to you. Is exhibit 11, the job sheet that Bobby Pickens keeps?

A Yes, sir.

Q And on it does it show that you were on the Bancroft job Monday, Wednesday, Thursday and Friday before the fire?

A Yes, sir.

Q Does it also indicate whether there were any other -- you said it was Mr. Fister?

A Yes, sir.

Q I don't see any entry on here for Mr. Fister, do you?

A No, sir.

Q And who are all these other crew chiefs or foreman, for instance, Troy McCall?

A Yes, sir.

Q What does he do?

A He does roofing. I don't know what. He wasn't up there I don't think.

Q He wasn't up there the day before the fire, right?

A Right.

Q What type of work does he do?

A He does down like white cap, rubber, stuff like that.

Q So he does flat roofs?

A Yes.

Q Do you know if he was on the project? There were a

couple of flat roofs in different areas away from the flat roof that we have been discussing, right?

A Yes, sir.

Q Towards the front of the building?

A Yes, sir.

Q Was Mr. McCall and his crew working on the day prior to the fire?

A I don't remember.

Q Okay. Who is Scott Arnett (phonetics)?

A He was a foreman out there at one time.

Q Does he work for Pickens?

A He is no longer with Pickens, no sir.

Q What type of foreman was he?

A He was metal crew foreman.

Q He was also metal crew?

A Yes, sir.

Q And exhibit 11 indicates he was there Monday. I think it says Thursday.

A Yeah.

Q Since you don't have your glasses you have to trust me.

MR. VOGT: Is that right Kirby?

MR. SHEALY: Yes.

Q So, if I looked at this crew sheet would this tell me the last time a shingle crew was on that roof?

A It should. I don't know.

Q I should ask Mr. Pickens that?

A Yes, sir, I don't know nothing about that.

Q Did you see anybody on this roof or Owens roof at any time prior to the fire other than Pickens employees?

A No, sir.

Q And you don't know if there was anything else on that flat roof other than the metal you used that day, that's your testimony?

A Yes, sir.

Q And you think Chief Driggers was mistaken when he wrote down rolls of roofing paper; is that correct?

A Yes, sir.

MR. VOGT: Thank you, sir.

MR. SHEALY: If it please the Court.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. SHEALY:

Q Mr. Pruitt, just a few questions. This particular day before the fire, there was nothing about that particular day that stood out in your mind, correct?

A Right. Yes.

Q This was just another day working on a roof, right?

A Yes, sir.

Q And that's what you have been doing your whole adult life, right?

A Yes, sir.

MR. VOGT: Objection, Your Honor. This is leading. The witness is obviously not hostile.

THE COURT: Sustained.

Q You were asked whether you smoke?

A Yes, sir.

Q Any member of your crew, Matt or Brandon either of them smoke?

A No, sir.

Q All right. And the three of you all were the only Pickens people there on the Friday before the fire, right?

A Yes, sir.

Q Okay. Except for Bobby Pickens, correct?

A Yes, sir.

Q Now, you were shown this picture. I want to go back to it.

Miss Strait, can you dim the lights. You were shown exhibit number 11 which is the same thing as Plaintiff's Exhibit 6. You were shown Plaintiff's six earlier, this photograph?

A Yes, sir.

Q Okay.

MR. SHEALY: Your Honor, may I approach the witness?

THE COURT: Yes.

Q We live and die by technology. Can you see that better

now that I have it in front of you?

A Yes, sir.

Q Okay. Now, Bobby Pickens was he the one that took this picture?

A Yes, sir.

Q And do you know what time of day that was?

A I can't remember what time. Bobby comes at different times.

Q Right. And what is it that you all were working on?

A Copper dormer right there.

Q Explain to me what it is that -- tell me what you all do on a copper dormer, what your crew does?

A Basically to start to finish. We put red paper down to keep the copper separated from the other materials so it wouldn't deteriorate the copper. Then we put a copper panel down. Then we screw -- put clips on it. Screw clips down. Then we put another panel on, lock it together and we have a set of hand seamers. We go down there and lock it down to the first stage. Then we come back with another set and lock it down the second stage and basically that is how you lock them down.

Q And no one on your crew solders any material together?

A No, sir.

Q All of what you just described is with your hands and some tools?

A Yes, sir.

Q Now this material up here on the pitch of the roof --
A Yes, sir.
Q --- what is that?
A Looks like shingles.
Q These are packs of shingles?
A Yes, sir.
Q All right. There is a red item depicted in that photograph, do you know what that is?
A That's my red paper that I put under the copper.
Q Okay. You had there up there with you while you were working?
A Yes, sir.
Q Okay. And I think you indicated earlier that was -- you took that up that day?
A Yes, sir.
Q And what did you do with it at the end of the day?
A I put it in my truck at the end of the day.
Q All right. As the foreman what responsibility did you have at the end of the particular work day?
A Make sure everything is cleaned up in the area so nothing will fall off on to student or anybody that is walking below. You know, make sure everything is locked down pretty tight.
Q All right. Now, you worked over I don't know how many week period of time on Bancroft, correct?

A Yes, sir.

Q Do you know long you were up there?

A No, sir, I have been up there so many times on different buildings it is hard to recollect time that I was on that one building.

Q Yes, sir. And what we are talking about was over four years ago, correct?

A Yes, sir.

Q Do you know how many dormers you worked on on Bancroft?

A Let's see. I am going to say about seven or eight.

Q And this particular day, March the 5th, 2010, do you have a particular recollection of you, yourself, going down on to the flat roof that day?

A I do. Warming my hands up because it was cold that day.

Q So you remember taking breaks down there that day?

A Yes, sir.

Q And that day, what do you remember being on the flat roof?

A Just my copper. Like I said, the only thing I do is store my material up there. That's the only thing I know that was up there, my material.

When I go to a job I make sure my materials is only thing I mess with. I don't clean up nobody else's mess. I clean up my mess.

Q Yes, sir. And why did you put copper on the flat roof as opposed to putting it up on the pitched roof where these packs of shingles were where we saw in the picture?

A So that stuff won't blow off. Copper is a lot lighter than the shingles, packs of shingles and that flat area is the safest place to store it so it won't blow off on somebody.

Q Okay. Now you mentioned there was a roof hatch?

A Yes.

Q Can you describe where the roof hatch is in relation to where you all were working?

A It was on the other building across from where we were working at.

Q You all were working on Bancroft?

A Yes, sir.

Q And the roof hatch comes out of Owens?

A Yes, sir.

Q Okay. Owens was not anything you all were working on, right?

A Yes, sir. We weren't working on it, no, sir.

Q All right, but is that roof hatch a way of getting down to flat roof area?

A Yes, sir, it is.

Q Now, if you come out of the hatch what do you do to get down to that flat roof area?

A If I remember correctly you come out the roof hatch and

you can walk straight to the right, you go right over to it, or right above it, something like that.

Q Okay, and the -- during the time that however long that you were working on Bancroft, do you ever remember seeing anyone come out of that roof hatch?

A I have seen people come out of it, yes, sir.

Q You can't tell when?

A No, sir.

Q Certainly don't know that that happened on March 5th?

A No, sir.

Q But you have seen people come out of it?

A Yes, sir, over the time period since I have been there, yes, they have come out.

Q All right. When you left on March 5th, what did you carry down with you at the end of the okay?

A It was on the weekend. Usually on the weekend I get everything up; safety ropes, all that stuff I take down so they won't get wet if it rains or something. Make sure all of the material, stuffs up and then anything I need to take back with me I usually take back and load everything up on the weekend.

Q Okay. All right.

MR. SHEALY: Mr. Pruitt, I have no further questions. Please answer any further question Mr. Vogt may have?

MR. VOGT: I do have a few more, Mr. Pruitt and I

appreciate your patience.

THE WITNESS: Yes, sir.

REDIRECT EXAMINATION

BY MR. VOGT:

Q I showed you earlier exhibits six and seven?

A Yes, sir.

Q If you look as those in your book, exhibit six and seven. Do those depict the materials at the ridge of the roof, right?

A Yes, sir.

Q That is the day before the fire. And you said it's your practice on a weekend to pick up everything and bring it down?

A Yes, sir.

Q Did you bring down all those packs of shingles?

A No, sir.

Q So your practice was what?

A What I brought up I take down that's mine that's metal. Anything related to metal work.

Q All right. So you didn't concern yourself with anything else that some other Pickens crew may have done, correct?

A No, sir. That's their job. They're suppose to be doing that. Their taught just like me. Get their own material up.

Q So as far as -- you did say though that you would take

your safety ropes up and what else?

A Some of my small materials like tools and stuff like that I need.

Q Let me show you what has been mark as exhibit 54-G, and I don't have it here. Do you see a safety rope in that photograph?

A No, sir.

Q Okay.

A Which I wasn't tearing off, I don't do that.

Q The rope at the top of the photograph at the ridge? (Indicating)

A Yes, sir, I see it now.

Q Okay. And this was taken after the fire obviously, correct?

A I reckon. I don't know. Like I said I wasn't there to do tear offs. I don't do tear offs.

Q After the fire, you weren't on the roof after the fire?

A No, sir. I wasn't on that part right there.

Q Okay. Now, what is a small cut roll?

A A small cut roll?

Q Yes.

A Of what?

Q Roofing paper.

A That's basically they cut up in little rolls depending on what size they need for a job.

Q Thirty pound felt?

A Thirty pound, 15 pound.

Q Twelve-inch strips?

A Yes, sir, twelve-inch strips.

Q Did you leave any of those on the flat roof?

A I don't recall it.

Q Did Mr. Pickens, Bobby Pickens, ever tell you that it was appropriate to store roofing rolls and copper flashing on the flat roof?

A If Bobby told me to put it up there I have would put it up there.

Q Did he ever tell you that, do you recall?

A Not that I recall.

MR. VOGT: Your Honor, may I approach?

THE COURT: Yes.

Q Let me show your deposition again. I will start at page 27 and I will read you a series of questions and answers and see if it refreshes your recollection.

