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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal,
Chief Justice of the Supreme Court of South Carolina (Retired),
Acting Circuit Court Judge

Supreme Court Case No. 2022-000368
Court of Appeals Case No. 2019-000164
Circuit Court Case No. 2015-CP-46-3456

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeanette Howe,

Respondents,

V.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Cheste1ion Company; Beloit Corporation; Black Clawson Converting Machinery LLC, Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, A Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc. f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber Industries, Inc.); Cleaver-Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Enterprises, Inc. f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boe Group, Inc. f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as successor-in-interest to Buell Engineering Co.; Marsulex Environment Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies,

Inc. f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants,

Of which Cleaver-Brooks, Inc. is the Appellant/Petitioner

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INTRODUCTION

The trial court and a unanimous Court of Appeals panel agreed that Appellant-Defendant Cleaver-Brooks engaged in such serious discovery misconduct that sanctions were warranted under Rule 37(b), SCRCP. Cleaver-Brooks was required to pay reasonable attorneys' fees and expenses to Plaintiff-Respondent Timothy Howe, personal representative for the Estate of Wayne Erwin Howe (hereinafter "Plaintiffs"), due to its consistent pattern of discovery obstruction over the course of a two-year period.

The record shows Cleaver-Brooks refused to produce documents or a corporate representative until Plaintiffs moved to compel. At the hearing on this motion, Cleaver-Brooks assured the trial court it would produce all relevant documents and a prepared corporate representative. Despite such assurances, and warning from the trial court that failure to meet them would result in sanctions, Cleaver-Brooks proceeded to produce incomplete and misleading documents, and an unprepared corporate representative, concerning the key issue in the case. Specifically, Cleaver-Brooks responses to discovery showed there were two Cleaver-Brooks boilers at Decedent Wayne Howe's Bowater jobsite.

Based upon the documents produced and testimony of Cleaver-Brooks' corporate representative, Plaintiffs started trial with the incorrect belief that there were two asbestos containing boilers at Bowater.

It was not until well into trial, near the end of Plaintiffs' case-in-chief, that Cleaver-Brooks produced documents that had been in its possession for decades, showing that there was only one Cleaver-Brooks boiler at Bowater. The following day, its corporate representative for the first time explained that the references to two boilers in Cleaver-Brooks' original production had been a "typographical error." The combined effect of this late production and previously undisclosed testimony was incredibly damaging to Plaintiffs' case.

The Hon. Jean H. Toal, former Chief Justice of the Supreme Court of South Carolina (Retired), presided over all pre-trial and trial proceedings. During multiple hearings and in multiple written orders, Judge Toal found Cleaver-Brooks' discovery responses and testimony were untimely, incomplete, misleading, and false, causing "tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury." Finding, "Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read," and Cleaver-Brooks discovery efforts "incredibly sloppy" and a "dereliction" of its discovery obligations, Judge Toal ordered it to pay Plaintiffs' attorney fees and expenses incurred due to Cleaver-Brooks' discovery misconduct. The Court of Appeals agreed with the trial court's findings of fact and affirmed that the imposed sanctions were appropriate. This Court should likewise find Judge Toal's findings of fact supported by the record and affirm both the decision to sanction Cleaver-Brooks and the amount of the sanctions.

RE-STATEMENT OF ISSUES ON APPEAL

1. Did Cleaver-Brooks fail to properly and fully disclose critical information and documents about its boilers at the Bowater facility even after multiple discovery requests and a warning from the trial court that sanctions would result from its continued obstruction?
2. Did the trial court abuse its discretion in sanctioning Cleaver-Brooks or in determining the amount of sanctions imposed against it?

STATEMENT OF THE CASE

"Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read."

- The Hon. Jean H. Toal, Chief Justice of the Supreme Court of South Carolina (Retired), Acting Circuit Court Judge (R. 8)

This case concerns Wayne Howe, who died of the terminal cancer mesothelioma, caused by asbestos. (R. 1616:13 – R. 1624:18). Plaintiffs were Mr. Howe's surviving spouse, Jeanette

Howe,[1] and son and personal representative for his estate, Timothy Howe. The original Complaint was filed on November 9, 2015, naming Cleaver-Brooks as a manufacturer and seller of asbestos containing products which caused Mr. Howe's mesothelioma. (R. 36-66).

Before his passing, Mr. Howe testified he worked at Bowater paper mill in Rock Hill, South Carolina for several decades as a pipefitter and mechanic. (R. 1184:17 – R. 1187:3, R. 1191:13-15). While there, he was exposed to asbestos from boilers, pipes, and precipitators located in Bowater's powerhouse. (R. 1187:7-18, 1188:6-12, 1189:22 – R. 1190:4. 1188:13-17, 1194 at 19:20-23, 1197 at 29:25-30:4). It was undisputed that Cleaver-Brooks manufactured at least one asbestos-containing boiler used at Bowater. (R. 1234 at 42:18-25, 43:6-21). Thus, as acting Circuit Court Judge Jean Toal recognized, "the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. 6). Specifically, the critical issue was whether there was a Cleaver-Brooks boiler in the powerhouse, as the evidence showed that all boilers at Bowater were either in the powerhouse (where Mr. Howe worked) or the administration building (where he did not). (R. 1293, para. 14).

