THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge
McDonald, Short, and Geathers, Court of Appeals Judges

Supreme Court Case No. 2016-002336
Appellate Case No. 2014-000821

THE WINTHROP UNIVERSITY TRUSTEES
FOR THE STATE OF SOUTH CAROLINA, Respondent,

v.

PICKENS ROOFING AND SHEET METALS, INC., Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (RESTATED)

Rule 242(a), SCACR, provides this Court discretionary authority to "issue a writ of certiorari to review a final decision of the Court of Appeals." *See, e.g., State v. Humphries*, 354 S.C. 97, 579 S.E.2d 613 (2003) (reviewing the Court of Appeals' decision to determine whether the Court of Appeals—and not the trial court—erred). With this scope of review in mind, the Petitioner's questions presented are restated as follows[1]:

I. Did the Court of Appeals err in holding that the Petitioner's argument on appeal that Juror 25 should not have been included in the venire was unpreserved, without factual support, or lacking a necessary demonstration of prejudice to create reversible error?

II. Did the Court of Appeals err in affirming the trial court's denial of Petitioner's motion for directed verdict where there was evidence from which the jury could reasonably infer Petitioner's improper storage of combustible materials on the Respondent's roof "was a direct cause of the fire damages, as the fire would not have spread to either of the pitched roofs nor caused significant damage but for [Petitioner's] acts"?

III. Did the Court of Appeals err in finding no reversible error when the trial court undisputedly instructed the jury on proximate cause and foreseeability, and then answered the jury's request for reinstruction on proximate cause by reinstructing the jury on proximate cause to the jury's satisfaction?

[1] Pickens numbers its six issues differently in the "Questions Presented" section of its petition than it does throughout the body of its petition. Winthrop restates the issues and numbers them to comport with the numbers in Pickens' "Questions Presented" section.

IV. Did the Court of Appeals err in holding the trial court did not abuse its discretion in bifurcating the trial where the issues of liability and damages did not overlap, and bifurcation served the interests of convenience and judicial economy without creating any injustice?

V. Did the Court of Appeals err in affirming the trial court's submission of the question of damages to the jury, when the Respondent submitted substantial testimony and documentary evidence establishing the amount of damages, and expert testimony from which the jury could infer no damage would have occurred but for Petitioner's improper conduct?

VI. Did the Court of Appeals err when, in accordance with South Carolina precedent, it affirmed the trial court's refusal to apply comparative negligence principles to Respondent's breach-of-contract action?

COUNTER-STATEMENT OF THE CASE

The Petitioner's statement of the case is incomplete, and thus necessitates the following supplemental information from the record on appeal.

The basis of the suit: The Respondent, Winthrop University Trustees for the State of South Carolina ("Winthrop") sued the Petitioner, Pickens Roofing and Sheet Metals, Inc. ("Pickens"), in the Court of Common Pleas for the Sixteenth Judicial Circuit. (R. p. 13.) The complaint alleged both breach of contract and negligence. (R. pp. 14-15, 17-18.) Winthrop asserted that Pickens stored combustible materials on a flat roof at Winthrop University while executing a roofing contract—in violation of the contract specifications, as well as fire codes, and state law. (R. pp. 14-15, 17-18.) Winthrop asserted that the improper storage of combustible materials resulted in a fire originating on that flat roof, and Winthrop ultimately

proved that fire caused an undisputed $7,223, 343.14 in damages. (R. p. 968, line 1-p. 969, line 1.)

Jury selection: For-cause challenges were handled off the record. (R. p. 138, line 22-p. 139, line 15.) Pickens apparently used a peremptory strike to strike Juror Number 25—she did not sit on the jury. (R. p. 147, lines 15-18.) Pickens later placed its in-chambers for-cause objection to Juror Number 25 on the record. (R. p. 144, lines 9-23.) Pickens argued that Juror Number 25 should have been stricken for cause because she was "a student at Winthrop University" who had heard about the fire and talked with others around the time it occurred. (R. p. 144, lines 11-13.). Pickens did *not* object based on Juror 25's status as a "student researcher." The trial court explained it had denied the for-cause challenge because Juror Number 25 was not a Winthrop employee, had not heard about the lawsuit, and agreed she could decide the case based on the evidence presented. (R. p. 145, line 2-p. 148, line 6.) Further, the court noted there was no prejudice because Pickens used a peremptory strike and she was not on the jury. (R. p. 148, line 4.)

