

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

RECEIVED

DEC 19 2016

S.C. SUPREME COURT

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

v.

Pickens Roofing and Sheet Metals, Inc., Petitioner.

VERIFIED PETITION FOR SUPERSEDEAS

Kirby D. Shealy III
Lyndey Ritz Zwingelberg
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
(803) 254-4190
Attorneys for Petitioner

Other Counsel of Record:

Zachary M. Jett, Esquire
Peter M. Vogt, Esquire
Butler Weihmuller Katz Craig, LLP
11605 North Community House Road, Suite 150
Charlotte, NC 28277
(704) 543-2321
Attorneys for Respondent

Pursuant to Rule 241(d) of the *South Carolina Appellate Court Rules*, Petitioner Pickens Roofing and Sheet Metals, Inc. hereby moves for review of the lower court's order granting Petitioner's motion for a stay of execution as to the judgment dated March 21, 2014 pursuant to Rule 62(d), SCRCF. *See* certified copy of Order dated November 18, 2016, attached hereto as **Exhibit A**. Although the lower court granted Petitioner's motion, the court erred by setting a bond in the amount of Six Million and No/100 Dollars (\$6,000,000.00) in contravention of S.C. Code Ann. § 18-9-130 (Rev. ed. 2014). This Petition is supported by the affidavit of James M. Pickens, attached hereto as **Exhibit B**, pursuant to Rule 241(d)(4)(A).

BACKGROUND

The case arises from a breach of contract and negligence action instituted by Winthrop. The case was tried before a jury from March 17 to 21, 2014. Following presentation of all evidence, the jury determined Winthrop sustained damages in the total amount of Seven Million, Two Hundred Twenty-Three Thousand, Three Hundred Forty-Three Dollars and Fourteen Cents (\$7,223,343.14). *See* Judgment, filed March 21, 2014. (Appx. p. A-66).

On April 21, 2014, Pickens filed a notice of appeal. Pickens appealed the judgment, all oral orders of the court during trial, and all post-trial orders. Generally, "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." *See* Rule 241, SCACR. However, there are exceptions to the automatic stay, which include execution of money judgments. *See* Rule 241(a) and (b)(1), SCACR (*citing* S.C. Code Ann. § 18-9-130). The underlying Judgment in this case is a money judgment and is not automatically stayed by Rule 241.

The court of appeals filed an opinion on August 3, 2016, affirming the judgment. *See* 2014-000821, Op. No. 5433 (August 3, 2016). Petitioner filed a Petition for Rehearing on

August 18, 2016 which was denied on October 24, 2016. In the interim, Petitioner filed a Motion to Stay Execution of the Judgment Pending Appeal on October 3, 2016 with the lower court. *See* Motion to Stay Execution, attached as **Exhibit C**. On November 18, 2016, the lower court granted Petitioner's Motion, staying enforcement and execution on Plaintiff's judgment pending a final order on Petitioner's appeal, and requiring Petitioner to post a bond in the amount of \$6,000,000.00 within thirty days. *See* Order.

Pursuant to Rule 241(d)(3), a copy of Petitioner's original notice of appeal is attached hereto as **Exhibit D**.

STANDARD OF REVIEW

A trial court has the discretion, pursuant to Rule 62(d), SCRPC, to stay enforcement of a judgment pending an appeal. Section 18-9-130(A)(1) of the South Carolina Code and Rule 241, SCACR, provide further guidance to the Court as to when, and under what circumstances, a stay may be imposed. A writ of supersedeas staying the execution of a money judgment is typically granted in order "to . . . stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to the appellate the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 309 S.C. 128, 390 S.E.2d 469, 470 (Ct. App. 1990) (*quoting* 4A C.J.S. *Appeal & Error* § 497 (1957)).

Rule 241(d)(1), SCACR, mandates that an application for supersedeas "must first be made to the lower court . . . which entered the order. However, "[a]fter the lower court . . . has ruled, any party may petition the appellate court where the appeal is pending . . . for review of this order." *Id.* at Rule 241(d)(2), SCACR.