The record establishes Cleaver-Brooks engaged in a pattern of discovery obstruction that continued even after the trial court's warning that sanctions would result from this misconduct. Asbestos cases in South Carolina's Sixteenth Judicial Circuit are governed by a Master Discovery/Scheduling Order. (R. 777-831). This order permits asbestos plaintiffs to utilize "Standard Interrogatories and Requests for Production of Documents," which are automatically deemed served in any pending or future asbestos related personal injury cases on the asbestos litigation coordinated dockets. (R. 778 at para. II(a)). Plaintiffs' standard discovery requests included a request that Cleaver-Brooks identify and produce documents related to all products

[1] Jeanette Howe subsequently passed away during the pendency of this appeal.

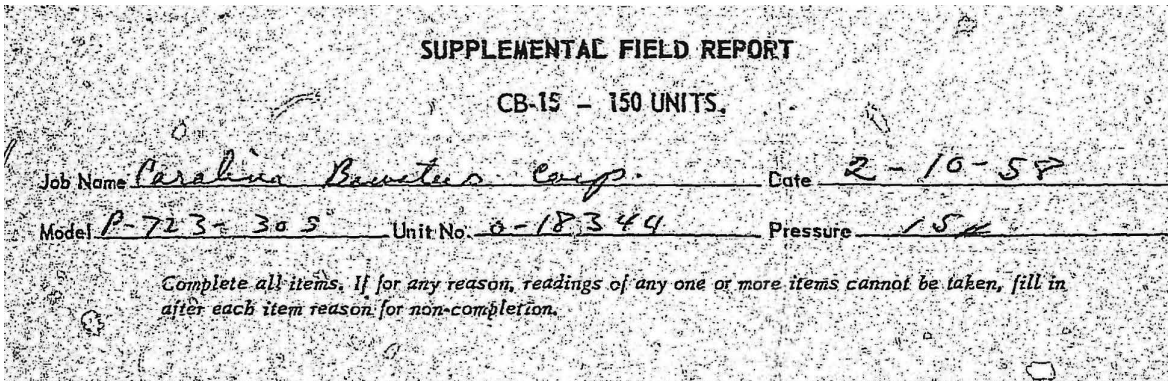
which it sold to Mr. Howe's Bowater jobsite. (R. 820-821). Pursuant to the Master Discovery/Scheduling Order, Plaintiffs' responses to Defendants' standard discovery were due 60 days after the case was filed, and Cleaver-Brooks' responses were due 30 days after Plaintiffs served their discovery answers.[2] (R. 779).

In addition to serving written discovery, Plaintiffs repeatedly attempted to depose Cleaver-Brooks' corporate representative. (R. 946, 1558, 1566, 1593, 1600). In each notice, Plaintiffs specifically requested Cleaver-Brooks' representative testify and produce documents about its boilers at Bowater. (R. 948, 1560, 1568, 1595, 1602).

On January 11, 2018, over two years into this litigation, (R. 36, R. 1393), and long after discovery responses were due under the Master Discovery/Scheduling Order, Cleaver-Brooks finally produced its 25-page file for Bowater (hereinafter, "25-page Bowater file," R. 1199-1223). According to Cleaver-Brooks, these documents have been in its files since the 1950s. (R. 667 at p.42:23-43:1).

The 25-page Bowater file repeatedly references ***two*** unique boiler units. (R. 1199-1223). Boiler unit number 0-018343 is referenced on nine pages. (R. 1199, 1200, 1201, 1202, 1211, 1212, 1214, 1220, 1223). Boiler unit number 0-18344 is referenced four times (R. 1203, 1204, 1205, 1208). Two of these references to 0-18344, including the two earliest references, are handwritten on Cleaver-Brooks' forms. (R. 1205, 1208).

[2] Plaintiffs served their discovery responses on December 22, 2015, making Defendants' master discovery responses due January 21, 2016.



SUPPLEMENTAL FIELD REPORT

CB-15 – 150 UNITS.

Job Name Carolina Bowaters Corp. Date 2-10-58

Model P-723-30S Unit No. 0-18344 Pressure 15#

Complete all items. If for any reason, readings of any one or more items cannot be taken, fill in after each item reason for non-completion.

Earliest reference to boiler 0-18344, handwritten on Cleaver-Brooks Supplemental Field Report (R. 1208)

As Cleaver-Brooks had still failed to produce a corporate representative and all documents responsive to discovery, Plaintiffs were forced to file a motion to compel. (R. 873-77). A hearing was held on January 24, 2018, just months before trial. (R. 581-626). At this hearing, Cleaver-Brooks represented to the trial court it would finally produce all responsive documents that day. (R. 624:12-20). Judge Toal's Order memorializing this hearing indicated, "Counsel for Cleaver-Brooks represented that an order was not needed because it would produce requested documents on January 24, 2018 and produce a corporate representative witness prepared to discuss what was known or reasonably available to the company on February 2, 2018." (R. 32). Judge Toal cautioned: "*Failure to comply with these representations will result in sanctions*." (R. 32, emphasis added).

Cleaver-Brooks eventually produced its corporate representative John Tornetta for deposition on February 2, 2018. (R. 1228). However, his lack of preparation to discuss the Bowater plant and failure to produce all requested documents necessitated a second deposition which did not take place until March 6, 2018, less than a week before trial was scheduled to begin. (R. 1143-1144, R. 1157, R. 1241, R. 1292 ¶ 10).

