THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

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

---

APPENDIX VOLUME IV

Kirby D. Shealy III, SC Bar No. 11556
Lyndey Ritz Zwingelberg, SC Bar No. 100804
Adams and Reese LLP
1501 Main Street, Fifth Floor
Post Office Box 2285 (29202)
Columbia, South Carolina 29201
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Attorneys for ~~Appellant~~ Petitioner

Other Counsel of Record:

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Charlotte, NC 28277
(704) 543-2321
Attorneys for Respondent

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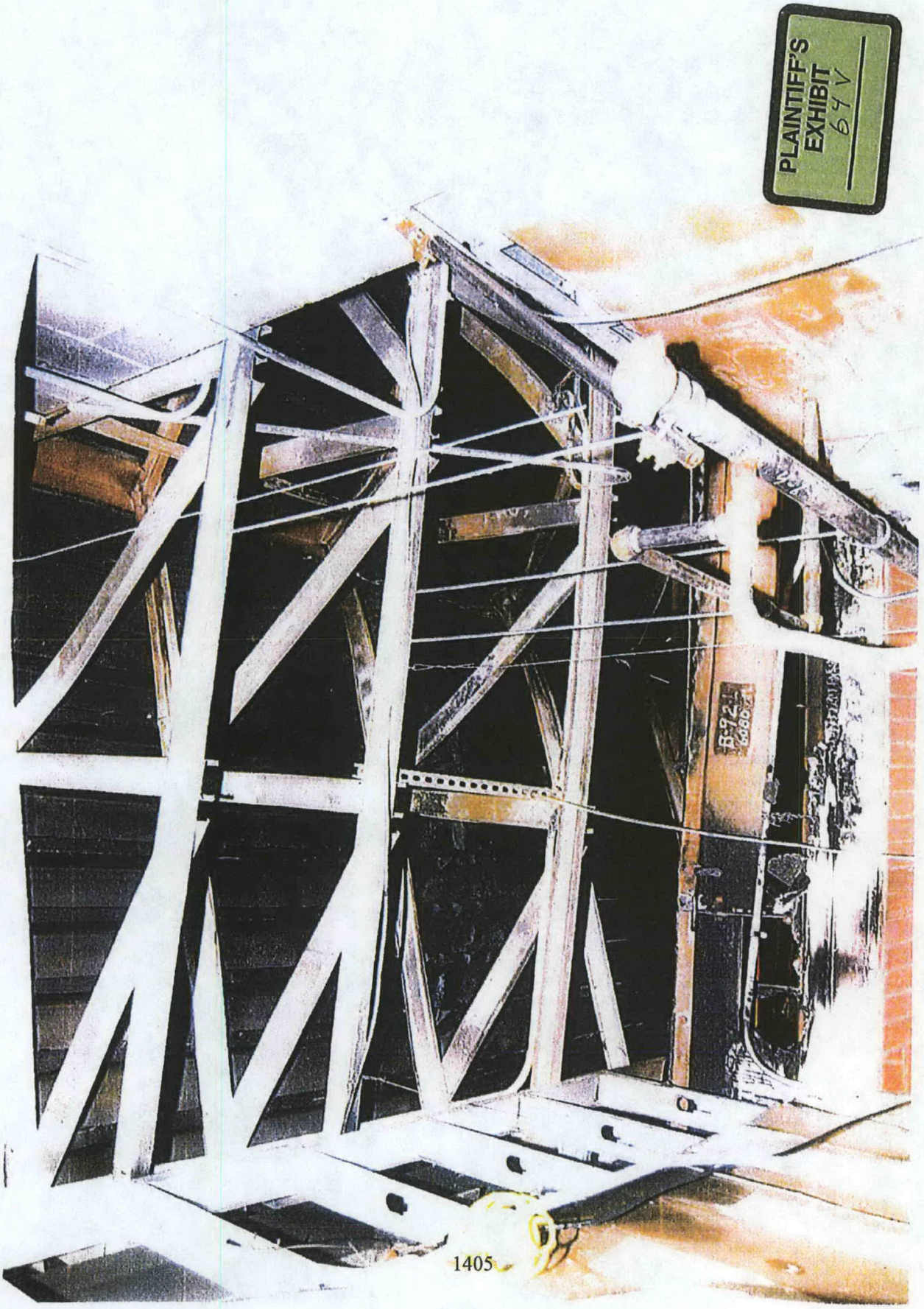
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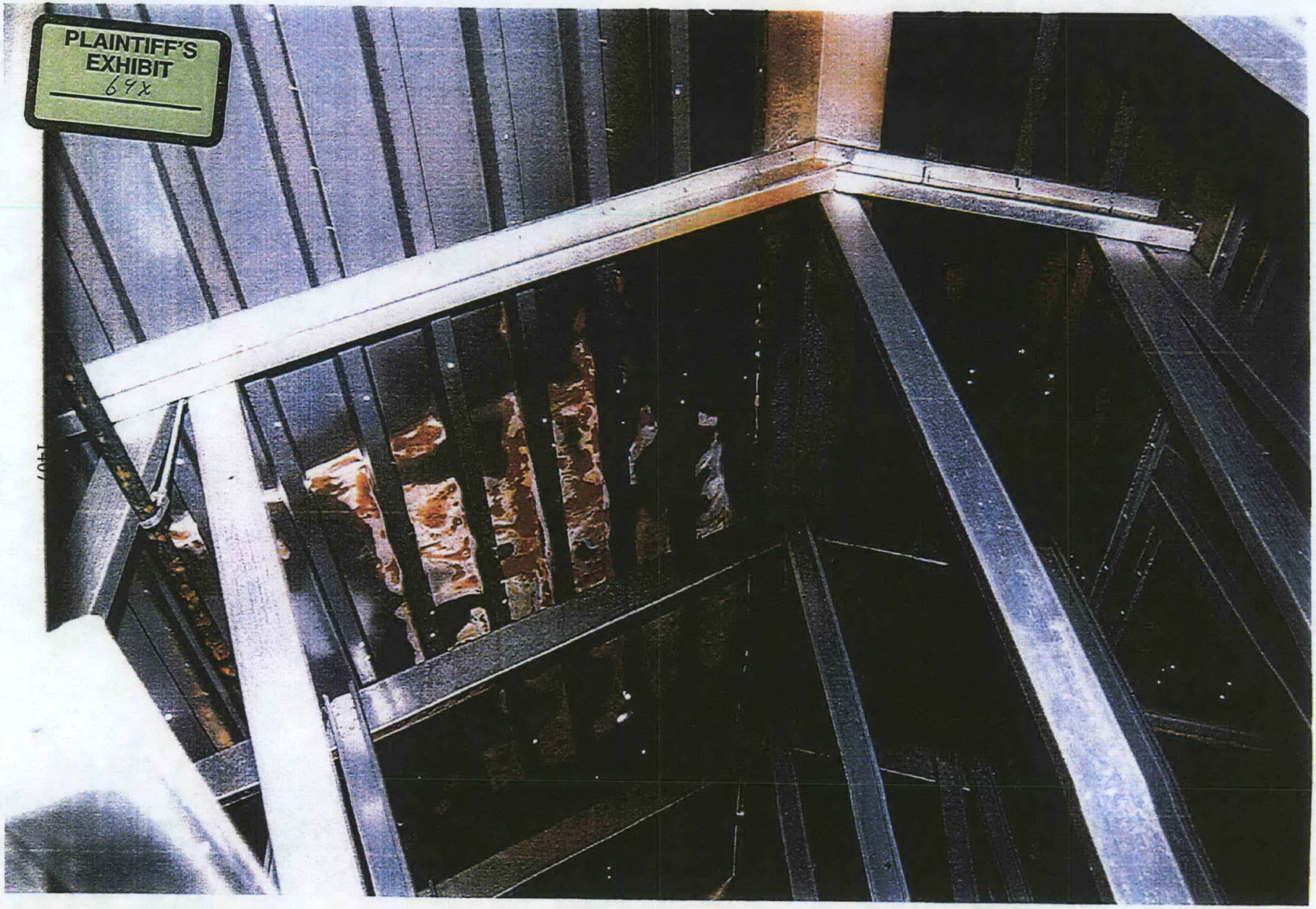
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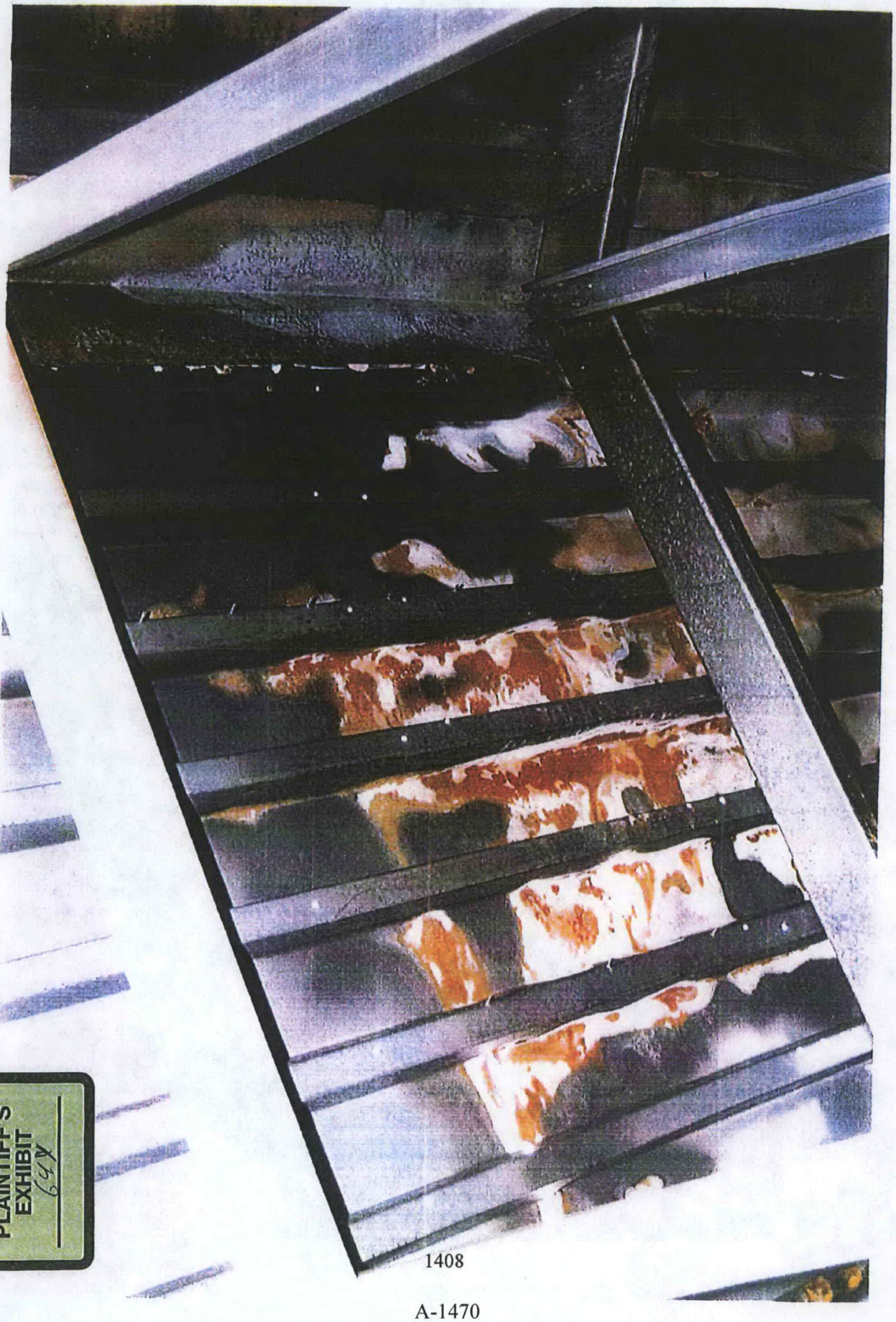

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SOUTHERN ELEVATOR COMPANY, INC.

RJ- 88153

Corporate Offices:
130 O'CONNOR STREET / PO BOX 36006
GREENSBORO, NORTH CAROLINA 27416
800-373-0058
336-274-2401

DATE 3-24-10

CUSTOMER Winthrop Univ.

STREET

CITY Rock Hill

AUTH. BY Pat Turner

ELEVATOR NO.: Contract Maintenance

CUST. ORDER NO.

CUSTOMER REPORT: Bancroft, Crawford, Withers (Otis), Withers (Dover), Withers (Lift) Owens, Baseball, Coliseum, Owens.

TAKEN BY Contract

PERFORMED BY Joe S.

COMPLETION DATE

BILLING

RESOLUTION:

QTY.	PARTS

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~~2:00 to 4:30~~ 2:00 to 4:30