The amount of an appeal bond is a matter committed to the sound discretion of the trial court. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). However, the appellate courts may reduce the amount of the bond. *See*

Bunkum v. Manor Properties, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996) (upon petition for supersedeas, Supreme Court reduced amount of appeal bond).

ARGUMENT

I. THE LOWER COURT ERRED IN SETTING THE APPEAL BOND AT MORE THAN \$1 MILLION DOLLARS.

Although the lower court granted a stay of execution in Petitioner's favor, it set the appeal bond at an illegal level. Pursuant to S.C. Code Ann. § 18-9-130 (Rev. ed. 2014), any bond required to stay execution on the judgment should not have exceeded \$1,000,000.

In support of its Motion for a Stay of Execution, Petitioner provided a sworn affidavit of Bert Pickens, current employee of Petitioner with personal knowledge of its business operations, which was sufficient to show the lower court that Petitioner employed less than fifty persons and had gross revenues less than Five Million (\$5,000,000) Dollars. See Petitioner's Motion and Affidavit attached thereto. Section 18-9-130 is clear that the lower court must set the amount of an appeal bond at "the amount of the judgment or . . . one million dollars, *whichever is less*" in cases where the moving party can show it employs less than fifty persons and has gross revenues less than five million dollars for the previous tax year. See S.C. Code Ann. § 18-9-130(A)(1)(b) (Rev. ed. 2014) (emphasis added). The lower court erred in finding the affidavit "lack[ed] the necessary specificity or documentary support to establish" these facts.

Affidavits must be made on personal knowledge and set forth facts as would be admissible in evidence. See *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). "The affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness." *State v. Dunbar*, 361 S.C. 240, 248, 603 S.E.2d 615, 619 (Ct. App. 2004) (quoting 3 Am. Jur. 2d *Affidavits* § 14 (2002)).

As further evidenced by the attached affidavit of James M. Pickens, at no time from January 1, 2013 to December 31, 2015 has Petitioner employed more than fifty persons *and* had

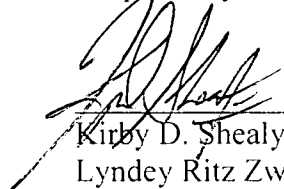
gross revenues exceeding five million dollars. Corporate officers are assumed to have personal knowledge of the acts of their corporations. *See Barfield v. Dillon Motor Sales, Inc.*, 233 S.C. 26, 39, 103 S.E.2d 416, 422 (1958) (“corporation must speak and act through its officers”) (quotation omitted); *see also S. Bank & Trust Co. v. Praestans One, LLC*, No. 2:12-cv-450, 2013 WL 1155526, at *8 (E.D. Va. Mar. 19, 2013).

Accordingly, the appeal bond in this case should have been set at one million dollars pursuant to S.C. Code Ann. § 18-9-130(A)(1)(b) (Rev. ed. 2014). As previously set forth by Petitioner, and accepted by the lower court, Petitioner will be irreparably harmed if the execution of the Judgment is not stayed.

CONCLUSION

Pickens respectfully requests the Court grant supersedeas, staying Respondent’s execution of the judgment upon the posting of an appeal bond in the amount of \$1,000,000.00.

Respectfully submitted,



Kirby D. Shealy III
Lyndey Ritz Zwing
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29202
Telephone: (803) 254-4190
kirby.shealy@arlaw.com
lyndey.zwing@arlaw.com

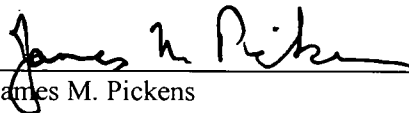
*Attorneys for Pickens Roofing
and Sheet Metals, Inc.*

December 19, 2016.