In both this matter and past litigation, Mr. Tornetta testified every Cleaver-Brooks boiler has a unique unit number that is equivalent to a serial number. (R. 1245 at 168:7-13, R. 1249 at

186:16-19, R. 1459 at 46:10-R. 1460 at 50:24, R. 1464 at 1530:17-1531:9, R. 1467 at 1481:7-19). Cleaver-Brooks' filings in this case confirmed, "Each Cleaver-Brooks boiler has a unique identification number called a unit number. . . Commercial records are organized by unit number." (R. 1392).

Mr. Tornetta has also testified Cleaver-Brooks maintains index cards which provide information about each boiler's unit number as well as the jobsite where it is located. (R. 1231 at 25:14 – R. 1233 at 31:11, R. 328:12-18, R. 1464 at 1530:21-26, R. 1467 at 1481:7-19, R. 1468 at 1524:06-1525:04). According to Mr. Tornetta, in searching for records located at a specific jobsite, "We start out with a series of index cards, I'll call them, that indicate job sites where boilers would be." (R. 1244 at p. 166:1-3). "If I had a serial number for a boiler, it would get me directly to that specific boiler. Short of a serial number with just a job name, city, and state, the index cards would be the gate into that. That's the only way I could find it other than a serial number or unit number for the boiler." (R. 1245 at 168:7-13). Once he had such a number, Mr. Tornetta admitted "I can get to the commercial records relatively quickly in a matter of minutes . . ." (R. 331:22-23).

None of these index cards were produced to Plaintiffs before trial began, because according to Cleaver-Brooks, "it's something that we don't ever produce." (R. 341:17 – R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1236 at 50:13-20, 1292 ¶ 9). However, at trial Mr. Tornetta admitted that the cards are maintained in his office, and that Plaintiffs had asked for them at his deposition. (R. 331:13-14, R. 341:17 – R. 342:7, R. 1245 at 168:14-15).

On March 8, 2018, Plaintiffs filed a motion for sanctions against Cleaver-Brooks for its abuse of the discovery process. (R. 1161-1390). A hearing was held on March 9, 2018, four days before trial. (R. 627-56). During this hearing, Cleaver-Brooks acknowledged it sold multiple boilers to Bowater.

The Court: Yeah, that's what I want to know. What information did you give that discloses – you apparently know that you sold *some boilers* to Bowater.

Mr. Pugh[3]: Correct.

(R. 638:25-639:3, emphasis added). The trial court determined Cleaver-Brooks had engaged in a "business of not giving [Plaintiffs] sufficient information about where [Cleaver-Brooks'] boilers were located until late in the game," and described Cleaver-Brooks' response to discovery as a "very late disclosure." (R. 636 at 8-11, 20-23). However, Judge Toal did not immediately rule on the sanctions request. (R. 644 at 23-24).

On March 12, 2018, trial commenced against Cleaver-Brooks as the sole remaining Defendant. (R. 1293, ¶13). Because the 25-page Bowater file repeatedly referenced two unique boiler units, numbers 0-018343 and 0-18344, (R. 1199-1223), Plaintiffs started trial with the belief there were two Cleaver-Brooks boilers at Bowater (R. 1293-1294, ¶14, R. 1301, ¶14, R. 1430, ¶14).

Plaintiffs' opening statements and questioning of witnesses repeatedly referenced multiple Cleaver-Brooks boilers at Mr. Howe's jobsite. (*see, e.g.*, R. 139 at 11-14, 249 at 10-12, 252 at 12-15). Cleaver-Brooks itself also referenced multiple "boiler<u>s</u>" sold to Mr. Howe's jobsite in its opening statements. Specifically, Cleaver-Brooks' counsel explained to the jury "And you will see some evidence that Cleaver-Brooks ***<u>boilers</u>*** sold to the Bowater Paper Mill had some asbestos containing refractory in ***<u>them</u>***, put in at the factory and then sent out." (R. 170 at 4-7, emphasis added).

Mr. Tornetta was scheduled to testify at trial on March 16, 2018. The night before, beginning at 11:35 p.m., Cleaver-Brooks for the first time produced certain documents to Plaintiffs

[3] Mr. Pugh is counsel for Cleaver-Brooks.

(hereinafter, "the midnight documents," R. 858-863, 1294 ¶¶ 16-17). Included in the midnight documents were Cleaver-Brooks' index cards showing that while boiler unit number 0-18343 had been delivered to Bowater (R. 859), boiler unit number 0-018344 had been delivered to a completely different facility in Illinois. (R. 8, R. 860, R. 1294, para. 16-17). This was the first evidence produced to Plaintiffs indicating boiler 0-018344 was not at Bowater. (R. 1294, ¶16-17, R. 1301-1302, ¶16-17, R. 1430, ¶16-17).

As the evidence at trial showed boiler unit 0-018343 was in a separate building from the powerhouse where Mr. Howe worked, the fact that 0-018344 was not also at Bowater (and thus could not have been in the powerhouse) was highly damaging to Plaintiffs' case. (R. 1294, ¶¶ 16-19, R. 1302, ¶18; R. 1430, ¶18).