Bifurcation: Winthrop filed a motion in limine asking that the trial court bifurcate the issues of liability and damages. (R. p. 70.) Winthrop explained that it planned to call numerous additional witnesses on the issue of damages, and there was no genuine issue as to the extent of its damages. (R. p. 70.) It explained that the damages testimony could add several days to the expected length of the trial. (R. p. 70.)

The parties discussed the motion with the trial court in chambers. (R. p. 149, lines 20-24.) The trial court granted the motion. (R. p. 149, line 16.) It asked Pickens to place on the record its objections to the court's ruling. (R. p. 149, lines 7-10; R. p. 151, lines 3-5.) Pickens

only generally stated that it opposed the request for bifurcation, providing no factual or legal basis. (R. p. 149, lines 20-24.)

After the bifurcated trial concluded, Pickens moved for new trial, claiming in part that the bifurcation improperly forced the jury to consider proximate cause and damages separately. (R. p. 977, line 17-p. 976, line 6.) The trial court found that this was not the same objection Pickens had raised before trial, that bifurcation was appropriate in this case, and that there was no prejudice where Pickens was "free to raise the issue of damages, the full amount of damages, what's involved before the jury in opening statement. And the plaintiff said he intended to do that and he did." (R. p. 986, line 16-p. 989, line 8.)

Evidence presented at trial related to the factual issues presented in Petitioner's petition:[2] The parties stipulated that the fire originated on the flat roof. (R. p. 270, lines 3-7.) Fire Chief Driggers testified that the fire began on the flat roof, that access to the roof was secured before the fire, and that he had ruled out other causes of fire such as a fan, building mechanical systems, and electrical wiring in the area. (R. p. 275, lines 12-19; R. p. 277, lines 5-7; R. p. 312, lines 2-4; R. p. 291, lines 18-19; R. p. 292, lines 2-5, 7-13; R. p. 293, lines 9-11; R. p. 301, lines 22-24; R. pp. 1347-53; R. pp. 1374-75.) He further testified that Pickens' employees told him they had stored combustible materials on the roof. (R. p. 289, lines 6-8; R. p. 289, lines 15-21; R. p. 294, lines 7-8.)

Winthrop's expert, Daniel Arnold, a registered fire protection engineer, testified there was a substantial amount of combustible roofing materials stored on the flat roof, and that the storage of those materials caused the fire damage to the buildings. (R. p. 746, lines 10-21; R. p. 748, lines 5-13.) He testified the source of ignition was not relevant in this case:

[2] A full recitation of the pertinent evidence can be found in the Respondent's brief in the Court of Appeals, and the Court of Appeals' opinion also identifies additional facts.

For a fire of that magnitude on that substance to exist, to occur, you had to have fuel sufficient to do that.

The 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.

Q: So, if I took a cigarette and I threw it down on the flat TPO roof and there was nothing else there what would happen?

A: I would expect that fire to self-extinguish and certainly not create the fire that we see here.

Q: Why?

A: Because roofs are a regulated component of building construction. For hundreds of years we have been been [sic] concerned with fire spreading from building to building by embers landing on a roof, whether it be your neighbor's house or a building down the block. We burn cities down as a result of that. So the roof construction is regulated and protected against an assault from fire above, and the an [sic] assult includes testing those materials for their ability to withstand those kinds of ignition sources.

Q: So, if I took a roofer's torch and there were no other combustibles on that flat roof and I started a fire on that flat roof, would it spread to the adjoining pitched roofs?

A: It would not. If you remove that torch it would not.

(R. p. 747, line 7-p. 749, line 7.)

Pickens moved for directed verdict. (R. p. 788, line 3-p. 789, line 21.) Pickens argued that Winthrop failed to prove causation because "[t]here has been no evidence introduced as to how this fire began." (R. p. 788, lines 8-9.) Pickens claimed Winthrop was relying on "what is known as the spread theory of liability and that theory of liability has not been recognized in South Carolina." (R. p. 788, lines 9-12.) Winthrop responded there are "many, many cases in South Carolina that deal with negligence and breach of contract, and what we have in this case is but for storage on the flat roof this fire would not have spread." (R. p. 790, lines 1-8.) The trial

court denied the motion, and Pickens rested without putting on any evidence. (R. p. 799, line 24-p. 800, line 1; R. p. 802, line 10.)