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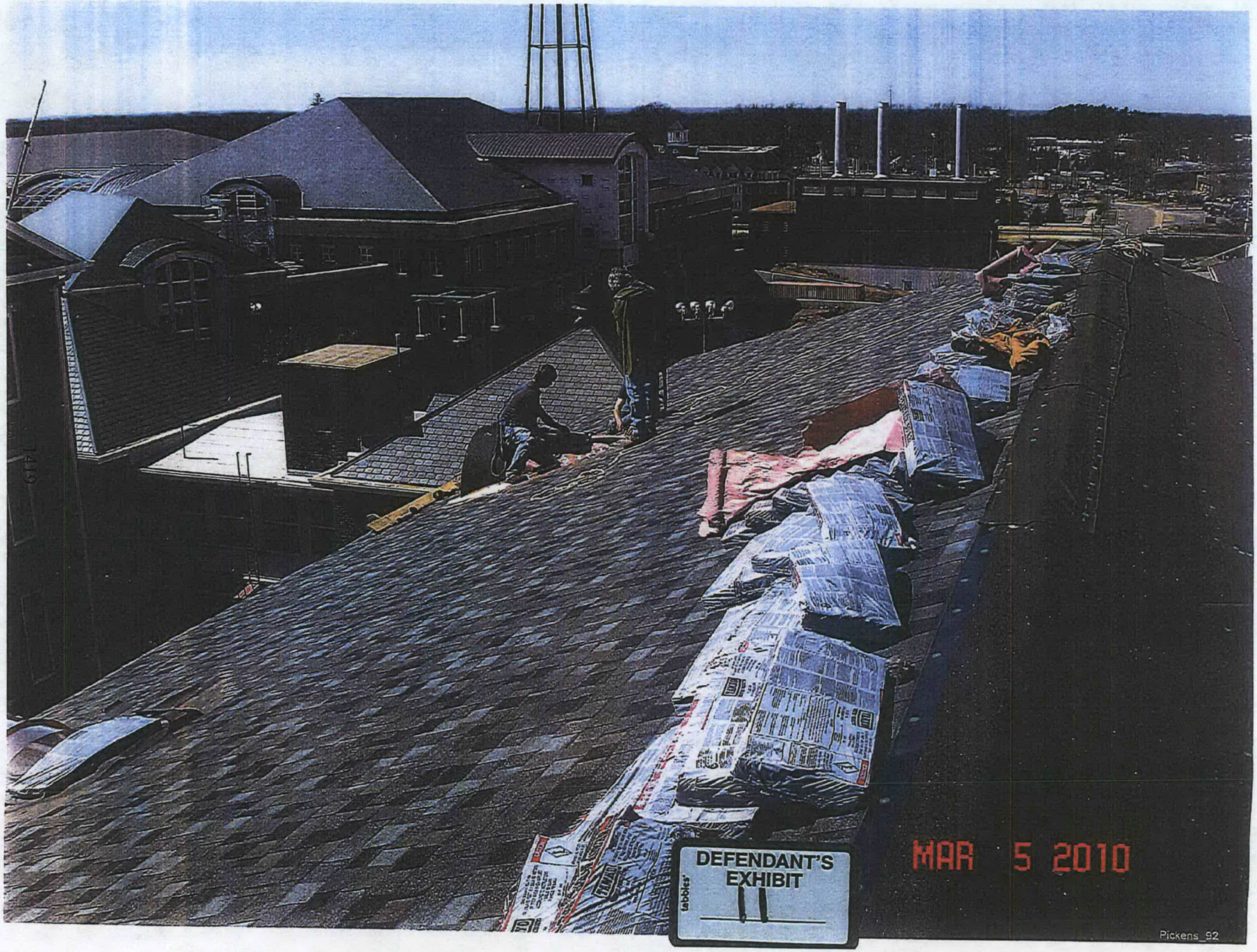
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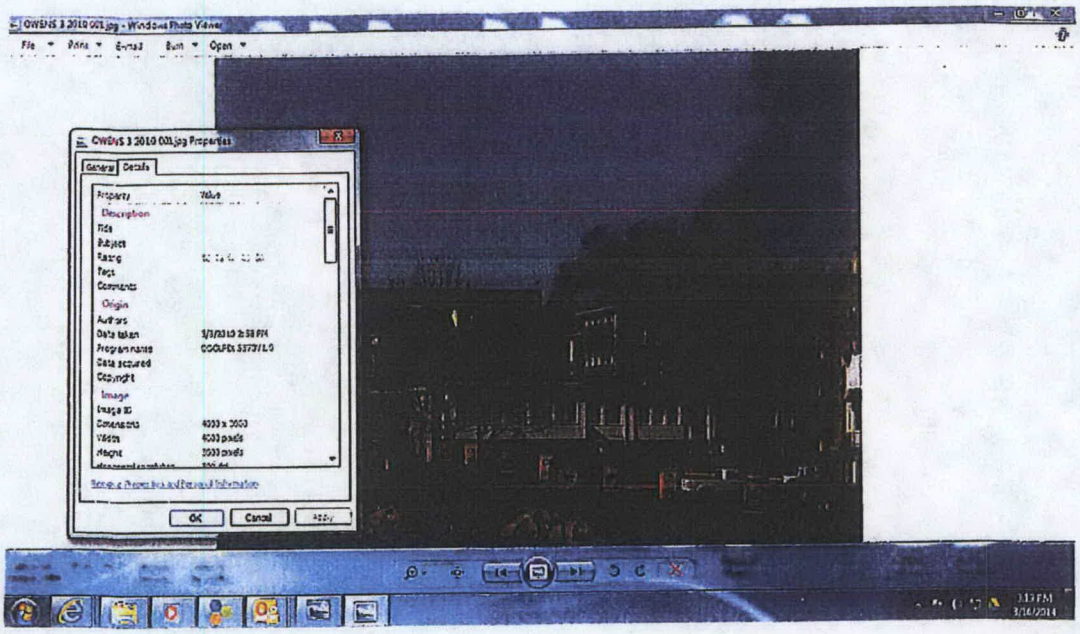
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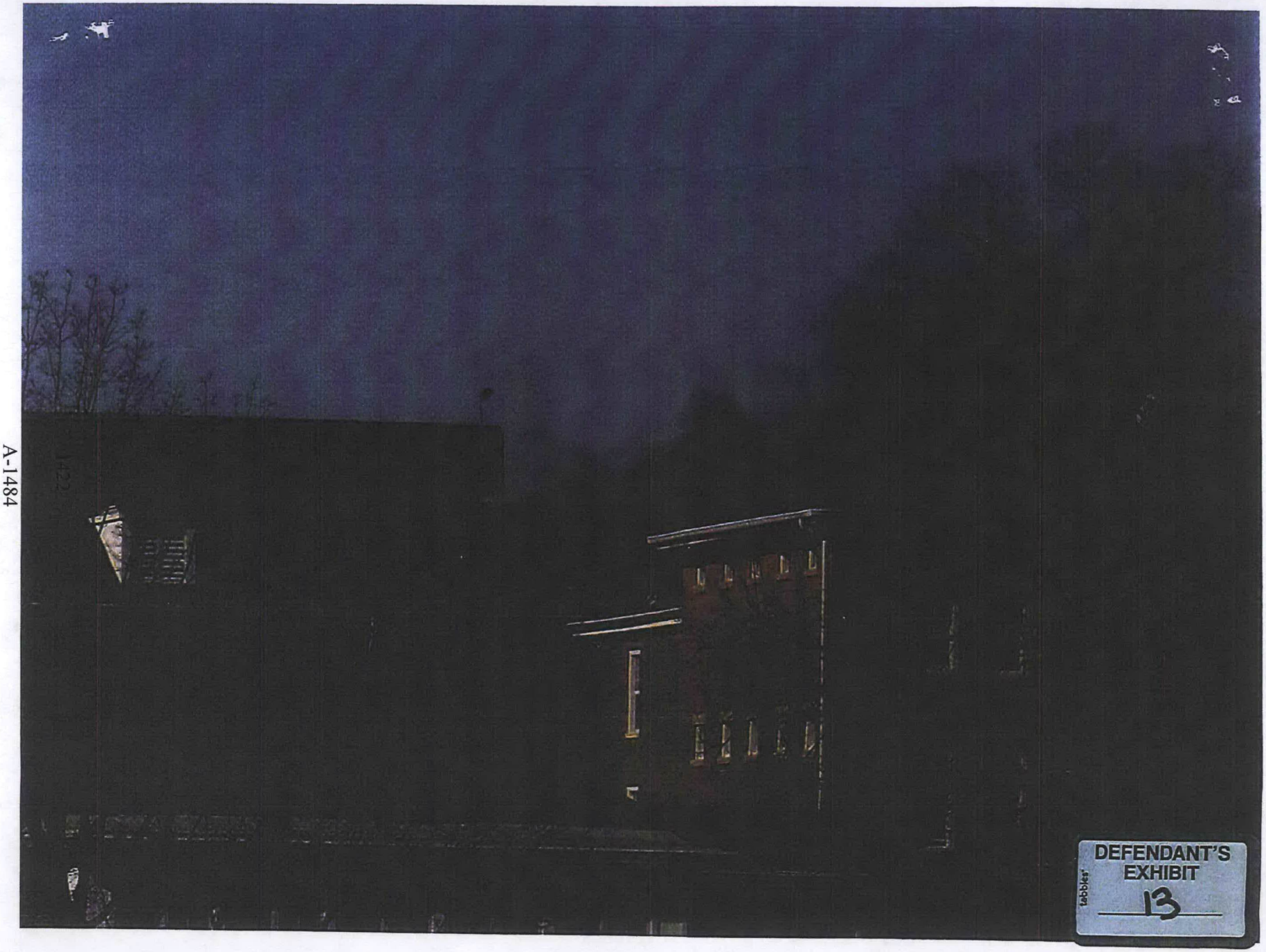
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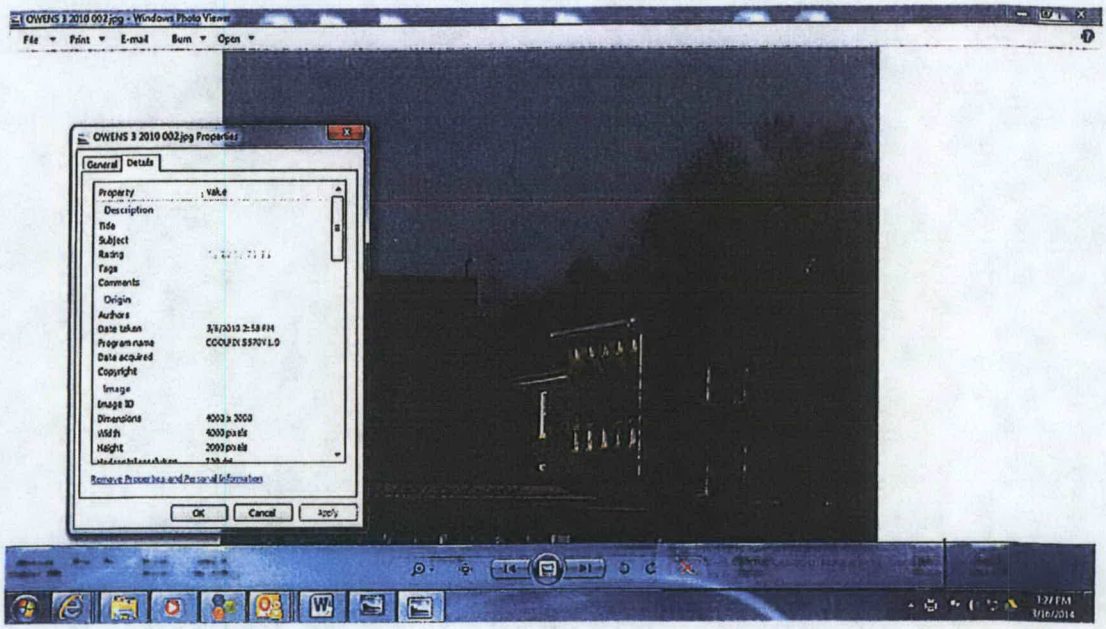
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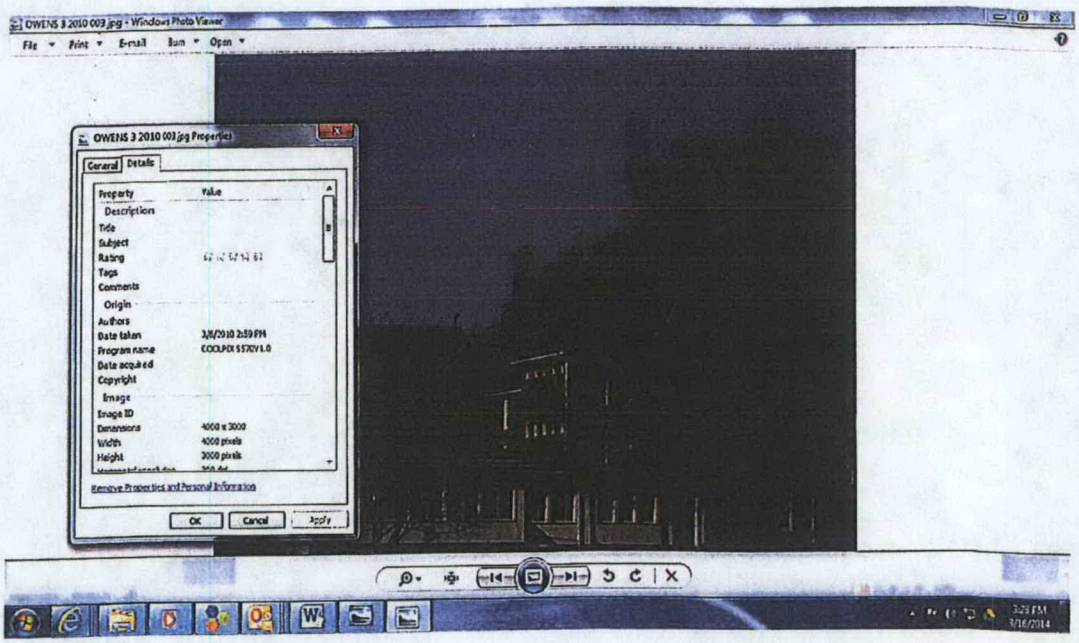
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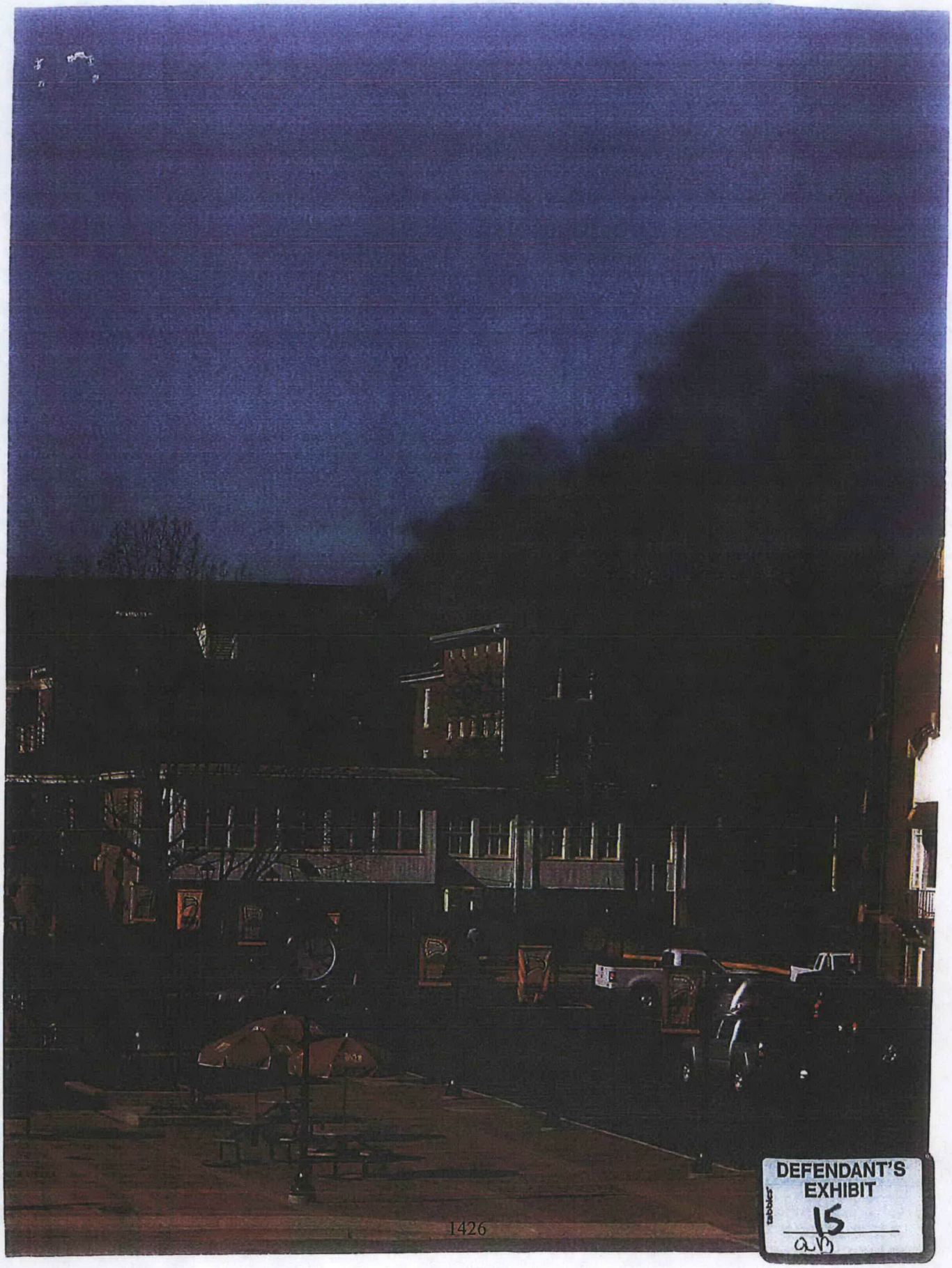
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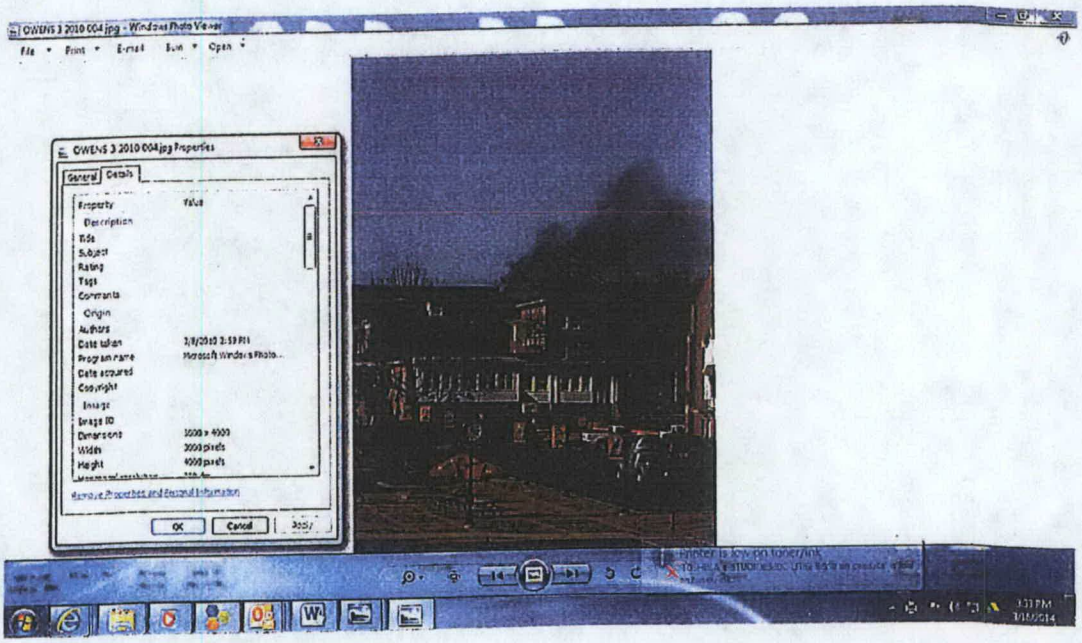
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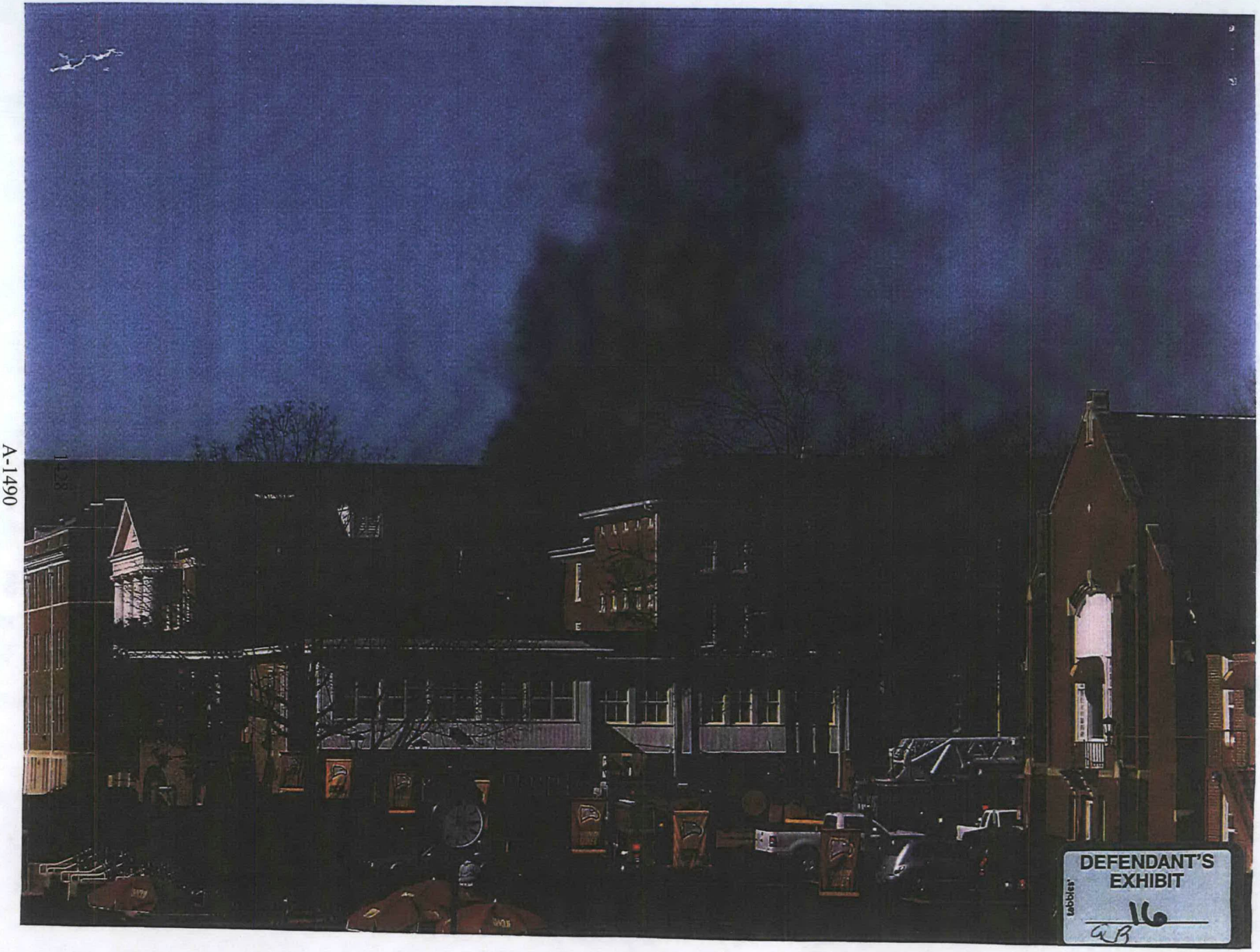
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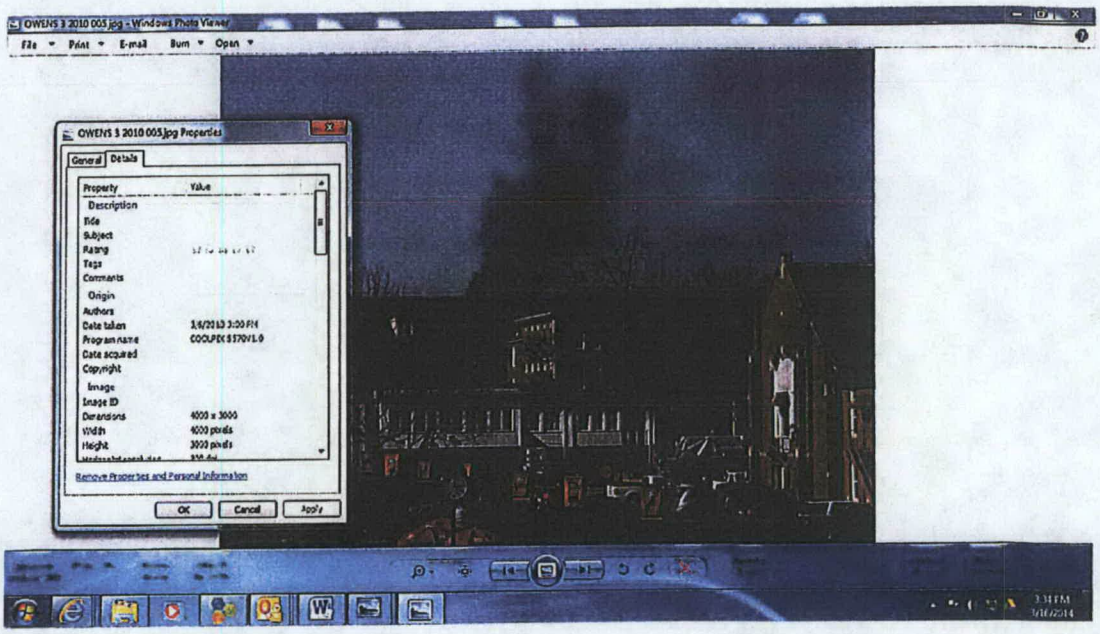
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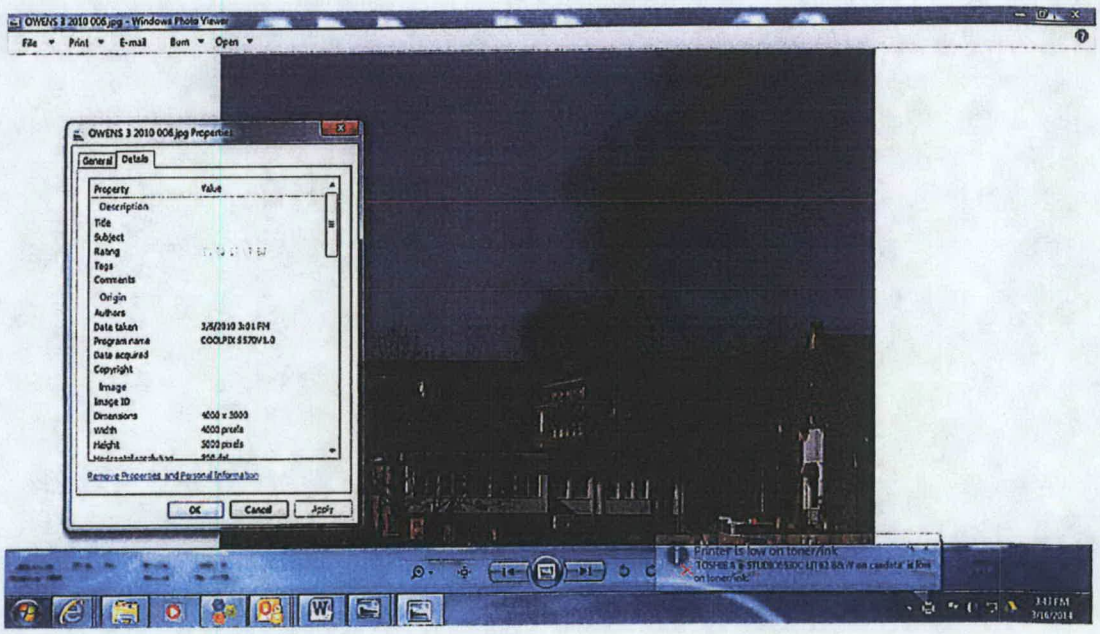
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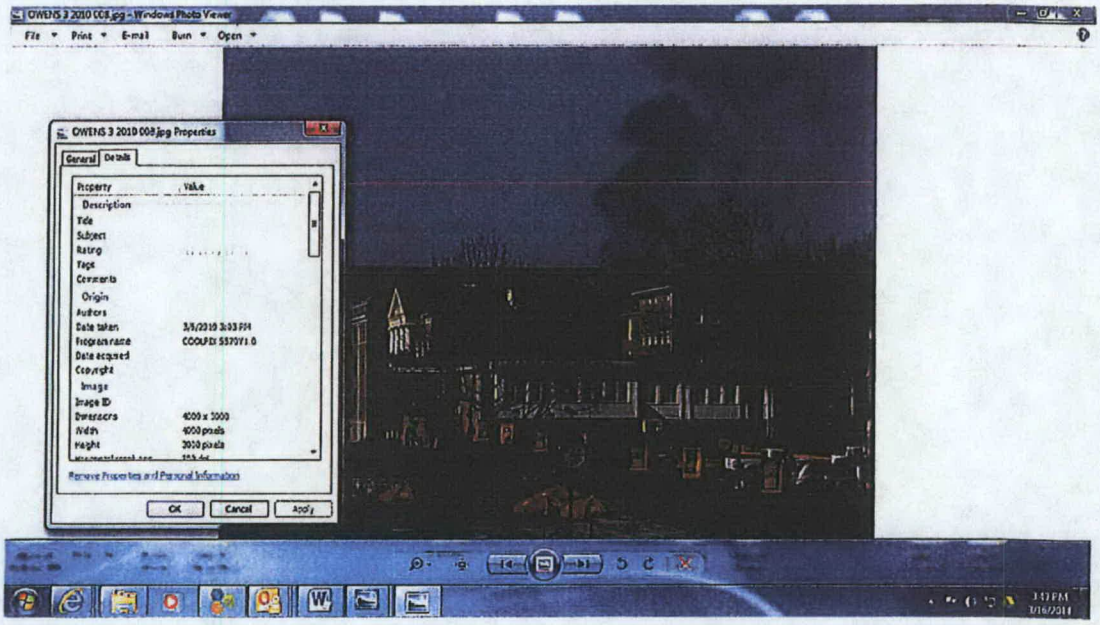
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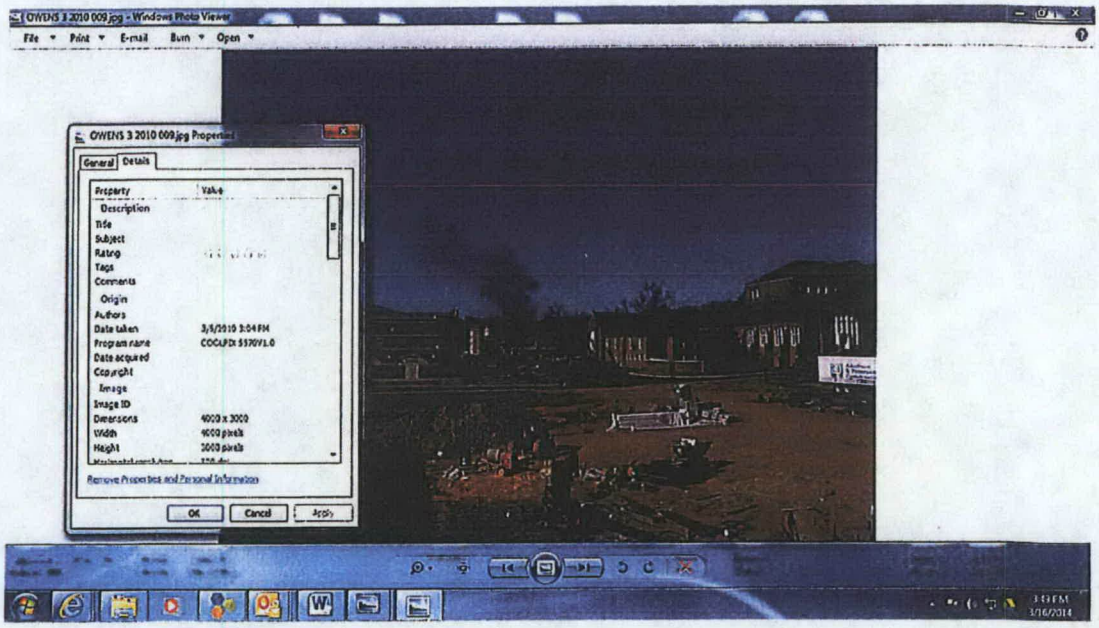
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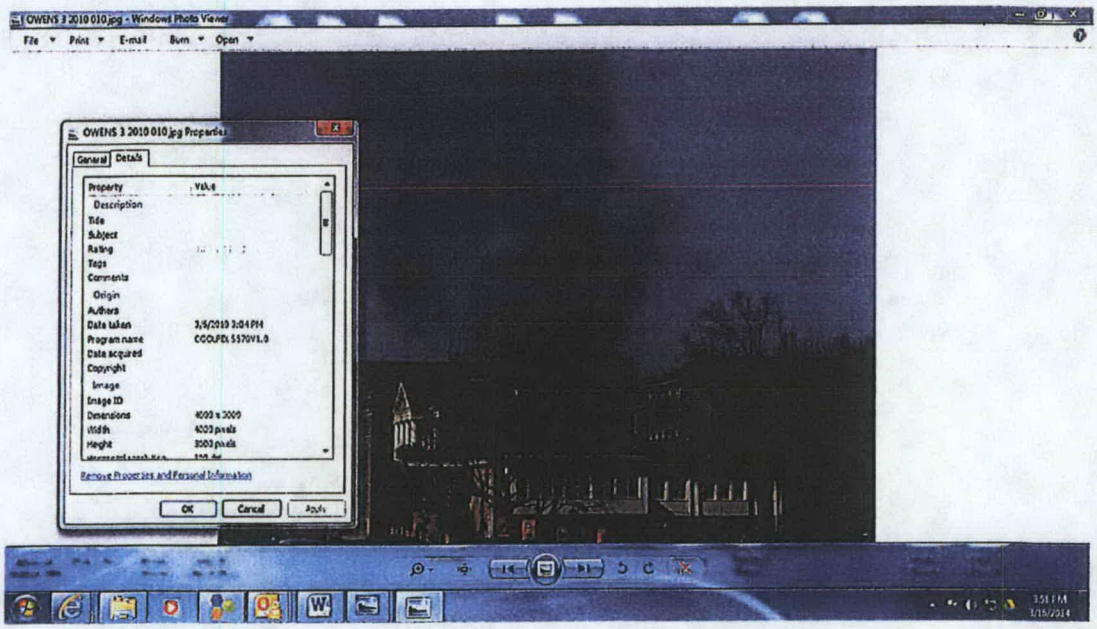
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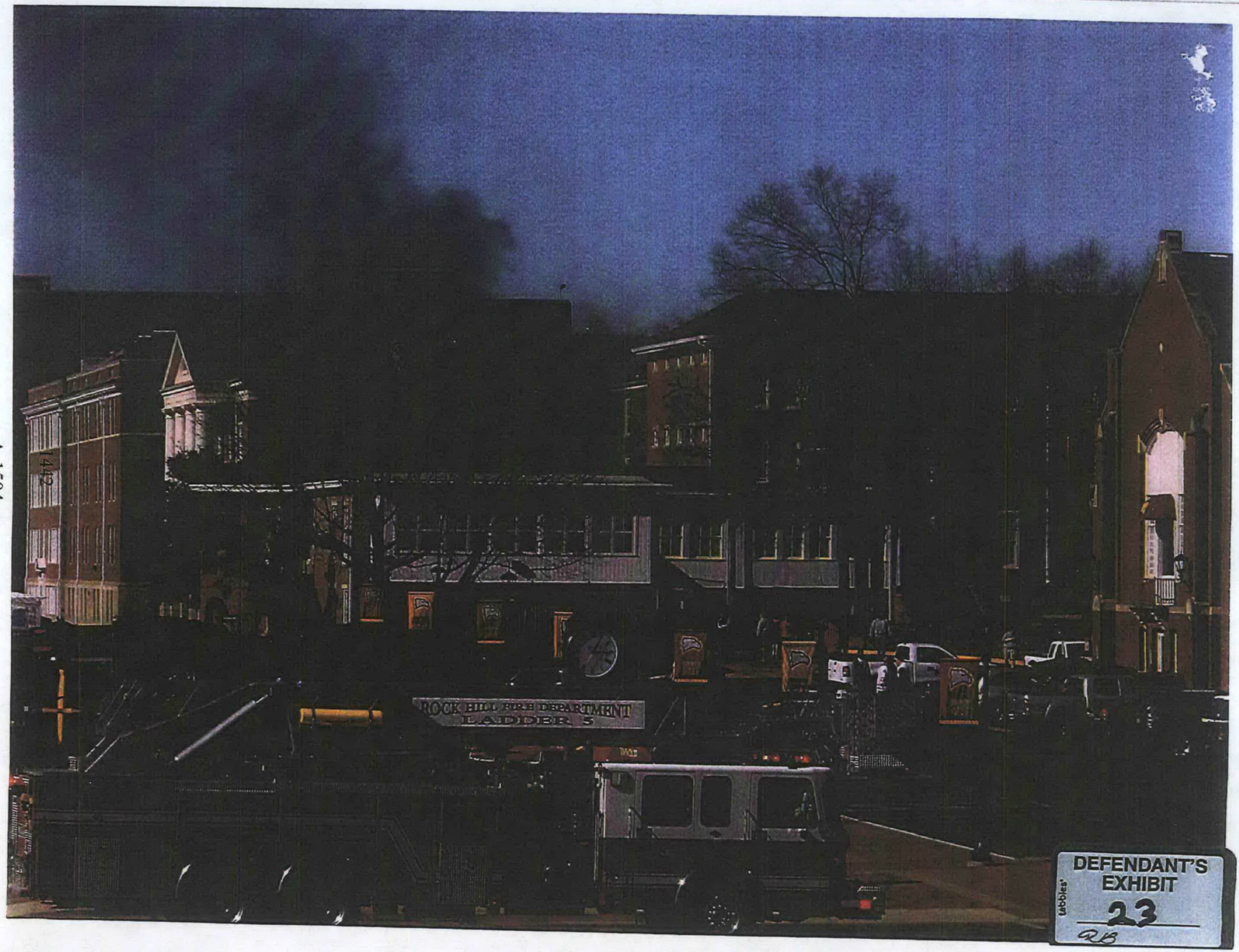
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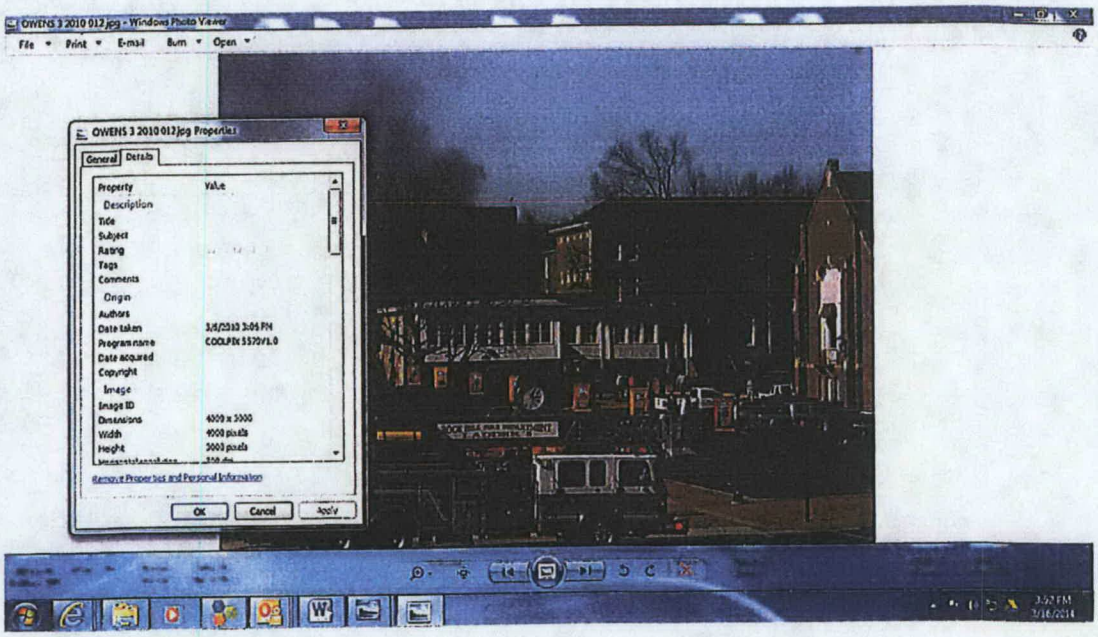
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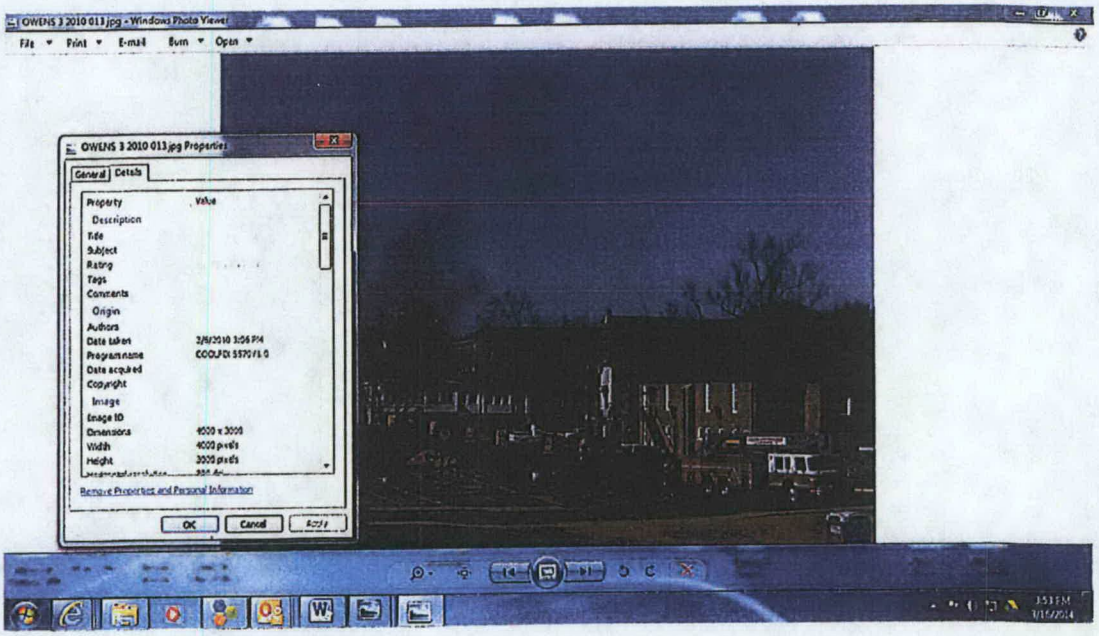
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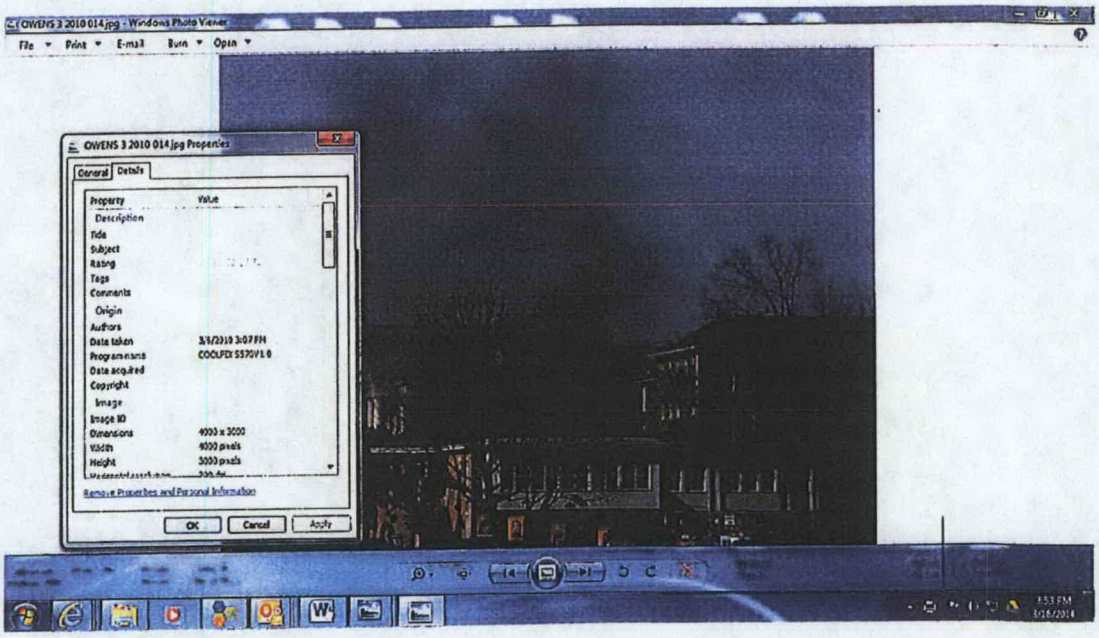
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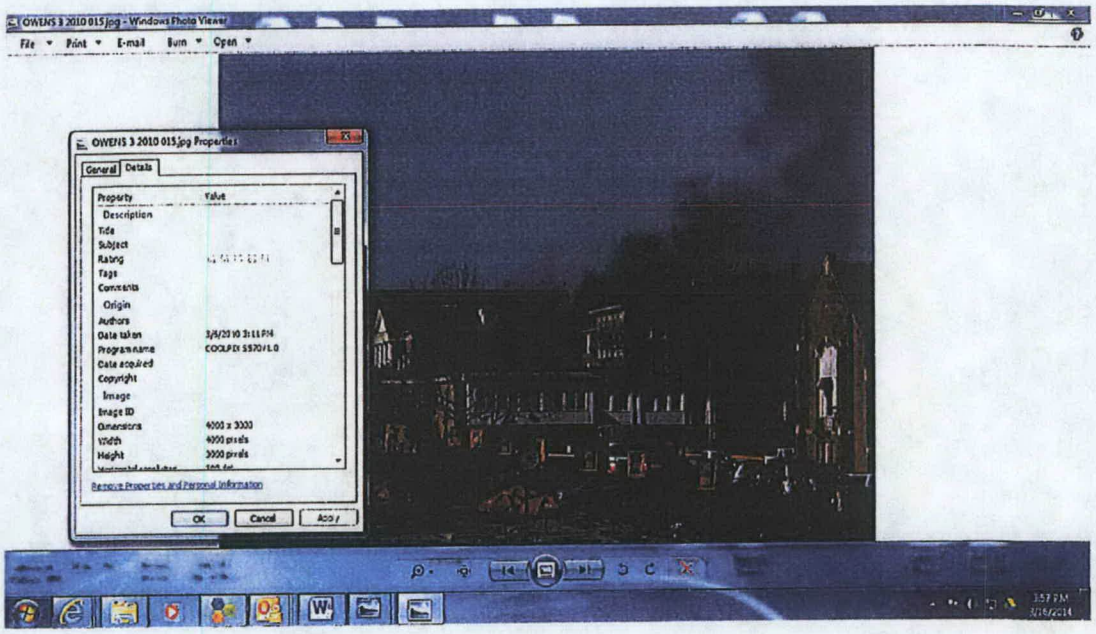
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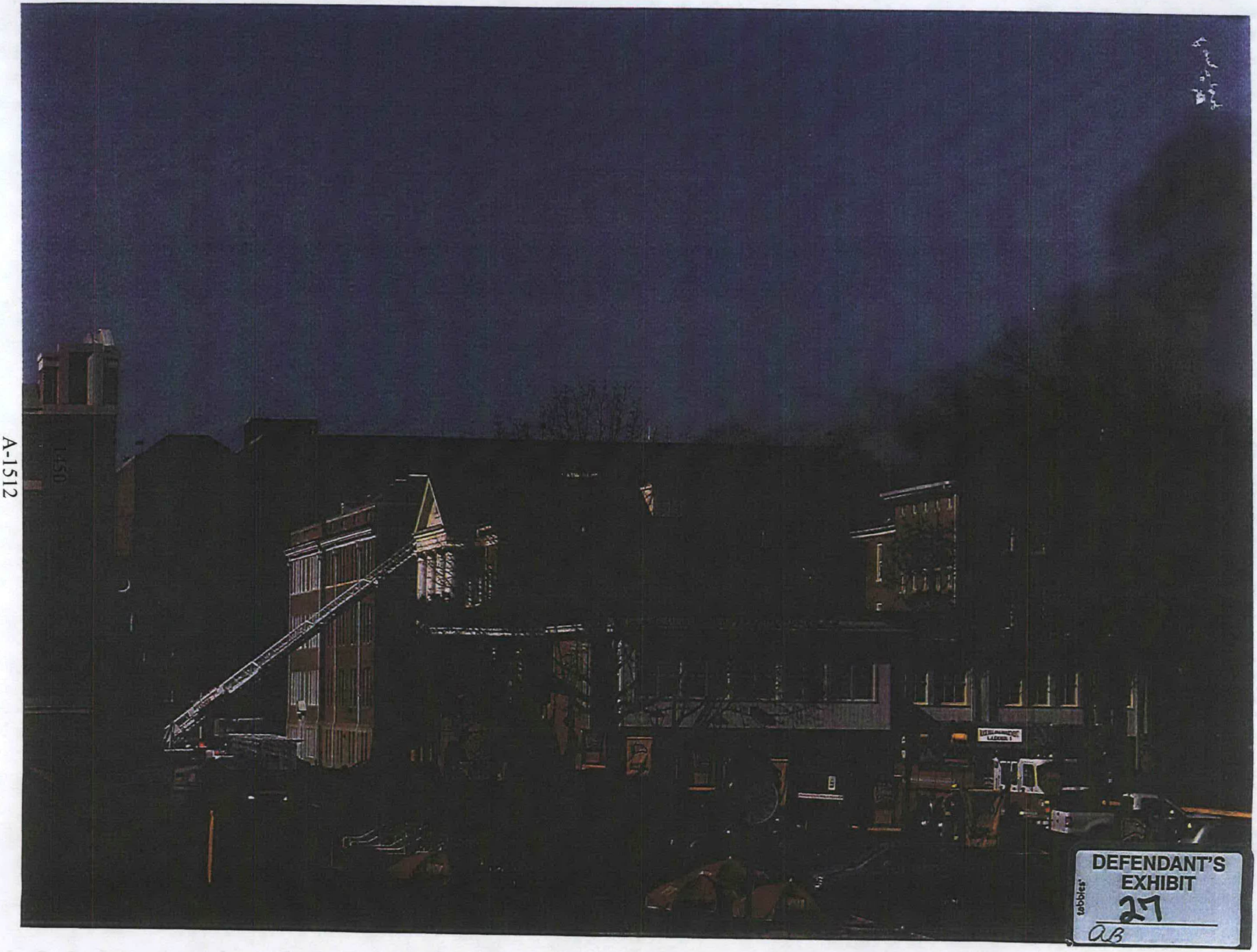
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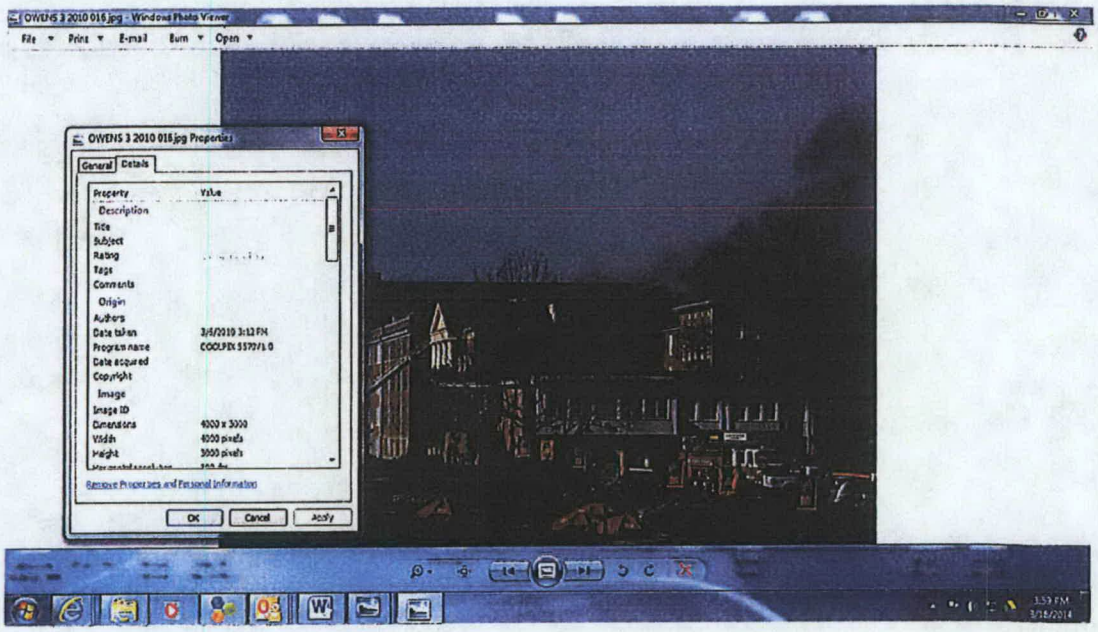
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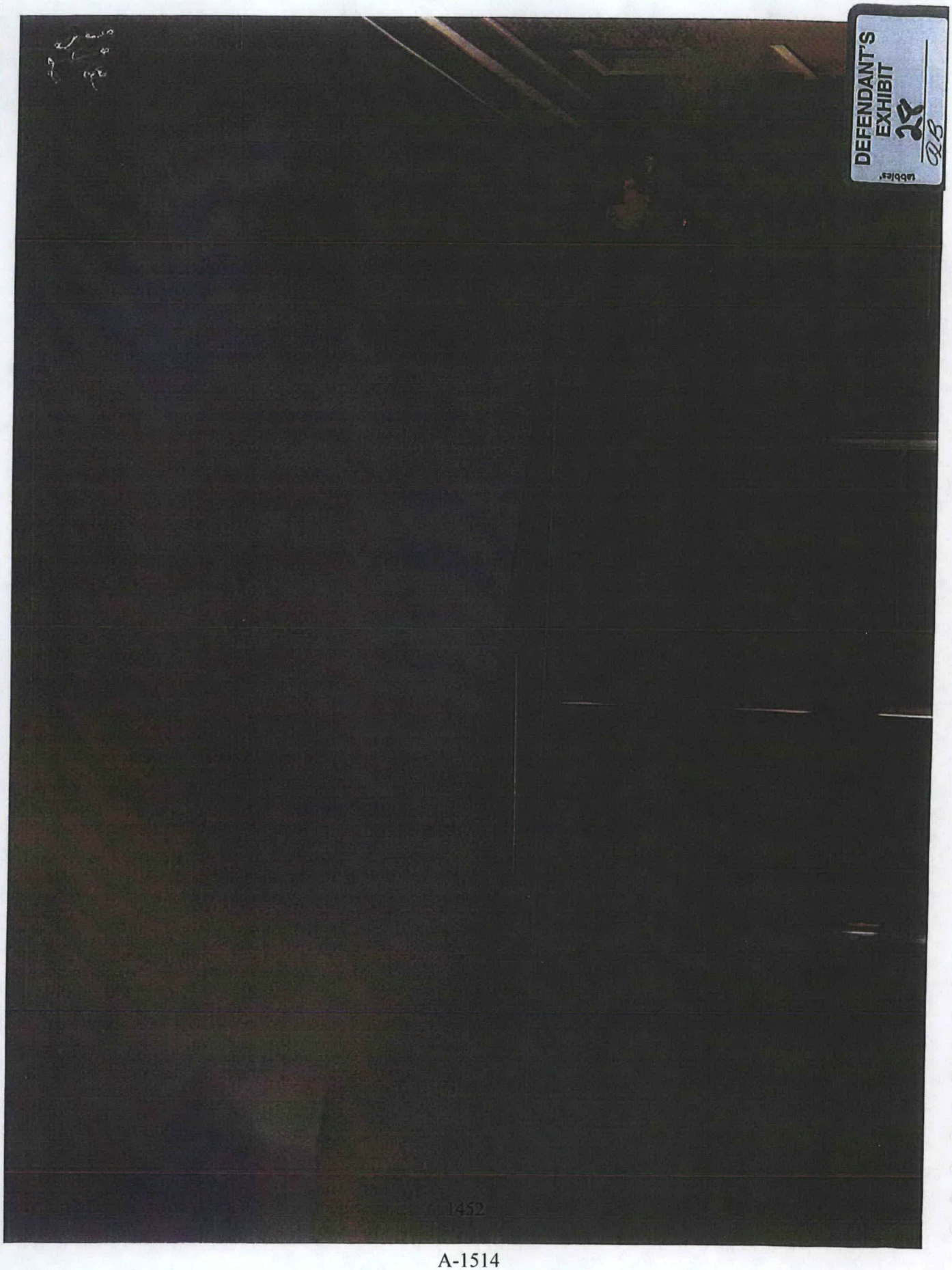
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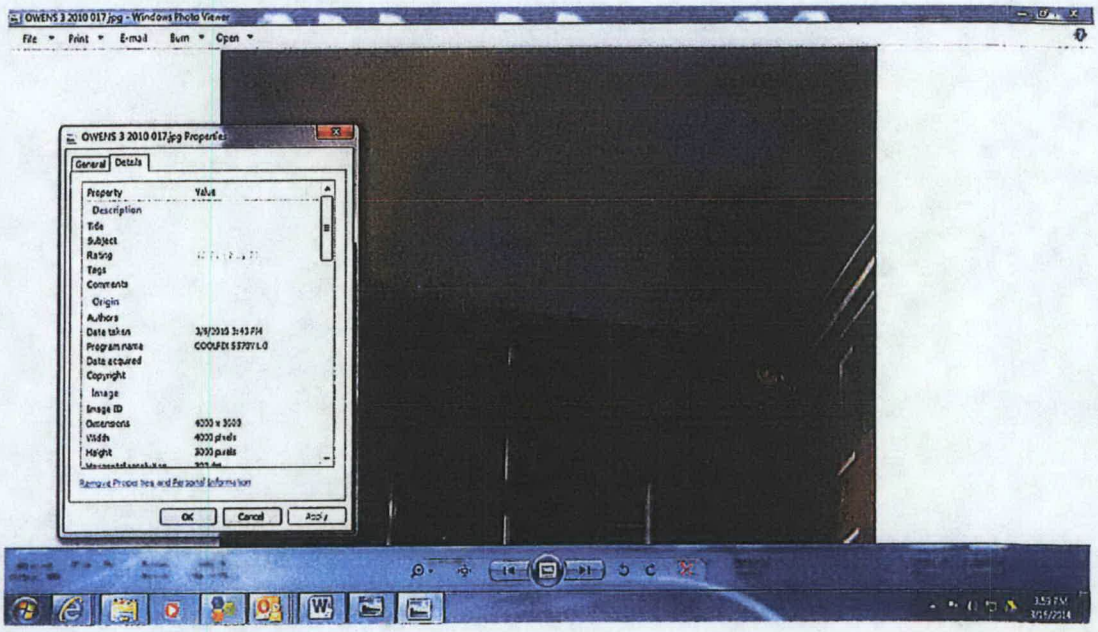
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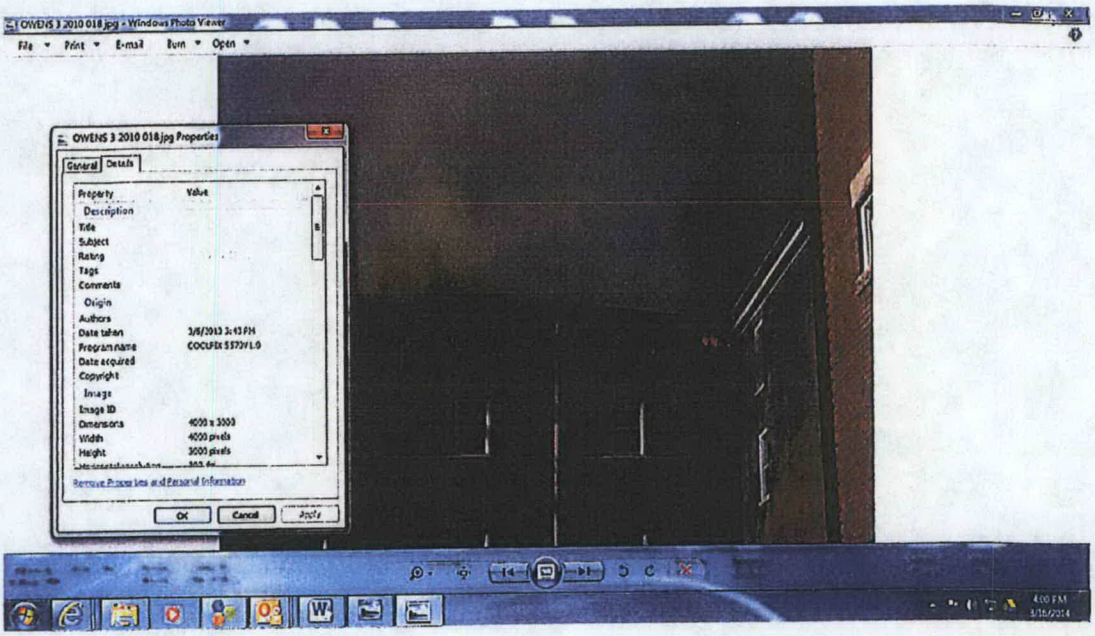
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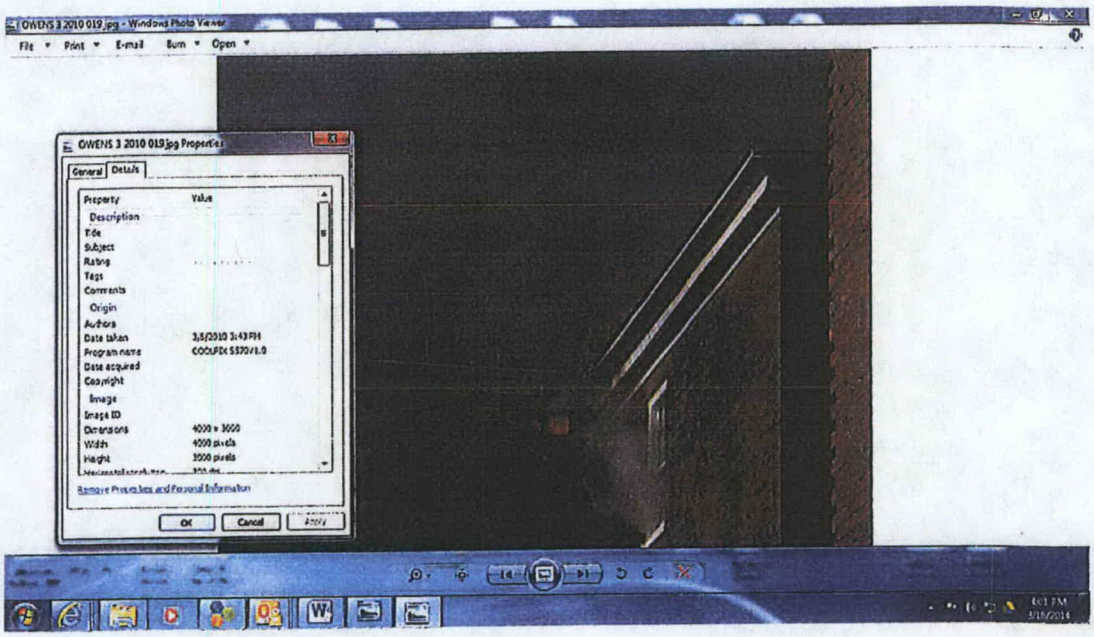
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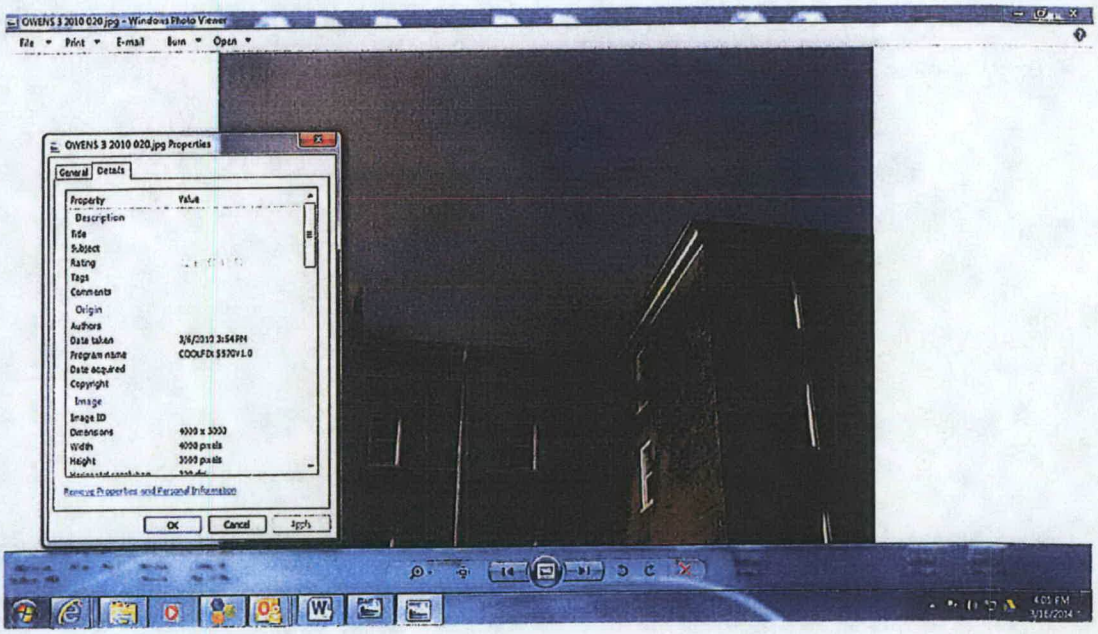
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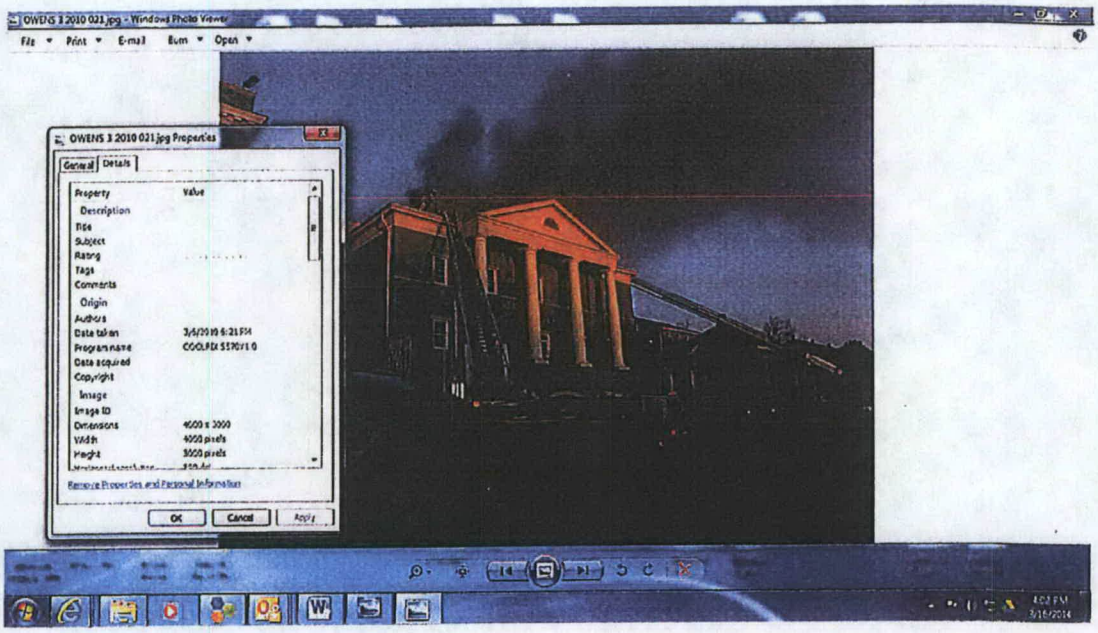
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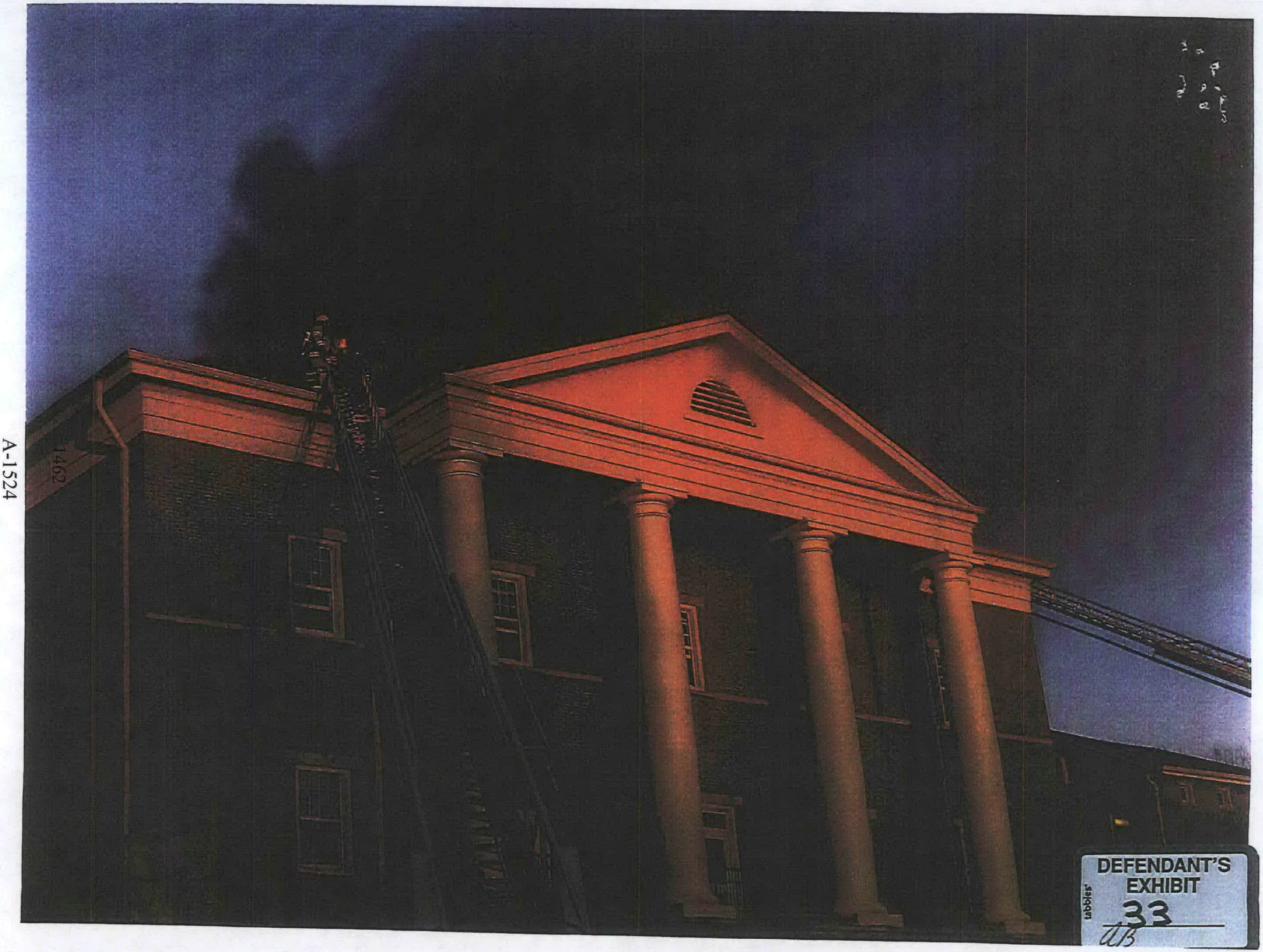
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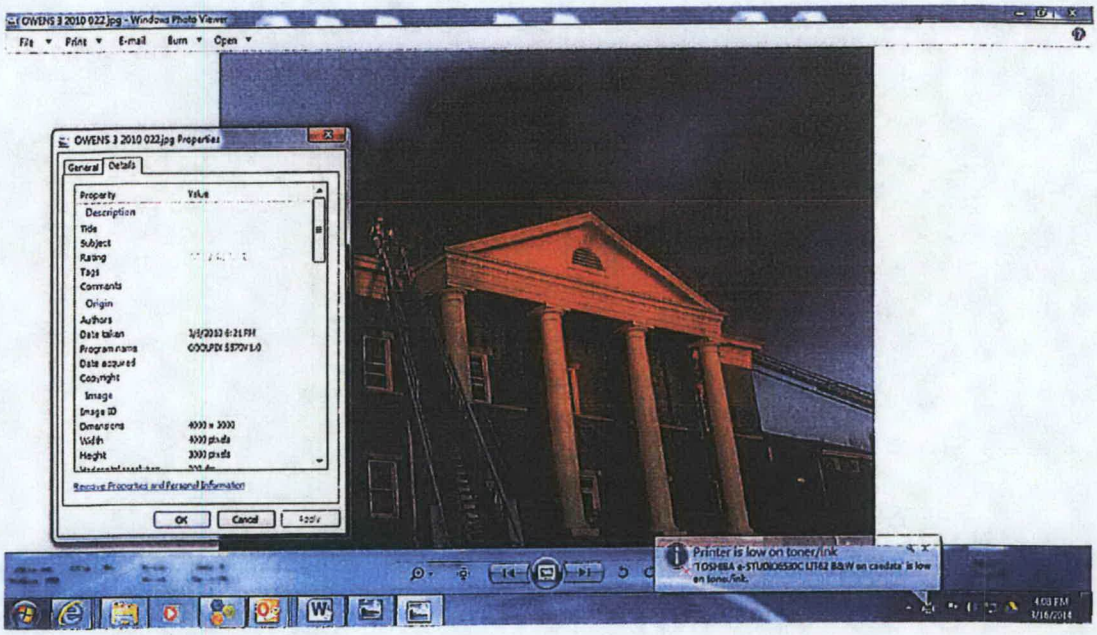
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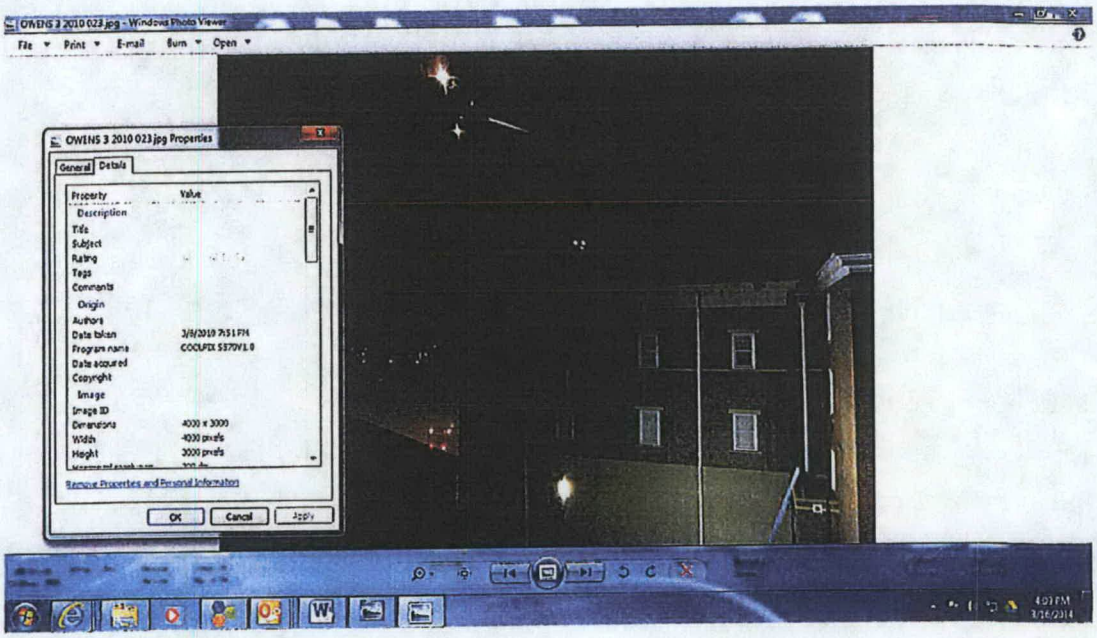
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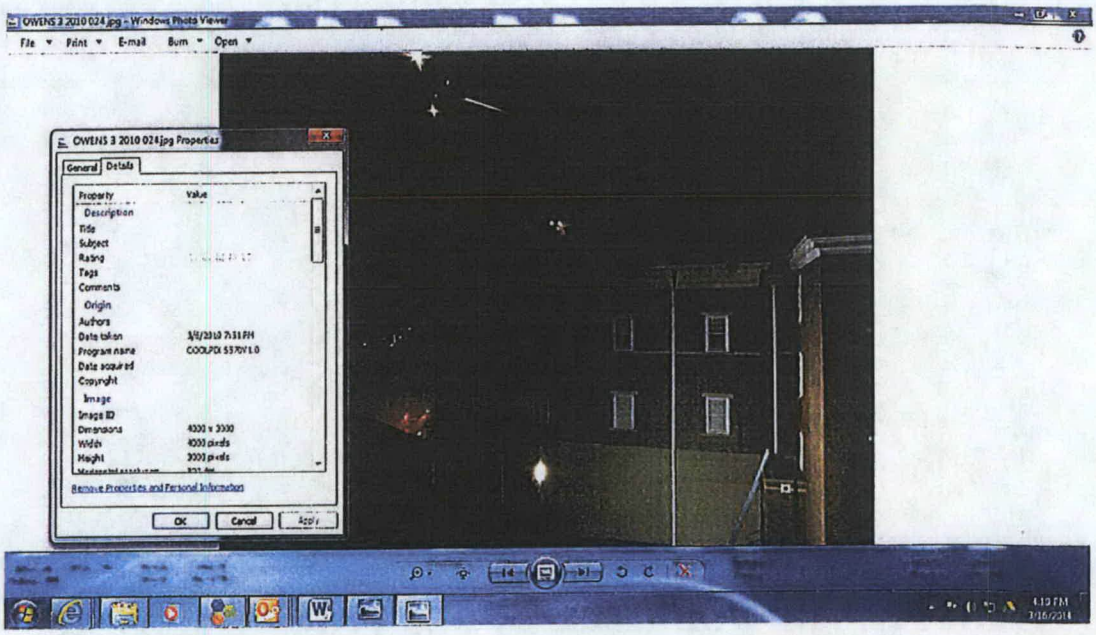
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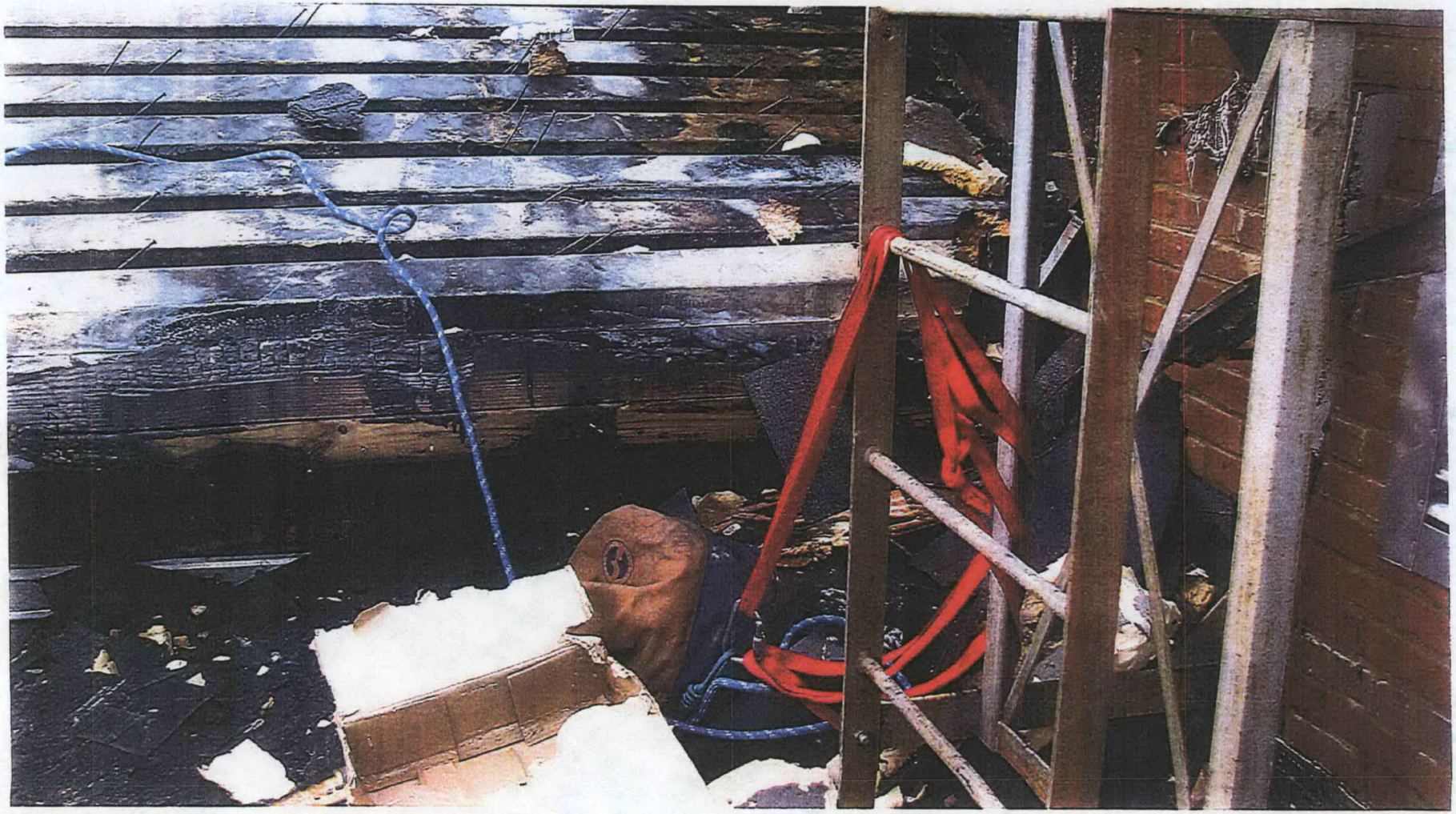