VERIFICATION

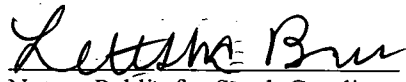
PERSONALLY appeared before me, , who, after being duly sworn, deposes and states that he has read the foregoing Verified Petition for Supersedeas and the allegations contained therein are true and accurate, to the best of his knowledge. All exhibits that are attached to the Verified Petition for Supersedeas are in their original form or are duplications of genuine documents which have not been altered.

FURTHER AFFIANT SAYETH NAUGHT.


James M. Pickens

SWORN TO AND SUBSCRIBED BEFORE ME

this 19th day of December 2016.


Notary Public for South Carolina
My Commission Expires: December 27, 2017

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4603151

Winthrop University
Zachary Mason Jett

Pickens Roofing And Sheet
Metals Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

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.
- ACTION DISMISSED (CHECK REASON):
 - Rule 43(k), SCRPC (Settled);
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - 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: _____

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)
n/a	n/a	n/a

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

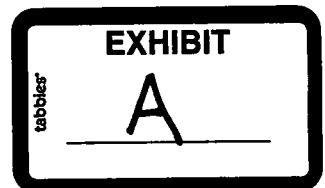
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time 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.

S. Jackson Kimball

Circuit Court Judge

3063
Judge Code

11/18/2016
Date



For Clerk of Court Office Use Only

This judgment was entered on **November 21, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **November 21, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

L Andrew Watson Butler Pappas 11620 N Community House Road Charlotte, NC 28277
Jay M Goldstein Butler Pappas Weihmuller Katz Craig Llp 11620 N Community House Road Charlotte, NC 28277
Zachary Mason Jett 11605 N. Community House Rd Suite 150 Charlotte, NC 28277
Peter W Vogt 11605 N Community House Road Suite 150 Charlotte, NC 28277

Kirby Darr Shealy III PO Box 2285 Columbia, SC 29202
Lyndey Ritz Zwingelberg 1501 Main Street Fifth Floor Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

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.

CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

2016 DEC 16 AM 10:47

SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-46-3151

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

THE WINTHROP UNIVERSITY
TRUSTEES FOR THE STATE OF
SOUTH CAROLINA,

Plaintiff,

vs.

PICKENS ROOFING AND SHEET
METALS, INC.,

Defendant.

ORDER

DAVID HAMILTON
C.C. JUDGE
YORK COUNTY, SC

2016 NOV 21 AM 9:09

FILED-RECEIVED

This matter came before the Court on November 17, 2016, upon Defendant's Motion to Stay Execution of Judgment Pending Appeal pursuant to Rule 62(d), SCRCP. Representing Plaintiff was Peter W. Vogt, and representing Defendant was Kirby D. Shealy. Based on my review and consideration of the record presented and the arguments of the parties, I make the following findings, conclusions, and ruling.

BACKGROUND

This matter arises from an action instituted by Plaintiff, and tried by a jury from March 17 to 21, 2014. The jury returned a verdict in favor of Plaintiff on March 21, 2014, in the amount of \$7,233,343.14. Defendant filed a notice of appeal on April 21, 2014, and the South Carolina Court of Appeals issued its opinion (Op. No. 5433) affirming the verdict of the Trial Court on August 3, 2016. Defendant filed its Petition for Rehearing in the Court of Appeals on August 18, 2016, and the Court of Appeals denied the Petition on October 21, 2016.

Defendant has indicated that it intends to seek a Writ of Certiorari from the South Carolina Supreme Court. Plaintiff has now notified Defendant of its intention to execute on the judgment without regard to further pending appeals, and it is entitled to do so. On September 29, 2016, Defendant filed this Motion to Stay the Execution of Judgment Pending Appeal.