The next day in trial, Cleaver-Brooks, via Mr. Tornetta's testimony, for the first time took the position that the repeated references to boiler unit 0-18344 in the 25-page Bowater documents were a "typographical error." (R. 337:12-19, R. 345:20-21). Referring to the fact that the 25-page Bowater file referenced two unique boiler numbers, Mr. Tornetta testified "I personally didn't look at it last week or last month, quite frankly I'm not sure I noticed it. I don't remember coming across that in the last week – or prior to last week or prior to last month . . ." (R. 339 at 4-7). In its trial court briefing, Cleaver-Brooks admitted, "Cleaver-Brooks did not notice this discrepancy" in the 25-page Bowater file. (R. 1392).

After this revelation, the trial court recognized a "dereliction" by Cleaver-Brooks in failing to review the 25-page Bowater file and recognize it referenced two different unit identification numbers, O-18343 and O-18344. (R. 365:25 – R. 367:15). Judge Toal described Cleaver-Brooks' representative's efforts as "incredibly sloppy on his part to have never looked at those documents." (R. 366:20-25). "[I]t was a terrible lapse in doing his job of checking these records. . .." (R. 368:12-

13). Judge Toal went on to find Cleaver-Brooks violated its discovery duties by failing to produce its boiler index cards. "[B]ecause of the way the Cleaver-Brooks records are set up, you had to have these index cards to [tell you that's a typographical error]." (R. 367:7-10). Judge Toal recognized Mr. Tornetta himself used the index cards as "the roadmap" to determine the repeated references to boiler O-01344 in the 25-page Bowater documents were a typographical error. (R. 367:8-15, R. 1392-1393). Yet Mr. Tornetta "deliberately did not give those index cards out, saying it was simply duplicative" (R. 367:8-12), despite Plaintiffs' request for the cards to be produced. (R. 331:13-14, R. 341:17 – R. 342:7).

As part of these discussions, Plaintiffs specifically requested the right to request sanctions after trial, and the Court explicitly recognized such a request had not been waived.

> Ms. Dean: Your Honor, Ms. McVey had made a request on Friday that these actions were somewhat a lynch pin of our case, fundamentally fact of how we approached this trial. We want to seek – I just want to make sure that if we seek sanctions for costs or time after trial we haven't waived anything."
>
> The Court: You have already completely talked about how fundamental it was to your case so forth and so on, that is very well protected in the record as I view it.

(R. 17).

Had Cleaver-Brooks timely produced the midnight documents and disclosed that boiler unit 0-18344 was not actually at Bowater, Plaintiffs would not have proceeded to trial against it. (R. 1294, ¶19; R. 1302, ¶18; R. 1430, ¶18). They therefore again moved for discovery sanctions on March 31, 2018, with supplemental briefing filed on April 30, 2018 and June 28, 2018. (R. 27, R. 1156-1181, 1436-1456). The April 30, 2018 filing included affidavits from Plaintiffs' trial counsel Jessica Dean (R. 1290-1296, 1311-1314), and Jonathan Holder (R. 1299-1303), setting forth their hourly rates, expenses, and time spent on trial.[4] An affidavit from Plaintiffs' third trial

[4] After Cleaver-Brooks claimed it had not received the affidavits, Plaintiffs re-filed and re-served them on June 4, 2018. (R.1424-1435).

attorney, Theile McVey, setting forth her hourly rates and time spent on trial, was served on Cleaver-Brooks on May 1, 2018, and subsequently filed June 4, 2018. (R. 1428-1431, 1435).

Following a lengthy hearing on October 10, 2018 (R. 27, 657-76), Judge Toal granted Plaintiffs' motion for sanctions, awarding attorney fees and costs for Cleaver-Brooks' "abuse of the discovery and trial processes." (R. 5-26). Judge Toal found Cleaver-Brooks' failure to review its own documents "was extremely sloppy or maybe something worse than that." (R. 667 at p. 43:22-23). "I think that sloppiness or whatever on the part of the corporate representative and the 30(b)(6) witness extended this trial and caused much more expense in trying the case that in all probability would not have been tried if those index cards had been produced before they were." (R. 674, at p. 69:24-70:4). The court concluded the hearing by finding "I think an award of attorneys' fees and expenses is appropriate," (R. 674 at 70:21-22) but noted "I don't intend to make a full award of what has been requested." (R. 674 at 71:12-13). The court indicated she would review the submissions to determine the exact amount of the award. (R. 674: at 72:8-12)

On December 8, 2018 Judge Toal issued a 22-page written order, including eight-and-a-half pages of "Findings of Fact." (R. 5-13). The court noted, "Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings." (R. 5). The court narrowly tailored the award only for time spent trying the case against Cleaver-Brooks. (R. 24).

Among the trial court's written findings were that each Cleaver-Brooks boiler has a unique identifier number. (R 6-7). The court also found, "the 25 pages which were produced by Cleaver-Brooks as the file for the Bowater site where Mr. Howe worked contained documents regarding unit numbers 18343 and 18344, both of which were shown to ship to Bowater." (R. 7).