The jury requested to be recharged on "proximate cause" in the liability phase. The trial court fully charged the jury on breach of contract, negligence, and proximate cause, among other charges. (R. p. 847, line 23-p. 874, line 2.) The court instructed the jury that foreseeability was required for negligence. (R. p. 864, lines 11-25.) Pickens raised no objections to the instructions given.

During deliberations, the jury asked to be recharged on the "definition of proximate cause." (R. p. 879, line 23; R. p. 1474.) The court reinstructed the jury as follows:

> THE COURT: 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 so[le] 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. In other words—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: No, that answers it.
>
> THE COURT: If you need anything else you will let me know.
>
> THE FOREPERSON: Thank you.

(R. p. 881, line 14-p. 882, line 8.) Pickens objected because the court did not also instruct the jury on foreseeability. (R. p.. 883, line 11; R. p. 889, line 14.) The court overruled the objection. (R. p. 883, lines 12-22.)

The jury rules in favor of Winthrop on liability for both counts, then awards Winthrop damages in the amount established by its evidence. The jury returned a verdict in favor of Winthrop on both counts, apportioning fault as it saw fit on the negligence count. (R. p.

8; R. p. 884, line 7-p. 885, line 14.) The damages portion of the trial then proceeded. Winthrop presented six witnesses and a large binder of documentation to support its claim. (R. p. 889, line 3; R. p. 902, line 14; R. p. 921; R. p. 973, lines 7-10; R. p. 992, line 16; R. p. 929, line 19; R. p. 937, line 5; Pl. Ex. 67.[3]) Pickens presented no evidence and asked no questions of any witnesses. (R. p. 899, line 3; R. p. 923, line 1; R. p. 928, line 12; R. p. 932, line 25; R. p. 936, line 8; R. p. 944, lines 5-7.)

In closing arguments, Winthrop argued that it had established it suffered $7,223,343.14 in damages. (R. p. 968, lines 1-23.) Pickens told the jury, "you didn't hear us contest any of those numbers." (R. p. 968, lines 25-p. 969, line 1.) Pickens merely argued, "you have been offered no way to determine what damages were caused by what Pickens did versus would have been caused anyway." (R. p. 969, lines 5-7.) The jury awarded Winthrop $7,223,343.14. (R. p. 975, line 8; R. p. 12.) There being no questions from either party, the jury was released. (R. p. 975, line 14-p. 976, line 23.)

Winthrop elected the breach of contract remedy, and the trial court entered judgment accordingly. (R. p. 984, lines 20-21.) Because Winthrop elected breach of contract, the trial court awarded the full amount of damages in the judgment without any setoff. (R. p. 986, lines 1-4.) It entered judgment for Winthrop in the amount of the jury verdict, $7,223,343.14. (R. pp . 10-11.)

ARGUMENT

This Court may only exercise its discretionary power to consider a petition for a writ of certiorari to the Court of Appeals "where there are special and important reasons," such as:

(1) Where there are novel questions of law.

[3] Mr. John Murphy's deposition was read to the jury in lieu of live testimony.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242(b).

Pickens raises six issues in its petition, but only asserts a recognized basis for certiorari review for issues II and VI—claiming they involve "novel questions of law." (Petition p. 6.) Pickens fails to allege any recognized basis for this Court to exercise its discretion to review issues I, III, IV, or V. Instead, Pickens merely argues that the appellate court erred. None of the six issues in this case present a "novel" issue that warrants certiorari review, and even if they did, the Court of Appeals' conclusions are correct.

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PETITIONER'S ARGUMENT ON APPEAL THAT JUROR 25 SHOULD NOT HAVE BEEN INCLUDED IN THE VENIRE WAS UNPRESERVED, WITHOUT FACTUAL SUPPORT, OR LACKING A NECESSARY DEMONSTRATION OF PREJUDICE TO CREATE REVERSIBLE ERROR?

Preliminarily, Pickens does not specify any "special and important reasons" why this question warrants a writ of certiorari, and Winthrop is unaware of any such reason why this Court should consider this question in the petition. *See* Rule 242(b), SCACR.

Regardless, Pickens' arguments lack merit. First, Pickens claims the Court of Appeals incorrectly concluded Pickens had not preserved any objection to Juror 25 as a "student researcher." But the transcript is clear: Pickens objected to Juror 25 only on the basis that she was a "student," and never claimed she should be excluded on the basis that she was a "student researcher." (R. p. 144, lines 9-23.)