DISCUSSION

Rule 62(d), SCRCP, provides this Court broad discretion when considering motion to a stay of enforcement of a judgment pending appeal. Defendant submitted an affidavit in support

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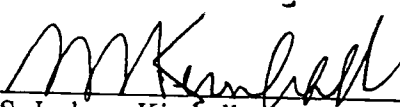
of its position that, pursuant to S.C. Code Ann. § 18-9-130 (1976, as amended), any bond required to stay execution on Plaintiff's judgment may not exceed \$1,000,000. See § 18-9-130(A)(1). Defendant's affidavit would place consideration of any bond under § 18-9-130(A)(1)(b). However, I find that the affidavit lacks the necessary specificity or documentary support to establish Defendant's contention.

Nevertheless, I agree that a stay is appropriate under the circumstances, provided that Plaintiff's judgment is adequately protected. In that regard, I find and conclude that a bond in the amount of \$6,000,000 is adequate under the circumstances to protect Plaintiff's judgment.

Therefore, it is ordered that Defendant be granted a stay of enforcement and execution on Plaintiff's judgment pending a final order on Defendant's appeal. It is further ordered that Defendant shall post a bond in the amount of \$6,000,000.00. Such bond shall be provided within thirty days of the date of this order, or Plaintiff shall be permitted to proceed with enforcement of its judgment.

AND IT IS SO ORDERED.

November 18, 2016


S. Jackson Kimball
Special Circuit Court Judge
York County

12

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,

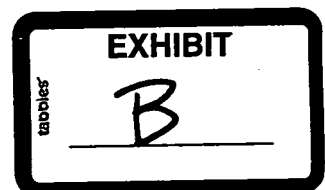
v.

Pickens Roofing and Sheet Metals, Inc., Petitioner.

AFFIDAVIT OF JAMES M. PICKENS

PERSONALLY appeared before me, James M. Pickens, who, being duly sworn, deposes and states that the following is based upon his own personal knowledge, except those matters stated upon information and belief, and as to those matters, he believes them to be true:

1. I am a citizen and resident of Spartanburg, South Carolina.
2. I am over the age of eighteen and am of sound mind to give this affidavit.
3. I am the vice president/treasurer for Pickens Roofing and Sheet Metals, Inc. ("Pickens Roofing"), which provides roofing and sheet metal fabrication services, primarily in commercial settings. I have served in this capacity for approximately 40 years. The other officers of company are Robert O. Pickens III and Benjamin R. Pickens.



4. As an officer of Pickens Roofing, I am familiar with and have reviewed the business records of the company and, based on information acquired through performance of my official duties, I have personal knowledge of the information contained in this affidavit.

5. The outstanding shares of the business are currently owned by me, Robert O. Pickens III and Benjamin R. Pickens. The business is actively managed by me and my cousins. We rotate officer positions every three years.

6. At no time from January 1, 2013 to December 31, 2015 has Pickens Roofing both:
A. employed more than 50 persons, and B. had gross annual revenues exceeding Five Million Dollars (\$5,000,000.00). In 2013, Pickens Roofing had 43 employees and gross revenues of \$4,432,253.00. In 2014, Pickens Roofing had 40 employees and gross revenues of \$8,141,891.00. In 2015, Pickens Roofing had 40 employees and gross revenues of \$9,456,730.00.

7. The corporate records from which I gleaned the information set forth in paragraphs 5, 6 and 7 above are commercially sensitive documents, and I am not willing to furnish them to the Court or the Plaintiff in the above-captioned action in the absence of a protective order.

8. The judgment entered against Pickens Roofing in the above-captioned action exceeds Pickens Roofing's insurance coverage by more than One Million (\$1,000,000) Dollars.

9. If Plaintiff were to execute upon the judgment while Pickens Roofing's appeal is pending, Pickens Roofing would be irreparably harmed.

FURTHER AFFIANT SAYETH NAUGHT.

James M. Pickens
James M. Pickens

SWORN TO BEFORE ME THIS 19th

DAY OF December 2016.