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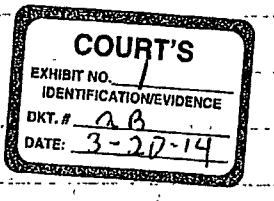
Need Definition of Proximate Cause

Need ICC Code Read (your last statement)

James R McCarthy Jr Mon 85



STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

PICKENS ROOFING AND SHEET METALS, INC.,

Defendant.

STIPULATION

The parties hereby stipulate and agree that the pre-file values of Bancroft Hall and Owens Hall exceeded the costs of repairs to those buildings caused by the March 6, 2010 fire.

This the 15 day of March, 2014.

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Counsel for Plaintiff

COURT'S
EXHIBIT NO. 2
IDENTIFICATION/EVIDENCE
DKT. # 3-31-14
DATE: CB

P1 1 P2 5 P3 8 P4 18 D1 11 D2 2 D3 17 D4 9
Alt1 23 Alt2 25 Alt1 21 Alt2 24

York Circuit Court
RANDOM STRIKE SHEET

JUDGE NAME : Alford, Lee
TRIAL TYPE : Civil
PANEL ID : 2012CP4603151
COURTROOM CTRM

DESCRIPTION : 2012CP4603151

Sorted by: Random Nbr
Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
~~1 Miller, Leslie J~~	91	W	F	( )	( )	( )	excuse
~~1 Freshcorn, Christopher~~	~~90~~						
~~2 Kissiah, Terry J~~	~~68~~	W	F	( )	( )	( )	
3 Robinson, Susan M	113	W	F	( )	( )	( )	
4 Prescott, Denise R	104	W	F	( )	( )	( )	
~~5 Wilson, Shannon D~~	~~146~~	W	F	( )	( )	( )	
6 Williamson, Stephanie W	144	W	F	( )	( )	( )	
7 Lampkin, James J	73	B	M	( )	( )	( )	
~~8 Sanders, W Bernard Jr.~~	~~118~~	W	M	( )	( )	( )	
~~9 Piper, Tracey A~~	~~102~~	W	F	( )	( )	( )	
10 Ligon, Norma S	76	W	F	( )	( )	( )	
~~11 Clawson, Vitta L~~	~~25~~	B	F	( )	( )	( )	
12 Houston, Susan S	54	W	F	( )	( )	( )	
13 Smith, Denise A	125	W	F	( )	( )	( )	
14 Brinson, Linda R	13	W	F	( )	( )	( )	
15 Adams, Michael R	1	W	M	( )	( )	( )	
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~~18 King, David L~~	~~66~~	W	M	( )	( )	( )	
19 Mccartney, Janice R	85	W	F	( )	( )	( )	
20 Galvin, Jeffrey M	42	W	M	( )	( )	( )	
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22 Joyner, Tara C	65	W	F	( )	( )	( )	
~~23 Ludwa, Sandra L~~	~~79~~	W	F	( )	( )	( )	
~~24 Morrison, Krystal W~~	~~97~~	B	F	( )	( )	( )	

York Circuit Court
RANDOM STRIKE SHEET

JUDGE NAME : Alford, Lee
TRIAL TYPE : Civil
PANEL ID : 2012CP4603151
COURTROOM CTRM

DESCRIPTION : 2012CP4603151

Sorted by: Random Nbr
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NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
~~25 Davis, Muhammad I~~	~~31~~	B	M	( )	( )	( )	
26 Burris, Jeffery R	17	W	M	( )	( )	( )	

Total Number of Jurors: 26

** END OF REPORT **

York Circuit Court
RANDOM STRIKE SHEET

JUDGE NAME : Alford, Lee
TRIAL TYPE : Civil
PANEL ID : 2012CP4603151A
COURTROOM CTRM

DESCRIPTION : 2012CP4603151A

Sorted by: Random Nbr
Trial

	NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1	Freshour, Christopher S	40	W	M	( )	( )	( )	

Total Number of Jurors: 1

** END OF REPORT **

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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(803) 254-4190

Attorneys for Appellant

January 16, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT PICKENS' MOTION FOR DIRECTED VERDICT BASED ON WINTHROP'S FAILURE TO PRESENT ANY EVIDENCE THAT PICKENS CAUSED THE FIRE?

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE A RECHARGE OF PROXIMATE CAUSATION THAT INCLUDED FORESEEABILITY?

IV. WHETHER THE TRIAL COURT ERRED IN BIFURCATING THE LIABILITY AND DAMAGES PHASES OF TRIAL WHERE CAUSATION AND DAMAGES WERE INEXTRICABLY INTERTWINED?

V. WHETHER THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS TO DAMAGES WHERE WINTHROP FAILED TO PRESENT ANY TESTIMONY ESTABLISHING THE DEGREE TO WHICH PICKENS' CONDUCT WORSENED THE DAMAGES RESULTING FROM THE FIRE?

VI. ALTERNATIVELY, WHETHER THE TRIAL COURT ERRED IN FAILING TO ADJUST THE JUDGMENT TO REFLECT THE JURY'S DETERMINATION THAT WINTHROP WAS 40% AT FAULT?