Pickens now claims that any distinction between its objection to Juror 25 as a "student," and the objection it did not make to her as a "student researcher," "lacks any meaningful difference." (Petition p. 8.) But that directly contradicts what Pickens argued to the appellate court. Rather, Pickens previously sought to distinguish Juror 25 from a mere "student" by likening her to a Winthrop *employee* who was stricken as a juror (Juror 91), and then citing a section of American Jurisprudence Second that addresses whether *employees* of a party may serve on a jury. (Appellant's Final Brief, p. 14-15.) Pickens did raise this new argument for the first time in its petition for rehearing in the Court of Appeals, but it was improperly raised at that late date. *See Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 531, 532 (2001) (holding that an appellate court should not consider new argument presented for the first time on rehearing). It is likewise improperly raised here. *See* Rule 242(d)(2) SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari") (emphasis added). Further, vague objections are never sufficient to preserve error, so Pickens' contention that it meant "student researcher" when it raised the "student" objection proves its objection was insufficient. *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.").

The remainder of Pickens' arguments on the juror selection issue likewise lack merit. Pickens has never before argued that Juror 25's relationship with Winthrop was "akin to a juror having a familial relationship with one of the parties" (Petition 9), so that argument is unpreserved. *See* Rule 242(d)(2) SCACR. Pickens likewise provides no evidence (and cannot do so for the first time here) to support its conclusion that a student has a closer relationship with a university she attends than with "second cousins or first cousins twice removed." (Petition p.

9.) Rather, a student is akin to a customer of a university, and being a customer of a party does not automatically disqualify a person from serving on a jury. *See Rook v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988). Juror 25's knowledge of the facts of the case and exposure to publicity about the fire did not automatically disqualify her from service, either. *See R.K. Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1997).

The appellate court correctly concluded that Pickens could not establish any prejudice because Juror 25 never sat on the jury. Pickens' position that it established prejudice by virtue of using a peremptory challenge to excuse Juror 25, logically extended, is that an incorrect denial of a for-cause challenge creates *automatic reversible error* without any showing of prejudice, even where that juror does not sit on the jury. Suggesting that no showing of evidence is necessary conflicts with South Carolina law. *See 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. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR DIRECTED VERDICT WHERE THERE WAS EVIDENCE FROM WHICH THE JURY COULD REASONABLY INFER PETITIONER'S IMPROPER STORAGE OF COMBUSTIBLE MATERIALS ON THE RESPONDENT'S ROOF "WAS A DIRECT CAUSE OF THE FIRE DAMAGES, AS THE FIRE WOULD NOT HAVE SPREAD TO EITHER OF THE PITCHED ROOFS NOR CAUSED SIGNIFICANT DAMAGE BUT FOR [PETITIONER'S] ACTS[?]"

Pickens' argument in this petition, as it was in the Court of Appeals, is based on several misinterpretations of law and mischaracterizations of Winthrop's position. Pickens quotes the proper principles of causation, but fails to apply them.

> 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.*

(Petition 13-14.) The Court of Appeals recognized this burden, and detailed the evidence that the jury was presented, from which it made the following holding:

> 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.

Pickens claims that Winthrop was required to prove more than Pickens' acts caused the damage, but also that Pickens *ignited* the fire. Pickens has never cited any authority to support this argument. To the contrary, South Carolina law holds that a party's supplying of the fuel to start a fire can be the proximate cause of the damage caused by that fire, even where the party did not ignite the fire. *See Brown v. Nat'l Oil Co.*, 233 S.C. 345, 105 S.E.2d 81 (1958) (fuel service station owner was held to have proximately caused the fire damage at the gas station by failing to place proper vents on underground tanks—thereby allowing fuel fumes to dangerously accumulate when the tanks were being filled—even when the fire was ignited by an unrelated

third-party striking a match). *Brown* establishes what Pickens fails to recognize—that the negligent storage of combustible material can just as easily be the proximate cause of fire damage as the supply of the ignition source; the proximate cause would depend upon the situation. None of Pickens' cases refute this.