Letitia Oran
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: December 27, 2017

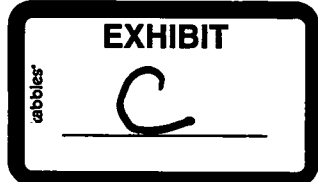
STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)
)
 The Winthrop University Trustees for the State of)
 South Carolina)
 Plaintiff,)
 v.)
)
 Pickens Roofing and Sheet Metals, Inc.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE SIXTEENTH JUDICIAL CIRCUIT
 Civil Action No.: 2012-CP-46-3151

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorneys: Peter W. Vogt, Bar No. _____ Zachary Jett, Bar No. _____ Address: Butler Pappas 11620 N. Community House Road Charlotte, North Carolina 28277 Phone: (704) 543-2321 Fax: Email: pvogt@butlerpappas.com zjett@butlerpappas.com	Defendant's Attorneys: Kirby D. Shealy III, Bar No. 11556 Lyndey Ritz Zwing, Bar No. 100804 Address: Adams and Reese LLP 1501 Main Street, Fifth Floor Columbia, South Carolina 29209 Phone: (803) 254-4190 Fax: (803) 779-4749 E-mail: kirby.shealy@arlaw.com lyndey.zwing@arlaw.com		
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: <u>Motion to Stay Execution of Judgment During Appeal</u> Estimated Time Needed: <u>15 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO			
SECTION II: Motion/Order Type <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="text-align: right; margin-top: 20px;"> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: right; margin-top: 5px;"> <u>September 29, 2016</u> Date submitted </div>			
SECTION III: Motion Fee <input checked="" type="checkbox"/> PAID - AMOUNT: \$ <u>25.00</u> <input type="checkbox"/> EXEMPT: <table style="width:100%; border: none;"> <tr> <td style="width: 20%; border: none;">(check reason)</td> <td style="border: none;"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ </td> </tr> </table>		(check reason)	<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____
(check reason)	<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____		
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____		
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____			

25 OCT -3 PM 2:28
 DAVID HAMILTON
 C.O.C.P. & J.S.
 YORK COUNTY, SC



STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2012-CP-46-3151

The Winthrop University Trustees for the)
State of South Carolina,)
)
Plaintiff,)
)
v.)
)
Pickens Roofing and Sheet Metals, Inc.,)
)
)
Defendant.)

**MOTION TO STAY
EXECUTION OF JUDGMENT
DURING APPEAL**

2016 OCT -3 PM 2:28
DAVID HARTIG
C.C.C.P. & GS
YORK COUNTY, SC
RECEIVED

TO: PETER VOGT, ATTORNEY FOR PLAINTIFF:

Defendant Pickens Roofing and Sheet Metals, Inc. hereby moves for an order granting stay of execution as to the judgment dated March 21, 2014 pursuant to Rule 62(d), SCRCF.¹

The case arises from a breach of contract and negligence action instituted by Winthrop. The case was tried before a jury from March 17 to 21, 2014. Following presentation of all evidence, the jury determined Winthrop sustained damages in the total amount of Seven Million, Two Hundred Twenty Three Thousand, Three Hundred Forty Three Dollars and Fourteen Cents (\$7,223,343.14). See Judgment, filed March 21, 2014, attached hereto as Exhibit A.

On April 21, 2014, Pickens filed a notice of appeal. See Exhibit B. Pickens appealed the Judgment, all oral orders of the Court during trial, and all post-trial orders of the Court. *Id.* Generally, “the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” See Rule 241, SCACR. However, there are exceptions to the automatic stay, including execution of money judgments.

¹ Previously, counsel for Winthrop informed the undersigned it did not intend to execute on the judgment while the appeal was pending before the Court of Appeals. In light of the recently-filed Opinion of the Court of Appeals, Op. No. 5433 (August 3, 2016), counsel for Winthrop has indicated that, in the absence of an order and Pickens’ posting of an appeal bond, Winthrop may elect to execute on the judgment

See Rule 241(a) and (b)(1) (*citing* S.C. Code Ann. § 18-9-130). The underlying Judgment in this case is a money judgment. See Judgment, dated March 21, 2014, attached hereto as Exhibit A.