STATEMENT OF THE CASE

This case was commenced by the filing of a summons and complaint in the York County Court of Common Pleas on September 5, 2012. (R. pp. 13-19.) Plaintiff Winthrop University Trustees for the State of South Carolina ("Winthrop") alleged causes of action for breach of contract and negligence against Defendant Pickens Roofing and Sheet Metals, Inc. ("Pickens") and sought damages arising from a fire that occurred upon Winthrop's campus on March 6, 2010. (*Id.*) Pickens answered on October 4, 2012 and denied all liability. (R. pp. 61-66.) Among its affirmative defenses, Pickens alleged that Winthrop was comparatively negligent. (*Id.*)

The case was called to trial before a jury during the week of March 17-21, 2014. Over Pickens' objection, the liability and damages phases of the trial were bifurcated. (*See* R. p. 149, line 7 – p. 151, line 5.) During jury selection, Pickens moved to strike Juror 25 for cause based upon that juror's status as a "student researcher" for Winthrop, who had been enrolled as a Winthrop student and was on campus when the fire occurred that formed the predicate for Winthrop's lawsuit. (*Id.* at p. 144, lines 9-23.) The trial court denied Pickens' motion and forced it to use one of its peremptory strikes to remove that juror. (*Id.* at p. 145, line 2 – p. 148, line 6.)

Following a four-day trial on liability, Pickens moved for a directed verdict on the grounds that Winthrop had offered no evidence that some act or omission by Pickens had caused the fire to ignite. (R. p. 788, line 3 – p. 789, line 21.) Although acknowledging that Winthrop had failed to adduce any evidence as to the ignition of the fire, the trial court nonetheless denied Pickens' motion on the grounds that Winthrop had introduced evidence to show that once the fire was ignited, Pickens' acts or omissions caused it to

spread. (R. p. 791, line 18 – p. 800, line 2.) Pickens put up no evidence during the liability phase of trial. (*Id.* at p. 801, lines 5-8; p. 803, lines 11-25.)

During the jury's deliberations on the issue of liability, it sent a note to the trial court asking, among other things, to be recharged concerning proximate cause. (R. p. 879, line 21 – p. 880, line 7.) The court provided an instruction as to cause-in-fact, but it left out any instruction as to foreseeability. (*Id.* at p. 881, line 14 – p. 882, line 4.) Pickens objected but was overruled. (*Id.* at p. 882, line 11 – p. 883, line 22.) The jury returned a verdict in Winthrop's favor as to its breach of contract and negligence causes of action, but it found that Winthrop bore 40% of the responsibility for the loss. (*Id.* at p. 884, line 3 – p. 885, line 5.) Pickens moved for judgment notwithstanding the verdict on the basis that the jury was never presented any evidence as to how the fire was caused to ignite. (*Id.* at p. 886, line 21 – p. 887, line 6) That motion was denied. (*Id.* at p. 887, lines 7-19.)

At the close of Winthrop's case as to damages, Pickens renewed its earlier directed verdict motion. (R. p. 945, lines 4-10.) It additionally moved for a directed verdict on the grounds that Winthrop had failed to introduce evidence as to how much worse the damages caused by the fire were than they would have been in the absence of Pickens' involvement. (*Id.* at p. 945, line 11 – p. 946, line 1.) These motions were likewise denied. (*Id.* at p. 946, line 13 – p. 965, line 10.)

The jury returned a verdict for Winthrop in the amount of $7,223,343.14. (R. p. 975, lines 4-13; *see also* R. p. 10.) Pickens moved for judgment notwithstanding the verdict on the same grounds it had previously raised at the directed verdict stage of the trial. (*Id.* at p. 977, lines 6-10.) It also moved for a new trial absolute on the grounds that

the trial court erred in bifurcating the trial and in failing to grant Pickens' motion to strike Juror 25 for cause. (*Id.* at p. 978, lines 4-6.) Alternatively, Pickens moved that the judgment be governed by the jury's comparative negligence determination on the grounds that the duty giving rise to Winthrop's contract claim was identical to the duty that gave rise to Winthrop's negligence claim. (*Id.* at p. 978, lines 7-22.) The trial court denied all of these motions. (*Id.* at p. 983, line 2 – p. 989, line 9.) Winthrop thereafter elected to recover under its contract cause of action. (*Id.* at p. 984, lines 8-21.)

Pickens received written notice on March 27, 2014 that judgment had been entered against it and timely filed its Notice of Appeal on April 21, 2014.

FACTS

Under the leadership of Winthrop's former President, Anthony DiGiorgio, Winthrop went through a transformative period, experiencing a multi-million dollar construction boom that led to the placement of several new buildings on its campus over the last twenty-five years. (R. p. 573, line 18 – p. 574, line 5; p. 514, line 12– p. 515, line 2.)

Among those new buildings is Owens Hall, constructed in 2007. (R. p. 576, lines 4-7.) Owens Hall is a state-of-the-art academic building with multiple classroom and office spaces in which technological teaching aids have been fully integrated into the structure. (Id. at p. 575, line 16 – p. 576, line 3.)

In 2009, President DiGiorgio sought to re-roof one of the older academic buildings on its campus known as Bancroft Hall. (R. p. 515, lines 13-15; p. 516, lines 2-6.) Bancroft Hall is a U-shaped building that contains primarily classrooms and professors' offices. (*Id.* at p. 522, lines 10-17; p. 609, lines 12-20.) The building was

originally constructed in 1909 and is connected to Owens Hall by way of the Bancroft Annex. (*Id.* at p. 522, lines 10-17.) Both Bancroft and Owens Halls have multiple roof surfaces, but most of their respective footprints are covered by sloped, asphalt-shingled roofing. (*Id.* at p. 576, lines 16-24; p. 605, lines 4-25.) However, the manner by which the shingle roofing systems are constructed on each building is different. Owens Hall's shingles are nailed to plywood nailboards that are adhered to both top and bottom sides of a layer of polyisocyanurate insulation, which is in turn mounted to a metal roof deck. (*Id.* at p. 279, lines 14-20.) All of these materials that are mounted to the metal roof deck are combustible. (*Id.* at p. 742, lines 6-18.) The older Bancroft Hall does not have the metal deck or the layer of insulation. Felt paper is nailed to plywood decking, and shingles are nailed over the felt paper in the same way that shingles are applied to residential structures. (*Id.* at p. 630, line 18 – p. 633, line 6.) While the materials that comprise it will burn, the roofing system that Pickens was hired to install on Bancroft carries the highest rating for resistance to fire known to the roofing industry. (*Id.* at p. 633, line 17 – p. 636, line 16.)

The roof over the Bancroft Annex is flat. It is comprised of metal decking that is covered by a layer of insulation and a thin, fully-adhered waterproof membrane. (R. p. 523, lines 14-25; p. 576, lines 16-24; p. 605, lines 3-25.) While this roofing system is combustible, it also carries the highest rating for resistance to fire known to the roofing industry. (*Id.* at p. 686, lines 6-19.) The flat roof is lower than the pitched roofs of the adjoining buildings and is accessible by means of a scuttle, or hatch, that opens onto the roof from Owens Hall and then climbing down a set of metal stairs approximately four feet. (*Id.* at p. 350, line 7- p. 351, line 2; p. 524, lines 18-24.) A ventilation fan for the

elevator shaft in Bancroft Hall projects through the brick sidewall along the flat roof next to the metal stairs. (R. p. 290, line 25 – p. 291, line 15; p. 588, lines 17-21.) That fan is the only mechanical device on the flat roof over the Bancroft Annex. (*See id.*) It is located immediately adjacent to the metal stairs described above. (*Id.*)

Immediately adjacent to the flat roof on the inside of Owens Hall is a mechanical room and the elevator shaft for Owens Hall. (R. p. 295, line 24 - p. 296, line 7.) The roof hatch is accessed by entering the mechanical room through a set of doors that are supposed to be kept locked. (*Id.* at p. 340, lines 13-19; p. 350, line 7 – p. 351, line 13; p. 408, lines 8-12; p. 524, line 18 – p. 525, line 12.)

The re-roofing of Bancroft Hall was primarily motivated by President DiGiorgio's aesthetic concerns, as the aging transite shingles on the building were covered with lichen, making the building look old and unmaintained. (R. p. 576, lines 10-15; p. 583, lines 6-14; p. 610, lines 11-17.)

Pickens won the bid for the re-roofing project, which began in 2009. (R. p. 615, line 23 – p. 616, line 11.) It had worked with Winthrop on several previous roofing jobs and was working with it on another roofing project on campus during the Bancroft Hall project, so the entities were generally familiar with how they each operated. (*Id.* at p. 395, lines 1-10; p. 398, line 21 – p. 399, line 6; p. 469, lines 14-17.)

The original specifications for the project called for the roofing contractor to have two staging or "lay down" areas at ground level, immediately adjacent to Bancroft Hall. (R. p. 401, line 23 - p. 402, line 3.) However, President DiGiorgio objected to the visibility of one of the lay down areas, indicating that it was unsightly to visitors and other pedestrians on campus. (*Id.* at p. 401, line 9 - p. 402, line 11.) One lay down area

was therefore removed during the final negotiations of the roofing contract with Pickens. (R. p. 401, line 9 - p. 402, line 13.) Pickens informed Wes Love, Winthrop's project manager for the Bancroft Hall re-roofing job, that not having the second lay down area would increase the labor costs for the project, as it would not be as efficient to move workers and supplies up to the roof level from only one area on the ground. (*Id.* at p. 515, lines 16-18; p. 516, line 22 – p. 517, line 23; p. 577, lines 17-24.) The parties therefore negotiated an addendum to the roofing contract to allow for the higher labor cost. (*Id.*)

Pickens subcontracted the demolition work and most of the shingling work to other companies. (R. p. 428, lines 13-15; p. 429, line 24 - p. 430, line 10.) However, it kept the metal fabrication aspects of the job in-house. (*See id.* at p. 319, lines 13-16.) Pickens employees were involved in the project in various capacities. (*Id.* at p. 319, lines 8-10; p. 335, line 22 – p. 336, line 7; p. 344, lines 6-16; p. 398, lines 15-20; p. 399, lines 7-8.) Clint Robinson was the project manager who had bid the job and was responsible for its overall progress and for addressing issues as they arose during the project. (*Id.* at p. 399, lines 7-8; p. 440, lines 11-13.)

During the week of March 1 to March 5, 2010, a metal crew from Pickens was installing copper panels on dormer roof projections along one particular pitch of Bancroft Hall's roof. (R. p. 319, lines 13-16; p. 329, lines 20-24; p. 347, lines 9-25.) The work did not involve the use of torches, soldering guns or any other tools that produced heat or flame. (*Id.* at p. 335, lines 10-19; p. 347, lines 11-25.) The crew stored metal pieces on the flat roof where Bancroft and Owens Halls adjoined to keep them from blowing or sliding off the pitched roof while they worked. (*Id.* at p. 350, lines 1-6.)

The members of Pickens' metal crew that worked on Bancroft during the week of March 1-5, 2010 were Brandon Lusk, Matthew Pruitt, and Randall "Randy" Pruitt. (*See* R. p. 319, lines 13-16.) Randy Pruitt served as foreman and the others were helpers. (*Id.* at p. 314, lines 15-18; p. 315, lines 3-10; p. 357, line 22 – p. 358, line 3; p. 379, lines 4-5; p. 405, lines 10-11; p. 418, lines 16-22.) None of the crew members smoked. (*Id.* at p. 328, lines 20-21; p. 346, lines 7-9; p. 368, lines 4-9; p. 389, lines 5-10.)

On March 5, 2010, the metal crew was the only Pickens crew working on Bancroft Hall.[1] (R. p. 342, line 6 - p. 343, line 12.) They were joined by Bobby Pickens for about 45 minutes. (*Id.* at p. 334, lines 23-25; p. 471, line 18 – p. 472, line 8.) He took pictures of their work activity and then left the jobsite. (*Id.*)

The crew stopped working at approximately 4:00 p.m. (R. p. 371, lines 24-25; p. 289, lines 13-16.) They came down and spoke with Clint Robinson, who had come by the jobsite that afternoon to ask about their progress. (*Id.* at p. 419, lines 3-17.) Robinson did not go on the roof that day; in fact, it had been one or two weeks since he had last been on the roof. (*Id.* at p. 408, line 25- p. 409, line 2.)

Winthrop asserted that when the Pickens metal crew left the jobsite on March 5, 2010, they left shingles, roofing paper and other combustible materials on the flat roof. None of these materials is known to ignite spontaneously; in fact, they are designed to resist fire. (R. p. 304, line 22 - p. 305, line 16.) To establish its prima facie case, Winthrop relied primarily upon the testimony of Pickens employees, which was conflicting in many respects as to what materials were left on the flat roof when the crew

[1] There was evidence that a technician from Southern Elevator had performed routine maintenance on the elevators in both Bancroft and Owens Halls on either March 4 or 5, 2010. (*See* R. p. 586, line12 - p. 588, line 16; R. p. 1417.)

left for the day.[2] Nonetheless, there was testimony that packs of shingles and roofing paper had been stored on the flat roof and could have been left there when the crew stopped working on March 5, 2010.[3] (*See* R. p. 359, line 16 – p. 360, line 3; p. 385, lines 5-25; p. 386, lines 13, 20-22, p. 387, lines 14-16; p. 356, line 19 – p. 357, line 6; p. 387, lines 11-13, p. 387, line 24 – p. 388, line 5.) There was also testimony that the use of the flat roof as a storage or staging area was done with Winthrop's knowledge, and that Winthrop had not designated anyone to serve as its "fire prevention program superintendent" for the project. (*Id.* at p. 336, lines 8-10; p. 405, lines 20-25; p. 530, line 4 - p. 531, line 20; p. 584, line 22 - p. 586, line 11.)

Shortly before 3:00 p.m. on March 6, 2010, a Winthrop student noticed smoke emanating from Owens Hall and dialed 911. (R. p. 305, line 17 – p. 306, line 1; p. 478, line 25 – p. 480, line 11.) The fire department arrived within 15 minutes, but the fire was burning within the insulation layer of the roofing system on Owens Hall and was difficult to extinguish. (Id. p. 305, line 17 - p. 308, line 1; p. 278, line 23 - p. 280, line 3.) The fire burned from March 5, 2010 until approximately 6:45 p.m. on March 7, 2010. No source of ignition could ever be identified by any fire investigator. (Id. p. 290, line 15 - p. 293, line 14; p. 295, lines 21-23; p. 747, lines 22-24.)

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[2] Several witnesses testified that only metal was stored on the flat roof while others testified that shingles and roofing paper were also stored there. (*See* R. 350, lines 1-6 (regarding storage of copper on flat roof); p. 385, lines 5-20 (same), p. 387, lines 16-18 (same), p. 388, lines 19-22 (same). *See also* R. p. 359, line 16 – p. 360, line 3 (regarding storage of shingles); p. 385, lines 5-20 (same); p. 385, lines 21-25 (same); p. 386, lines 20-22 (same), p. 387, lines 14-16 (same); *see also* p. 386, lines 13 (regarding storage of tar paper on the flat roof); p. 387, lines 11-13, p. 387, line 24 – p. 388, line 5 (same); p. 472, line 17- p. 473, line 18 (Pickens reported to Winthrop that it only lost metal in the fire).)

[3] Unquestionably, packs of shingles were left along the ridgeline of the pitched roof on Bancroft Hall, as these were depicted in photographs taken before and after the fire, but these shingle packs did not burn in the fire. (*See* R. p. 348, lines 1-6; p. 352, lines 5-16.)

The jury was instructed that section 8.3.3 of chapter 241 of the codes and standards promulgated by the National Fire Protection Association ("NFPA") states that "Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration" and that this provision had the force of law at the time of the fire. (*See* R. p. 861, line 7 – p. 862, line 22.) Likewise, the jury was instructed that in any construction project, the property owner is required to designate "a person who shall be responsible for the fire prevention program and who shall insure that it is carried out to completion." (*Id.* at p. 862, lines 15-19.) The jury was instructed that such person designated by the property owner was to be known as the "fire prevention program manager" who would have the "authority to enforce the provisions of [Section 7.2 of the IFC] and other applic[able] fire protection standards." (*Id.* at 862, lines 20-23; *see also* p. 862, line 24 – p. 863, line 5.)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR NEW TRIAL ABSOLUTE BASED ON THE COURT'S REFUSAL TO STRIKE JUROR 25 FOR CAUSE.

During the jury selection process, Juror 25, Vitta Clawson ("Juror 25"), responded affirmatively to several voir dire questions posed by the Court. Based on her answers, Juror 25 should have been stricken for cause because she was a current "student researcher" at Winthrop, had been a Winthrop student at the time of the fire, had previous knowledge of the facts of the case, and had discussed the subject fire with Winthrop professors and students at the time of the fire. (R. p. 116, line 6 - page 117, line 20.) The trial court erred in denying Pickens' motion to strike Juror 25 for cause and in denying Pickens' motion for new trial absolute.

Juror 25 responded affirmatively to several questions posed by the trial court to the jury venire. The first question was whether "any member of the jury panel or any member of your immediate family . . . [ever] worked for or ha[d] any business relationship with Winthrop University[?]" (*See* R. p. 112, line 23 – p. 113, line 1.) Juror 25 answered that she was a current "student researcher" at Winthrop and "d[id] know about this [incident]." (*Id.* at p. 116, lines 7-8.[4]) She also had personal knowledge of the subject fire, including its alleged cause. (*Id.* at p. 117, lines 8-12.)

Following the colloquy on this particular question, the court asked Juror 25 whether her "experiences in that regard and those relationships would interfere in any way with [her] ability to give both sides . . . a fair and impartial trial." (R. at p. 116, line 23 – p. 117, line 4.) Juror 25 responded: "I could do that. I could do that. That's not a problem. It's just I wanted to say that I knew things that occurred." (*Id.* at p. 117, lines 5-7.) The court continued to question her about her prior knowledge of the fire. (*See id.* at p. 117, lines 8-10.) She responded: "I was there during the fire, the incident, so I know people who were affected by it." (*See id.* at p. 116, lines 16-17.) She further responded that she knew about "[t]he fire, the incident, things that were said about how it occurred, and so forth." (*Id.* at p. 117, lines 11-12.)

Juror 25 also responded affirmatively to several other voir dire questions, including whether "any member of the jury panel or member of [their] immediate family obtained a degree or attended classes at Winthrop University" and whether "any member of the jury panel had any prior knowledge about this case from any source before"

[4] In addition to Juror 25, six other prospective jurors responded affirmatively to this question. Of these seven total jurors, five had only attenuated relationships with Winthrop and one was a current employee of the school who was later removed from the venire by the trial court based on her current employment status.

coming to court. (*See* R. p. 117, line 25 – p. 118, line 2; p. 121, lines 6-12; p. 132, lines 6-11; p. 136, line 6 - p. 137, line 4.) She answered that she was a "recent graduate" of Winthrop University and that she had previous knowledge about the case. (*Id.* at p. 121, line 6; p. 136, lines 6-15.) She explained her knowledge as follows:

> I watched it on the news. I am friends with students who were affected by the fire. They discussed some things that they knew [on] the school website and then some of the professors talked about it, but I don't live on campus so I don't know any specifics, but I have watched it.

(Id. at p. 136, lines 10-15.)

Article I, section 14 of the South Carolina Constitution and section 14-7-1050 of the South Carolina Code of Laws both mandate that litigants receive a fair trial by an impartial jury. S.C. Const. Art I, § 14; S.C. Code Ann. § 14-7-1050 (Supp. 2013). *See also Alston v. Black River Electric Co-Op.*, 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001) ("[u]nder South Carolina law, litigants are guaranteed the right to an impartial jury"). "If a potential juror has an interest in the lawsuit such that she is 'not indifferent in the case,' the juror shall be deemed incompetent to serve on the jury." *Id.* at 326-27, 548 S.E.2d at 859 (*quoting* S.C. Code Ann. § 14-7-1020 (Supp. 2000)).

"The trial court has a duty to assure that every juror is unbiased, fair, and impartial." *State v. Gaskins*, 284 S.C. 105, 114, 326 S.E.2d 132, 138 (1985),(citation omitted), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Although the decision to strike a juror is within the sound discretion of the trial court, appellate courts of this state have set parameters to guide trial courts in deciding whether to qualify a juror or not. *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007); *Wilson v. Childs*, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993). The South Carolina Supreme Court has held: "A juror should be disqualified by the court if it appears to the

court that the juror is not indifferent in the case." *State v. Woods*, 345 S.C. 583, 590, 550 S.E.2d 282, 285 (2001); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986).

"When reviewing [a] trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire." *State v. Council*, 335 S.C. 1; 10, 515 S.E.2d 508, 512-13 (1999) (*citing State v. Green,* 301 S.C. 347, 392 S.E.2d 157 (1990)), *reh'g denied*, (May 14, 1999) and *cert denied*, 120 S.Ct. 558, 145 L.Ed.2d 489 (1999). Here, despite testifying that she could remain "fair and impartial" and give both sides a fair trial (*see* R. p. 117, lines 5-7, 20), Juror 25 provided several bases upon which the Court must find that the prospective juror could not be indifferent in this case. Not only was Juror 25 currently affiliated with Winthrop as a "student researcher,"[5] but she also "recently graduated" from the school, and had been a Winthrop student "during the fire, the incident" and "knew people who were affected by it." (R. p. 116, lines 7-8, 16-17, 20-22.) She also specifically stated that she "knew things that occurred," such as "[t]he fire, the incident, things that were said about how it occurred, and so forth." (*Id.* at 117, lines 11-12.) Juror 25's previous knowledge or belief about "how [the fire] occurred" (id.) gave her a perspective about the issues in the case that other potential jurors did not share.

Appellate courts have held that one disqualifying factor alone is insufficient to strike a juror for cause. *See Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961); *DeLee v. Knight*, 266 S.C. 103, 221 S.E.2d 844 (1975) (prospective jurors who may have heard details about the case were qualified where "they had not formed any

[5] It is unclear from Juror 25's responses as to whether she was compensated by Winthrop for performing such services. (*See* R. at p. 116, lines 7-8.)

concrete opinions" about the issues and stated that they could lay aside any impression or opinion and render a verdict based on the evidence presented in court); *Abofreka v. Alston Tobacco Co.*, 288 S.C. at 125, 341 S.E.2d at 624 ("A prior business relationship between a juror and a party does not as a matter of law disqualify a juror") (citation omitted). However, in a case such as this where the prospective juror had not only a *current* relationship with one of the parties, but also had knowledge of the facts of the case, the juror at issue could not have been wholly indifferent and should have been stricken for cause.

The trial court's failure to strike Juror 25 is especially egregious considering the court's decision to strike another prospective juror, Leslie Miller ("Juror 91"), for cause. During voir dire, Juror 91 stated that she was currently employed by Winthrop in the "office that coordinates help for struggling students." (*See* R. p. 114, lines 19-23.) Despite her statement that she had no personal knowledge about the case before coming to court (*id.* at p. 114, line 24 – p. 115, line 1) and testimony that she was not aware of any reason why her "work relationship . . . would interfere in any way with [her] ability to give both the plaintiff and the defendant a fair and impartial trial in this case" (*id.* at p. 115, lines 2-8), the trial court struck her for cause (*id.* at p. 147, lines 4-7). Later, in explaining its bases for striking Juror 91 for cause, the trial court stated that "even though that juror said [she] could be fair and impartial, [I] struck that jur[or] because [her employment with Winthrop] is too close of a connection." (*Id.* at 981, lines 6-14.)

The only difference between Juror 91 and Juror 25 is that Juror 25 had *closer proximity* to the issues in the case. Both were currently affiliated with Winthrop, one as an employee in the office assisting students (*id.* at p. 114, lines 19-23), and the other as a

student researcher (*id.* at p. 116, lines 7-8). *See* Am. Jur. 2d, *Jury* § 315 (the relation of employer and employee or master and servant between a party to a cause of action and a prospective juror is sufficient ground for a challenge for cause). In addition to being currently affiliated with Winthrop, Juror 25 was also a student at the time of the fire and had discussions with other students and professors about the cause of the fire. (R. p. 116, lines 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.) Juror Number 91, on the other hand, stated on the record that she had no previous knowledge of the incident. (*See id.* at p. 114, line 24 – p. 115, line 1.)

Failure to strike a juror who is biased as to the facts of the case is grounds for a new trial. *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000); *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67 (Ct. App. 2000). Pickens' motion to strike Juror 25 for cause should have been granted based on her current affiliation with Winthrop as a "student researcher," her status as a "recent graduate" of the University, and her personal knowledge of the facts of the case, including the "cause" of the fire. (*See* R. p. 116, lines 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.)

At the close of trial, Pickens moved for a new trial absolute based on the trial court's denial of its motion to strike Juror 25 for cause. (*See* R. p. 978, lines 4-6.) The trial court denied Pickens' motion, finding that "there was no other close connection to Winthrop that would cause the Court to excuse her for cause" other than Juror 25's status as a "recent graduate" of the University. (*Id.* at p. 981, line 15 – p. 982, line 10.) By forcing Pickens to use one of its four peremptory strikes on a juror that was biased as to the facts of the case and was not indifferent, the trial court erred. (*Id.* at p. 139, line 14 –

p. 140, line 25; p. 982, line 11 – p. 983, line 8.) For these reasons, Pickens requests a new trial absolute.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT PICKENS' MOTION FOR DIRECTED VERDICT AS TO LIABILITY BECAUSE WINTHROP FAILED TO PRESENT EVIDENCE OF CAUSATION.

When ruling on a motion for directed verdict, the court must view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the non-moving party. *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); *Bailey v. Segars*, 346 S.C. 359, 365-66, 550 S.E.2d 910, 913 (Ct. App. 2001). The appellate court should "reverse the trial court . . . when there is no evidence to support the ruling below." *Steinke v. S.C. Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (citation omitted).

Both of Winthrop's legal theories, breach of contract and negligence, required proof of proximate causation. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009); *Hanselmann v. McCardle*, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980). "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Hanselmann*, 275 S.C. at 48-49, 267 S.E.2d, at 533 (quotation omitted).

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.*

Most negligence cases resulting in fire must be proven by circumstantial evidence because there is no direct evidence of the cause and/or origin of the fire, and oftentimes any potential direct evidence is destroyed by the fire. In *Thorburn v. Spartanburg Theatres, Inc.*, 263 S.C. 165, 168, 208 S.E.2d 919, 920 (1974), the South Carolina Supreme Court noted that "[t]he circumstances under which the fire originated and its destructive effect precluded direct proof of its cause . . . ." In such a case, although the "difficulty of proof does not relieve plaintiff of the burden of proof . . . the Court should take a very liberal view of the testimony." *Id.* (*quoting Brock v. Carolina Scenic Stages & Carolina Cas. Co.*, 219 S.C. 360, 366, 65 S.E.2d 468, 470 (1951)). Even under the most liberal view of the testimony in this case, there is unquestionably no proof that an act or omission by Pickens caused the fire to ignite. Rather, all of the testimony is consistent in that the cause of the fire, and even its precise origin, cannot be determined.

In *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993), this Court affirmed summary judgment in a fire case where the jury was left to speculate

as to the most probable cause of the fire. As in *Harris*, the jury in this case was provided no evidence as to the cause of the event that forms the predicate for this lawsuit.

Because Winthrop could not prove, even with circumstantial evidence, that Pickens caused the fire to ignite, it relied upon a "spread theory" of liability. (*See* R. p. 781, lines 3-7; p. 819, lines 3-7; p. 821, lines 8-16, p. 823, lines 18-25.) To establish this theory it relied principally upon its expert witness, Dan Arnold, who testified that the source of the ignition for the fire is not relevant, because "we know the fire occurred" and "[f]or a fire of that magnitude and that substance to exist, to occur, you had to have fuel sufficient to do that." (*Id.* at 748, lines 3, 7-8.) Mr. Arnold testified that in his expert opinion, "[t]he means of ignition in most fires[,] while important[,] it's often the fuel that's there that creates the damage. So, it's based on that. That my opinion is that but for those combustibles the damage that I saw and the spread of the fire to the roof wouldn't have occurred." (*Id.* at p. 748, lines 9-13.) Winthrop's counsel used this testimony as the foundation for its contention that "the ultimate issue in this case" is "whether the fire could spread from the flat roof to the adjoining pitched roofs if there weren't combustibles there." (*Id.* at p. 824, lines 4-9.)

There is no South Carolina case to date that recognizes or adopts the "spread theory" of liability in a claim arising from a fire. The classic "spread theory" case involves a landowner or possessor who "affirmatively create[s] or maintain[s]" premises in an "unusually hazardous" manner, which "gives rise to an extraordinary and undue risk of combustibility." *See* 23 Am. Jur. Proof of Facts 2d 461 at § 8; *Scully v. Fitzgerald*, 843 A.2d 1110, 1116 (N.J. 2004) (*quoting B.W. King, Inc. v. Town of West New York*, 230 A.2d 133, 138-139 (N.J. 1967)). In such a situation, it becomes foreseeable that a

fire could easily ignite and thereafter fall, leap, or be thrown by the defendant's operations, and when in fact such event occurs, the defendant should be held responsible. There are no such facts in the case at hand.

Courts in other jurisdictions have found that a property owner and/or contractor performing work on a landowner's property can be liable to third parties for negligent storage of flammable materials and/or negligent maintenance of conditions likely to become highly combustible. As the Missouri Court of Appeals stated in *Sherrell v. Brown*, 284 S.W.3d 164, 166 (Mo. Ct. App. E.D. 2009):

> The cause of a fire is frequently unknown and it is possible for a fire to occur under circumstances where appropriate care has been exercised. The mere occurrence of a fire does not raise a presumption of negligence or a presumption as to the cause of the fire. In establishing a submissible case on the issue of negligence, the plaintiffs must prove by substantial evidence that (1) there was negligence, and (2) **such negligence caused the fire.**

(internal citation omitted; emphasis added); *see also Mills v. Crawford*, 822 S.W.2d 548, 551 n. 1 (Mo. Ct. App. 1992) ("Generally a property owner is not responsible for damages resulting from a fire occasioned by others unless, due to conditions on his property, **he should have anticipated that the fire was likely to start**.") (emphasis added) (*citing Hesse v. Century Home Components, Inc.*, 514 P.2d 871 (Or. 1973); *Roy v. Domingue*, 493 So. 2d 880 (La. Ct. App. 1986); *Fridge v. Talbert*, 158 So. 209 (La. 1934)).

The condition of the premises where the fire occurs-- and whether that condition is conducive to the ignition of a fire-- is the primary factual focal point for many of the spread theory cases. *See Texas & N.O.R. Co. v. Bellar*, 51 Tex. Civ. App. 154 (1908) (Tex. Civ. App. 1908) (holding despite the lack of evidence as to the fire's cause and/or

origin, the railroad was negligent because it allowed vast amounts of oil to seep from its railcars and spread onto the ground). *See also Prince v. Chehalis Sav. & Loan Ass'n*, 58 P.2d 290, 291 (Wash. 1936) ("The theory of the respondents' action was that the appellant had permitted the garage to get into **such a state of disrepair that it created a fire hazard**") (emphasis added); *Menth v. Breeze Corp.* 73 A.2d 183 (N.J. 1950). Most of the cases focus on facts giving rise to a high likelihood that the conditions on the premises would cause a fire to ignite. *Scully v. Fitzgerald*, 843 A.2d 1110, 1116 (N.J. 2004) (referring to "an extraordinary and undue risk of combustibility"). In many of these cases, the likelihood of a fire starting is highly foreseeable given the type of work performed or the type of premises involved.

For example, in an early case discussing the spread theory, *Quaker Oats Co. v. Grice*, 195 F. 441 (2d Cir. 1912), the Second Circuit identified facts such as "large quantities of dust accumulat[ing]" in the air that was "known to be a combustible substance, which, when diffused and mixed with air, would upon the application of a flame or spark, ignite and explode" as providing the predicate circumstances giving rise to a foreseeable risk of fire. *Id.* at 443-44. Additionally, there was evidence that when the machinery in the building was running, it caused the building to vibrate so strongly that the dust would "rise or . . . sift off into the atmosphere, which became so dense that there 'was trouble in looking through it.'" *Id.* The Court held that the landowner had a duty to keep the premises clean, by preventing such dust from accumulating, when the landowner had clear notice and knowledge that such dust, when sifted in the air by the ordinary operation of the business's machinery, would foreseeably cause a fire to ignite. The Court held:

> If premises are allowed to become unsafe because they are filled with dust which would explode on the application of spark or flame, and the exercise of reasonable care would have prevented the premises from becoming thus unsafe, the person whose neglect brought about such a dangerous condition would not be excused because the actual spark which fired the train was produced by some [other cause].

Id. at 444. Even though the "spark or flame" may have been caused by some third party, the landowner was liable for enabling the premises to be kept in such condition that a fire was practically inevitable and could have been prevented by reasonable maintenance procedures. *Id.*

In *Menth v. Breeze Corp.* 73 A.2d 183 (N.J. 1950), the Supreme Court of New Jersey further stated:

> [I]f an owner or occupier by reason of his negligence has kept his premises in an unsafe and dangerous condition, as by the accumulation of inflammable material thereon so as to create a fire hazard to adjoining property in the event such material becomes ignited, such negligent owner or occupier may be held answerable for the damage caused by the spread of the fire even though such fire may have been started by the act of a third person or independent agency or any unauthorized act, if such act was **reasonably foreseeable** as the natural and probable consequence of the negligent manner in which the premises were kept.

Id. at 188 (emphasis added).

In *Chicago, M., St. P. & P. R. Co. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), the court held "once it is established that the owner of a building **has negligently allowed it to become a fire hazard** and a fire does start, the actual cause . . . is immaterial." *Id.* at 451 (emphasis added).