Line 18 of page 27, "So the rolls of roofing paper were they stored by your crew or some other crew." Answer, "They were stored by me." Question, "What type of rolls were they?" Answer, "Basically it was small cut rolls." Question, "Okay." Answer, "Because we have a flash around the flashing." Question, "What did they look like?" Answer, "It was basically 30-pound felt cut about 12-inch strips of rolls." Question, "At

any time during the preplanning conference did Mr. Renner or anybody else from Pickens tell you that it was okay to store roofing materials on the flat roof?" Answer, "Just my boss man." Question, "Who was that?" Answer, "Bobby Pickens." Question, "And Mr. Pickens told you it was appropriate to store the roofing rolls and the copper flashing on the flat roof?" Answer, "Yes, sir." Question, "When did he tell you that? The day we was out there. The first day we got up there we stored material up there."

Did I read that accurately?

A Yes, sir.

Q Does that refresh your recollection?

A Yes, it does. I do remember now that we have to use that flashing to go around before he put the shingles down. We have to run that felt paper over the flashing, yes, sir.

Q So there was felt roofing paper on the flat roof the day prior to the fire?

A Just a couple. It don't take much to run that.

Q A couple of rolls, is that what you are saying?

A A couple of small rolls, yes, sir.

Q Where were they located?

A Probably on that little flat roof.

Q Where on the flat roof?

A Probably with the copper right there.

Q Okay, so now you recall there was actually --

A Yes.

Q Something other than metal on the roof?

A Yes, the little rolls of felt paper. Yes, sir, we used them step -- as we put down the copper -- before the shingle goes on because I've been putting shingles on, I put a piece of felt paper over it to give it a proper lap.

MR. VOGT: Thank you, sir. Nothing further Your Honor other than the right to call him for rebuttal.

MR. SHEALY: No questions, Your Honor.

THE COURT: Thank you, sir, you may stand down sir.

MR. VOGT: Next witness?

THE COURT: Yes, sir.

MR. VOGT: The plaintiff calls Brandon Lusk.

BRANDON LUSK, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q Good morning, sir. Can you tell us your name?

A My name is Brandon Lusk.

Q Trying to get my stuff together here, bear with me for a second.

Where do you live Mr. Lusk?

A I live in Spartanburg South Carolina.

Q All right. How old are you?
A I'm 24.
Q And what do you currently do?
A What do I do?
Q How are you employed?
A Oh, I work for my dad, paint. Painter.
Q How long have you been doing that?
A A couple years.
Q Before you went to work with your dad painting what did you do?
A I worked for Pickens.
Q What did you do at Pickens?
A Sheet metal.
Q What does that mean?
A Pickens Roofing.
Q No, no, I am sorry. When you say you did sheet metal what does that mean?
A That's when you put like copper panels, metal roofing. Stuff like that.
Q Okay. How long did you work for Pickens?
A About three years.
Q Three years total, and what was your job there? Were you a helper? Were you foreman?
A Helper.
Q And who did you work under?

A Randy Pruitt.

Q For all three years?

A Yeah.

Q And you left because you wanted to go work for your dad?

A Yeah.

Q Prior to working with Pickens did you do any roofing?

A I did a little bit.

Q What did you do?

A I went to this school called RD Ederson, and it's like they teach you like -- they had different classes you can take like carpentry and stuff like that. I was in the carpentry classes. They build like these little homes. I did roofs on there and I helped my dad roof his building and stuff like that.

Q Okay. And while were you at Pickens or anywhere else, did you ever receive any training regarding safety with respect to roofing?

A Yes.

Q What type of training did you received at Pickens?

A Like safety training, fire training.

Q What type of safety training did you receive?

A Like fall training. Stuff like that. Fall protection training.

Q And what type of fire training did you receive?

A Like how to use like a fire extinguishers and stuff

like that and what not to put on fires in case of fire.

Q Who put on that training?

A Larry.

Q Larry Renner?

A Yeah, renner. Yeah.

Q Any training -- did you receive any training whatsoever relating to the proper storage of roofing material?

A Yeah, we had training on that too.

Q What was that training?

A When it took place I can't remember. Its been so long ago.

Q Did you receive any training that would tell you what you could and could not store on a roof?

A Yeah.

Q What could you store on a roof?

A Well, couldn't store like gasoline or stuff that is like flammable. Like cleaners and stuff.

Q Was it already to store shingles on the roof?

A Yeah.

Q Packs of shingles and wrapping paper?

A Yeah.

Q Was it all right to store pallets of material on the roof?

A Just material. We don't leave wood pallets up there on the roof.

Q Okay. Why wouldn't you leave the wooden pallets up there?

A Because they are combustible. They catch on fire easy.

Q Okay, and you say combustible. Does that mean something that would burn?

A Yeah, something that you put a torch to it'll catch on fire.

Q Randy Pruitt was your uncle and he was your supervisor?

A Yes.

Q And typically was that a two-man crew or three-man?

A It was a typical three-man crew. We just had that one extra person helping.

Q Do you recall working at Bancroft Hall at Winthrop campus in March of 2010?

A Yeah.

Q What did you do?

A Sheet metal, roofing, putting like copper on the louvers.

Q Copper on the dormers?

A Yeah. They call them dormers or louvers.

Q And what was your job?

A Putting the metal on and getting the metal, the material and all that we needed.

Q Now, at any time while you were working at Bancroft Hall did you bring materials up on to the roof?

A Yes, sir.

Q Did you bring materials up on to the roof from the temporary staging area?

A Yeah.

Q That is where the lift was located?

A Yeah.

Q At the front of the building?

A Yeah, in front of the building.

Q What type of materials would you bring up?

A Copper panel, the louvers that go in front of the dormers and screws, the metal clips that hold the copper panel down and our tools; our drills and stuff like that.

Q And if I show you exhibit number 59-A and that's in the book in front of you as well.

A What page is that.

Q It look at those tabs it is 59-A. Does that depict the laydown area? Do you want me to help you with it?

A It's 59.

Q Have you got it?

A Yes, sir.

Q Exhibit 59-A, is that a photograph of the laydown area?

A Yes.

Q Is that front of Bancroft?

A Yeah.

Q Exhibit 59-B show another angle?

A Yeah, that's the laydown area.

Q 59-C -- go through these pretty quickly. Does that also depict a laydown area?

A Yeah, that's the laydown area.

Q How about 59-E?

A Yeah, that's a laydown area.

Q 59-F?

A Yeah, that the laydown area.

Q What was in the laydown area?

A Shingles and the dumpster to carry the asbestos shingles because they get hauled specially. And there is like a couple of vehicles in there when the other crew was doing the tear off of asbestos shingles.

Q Now, that is 59-G you are looking at and I am not representing to you it was taken the day before the fire.

A Yeah.

Q I was just wondering generally what was in there. Did you park in there?

A No, was parked on the street.

Q So when you were working there what was in the laydown area, the lift?

A Yeah, the forklift and the main lift that is showing on the picture and shingles, that is about it.

Q How about roofing paper?

A Yeah, some roofing paper was laying on the ground.

Q Were the shingles stored on pallets?

A Yeah, they were on pallets.

Q Were they wooden pallets?

A Yeah, wood pallets.

Q So the the forklift would be driven over, you pick up the pallet and you put it on the lift to get it up to the roof?

A Yeah, we forked up the pallet up and bum it up there on the roof and then we had to be take the shingles of the pallet and lift the pallet back down.

Q Was it difficult to bring materials up from the staging area on to the roof?

A Yeah, pretty difficult.

Q Why was it difficult?

A Because we only got that one lift. Some times people use it. We would have to take turns using it because there was another company that was tearing the asbestos shingles off and they had to use it too.

Q Well, wait a second. Wasn't all the the asbestos shingles torn off before you began your work?

A No, we was going behind them doing the work.

Q Who did that work?

A I can't think of the name of the company. I don't know.

Q There were people working for Pickens?

A No.

Q This is a different company you think?

A Yeah, it's a different company.

Q Okay. And you think this fire occurred on March 6th were they still tearing off asbestos on March 5th?

A No, sir.

Q When did that stop?

A I don't know for sure, but its been about like a month way before that.

Q So these people that were tearing the asbestos off hadn't been out there for a month or so before the fire?

A They were long gone.

Q Okay. So, tell me again about why it was difficult to get materials on the roof if the asbestos crew is not there what's the difficulty?

A When they are not there we used the lift to hall our materials up there. When they are there we had to take turns using it or some times we just used the ladders. We set up on the front of the building.

Q Was it hard?

A Yeah, it's hard.

Q Hard work to carry shingles by yourself, right?

A We weren't carrying shingles up. Some times we help them carry shingles, so -- so we can -- so they can start, you know, immediately doing their work, so we can go behind and put the metal on.

Q Okay. And do you recall that there was a flat roof between Bancroft and Owen?

A Yes, sir.

Q And were there any materials stored on that flat roof between Bancroft and Owens?

A Yes, sir.

Q What was stored there?

A Copper panels and louvers that go in front of the dormer, metal screws and metal clips to hold the copper panel down.

Q Anything else?

A That was it.

Q Were you on the flat roof the day before the fire?

A Yes, sir, I was on the roof the day before. On Friday?

Q Yes.

A Yeah, I was on that day.

Q How many times were you there the day before the fire?

A How many days I was there?

Q No, how many times were you on the flat roof the day before the fire?

A I was going back and forth getting materials.

Q All right. So a number of times?

A Yeah, a number of times.

Q What else, if anything, was on the flat roof other than material you described?

A That was it.

Q You didn't see anything else on the flat roof?

A No, sir.

Q Now do you recall after this fire speaking to Chief Otis Driggers?

A Yes, sir.

MR. VOGT: Your Honor, may I approach?

THE COURT: You may.

(Whereupon, there was an off the record discussion.)

Q So, you recall discussing this fire with Chief Driggers after the fire?

A Yes, sir.

Q And where did you talk to him?

A Down there on the ground by the road where our trucks was parked.

Q And that was maybe a week or so after the fire?

A Let's see -- no, it was like the Monday. I was out cause he came to speak to me, because I was sick. I think Tuesday he wanted to speak to me I think.

Q Do you recall telling Chief Driggers that in addition to the metal you described there was also rolls of felt paper on the flat roof?

A I told him there was metal up there. There wasn't no felt paper was up there. We had no use for felt paper.

Q Let me show you, if you look at that booklet, exhibit 18.

Dim the lights. Do you recall reading this during your deposition?

A Yes, sir.