Under this Court's *Brown* opinion, a fire case does not require anything different than any other negligence or breach of contract case in terms of proof. *Brown* does no more than apply the standard principles of proximate causation that Pickens quotes to analogous facts involving causation of a fire—the source of ignition is irrelevant to the jury's determination of whether Pickens' conduct was the proximate cause of the damage. *See also McQuillen v. Dobbs*, 262 S.C. 386, 391-92, 204 S.E.2d 732, 735 (1974) (holding that "evidence of facts and circumstances from which the inference might be reasonably drawn that, but for the negligence of defendants, the fire would not have occurred," can be sufficient even when the cause of ignition is unknown). Simply put, the evidence here established that the fire that caused the damage at Winthrop would not have occurred but for Pickens' improper placement and storage of combustible materials on the roof.

Pickens attempts to muddy the waters of this clear application of South Carolina law by claiming "courts have struggled with . . . causation for decades, particularly in fire cases;" that this case is based on "spread theory" that has not been adopted by South Carolina, and that "spread theory" is "a first cousin to *res ipsa loquitur*." But there is nothing to struggle with in this case—the evidence before the jury proved causation as defined by South Carolina law. The cases cited by Pickens involving the so called "spread theory" of liability all hold a defendant liable for damage to another's property when some negligent act transfers a fire from one property to another. (Petition, p. 14-15.) Here, the evidence established that a fire originated on

a flat roof owned by Winthrop, traveled up and into the eaves of the adjoining building owned by Winthrop, and destroyed both the flat roof and the adjoining building, solely due to Pickens' conduct.

This is not a *res ipsa loquitur* case. Not only does *res ipsa loquitur* not apply to breach-of-contract actions, it also does not apply where direct *or* circumstantial evidence is presented from which the jury can make its conclusions. While South Carolina courts have rejected the *res ipsa loquitur* doctrine, they have hastened to add, "that obviously this does not mean that negligence may not be established by circumstantial as well as direct evidence." *Eickhoff v. Beard-Laney, Inc.*, 199 S.C. 500, 20 S.E.2d 153, 155 (1942).

The appellate court also properly rejected Pickens' argument that the fire was not foreseeable. The contract expressly provided for storage of materials in two locations, neither of which was on the flat roof. (R. p. 421, lines 5-9; R. p. 442, line 23; R. p. 443, line 5; R. p. 518, lines 1-11; R. p. 1085; R. p. 1218; R. p. 1220; R. pp. 1229-30.) Pickens agreed that the International Fire Code, and the National Fire Protection Association Code Section 241 ("NFPA 241"), were "the law" or "had the force of law," and that Pickens was required to follow them. (R. p. 153, lines 17-23.) Both codes prohibited storage of combustible materials near or on a building — for the very reason that they presented a fire risk. (R. p. 757, lines 11-12; R. p. 861, lines 7-16; R. p. 760, line 23-p. 761, line 3.) Mr. Arnold read to the jury section 315.3 of the International Fire Code, which stated, "Combustible materials stored or displayed outside of buildings that are protected by automatic sprinklers shall not be stored or displayed under non-sprinklered eaves, canopies or other projections or overhangs." (R. p. 760, line 23-p. 761, line 3.) Mr. Arnold testified that the Winthrop buildings were protected by automatic sprinklers on the interior, but those sprinklers did not protect the building from fires that started on the

exterior. (R. p. 761, lines 4-9.) He could not say exactly where the combustibles were stored on the flat roof, but he testified "they were within [the proximity] of those eaves sufficiently to allow the fire to get to the roof structure through that path." (R. p. 761, lines 18-22.)

Pickens knew or should have known it was required to comply with fire codes. Again, those fire codes prohibited storage of combustibles near the building for the very reason that they presented a fire risk. The courts below both correctly rejected Pickens' argument that the fire was wholly unforeseeable as to support a directed verdict:

> 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* [*Thorburn v. Spartanburg Theatres, Inc.*, 263 S.C. 165, 168-69, 208 S.E.2d 919, 920 (1974)] ("Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." (quoting *Player* [*v. Thompson*], 259 S.C. [600,] 606, 193 S.E.2d [531,] 533 [(1972)])).

(Op. p. 15).