As the above cases illustrate, the spread theory is only viable where there are facts tending to show that the landowner or possessor maintained the premises in a "tinderbox" condition, i.e., an extreme state of disrepair leading the landowner to know or have

reason to know that the chance that a fire may be ignited is high. For example, in *Scully v. Fitzgerald*, the Supreme Court of New Jersey noted:

> [A] landowner ordinarily is not liable for a fire started by a trespasser in the absence of the landowner's negligence. [citations omitted] We described the type of unsafe and dangerous condition that would give rise to a landowner's negligence as:
>
> > an ***unusually*** **hazardous situation** affirmatively created or maintained by the owner which gives rise to **an *extraordinary and undue risk* of combustibility**. . . . Generally, [such a condition] would arise from the type of use to which the building is put and either the resulting accumulation of flammable material therein or the increase of the flammability of the structure itself, from the use to which it was put.

843 A.2d at 1116 (*quoting B.W. King, Inc.*, supra, at 138-39) (emphasis added).

South Carolina continues to reject *res ipsa loquitur* as a theory of liability. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Fletcher v. Medical University of South* Carolina, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010); *Gilland v. Peter's Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857, 858 (1940) ("where the burden rests upon a party to prove negligence we hold that he cannot meet this burden by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence"). Given this position, Winthrop should not have been absolved of its responsibility to prove that the fire was caused to ignite by some act or omission by Pickens. Winthrop's attempt to shift the focus in this case to the spread of the fire rather than to its ignition was a blatant attempt to do an end run around its *res ipsa loquitur* problem.

South Carolina's refusal to adopt *res ipsa loquitur* required Winthrop to prove that Pickens caused the fire to ignite, particularly where its alleged negligence was in furnishing some, but by no means all, of the potential fuel for the fire, none of which was

known to be highly combustible or especially conducive to the ignition of a fire.[6] (*See* R. p. 633, line 17 – p. 636, line 16.) However, the trial court merely allowed Winthrop to rely on evidence of the damage caused by the fire as the means of holding Pickens liable. This reliance was misplaced. As the New Jersey Supreme Court stated in *Menth*, supra:

> It is also essential to the application of the *res ipsa loquitur* doctrine that those seeking to obtain the benefit of its presumptive effect must show that in all probability the direct cause of the injury and so much of the surrounding circumstances essential to its occurrence were in the exclusive control of the defendant, or his agents or servants . . . . In case of fire the rule requires that the actual cause of it must have been under the exclusive control of the party charged with negligence.

73 A.2d at 187 (citations omitted). If making use of the presumption afforded by *res ipsa loquitur* requires proof of the cause of ignition then, in the absence of that presumption, such proof is of paramount importance. In the seminal case of *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (N.Y. 1920), the Court of Appeals of New York succinctly stated:

> We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. . . . "Proof of negligence in the air, so to speak, will not do."

Id. at 170 (citation omitted). *See also Holmes v. Davis*, 126 S.C. 231, 119 S.E. 249 (1923) (proof of injury alone does not raise the presumption of negligence).

Another logical impairment to Winthrop's theory is that the combustible materials that Winthrop alleged to have been stored in violation of the applicable section of the International Fire Code were the very materials that Pickens was contracted to install on

[6] It was impossible for Winthrop to argue that Pickens' roofing materials were the only combustible materials on the flat roof, as it was acknowledged by Winthrop's own witnesses that the components of the flat roof are themselves combustible. (R. p. 686, lines 6-19.)

the roof of Bancroft Hall. (*See* R. p. 348, lines 1-15; p. 355, lines 13-24; p. 383, lines 12-24.) These materials carried the highest flame resistance rating available (*id.* at p. 633, line 17 – p. 636, line 16), yet it was their alleged presence on the flat roof that provided the fuel Winthrop contended was necessary to allow the fire that started on the flat roof to migrate into the surrounding pitched roofs. (*Id.* at p. 747, line 25 - p. 748, line 18.) This situation bears no resemblance to the kind of "tinderbox" conditions that have given rise to the recognition of the "spread theory" of liability in other states. Here, there is no evidence that the accumulation of such materials on the flat roof would increase the risk that a fire would start.

Although generally questions of proximate cause are for the jury, courts have found that certain consequences of an alleged act or omission were unforeseeable as a matter of law on several occasions. *See, e.g., Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978) (use of unaccepted repair practice by boat repairman deemed unforeseeable by boat manufacturer); *Crolly v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989) (suicide of intoxicated bar patron held unforeseeable by bartender); *Rife v. Hitachi Constr. Machinery Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005) (manufacturer could not foresee export of product manufactured for sale in Japan); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008) (application of Tennessee's election of remedies doctrine, precluding workers' compensation suit in Tennessee, was not foreseeable by attorney); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010) (client's lost profits not foreseeable in claim against law firm). In this case, Pickens contends that its storage of the very materials that

would shortly be installed on the roof of Bancroft Hall does not create a foreseeable risk of fire ignition that is any greater than that borne by the building generally.

Pickens' storage of roofing materials on the flat roof did not create a heightened risk that a fire would ignite. A fire on the flat roof was no more foreseeable because of the materials left there by Pickens' employees than it might have been in their absence. The absence of such foreseeable risk is fatal to Winthrop's cause of action, as it is this element that is crucial to other courts' allowance of fire claims where the precise cause of ignition is unknown. The trial court should therefore be reversed, and judgment should be entered in Pickens' favor.

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A COMPLETE CHARGE ON PROXIMATE CAUSE TO THE JURY FOLLOWING THE JURY'S REQUEST FOR ADDITIONAL INSTRUCTION.

Throughout the duration of the four day trial on liability, the jury was asked by both parties to focus its attention on the narrow issue of causation.[7] Pickens' counsel argued to the jury:

> Even if [Pickens] stored roofing paper, shingles on the flat roof, even if they weren't suppose[d] to, it's not foreseeable that that is going to start a fire. Those very things are designed the way they are to resist fire. So -- so they fail on but for there being there the fire wouldn't have happened and they fail on the foreseeable. It has got to be foreseeable.

[7] (*See* R. p. 244, lines 17-24 (Winthrop's counsel stated during his opening statement that causation "is very important"); p. 248, lines 5-12 (further stating that "fuel for the fire" was "the linchpin of [Winthrop's] proof"). *See also* R. p. 253, lines 19-25 (Pickens' counsel stating during opening statement that Winthrop's case is "fatal[l]y flawed" because "[n]o one can . . . say [Pickens] was responsible for" any "source of ignition" for the fire, and "that's ultimately what this whole case comes down to.").) During closing arguments, Pickens' counsel suggested the jury "focus [their] attention on" Winthrop's inability to prove that the fire was "a foreseeable consequence of something [Pickens] did or that [it] [was not] suppose[d] to do." (Id. at p. 828, lines 14-21.)

(R. at p. 838, line 20 - p. 839, line 2.) Winthrop responded in its closing argument to the jury: "Fire is a foreseeable event when you store materials in such a manner that it violates the fire code." (Id. at p. 847, lines 17-21.)

After all of the evidence on the question of Pickens' liability for the fire was presented, the trial court instructed the jury on the applicable law. (R. p. 848, line 15 – p. 871, line 12.) As a part of its charge, the trial court instructed the jury on the definition of "proximate cause," including the requisite elements of cause-in-fact and legal causation. (*Id.* at p. 864, line 2 – p. 866, line 13.) The trial court appropriately defined cause-in-fact, as the cause but for which the accident would not have occurred, and legal cause as being "prove[n] by establishing foreseeability." (*Id.* at p. 864, line 6 – p. 866, line 13.) In addition to giving its general charges to the jury, the trial court instructed that "[o]nce you begin your deliberations if you still have some question or do not understand some part of the law or all of it for that matter, upon your request I will bring you back out . . . and re-instruct you on any part of it which you need to be instructed." (*Id.* at p. 848, lines 6-11.)

The jury deliberated for some time and then sent a note to the trial court requesting to be recharged, in part, on the "definition of proximate cause." (*See* R. at p. 879, lines 15-23.) The trial court's complete recharge on the definition of proximate cause was as follows:

> 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 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 proximate cause is a direct cause without which the damage would not have occurred.

(Id. at p. 881, lines 10-24.[8])

Pickens objected. (*See* R. p. 882, lines 13-25.) It argued that the trial court failed to include within its definition "the discussion of foreseeability" that it had previously included. (*See id.*) The trial court responded by stating simply that the jury "didn't ask for that. They asked for proximate cause and I don't want to complicate it." (*Id.* at p. 882, lines 16-17.) The trial court further stated, "I know foreseeability is something [the jury] can consider on proximate cause, but they only asked me about proximate cause. . . . Foreseeability may be a portion of that, but it is not in my proximate cause charge." (*Id.* at p. 883, lines 5-7, 14-16.)

The trial court erred in failing to include within its definition of proximate cause the requirement of legal causation. It is black letter law in South Carolina that "proximate cause requires proof of both causation in fact and legal cause." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 146-47, 638 S.E.2d 650, 662 (2006) (emphasis added) (citing *Oliver v. S.C. Dep't of Highways & Public Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). The South Carolina Supreme Court has made it clear that "the **touchstone of proximate cause is foreseeability** which is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (citation omitted) (emphasis added). "[P]roximate cause requires proof beyond just the act or omission in question and concerns whether it is the 'but for' cause of the plaintiff's injuries and whether the

[8] The trial court also asked the jury whether it needed "[a]nything else"? (R. at p. 882, lines 3-4.) The foreperson responded, "[n]o, that answers it." (Id at p. 882, line 5.)

harm was foreseeable." *Grier v. AMISUB of South Carolina*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012) (citation omitted).

"A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (citation omitted); *see* S.C. Const. Art. V, § 21. The South Carolina Supreme Court has stated that "[a] charge is sufficient if, as a whole, it covers the law applicable to the case." *State v. Burton*, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citation omitted). It has further held that "an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial." *Priest v.* Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). Here, the trial court's recharge on the definition of proximate cause did not cover all of the applicable law. In fact it left out the "touchstone" of the definition: foreseeability. *Madison ex rel. Bryant*, 371 S.C. at 146, 638 S.E.2d at 662 (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130 (1992)). By failing to instruct the jury on legal causation when giving its recharge on the definition of proximate cause, the trial court prejudiced Pickens. Not only was causation the primary issue in the case, but both parties had focused the jury's attention on the narrow question of whether a fire was a foreseeable consequence of Pickens' alleged acts or omissions. (R. p. 253, lines 17-23; p. 828, lines 14-22; p 838, line 20 - p. 839, line 2.)

The case of *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), is instructive. In *Lee-Grigg*, the defendant was charged with forgery when she submitted duplicative receipts to a state agency to recoup her costs for relocating a victim. The defendant argued that she lacked the requisite criminal intent to commit forgery because

she had a good-faith belief that she was authorized to seek reimbursement. The defendant's counsel submitted several requests to charge to the trial court, including one to the effect that there is a good faith defense to the crime of forgery and another that the jury could consider evidence of the defendant's good character in deciding whether she possessed the requisite criminal intent. The trial court refused to give the jury either of these two requested charges. The case was submitted to the jury, and after some deliberation the jurors asked the judge to reinstruct them on the definition of 'intent. The trial court recharged the jury and sent them back to deliberate. They subsequently returned with a guilty verdict.

The defendant in *Lee-Grigg* appealed, arguing that the trial court erred in failing to instruct the jury as requested. With regard to the second requested charge on character evidence, the Supreme Court noted that "the dispositive issue presented by the defense was whether [the defendant] believed in good faith that she was authorized to apply for reimbursement" and "[t]he jurors' request for a recharge on the definition of 'intent' is evidence that they were struggling with this question." *Id.* at 317, 692 S.E.2d at 898. Because "[c]haracter evidence of [the defendant's] reputation for honesty and trustworthiness was admitted, but without an instruction . . . that [the jury] could consider this evidence in determining her credibility and her culpability" the defendant was prejudiced. *Id.* The Supreme Court determined that such error was not harmless. *Id.*; *see also Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 302, 395 S.E.2d 740, 741 (Ct. App. 1990) (recognizing that "[f]ailure of the trial judge to give . . . requested charges [can be] prejudicial" where the requested charge relates to "the sole issue before the jury" and "the majority of evidence presented" during trial).

Similarly, in this case counsel repeatedly presented arguments to the jury that causation was the focal point of the trial. (*See* R. p. 244, lines 16-23; p. 248, lines 5-11.) Specifically, Pickens' counsel directed the jury's attention to its argument that there was no evidence Pickens' acts or omissions were the cause-in-fact of the fire. (*Id.* at p. 253, line 10 – p. 254, line 2.) He also argued with equal force that the ignition of a fire was not foreseeable to Pickens, given that fire-resistant materials were alleged to have been stored in a place where they were not subject to molestation by passersby or other parties. (*Id.* at p. 252, line 20 - p. 253, line 4; p. 834, line 21 - p. 836, line 1; p. 838, line 20 - p. 839, line 2.) The jury's request for clarification on the definition of proximate cause evidences its struggle with the issue. Without a jury instruction on causation that included foreseeability, the jury was misguided on the question whether Pickens should be found liable for breaching the parties' contract or in negligence.

In *State v. Anderson*, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court explained: "when a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request." *Id.* at 94, 470 S.E.2d at 106 (internal quotation and citations omitted). Here, the trial court attempted to charge only those matters necessary to address the jury's question related to proximate cause (R. p. 882, lines 16-20), but in reality it failed to charge the jury on the full and complete definition of proximate cause, leading to potential juror confusion. The effect of the trial court's error was to downplay the importance of foreseeability as an element of proximate cause, which prejudiced Pickens.

In *Miller v. State*, 513 S.E.2d 27 (Ga. Ct. App. 1999), the Georgia Court of Appeals recognized that a "court's recharge [may] [leave] the jury with [a] 'mistaken

notion'" as to the applicable law where the court fails to provide adequate instructions during the recharge. *Id.* at 32. In *Miller*, the defendant was accused of committing first degree vehicular homicide after striking a bicyclist while allegedly driving drunk. Part of the State's required burden of proof was to show that the defendant's conduct was the proximate cause of the victim's death. Following a trial on the evidence, the jury was charged and sent to deliberate. During their deliberations, the jury asked the court the following question: "If we determine that the defendant was in fact DUI, then is he guilty of counts 1 or 2 by virtue of the fact that it is being determined that he was DUI. (Space) Need clear explanation of reasonable doubt." *Id.* at 31. In answering the jury's question, the Court proposed to re-read the charges on presumption of innocence, burden of proof and reasonable doubt. *Id.* The defendant also requested that the trial court recharge the jury on proximate causation, which the trial court refused. *Id.* After the jury was re-charged on the law, it deliberated further and returned a verdict of guilty.

On appeal, the Georgia Court of Appeals found that "[t]he significance of causation as the connecting link, causation in the sense of proximate cause, was not explained" to the jury, and such error was harmful to the defendant. *Id.* at 31-32. The Supreme Court noted that the defendant had two defenses: first that he did not violate the DUI statute, and second, his conduct was not, in any event, the proximate cause of the victim's death. *Id.* at 32. By failing to recharge the jury on proximate cause upon the defendant's request, the trial court's instructions "[a]t worst, . . . had the effect of depriving [the defendant] of a major defense" and "[a]t best, . . . was confusing." *Id.*

The court in *Miller* also ruled that the trial court's error was not saved by its "admonition to the jury to interpret the recharge and general charge as a whole . . .

because the recharge was merely a repetition of part of the original charge and the jury showed by its request for additional instructions that it did not comprehend the general charge on this pivotal particular." *Id.* at 32; *see also, State v. Davis*, 648 S.E.2d 354, 359 (W. Va. 2007) ("It was quite clear from the jury's question that they did not understand the trial court's initial charge...."); *State v. Brown*, 610 So. 2d 579, 581 (Fla. Dist. Ct. App. 1992) ("We may assume that the jurors could not adequately remember the definitions ..., since they requested reinstruction.").

A correlative principle to the requirement that a jury charge cover the law applicable to the case (*see State v. Burton*, 302 S.C. at 498, 397 S.E.2d at 92) is the requirement that additional charges to the jury state the law correctly and not be misleading. Courts in other jurisdictions agree. *See, Stewart v. Federated Department Stores, Inc.*, 662 A.2d 753, 757 (Conn. 1995) (court must "correctly adapt law to case in question" and "must provide jury with sufficient guidance in reaching correct verdict") (citation omitted); *see also Miller v. State*, 513 S.E.2d 27, 32 (Ga. Ct. App. 1999) ("[e]ven when the [re]charge relies on the exact language of the law, it must be calculated to enlighten rather than confuse the jury") (citation omitted); *Peake v. State*, 545 S.E.2d 309, 311 (Ga. Ct. App. 2000) ("It is not error to recharge only on the specific question so long as the recharge taken alone does not leave an erroneous impression in the minds of the jury.") (internal quotations and citations omitted). Supplemental instructions to the jury, if handled incorrectly, may result in prejudicial error requiring reversal. *See, e.g., Crim v. Shirer*, 278 S.C. 639, 300 S.E.2d 731 (1998); *see also Pearson v. Tippmann Pneumatics, Inc.*, 642 S.E.2d 691 (Ga. 2007) (recharge on proximate causation warranted reversal of case). Cases warranting reversal may include "situation[s] where the trial

court's selective re-reading of instructions . . . unfairly prejudice[s] the jury." *State v. Pannell*, 330 S.E.2d 844, 848 (W. Va. 1985).

In *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993), a jury was asked to determine whether a property owner had acquiesced to the public dedication of his land. The jury requested to be recharged on the law of dedication. The trial court erroneously substituted the word "acquisition" for the word "acquiescence" in its supplemental instruction and refused to correct the error. The South Carolina Supreme Court held that

> Acquiescence is a crucial element in determining a central issue of dedication. Considering that the uncorrected supplemental instructions were made at the request of the jury, the potential prejudicial effect of the erroneous instruction is heightened. We conclude that the inaccurate charge did not afford the jury a proper basis for determining the issues, and that the failure of the trial judge to give a corrective charge constitutes prejudicial error.

Id. at 369, 434 S.E.2d at 262.

Here, the trial court erred in concluding that even though "[f]oreseeability may be a portion of [proximate cause]" (*see* R. p. 883, lines 14-16), it did not need to be instructed merely because it was "not in [the court's] proximate cause charge" (*id.*). By failing to recharge the jury on the entire definition of proximate cause, including the pivotal element of foreseeability, the trial court misguided the jury, who was already struggling with this issue. The trial court's refusal to enlighten the jury on both requisite elements of proximate cause was prejudicial to Pickens and should be reversed.

IV. THE TRIAL COURT ERRED IN BIFURCATING THE LIABILITY AND DAMAGES PHASES OF TRIAL WHERE CAUSATION AND DAMAGES WERE INEXTRICABLY INTERTWINED.

In the case at bar, Winthrop's contract and negligence claims were both founded upon the contention that Pickens' conduct worsened the effects of the fire that occurred on March 6, 2010. (*See* R. p. 790, lines 6-8; p. 790, line 25 – p. 791, line 2; p. 791, lines 4-5.) Winthrop relied upon a fire "spread" or "aggravation" theory because it was unable to prove how the fire started or who caused it to ignite. (*Id.* at p. 290, lines 15-18; p. 295, lines 12-23; p. 747, lines 22-24.[9])

Prior to the start of trial, Winthrop's counsel moved to bifurcate the liability and damages phases of trial pursuant to Rule 42(b) of the *South Carolina Rules of Civil Procedure*. (*See* R. p. 149, lines 7-11.) The trial court granted that motion over Pickens' objection. (Id. at p. 149, line 20 – p. 151, line 6.) In granting Winthrop's motion, the trial court ruled that a bifurcated trial was in the interest of the parties, witnesses and judicial economy:

> I was not inclined to bifurcate if I was going to have the same witnesses testify in the second trial with regard to damages, but since apparently the only witnesses who will be testifying about the damages their testimony would be a lot shorter in the liability phase and most of these witnesses on damages will not be called during the liability phase. It makes sense to me to bifurcate because if the jury [was] to return a verdict for [Pickens] we wouldn't have to spend all that time with all those witnesses on damages.

(Id. at p. 150, lines 2-13.) The decision to bifurcate was completely inappropriate in these circumstances, as any consideration of time savings was outweighed by the

[9] The trial court recognized that Winthrop had been unable to present evidence as to the cause or ignition source for the fire. (R. p. 488, line 25 – p.489, line 4; p. 679, lines 2-10. *Id* at p. 964, lines 5-20 ("The jury found proximate result in damage to the plaintiff. And that's what this case is about. Not on the spread liability, fire spread liability theory. And I think that's where the defense missed the boat on this one, in arriving at their assessment and refusing absolutely to recognize any liability whatsoever on their part and refusing to try to work this case out somehow prior to a jury verdict. . . . I don't see [this case] [as] a spread liability case at all.").)

problem created by separating the jury's consideration of causation from the evidence of Winthop's alleged damages.

"Bifurcating a trial directly impacts how issues are presented at trial and the lens through which a judge or jury views a case." Note, Brian A. Comer, *Bifurcation of Civil Cases in South Carolina and the Fourth Circuit: What to Consider and How Parties Can Benefit*, 19 S.C. Law. 30 (Nov. 2007). The decision to grant or deny a motion to bifurcate is within the discretion of the trial court. *See Senter v. Piggly Wiggly Carolina Co., Inc.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000) (*citing* Rule 42(b), SCRCP).

Although the trial court is given "broad discretion" in considering whether to grant a motion to bifurcate, such "discretion . . . is limited." *Cox v. E.I. DuPont de Nemours & Co.*, 39 F.R.D. 56, 57-58 (D.S.C. 1965). "This Court, mindful of the broad power of its 'discretion,' is ever cognizant of the limitation of its use to that which is right, is just, promotes the fairest and most impartial trial." *Id.* at 58. Although "consider[ations] of time and money [are] factors . . . , the real issue is prejudice or lack of prejudice with convenience as a close second." *Id.* at 58; *see also In re Benedictin Litigation*, 857 F.2d 290, 308 (6th Cir. 1988) ("A paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto.") (quotation omitted).

Bifurcation of liability and damages is appropriate "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice. *See Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (citation omitted); *see also Flagstar Corp. v. Royal Surplus Lines*, 341 S.C.

68, 73 n. 8, 533 S.E.2d 331, 333 n.8 (2000) ("In exercising their discretion, trial judges should take care to analyze whether or not the issues are overlapping or not distinct, in determining whether or not the 'separate issue' mandate of Rule 42(b) is met.").

Courts in other jurisdictions similarly recognize that "to justify a separate trial on the issue of liability, it must appear that it is separate and distinct from the issue as to damages, that such prior trial will not operate to the prejudice of a party to the action, and that it will expedite the litigation or lessen the cost thereof." *State ex rel. Perry v. Sawyer*, 500 P.2d 1052 (Or. 1972) (quotation omitted).

In cases where the nature of the plaintiff's injuries or damages have a direct bearing on the question of liability, as when there is a serious question whether the defendant's conduct was the proximate cause of a particular injury or category of damage, the jury should consider the two items simultaneously and bifurcation is improper. *Mason v. Moore*, 641 N.Y.S.2d 195 (N.Y. App. Div. 1996); *see also Rooss v. Mayberry*, 866 So. 2d 174, 176 (Fla. Dist. Ct. App. 2004) (bifurcation inappropriate where "issues of damages and causation ... are related and necessarily have an 'important bearing' on one another") (citation omitted); *Walker Drug Co., Inc. v. LaSal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998) (where issues of liability and damages are "not clearly separable" the trial court may err in granting a motion to bifurcate); *see also Ennix v. Clay*, 703 S.W.2d 137, 140 (Tenn. 1986) ("separation of issues in a trial is inappropriate where the nature of plaintiff's injuries could have an important bearing on the issue of liability") (citation omitted); *Verner v. Nevada Power Co.*, 706 P.2d 147, 150 (Nev. 1985) (where "issues of liability and damages [are] inextricably interrelated" bifurcation may be prejudicial to a party).

Other courts have held that where a defendant is alleged to have aggravated or worsened the plaintiff's pre-existing conditions, trial judges may commit reversible error in bifurcating trial into separate phases on liability and damages. *Agron v. Trustees of Columbia Univ. in City of New York*, 1997 WL 399667 (S.D.N.Y. July 15, 1997); *State ex rel. Perry v. Sawyer*, 500 P.2d 1052 (Or. 1972); *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade and Douglas*, 411 F.2d 1379 (4th Cir. 1969). These cases stand for the proposition that separate trials on the issue of liability and damages could prejudice a party because the jury is unable to determine issues of proximate causation in light of the alleged pre-existing and later aggravated damages. *See id.* For example, in *State ex rel. Perry v. Sawyer*, 500 P.2d 1052, the Supreme Court of Oregon considered a personal injury case where the plaintiff sought damages for personal injury and "aggravation of a pre-existing emotional condition allegedly sustained in a motor vehicle accident." *Id.* at 1054. Because "plaintiff's emotional instability is important, not only regarding the extent of her injuries, but also concerning the question of liability," the Court held that bifurcation was inappropriate. *Id.*

Similarly, in *Agron v. Trustees of Columbia Univ. in City of New York*, 1997 WL 399667, the U.S. District Court for the Southern District of New York held that the evidence of liability and damages was inextricably intertwined where the plaintiff alleged that her "Post-Traumatic Stress Disorder and other physical disabilities worsened, or that Defendant's conduct caused new injuries different from those she suffered from previously." *Id.* at *2. "In either case, the evidence necessary to establish a handicap for the liability stage appears to be intertwined with the evidence of Plaintiff's damages." *Id.* "The Court thus finds that the liability and damages issues in this case are not so distinct

as to warrant bifurcation." *Id.*; *see also Shea v. 5008 Broadway Assoc.*, 739 N.Y.S.2d 155 (N.Y. App. Div. 2002) (where plaintiff allegedly sustained injuries from scalding hot water, "[t]he nature and extent of [the] burns were inextricably intertwined with the question of defendant's liability, thus requiring medical proof to show the causal connection between the subject incident and the injury in order to establish liability").

Winthrop's expert witness, Dan Arnold, testified at length as to his opinion that without Pickens' storage of combustible materials on the flat roof between Bancroft and Owens Halls, the subject fire would not have spread and caused the extensive damage that occurred on Winthrop's property. He opined:

> Q: And is it your opinion that this fire -- how can you have an opinion as to the fire spread without knowing how the fire -- what was the source of ignition for the fire?
>
> A: Well, we know the fire occurred.
>
> Q: Right.
>
> A: And we know the fire that did occur created the damage that we see and the observations that I already pointed out. For a fire of that magnitude and 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.

(R. p. 747, line 25 - p. 478, line 18.)

Bifurcation was inappropriate because the jury was forced to separately consider proximate cause and damages, even though these two issues were inextricably linked. In the first phase of trial, the jury heard evidence that but for Pickens' storage of combustible materials on the flat roof, the subject fire would not have spread to the adjoining roofline—making the fire and its resulting damages worse. (*See* R. p. 748, lines 1-19 (expert testimony of Dan Arnold).) However, the jury was precluded from making a determination as to what damages would have resulted from the fire irrespective of Pickens' conduct, versus what damages were caused by Pickens' improper storage of roofing materials on the flat roof. These issues were not separate and distinct and should not have been bifurcated. *Creighton v. Coligny Plaza*, 334 S.C. at 108, 512 S.E.2d at 516 (holding bifurcation of liability and damages is appropriate "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice). The bifurcation of these issues foreclosed the issue of causation before the jury was ever presented with Winthrop's damages. This decision was erroneous and prejudiced Pickens.

Although the trial court may have relied on grounds such as judicial economy and convenience, such issues do not trump a party's right to a fair trial. *Rossano v. Blue Plate Foods, Inc.*, 314 F.2d 174, 176 (5th Cir. 1963) ("While conservation of both time and money are the bedrock basis for the rule, it is also [true] that if trial on a limited issue is prejudicial to the objecting party there has been an abuse of discretion which should be reversed"). The trial court's decision to separate the issues of liability and damages did just that, and this case should be reversed and remanded for a new trial.

V. THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS TO DAMAGES BECAUSE WINTHROP FAILED TO PRESENT ANY TESTIMONY ESTABLISHING THE DEGREE TO WHICH PICKENS' CONDUCT WORSENED THE DAMAGES RESULTING FROM THE FIRE.

"Neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). "Generally, in order for damages to be recoverable, evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 379 (Ct. App. 2005). Winthrop failed to provide the jury in this case with the evidence it needed to make an appropriate determination as to what damages Pickens caused with reasonable certainty or accuracy.

South Carolina adheres to the general rule that a defendant can only be held liable for damages proximately caused by its acts or omissions. *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). A defendant is not liable for pre-existing conditions, nor is it liable for damages that the plaintiff would have sustained in the absence of the defendant's acts or omissions. However, a defendant is liable for the exacerbation of pre-existing conditions. *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C.255, 422 S.E.2d 98 (1992); *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964).

In cases of property damaged by fire, an owner may recover such damages as will restore him to the same property status that he occupied before his property was burned. *Nelson v. Coleman Co.*, 249 S.C. 652, 155 S.E.2d 917 (1967); *Hall v. Seaboard Air Line*

Ry. Co., 126 S.C. 330, 119 S.E. 910 (1923). The goal of an actual damages award is to compensate the plaintiff for losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position it would have been in if there had been no wrongful injury. *Mellen v. Lane*, 377 S.C. at 287, 659 S.E.2d at 250.

In the present case, the jury was told that a fire ignited by unknown means (*see* R. p. 295, lines 21-23; p. 747, lines 22-24) and that Pickens' behavior caused the fire to spread (*id.* at p. 754, line 6 – p. 755, line 4; p. 766, lines 12-19). However, the jury was not given the critical piece of evidence that it needed to know so that it could discharge its duty of only awarding damages to Winthrop that were proximately caused by Pickens: the cost of such repairs to Winthrop's property in the absence of Pickens' breach of duty. This hole in the evidentiary record renders the jury's verdict fatally flawed, as it unquestionably holds Pickens liable for *all* of Winthrop's losses occasioned by the fire. Pickens acknowledges that Winthrop was not required to prove its damages with mathematical certainty, but given Winthrop's theory that Pickens' actions aggravated or exacerbated the damage resulting from a fire whose ignition could not be attributed to Pickens, Winthrop should have been required to offer some evidence as to what damage would have resulted from the fire without Pickens' involvement. Because Winthrop's evidence failed to "enable the jury to determine the amount" of its losses that were attributable to Pickens "with reasonable certainty or accuracy," its negligence and contract actions must fail. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). The trial court's denial of Pickens' directed verdict motion should therefore be reversed.

VI. THE TRIAL COURT ERRED IN FAILING TO ADJUST THE JURY'S VERDICT AS TO DAMAGES ACCORDING TO ITS COMPARATIVE NEGLIGENCE DETERMINATION.

Winthrop asserted two causes of action against Pickens: breach of contract and negligence. (*See generally* R. pp. 13-19.) Winthrop based its contract claim on several contractual provisions, all of which incorporated, in one way or another, duties that already existed by way of law or regulation. Pickens' compliance with the following contractual terms was at issue:

> 1500-1.9(L) Initiate, maintain and supervise all safety precautions and programs in connection with the work. Take all necessary precautions for the safety of, and provide the necessary precaution to prevent damage, injury or loss ...
>
> 4. Comply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss.
>
> 1700-3.4 (A)(1) Comply with requirements in NFPA 241 for removal of combustible waste materials and debris.

(R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) Winthrop's negligence cause of action was purportedly based on Pickens' failure to act in a reasonable, "professional and workmanlike manner." (R. p. 17 at ¶ 23; *see also id.* at ¶ 24(a)-(h).) Pickens asserted the affirmative defense of comparative negligence. (*See* R. pp. 61-66.)

During trial, Winthrop focused on Pickens' alleged failure to follow applicable laws and regulations, including the 2006 edition of the International Fire Code, which incorporates by reference Chapter 241 of the codes and standards promulgated by the NFPA. (*See* R. p. 320, line 17 – p. 321, line 12; p. 400, line 11 – p. 401, line 10; p. 422, line 15 – p. 425, line 3; p. 441, line 16 – p. 442, line 22; p. 443, line 15 – p. 450, line 10; p. 578, line 19 – p. 579, line 15; p. 590, lines 11-23; p. 666, line 20 – p. 668, line 10; p.

667, line 21 – p. 668, line 1.) In its closing argument to the jury, Winthrop referenced Pickens' alleged breach of the contract. "There is no dispute that the contract required Pickens to follow code." (*Id.* at p. 819, lines 22-24; p. 820, lines 5-6 (stating the contract required Pickens to "comply with all applicable laws.").) Winthrop presented evidence of Pickens' employees' alleged lack of knowledge regarding NFPA 241, which was in effect at the time of the fire and which Pickens was required by both law and the parties' contract to follow. (*See* R. p. 991 at 1700-3.4(A)(1); *see also* R. p. 417, line 22 – p. 418, line 22; p. 456, line 21 – p. 458, line 12; p. 556, line 21 – p. 558, line 18.)

Pickens presented evidence of Winthrop's own contributory negligence in its failure to take measures required by statute to minimize the risk of fire. (*See* R. p. 531, lines 9-23; p. 579, lines 16-24; p. 584, line 15 – p. 586, line 5.) In its closing argument to the jury, Pickens argued that just as Pickens had legal obligations that were prescribed by the fire code, Winthrop had legal obligations of its own that it failed to adhere to by not designating a fire prevention program superintendent, as required by law. (*Id.* at p. 833, lines 6 – 834, line 10.) After hearing all of the evidence in the liability phase, the jury returned a verdict in Winthrop's favor as to its breach of contract and negligence causes of action, but it found that Winthrop bore 40% of the responsibility for the loss. (*Id.* at p. 884, line 3 – p. 885, line 5.)