Q And you tell me if I read it accurately. "Mr. Lusk stated that they had been working on the flashing on the dormers near to Owens Hall on Friday March 5, 2010. They had gotten off work around four. He hadn't noticed anything unusual. He knew several things were stored on the flat roof area which were rolls of flat paper, louvers, copper flashing and other hip ridge flashing material. He also stated that he nor the other crew member smoked. No further details."

Did I read that accurately.

A Yes, sir.

Q Does that refresh your recollection with respect to what was on the flat roof the day before the fire?

A When I was talking about the felt paper it wasn't on the flat roof because we didn't have no need of felt paper on the roof that day. So it wasn't no paper up there. That's what I told him.

Q But you don't need felt paper to complete the dormer -- copper dormer installation?

A It was already felt paper on. We didn't need no felt paper.

Q So, Chief Driggers was wrong when he wrote down rolls of felt paper, is that your testimony?

A Yes, sir.

Q You say you don't smoke?

A Yeah, I don't smoke at all.

Q Have you ever smoked?

A Back when I was like 14, 15. I didn't like it.

Q Did anybody on the crew smoke?

A No, sir.

Q What was Mr. Randy Pruitt doing the day of the fire?

A He was supervisor. He was watching out because we were suppose to have one person watch and make sure everybody is being safe.

Q Can you show exhibit six please. Exhibit six depicts you on the roof on the day prior to the fire?

A Can you repeat that please.

Q The photograph that you have in front of you, exhibit six, do you see yourself in that photograph?

A Yes, sir.

Q Okay. And are you the one sitting down on the dormer?

A Yes, sir.

Q And Randy Pruitt is standing?

A Yes, sir.

Q He is the one with his arm in his sling?

A Yes.

Q And Matthew Pruitt is hidden a little bit behind him?
A Yes, sir.
Q Okay. And the materials that are on the hip ridge, the ridge of the roof, do you see those?
A Yes, sir.
Q Who put those there?
A The roofing company that was putting the shingles on.
Q What roofing company?
A I don't know the name.
Q A different company then Winthrop -- I'm sorry. A different company then Pickens?
A A different company.
Q Can you describe some of those crew members?
A I think there is like five, six, maybe seven Mexicans was working on that roof doing the shingles. They were dong the shingles on that roof.
Q When were they working on there?
A When were they working on it? They weren't working on that day.
Q They weren't working the day before the fire. When were they last working?
A I don't remember.
Q Do you remember the names of any of those gentlemen?
A No, we don't speak to them. Some times we speak to them, but I don't know their names.

Q Would you recognize the foreman?

A There foreman, no, sir.

Q Six or seven and did you say Mexican, is that what you said?

A Yeah, they're Mexicans I think.

Q Okay. And you don't know the name of company. You don't know who they were working for, but you believe they were putting the shingles on?

A Yeah, they the ones putting the shingles on.

Q And this was a different company then Pickens?

A Yes, sir.

Q Okay. What is the red material in exhibit six?

A That's the rising paper that we put between the copper panel and eye-shield.

Q Who put that up on the roof?

A We did.

Q Who is we?

A Me and Randy.

Q What did you do with it at the end of the day?

A We put it in the truck. We don't leave that up there on the roof.

Q Do you ever store paper on the roof?

A Can you repeat.

Q Are you allowed to store paper on the roof?

A No, sir.

Q Felt paper can burn, right? It's combustible, right?

A At a certain point.

Q Sure. And can you store roofing paper on the roof?

A You can, but we rather keep it on the ground because it round. It ain't that much place to can put it up there.

Q Do you know what a description of small cut rolls, does that mean anything to you?

A Yeah.

Q What's that?

A Small piece of felt paper.

Q Can you store that on the roof?

A We usually -- we usually keep that stuff on the truck.

Q Why is that? Why do you keep that on the truck?

A To keep from the wind from blowing it off the roof because there is no way holding it down.

Q Small cut rolls, is that combustible material?

A Yeah, at a certain point.

Q Certain point meaning if I took a match and lite it up?

A Yeah, it would light up.

Q So the red material is different then the small cut rolls, right?

A Yeah, that's paper. That's that red rising paper I think is what it is called.

Q When did you get off work that day?

A About four o'clock.

Q How did you get on the roof?

A We were using ladders because the fork lift -- that main lift that is shown on the exhibit 56, they already took it out so we used a ladder to get up there.

Q I am sorry. Let's go back. I think you said 56. I think it is 59?

A Yeah, 59.

Q Letter G, can you look at that again. It's also on the screen if that helps, Mr. Lusk. That lift wasn't there on March 5, 2010 the day before the fire?

A No, it was long gone because they are the ones that got that -- the guys that were tearing off the asbestos shingles that was their lift.

Q So if the lift wasn't there that would have made it more difficult for Pickens to carry materials up on the roof, right?

A Yes, sir.

Q Did you ever talk to Clint Robinson about storing materials on the roof?

A No, sir.

Q Do you know who he is?

A Yes, sir.

Q What was his job?

A He was -- I think he was salesman, I think.

Q Was he project manager for this job?

A I think so. I don't hardly talk to him that much.

Q Did you ever ask Mr. Robinson if you could store any materials on the flat roof?

A I don't remember.

Q You don't remember?

A No, I don't think.

Q I'm sorry, I was just having a hard time hearing you.

A I just don't remember.

Q Did you ever ask Bobby Pickens what could be stored on the flat roof?

A Yeah, we asked Bobby about it.

Q What did he say?

A Store them on the flat roof.

Q Store what on the flat roof?

A The metal copper, the louvers and the clips --

Q How about the rolls? I'm sorry I didn't mean to cut you off.

A Oh, that's fine.

Q How about the rolls of felt paper. Did you ask him about that?

A He said don't leave them up there.

Q Mr. Pickens said don't leave paper on the roof?

A That red rising. That red rising paper and the felt paper.

Q So the standard at Pickens was you weren't suppose to

leave paper materials on the roof?

A Yes, sir.

MR. VOGT: I have no further questions at this time.

MR. SHEALY: No questions.

THE COURT: Thank you, sir, you may stand down. Counsel, it is probably a good time to get some lunch. Madame forelady, members of the jury panel. It's about 25 minutes to one. We are going to recess for lunch at this time. I will ask you to be back in the jury room -- get lunch and be back in the 25 minutes to two. That is hour from now, 25 minutes to two. So please enjoy your lunch. Please again, do not discuss the case with anyone.

Thank you.

(WHEREUPON, the jury leaves the courtroom.)

THE COURT: Anything we need to take up out of the presence of the jury at this time?

MR. VOGT: No, Your Honor.

MR. SHEALY: Your Honor, just to clear up the record we would move to admit Defendant's Exhibit one through 42 into the record.

(Defendant's Exhibits 1-42, photographs, received in evidence as of this date.)

THE COURT: Any objection?

MR. VOGT: No objection.

THE COURT: It will be without objection. Anything else? If not we will resume at 25 minutes to two.

MR. SHEALY: Thank you.

(WHEREUPON, luncheon recess was taken.)

THE BAILIFF: All rise.

THE COURT: Please be seated. Counsel ready to proceed?

MR. VOGT: Your Honor, I had one question.

THE COURT: Yes.

MR. VOGT: On my way out to you lunch I happen to see Brandon Lusk and Matthew Pruitt who will be our next witness and Clint Robinson who will be the following witness kind of talking and I wasn't sure if Brandon Lusk was aware of his responsibilities.

THE COURT: It depends on counsel to have instructed his witnesses. As I told you when the motion was made and I granted it, it was your responsibility to make sure that they are aware. They can't be in the courtroom until after they testify and they can't discuss their testimony with anybody who has not yet testified. So, I don't know what he was talking to him about, but he was not suppose to be talking to him about the case.

MR. VOGT: I didn't want to question him about it. He is no longer an employee of Pickens, so it is not Mr. Shealy's client.

THE COURT: Still -- well, that's right. He really wasn't their witness because you called him, now that I think about it.

MR. VOGT: Right.

MR. SHEALY: And he was here under subpoena and he didn't communicate with us at all.

THE COURT: Then that was your responsibility. He was your witness.

MR. VOGT: Okay. That's fine.

THE COURT: I hadn't thought about that. They may not have call him. I don't know. Obviously he had a little bit of different testimony today then he had in his deposition and in his previous statements.

In any event, are you ready to proceed?

MR. VOGT: Yes. Yes, sir.

THE COURT: Please bring the jury in.

(WHEREUPON, jury enters the courtroom.)

THE COURT: Good afternoon, madame forelady and member of the jury panel. I hope you enjoyed your lunch. We are ready now to resume with the trial. Counsel ready to proceed?

MR. VOGT: Plaintiff calls Matthew Pruitt.

MATTHEW PRUITT, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q Sir, please tell us your name and where you live?

A My name is Matthew Pruitt and I live at 1500 Jay Country Club Road, Spartanburg, South Carolina, 29302.

Q How old are you?

A Twenty-five.

Q We heard testimony from I believe your uncle, Randy Pruitt today, is that right?

A Yes, sir.

Q I may slip and call you Matthew just so we keep our Pruitts straight. I am not trying to be informal with you. Okay?

A Sounds good.

Q How far did you go in school Matthew?

A I graduated.

Q From high school?

A High school, yes, sir.

Q And what are you doing currently?

A I am working at Addias.

Q I am sorry?

A I am working at Addias.

Q Was do you do I there?
A I am forklift driver.
Q How long have you been doing that?
A For a month and a half now.
Q What did you do before that?
A I was working for the Greenville News before that and I sold newspapers there for them.
Q And did you say you are 24?
A Twenty-five.
Q Twenty-five?
A Yes, sir.
Q And what did you do when you first got out of high school?
A I was looking for jobs, you know. I mean I would go from job to job trying to find one that paid decently and get me on my feet.
Q Sure. Sure. And this lawsuit involves a fire that happened in March of 2010. Were you working go for Pickens Roofing and Sheet Metal at that time?
A Yes, sir.
Q And how long did you work there?
A For about a year and a half.
Q When did you start?
A I can not remember to be honest with you.
A The fire was in March of 2010.

A I think about '09, 2009.

Q Okay. So maybe a year before the fire?

A Yes, sir.

Q And what was your job at Pickens?

A I was roofer's helper.

Q Had you ever done than type of work before?