The trial court recognized, "There was no discrepancy in the commercial records: all of the documents produced by Cleaver-Brooks up until it finally produced the midnight documents indicated unequivocally that there were two Cleaver-Brooks boilers at Bowater." (R. 7). "In Cleaver-Brooks' own words, '[e]ach Clever-Brooks boiler has a unique identification number called a unit number' . . . *Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read*." (R. 8, emphasis added).

The trial court found, "Mid-way through trial, Cleaver-Brooks for the first time produced evidence – the 'midnight documents' – proving that one boiler that had been identified in the commercial records it had produced responsive to requests regarding Bowater in fact pertained to a boiler that was sent to Illinois, not Bowater." (R. 8). The trial court also found that among the midnight documents was "the index card pertaining to Bowater, which showed the unique identifier for the unit number of the boiler at Bowater, was always responsive to [Plaintiffs' discovery] requests." (R. 9). With respect to the fact that the 25-page Bowater file contained errors, the court ruled, "Ultimately, however, such errors could have been discovered through earlier, timely production of the documents, and not ambush production in the middle of trial." (R. 8).

Contrary to Cleaver-Brooks' claims, Judge Toal directly addressed the discovery requests which Cleaver-Brooks failed to answer, including Plaintiffs' Standard Interrogatories and Request for Production of Documents. (R. 10). That discovery specifically requested "documents which show sales" pertaining to products containing asbestos to job sites at which the injured plaintiff was employed, which included Bowater. The court found that the documents were also subject to the document request attached to the Rule 30(b)(6) notices, requiring Cleaver-Brooks to produce "purchase order records for all asbestos-containing products sold to any Premises at Issue between

1962 and 2008." (R. 10-11). The court recognized the documents were also the subject of Plaintiffs' previous motion to compel, stating at trial, "oh, no question about that." (R. 11, R 831:16). Finally, the trial court noted that Cleaver-Brooks admitted Plaintiffs requested these materials after a February 20, 2018 deposition of a non-party witness. (R. 11). The Court rejected Cleaver-Brooks' contention that the index cards were not responsive to Plaintiffs' discovery, explaining,

> Cleaver-Brooks misses the point. Plaintiffs' discovery requests pertained to documents relevant to Wayne Howe's worksites. Plaintiffs had no interest in accessing Cleaver-Brooks' files pertaining to irrelevant sites, nor could Plaintiffs have anticipated that Cleaver-Brooks would produce such documents. Cleaver-Brooks, by producing documents apparently relevant to a completely unrelated location, put that location at issue. Worse, Cleaver-Brooks confused the issue by producing those documents as "commercial records" of Bowater, where Howe had worked, and later playing "gotcha" to reveal midway through trial that the documents were unrelated to Bowater but were mere typos. All of this confusion on the part of Cleaver-Brooks was the result of its failure to review a mere 25 pages of its commercial records and its failure to carefully maintain those commercial records in the first place.

(R. 15).

After Cleaver-Brooks filed a motion to alter or amend its sanctions order, Judge Toal confirmed her ruling, stating,

> Cleaver-Brooks ignores the reality of Plaintiffs learning this information near the end of their case-in-chief, approximately midnight before the testimony of Cleaver-Brooks' corporate representative who had twice testified inconsistent with the "midnight" documents during his two prior depositions, and after months of evaluating this case consistent with Cleaver-Brooks' own interpretation of its own records, which Cleaver-Brooks itself discovered (near the end of Plaintiffs' case-in-chief) to be in error. As a result of Cleaver-Brooks' failure to produce these long-requested documents sooner, Plaintiffs lacked ample time to evaluate them in the midst of trial and make a decision to cease the same upon receiving the documents. This Court, having sat through the trial and observed the parties' conduct, was fully aware of these issues and considered them in rendering its Order granting sanctions against Cleaver-Brooks.

(R. 28-29).

Cleaver-Brooks then appealed the matter to the South Carolina Court of Appeals. The unanimous panel affirmed the trial court's award of sanctions against Cleaver-Brooks. (App'x 131). The Court of Appeals "agree[d] with the trial court's findings of fact and conclude[d] the trial court did not abuse its discretion in imposing sanctions in the form of attorney fees and costs on Cleaver-Brooks for failing to provide discovery." (App'x 132).

Cleaver-Brooks subsequently filed a Petition for Rehearing and a separate Petition for Rehearing *En Banc* with the Court of Appeals. The panel unanimously denied the request for rehearing, and the request for *en banc* review was rejected after being distributed to the appellate judges. (App'x 221-225).

STANDARD OF REVIEW

South Carolina appellate courts may affirm any ruling, order, decision, or judgment upon any grounds appearing in the Record of Appeal. Rule 220(c), SCACR. Since the decision whether to impose sanctions is a decision for the judge, not the jury, it sounds in equity rather than at law. *Father v. S.C. Dep't of Soc. Servs*., 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). This Court reviews findings of fact in a matter of equity taking its own view of the evidence. *Id*. (citing S.C. Const. art. V, § 5). Courts applying this standard of review have recognized it does not require the appellate court to disregard the findings of the trial court. *See, e.g.*, *Regions Bank v. Wingard Properties,* 394 S.C. 241, 249, 715 S.E.2d 348, 352 (2011), *Carpenter v. Burr*, 381 S.C. 494, 501, 673 S.E.2d 818, 822 (2009). Nor is an appellate court required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id.* Moreover, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed error in its findings. *Regions Bank*, 394 S.C. at 248-9.