Following the close of all evidence, Pickens moved that the judgment be governed by the jury's comparative negligence determination on the grounds that the duty giving rise to Winthrop's contract claim was identical to the duty that gave rise to Winthrop's negligence claim. (R. p. 978, lines 7-22.) The trial court denied Pickens' motion. (*See id.* at p. 981, line 2 – p. 989, line 10.) Winthrop elected to recover under its

contract claim, which the trial court held to be unaffected by the jury's comparative negligence determination. (R. p. 984, line 8 - p. 986, line 4.)

Ordinarily, comparative negligence does not operate as a defense to a breach of contract action. *See Ritter & Assoc., Inc. v. Volkswagen, Inc.*, 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013). However, South Carolina does recognize that a breach of duty that arises independently of any contract duties between the parties may support a tort action. *Cullum Mech. Const., Inc. v. South Carolina Baptist Hosp.*, 344 S.C. 426, 544 S.E.2d 838 (2001). As Circuit Judge L.D. Lide explained in an opinion adopted by the South Carolina Supreme Court in *Meddin v. Southern Railway-Carolina Division*, 218 S.C. 155, 165, 62 S.E.2d 109, 112 (1950):

> [I]f the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie. On the other hand, where the contract creates a certain relationship between the parties, and certain duties arise by operation of law, irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort.

See generally W. Page Keeton et al. *Prosser and Keeton on the Law of Torts* § 92 (5th ed. 1984) ("Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction"); *Jacques v. First Nat'l Bank of Maryland,* 307 Md. 527, 534, 515 A.2d 756 (1986) ("Where a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of circumstances surrounding or attending the transaction, the breach of such duty is a tort"); *Interwest Const. v. Palmer*, 886 P.2d 92, 101 (Utah Ct. App. 1994), *aff'd* 923 P.2d 1350 (Utah 1996) ("In some cases an act or omission resulting in a breach of contract

may also constitute a breach of duty that is not subsumed by the contract and may thereby give rise to a cause of action sounding in tort").

In the present case, the duty giving rise to Winthrop's breach of contract claim exists outside of the contract between the parties. Winthrop based its contract claim on language in the parties' agreement that required Pickens to "[c]omply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss." (R. p. 991, at 1500-3, § 1.9(L)(4); p. 1700, § 3.4(A)(1); R. p. 819, line 16 - p. 820, line 6.) Winthrop alleged that Pickens breached this duty by failing to adhere to the requirements of the 2006 edition of the International Fire Code, which incorporates by reference NFPA 241, all of which were stipulated by the parties to have the force of law in South Carolina at the time of the fire. (*See* R. p. 153, lines 9-12; p. 153, lines 17-25.)

The parties' contract therefore merely acknowledged the duties imposed upon Pickens by statute, rather than imposing obligations upon Pickens that did not otherwise exist. Winthrop may argue that its breach of contract action was predicated upon other language in the contract that limited Pickens' storage of construction materials to locations approved by Winthrop. Section 1500-2, 1.9(D) of the Specifications provides: "Prior to starting work, [Contractor must] obtain approval from Owner for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved locations." (R. p. 991 at 1500-2, § 1.9 (D).) However, under even the broadest reading of that provision, it cannot be said to have any bearing upon whether, and to what extent, Pickens could store materials *on the roof*, where the

combustible materials that served as the alleged fuel for the fire in this case were allegedly stored.

Winthrop's breach of contract action is therefore coextensive with its negligence claim, as both arise from the same duty of care. Ultimately, the claim that Winthrop denominated as "breach of contract" lies in tort, and the jury's comparative negligence determination should therefore govern the court's judgment in this case. It would violate public policy for a contracting party to essentially incorporate by reference the duties to which the opposing party is otherwise bound by law into a contract and thereby escape an apportionment of liability for his own contributions to a particular loss. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (referencing opinion of Chief Judge Sanders in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) ("One person being at fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.").

Like courts in many other states, South Carolina has struggled to determine whether certain causes of action lie in tort or contract. *See generally* James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. Rev. 1067 (2002). In most situations, the plaintiff seeks to convert what is otherwise a contract action into a tort claim in hopes of recovering tort damages. Here, on the other hand, Winthrop seeks to distinguish its contract claim from its negligence cause of action to avoid the jury's finding that it bears forty percent (40%) of the fault for its loss.

In other settings, the determination of whether a given claim sounds in contract or tort might not be clear, but there is unquestionable clarity here. Winthrop has clothed a

pure tort claim in the mantle of contract, but it cannot point to any contractual obligation that Pickens promised to undertake that it was not otherwise obliged to perform under South Carolina law. Pickens is by no means seeking to have this Court recognize a new defense to breach of contract actions.[10] It merely seeks a resolution, perhaps limited to the facts of this case, that recognizes the type of duty allegedly breached here, to which tort defenses should be applicable.

If the Court is unwilling to grant Pickens judgment as a matter of law or a new trial for the reasons set forth elsewhere in this brief, then it would respectfully request that the trial court's judgment be governed by the jury's comparative negligence determination.

CONCLUSION

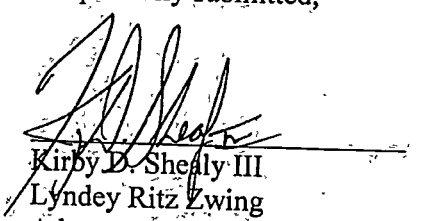
Based on the foregoing, Pickens respectfully submits that this Court should reverse the trial court's denial of Pickens' motion for directed verdict as to liability and/or motion for directed verdict as to damages. In the alternative, Pickens requests that this Court reverse and remand the case for a new trial based on the trial court's denial of Pickens' motion for new trial absolute based on the trial court's refusal to strike Juror 25 for cause. Alternatively, Pickens asks the Court to remand the case to the trial court with

[10] Many commentators have argued for the recognition of comparative fault as a defense to certain kinds of contract actions. Ariel Porat, *A Comparative Fault Defense in Contract* Law, 107 Mich. L. Rev. 1397 (2009); John Barclay Phillips, *Out with the Old Abandoning the Traditional Measurement of Contract Damages for a System of Comparative* Fault, 50 Ala. L. Rev. 911 (1999). Some courts have resolved the issue by interpreting a jury's finding that a plaintiff bears a share of responsibility for its own loss as a determination that the plaintiff failed to mitigate its damages (a traditional contract defense) to that extent. *See, e g , Lesmeister v* Dilly, 330 N.W.2d 95 (Minn. 1983);*Gateway Western Ry. v Morrison Metalweld Process*, 46 F.3d 860 (8th Cir. 1995). Pickens does not believe the present facts warrant such judicial creativity.

CONCLUSION

Based on the foregoing arguments, Pickens respectfully requests that this Court grant the relief requested in its primary brief.

Respectfully submitted,



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February 2, 2015.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

PICKENS ROOFING AND SHEET METALS, INC., Appellant.

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STATEMENT OF THE CASE

Winthrop filed suit against Pickens for breach of contract and negligence.

On September 5, 2012, The Winthrop University Trustees for the State of South Carolina ("Winthrop") sued Pickens Roofing and Sheet Metals, Inc. ("Pickens") in the Court of Common Pleas for the Sixteenth Judicial Circuit. (R. p. 13.) In the complaint, Winthrop asserted the following facts relevant to this appeal:

- Pickens and Winthrop entered a contract requiring Pickens to replace a roof on the university campus;
- Express provisions limited Pickens to the storage of its construction materials to two areas, one on the ground in front of the building, the second at a parking lot about a half mile away. In addition, applicable building codes and industry standards forbade Pickens from storing combustible construction materials on the flat roof adjacent to its work area;
- Pickens stored combustible construction materials on the flat roof in violation of the contract and industry standards;
- A fire occurred on March 6, 2010, causing substantial damage to the buildings.

(R. pp. 14-18.) Winthrop raised three counts for relief, two of which are pertinent here. In Count I, Winthrop alleged that Pickens breached the contract by storing the combustible construction materials on the roof, and that the breach of contract caused the damage. (R. pp. 14-15.) In Count III, Winthrop alleged that Pickens was negligent in improperly storing the combustible construction materials on the roof, or permitting such materials to be stored on the roof, in violation of applicable safety codes, and that the negligence caused the damage. (R. pp. 17-18.) Winthrop later established it suffered

$7,223,343.14 in damages from the fire—an amount Pickens did not dispute. (R. p. 968, line 1-p. 969, line 1.)

The contract only authorized storage of materials in specific locations on the ground. The Specifications were part of the contract. (R. p. 434, lines 2-4.) Section 1.9(D) of the Specifications stated:

> D. Prior to starting work, obtain approval from Owner for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved locations.

(R. p. 1085.) Prior to starting work, the Specifications limited Pickens to two areas for storage—a part of a nearby parking lot, and a "lay down" area on the ground in front of the building. (R. p. 421, lines 5-9; R. p. 442, line 23-p. 443, line 5; R. p. 1085; R. p. 1218; R. p. 1220.) This coincided with a "Change Order" between the parties that eliminated what would have been a third location for storage of materials—on the ground and again near Bancroft Hall. (R. p. 518, lines 1-11; R. pp. 1229-30.). Nothing in the specifications authorized storage of materials on the flat roof adjoining Bancroft Hall and Owens Hall. (R. p. 421, lines 2-4; R. p. 422, lines 9-14; R. pp. 991-1161.) Winthrop did not authorize storage of materials on the roof. (R. p. 406, lines 18-22.)

The Specifications also provided that the owner, Winthrop, would have no responsibility for supervising or inspecting Pickens' work to ensure Pickens complied with its contractual obligations:

> C. The words "supervise" and "inspect" wherever used herein in connection with the duties or activity of the Owner shall in no way, expressed or implied, relieve the contractor from his responsibilities for the safety of the workmen, the preservation of the work or proper performance under this contract. The Owner shall not be responsible for the safety of the workmen, the safeguarding of the work, or the proper performance of the Contractor.

D. No Inspector shall have the power to waive the obligation resting upon the Contractor to furnish good material and do good work as herein prescribed. Any failure or omission on the part of any Inspector to the Engineer to observe, object to or condemn any defective material or work shall not release the Contractor from the obligation to at once tear out, remove, and properly replace or rebuild the same at any time upon discovery of the defect and upon notice from the Owner or Engineer to do so.

(R. p. 1081.)

The contract further required Pickens to comply with all applicable fire and safety codes. Section 1.9 of the Specifications, titled "PROTECTION OF BUILDINGS AND PROPERTY," required, *inter alia*, the following of Pickens:

L. Initiate, maintain and supervise all safety precautions and programs in connection with work. Take all necessary precautions for the safety of, and provide the necessary precaution to prevent damage, injury or loss to:

1. All employees on the work and other persons who may be affected thereby.
2. All the work and all materials or equipment to be incorporated therein, whether in storage on or off the site.
3. Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
4. **Comply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss.** Erect and maintain, as required by the conditions and progress of the work, all necessary safeguards for safety and protection. Remedy all damage, injury or loss to any property caused, directly or indirectly in whole or in part, by the Contractor, and Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

(R. p. 1086) (emphasis added).[1] 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." (R. p. 153, lines 17-23.) The vice-president of Pickens agreed that the South Carolina Fire Code applied to the work Pickens performed. (R. p. 444, lines 19-22.)

NFPA 241 prohibited storage of combustible construction materials within thirty feet of the building. NFPA 241 was expressly incorporated into the contract R. p. 1090, § 3.4(A).) NFPA 241, "Standard for Safeguarding Construction, Alteration, and Demolition Operations," states in Section 8.3.3, "Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 ft (9 m) from the structure under construction or alteration." (R. p. 757, lines 11-12; R. p. 861, lines 7-16.) Pickens agreed that the International Fire Code "was the law." (R. p. 153, lines 18-19.) Importantly, the contract required Pickens to ensure compliance with the contract and its Specifications. (R. p. 1081.)

Jury selection. The trial proceedings began on March 17, 2014, and ran through March 21, 2014, before the Honorable Lee S. Alford in York County, South Carolina.

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. (R. p. 147. lines 15-18.) Pickens later placed a previous objection to Juror Number 25 on the record. (R. p. 144, lines 9-23.) Pickens argued that she should have been stricken for cause because she was "a student at Winthrop University" who had heard about the fire

[1] The parties stipulated to the admission and authenticity of exhibits before trial, and so they were admitted without objection. (R. p. 277, line 22-p. 278, line 5; R. p. 374, line 20; R. p. 375, line 2.)

and talked with others around the time it occurred. (R. p. 144, lines 11-13.). 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.)

The court addressed pretrial motions on bifurcation of the liability and damages issues for trial. 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.)

At trial, Chief Fire Marshal Otis Driggers testified as to the cause and origin of the fire; the parties agreed the fire originated on the flat roof. (R. p. 270, lines 3-7.) Chief Driggers, the Rock Hill Fire Department's fire investigator, investigated the 2010 fire at Winthrop. (R. p. 270, lines 16-18; R. p. 274, lines 1-37.) He testified that Officer Howe of the Winthrop Police Department had to unlock doors to the roof to let

firefighters get to the roof to fight the fire.[2] (R. p. 275, lines 12-19; R. p. 277, lines 5-7; R. p. 312, lines 2-4.)[3] Chief Driggers testified that the fire originated on the flat roof area between the Bancroft and the Owens buildings. (R. p. 282, line 23-p. 283, line 15; R. p 285, lines 12-13; R. p. 294, lines 17-20.) The parties later stipulated that the fire originated on the flat roof. (R. p. 801, line 25-p. 802, line 2.) Chief Driggers demonstrated the scene of the fire with pictures. (R. p. 277, line 14-p. 280, line 3; R. pp. 1364-67; R. pp. 1369-75.)

Chief Driggers ruled out a fan on the roof, building mechanical systems, and electrical wiring in the general area as possible causes of ignition—there were no other visible possible sources. (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. 1374-75.) After the fire, all that remained on the roof was metal. (R. p. 303, lines 204.) He did not expect to find any combustibles—roofing paper, wooden pallets, or shingles—because they would have been destroyed by the fire. (R. p. 310, lines 2-15.) In his report, he concluded that the fire started on the flat roof, that access to that area was secured, and that Pickens had stored roofing supplies in that area. (R. pp. 1347-53.)

Chief Driggers interviewed Pickens' employees Randal Pruitt and Brandon Lusk, who told him they were on the flat roof prior to the fire. (R. p. 287, lines 20-21.) Those employees told him that there were roofing materials on the flat roof before the fire. (R. p. 288, line 23-p. 289, line 2.) More specifically, Lusk told him there "were rolls of felt paper, louvers, copper flashing and other hip-ridge flashing materials." (R. p. 289,

[2] Pickens objected. The trial court "sustain[ed] the objection as to any other hearsay." (R. p. 277, lines 8-12.) Pickens did not move to strike this testimony.
[3] Officer Howe also testified, and confirmed that he unlocked the doors for the firefighters to get to the roof to fight the fire. (R. p. 484, lines 12-15.)

lines 6-8.) Pruitt told him "[t]hey had stored roofing materials in the area of the flat roof such as copper flashing, rolls of roofing paper, metal flashing." (R. p. 289, lines 15-21.) Chief Driggers testified that roofing paper is a combustible material. (R. p. 294, lines 7-8.)

There was evidence that Pickens should not have stored materials on the flat roof. Robert Pickens, one of the owners of Pickens Roofing, testified and agreed that "specifications are mandatory criteria guideline – standards, whatever you want to call them for, Pickens to follow." (R. p. 434, lines 18-21.) He admitted Pickens made more money as a result of Winthrop's limiting the storage of materials to one lay-down area near the building, and that this change did not prohibit Pickens from complying with the specifications and all applicable laws and codes. (R. p. 455, lines 10-24.) Mr. Pickens was wholly unfamiliar with NFPA 241, s. 8.3.3., before the fire occurred. (R. p. 446, lines 2-3.)

Mr. Pickens further admitted no one from Winthrop told him it was acceptable to store combustible materials on the flat roof. (R. p. 456, lines 3-7.) He admitted that, under the contract, it was solely Pickens' responsibility to carry out the job and meet the Specifications. (R. p. 459, lines 8-10.) He agreed that rolls of paper should not have been on the roof. (R. p. 467, line 4-p 468, line3.)

Clint Robinson, Pickens' project manager, testified that the Specifications were part of the job and became part of the contract. (R. p. 400, lines 4-6; R. p. 420, lines 14-18; R. pp. 991-1230.) The contract and Specifications provided for two storage areas—one about a half-mile away, and a 50 by 50 foot area on the ground adjacent to the building. (R. p. 401, lines 11-19; R. p. 421, lines 15-17; R. pp. 991-1230.) The contract

originally provided for a third area, but Winthrop negotiated a change order with Robinson to eliminate that area, for a higher contract price. (R. p. 401, line 23-p. 403, line 6; R. pp. 1162-1230.) Robinson admitted that nothing in the Specifications authorized storage of materials on the flat roof. (R. p. 405, lines 12-19; R. p. 422, lines 9-14.) He also admitted no one from Winthrop ever authorized such storage. (R. p. 406, lines 18-22.)

The evidence was Pickens stored combustible construction materials on the flat roof in breach of express provisions of the contract; and that a lift previously used to move materials to the roof was "long gone" a month before the fire. Clint Robinson admitted that Pickens stored materials, including "rosin paper" on the flat roof. (R. p. 408, lines 19-22.) The last time he was on the roof was a week or two prior to the fire. (R. p. 409, line 2.) At that time there were wooden pallets on the roof. (R. p. 409, lines 5-14.) There were sheet metal, fasteners, rolls of felt, and maybe shingles on the pallets. (R. p. 408, lines 8-11.) He said, "there was definitely material being stored there, yes." (R. p. 410, lines 22-23.) Randall Pruitt, Pickens' supervisor, admitted there was felt roofing paper on the flat roof on the day prior to the fire. (R. p. 335, line 13-p. 356, line 6.) Matthew Pruitt, Randall Pruitt's nephew and Pickens' "helper," testified there was felt paper, shingles, and other materials stored on the flat roof the day before the fire. (R. p. 386, line 1-p. 388, line 22.)

Brandon Lusk, another "helper," testified it was difficult bringing roofing materials from the staging area on the ground up to the roof. (R. p. 363, lines 10-12.) There was only one lift, which was owned by the company Pickens hired to tear the asbestos shingles off the roof. (R. p. 372, lines 8-17.) When that company doing

asbestos removal was on site, it allowed Pickens' crew to share the lift to haul materials up to the roof. (R. p. 372, lines 8-17.) Sometimes Pickens just used ladders set up in front of the building instead of using the lift. Lusk described the work of carrying roofing materials up the ladder as "hard." (R. p. 364, lines 15-20.) The company doing asbestos removal was "long gone" a month before the fire, taking the lift with them. (R. p. 364, lines 3-11; R. p. 372, lines 8-17.) At the time of the fire, Pickens did not have access to the lift to haul materials up to the roof. (R. p. 364, lines 3-11; R. p. 372, lines 8-17; R. p. 1383.)

Winthrop's expert established that the fire starting on the flat roof would not have spread to the adjoining roofs and likely self-extinguished but for the storage of combustible construction materials on the flat roof. Daniel Arnold is a registered fire protection engineer. (R. pp. 703-06.) He testified for Winthrop as an expert in fire protection and analysis, including fire spread analysis. (R. p. 710, lines 8-10.) Among his many qualifications, he is a member of the National Fire Protection Association. (R. p. 706, lines 19-20.)

Mr. Arnold testified that the fire starting on the flat roof, in the absence of other combustibles being present, would not have reached a flame height high enough to spread to the eaves of the adjoining roofs. (R. p 740, lines 7-13; R. p. 741, lines 10-15; R p. 746, lines 6-17; R. p. 748, lines 5-10; R. p. 750, lines 5-10; R. p. 754, lines 9-16; R. p. 755, lines 2-4; R. p. 761, lines 18-22.) Mr. Arnold discussed the importance of several photographs to the jury, including some showing how high the flame from the flat roof reached. Some of them showed flames reaching through and above a scupper. (R. pp. 1385-1416 ; R. p. 739, line 5-p. 753, line 25.) He explained, "if it was just solely

a TPO roof, or just a flat roof absent of combustibles you wouldn't have this kind of flame height on that roof." (R. p. 741, lines 10-15.) Other pictures showed damage, which Mr. Arnold said "Flame height of two and half to three feet of some duration. It burned a long time at that location because the fire department was already there and had opened windows. So there was a substantial amount of fuel on that roof." (R. p. 743, lines 19-23; R. pp. 1385-1416.) Mr. Arnold testified there was evidence of combustible roofing materials on the flat roof, and that the storage of those materials caused the damage. (R. p. 746, lines 10-21; R. p. 748, lines 5-13.) He testified the cause of ignition was not relevant in this case:

> 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.)

Mr. Arnold also testified that the International Fire Code and, by incorporation, NFPA 241, were adopted in South Carolina. (R. p. 755, line 11-p. 756, line 25.) After reading sections of NFPA 241, he informed the jury that roofing paper, shingles, and wooden pallets were considered combustible construction materials. (R. p. 759, lines 10-15.) He also explained that it was impossible to store materials on the flat roof, and have that storage be more than 30 feet from either Bancroft Hall or Owens Hall. (R. p. 759, lines 20-24.)

Mr. Arnold read 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-sprinkler 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 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 gave a definition of "proximate cause," to which Pickens objected because the court did not also instruct the jury on foreseeability. (R. p. 889, line 14-p. 883, line 11.) The court overruled the objection. (R. p. 883, lines 12-22.) The jury also requested to be recharged on the provision of the International Fire Code requiring Winthrop to designate a person to be a "Fire Prevention Program Superintendent" during the course of the re-roofing project. (R. p. 879, line 25-p. 881, line 13.)

The jury reached a verdict in the liability phase of the trial: The jury found Pickens breached its contract, and was negligent. (R. p. 8; R. p. 884, line 7-p. 885, line 14.) The jury found both the breach of contract and negligence were a cause of Winthrop's damages. (R. p. 8; R. p. 884, line 7-p. 885, line 14.) The jury also found

Winthrop comparatively negligent, assigning 60% of the negligence to Pickens and 40% to Winthrop. (R. p. 8; R. p. 884, line 7-p. 885, line 14.)

Winthrop presented evidence of the amount of damage during the damages phase; Pickens presented no evidence. Winthrop presented testimony from six witnesses to substantiate its damages. (R. p. 889, line 3; R. p. 902, line 14; R. p. 992, line 16; R. p. 929, line 19; R. p. 937, line 5 [4].) Mr. Wesley Love, a project manager for Winthrop, photographed all the damage to several buildings caused by fire, smoke, or water used to put out the fire. (R. p. 889, line 8-p. 890, line 22; Pl. Ex. 67.) The photographs showed substantial damage to Bancroft Annex, its rooms, and its contents (technology and art) caused mostly by water pouring in. (R. p. 891, line 15-p 897, line 13.) The other witnesses established the amounts paid to contractors to repair the damage caused by the fire. (R. p. 902, line 1-p. 944, line 1.) Winthrop also had admitted into evidence a binder of documentation establishing the specific amount of damages by category, including damage to the roofs. (R. p. 921; R. p. 973, lines 7-10; Pl. Ex. 67.) The jury had this binder during their deliberations. Included within the binder were invoices for the damages to the flat roof. (Pl. Ex. 67, Tab 22A- Bates # 3918.)

Pickens did not ask any questions of any of Winthrop's 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.) Pickens also did not present any of its own witnesses or evidence. (R. p. 944.)

Pickens renewed its motion for directed verdict again. Pickens again argued there was no evidence as to how the fire started. (R. p. 945, lines 4-1.) Pickens also argued that Winthrop failed to prove how much of the damage was caused by Pickens'

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

actions versus how much would have been caused without the combustible materials on the roof. (R. p. 945, line 11-p. 946, line 1.) Again, the trial court denied the motion, finding there was "plenty of evidence" for the jury "to form a basis as to the damages and what caused them and how it was done and the amount of damages." (R. p. 951, lines 16-25.)

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 was instructed only to determine Winthrop's damages, without objection. As to damages, the jury was given a verdict form with a single question: "We the Jury find damages in the amount of $_____." (R. p. 12; R. p. 971, lines 20-21.)

The court also instructed, without objection:

> Now, let me say insofar as the negligence action you have split liability in that case, but you do not be [sic] concerned about that. What you are to determine is the total amount of damages suffered by plaintiff. If there should be any reduction in that that would be for the Court to determine. Not for you. You are to determine the total amount of damages suffered by the plaintiff and that is the amount that you write in there. Don't try to reduce it in any way. Just put the total amount. If there is any reduction in that the Court would take care of that. Just put the full amount of damages you find suffered by the plaintiff.

(R. p. 972, lines 4-15.) Neither party had any exceptions or additional requests. (R. p. 973, lines 3-6)

The jury found Winthrop proved its damages. 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.)

Pickens raised several post-verdict motions. Pickens again argued the verdict should not stand because there was no evidence on the cause of ignition or distinguishing the damages caused by the materials being on the roof versus what would have occurred otherwise. (R. p. 977, lines 6-11.) Pickens also moved for a new trial, arguing bifurcation improperly forced the jury to consider proximate cause and damages separately, and "based on the denial of our motion to strike the juror for cause." (R. p. 977, line 17-p. 976, line 6.) Pickens then asked the court to apply the comparative negligence determination to the breach of contract action when it entered judgment (R. p. 978, lines 7-22.)

Winthrop responded there was ample evidence to support the jury's verdict, (R. p. 979, line 2-p. 980, line 13), that there was no legal basis to apply negligence principles to breach of contract, (R. p. 980, lines 14-20), and that Pickens' objection to bifurcation was not raised earlier, there was no prejudice, and the decision was within the trial court's discretion. (R. p. 980, line 21-p. 981, line 2.)

The trial court denied all of Pickens' motions. (R. p. 981, line 3-p. 898, line 11.) The court placed its reasoning on the record:

- Juror issue: Pickens had sought to strike two jurors for cause. The court struck one—an employee of Winthrop. The court declined the other—a student at Winthrop—because there was no similar "close connection," and the student said she could be impartial and decide the case on the evidence at trial Further, Pickens had used a peremptory strike on her, so no prejudice had been shown And Pickens never showed any prejudice. (R. p. 981, line 3-p. 983, line 8.)

- Directed verdict: "The Court reiterates, this is not a fire spread case. It is a case of a fire at the worksite, and the whole worksite there, is what it is. And so the Court denies the judgment JNOV on that basis." (R. p. 983, lines 9-22.)
- Form of the judgment: The jury provided a sixty/forty split on the negligence charge. However, the plaintiff has a right to elect its remedy from one of its two causes of action. And on the contract action, there is no allegation that Winthrop breached the contract. There is no offset allowed. (R. p. 983, line 23-page 987, line 4.)
- Bifurcation: Pickens did not raise the same objection before the outset of trial that it did in its post-verdict motion. And 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." Further, bifurcation was appropriate for a myriad of reasons in this case. (R. p. 986, line 16-p. 989, line 8.)

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.)

STANDARD OF REVIEW

Generally, "The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 412, 717 S.E.2d 765. 769 (Ct. App.

2011) (quoting *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989)).

Issue I: The grant or denial of new trial motions rests within the sound discretion of the circuit court and its decision should not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); *Boozer v. Boozer*, 300 S.C. 282, 283, 387 S.E. 2d 674, 675 (Ct. App. 1988). Further, the decision to strike a juror for cause is within the sound discretion of the trial judge. *See State v. Woods*, 345 S.C. 583, 590, 550 S.E.2d 282, 285 (2001).

Issue II: On a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). An appellate court should reverse a trial court's ruling on a directed verdict only where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Id.; see also Jones v. Lott*, 379 S.C. 285, 288-289, 665 S.E.2d 642, 644 (Ct. App. 2008) *aff'd*, 387 S.C. 339, 692 S.E.2d 900 (2010).

Issue III: Jury instructions must be considered as a whole and if as a whole they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 501 (Ct. App. 1993).

Issue IV: As Pickens acknowledges, "the trial court is given 'broad discretion' in considering whether to grant a motion to bifurcate." (Appellant's Brief, p. 35.) An

appellate court will not disturb a trial court's decision to bifurcate absent an abuse of discretion. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

Issue V: In ruling on motions for directed verdict, or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); *see also Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002)("In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence.") (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Id.* Further, an appellate court should only reverse the trial court's ruling on a directed verdict or JNOV motion where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Clark v S.C. Dep't of Public Safety*, 362 S.C. 377, 382-383, 608 S.E.2d 573, 576 (2005); *Hinkler v Nat'l Cas Ins Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

Issue VI: Whether "comparative negligence" applies to a breach of contract action is a question of law, and thus is entitled to *de novo* review. *See Proctor v. Steedley*, 398 S.C.561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012).

ARGUMENT

Introduction

Winthrop sued Pickens, a roofing contractor, for fire damage to its buildings caused by Pickens' storage of combustible materials on a flat roof during a re-roofing project at the University. (R. p. 13.) There is no dispute that the fire started on the flat roof adjoining the building upon which Pickens was working. (R. p. 801, line 25-p. 802, line 2.) The contract between Winthrop and Pickens provided for the storage of material on the ground at the front of the building in a designated fenced in area, or at a parking lot a half mile away. (R. p. 401, lines 11-19; R. p. 421, lines 15-17.) The parties further agreed that certain fire codes prohibiting storage of combustible materials applied. (R. p. 153, lines 17-20; R. p. 444, lines 19-22.) Winthrop's expert, Mr. Arnold, testified at length that any fire on the flat roof would not have spread to the adjoining roofs and likely self-extinguished but for the storage of combustible roofing materials on the roof. (R. p. 740, lines 7-13; R. p. 741, lines 10-15; R. p. 746, lines 6-17; R. p. 747, lines 7-p. 749, line 7; R. p. 750, lines 5-10; R. p. 754, lines 9-16; R. p. 755, lines 2-4; R. p. 761, lines 18-22.) Pickens presented no evidence to the contrary. In finding that Pickens breached the contract and was negligent, the jury necessarily found that Pickens was improperly storing materials on the roof. (R. pp. 8-9.) Pickens does not appeal that finding.

Pickens' only defense to the merits below was to argue Winthrop was required to prove the source of ignition of the fire in order to obtain an award for Pickens' breach of contract or negligence. (R. p. 788, lines 8-9.) The trial court repeatedly rejected this argument based on the direct and circumstantial evidence Winthrop presented.

(R. p. 799, line 24-p. 800, line 1.) Pickens raises that issue along with several procedural arguments on appeal.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE JUROR 25 FOR CAUSE AND DENYING PICKENS' MOTION FOR NEW TRIAL

A. Pickens cannot establish prejudice as a matter of law by failing to demonstrate that it was deprived of a subsequent strike to a prospective juror.

Pickens claims to have been prejudiced by using a peremptory strike to strike Juror 25. To establish prejudice the party must demonstrate that it was deprived of a subsequent strike it would have exercised but for the forced strike. *Green v. Maynard*, 349 S.C. 535, 538-39, 564 S.E.2d 83, 84 (2002). To preserve such a claim for appeal, the party must state an objection on the record to a subsequently presented juror. *Id.* at 538-539. Here, Pickens cannot show prejudice because there is no objection on the record to a subsequently presented juror. Thus, on this basis alone, Pickens' arguments fail and appeal on these grounds is utterly without merit.

B. Pickens failed to preserve any argument that Juror 25 should be stricken because she was a "student researcher."

Pickens argues the trial court erred in not striking Juror 25 for cause because she said she was a "student researcher" for Winthrop. But Pickens never raised this objection below. In the trial court, Pickens argued that Juror 25 should be stricken because she was "a *student* at Winthrop University," that she saw the fire on the news and discussed it with others at the University at the time, and "that gave her a perspective on this case that other jurors would not have." (R. p. 144, lines 9-23.)

Only the specific grounds Pickens argued below are preserved for appeal. *See Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (remanded

on other grounds, 408 S.C. 200, 758 S.E.2d 716) ("For an objection to be preserved for appellate review . . . it must be made with sufficient specificity 'to inform the trial court of the point being urged by the objector.'"). Thus, Pickens failed to preserve the first argument it makes on appeal. *See State v. Carlson*, 363 S.C. 586, 595, 611 S E.2d 283, 287 (Ct. App. 2005); *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000)(finding arguments must be conducted on the record to be preserved for appellate review); *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998). Any objection to Juror 25 based on an alleged "employment" status has been waived.

Assuming this argument was preserved, it is also meritless. There is nothing in the record to indicate that Juror 25 was a current or former "employee" or was paid for her services. She stated only that she was a "student researcher." (R. p. 116, lines 7-8.) Pickens' failure to request additional voir dire to clarify Juror 25's "employment" status waives any objection on this basis on appeal. *See State v. Ivey*, 331 S.C. 118, 122, 502 S.E.2d 92, 94 (1998) (ruling defendant should have immediately moved for permission to make additional inquiries of juror following trial judge's examination of her to preserve objection for appeal).

C. The trial court did not abuse its discretion in failing to strike Juror 25 for cause and Pickens failed to show prejudice.

None of Pickens' remaining grounds establish that the trial court abused its discretion in not striking Juror 25 for cause. South Carolina law provides as follows regarding striking a juror for cause:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any

> opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

S.C. Code Ann. 14-7-1020 (1976).