Pickens' claim that the fire was unforeseeable because the "materials carried the highest flame resistance rating available" is a mischaracterization of the testimony it cites. Pickens cites to pages 693 through 696 of its appendix (pages 633 through 636 of the record on appeal), where expert Vu Nguyen testified to the fire rating of "everything put together" as a system—an assembly—not to any particular item. (R. p. 635, line 11-R. p. 636, line 9.) The roofing materials stored on the roof were not assembled. Mr. Nguyen did not, for example, know the particular fire rating for uninstalled roof paper, which he noted was "tar saturated felt." (R. p. 644, lines 17-23.) He did not testify that uninstalled roofing materials sitting on top of a roof

were fire resistant. Regardless, the fact that the jury heard that applicable fire codes considered storage of roofing materials on a roof a fire hazard was sufficient to create a jury question on the issue of foreseeability.

III. DID THE COURT OF APPEALS ERR IN FINDING NO REVERSIBLE ERROR WHEN THE TRIAL COURT UNDISPUTEDLY INSTRUCTED THE JURY ON PROXIMATE CAUSE AND FORESEEABILITY, AND THEN ANSWERED THE JURY'S REQUEST FOR REINSTRUCTION ON PROXIMATE CAUSE BY REINSTRUCTING THE JURY ON PROXIMATE CAUSE TO THE JURY'S SATISFACTION?

Preliminarily, Pickens does not specify any "special and important reasons" why this question warrants a writ of certiorari, and Winthrop is unaware of any such reason why this Court should consider this question in the petition. *See* Rule 242(b), SCACR. On the merits, Winthrop adopts the holding of the Court of Appeals, asserting that the court did not err in applying the appropriate standard of review and affirming the trial court's ruling on jury instructions:

> "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.

(Op. pp. 16-17.)

IV. DID THE COURT OF APPEALS ERR IN HOLDING THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BIFURCATING THE TRIAL WHERE THE ISSUES OF LIABILITY AND DAMAGES DID NOT OVERLAP, AND BIFURCATION SERVED THE INTERESTS OF CONVENIENCE AND JUDICIAL ECONOMY WITHOUT CREATING ANY INJUSTICE?

Again, Pickens does not specify any "special and important reasons" why this question warrants a writ of certiorari, and Winthrop is unaware of any such reason why this Court should consider this question in the petition. *See* Rule 242(b), SCACR. On the merits, Pickens' claim that the appellate court did not acknowledge Pickens' argument that causation and damages were inextricably intertwined is inaccurate. Likewise, Pickens' claim that the appellate court solely focused on judicial economy and convenience without considering any risk of prejudice is inaccurate.

The very first sentence of the Court of Appeals' analysis of this issue was "Pickens contends the circuit court erred in bifurcating the trial because causation and damages were inextricably intertwined." (Op. p. 17.) Further, the opinion stated:

> 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.)

In the opinion on review, the Court of Appeals 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.) The 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.)

Pickens continues to raise the same straw-man "spread theory" argument it raised in both courts below, despite Winthrop never presenting, arguing, or relying on any such theory. Pickens asserts that there would have been damage even without Pickens' negligence, disregarding the testimony of Dan Arnold that the Court of Appeals acknowledged:

> 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.

(Op. p. 16) (emphasis added).

The Court of Appeals applied the proper deferential standard of review and correctly determined the trial court did not commit reversible error in bifurcating the trial when such was in the interests of judicial economy, caused no injustice to Pickens, and the evidence as to liability and damages was wholly distinct.

V. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S SUBMISSION OF THE QUESTION OF DAMAGES TO THE JURY, WHEN THE RESPONDENT SUBMITTED SUBSTANTIAL TESTIMONY AND DOCUMENTARY EVIDENCE ESTABLISHING THE AMOUNT OF DAMAGES, AND EXPERT TESTIMONY FROM WHICH THE JURY COULD INFER NO DAMAGE WOULD HAVE OCCURRED BUT FOR PETITIONER'S IMPROPER CONDUCT?

Again, Pickens does not specify any "special and important reasons" why this question warrants a writ of certiorari, and Winthrop is unaware of any such reason why this Court should

consider this question in the petition. *See* Rule 242(b), SCACR. On the merits, again, Pickens disregards the testimony of Dan Arnold. Mr. Arnold's testimony was competent and substantial evidence from which the jury was entitled to find that no damage would have occurred but for Pickens' negligence. Thus, there was no issue involving the jury having to distinguish between damage caused by a fire alone versus damage caused by an exacerbated fire due to Pickens' negligence and breach of contract—ALL of the damage was due to the magnitude of the fire as caused by Pickens' actions. Even Pickens recognizes that "a defendant may be held liable for the exacerbation of pre-existing conditions." (Petition p. 27.)