A My dad was a roofer and I helped him whenever I had the opportunity and he needed help and stuff, so I would help with him that.

Q What kind of roofing did your dad do?

A He shingled and that was about it.

Q Houses?

A Houses, yes, sir.

Q Before you came to Pickens had you ever done any commercial?

A No, sir.

Q What type of training did you receive at Pickens?

A A lot of metal roofing training. I mean from that to shingling. I had more hands-on experience with that so ---

Q So you had some training about how to do metal work?

A Metal work.

Q Did you have any training about where you should store roofing materials during the job?

A Yes, sir. We had more paperwork on that.

Q What was that paper work?

A It's just instructions on like how to do this and where to put what, you know.

Q Is that in the safety manual?

A It's in manual.

Q Okay, if you look at that book in front of you if you turn to exhibit number five. Did you find it?

A Yes, sir.

Q And is this the safety manual that you are referring to?

A Yes, sir.

Q And if you can, can you look through here and point out the information you received with respect to material storage?

A Pages 62 through 63 show a little bit. I mean some of the training and stuff that we needed for that.

Q Well, first let's look at page 59 on the pre-job planning that states "Pre-job planning; Safety should be considered in pre-job planning conferences. The following subjects should be discussed in pre-job planning sessions," and then there are seven listed items and in item number three it says "Job layout, material storage and proper placement and movement of equipment/vehicles."

Did I read that correctly?

A Yes, sir.

Q Was there is a pre-job conference? Did you ever participate in a pre-job conference?

A Yes, sir.

Q You did. Okay. Do you recall working at Bancroft Hall?

A Yes, sir.

Q Was there a pre-job conference with the Bancroft Hall job?

A I don't remember. I don't recall.

Q Okay. What was the discussed specifically at those pre-job conferences with respect to material storage?

A Where to put the material and do what with it, you know. We took it to the trucks. After we got done with a job or whatever we just took it to the trucks and head out for the day.

Q Okay. So would it be a topic of discussion about where you could store materials on site?

A I don't recall that.

Q Okay. And then you had told me I think you said page 62 -- I am sorry Pickens, 62 of exhibit five?

A Yes, sir.

Q What did you see on that page?

A On the safety committee on seven, number three, "Making safety inspections or analyzing operations and procedures as needed and reviewing the performed by others."

Q Did you perform those type of inspections?

A Not all the time, no, sir.

Q How do you determine whether you should perform those type of safety inspections?

A Randy, our supervisor, he showed us what we needed to do on the job.

Q So, is it fair to say that you follow the directions that Randy gave you --

A Follow the directions of the supervisor, yes, sir.

Q -- if he was your supervisor?

A Yes, sir.

Q I am trying not to talk over you. It's is very difficult for the court reporter.

A I'm sorry.

Q And so if I am stopping you that is why. Okay.

A I'm sorry.

Q Can't talk at the same time. Anything else in exhibit five that you saw that related to material storage?

A No, sir.

Q Now, you said you recall working at Bancroft Hall on March of 2012. What type of work were you doing?

A We were shingling and we were doing copper -- copper roofing.

Q And who was your supervisor for that work?

A Randy Pruitt.

Q Who else was on that crew?

A It was Randy, myself and Brandon.

Q Brandon, that is your cousin?
A Yes, sir.
Q Okay.
A By marriage.
Q So the work was shingling and copper work?
A Yes, sir.
Q Where did you shingle?
A Bancroft and -- I don't recall the other.
Q I'm sorry. I will ask a better question.
On Bancroft that is the job we are talking about?
A Yes, sir.
Q Describe the shingle work that you were performing. Was it in conjunction with the metal work?
A Yes, sir. It was in conjunction with the metal work. We would do the shingles first, you know, then after we got done with the shingling we went to the copper.
Q So you would shingle around the dormer, up to the dormer and then put the copper over the dormer?
A Yes, sir.
Q And that was all part of the job?
A Yes, sir.
Q And you were working at Bancroft the day before, the day before this fire, right?
A Yes, sir.
Q Do you recall were you doing that work the day before

the fire, the shingling and the copper work?

A I believe we were done with all the copper work by then -- I mean with all the shingling work and then we went straight to the dormer.

Q Why do you believe that?

A Because I wasn't here yesterday, and I was going back and trying to figure out everything that we were doing, you know.

Q You weren't here yesterday?

A Yes, sir. Memories started coming back to me as I was thing about everything that was going on at the time.

Q Okay. Do you recall giving a deposition in this matter?

A Yes, sir.

Q Okay. Was your memory better then then it is today?

A It is better today because everything that was going on yesterday and when I came in, you know, I was thinking about everything that went on.

Q Okay. Do you recall after the fire being interviewed by Chief Driggers?

A Yes, sir.

Q And do you recall telling Chief Driggers that you brought supplies from the flat roof between Owens and Bancroft to where you were working?

A Yes, sir.

Q Do you recall where that flat roof was?

A Yes, sir.

Q Do you know how big it was?

A Not exactly square footage.

Q What type of materials were you bringing from the flat roof to where you were working on the day before the fire?

A We had the dormer and everything and then we had some of the shingles and stuff before that, you know. Well, we were done with all the shingles and stuff but ---

Q What did you bring from the flat roof to the area you worked at the day before?

A The dormers. We didn't have all the dormers set so we went ---

Q What was stored on that flat roof area on the day prior to the fire?

A Like the dormers and stuff.

Q What does that mean, dormers and stuff?

A The dormers.

Q Copper?

A Copper.

Q Was there any shingles there? Were there any shingles there?

A I can't recall. I believe -- I mean I think there shingles and stuff over there after we got down with the roofing, you know.

Q Was there roofing paper on the flat roof?

A There was felt paper. We had whatever material that we had left over.

Q Would it help if you read your deposition? If I refresh your recollection and let you read your deposition testimony?

A Yes, sir. It would help a little bit.

Q It's not in front of you. Would that help you are fresh your recollection?

A Yes, sir.

MR. VOGT: Judge may I open the deposition?

THE COURT: Yes, sir.

Q If you turn, Matthew, to page 20? Do you see that?

A Yes, sir.

Q Line number nine, I asked you the question, "How big was this flat roof area?" And your answer was?

A "I'm not too sure. I don't remember."

Q Question, "okay. What was stored back there?"

A "We had all the material and stuff set back."

Q Question, "Okay. What type of material was it?"

A "Shingles and, I mean, a lot of times we brought up stuff from the truck on the way there."

Q And you also said -- you missed a word there. Can you read that answer for me again, line 14.

A "Shingles and, I mean, a lot of the times we brought it

out of the truck to on the way there."

Q Question, "Right. And the statement, the summary of the statements said you were going to the flat roof area to get supplies." What was your answer?

A Yes, sir.

Q Next question, "What type of supplies do you recall getting on that day?"

A "I think nails and the shingles and stuff."

Q Question, "And those were all stored on the roof?"

A Yes, sir.

Q Question, "Was there roofing paper stored in that area as well?" Answer?

A I believe so.

Q Question, "shingles?"

A "Shingles and felt paper."

Q Question, "Shingles and felt paper. How about metal pieces, were they stored there as well?"

A "I believe a few pieces were."

Q And then if you turn to page 31. I am sorry, I might have given you the wrong page. Page 27. Start on line six. Question, "How many times did you go to flat roof area to get materials?"

A "Whenever we were running low on something."

Q Question, "Do you remember there being rolls of roofing paper?"

A "Felt paper."

Q Question, "yes."

A "There were."

Q Question, "There were?"

A "Yes, sir."

Q Question, "Would you cut the material off the rolls in the flat area or would you bring a whole roll back?"

MR. SHEALY: Your Honor, a lot of these questions have not been posed to the witness. I would just ask --

MR. VOGT: I was trying to refresh his recollection.

THE COURT: I understand. Follow proper procedures.

Q So Matthew, now that you been able to read your prior testimony do you recall bringing shingles, nails and felt paper from the flat roof to the area you were working?

A Yes, sir.

Q And was there also metals stored on the flat roof?

A There was metal, yes, sir.

Q So on the flat roof the day prior to the fire there was roofing felt paper, shingles, metal. Were the shingles on pallets?

A No, sir.

Q Was there anything else on the flat roof other than

what you described?

A No, sir.

Q How many times did you go to flat roof area that day?

A I don't remember.

Q Do you smoke?

A No, sir.

Q Have you ever smoked?

A When I was younger, yes, sir.

Q You didn't smoke on the day prior to the fire?

A No, sir.

Q Did you take breaks on the flat roof that day?

A Every once in a while. Whenever it got too hot.

Q I'm sorry.

A Whenever it got too hot.

Q Okay. And this was early March. What would you do on the flat roof when you took your break?

A We would go down to the truck and we would get something to drink or whatever we needed down there and take a break and get something.

Q And did you see anybody else on the roof of Bancroft, Owens and the flat roof on the day prior to the fire?

A No, sir.

Q Did you see Mr. Bobby Pickens there that day?

A Yes, sir.

Q What did Mr. Bobby Pickens do that you recollect?

A Came up and took pictures of that other roof.

Q Did he give you any instructions that day?

A I don't recall.

Q Did he ever tell you that it was okay to store shingles and roofing paper on the flat roof?

A I don't recall.

Q Were you just following the direction of your supervisor Randy Pruitt?

A Yes, sir.

Q Did Randy tell it was okay to store roofing paper and shingles on the flat roof?

A Yes, sir.

Q Now, what time did you finish that day?

A I don't remember.

Q Well, what would the typical finish time be?

A About five, five-thirtyish.

Q And would you collect the trash at the end of the day?

A Yes, sir, we would collect the trash and we would put it on the bucket and take it down to the truck.

Q Did you ever thrown the trash off the roof?

A Not literally throw the trash off the roof. We would put it in a bucket, you know, take it down with a rope and take it to the truck after that.

Q If you turn to page 31 in your deposition?

A Yes, sir.

Q Question beginning on line 18, "Were you responsible for collecting any waste material on the roof, trash, that type of thing?" What was your answer?

A "I mean, I like -- we through down like excess stuff we didn't use, you know, and we put it in the truck."

Q Question, "You through it down?" What was your answer?

A "Yes, sir. In front of the building, yes, sir."

Q Does that refresh your recollection with respect to throwing trash off the building?