"[W]here the appellate court agrees with the trial court's findings of fact," its remaining analysis is under the abuse of discretion standard:

> The "abuse of discretion" standard urged by Father does, however, play a role in the appellate review of a sanctions award. An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. For example, **where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard**.

Father, *supra*, 353 S.C. 261, 578 S.E.2d at 14–15 (emphasis added, int'l citations omitted). "An 'abuse of discretion' occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016).

ARGUMENT

1. The Record Supports a Finding that Cleaver-Brooks' Discovery Responses and Testimony were Untimely, Incomplete, Misleading, and False.

The first step in this Court's review is to determine if it agrees with the trial court's findings of fact. *Father, supra*. 353 S.C. 254, 578 S.E.2d 11. There is overwhelming evidence supporting the findings of both the trial court and the Court of Appeals that Cleaver-Brooks' discovery responses were untimely, incomplete, misleading, and false. Such evidence and findings include:

+ "Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings." (R. 5)

+ Cleaver-Brooks failed to produce documents responsive to Plaintiffs' Master Discovery for approximately two years, delaying producing the 25-page Bowater file until only a few months before trial. (R. 36, 1199-1223, 1393).

+ This delay occurred despite the fact Cleaver-Brooks had these documents in its possession since the 1950s. (R. 667 at p.42:23-43:1).

+ Plaintiffs were forced to file a motion to compel Cleaver-Brooks to produce a Rule 30(b)(6) corporate representative for deposition and produce documents fully responsive to Plaintiffs' requests for production. (R. 873-77).

+ At the January 24, 2018 hearing on Plaintiffs' motion to compel, Cleaver-Brooks represented it would produce all responsive documents that day, and produce a corporate representative prepared to testify by February 2, 2018. (R. 32, 624:12-20).

+ Judge Toal's written order memorializing the motion to compel hearing cautioned, "Failure to comply with these representations will result in sanctions." (R. 32).

+ Plaintiffs were required to take a second deposition of Cleaver-Brooks' representative after Mr. Tornetta's admitted lack of preparation to discuss the Bowater plant and failure to produce all requested documents. (R. 1292 ¶ 10).

+ The 25-page Bowater file produced by Cleaver-Brooks repeatedly referenced two unique Cleaver-Brooks identification numbers, boilers 0-018343 and 0-18344. (R. 1199-1223)

+ "In Cleaver-Brooks' own words, '[e]ach Clever-Brooks boiler has a unique identification number called a unit number' . . ." (R. 8, R. 1245 at 168:7-13, R. 1249 at 186:16-19, R. 1392, R. 1459 at 46:10- R. 1460 at 50:24, R. 1464 at 1530:17-1531:9, 1467 at 1481:7-19).

+ Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read. (R. 8)

+ With respect to the 25-page Bowater file's repeated references to two different boiler units, Cleaver-Brooks' corporate representative John Tornetta admitted at trial, "I personally didn't look at it last week or last month, quite frankly I'm not sure I noticed it. I don't remember coming across that in the last week – or prior to last week or prior to last month . . ." (R. 339 at 4-7).

+ Cleaver-Brooks briefing to the trial court admitted, "Cleaver-Brooks did not notice this discrepancy" in the fact the 25-page Bowater file referenced two boiler units. (R. 1392).

+ Cleaver-Brooks refused to produce its index cards related to the boilers referenced in the 25-page Bowater file until it produced the midnight documents during trial. (R. 341:17 – R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1292 ¶9).

+ When asked why the index cards had not been produced, Cleaver-Brooks simply took the position, "it's something that we don't ever produce." (R. 341:17 – R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1236 at 50:13-20, 1292 ¶ 9).

+ Cleaver-Brooks failed to disclose that boiler unit 0-18344 was not at Bowater until it produced the midnight documents near the close of Plaintiffs' case-in-chief during trial. (R. 28-29, R. 1294, ¶18).

+ Cleaver-Brooks failed to disclose its position that the 25-page Bowater file contained "typographical errors" until well into trial, when Mr. Tornetta testified to that effect. (R. 337:12-19, R. 345:20-21)

+ At trial Mr. Tornetta admitted these index cards had been sitting in his office all along and that Plaintiffs had asked him for them months earlier during his depositions. (R. 331:13-14, R. 341:17 – R. 342:7).

+ Cleaver-Brooks' representative used these index cards as road map or gate to determine the references to 0-18344 in the 25-page Bowater file were a "typographical error." (R. 367:8-15, R. 1245 at 168:7-13).

+ According to Mr. Tornetta, the index cards were "the only way I could find [the files for a specific boiler] other than a serial number or unit number for the boiler." (R. 1245 at 168:7-13).

Cleaver-Brooks' Brief of Cleaver-Brooks, Inc. (hereinafter, "Opening Brief") to this Court represents, "the instances of the Unit Number O-18344 appearing within those records [the 25-page Bowater file] were typographical errors by a third-party contractor when filling out paperwork." Opening Brief, p. 17. This statement is misleading in two ways, as the records at issue 1) include handwritten references to O-18344 (R. 1205, 1208), and 2), appear on Cleaver-Brooks documents (R. 1203, 1205, 1208). These references were not just "typographical" errors, and they did not only exist on third-party documents. In fact, the earliest document referencing 0-18344 is handwritten on a Cleaver-Brooks' document. (R. 1208). Cleaver-Brooks' efforts to blame anyone but itself are not supported by the record.