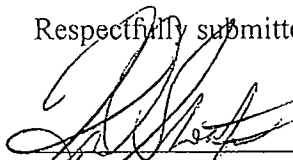
A trial court has the discretion, pursuant to Rule 62(d), *South Carolina Rules of Civil Procedure*, to stay enforcement of a judgment pending an appeal. Section 18-9-130(A)(1) of the South Carolina Code and Rule 241, SCACR provide further guidance to the Court as to when, and under what circumstances, a stay may be imposed. A writ of supersedeas staying the execution of a money judgment is typically granted in order “to . . . stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to the appellate the fruits of a meritorious appeal where they might otherwise be lost to him.” *Graham v. Graham*, 309 S.C. 128, 390 S.E.2d 469, 470 (Ct. App. 1990) (*quoting* 4A C.J.S. *Appeal & Error* § 497 (1957)).

It has been held that an order staying proceedings on appeal should be made “when it appears that the party making the application has just reason to apprehend that without a stay he would be deprived of the benefit of the favorable result on appeal.” *Porter v. Lesesne*, 85 S.C. 399, 67 S.E. 453 (1910) (acknowledging that the difficulty in restoring the status of the parties in the event that the appeal is sustained should be considered).

Based on the foregoing reasons, Pickens requests the Court impose a stay upon the execution of the judgment.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



Kirby D. Shealy III
Lyndey Ritz Zwing
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29202
Telephone: (803) 254-4190
kirby.shealy@arlaw.com
lyndey.zwing@arlaw.com

*Attorneys for Pickens Roofing
and Sheet Metals, Inc.*

September 29, 2016.

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

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

PLAINTIFF(S)

DEFENDANT(S)

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.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 43(k), SCRPC (Settled);
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - 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	\$7,223,343.14

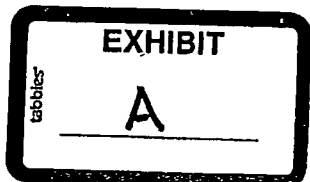
If applicable, describe the property, including tax map information and address, referenced in the order:

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.

Jacob D. [Signature]
Circuit Court Judge
CPFORM4Cm
SCCA SCRPC Form 4C (Revised 3/2013)

2113
Judge Code

3/21/14
Date



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 Wehmuller Katz Craig LLP
11620 N Community House Road Charlotte, NC 28277

Kirby Darr Sheaty III PO Box 2285 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

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.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL CIRCUIT
)

CIVIL ACTION NO. 2012-CP-46-3151

The Winthrop University Trustees for the
State of South Carolina,

Plaintiff,

v.

Pickens Roofing and Sheet Metals, Inc.,

Defendant.

VERDICT FORM

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

We the Jury find damages in the amount of \$ 7,223,343.14.

Please sign and date the verdict form.

Janice R. McPortney
FOREPERSON

Date: March 21, 2014.

York, South Carolina

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-CP-46-3151

The Winthrop University Trustees for the
State of South Carolina,

Respondent,

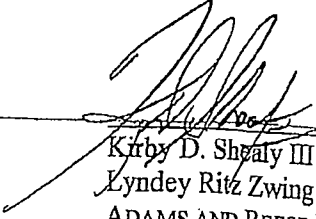
v.

Pickens Roofing and Sheet Metals, Inc.,

Appellant.

NOTICE OF APPEAL

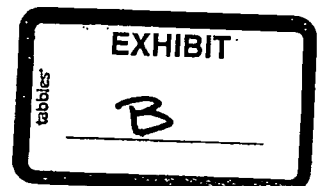
Pickens Roofing and Sheet Metals, Inc. appeals the judgment of the Court filed March 21, 2014, which encompasses all oral orders during trial and all oral post-trial rulings made by the Honorable Lee S. Alford. Appellant received written notice of entry of the judgment on March 27, 2014.