A Just like I was saying, we put it in buckets and things when we put it down. We tied it to through the rope and send it down that way.

Q Just phrased your answer differently during deposition?

A Yes, sir.

Q What type of trash would you collect?

A Whenever we use shingles we take the plastic and wrap it up in the bucket and send it down and the nails and stuff that we didn't use, you know.

Q When you are talking about the plastic with the shingles, you are talking about the plastic wrapping?

A Plastic wrapping. Wrapping.

Q Let me show you exhibit number six. Do you recognize yourself in this photograph?

A Yes, sir.

Q You were standing behind your uncle in that photograph

or sitting behind?

A I was sitting behind.

Q What were you doing in that photograph?

A Shingling.

Q You do shingle work?

A Shingle work, yes, sir.

Q Okay. So you had to use roofing paper with shingles?

A Felt paper then put shingles over.

Q So in orders to shingle around the dormers you had to put felt paper down and then you hammer your shingles in?

A Yes, sir.

Q And was Brandon responsible for the metal part of the work?

A Brandon did a lot of metal work, yes, sir.

Q Now, you told us about what was on the flat roof; shingles, roofing paper, metal, the material that is at the top of the roof in Plaintiff's Exhibit Six did you bring that material up to the roof on the lay down area?

A Yes, sir. I did a lot of the bringing the material and taking back.

Q Did you bring it up on the day prior to the fire?

A Yes, sir.

Q So that material that is depicted in exhibit six was material that -- did Brandon help you bring that material up?

A We all did it. I mean, it wasn't just a one man

person.

Q At that time where did you get that material from?

A We got it from the truck.

Q Okay, is the truck down parked at the front of the building?

A Yes, sir.

Q Okay. Are you familiar with the term lay down area?

A No, sir.

Q Let me show you a photograph and I may be using a term you're not ---

Is the photograph, I believe it is 59-G, does that depict the area where you got the material from your truck?

A Yes, sir.

Q I am sorry, 59-F. And so how would you get the material from that fenced in area that is depicted in 59-F up to the roof?

A We have like this little -- we had a crane and if the shingles were too much we had it lifted up there for us. And whatever wasn't heavy -- I mean, if it was light enough we take it up there with a ladder.

Q And I will show you another photograph, 59-E. Is that the lift that you would use?

A Yes, sir.

Q Was that lift there the day before the fire?

A I can't recall.

Q If it wasn't there before the fire you would have to carry it up on ladders, right?

A Yes, sir.

Q And so on this day before the fire, March 5, 2010 you brought a lot of materials up on the roof and then you worked on this dormer area that you said were you shingling. You were going back and forth to the flat roof getting materials which included roofing paper and shingles.

Did you do anything else that day?

A No, sir.

Q Do you see anybody else on the roof that day other than Mr. Pickens, Mr. Bobby Pickens?

A No, sir.

Q Did you ever see anybody else on the roof at any time prior to the fire other than Pickens's employees?

A There were a few crews, but I don't remember who they were with.

Q Crews working on the roof?

A I don't know who who was on roof. I don't know if they were on the roof doing work or anything but ---

MR. VOGT: Thank you, Mr. Pruitt.

MR. SHEALY: May it please the Court.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. SHEALY:

Q Mr. Pruitt, just briefly, you mentioned another project going on at Winthrop. How many different projects did you work on at Winthrop during the time you worked for Pickens?

A I worked on the bigger building. I'm not sure what the name of that one was.

Q Was that going on at the same time as Bancroft?

A That one was first and then I was and Bancroft after that.

Q All right. Did the two projects overlap?

A Not that I am aware of.

Q Okay. You were asked a lot about the day March, 6, 2010?

A Yes, sir.

Q Do you recall one way or the other what materials were left up on the flat roof when you all left that day?

A I don't. I don't recall.

MR. SHEALY: No further questions.

MR. VOGT: No questions, subject to recall.

THE COURT: Okay. Thank you, sir, you may stand down.

(Witness excused.)

MR. VOGT: Plaintiff calls Clint Robinson.

CLINT ROBINSON, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q Good afternoon, Mr. Robinson. Can you please tell us your name and where you live?

A Clinton Haywood Robinson, 111 Stonecrest Court, Pacolet South Carolina.

Q How old are you Mr. Robinson?

A Thirty-six.

Q How far did you go in school?

A An associates degree.

Q From where?

A Spartanburg Community College.

Q What was that degree in?

A Civil Engineering.

Q What year did you get that?

A 1997.

Q Who do you work for currently?

A I work for Guy Roofing Incorporated.

Q How long have you worked there?

A Two years, two months.

Q What is your position with Guy Roofing?

A I'm a project manager.

Q Prior to working for Guy Roofing who did you work for?

A Pickens Roofing.

Q How long did you work for Pickens?

A Fifteen years, approximately.

Q And when you left Pickens what was your job title?

A I was an estimator, project manager.

Q Two separate roles, but you played both rolls?

A Yes.

Q And how long have you done estimating and project management for Pickens?

A The entire time I was there.

Q Prior to working for Pickens had you had roofing experience?

A No.

Q What are the duties of project manager?

A Just oversee the job, order material, build a job. Make sure all the men on the job have everything they need.

Q At any time during the time you worked for Pickens's Roofing did you receive any training as to building or fire codes or standards that apply to roofing?

A Training, no.

Q Education?

A No.

Q Did you receive any information with respect to building or fire codes that apply to roofing work?

A Building codes, yes.

Q What building code information did you receive?

A Well, we are required to follow the International

building code in respect to installing roofs.

Q Did you have any training with respect to fire codes that apply to roofing work?

A No.

Q Are you familiar with the National Fire Protection Association Chapter 241?

A No. CC

Q Are you familiar with International Fire Code Chapter 14 that relates to demolition and construction -- I'm sorry, demolition and alteration for construction projects?

A No.

Q Have you ever read section 8.3.3 of the National Fire Protection Association Code Chapter 241?

A No.

Q Who at Pickens, if you know, during your tenure was responsible for insuring that the work met all of the applicable codes?

A I would say the owners of the company probably were.

Q And when you were there who was that?

A Bobby Pickens, Ben Pickens and Jim Pickens.

Q During your employment at Pickens did you work on a number of projects at Winthrop University?

A Yes.

Q Can you tell us how many?

A Several repair projects, roof replacements, probably

three and then one new construction project.

Q The new construction project being the campus center?

A Yes.

Q So, the reroofing at Bancroft Hall would be one of the other ones you talked about?

A Replacement, yeah.

Q Were you Pickens point person for bidding that job?

A Yes.

Q And so how did you as the estimator go about preparing Pickens bid?

A We are given a set of plans and specs from a roof consultant that was hired by Winthrop.

Q And if you look in the book in front of you, exhibit one, is that the specifications that you referring to?

A It appears to be, yes.

Q And as part of preparing the estimate for the job did you read the specifications marked as exhibit one?

A Yes.

Q Did anybody else at Pickens participate in preparing the estimate of the job?

A I was on vacation the week that the job actually bid, so Ben Pickens Jr. actually handled getting the paperwork together and bid together and getting it to Winthrop.

Q So you and Ben Pickens were responsible for the bid?

A Yes.

Q As a result did Pickens win the bid for the Bancroft Hall reroofing project?

A Yes.

Q These specifications which are exhibit one they became part of the contract, correct?

A Correct.

Q If you look at exhibit number two, is that a copy of the contract between the Winthrop and Pickens for the reroofing of Bancroft hall?

A It appears to be, yes. I you would you say yes.

Q Prior to bidding the job, did you submit any questions to Winthrop or anyone acting on its behalf with respect to the requirements set forth in the specifications?

A Not that I remember.

Q If you can look again exhibit number one. There made be a yellow sticky note. It is page 1500-3.

A 1500?

Q 1500 -- I'm sorry, we will start at dash two?

A I don't know if I am in the right place.

Q Let me help you. The specifications you had read prior to bidding a job, correct?

A Yes.

Q And the specifications became part of the contract right?

A Yes.

Q 1.9(D) of that section states prior to starting work obtain approval from owner for location of work operations at ground level such as material storage, waste dumping, et cetera, restrict work to approved location.

Did I read that adequately?

A Yes.

Q The owner is Winthrop, correct?

A Yes.

Q What location or locations did Pickens receive approval from Winthrop with respect to material storage?

A We were given a material storage area in what I believe is the fairgrounds, about a half a mile from the job site and then we were given about a 50 by 50 area adjacent to Winthrop.

Q Okay. So there was essentially a parking lot about half a mile away where you could store all materials and then then was a lay down or storage area at the front of the building?

A Yes.

Q And what was in that area?

A There was a dumpster in there, a man lift, miscellaneous roofing materials. Kind of changed on a day-to-day basis.

Q Now, originally didn't the specification call for two temporary storage areas?

A Yes.

Q Okay. One at the front of the building and one at the rear?

A One on the left side, one on the right.

Q And prior to the start of the work did that change?

A Yes.

Q And can you tell us about how that changed prior to the job starting?

A I believe the president of the college did not want us setting up on the right hand side of the building.

Q As a result of that a change order was issued, right?

A Correct.

Q And did you negotiate the terms of the change order?

A I did.

Q Okay. If you look at exhibit number one, that became part of the contract, correct?

A Yes.

Q And if you look at exhibit number one, at the end of that. I think it is tabbed.

A What am I looking for?

Q Exhibit two. I'm sorry. Exhibit two is the contract.

A Okay.

Q And do you see the change order?

A Yes.

Q And in return for Pickens being limited to one temporary storage area Winthrop paid Pickens how much additional

money?

A $19,350.

Q Was there any confusion at all at the time with respect to the area where Pickens could use -- what area Pickens could use as temporary lay down area?

A No.

Q Now, did the specifications require Pickens to adhere to all applicable code, ordinances and regulations?

A I mean without reading through it right now I couldn't say yes or no.

Q That is fine and we will get to a specific section here. If you look at 1500-3.

A Okay.

Q Subsection L, states "Initiate, maintain and supervise all safety precautions and programs in connection with the work. Make all necessary precautions for the safety of and provide the necessary precautions to prevent damage, injury or loss to". If we go down to three it says, "Other property at the site or adjacent thereto". And number four, under that section states, "Comply with all applicable law ordinances, rules and 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."