Cleaver-Brooks' brief also misrepresents the record of both pre-trial and opening statements, focusing exclusively on references to a single boiler. In doing so, Cleaver-Brooks fails to report the repeated references to multiple Cleaver-Brooks' "boiler<u>s</u>" at Mr. Howe's jobsite, *including references made or confirmed by Cleaver-Brooks itself*. (R. 170 at 4-7, R. 638:25-639:3). Cleaver-Brooks also ignores Mr. Tornetta's testimony and its own representations to the trial court that each of its boilers has a unique boiler number. (R. 1245 at 168:7-13, R. 1249 at

186:16-19, R. 1392, R. 1459 at 46:10- R. 1460 at 50:24, R. 1464 at 1530:17-1531:9, 1467 at 1481:7-19).

The record shows Cleaver-Brooks delayed answering written discovery for nearly two years, and only produced documents and a corporate witness after a motion to compel was filed. (R. 873-877, 1393). A party served with written discovery has a duty to answer it unless the party objects based on a stated reason or moves for a protective order. *Richardson on Behalf of 15 Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars*, 430 S.C. 594, 598, 599, 846 S.E.2d 14, 16 (Ct. App. 2020). "The text of Rule 37, SCRCP, tells us a party does not need to file a motion to compel to request a sanction for another party's failure to answer a properly served discovery request." *Id.*

The record further shows that Cleaver-Brooks' document productions were incomplete, failing to produce the midnight documents until late in Plaintiffs' case-in-chief (R. 28-29, R. 1294, ¶18), failing to produce any evidence that the records it produced contained a "typographical error" until well into trial (R. 337:12-19, R. 345:20-21), and failing to produce its index cards which Cleaver-Brooks uses as a "gate" to determine where its boilers were located and what files it maintains, and which were "always responsive to [Plaintiffs' discovery] requests." (R. 9, R. 1245 at 168:7-13).

The record shows Cleaver-Brooks' discovery responses were inaccurate and misleading, containing four separate references to a boiler unit being at Mr. Howe's jobsite, when that boiler was actually shipped to another state. (R. 1199-1223).

Finally, the record shows Cleaver-Brooks' discovery responses were false, misrepresenting that its index cards were "duplicative," when in fact they were necessary to determine that boiler unit O-18344 was not at Bowater. (R. 860, R. 1245 at 168:7-13). As Mr. Tornnetta admitted,

"[s]hort of a serial number with just a job name, city, and state, the index cards would be the gate into that. *That's the only way I could find it* other than a serial number or unit number for the boiler." (R. 1245 at 168:7-13, emphasis added).

Although South Carolina law permits this Court to take its own view of the facts, it is not required to ignore Judge Toal's findings, given that she presided over multiple hearings about Cleaver-Brooks' discovery abuses, and explicitly set forth multiple pages of finding-of-fact based upon her personal observations of Cleaver-Brooks' conduct. The record supports her finding that Cleaver-Brooks' discovery responses were untimely, incomplete, misleading, and false. This Court should adopt the findings of both the trial court and the unanimous Court of Appeals panel.

2. The Trial Court Did Not Abuse its Discretion in Awarding Sanctions or in Determining the Amount of Sanctions.

Should this Court agree with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under the "abuse of discretion" standard. *Father*, *supra*, 353 S.C. at 261, 578 S.E.2d 11, 14. Under this standard, the evidence supports both the decision to sanction Cleaver-Brooks, as well as the amount of the sanctions.

A. Cleaver-Brooks' Untimely, Incomplete, Misleading, and False Discovery Responses Merited Sanctions.

i. *The trial court did not abuse its discretion in awarding sanctions pursuant to Rule 37 SCRCP.*

A court may award reasonable expenses, including attorney fees, for a party's failure to make or cooperate in discovery. Rule 37(b), SCRCP; *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (affirming award of attorney fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorney fees incurred during contempt hearing for discovery abuse);

Scott v. Greenville Hous. Auth., 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted trial preparation costs and attorney fees for defendant's failure to produce consequential documents until trial); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc*., 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorney fees for defendant's discovery abuses, including late production of consequential documents); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co*., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (trial court awarded attorney fees for discovery abuse, including failure to produce material, relevant evidence).

Rule 37(B)(2) SCRCP provides trial courts with the authority to sanction parties for discovery abuse. Among other remedies, it permits a court to order "the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such fees are appropriate

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f).

During the January 24, 2018 hearing on Plaintiffs' motion to compel, Cleaver-Brooks represented it would produce all responsive documents that day, and would produce a corporate representative by February 2, 2018 to testify about the matters set forth in Plaintiffs' 30(B)(6) deposition notices. (R.32). Cleaver-Brooks was warned, "Failure to comply with these representations will result in sanctions." (R. 32). Despite this fact, Cleaver-Brooks did not produce all responsive documents that day, and did not produce a prepared corporate witness by February 2, 2018.