Kirby D. Shealy III
Lyndey Ritz Zwing
ADAMS AND REESE LLP
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190
Attorneys for Appellant

April 21, 2014.

Other Counsel of Record:
Peter W. Vogt, Esquire
Zachary Jett, Esquire
11620 N. Community House Road
Charlotte, North Carolina 28277
(704) 543-2321
Attorneys for Respondent

RECEIVED
APR 21 2014
SC Court of Appeals



STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

The Winthrop University Trustees for the)
State of South Carolina,)
)
Plaintiff,)
)
v.)
)
Pickens Roofing and Sheet Metals, Inc.,)
)
Defendant.)

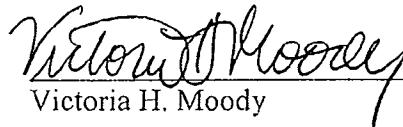
IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2012-CP-46-3151

CERTIFICATE OF SERVICE

The undersigned does certify that on September 29, 2016, she did cause to have served United States Postal Service, first-class postage affixed thereunto, a copy of the **Motion to Stay Execution of Judgment During Appeal** in the above-referenced action, to the following:

Peter W. Vogt, Esquire
Zachary M. Jett, Esquire
BUTLER WEIHMULLER KATZ CRAIG LLP
11605 N. Community House Road, Suite 150
Charlotte, North Carolina 28277


Victoria H. Moody

2016 OCT -3 PM 2:28
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

4-98777111

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2012-CP-46-3151

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

AFFIDAVIT OF BERT PICKENS

Plaintiff,)

v.)

Pickens Roofing and Sheet Metals, Inc.,)

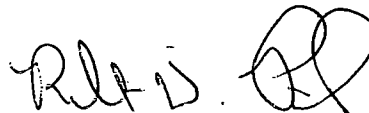
Defendant.)

PERSONALLY appeared before me, Bert Pickens, who, being duly sworn, deposes and states that the following is based upon his own personal knowledge, except those matters stated upon information and belief, and as to those matters, he believes them to be true:

1. I am a citizen and resident of Spartanburg, South Carolina.
2. I am over the age of eighteen and am of sound mind to give this affidavit.
3. I am an employee of Pickens Roofing and Sheet Metals, Inc. ("Pickens Roofing"), a family-owned roofing contractor that has been in operation for more than one hundred years.
4. At no time from January 1, 2013 to December 31, 2015 has Pickens Roofing employed more than 50 persons and had gross revenues of more than Five Million Dollars (\$5,000,000).
5. The Plaintiff's judgment entered against Pickens Roofing in the above-captioned action exceeds Pickens Roofing's insurance coverage by more than One Million (\$1,000,000) Dollars.

6. Any attempt to execute the Plaintiff's judgment prior to the resolution of the pending appeal in the above-captioned matter will have a materially adverse impact upon the financial position of Pickens Roofing.

FURTHER AFFIANT SAYETH NAUGHT.



Bert Pickens

SWORN TO BEFORE ME THIS 16th
DAY OF November 2016.

Hettisha Brown
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: December 27, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 21 2014
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-CP-46-3151

The Winthrop University Trustees for the
State of South Carolina,

Respondent,

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KOS/LEE/THA
APR 20 2014
050434-00018

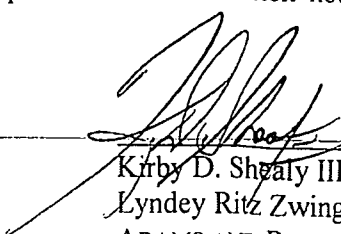
v.

Pickens Roofing and Sheet Metals, Inc.,

Appellant.