Did I read that correctly?

A Yes.

Q Who at Pickens was responsible for initiating, maintaining and supervising all the safety precautions and programs connected with the Bancroft reroofing job?

A I would say it was probably a combination of a lot of us.

Q Can you tell us who that was?

A I was on the project, Ben Pickens Jr. was on the project, Bobby Pickens was on the project, Robert Pickens was on the project, Larry Renner was on the project at one point or another.

Q Do you know if any of those gentlemen are familiar with the NFPA 241?

MR. SHEALY: Objection it calls for this witness to state what another witness is aware of.

THE COURT: He can answer if he knows. If he doesn't know he can say I don't know.

A I don't know.

Q You told us you weren't familiar with NFPA 241, correct?

A Yes.

Q At any time during the project did you review any codes ordinances, regulations or laws connected with work?

A No.

Q Okay. So, let's go to 1400 of the specifications which is part of exhibit number 1. I am sorry, we start at 1400-1,

which states, "Superintendent: For the purpose of these specifications the designation superintendent is hereby defined as the individual present on the job site at all times work is being performed, and who primary responsibility is to supervise and direct performance at work."

Who was the superintendent for this job at Pickens?

A I would say Randy.

Q Randy Pruitt?

A Yes.

Q Is Mr. Pruitt also a foreman of the crew?

A Yes.

Q Was there anything in the specification that allowed Pickens to use the flat roof between Owens and Bancroft as an additional lay down storage area for roof materials that were not in use?

A Was there anything in the specifications that allowed that?

Q Yes?

A Probably not.

Q Were you ever told by anybody at Winthrop or anyone acting on its behalf that Pickens could use the flat roof between Owens and Bancroft as an additional lay down storage area?

A There were several representatives from Winthrop that were on that roof that saw the material on the roof.

Q Who is that?

A Wes -- I can't remember Wes's last name.

Q Wes love?

A Yes.

Q When did Wes Love see the materials on the flat roof?

A I am not saying specifically that he did. I am saying that he was up there on the roof many, many times.

Q I'm sorry, you don't know if he saw the flat roof or whether there were materials on the flat roof?

A No.

Q Who else from Winthrop?

A Ben Roach.

Q Do you know if Ben Roach saw the flat roof or whether materials were stored on the flat roof?

A I don't know that he did know.

Q Anybody else?

A Nobody that I know of.

Q Did either Wes Love or Ben Roach or anybody else working for Winthrop ever tell you as the project manager that Pickens could store roofing materials on the flat roof between Owens and Bancroft?

A Not specifically, no.

Q You say, "not specifically", that seems to qualify your answer. What does that mean?

A I guess what I mean is, they were on the project and

knew that we had material down there and they didn't tell us that we couldn't put material down there.

Q You are assuming that they knew there was material on the flat room?

A I am assuming yes.

Q Why do you say that?

A Because they were on the roof and they had to have seen it.

Q The flat roof that we are talking about wasn't part of the Bancroft Hall reroofing project, correct?

A That's correct.

Q And we go to the overview, that would have part of the Owens Hall, correct?

A That's correct. It is a connected between the two.

Q And Pickens started its work at this end of the building, correct?

A That's correct.

Q And it went around this U-shape building and was approaching the flat roof just prior to the fire, correct?

A That's correct.

Q How did you get on the roof every day?

A In the beginning we had a lift in the staging area and then we had a ladder from one of the low flat roofs up to the higher roof.

Q You never went up on the roof through an interior

access through Owens Hall?

A A couple of times, yes.

Q You did that prior to the fire?

A Oh, on Owens Halls, no. No. On Bancroft, yes.

Q Where did you do it on Bancroft?

A On the flat roof in the front, the little white stripe.

Q I can't see it.

A There is a roof hatch right there, in that. (Indicating).

Q That's a flat roof that is your pointing to at that ends of building?

A Yes.

Q Now, you assume that Winthrop knew. Did anybody from Pickens ever tell you -- Bobby Pickens you said was involved in this job, Larry Renner, I think it was Jim Pickens and Ben Pickens. Did you ever have any discussions with Ben regarding the storage of materials on the flat roof?

A No.

Q What type of materials did Pickens store on the flat roof?

A Sheet metal, fasteners, probably some rosin paper.

Q Rosin paper is -- what's that?

A I mean, I don't know specifically what was up there at any one given time.

Q The last -- when was the last time were you on the

roof?

A A week to two weeks prior to the fire.

Q Do you recall your deposition being taken in this case?

A Yes.

Q Do you recall testifying that there were wooden pallets taken on the flat roof?

A Yes.

Q Okay and those wooden pallets were storing what?

A Sheet metal, fasteners, I think rolls of felt.

Q How about shingles?

A Maybe. I don't remember specifically.

Q How many pallets were there?

A I believe through was either two square pallets or one rectangular shaped pallet.

Q I will show you -- do you recall your deposition was taken in this case?

A Uh-huh.

Q And you testified under oath, right?

A Yes.

MR. VOGT: Your Honor, may I?

THE COURT: You may open it.

Q If you look at page 51.

A Good.

Q Line nine, question "What was on the pallets that you recall?" Could you read your answer?

A As far as I remember there was some shingles, bundles of shingles, some copper. I specifically remember there being copper there.

Q Question, "roofing paper?"

A Yes.

Q Question, "Is that correct, roofing paper?"

A And I said felt paper.

Q And then the last question, line 19, "Okay, how many different pallets were there?"

A And I said, "I think there was two. There were either two square pallets or one rectangular-shape pallet."

Q So does this refresh your recollection with respect to what was being stored on the pallets?

A Not really.

Q You don't recall there being shingles, copper, roofing paper -- I am sorry, felt paper on the pallets as you testified on July 12, 2013?

A I don't recall specifically what was on the pallet.

Q Now, is it fair to say that the flat roof was being used essentially as staging area for that portion of the roof closest to it?

A I think there was definitely material being stored there, yes.

Q Would you characterize that as staging area for that portion of the roof closest to it?

A I guess it would depend on what you mean by staging area.

Q Okay, if you look at your deposition page 53, line 12, question was, "Okay, so that flat roof was being used as essentially a staging area for that portion of the roof closest to it." Can you read your answer?

A My answer said, "Correct, plus there is a big fire wall right here. Our lift was there. This is a big fire wall that you have to climb over the top of, so getting there from here to there was a major undertaking because you had to climb over this wall.

Q And that fire wall was located here, right? (Indicating)

A Yes.

Q So the reason why you were using the flat roof as another staging area was because there is was a fire wall?

A That is probably part of it, yes.

Q What is the other part of it?

A Convenience maybe.

Q And also save money?

A I don't know that I would say that.

Q Did it make -- you could have brought those materials up on a daily basis, right?

A Well, we could have stored them on the shingled roof.

Q It would have been appropriate to store all those

materials on the shingled roof?

A That would have been the same as storing them on the flat roof. You asked me if it would save us money --

Q Right.

A -- and I would say not any more so then it would storing on the shingled roof.

Q Well, if you brought the material off the roof each day when you were done, wouldn't that increase your labor cost?

A Yes.

Q So you would save money by storing materials on the flat roof, correct?

A Yes.

Q Now, how long had the pallets been there?

A I don't recall specifically.

Q The last time you were on the roof was about a week before?

A A week to two weeks probably.

Q And were the pallets there then?

A I don't recall specifically.

Q Are you familiar with Stafford Engineering?

A Yes.

A When is the last time a Stafford engineering employee was on the roof?

A I don't recall.

Q As the project manager did you receive copies of

Stafford Engineering inspection reports?

A I believe, I did yes.

Q And what type of issues were typically noted in those reports?

A Quality related stuff.

Q When you say quality work, for instance the shingles weren't put on correctly or flashing wasn't done right?

A Yes.

Q And if you turn to exhibit 60.

A Yes.

Q Can you describe what exhibit 60 is?

A It is a site visit report from the roof consultant.

Q Can you describe the issues that were found by Stafford Engineering on that date?

A Shingle tab broken, fascia boards around the penthouse they are asking us to replace those. Basically just -- I don't see very many deviations on here as far as -- basically just a report.

Q What is the date of that report?

A February 4th.

Q So that's -- I don't know, 2010 was a leap year, but approximately thirty days prior to the fire?

A Yes.

Q Was this the last inspection report Pickens received from Stafford Engineering prior to the fire?

A I really don't know.

Q This report was directed to you, correct?

A Yes.

Q It was also directed to Wes Love at Winthrop, correct

A Yes.

Q Did anybody from Stafford Engineering ever tell you or anyone working for you that it was okay to store materials on the flat roof?

A No.

Q If you go back to exhibit number 1, the specifications?

A Yes.

Q In 1400-3. Under inspection of the work, C. I want to read that. It's a little hard to read. "The words supervise and inspect wherever used herein in connection with the duties or activity of the owner shall in no way, expressed or implied, relieve the contractor from his responsibilities for the safety of the workmen, the preservation of the work or proper performance under this contract. The owner shall not be responsible for the safety of the workmen, the safeguarding of the work, or the proper performance of the contractor."

Did I read that accurately?

A Yes.

Q Did you read that prior to bidding the job?

A I am sure I did, yes.

Q And is it fair to say that Winthrop did not have any

duty to supervise and inspect the work performed by Pickens?

MR. SHEALY: Your Honor, objection. Calls for legal conclusion. May we approach?

THE COURT: Yes.

(Whereupon there was an off the record discussion.)

MR. VOGT: Can the court reporter read the question, Your Honor?

(WHEREUPON, the last question was read back.)

A I really don't know.

Q Who at Pickens would know then?

A I don't know.

Q 1.6 (D) of that specification, page 1400-3 states, "No inspector shall have the power to waive the obligations resting upon the contractor to furnish good material and do good work as herein prescribed. Any failure or omission on the part of any inspector or the engineer to observe, object to or condemn any detective material or work shall not release the contractor from the obligation to at once tear out, remove, and properly replace or rebuild the same at any time upon discovery of the defect and upon notice from the owner or engineer to do so."

Did I read that correctly?

A Yes.

Q Did anybody at -- could anybody at Winthrop waive the obligations rested upon Pickens to do good work as prescribed by

the specifications?