Pickens argues that Juror 25 was "biased" because she "...had personal knowledge of the facts." (Appellant's Brief. p. 15.) But knowledge is not the equivalent of bias. When asked what she knew, Juror 25 stated, "The fire, the incident, things that were said about how it occurred, and so forth." (R. p. 117, lines 8-12.) Juror 25 knew that the fire occurred but plainly stated it would not affect her ability to render a fair and impartial decision based solely on testimony and evidence presented at trial. (R. p. 117, lines 5-20.) She had not formed any opinions on the matter. As stated by the trial court:

> "She did indicate that she had been up there I think when this was going on and she had talked to some other people about it. That is professors had said something about the fire. She had talked to some other students. That they were kind of inconvenienced by the fire and caused them some problems in that regard She did say that. And she did have some connection with Winthrop. However, she stated when I asked her specifically about whether she could put aside anything she had heard about the fire. **She didn't say she heard anything about the case.** Just that there was a fire and it displaced people and the building was burned...."

(R. p. 145, lines 11-23.)

As recognized by Pickens, jurors may be qualified where they have knowledge of the incident at issue but where they have not formed any concrete opinions on the matter. Thus, the juror is qualified because she has no demonstrable bias.

In *R.K. Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1997), the Supreme Court of South Carolina addressed the issue of excluding jurors for cause due to their knowledge of issues in the case. The Court ruled that mere exposure to pretrial

publicity does not automatically disqualify a prospective juror. Again, impartiality does not require ignorance of the incident in question.

Similarly, in *Rook v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988), the appellants claimed that the trial court erred in failing to strike for cause, any prospective juror who was being or had been treated, or whose family members had been treated by the respondent physicians in a medical malpractice action. During voir dire, some of the prospective jurors indicated that they themselves or a close relative had been treated by the respondents. The trial court individually questioned the jurors and each responded that his or her connection to the physicians being sued in the case would not prejudice or prevent him or her from reaching a true and just verdict in the cause. The appellate court found no abuse of discretion by the trial court in impaneling those jurors *Id* at 158.

In sum, the trial court did not abuse its discretion in refusing to strike Juror 25 for cause Juror 25's knowledge of the fire did not render her biased. She did not state that she had formed any opinions on the matter, only that she had heard about it. (R. p. 117, lines 11-12.) She specifically testified that she could render a fair and impartial verdict based on the evidence. (R. p. 117, lines 13-20.) Further, Pickens failed to state any objection other than her status as a student at the time of voir dire. (R. p. 144, lines 9-22.) Pickens also failed to request additional voir dire or state an objection to a subsequently presented juror after striking Juror 25. Thus, these objections are not preserved for appellate review and Pickens cannot demonstrate prejudice. The final judgment for Winthrop should not be reversed on this basis.

II. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS PROOF OF THE FIRE'S IGNITION SOURCE WAS NOT REQUIRED TO PROVE PICKENS' BREACH OF CONTRACT AND COMMON-LAW DUTY CAUSED DAMAGES

A. Proof of ignition source was unnecessary to establish liability under contract or tort.

Pickens' primary argument is based on its erroneous conclusion that Winthrop had to prove that "Pickens caused the fire to ignite." (Appellant's Brief, pp. 17-18.) This is not true, under either the breach of contract action or the negligence action.

1 Breach of contract.

This Court has set forth the requirements for an action for breach of contract:

> "This being an action for the breach of contract, the burden was upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." *Fuller v. E. Fire & Cas Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App.1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Id.*

Maro v. Lewis, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

Pickens challenges the judgment on appeal arguing that Winthrop failed to prove Pickens' actions ignited the fire. Pickens is mistaken as to Winthrop's burden of proof. Winthrop had to establish that Pickens' breach of contract caused *the damage*, not that it *caused the ignition of a fire. See id* This is an important distinction. The only reason **this** fire was able to sustain, grow, and ultimately cause millions of dollars of damage to the building was because Pickens breached the contract by storing combustible construction materials on the flat roof. The evidence proved that **this** fire starting on the

flat roof, without any combustibles on the flat roof, would not have spread to adjoining roofs and likely self extinguished. (R. p. 747, line 7-p. 749, line 7.) Thus, all the damage flowed naturally from Pickens' breach of the contract, i.e., breach of the express provision limiting storage of construction materials to two locations on the ground. (R. p. 1085.) The source of ignition is irrelevant—the cause of the damage was Pickens' actions. Further, the jury had substantial competent evidence of the dollar amount of damage caused by Pickens' breach of the express provisions of the contract and code. (Pl. Ex. 67.)

2 Negligence

"To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." *Vinson v. Hartley*, 324 S C. 389, 399. 477 S.E.2d 715, 720 (Ct. App. 1996).

Again, the only element to which Pickens' argument on proximate cause relates is the damage element.[5] Proximate cause requires proof of both causation in fact and legal cause. *Id* at 400. Pickens focuses on "legal cause," which has an element of foreseeability—A plaintiff must show "the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.* "The plaintiff need not prove that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen his negligence would

[5] Winthrop established both duty and a breach of that duty by evidence described in the statement of case and facts, and the jury necessarily found for Winthrop in finding Pickens negligent. (R. p. 8.) Pickens does not raise any issues on appeal regarding the jury's findings.

probably cause injury to someone." *Id.* (internal citation omitted).

The evidence established that Pickens' storage of combustible materials within 30 feet of the building under construction was a violation of the International Fire Code and National Fire Prevention Association codes and standards—codes that the parties stipulated placed duties on Pickens as a contractor in South Carolina because it carries the weight of law in South Carolina. As the trial court instructed the jury, without objection from Pickens:

> Madame forelady and members of the jury panel, I charge you with regard to the National Fire Protection Association code section 241, with regard to its scope and purpose. Nation Fire Protection Association 241 is the standard for safeguarding construction, alteration and demolition operations. Subsection 1.1 regarding the scope, this standard shall apply on structures and in the course of construction, alteration or demolition including those in underground locations. Section 1.2 with regard to purpose. This standard is intended to prescribe *minimum safeguards* for construction, alteration, demolition operations in order *to provide reasonable safety to life and property from fire* during such operations. Section on subsection 3.1 – excuse me. Let me get this right – subsection 1.3.1 provides that this standard provides measures *for preventing or minimizing fire damages* during construction, alteration and demolition operations.
>
> Demolition subsection 1-3-1 defines yard storage as storage of commodities in outdoor areas. The International Fire Codes chapter three provides general precautions against fire. Subsection 301.1 as to scope provides as follows; the provisions of this chapter shall govern the occupancy and maintenance and of all structures and premises or *precautions against fire and spread of fire.*
>
> Madame forelady and members of the jury panel, I charge you in the National Fire Protection Association 241, subsection 8.3 – well, no. Chapter 8 provides for safeguarding construction and alteration operations. Subsection 8.3 regards constructional materials and equipment storage. Subsection 8.3.3 provides for yard storage of equipment to be installed or *combustible construction material shall not be stored closer than thirty feet from the structure under construction or alteration.*

(R. p. 860, line 5-p. 861, line 16.) (emphasis added).[6]

The fire codes with which Pickens was bound to comply stated the reason combustible construction materials cannot be stored near buildings (let alone *on a flat roof adjoining buildings*, as here) was to prevent fire damage to buildings. The test for foreseeability that applied to the facts of this case is whether it was foreseeable to Pickens—charged with knowledge and compliance with these fire codes as a contractor bound by the laws of South Carolina—that storing combustible materials *on top* of a building could result in fire damage. The test was easily satisfied by the evidence of Pickens' violation of the fire codes.[7]

B. Pickens sets up its straw man "spread theory" argument only to knock it down—this is not, and never has been, a "spread theory" case.

There is no requirement that Winthrop prove the source of ignition of the fire. To the contrary, Winthrop needed only to prove that Pickens' breach of contract—or alternatively, Pickens' negligence—caused the damage to Winthrop's buildings. The issue at trial was whether a fire, ignited on the flat part of the roof, could have sustained

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[6] The trial court also instructed the jury, again without objection, "violation of regulation as adopted by state law constitute [sic] negligence per se." (R. p. 863, lines 11-12.)

[7] Winthrop attempted to introduce other testimony that would have further established proximate cause. The trial court excluded testimony from Chief Driggers and Mr. Arnold that Pickens' storage of combustible materials on the flat roof was a violation of the fire and safety codes, and that the fire could not have started but for the storage of combustible materials. (R. p. 74, line 5-p. 213, line 14; R. p. 693, lines 13-22; R. p. 701, line 22-p. 702, line 21, R. p. 759, lines 13-19; R. p. 761, line 15-p. 762, line 25.) Winthrop proffered testimony from Mr. Arnold to this effect. (R. p. 681, lines 8-15; R. p. 688, lines 20-22.) This testimony should have been permitted. *See Knoke v. South Carolina Dept. of Parks, Recreation & Tourism*, 234 S.C. 136, 478 S.E.2d 256 (1996) (holding that a fire safety expert was entitled to testify that defendant's actions were contrary to State and national standards of care, and that "Expert testimony is not rendered inadmissible simply because it embraces an ultimate issue to be decided by the trier of fact"). However, even without this testimony, the evidence was more than sufficient to support the jury's determination that Pickens' actions were the proximate cause of the damage Winthrop suffered.

itself, grown, and "spread" into the eaves of the adjoining pitched roofs but for Pickens storing combustible construction materials on the flat roof. (Appellant's Brief, p. 18.)

Pickens attempts to confuse the issue by claiming Winthrop relied on a "spread theory" of liability, and then claiming "spread theory" does not apply. Winthrop never relied on "spread theory," and Pickens fails to identify anything in the record to the contrary.

This is because "spread theory" does not apply to a case where a landowner is seeking damages from a contractor who caused a fire on the landowner's property. "Spread theory" applies to *hold a landowner responsible to another* where a landowner negligently creates a fire hazard on or emanating from his own land, and it is foreseeable that a fire could start and spread to an adjacent property. Every opinion and authority Pickens cites from other jurisdictions (not South Carolina) discussing "spread theory" follows that scenario.[8] (Appellant's Brief, p. 18-22.) The scenario in this case is completely different. This case involves a landowner seeking damages against a contractor due to the contractor's acts on the landowner's land. There is no "spread" of fire from one landowner's property to another's. For this reason, Winthrop has never advocated a "spread theory," and Winthrop agrees with Pickens that it does not apply. For Picken to claims that Winthrop did propose this theory—just so Pickens can knock it down—is disingenuous.

Assuming, *arguendo*, "spread theory" could apply to a landowner's claim for damages caused directly to the landowner's property by a contractor working on the same property, the evidence still supports the verdict. Under Pickens' out-of-jurisdiction cases,

[8] South Carolina has not addressed the issue of "spread theory" of liability.

"the precise origin of the fire is immaterial." *Chicago, M, St P. & P. R. Co v. Poarch*, 292 F. 2d 449, 451 (9th Cir. 1961). The question is whether "the property causing the fire has gotten into such a condition that it creates a fire hazard and that, if fire should occur in it, it is reasonably probable that it would spread to the adjacent property." *Id* at 451. Here, it was Pickens' actions that left the flat roof in "such a condition that it created a fire hazard." *Id.* The only evidence offered at trial was the storage of combustible construction materials on the flat roof made it reasonably probable that this fire that started on the flat roof, without any other combustibles being present, would not have spread to other roofs and likely self-extinguished.

C. Pickens' argument based on *res ipsa loquitur* is a red herring; Winthrop never relied on the doctrine.

Pickens raises *res ipsa loquitur* in its brief, arguing that South Carolina's refusal to adopt the doctrine required Winthrop to prove the source of ignition in order to obtain an award of damages. (Appellant's Brief, p. 22.) Pickens did not raise this doctrine as grounds for its directed verdict below. As this Court has held, "Generally, an issue must be both raised and ruled upon by the trial court in order to be preserved for appellate review. Arguments raised for the first time on appeal are not preserved for our review." *In re Jamal G,* 396 S.C. 158, 163, 720 S.E.2d 62, 64 (Ct. App. 2011). Because the trial court never had the opportunity to rule on whether the doctrine of *res ipsa loquitur* entitled Pickens to a directed verdict, this issue is waived.

Even were the issue preserved, it lacks merit. Winthrop never relied on *res ipsa loquitur* to establish Pickens' liability in this case, nor did it need to as the doctrine applies only to negligence actions, not to breach of contract. Second, it operates only in the absence of any probative evidence, circumstantial or otherwise, to show negligence.

Eickhoff v. Beard-Laney, Inc, 199 S.C. 500, 20 S.E.2d 153, 155 (1942). 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." *Id.*

Here, there was direct and circumstantial evidence Pickens was negligent. The evidence showed Pickens violated numerous fire safety codes and regulations, which is negligence per se. The self-stated purpose of those fire safety codes was to prevent fire damage to buildings. And Winthrop's evidence established that, but for Pickens' violation of those codes, the fire likely would have self-extinguished and no damage would have occurred. Winthrop had to provide evidence that Pickens' actions caused the damage, not that Pickens' actions were the source of ignition. Pickens provides no case law to the contrary.

At the risk of repetition, *res ipsa loquitur*, if it could apply, only applies to negligence. It does not apply to breach of contract, which Winthrop established by the same evidence as above. The trial court correctly denied the motion for directed verdict on negligence where Winthrop presented evidence from which the jury could have reasonably inferred that Pickens was negligent and that Pickens' negligence caused some or all of Winthrop's damages. *See The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005).

III. THE TRIAL COURT PROPERLY AND SUFFICIENTLY RESPONDED TO THE JURY'S REQUEST TO BE RECHARGED ON THE "DEFINITION OF PROXIMATE CAUSE"

Pickens argues that when the jury requested to be recharged on the "definition of proximate cause," the trial court erred by charging only the "definition of proximate

cause" and not also on foreseeability This issue lacks merit.

First, "foreseeability" was not part of the charge on breach of contract Nor should it have been. "Foreseeability" is measured differently for contracts and torts. In a breach of contract, the issue is whether damages were foreseeable at the time of contracting, not at the time of the breach of contract. *See Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942) (noting the fact of damage in a contract action is proved by showing (1) that the plaintiff realized an actual loss it would not have incurred but for the defendant's breach of contract; and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made). In this case, as in any case dealing with a construction project, there is a risk of fire associated with the work. The contract expressly addressed that issue by mandating, *inter alia*, that Pickens store its combustible construction materials on the ground. (R. p. 1085.)

In negligence, the issue is whether damages were foreseeable at the time of the negligent act. *Young v. Tide Craft*, 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978). Thus, there is no basis to reverse the final judgment for breach of contract on these grounds.

Second, and as Pickens acknowledges, during the court's initial charge, the court charged the jury on the definition of "proximate cause," and also the definition of "foreseeability." (Appellant's Brief, p. 26.). Pickens did not object to the charges. After deliberating for a time, the jury sent a note to the judge requesting to be recharged "on the 'definition of proximate cause.'" (Appellant's Brief p. 26, quoting R. p. 879, lines 15-22; R. p. 1474.) The trial court recharged 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.)

"It is well established in South Carolina that '[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.'" *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996). Thus, where the recharge is limited to answering the jury's question and the initial charge was adequate, there is no error. *Barksdale*, 311 S.C. 210 at 216, 428 S.E.2d at 502.

On appeal, Pickens admits that "Proximate cause is defined as 'the efficient or direct cause of an injury.'" (Appellant's Brief, p. 17) (quoting *McNair v Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998)). Black's Law Dictionary defines proximate cause as follows:

> ***Proximate cause.*** **1.** A cause that is legally sufficient to result in liability. **2.** A cause that directly produces an event and without which the event would not have occurred.

Black's Law Dictionary 213 (7th ed. 1999). Neither definition includes "foreseeability." The trial court's recharge on the "definition of proximate cause" mimics both the Black's

Law Dictionary definition and Pickens' own definition at page 17 of its brief. The trial court answered the jury's question completely and sufficiently. *Anderson*, 322 S.C. at 94. And the jury confirmed that the trial court's instruction was sufficient to answer its question. (R. p. 882, line 5.)

On appeal, Pickens argues the court erred in failing to recharge other concepts of "legal cause" and "foreseeability." First, Pickens never asked the trial court to recharge "legal cause," nor did it object to the court's recharge on the basis that it lacked a definition for "legal cause."[9] As this Court has held, "Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. Arguments raised for the first time on appeal are not preserved for our review." *In re Jamal G*, 396 S.C. at 163. Pickens' argument on "legal cause" is not preserved and merits no relief.

Pickens' argument on foreseeability is likewise meritless. As is plain from the Black's Law Dictionary definition and Pickens' own definition above, the "definition of proximate cause" does not include any reference to "foreseeability." Pickens effectively argues that when a jury asks a specific question, the trial court must also recharge the jury with other, related concepts. South Carolina law does not require a court to recharge the jury on all related issues when the jury asks a specific question. *See Anderson*, 322 S.C. at 94 (trial court properly excluded a *King*[10] recharge when the jury only requested a

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[9] "Legal cause" is not a synonym of "foreseeability" or "proximate cause." *See Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996) (recognizing that "proximate cause requires proof of both causation in fact and legal cause"); *see also* Blacks Law Dictionary 213 (7th ed. 1999) (on the definition of "legal cause," stating only, "See *proximate cause.*").

[10] *See State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (holding that trial court should instruct the jury that if they had any reasonable doubt as to whether unlawful killing was

recharge on the definitions of murder, malice, and involuntary manslaughter, and the original instructions included the *King* charge); *Barksdale*, 311 S.C. 210 at 216 (rejecting appellant's argument that the trial court should have recharged the definition of "mob," even where the appellant claimed "it was essential to understanding the definition of lynching," where the trial court recharged the definition of lynching per the jury's request).

"A charge is sufficient if, as a whole, it covers the law applicable to the case." *Id* A court's "failure to charge in greater detail is not error if the details were fully covered in the original charge." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (citing *Corbin v. Prioleau*, 260 S.C. 171, 194 S.E.2d 875 (1973)).[11] Thus, the "whole charge" in this case includes the original charge, which discussed foreseeability. The jury's request for recharge on the "definition of proximate cause" "was very specific and indicated [the jury's] areas of confusion." *See Rauch*, 284 S.C. at 597. "The court's additional charge was limited to answering the jury's request." *Id.* Thus, there is no error. *See id.*

Further, Pickens' cited case of *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), is not "instructive." The case does not address the question Pickens raises in this appeal – whether the trial court, upon receiving a request for a specific recharge of an

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murder or manslaughter, it was jury's duty to convict defendant of the lesser offense, manslaughter)." *State v. Anderson*, 322 S.C. 89, 91, 470 S.E.2d 103, 104 (1996).

[11] The Georgia law Pickens cites directly conflicts with South Carolina law on this point. *Miller v. State*, 236 Ga.App. 825, 13 S.E.2d 27 (Ga. Ct. App. 1999). In *Miller*, the court held that a jury must be recharged on issues far exceeding its specific requests, even if the instruction was already given in the original charge. This holding conflicts with South Carolina cases of *Rauch v. Zayas*. 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) and *Corbin v. Prioleau*, 260 S.C. 171; 194 S.E.2d 875 (1973), and thus carries no precedential value whatsoever in this state.

instruction previously given, must also recharge other instructions previously given. In *Lee-Grigg*, the question raised on appeal was whether the trial court erred in refusing to include *in the original charge* an instruction supported by the evidence. *Id.* at 316. In that forgery case, the defendant put in evidence of her good character, and requested an instruction to the jury on good character. *Id.* at 315. The trial court refused. *Id* The Supreme Court held the trial court's ruling was error because, in South Carolina, it is well settled that a defendant in a criminal case may put on evidence of good character, and is entitled to an instruction that the character should be considered by the jury in determining innocence or guilt. *Id.* at 317. The court noted that the jury later asked for a recharge on "intent," which was "evidence that they were struggling with this question," but without an instruction on character they were not aware they could consider such evidence. *Id.*

Here, Pickens acknowledges that the trial court properly and completely instructed the jury on proximate cause in its initial charge, and Pickens raised no objection. (Appellant's Brief, p. 26.) The jury heard all it needed to hear in the original charge, whereas the jury in *Lee-Grigg* was *never* instructed on a critical issue. Thus, *Lee-Grigg* does not apply.

Finally, Pickens speculates that the jury's request for a recharge on proximate cause "evidences its struggle with the issue." And that "...the jury was misguided on the question whether Pickens should be found liable for breaching the parties' contract or in negligence." (Appellant's Brief, p. 30.) (Again, Pickens did not object to the charge for breach of contract.) It is more likely, if the jury was "struggling," it was as to Winthrop's comparative negligence given the simultaneous request for a recharge on the

International Fire Code provision applicable to Winthrop. (R. p. 879, line 25-p. 880, line 14.) Whatever the basis for the jury's "struggle," it is improper to speculate when there is no error warranting reversal of the final judgment for breach of contract.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BIFURCATING THE TRIAL

A. The trial court acted properly and within its broad discretion to decide to bifurcate the trial.

Rule 42(b), SCRCP, states that "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . separate issue or . . . issues." Here, the trial court granted the motion to bifurcate after having "a conversation in chambers" with counsel for both parties. (R. p. 149, lines 7-16.) It then placed its reasons for its ruling on the record:

> And the basis for it was, I questioned plaintiff's counsel very closely about that because I was not inclined to bifurcate if I was going to have the same witnesses testify in the second trial with regard to damages, but since apparently the only witnesses who will be testifying about the damages their testimony would be a lot shorter in the liability phase and most of the [sic] these witnesses on damages will not be called during the liability phase. It makes sense to me to bifurcate because if the jury were to return a verdict for the defendant we wouldn't have to spend all that time with all those witnesses on damages.
>
> On the other hand, if they return a verdict against the defendant then with regard to damages the witnesses pretty much are different witnesses. Not the same witnesses. So we won't lose any time or have to put witnesses up to testify basically to the same things twice. That will be my only concern because that would be a waste of time. But in light of the fact that witnesses are going to be different most of them on the damages than the liability, it makes sense to get the liability determined.
>
> Again, if they find for the defendant on that that will be the end of it. If they find for the plaintiff on that then we can get into the damage, but we won't have a repeat of the testimony which is what I was concerned about. This is an appropriate case. I do not do that very often, but I think this is

an appropriate case for bifurcation.

(R. p. 150, line 1-p. 151, line 5.) The trial court's reasons speak to convenience, expedition, and economy—all valid bases under rule 42(b) that support his discretionary ruling to bifurcate.

B. Pickens failed to put any contemporaneous specific objection to bifurcation on the record, failing to preserve this issue for appeal.

Again, it appears that the merits of Winthrop's motion to bifurcate were discussed in chambers. (R. p. 149, lines 7-16.) There is no transcript in the record of that discussion. The court gave Pickens the opportunity to place the basis for his objection on the record: "Let defense counsel object to the ruling on the bifurcation." (R. p. 149, lines 15-16.) Pickens only generally objected, without providing any legal or factual reason for the objection:

> Yes, we do oppose the plaintiff's request for bifurcation. I understand that we had a conversation in chambers with Your Honor. Your Honor, has reached a decision on that. I just wanted to state that we did oppose that for the record.

(R. p. 149, lines 20-24.)

A general objection, "without reference to any basis on which the objection was made . . . does not preserve any argument for appeal because such a general statement does not bring the specific grounds for the objection to the attention of the trial court." *Busillo v City of North Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013). An objection "must be made with sufficient specificity 'to inform the trial court of the point being urged by the objector.'" *Allegro*, 400 S.C. at 44 (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). Further, "[a] motion or an objection made during an off-the-record conference that is not made a part of the record

does not preserve the question for review." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213-14, 723 S.E.2d 597, 608 (Ct. App. 2012). Pickens did not preserve any issue for appeal with respect to the trial court's decision to bifurcate.

At the end of the trial on damages, Pickens orally moved for a new trial absolute, partially based on the court's decision to bifurcate. (R. p. 977, line 17-p. 978, line 3.) Pickens argued that Winthrop's theory of the case rendered bifurcation inappropriate because proximate cause and damages should have been tried considered together. (R. p. 977, line 17-p. 978, line 3) Winthrop responded that Pickens' argument was not made previously when bifurcation was discussed, that the bifurcation caused no prejudice, and the decision was well within the trial court's discretion. (R. p. 980, line 21-p. 981, line 2)

The trial court denied the motion for new trial, and provided further insight into what occurred during the in-chambers discussion preceding the beginning of trial:

> Let me say this on the bifurcation. *The only objection to the bifurcation stated by the defendant at the time was that the jury – you thought the jury ought to know the full amount of the damages and that you were afraid that they would not – the jury would not perceive the magnitude of the damages and the magnitude of any verdict in this case.* In the event they rendered a verdict in favor of the plaintiff they wouldn't understand the magnitude of it. And that they might not appreciate the magnitude of it just going on the liability issue.

(R. p. 986, line 17-p. 987, line 2.) The court then explained how there was no prejudice because it allowed either side to tell the jury during opening argument about the amount of damages at issue, and the plaintiff did so. (R. p. 987, lines 2-13.) And the court explained in depth how bifurcation had the potential to save substantial time and expense, so bifurcation made sense. (R. p. 987, line 13-p. 989, line 9.) Pickens' brief does not appeal the denial of its motion for new trial on this basis. (Appellant's Brief, p 34-39.)

Even if Pickens had raised this argument, an issue may not be raised for the first time in a [motion for new trial] if it could have been raised previously. *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 434 n. 3 (Ct. App. 1997); *McGee v Bruce Hosp. System*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996) (issue raised for first time in motion for new trial is "procedurally barred").

On appeal, Pickens argues that the issues of liability and damages were too interrelated to warrant bifurcation, and "[b]ifurcation was inappropriate because the jury was forced to separately consider proximate cause and damages, even though these two issues were inextricably linked." (Appellant's Brief pp. 34-39.) Pickens did not raise these arguments before trial, and the trial court did not have the opportunity to consider and rule upon them at that time. *See Creighton*, 334 S.C. at 108 (holding that an issue not raised or ruled on by the trial court is not preserved for appellate review). Pickens raised these arguments for the first time in a motion for new trial at the conclusion of the damages trial, which was too late to preserve the arguments. *See McGee*, 321 S.C. at 346. The issues are procedurally barred.

C. Liability and damages were not inextricably intertwined.

Even if preserved. Pickens' arguments fail. Pickens claims that there would have been damage even without the improper storage of combustibles. Thus, bifurcation was improper because the jury was precluded from separating out the damage that would have occurred if Pickens was not involved. Pickens' argument is without merit.

Liability and damages were not "inextricably intertwined." Under the actions for breach of contract and negligence, once Winthrop established proximate cause, Pickens would be liable for 100% of the damages. During the liability phase, Winthrop presented

evidence that, but for Pickens' breach of contract in storing combustible construction materials on the flat roof, **this** fire would not have spread to adjoining roofs and likely self-extinguished. Thus, the jury had substantial competent evidence that, but for Pickens' breach of contract in storing combustible construction materials on the flat roof, there would be no damage. Proximate cause was determined entirely in the liability phase. The damages were caused by Pickens' breach of contract and negligence as established during the liability phase. Liability and damages were not "inextricably intertwined" because **no** damage would have existed but for Pickens' breach of contract in storing combustible construction materials on the flat roof. Only the amount of damages was at issue during the damages phase of the trial. The damages phase established the amount of the cost of repairing or replacing, water and fire damage to the buildings.

Pickens confuses the issue of proximate cause for liability with the dollar amount of damage. It claims it was prejudiced because the jury heard evidence in the first phase that the storage of combustible materials on the flat roof "made the fire and resulting damages worse." Pickens claims bifurcation foreclosed the issue of causation before the jury was presented with Winthrop's damages. But Pickens chose not to address Winthrop's proof of causation in the liability phase. Winthrop claimed the damage was caused by Pickens and no damage would have occurred but for Pickens' breach of contract. There was no need to try liability and damages together for Pickens to challenge Winthrop's expert's testimony that the magnitude of the fire was caused solely by Pickens' storage of combustible construction materials on the flat roof allowing the fire to spread to other roofs.

V. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT WHERE DIRECT AND CIRCUMSTANTIAL EVIDENCE SUPPORTED LIABILITY AND DAMAGES WERE NOT SPECULATIVE

Pickens claims that it was entitled to a directed verdict because the jury was allegedly not provided with "the cost of repairs to Winthrop's property in the absence of Pickens' breach of duty." (Appellant's Brief, p. 40-41.) Pickens argues that Winthrop "...should have been required to offer some evidence as to what damage would have resulted from the fire without Pickens' involvement." (Appellant's Brief, p. 41.)

A. The jury had evidence supporting the amount of damages it awarded.

Pickens ignores the testimony and evidence considered by the jury in the damages phase of the trial. Winthrop had admitted into evidence a binder of documents establishing the specific amount of damages by category. (R. p. 921, lines 20-21; R. p. 973, lines 7-10, Pl. Ex. 67.) The binder included an invoice itemizing the amount paid to repair the flat roof in the amount of $1,123.65. (Pl. Ex. 67, Tab 22A; Bates # 3918.) The jury had this evidence including all other evidence contained within the binder during their deliberations. (Pl. Ex. 67.) None of this evidence was challenged by Pickens. Pickens never asked the jury to "carve out" any damage it claimed was caused by something other than its conduct. Instead of confronting the overwhelming evidence supporting the amount of Winthrop's damage, Pickens erroneously advised the jury that they did not have any evidence to determine what damages would have been caused anyway. (R. p. 969, lines 1-12.) Now Pickens asks this Court to improperly speculate as to how the jury reached its verdict as to the scope of damage. The jury had all the evidence it needed to determine damages to a reasonable certainty. The jury could have awarded all, some or none of the damages claimed by Winthrop. After weighing the

evidence, the jury chose to award $7,223,343.14. The final judgment for breach of contract and damages in the amount of $7,223,343.14 should be affirmed.

The authorities cited by Pickens do not help its cause. Pickens acknowledges South Carolina's black letter law that a jury should be able to determine damages with reasonable certainly, but never ties the facts of the cases to the present situation. (Appellant's Brief, p. 41.) Instead, Pickens merely asserts Winthrop has not done so. In fact, the cases cited by Pickens assist Winthrop. In *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981), South Carolina's Supreme Court reversed a directed verdict for defendants at the conclusion of the evidence on the alleged failure of the plaintiffs to present enough evidence to permit the jury to determine damages with reasonable certainty. In that case, a fast-food type building had been destroyed. *Id.* at 12. The property owner, not an expert, testified to the purchase price of the building and cost of construction. *Id* The defendants claimed an expert was needed to testify "as to the value of a building like that." *Id.* at 12-13. The Supreme Court disagreed and ruled that from the testimony of the owner the jury could determine a reasonable value for the building at the time of its destruction. *Id.* at 13. Here, there was testimony from the contractors who actually repaired the buildings at Winthrop as to what the charges were. And every invoice relating to the payments, including damage to the flat roof, was admitted into evidence and provided to the jury for review during their deliberations. (Pl. Ex. 67.)

Similarly, in *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005), this Court affirmed the trial court's denial of defendant's motion for directed verdict on a failure of damages proof where the president of a video-gaming business testified to his

lost profits and salary as a result of a breach of contract, fraud and negligent misrepresentation. The president testified to a range of damages. *Id.* at 226. The appellate court noted that the jury's verdict was "well within the range of damages" testified to. *Id.* at 227. Further, because the verdict was a general verdict, the Court would not speculate as to how the jury allocated damages. *Id.* Here, the agreed-upon verdict form contained one-line item requesting the jury to enter the total amount of Winthrop's damages. The jury did so. The final judgment for breach of contract in the amount of $7,223,343.14 should be affirmed.

B. Damages were not speculative.

Pickens' arguments depend on its misapprehension of Winthrop's case. Pickens claims that Winthrop's theory was that Pickens' actions "aggravated or exacerbated the damage resulting from this fire whose ignition could not be attributed to Pickens." (Appellant's Brief, p. 41.) But Winthrop's theory was that Pickens caused all the damage – there would be no damage but for Pickens' improper storage of combustible construction materials in breach of express contractual provisions and in violation of the code causing the fire to spread to adjoining roofs.

The parties agreed that the fire originated on the flat roof. (R. p. 801, line 25-p. 802, line 2.) Pickens' argument also ignores the evidence provided by Winthrop's expert, Mr. Arnold that, but for Pickens' storage of combustible construction materials on the flat roof, the fire would not have spread to adjoining roofs and likely self-extinguished. (R. p. 746, line 7-p. 749, line 7; R. p. 740, lines 7-13; R. p. 741, lines 10-15; R. p. 746, lines 6-17; R. p. 748, lines 5-13; R. p. 750, lines 5-10; R. p. 754, lines 9-16; R. p. 755, lines 2-4; R. p. 761, lines 18-22.) Thus, there was evidence that, but for Pickens' breach of

contract, there would have been no damage. Instead of self-extinguishing, the fire reached the eaves of the adjoining roof and continued to burn. (R. p. 761, lines 18-22.) The trial court noted the direct and circumstantial evidence supporting Pickens' liability for damage "but for" Pickens' storage of combustible construction materials on the flat roof:

> There is also testimony from Mr. Arnold with regard to the height of the fire, flames and that he saw and that could not have gotten to that height or burn that hot unless there were materials left up on the roof, combustible materials on the roof at the time to serve as fuel for that fire.
>
> Otherwise his testimony was that any other small fire on that - I will say rubberized roof because I am not familiar with all the terms and things that they use for these covers on the roof – are rubberized or plastic rubber or whatever.
>
> Nevertheless, his testimony was any fire that you put just directly on there without any other source of fuel would die out on its own without doing any real damage, except a little spot on the roof. That was there testimony. And so – and there is testimony to indicate that the fire on the flat definitely occurred on the flat roof. There is the size of the flat roof that is all on the record and everything. And where this fire started was near the eaves of the roof. And so – and the testimony was from Chief Driggers that the problem they had with the fire, and most of the damages caused because the fire got hot enough, high enough, to get in to the – basically the vents I don't know if he said exactly like that but I certainly think the expert Mr. Arnold did, got in to the vents which was high enough to get into the vents and in the eaves underneath the roof and that once it got in there it got in to those layers where the fire fighters couldn't get in to.