NOTICE OF APPEAL

Pickens Roofing and Sheet Metals, Inc. appeals the judgment of the Court filed March 21, 2014, which encompasses all oral orders during trial and all oral post-trial rulings made by the Honorable Lee S. Alford. Appellant received written notice of entry of the judgment on March 27, 2014.


Kirby D. Shealy III
Lyndey Ritz Zwing
ADAMS AND REESE LLP
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190
Attorneys for Appellant

April 21, 2014.

Other Counsel of Record:
Peter W. Vogt, Esquire
Zachary Jett, Esquire
11620 N. Community House Road
Charlotte, North Carolina 28277
(704) 543-2321
Attorneys for Respondent

2014 APR 23 PM 4:00
YORK COUNTY, SC



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

RECEIVED
 MAR 21 11 51 AM '12
 YORK COUNTY

PLAINTIFF(S)

DEFENDANT(S)

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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.

[Signature]
 Circuit Court Judge

2113
 Judge Code

3/20/12
 Date

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 Wehmuller Katz Craig Llp 11620
N Community House Road Charlotte, NC 28277

Kirby Darr Shealy III PO Box 2285 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

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.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2012-CP-46-315

The Winthrop University Trustees for the)
State of South Carolina,)
Plaintiff,)
v.)
Pickens Roofing and Sheet Metals, Inc.,)
Defendant.)

VERDICT FORM

FILED-RECEIVED
2012 MAR 21 AM 8:32
UNITED STATES DISTRICT COURT
& 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	<u>60</u>	%
Winthrop	<u>40</u>	%
TOTAL	<u>100</u>	%

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.

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

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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)

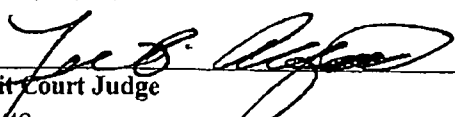
INFORMATION FOR THE JUDGMENT INDEX

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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	\$ 7,223,343.14

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

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Circuit Court Judge
CPFORM 4Cm
SCCA SCRPC Form 4C (Revised 3/2013)

2113
Judge Code

3/21/14
Date

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

Kirby Darr Shealy III PO Box 2285 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

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.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-46-3151

The Winthrop University Trustees for the)
State of South Carolina,)
Plaintiff,)
v.)
Pickens Roofing and Sheet Metals, Inc.,)
Defendant.)

VERDICT FORM

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

We the Jury find damages in the amount of \$ 7,223,343.14.

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-CP-46-3151

The Winthrop University Trustees for the
State of South Carolina,

Respondent,

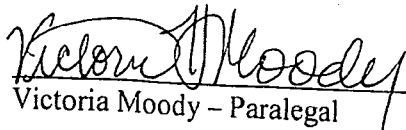
v.

Pickens Roofing and Sheet Metals, Inc.,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The Winthrop University Trustees for the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 21, 2014, addressed to its attorneys of record, Peter W. Vogt, Esquire and Zachary Jett, Esquire, at 1160 N. Community House Road, Charlotte, North Carolina 28277.


Victoria Moody - Paralegal

April 21, 2014.

RECEIVED
APR 21 2014
SC COURT OF APPEALS

FILED-RECEIVED
2014 APR 23 PM 4:00
YORK COUNTY, SC

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

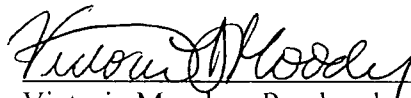
The Winthrop University Trustees for the
State of South Carolina, Respondent,

v.

Pickens Roofing and Sheet Metals, Inc., Appellant.

PROOF OF SERVICE

I hereby certify I served the Petition for Supersedeas upon the Respondent, by depositing a copy in the United States Mail, postage prepaid, on December 19, 2016, addressed to its attorneys of record, Zachary M. Jett, Esquire and Peter M. Vogt, Esquire, at Butler Weihmuller Katz Craig, LLP, 11605 North Community House Road, Suite 150, Charlotte, North Carolina 28277.


Victoria Moody – Paralegal