MR. SHEALY: Your Honor, again, it calls for a legal conclusion. Calls for interpretation and the contract speaks for itself.

THE COURT: I am going to sustain the objection unless you be more specific then that.

Q You indicated that you thought Wes Love or Ben Roach knew that Pickens was storing materials on the flat roof, correct?

A I know that Wes Love was on the roof.

Q Right. But let's assume that was the case. Did the specifications require Winthrop to carry out the work in accord with a contract regardless of what Winthrop knew or didn't know?

A I don't know.

Q Did you read 1.6(D) when you bid this job?

A I don't recall specifically, but I read the specifications before I bid the job, yes.

Q Did you have understanding what "No inspector shall have the power to waive the obligations resting upon the contractor" to mean?

A I think I do.

Q What is it?

A I think it means if an inspector --

MR. SHEALY: Your Honor, objection. Again, calling for him to interpret the contract.

THE COURT: He entered into the contract. He should be to say if he knows or does not know what the language means in the contract.

MR. SHEALY: Yes, sir.

THE COURT: If he signed it. You may answer.

A What was the question again?

Q 1.6 (D), the inspection of the work, of the specification, which is exhibit number one states, "No inspector shall have the power to waive the obligations resting upon the contractor".

Contractor is Pickens, correct?

A Yes.

Q So my question to you was you suggested that perhaps somebody at Winthrop knew Pickens was storing material on the flat roof. I am asking you under the specification of the contract that doesn't mean Pickens could waive its obligation, right, to carry out the work in accordance with the specification?

A I really don't know.

Q Who at Pickens would know that?

A I don't know that either.

Q If you turn to 1700-3 if you read 3.4 progress cleaning, sub part A, "General: Clean project site and work areas daily, including common areas. Coordinate progress cleaning for joint-use areas where more than one installer has

worked. Enforce requirements strictly. Dispose of materials lawfully."

Sub part one, "Comply with requirements in NFPA 241 for removal of combustible waste materials and debris."

Did I read that accurately?

A Yes.

Q Did you ever read the requirements set forth in NFPA 241 with respect to the removal of combustible waste materials and debris?

A No.

Q Do you have any idea what those requirements are?

A I do not.

Q Do you know of if anybody at Pickens was aware of those requirements?

A I wouldn't know.

Q So would Randy Pruitt as superintendent for this job was it his responsible to know requirements set forth in NFPA 241?

A I wouldn't know.

Q He was the superintendent, correct?

A Well, he was a foreman, but I think it is one and the same.

Q Okay. Now, on the day prior to the fire did you go up on the roof?

A The day prior to the fire?

Q Yes, sir.

A No.

Q Were you on the Winthrop Campus the day prior to the fire?

A Yes.

Q And why were you there?

A I don't recall specifically, but I believe I was there to pick up a check from Winthrop.

Q Did you go over to the Bancroft project?

A I did.

Q And what did you observe?

A It was about quitting time, time to get off, and Randy and Brandon and Matthew were coming off the roof getting into their truck to leave and I spoke with them briefly.

Q What did you speak to them about?

A Just asking them if they got everything done that they needed too. If they needed anything. That kind of thing.

Q Was there a reason you didn't go up on the roof that day?

A Yeah.

Q What was that?

A Because they were leaving.

Q You weren't there to inspect their work you simply wanted to see what they were doing?

A Well, I was over there for another reason and I just

stopped by there.

Q Okay. Are you a smoker?

A Yes.

Q Does the state allow smoking on the roof?

A Yes.

Q Is that rule ever violated?

A I wouldn't no.

Q You never saw any of your workers smoking on the roof?

A No.

Q What did you do as project manager to insure Pickens complied with all the contract specifications.

A What did I do to insure that we complied with specifications?

Q Yes. Specifications were part of the contract, right?

A Yes.

Q And Pickens had an obligation to comply with specifications, correct?

A Right.

Q What did you do as a project manager to insure that Pickens complied with all the contract specifications?

A Just made sure they did the job correctly every day.

Q And how did you go about doing that?

A Progress inspection.

Q But you knew at the start of this job that Pickens was limited to two storage areas, correct?

A On the ground, yes.

Q Was there any provision in the contract that said you could store material on the flat roof?

A Not that I am aware of.

Q So, you knew as project manager that materials had to be stored either at the parking lot, I think you said the fairgrounds about half mile away, or the lay down area on the ground in front of the building, correct?

A Yes.

Q That didn't comply with the specifications, correct?

A What didn't comply with specifications?

Q I'm sorry. Storing materials, construction materials on the flat roof did not comply with specifications, correct?

A I don't know.

Q Well, didn't you just tell us that the specifications called for two storage areas?

A Yes.

Q And you told us that specifications did not provide for storage of materials on the roof, correct?

A I don't know that it says that.

Q Can you find anywhere in the specifications that it allows storage of materials on the roof?

A You are probably not going to find where it says specifically that we can store materials on the roof, no.

Q Would you agree with me the specifications do not allow

for the storage of materials on the roof?

A I don't know that I would agree with you, no.

Q Then why don't you find the section that refers to that in the specifications either directly or indirectly? You said specifically, saying you didn't expect to find something specifically. Is there something non-specific in the specification?

A Not that I am away of, no.

Q So there is nothing in the specification that allow Pickens to store roofing paper, shingles, pallets, on the flat roof between Owens and Bancroft; is that correct?

A No, it doesn't say specifically we can store material.

Q Is that correct?

A Yes.

Q Now, what did you do as project manager to insure Pickens complied with all the building and fire codes applicable to its work?

A The building code?

Q We can start with the building code. All applicable codes, is what I am interesting in. I will ask the questions again.

A I think the building code would be more revolve around around the specification which is written by a roof consultant.

Q And the specifications require Pickens to comply with all codes and regulations, ordinances, and law, correct?

A Yes.

Q And you said you are not familiar with the South Carolina Fire Code, but do you know if any of those provisions apply to roofing work when there is demolition and alteration to the building?

A I don't know.

Q So you didn't do anything as project manager to insure that Pickens complied with fire code, is that accurate?

A Well, having not been familiar with the fire code I couldn't answer that question.

Q Well, you didn't do anything, correct, to make sure --

A I would have to read the fire code before I could tell you if I did anything.

Q So, if I show you NFPA 8.3.3 which says, yard storage of construction materials shall not be kept within 30 thirty feet of the building. What did you do to comply with that?

A Say that again.

Q Let me pull it up.

"Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration.

MR. SHEALY: Your Honor, I am going to object. It calls for a legal conclusion.

THE COURT: Overruled.

MR. SHEALY: Yes, sir.

A What was the question again?

Q What did you as a project manager do to insure that Pickens complied with the state fire code including 8.3.3 of NFPA 241?

A What is the definition of combustible or flammable construction materials.

Q What do you understand combustible to mean?

A Will burn.

MR. SHEALY: Objection, calls for legal conclusion.

THE COURT: Overruled.

Q All right. Will burn. Something that will burn?

A Yes.

Q Okay. All right. Is that you understanding of combustible?

A I am not real sure, but I think so.

Q Well, assuming that is the meaning because you are the project manager --

A I was one of the project managers.

Q You were one of the project managers required to make sure Pickens complied with the code. What did Pickens do -- what did you do for Pickens to ensure that it properly stored combustible construction materials?

MR. SHEALY: Same objection.

THE COURT: Overruled.

A I don't know.

Q You didn't do anything?

A I wouldn't say that.

Q Well, the contract required Pickens to store materials in a parking lot or on the ground in front of the building. Did Pickens comply with that?

A The storage area on the ground was closer then 30 feet from the building.

Q Let me show you a few pictures of the storage area. I think you said it was how big?

A Fifty by fifty, roughly.

Q So if you wanted to store construction, combustible construction materials you had adequate room to store those materials within the storage area further then 30 feet from the building, correct?

A If there was nothing else in there, yeah.

Q 59-E, does that show the storage area with the fence around it?

A That appears to be it, yes.

Q Thirty feet is ten yards, right?

A Yes.

Q Aren't those cars parked further then ten yards from the building?

A Probably, yes.

Q Don't you have stored construction materials more than

30 feet from the building in the lay down storage area in the front of the building?

A Say that again.

Q Wasn't there adequate space in this storage area, and we will give you a few more views if you want to see it. Wasn't there adequate space in that storage area to allow Pickens to store combustible construction materials more than 30 feet from the building?

A I don't know.

Q Didn't you tell me that you thought the space was fifty by fifty?

A Approximately, I thought it is, yes. I didn't take a tape measure and measure it though. That's an educated guess on my part.

Q Do you see the yellow stake in 59-B?

A Yes.

Q Is that more than ten yards from the building?

A I can't tell.

Q Do you have any ability to estimate distance?

A Yeah.

Q Are we about ten yards apart?

A Not quite ten yards.

Q Okay. How about now?

A Probably.

Q We will walk through all of 59 pictures.

(Pictures shown on monitor)

A And what am I looking at there? There is no fence there.

Q Understood. That's before the fence went up. Did you see the yellow stakes outlining where the fence was suppose to be place?

A In that picture?

Q No, sir, we go back to show you A and B. How far was the street from the building?

A Probably 60 feet.

Q Again, are those yellow stakes more than thirty feet from the building?

A Yeah, I would say they are.

Q So if Pickens wanted too it had ample room to store combustible construction materials in the lay down area?

A I guess so, yes.

Q As project manager how did you know that no one had the power to waive the obligations?

THE COURT: You have been over that counsel. Move on.

MR. VOGT: Okay. Thank you, Your Honor. Thank you Mr. Robinson.

THE WITNESS: Thank you.

CROSS EXAMINATION

BY MR. SHEALY:

Q Mr. Robinson, you mentioned Ben Pickens Jr. as one of the people involved. Is he an owner of the company?

A Yes.

Q Is he still alive?

A No.

Q What level of involvement did he have with the project?

A A fair amount. A good bit.

Q All right. Did he concern himself more with the shingle part, or the metal roof part, or the flat roof part or any part in particular?

A Probably, mostly flat and some the of the shingle. We subcontracted the shingles.

Q All right. Did you subcontract all of the shingle work.

A The nailing all of the shingles we subcontracted, yes.

Q Now, you mentioned that the last time you were on the roof was about a week or two before March 5, 2010, correct?