(R. p. 947, line 1-p. 948, line 5.)

> Most of the damage occurred from water having been pumped in and it had to be pumped because of where the fire was located in the roof and they had to keep pumping the water in there to try and put it out. Otherwise they could have gotten to it and put most of the fire out. So, that's the testimony.

(R. p. 949, lines 6-12.)

Thus, the jury had substantial competent evidence to determine damages to

Winthrop's property caused by Pickens' breach of the express contractual provision in storing combustible construction materials on the flat roof rather than on the ground, and violation of code. There is no "hole" in the evidentiary record. The only "hole" is the one Pickens dug itself into by failing to present a scintilla of evidence rebutting Winthrop's evidence that Pickens' breach caused the damages sought and banking its entire defense on an unnecessary element of proof – that Winthrop prove the source of ignition.

Again, Pickens' argument is unsupported by South Carolina law or the evidence at trial. South Carolina allows a plaintiff to recover those damages proximately caused by the defendant's breach of contract or tort duty. *Maro*, 389 S.C. at 222. The trial court did not abuse its discretion in denying Pickens' motion for directed verdict as to damages in light of this overwhelming evidence that, but for, Pickens' breach of express contractual provisions and code, the fire would not have spread to adjoining roofs and likely self-extinguished causing no damage. Pickens presented no evidence to rebut the testimony of Mr. Arnold or Chief Driggers. Pickens' liability for the full amount of the damages under contract and tort was supported by competent evidence. And Pickens never rebutted or challenged Winthrop's evidence supporting the amount of the damages.

VI. THE TRIAL COURT DID NOT ERR IN FAILING TO APPLY COMPARATIVE FAULT REDUCTION TO CONTRACT ACTION

A. Pickens waived any challenge to the jury's verdict by agreeing to the form and substance of the general verdict form.

After the liability part of the trial, the jury found (1) "Pickens Roofing breached the terms of its contract with Winthrop and that this breach was a proximate cause of Winthrop's damages," and (2) "Pickens Roofing was negligent and that such negligence

proximately caused the [sic] Winthrop's damages." (R. pp. 8-9.) Questions 3 and 4 asked the jury to attribute the negligence by each party that contributed to the damages caused by negligence. Pickens never objected to the use of this verdict form or the verdict once it was entered.

Thereafter, the damages portion of the trial continued. The court instructed the jury to determine the total amount of damages. (R. p. 972, lines 9-15.) Neither party had any exceptions. (R. p. 973, lines 4-6.) The court provided the jury with a verdict form that asked the jury only to fill in a blank in a single question: "We the Jury find damages in the amount of $_____." (R. p. 12.) Neither party expressed any exceptions. (R. p. 973, lines 4-6.) The jury filled in the blank as directed, finding that the damages were $7,223,343.14 (R. p. 12; R. p. 975, line 8; R. p. 12.) When they returned and informed the court of their verdict, neither party had any questions of the jury. (R. p. 975, lines 16-18.) The jury was excused. (R. p. 976, lines 22-23.)

Winthrop was required to elect its remedy, to choose which cause of action it wished to recover on. *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. This Court has explained that "under 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). This Court held "comparative negligence is inapplicable," and cannot operate to reduce an award when the award is based on "a breach of contract cause of action." *Id* Thus, as in *Ritter*, the trial court here "was correct in not reducing the award" based on breach of

contract. *Id. Ritter*'s reasoning comports with South Carolina's comparative negligence statute, S.C. Code Ann. 15-38-15 (1976), which contains nothing that says it applies to actions for damages for 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).

Pickens argues that *Ritter* does not apply, arguing that "the duty giving rise to Winthrop's breach of contract claim exists outside of the contract between the parties." (Appellant's Brief p. 45.) However, the contract expressly provided that all roofing materials would be stored in two places, neither of which was the flat roof. Further, the contract required Pickens to "[c]omply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss." (Appellant's Brief, p. 45.) Thus, Pickens breached express provisions of the contract in storing materials on the flat roof. Pickens' violation of the International Fire Code, which Pickens stipulated had the force of law in South Carolina, was a breach of contract claim for a duty to follow the law that was stated within the contract itself. (Appellant's Brief p. 45.) The argument that the breach of contract claim was for a breach that "exists outside of the contract" is nonsense. Moreover, Winthrop was found 40% comparatively at fault based on the allegation it failed to appoint a Fire Prevention Program Superintendent. (R. p. 379, line 25-R. p. 381, line 13.) However, the contract expressly provided that Winthrop was not responsible to supervise or inspect Pickens' work, or ensure that Pickens' complied with its contractual obligations. (R. p. 1081.) Critically, Pickens never pled or asserted that Winthrop breached the contract. The jury was never instructed to make any finding

whether Winthrop breached the contract. Thus, the 40% reduction could **only** apply to the negligence count.

Further, 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 required compliance with the fire code and prohibited storage of materials on the roof. Thus, the total amount of damages were properly awarded for breach of contract.

Had Pickens desired to somehow limit the amount of damages the jury awarded for breach of contract specifically, it could have offered evidence to rebut Winthrop's evidence. Pickens could have also requested a particularized verdict form that required the jury to identify an amount of damages attributable to breach of contract or negligence. Pickens also could have objected to the use of a generalized verdict. Pickens offered no evidence. It made no such objections, thus waiving any error in the jury's verdict form or the jury instruction. *See Creach*, 331 S.C. at 464. Instead, Pickens waited until the jury was excused, then asked the court to apply comparative *negligence* principles to the judgment even though the verdict did not identify it was based on the contract. (R. p. 978, lines 7-25.)

B. Comparative fault principles do not apply to contract damages.

The actions for breach of contract and negligence are different actions, and legal principles applicable to each are wholly independent. *See Smoak v. Carpenter Enters., Inc.*, 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995) (holding that a court should not charge a jury in a breach of contract action on contributory negligence, "a tort concept," because it is a legal principle inapplicable to the case).

In its answer to Winthrop's complaint, Pickens' answer only included affirmative defenses to Winthrop's negligence count. (R. pp. 61-66.) Those defenses can only apply to negligence. On the breach of contract count, Pickens did not raise *any* affirmative defense that would provide for any setoff against Winthrop. Affirmative defenses must be pled. Rule 8(c), SCRCP. No authority allows Pickens to bootstrap an affirmative defense to one cause of action to a different and independent second cause of action. Pickens' arguments to expand the scope of South Carolina's comparative negligence statute to include contracts damages are wholly without merit and would require an amendment to the existing statute. The trial court correctly applied South Carolina law. There is no error warranting reversal of the final judgment for breach of contract in favor of Winthrop.

VII. THIS COURT SHOULD AFFIRM FOR ANY GROUND APPEARING ON THE RECORD

Rule 208(b)(2), SCACR, states that a respondent may argue this Court should "affirm for any ground appearing in the record as provided by Rule 220(c)." *See also I'On, L.L.C. . Town of Mt Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000). "Rule 220(c), in turn, provides that "'[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.'" *Id.* at 418. This

means that a respondent may raise any additional reasons appearing in the record supporting an affirmance, whether or not they were raised or ruled upon in the trial court. *Id.* at 420. This Court can then review those reasons and "rely on them *or any other reason appearing in the record* to affirm the lower court's judgment." *Id.*

"An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *Id.* at 421. Consequently, Winthrop respectfully requests this Court "to affirm for any ground appearing on the record," as authorized by Rules 208(b)(2) and 220(c), SCACR.

CONCLUSION

Winthrop respectfully requests that this Court affirm the judgment on appeal for the reasons stated herein.

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February 6, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

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

REPLY BRIEF OF APPELLANT

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This case presents a dangerous opportunity for the creation of new law that would result in the wholesale abandonment of traditional notions of proximate causation in South Carolina. Until now, this state has adhered to the black letter formulation of proximate cause, which requires a plaintiff to prove both cause-in-fact and foreseeability. If the trial court's ruling below is allowed to stand, both of these elements will be replaced by a legal construct in which fortuitous proximity and happenstance may give rise to monumental liability. While the attendant procedural errors committed by the trial court provide a solid foundation for reversal, it is its adoption of a novel theory of liability that carries the greatest risk of opening new, unintended avenues of recovery and upsetting well-settled principles regarding the apportionment of risk between contracting parties.

I. WINTHROP'S THEORY OF LIABILITY, WHATEVER ITS NAME, FAILS AS A MATTER OF LAW.

Winthrop vehemently argues that it did not rely on a "spread theory" in this case and that Pickens uses this theory as a "straw man." *See* Initial Brief of Respondent at pp. 27-28. Whether it is labeled as a "spread theory" or not, it is undisputed that Winthrop sought to hold Pickens liable for making the fire worse, as it had no evidence that Pickens caused the fire to ignite. In the unique circumstances presented here, Winthrop cannot survive the "but for" test of causation and a directed verdict should have been granted.

The "spread theory" utilized by plaintiffs in other jurisdictions (and described in the cases cited by Pickens) was the only theory available to them, because unexplained fires caused their damages. The cited cases do not rise and fall on the fact that many of those cases involved adjoining landowners, and therefore cannot be distinguished from

the facts in this case on that basis. Rather, in those cases courts allowed the injured plaintiffs to recover from the defendants because the conditions that the defendants created gave "rise to an extraordinary and undue risk of combustibility." *See* 23 Am. Jur. *Proof of Facts* 2d 461 at § 8. By creating and/or maintaining such dangerous and unsafe conditions, courts have reasoned that it was foreseeable that *a fire may start*, even if the precise mechanism of its ignition was undetermined. *See id.*

Winthrop's theory of recovery, whatever its name, is fatally flawed because Pickens' alleged misconduct was not the "but for" cause of the fire's ignition, nor was it reasonably foreseeable that such a fire would begin as a consequence of such misconduct. Winthrop therefore failed to establish proximate causation, a requisite element of both its breach of contract and negligence causes of action.

There is no dispute that Winthrop failed to trace the cause of the fire's ignition to Pickens. Moreover, Winthrop failed to establish that it was reasonably foreseeable to Pickens that a fire was more likely to ignite because of the construction materials stored on the flat roof. The construction materials were intended to be installed on the adjacent pitched roof and were not known to spontaneously combust. The mere storage of these materials did not create an extraordinary and undue risk of combustibility such that liability based on a "spread theory," or some other negligence theory, could be established.

Furthermore, it was unforeseeable that a fire was likely to start *on the flat roof*, as opposed to any other location in, on or near Owens or Bancroft Halls. Given that it was, according to the uncontradicted evidence in the record, not a location where people would be expected to be during the almost 24-hour period between the time that Pickens'

employees left the worksite and when the fire occurred,[1] or where any mechanical activity was taking place,[2] a fire breaking out on the flat roof was no more likely than a fire igniting in a classroom, professor's office, or an HVAC system. It was therefore unforeseeable to Pickens that its alleged storage of felt paper or shingles would cause a fire to spread or be made worse, even if the manner of its storage violated NFPA 241. Winthrop's theory therefore fails, rendering the trial court's denial of Pickens' directed verdict motion erroneous.

II. THE PREJUDICE ANALYSIS URGED BY WINTHROP FOR ERRONEOUSLY QUALIFIED JURORS ONLY APPLIES IN CRIMINAL CASES.

The separate and distinct processes for examining prospective jurors and impaneling juries in civil and criminal proceedings are set forth in S.C. Code Ann. §§ 14-7-1010 – 1140 (Supp. 2014). In both types of cases, jurors are required to be impartial and the trial court must undertake the appropriate examination to prevent unqualified persons from jury service:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

---

[1] Winthrop Police Officer Jamie Howe testified that he had to unlock the doors from the attic to the flat roof in order to let firefighters onto the flat roof to fight the fire. (*See* R. p. 484, lines 12-15. *See also* R. at p. 589, lines 2-9 (testimony that to access the flat roof, a person would have to go through an attic from the third floor and the doors to the attic are typically locked).)

[2] (*See* R. p. 589, lines 10-15 (Hardin affirming that "[n]o part of the mechanical system for the elevator is on the [flat] roof.").)

S.C. Code Ann. § 14-7-1020 (Supp. 2014). "It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial." *State v. Holland*, 261 S.C. 488, 495, 201 S.E.2d 118, 122 (1973); *see also Alston v. Black River Electric Co-op.*, 345 S.C. 323, 326-27, 548 S.E.2d 858, 859 (2001) ("If a potential juror has an interest in the lawsuit such that she is 'not indifferent in the cause,' the juror shall be deemed incompetent to serve on the jury.") (quotation omitted).

The specific process for impaneling a jury in a civil action is set forth in Sections 14-7-1050 – 1070 (Supp. 2014). Section 14-7-1050 provides, in relevant part,

> [T]he clerk ... shall furnish the parties or their attorneys with a list of twenty jurors from the whole number of jurors who are in attendance, the names on the list to be numbered from one to twenty, and be stricken off by numbers in the same manner as the regular panels of jurors in those courts have been formed. From this list the parties or their attorneys shall alternatively strike, until there are but twelve left, which shall constitute the jury to try the case or issue. In all cases the plaintiff shall have the first strike and in all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury.

S.C. Code Ann. § 14-7-1050 (Supp. 2014). "[O]bjection[s] for cause must be made before striking . . . ." S.C. Code Ann. § 14-7-1070 (Supp. 2014).

The Supreme Court has stated that the legislative intent of § 14-7-1050 was to give litigants a fair and impartial jury which is guaranteed by the State Constitution. *See Brown v. S.H. Kress & Co.*, 170 S.C. 178, 170 S.E. 142, 143 (1933) (citation omitted); *see* S.C. Const. Art. I, § 14.

In sharp contrast to the specific rules for the striking of a civil jury (*see* S.C. Code Ann. §§ 14-7-1050, 14-7-1070), in criminal cases the law simply requires that it be done "according to the established practice." S.C. Code Ann. § 14-7-1100 (Supp. 2014). Commentators have explained the "established practice" as follows:

> [J]urors are required to come forward and stand before the parties and their attorneys, who then express their approval or disapproval, the state going first. The customary procedure is that the solicitor will say either "Excuse the juror," in which case the juror resumes his or her seat, or "Present the juror," in which case the defense must then decide whether to accept or reject the juror. The defense must then either exercise a strike, stating "Excuse the juror," or "Seat the juror," in which case the juror is seated in the jury box.

23 S.C. Jur. *Jury* § 28.

In light of the differences between the procedures used to impanel juries in civil and criminal cases, the Supreme Court's analysis in *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002), cited by Winthrop as barring Pickens' arguments with respect to Juror 25 (*see* Initial Brief of Respondent at p. 20), is inapposite here. *Maynard*'s three-part test, requiring that the objecting party (i) "exhaust[] all . . . peremptory challenges"; (ii) demonstrate "the juror was erroneously qualified"; and (iii) "demonstrate he was deprived of a fair trial" (*id.* at 538, 564 S.E.2d at 84) does not apply in a civil case.

With regard to the first element, it is worth noting that in a criminal trial, a defendant may not need or want to utilize all of his peremptory strikes. *See* 23 S.C. Jur. *Jury* § 28. However, he must do so if he wishes to preserve any error as to the qualification of a particular juror. *See Maynard*, 349 S.C. at 538, 564 S.E.2d at 84. On the other hand, a party to a civil suit always uses the four strikes allotted for each side. *See* S.C. Code Ann. § 14-7-1050 (Supp. 2014) ("From this list [of 20 prospective jurors] the parties or their attorneys shall alternatively strike, until there are but twelve left, which shall constitute the jury to try the case or issue.").

The third *Maynard* element is likewise inapplicable in a civil trial setting. In describing the requirement that the objecting party "demonstrate he was deprived of a fair trial," the Supreme Court concluded that the forced use of a peremptory strike upon an

otherwise unqualified juror alone is not evidence of prejudice. *See Maynard*, 349 S.C. at 541-42, 564 S.E.2d at 86 (*citing United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). The Court explained that an objecting party must demonstrate "he was deprived of a subsequent strike he would have exercised, and to which he would have been entitled, but for the forced strike. Such a claim may be preserved by stating for the record an articulable objection to a subsequently presented juror." *Id.* at 86 n. 6, 564 S.E.2d at 542.

An objecting party in a civil action has no opportunity to "object[] to a subsequently presented juror" after all of its strikes have been utilized. Thus, the requirements established by *Maynard*, including that the objecting party show prejudice by "demonstrating he was deprived of a fair trial," cannot logically be imposed upon litigants in a civil action.

Here, Pickens was deprived of its statutory right to "a panel of twenty *competent* and *impartial* jurors from which to strike a jury" pursuant to Section 14-7-1050 (emphasis added) because the trial court erroneously qualified Juror 25.[3] By failing to excuse Juror 25 for cause prior to establishing the pool of twenty jurors from which the parties would strike, the trial court required Pickens to use one of its peremptory strikes on an impartial and unqualified juror. This error mandates a new trial.

[3] The trial court had adequate evidence before it to find that Juror 25 was potentially biased. She was currently affiliated with Winthrop as a "student researcher," she was a recent graduate of the University, and she had personal knowledge of the facts of the case, including the cause of the fire. (*See* R. p. 116, lines 7-8, 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.) The court's failure to acknowledge all of these issues in denying Pickens' motion to disqualify evidences its miscomprehension of Juror 25's potential for partiality. (*Id.* at p. 145, lines 11-23.)

III. PICKENS PRESERVED ITS OBJECTION TO BIFURCATION.

Winthrop argues that Pickens has not preserved its objection to bifurcation on the ground that causation and damages were inextricably intertwined. *See* Initial Brief of Respondent at pp. 38-39. Winthrop asserts that Pickens should be limited to its pre-trial objection to bifurcation. *See id.* The law of error preservation yields no support for this proposition. Prior to the trial court's evidentiary rulings limiting Winthrop's expert's testimony, Pickens could have not known that causation and damages would become so integrally related. At the appropriate time, in its motion for new trial, Pickens timely raised the very argument it now posits to this Court. (*See* R. p. 977, line 17 – p. 978, line 3.)

At the outset of trial, Winthrop intended to prove that Pickens' conduct not only caused the fire to spread, but also that it led to the fire's *ignition*.[4] Pickens objected during the pre-trial conference to Winthrop's motion to bifurcate based on its concern that "the jury ought to know the full amount of the damages and that . . . [if the issues were bifurcated] the jury would not perceive the magnitude of the damages and the magnitude of any verdict in this case." (R. p. 986, line 17 – p. 987, line 2.) Pickens' objection was founded upon its concern that the jury's determination of the central question in the case (at least at that point)—whether Pickens started the fire—might not be given appropriate consideration in the absence of evidence as to the size of Winthrop's alleged damages.

[4] (*See* R. p. 211, lines 21-22 (stating to the trial court that "[t]his fire would not have occurred and spread if there weren't combustibles there."); p. 244, lines 16-23 (stating to the jury during its opening statement that "this fire would not have occurred or spread to Owens and Bancroft but for combustibles being stored on the flat roof").)

The trial court bifurcated the trial into liability and damages phases based on its conclusion that separate trials on these issues would promote convenience and save judicial resources. *See* Rule 42(b), SCRCP. (R. p. 149, line 25 – p. 151, line 13.) However, case law requires that such considerations yield to concerns of potential prejudice to a party. *See Cox v. E.I. DuPont de Nemours & Co.*, 39 F.R.D. 56, 58 (D.S.C. 1965) ("consider[ations] of time and money [are] factors . . . , [but] the real issue is prejudice or lack of prejudice with convenience as a close second."). The trial court's emphasis on convenience, expedition, and economy over Pickens' objection based on potential prejudice was error.

Subsequently, during the liability phase of trial, the court narrowed the scope of Winthrop's evidence by prohibiting its expert witness from testifying "concerning the causation, proximate cause and that sort of thing" because "we don't have . . . any factual evidence to show what started the fire." (R. p. 261, lines 18-24.) The trial court explained:

> He can't testify concerning . . . what was on the roof because he doesn't know. He wasn't up there. And when the fire got through there was nothing up there basically. Everything burned up. . . .
>
> Now, however, once the fire started the combustible materials would have made the fire worse. And I think he can testify to that, if that's his testimony . . . . And if he's properly qualified with expertise in that area I think he can testify to that.
>
> However, the Court is not going to allow him to testify on proximate cause. He can testify that if there are combustible materials up there which were prohibited that these combustible materials would have made the fire worse in allowing it to spread, to get as high as they did to get on the adjoining roofs. As I understand it that's the plaintiff's position and on a flat roof not allowed to have the materials and once there are combustible materials that is [sic] what caused the fire to be as bad as it was. I think he can testify concerning that, but he can't testify concerning proximate cause because he doesn't know what was on the roof and so,

> that's the problem I see in the plaintiff's case. I don't think he can testify as to proximate cause in this case. He can't testify but for this materials [sic] up there this fire would not have occurred. That's basically the position of the defense. I don't think he can testify to that. . . .
>
> I don't believe he can testify that this fire would not have occurred unless these materials were up there. I don't think there is enough factual evidence to support that conclusion.

(R. p. 262, line 1 - p. 265, line 5.) The court excluded the only evidence which would have established a causal connection between Pickens' storage of construction materials on the flat roof and the fire's *ignition*. (*See id.*) As a result, Winthrop's expert could only opine that but for Pickens' wrongdoing the fire would not have *spread*. (*Id.*)

Following Winthrop's proffer of its expert witness the trial court reiterated that it would not allow Winthrop to present opinion testimony that but for Pickens' conduct the fire would not have started. The court stated:

> I don't see how you are going to get to ignition, when I can think of at least 30 things that could have started this fire and all of them would be pure speculation. You can't go there. That's what I am telling you. You will not be able to speculate about the cause of the fire and how it started.

(R. p. 679, lines 2-8.) Winthrop was therefore left with the theory that Pickens' actions *worsened the effects* of the fire that occurred. (*See id.* at p. 790, lines 6-8; p. 790, line 25 - p. 791, line 2; p. 791, lines 4-5.) In other words, Winthrop was forced to rely on a "spread" or "aggravation" theory because it was unable to prove how the fire started or who caused it to ignite. (*Id.* at p. 290, lines 15-18; p. 295, lines 12-23; p. 747, lines 22-24.)

The court's limitation of Winthrop's evidence as to proximate cause necessarily made the issues of causation and damages inextricably intertwined. Nonetheless, because the trial was already bifurcated, the jury was forced to consider damages in a vacuum.

Evidence of Winthrop's damages was presented after causation had already been established, leaving the jury without any ability to determine which damages would have occurred in the absence of Pickens' alleged misconduct and which damages resulted from it.[5] The bifurcation of liability and damages prejudiced Pickens—for reasons that did not exist at the time the trial court made its decision to separate the trial into two phases. After the trial had concluded, the court erred in refusing to acknowledge that separating these issues was inappropriate where Winthrop's theory of liability had become solely focused on whether Pickens' conduct *worsened* the effects of the fire.

Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998), does not support Winthrop's contention that Pickens failed to preserve its objection to bifurcation on the ground that causation and damages were inextricably intertwined, because Pickens made an objection on that very basis to the trial court. In *Creighton*, the defendant moved for bifurcation of the liability and damages phases of trial and the plaintiffs objected. *Id.* at 107-08, 512 S.E.2d at 516. At the pre-trial conference, the plaintiffs' attorney argued that bifurcation was improper on the ground that the jury should not hear "sterile testimony" alone. *Id.* at 108, 512 S.E.2d at 516. On appeal, however, the plaintiffs asserted as an additional ground that the trial court

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[5] Parenthetically, it is worth noting that Winthrop claims throughout its brief that the "evidence ... established that there would have been *no damage* had Pickens complied with the contract ...." Initial Brief of Respondent at p. 48 (emphasis added); *see also id.* at pp. 40, 43. This assertion has no foundation in the record. Winthrop's expert, Dan Arnold, a registered fire protection engineer, admitted that in the absence of other combustibles, a fire commencing on the flat roof "would spread, melt through the rubber roof and then eventually self-extinguish." (R. p. 750, lines 8-10.) Mr. Arnold's testimony that the fire would have "self-extinguished" is incompatible with the assertion that "no damage" would have occurred without Pickens' involvement.

Thus, even if Winthrop's theory of liability had merit, Pickens cannot be held liable for the *full amount* of Winthrop's damages where Winthrop claimed that Pickens caused those damages to be *worse* than they otherwise would have been.

"ignored judicial economy by bifurcating the trial." *Id.* This second ground was *never* presented to the trial court. *See id.* On appeal, this Court held that "[b]ecause the argument presented by the [plaintiffs] to the trial court was based on grounds other than those raised on appeal, the issue is not properly preserved." *Id.*

Here, Pickens is not asserting that causation and damages are intertwined for the first time on appeal. That argument was raised before the trial court at the appropriate time, in Pickens' motion for new trial absolute. (*See* R. p. 977, line 17 – p. 978, line 3.) *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (quotation omitted). Pickens gave the trial court an opportunity to rule on the issue now before this Court. In relying upon concerns for judicial convenience, expedition and economy in denying Pickens' motion for new trial without considering the prejudice to Pickens, the trial court erred. (*See* id.)

Creighton is also distinguishable on the basis that the "judicial economy" ground submitted by the plaintiffs on appeal was available to the plaintiffs and could have been raised prior to the start of trial. In the present case, Pickens' contention that the issues of liability and damages were intertwined and not separate and distinct was not available to it at the pre-trial conference when the court granted Winthrop's motion to bifurcate. At that time, based on Winthrop's expressed theory that Pickens caused the fire to ignite—thereby causing *all* of the resulting damage—the issues of causation and damages were separate and distinct. However, after Winthrop's theory of liability changed, those issues became necessarily interrelated. Pickens' objection to bifurcation is therefore preserved.

IV. FOR PUBLIC POLICY REASONS, THE COURT'S JUDGMENT SHOULD BE CONTROLLED BY THE JURY'S COMPARATIVE FAULT DETERMINATION.

Pickens maintains that the appropriate remedy in this case is either to reverse the trial court's denial of Pickens' directed verdict motion or, alternatively, to grant it a new trial. However, in the event that the Court reaches the question as to the bearing that the jury's comparative negligence determination should have on the judgment, then it must reject Winthrop's arguments out of hand.

Winthrop attempts to rewrite the language of the parties' contract in an effort to manufacture a separate and independent contractual duty on which to hold Pickens liable under a breach of contract theory beyond the duties to which it was bound by applicable law. Its mischaracterization of the contract provisions undermines its argument that Pickens breached any duties arising solely under the parties' agreement and supports Pickens' theory that the jury's verdict should be governed by its comparative negligence determination.

As expected, Winthrop argues in its brief that "the contract expressly provided that all roofing materials would be stored in two places, neither of which was the flat roof." *See* Initial Brief of Respondent at p. 47. It relies upon section 1.9(D) of the Specifications. (R. p. 991 at § 1500-2.) Section 1.9(D) provides:

> Prior to starting work, obtain approval from Owner for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved locations.

(Id.) Winthrop submits that this provision "only authorizes storage of materials in specific locations on the ground." Initial Brief of Respondent at p. 3.

Nothing in the clear and unambiguous language of Section 1.9(D) limits storage of construction materials to the ground as Winthrop suggests. The only reasonable interpretation of that section is that it requires Pickens to: (1) obtain Winthrop's approval before commencing any work *on the ground*, and (2) keep its *ground level operations* confined to those approved locations. (R. p. 991 at § 1500-2 (emphasis added).) This interpretation is entirely consistent with the other evidence in the record regarding Winthrop's concerns with the appearance and aesthetics of its campus. (*See* R. p. 401, line 9 - p. 402, line 9.)

The only requirements in the parties' contract that limit the locations of material storage are Sections 1500(L)(4) and 1700-3.4(A)(1), which incorporate existing laws, ordinances, rules, and regulations, including specifically NFPA 241. (R. p. 991 at 1500(L)(4), 1700-3.4.(A)(1).) Because the duties imposed by these authorities exist outside of the parties' contract, Pickens' breach of those duties amounts to mere negligence, not a failure to fulfill obligations arising solely under the parties' private agreement.

Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013), cited by Winthrop (*see* Initial Brief of Respondent at p. 46), is distinguishable because in this case both a tort claim and a contract claim exist. In that case, Ritter operated as a licensed used car wholesaler in the State of Florida. *Id.* at 646, 748 S.E.2d at 803. Ritter was authorized to purchase used vehicles from the Florida Auto Auction of Orlando ("FAAO") and frequently transacted with Todd Taylor, a broker in South Carolina, to resell automobiles purchased from the FAAO to dealerships in other states. *Id.* at 647, 748 S.E.2d at 803. Taylor would direct that Ritter purchase vehicles

from the FAAO and resell them to him for distribution to his dealership-clients in South Carolina. *Id.* At some point during the relationship between Ritter and Taylor, and based on the frequency of the parties' transactions, Ritter gave Taylor the authority to directly deposit checks for the purchase of the vehicles from the South Carolina dealerships into Ritter's account. *Id.* at 647-48, 748 S.E.2d at 803. Taylor used this authority to establish an elaborate check kiting scheme. *Id.* at 648, 748 S.E.2d at 803.

Upon discovering the fraud perpetrated by Taylor, Ritter brought an action against Buchanan Volkswagen, Inc., one of the South Carolina dealerships that Taylor represented, in order to recover payment for unpaid vehicles sold to Buchanan by Ritter through Taylor. *Id.* Ritter asserted multiple causes of action, including breach of contract, negligence, and negligent supervision. *Id.* at 648, 748 S.E.2d at 804. The case was tried before a special referee. *Id.* The special referee held that Ritter's allegations of negligence and negligent supervision were mere "examples of the nonperformance of the contractual obligations between the parties" and that those causes of action did not exist outside of the parties' agreement. *Id.* The court entered judgment in Ritter's favor on its breach of contract action. *Id.*

On appeal, Buchanan Volkswagen argued that the special referee failed to apportion liability between it and Ritter based on Ritter's negligent business practices in dealing with Taylor. *Id.* at 651, 748 S.E.2d at 805. In making its argument, Buchanan agreed that "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." *Id.* This Court held that "the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Id.* (citation omitted). Because Buchanan's

liability to Ritter for payment for the vehicles it purchased through Taylor arose only because of the parties' contractual arrangement, no separate tort liability existed to hold Buchanan liable for Taylor's conduct. *Id.* Since no separate tort liability existed, tort defenses, such as comparative negligence were inapplicable. *Id.*

In this case, Pickens' duties arose pursuant to applicable law, including NFPA 241, and are only the basis of a breach of contract action because "all applicable laws" were specifically integrated into the parties' agreement. (R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) Winthrop admits that "[t]here is no dispute that the contract required Pickens to follow code." (R. p. 819, lines 22-24; p. 820, lines 5-6.) Even if those duties had not been incorporated into the contract, Pickens would have been bound by law to comply with these requirements. In effect, the contract merely acknowledged the duties imposed upon Pickens by law. Insofar as this case is concerned, the contract did not impose obligations upon Pickens that did not otherwise exist under the law.

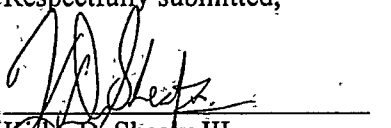
Winthrop argues that Pickens should have brought a counterclaim for breach of contract and that by doing so it could have had its potential contract liability reduced. *See* Initial Brief of Respondent at p. 47. It fails to acknowledge that a breach of contract action was not available to Pickens because the contract only expressed the requirement that Pickens, as the contractor, comply with applicable laws, ordinances, rules, and regulations. No countervailing expression of Winthrop's obligations to comply with extant legal authorities can be found in the contract. (R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) A breach of contract action against Winthrop is not viable in this case, and it is disingenuous of Winthrop to suggest that Pickens could have protected its rights by bringing a counterclaim.

Winthrop also argues that its comparative negligence should not be held against it pursuant to the terms of the contract because the agreement "expressly provided that Winthrop was not responsible to supervise or inspect Pickens' work, or ensure that Pickens' [sic] complied with its contractual obligations." *See* Initial Brief of Respondent at p. 47 (*citing* R. p. 991 at 1400-3). This provision does not contract away Winthrop's duty to maintain the safety of its own property. *See Wilson v. Marshall*, 260 S.C. 271, 276, 195 S.E.2d 610, 613 (1973) (recognizing a "duty to exercise due care for one's own safety"). "One person being at fault will not dispense with another's using ordinary care for himself." *Langley v. Boyter*, 284 S.C. 162, 166, 325 S.E.2d 550, 553 (Ct. App. 1984).

If Pickens is liable to Winthrop, its liability arises as a matter of law irrespective of its contractual promise to abide by the duties that give rise to that liability. Such liability sounds in tort, despite being enshrined in the parties' contract, and applicable affirmative defenses, such as contributory negligence, should apply. Winthrop's own contributory negligence, in failing to take measures required by applicable law to minimize the risk of fire (*see* R. p. 531, lines 9-23; p. 579, lines 16-24; p. 584, line 15 – p. 586, line 5), should be considered and applied to the jury's determination in this case. Allowing a party to shield itself from the consequences of its own negligence in bringing about a loss by wrapping another party's legal duties in a contract is not sound public policy, and it produces an unjust result here.

an instruction that the judgment be adjusted according to the jury's comparative negligence determination.

Respectfully submitted,



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