The Court of Appeals recognized these facts and this law and affirmed accordingly:

> 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.

(Op. p. 19.)

Consequently, there being evidence from which the jury could determine the amount of damages attributable to Pickens' improper conduct, the appellate court correctly affirmed the trial court's denial of Pickens' request for directed verdict.

VI. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE TRIAL COURT'S REFUSAL TO APPLY COMPARATIVE NEGLIGENCE PRINCIPLES

TO RESPONDENT'S BREACH-OF-CONTRACT ACTION, IN ACCORDANCE WITH SOUTH CAROLINA PRECEDENT?

"[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013) (citing *Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011)). Winthrop prevailed on both its breach of contract and negligence causes of action, and was required to choose its remedy. *See Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990); *Harper v. Etheridge*, 290 S.C. 112, 121-23, 348 S.E.2d 374, 379-80 (Ct. App. 1986). Winthrop chose breach of contract. Consequently, breach of contract—and not negligence—principles control. South Carolina law does not provide for comparative negligence principles to apply to breach of contract remedies. *See* S.C. Code Ann. 15-38-15 (1976) (providing that comparative negligence applies to negligence claims in South Carolina, with no mention of breach of contract). Courts are not authorized to expand the scope of a statute's operation. *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 597-99, 654 S.E.2d 284, 289-90 (Ct. App. 2007).

The "measure of damages for breach of contract is loss actually suffered by contractee as result of breach." *Bensch v. Davidson*, 354 S.C. 173, 177-78, 580 S.E.2d 128, 130 (2003). "The purpose of an award of damages for breach is 'to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the contract been performed.'" *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 109, 371 S.E.2d 532, 533-34 (1988). The evidence discussed above established that there would have been no damage had Pickens complied with the contract, which expressly provided for storage of materials only in two locations, both of which were on the ground. The contract also incorporated fire codes that

prohibited the same. Thus, the total amount of damages were properly awarded for breach of contract.

The appellate court properly applied the law of South Carolina. There is nothing novel about any of these principles that would warrant certiorari review. Pickens' claim that one cannot apply breach-of-contract principles if a party is guilty of conduct that violates both the contract and incorporated governing law is not novel. Further, none of the cases cited by Pickens support this contention. The case of *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991), a negligence case, did no more than replace contributory negligence with comparative negligence for negligence cases. The *Nelson* court referred to *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (1984), yet another negligence case in which this Court discussed the merits of contributory and comparative negligence. Neither Pickens nor the undersigned can direct this Court to any South Carolina case that applies comparative negligence principles to anything but negligence claims.

Pickens violated multiple terms of the contract—both express terms and other incorporated fire codes, laws, and regulations—by storing combustible materials in a dangerous and unauthorized location creating a fire risk. The jury found for Winthrop on its breach of contract claim. The judgment in favor of Winthrop calculated in accordance with breach of contract principles—and not negligence principles—was properly affirmed.

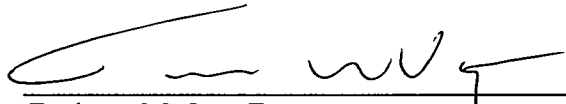
CONCLUSION

Pickens provides no basis for this Court to exercise its certiorari jurisdiction. At its essence, this is nothing more than a garden-variety breach-of-contract and negligence case. The issues are not novel, despite Pickens' best attempts to characterize some of them as such. The appellate court appropriately exercised the proper standard of review on each issue and affirmed the judgment in favor of Winthrop in accordance with South Carolina law. Even should this Court accept certiorari review, Pickens' claims fail on their merits.

Winthrop respectfully requests this Court allow the trial court's judgment, and the appellate court's affirmance thereof, to stand.

This the 20th day of December, 2016.

BUTLER WEIHMULLER KATZ CRAIG LLP



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge
McDonald, Short, and Geathers; Court of Appeals Judges

Supreme Court Case No. 2016-002336
Appellate Case No. 2014-000821

THE WINTHROP UNIVERSITY TRUSTEES
FOR THE STATE OF SOUTH CAROLINA, Respondent,

v.

PICKENS ROOFING AND SHEET METALS, INC., Petitioner.

PROOF OF SERVICE

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

[*SIGNATURE BLOCK ON NEXT PAGE*]

This 20th day of December, 2016.

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