A That's correct.

Q Is that the point at which you saw the materials you described on the flat roof or was it at some other time?

A I saw it several times. The main time that I saw it was after the fire when they dug the stuff up.

Q All right. That's when you saw the flat roof -- where you spent the most time at the flat roof was after the fire?

A Yes. Yes.

Q Okay. And you mentioned that this was a situation that changed on a day-to-day basis, is that correct?

In other words what was up there on a particular day?

A Yeah. Yeah.

Q Okay. So, in what position are you in to testify to what was on the flat roof on March 5, 2010 at the end of the work day?

A I would have no idea.

Q Okay. You did not go up on the roof that day?

A No.

Q All right. As people are working on a shingle roof what is the practice that people in the roofing industry observe in terms of where they put the materials they are working with?

MR. VOGT: Objection, Your Honor, he is asking to state a standard of care for the general roofing industry.

THE COURT: I will sustain the objection counsel.

MR. SHEALY: I have no further questions. Thank you.

MR. VOGT: I just have perhaps one or two more, Mr. Robinson.

REDIRECT EXAMINATION

BY MR. VOGT:

Q Did you say that nail of the shingle work was subcontracted out?

A Yes.

Q Who was it subcontracted out to?

A Dean Woods contracting.

Q So Pickens entered into a contract with Deans to do certain work for this job?

A Correct.

Q Did they also remove the asbestos?

A No.

Q Who removed the asbestos?

A Upstate environmental.

Q When was the Dean Wood's crew last on the roof?

A I don't remember specifically. It would have been a good long time prior to the fire.

Q Okay. So can you estimate for us, was it weeks, months?

A Weeks probably.

Q And Pickens was responsible for the work Dean Woods was doing, correct?

A Yes.

MR. VOGT: Thank you. I have no further questions at this time, subject to recall.

MR. SHEALY: No questions.

THE COURT: Okay. Thank you, sir. You may stand down sir.

Counsel, it's been close to hour and a half, let's

go ahead and take a short break.

Madam forelady and members of the jury panel we will take a short break at this time.

(WHEREUPON, jury panel exits courtroom.)

Counsel approach just a minute.

(WHEREUPON, there was an off the record discussion.)

THE COURT: All right, we will take ten minutes.

(WHEREUPON, there was a brief recess.)

THE BAILIFF: All rise, court is now in session.

THE COURT: Counsel ready to proceed?

MR. VOGT: Yes, Your Honor.

THE COURT: Bring the jury in.

(WHEREUPON, the jury enters the courtroom.)

THE COURT: All right, call your next witness.

MR. VOGT: The plaintiff calls Robert O. Pickens, III.

ROBERT O. PICKENS, III, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VOGT:

Q State your name please?

A Robert O. Pickens, III.

Q Where do you live sir?

A 504 Old Iron Works Road, Spartanburg, South Carolina.

Q There's a number of Pickens who have been identified throughout this case and I understand your usually call Bobbie, is that correct?

A That's correct.

Q What is your current position with Pickens Roofing and Sheet Metal?

A Vice president.

Q And at the time of the March 6, 2010 fire what was your position?

A President.

Q And kind of sketch for us a little bit the management structure at Pickens Roofing?

A Yeah, myself, two cousins; Jim Pickens and Ben Pickens Jr. are the eldest and we rotate the president, and vice presidency and secretary between us. Ben Pickens, Jr. passed away two years ago.

Q Was that your brother?

A My cousin.

Q Pickens Roofing and Sheet Metal is that a corporation?

A Yes, sir.

Q Who are the -- and you said the officers are yourself and your two cousins?

A It was, but when Ben died his son, Ben Pickens III, took his place and his ownership.

Q What is the nature of Pickens Roofing business?

A We do commercial and residential roofing.

Q What percentage of Pickens Roofing work is commercial?

A Probably eighty percent, seven-five to eighty percent.

Q Does Pickens Roofing do a number of projects involving schools and universities, that type of thing?

A We did do.

Q What percentage of your business is public buildings like that?

A Maybe thirty to forty percent.

Q Is that the case in 2009, 2010?

A I would think so.

Q So at the time Winthrop entered into its contract with Pickens Roofing for the re-Roofing of Bancroft Hall were you the press?

A Yes, sir.

Q And that was in 2009, correct?

A I believe that is correct, yes, sir.

Q If you look at exhibit number two can you identify that as the contract for the reroofing project?

A Which page would that be on?

Q It should be one of the first pages. I will find it for you sir.

Is exhibit two a copy of the contract between Winthrop and Pickens?

A Yes, sir

Q And are the specifications for the job which are exhibit one, did they become part of the contract?

A Yes, sir.

Q Are you familiar with the specifications that were made part of the contract for the Bancroft reroofing?

A I wasn't directly involved in the negotiation, so I wasn't real familiar with all the specs.

Q You were here for Mr. Robinson's deposition?

A Yes, sir.

Q And he testified he was the person that prepared the bid?

A Right.

Q Along with somebody else that helped him?

A Yes, sir.

Q Who was that?

A That was Ben Pickens Jr..

Q Is it fair to say that the specifications are mandatory criteria guideline -- standards, whatever you want to call them for, Pickens to follow?

A We try to follow those, yes, sir.

Q Is it up to Pickens to determine the best means and method to carry out the work?

A Yes, sir.

Q Now if you can we will spend some time with exhibit

number one. To it is in front of you.

A Okay.

Q And that's the specifications. If you would turn to 1500, two of exhibit one NSD I can help you find it if you like.

A Are you talking about page 1500?

Q 1500-2

A May be you can help me find it.

Q I will. And before we get to that, who else in your immediate family works for the company?

A My son, Robert Pickens, and Jim's son, Burt Pickens, and Ben Jr's son, Ben the third.

Q And how far did you go in school sir?

A I went to Wofford College and then I went to Clemson University for a masters.

Q I am sorry. You said you went to Wofford you said?

A Yes.

Q What did you get your degree in from Wofford?

A It was a Bachelors degree in Business and Economics.

Q What year was that?

A 1965.

Q And you got a masters degree from Clemson?

A Yes, sir.

Q And what was that in?

A Industrial management.

Q What year did you get that?

A 1966.

Q Have you ever worked for any other company other than Pickens Roofing and Sheet Metal?

A No, sir.

Q Now, I started to ask you questions about exhibit number one, 1500-2 that I was interested in, 1.9 (D) states "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." Did I read that accurately?

Q Tell me again which paragraph you are reading.

Q I am sorry it is 1.9 (D).

A D?

Q "D" as in dog.

A Okay. Yes, sir.

Q Okay. "Prior to starting the work obtain approval from owner?"

A Yes, sir, I got it.

Q "Locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work for approval locations."

Now, what was your role during this project as president of the company?

A I looked after the metal work that we do at our shop and also some of the metal work that we install on the various

jobs that we are involved with.

Q Did Randy Pruitt report to you during this time?

A He does.

Q And did he during the Bancroft reroofing project?

A Yes, sir.

Q Now, at any time prior to or during the work did you ever read the specifications or any part of the specifications?

A I read the part that pertained to the sheet metal work and the drawings that pertained to the metal work.

Q The portions which detail how the metal is suppose to be on the dormers is that what you are saying?

A Right and the fire wall.

Q How about the requirements set forth for instance in 1500-2. Did you ever read those as president of the company. The title of that is 1.9 protection of building and property.

A I probably read that at some point, but I was not directly involved in the parts of it.

Q Prior to commencing this job did Pickens obtain approval from Winthrop for location of work operations on ground level such as material storage?

A I'm not sure. I don't know.

Q Who was -- was that Clint Robinson's responsibility?

A It could have been Clint's or Ben Pickens Jr.

Q Okay, and I's sorry Ben Pickens Jr. passed?

A Yes, sir.

Q What was Ben Pickens Jr.'s title?

A He was at that time vice president.

Q This specification required Pickens to identify superintendent for the project?

A Yes, sir.

Q Who was the superintendent for the project?

A At that time Randy Pruitt was.

Q What training and background does Mr. Randy Pruitt have that enables him to carry out the duties of superintendent for a project of this size?

A He was superintendent at that time on the metal work. The part that was ongoing during March of that year. So he was in charge of his crew, superintendent and foreman of that crew.

Q So were there multiple superintendents?

A Yes, sir.

Q Who were the other superintendents?

A Troy McCall would have been one when that part was going on and he was foreman/superintendent.

Q What superintendent -- what work was he superintendent for?

A He was on the flat roof portion.

Q That done before March 6, 2010, correct?

A Yes, sir.

Q Who else was the superintendent?

A Dan Feaster.

Q Who is he?

A He was a one of our employees from the Anderson branch.

Q And what was he superintendent of?

A He was working on the part that installed nail letters and wood sheeting on the Annex.

Q Anybody else other than Randy Pruitt, Troy McCall or Dan Feaster?

A Well, you could probably identify Clint as superintendent.

Q Client, okay. Anybody else?

A That would probably be all.

Q I am sorry.

A That would be all, yes, sir.

Q But don't these specifications require Pickens to identify one superintendent who had controlled over the entire job?

A Well, identify one project manager.

Q If you turn to 1400-1 of exhibit one. Just a few pages from where you are now, sir.

1.4 states, "For the purpose of these specifications the designation superintendent is hereby defined as the individual present on the job site at all times work is being performed, and whose primary responsibility is the supervise and direct that performance of the work."

A Yes, sir.

Q Are you -- are you stating today that there are five such individuals?

A When that particular work phase was going on, like for instance, Randy he was involved over the part that dormers and the metal flashing and covers, but he was not there during the parts of the other phases.

Q If you turn to the next page, 1400-2 sub part F. It says, "The contractor shall provide the owner in writing the name of the proposed project manager, job superintendent and foreman for approval no later then seven days prior to the pre-work conference.

Now, Client Robinson was the project manager, that is right?

A Yes, sir.

Q And the job superintendents were, Randy Pruitt, Troy McCall, Dan Feaster, Clint Robinson?

A Yes, sir.

Q And who were the foreman?

A They were joint superintendents and foreman. Randy as he said was both.

Q Should the job superintendent be familiar with the specifications?

A The part he is working on.

Q Now, for instance, Randy Pruitt he did sheet metal work, right?