Instead, Cleaver-Brooks waited until midway through trial to produce the midnight documents and to explain that the references to two unique boilers in the 25-page Bowater file were "typographical errors." Under these facts, sanctions were appropriate under Rule 37(B)(2), SCRCP.

ii. *Sanctions were appropriate under Rule 11 SCRCP and the Court's inherent equitable powers.*

The record shows Cleaver-Brooks untimely, incomplete, misleading, and false discovery responses justified Rule 37 SCRCP sanctions. However, even were this Court to find Rule 37 SCRCP inapplicable, sanctions were also appropriate under Rule 11 SCRCP, which states in pertinent part,

> If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

South Carolina has also vested its trial courts with inherent equitable powers. "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 310 S.E.2d 440, 279 S.C. 592 (Ct. App. 1983).

Over two years after it was served with discovery, Cleaver-Brooks produced the 25-page Bowater file which referenced two separate boiler units at Bowater. By their own admissions, neither Cleaver-Brooks' corporate representative nor its attorneys ever looked at or noticed that these documents referenced two different boiler units until the night before Cleaver-Brooks' representative was scheduled to testify at trial. (R. 339 at 4-7, R. 1392). In Judge Toal's words, such conduct was "a dereliction," "incredibly sloppy," and "a terrible lapse in doing his job of checking these records." (R. 365:25 – R. 367:15, 368:12-13).

Because Rule 220(c), SCACR permits South Carolina appellate courts to affirm any ruling, order, decision, or judgment upon any grounds appearing in the Record of Appeal, Rule 11 SCRCP and the trial court's inherent equitable powers provide an independent basis for affirming Cleaver-Brooks' sanctions. For this additional reason, Respondent respectfully requests this Court affirm the lower courts' orders sanctioning Cleaver-Brooks.

B. The Manner and Amount of Sanctions were Appropriate.

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. Of Educ. V. United States Gypsum Co*., 302 S.C. 390, 396 S.E.2d 369 (1990) *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) (citing *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989)). Sanctions can range up to default or dismissal, and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co*., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The award must be reasonable and supported by adequate findings. *Burton, supra,* 358 S.C. at 357. The court should consider (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Cleaver-Brooks argues, without citation, that the sanctions against it are the highest in South Carolina history. There is no evidence in the record to support this claim. Even if true, courts around the country, including the U.S. Supreme Court, have awarded or approved fees comparable to or far exceeding those at issue in this matter. *See, e.g., Chambers v. NASCO,* 501 U.S. 32 (1991) ($996,644.65 in fees and expenses); *Goodyear Tire & Rubber Company v. Haeger*,

137 S.Ct. 1178 (2017) (remanding award of attorney fees for reconsideration, but noting the defendant's own submissions possibly conceded approximately $2 million in fees)[5]; *International Business Machines v. ACS Human Services*, 999 N.E.2d 880 (Ind. Ct. App. 2013) ($425,178.85); *In re Tobacco Cases I*, 216 Cal.App.4th 570 (2013), ($2,943,920.63); *Abner v. Kansas City S. Ry. Co*., 541 F.3d 372, 380 (5th Cir. 2008) ($446,777.12); and *Gierlinger v. Gleason*, 160 F.3d 858, 873-83 (2d Cir. 1998) (reversing order that improperly limited fees to only $104,949, finding trial court should have used a *higher* hourly rate based on "current market rates").

Plaintiffs filed four affidavits in support of their request for expenses and attorney fees incurred over the course of the eight-day trial for this matter. (R. 1291, 1299, 1311, 1428). The affidavits were served on Cleaver-Brooks via e-mail on April 30 and May 1, 2018, and set forth Plaintiffs' expenses, as well as the hourly rates and hours worked for each attorney who represented Plaintiffs at trial. (R. 1435).

During the October 10, 2018 sanctions hearing, Plaintiffs' counsel appeared and volunteered to answer any questions the Court had about the amount of its requested sanctions. (R. 661 at p. 18:16-17, R. 671 at p. 58:25 – 672 at p. 63:21). Cleaver-Brooks was also given ample opportunity to present evidence, argue, and object to the amount of Plaintiffs' requested sanctions. (R. 667 at p. 44:17 – R. 670 at p. 55:16).

At this hearing, Cleaver-Brooks acknowledged Plaintiffs' counsel included, "a high-ranking member of the plaintiffs' bar in South Carolina." (R. 672 at p. 64:23 – R 673 at p. 65:1). Cleaver-Brooks' counsel admitted that his criticism of rates charged by lawyers from other states[6]

[5] In *Goodyear,* the case was remanded because the trial court's sanctions award included expenses which would have been incurred even absent the wrongdoer's discovery violations. In this case, Judge Toal limited Plaintiffs' expenses only to its trial costs and expenses, all of which were incurred against Cleaver-Brooks, the sole remaining Defendant at the time of trial. Thus, the fees and expenses in this case are squarely in line with those contemplated by the U.S. Supreme Court in *Goodyear*.

[6] Plaintiffs' lead trial counsel Jessica Dean practices in Texas, where the firm of Dean Omar Braham Shirley, LLP is located.

"is borne out of jealousy." (R. 673 at p. 66:4-6). Cleaver-Brooks' counsel repeatedly declined to suggest an alternate hourly rate (R. 673 at p. 66- R. 57), instead informing the trial court, "I can't sit here and tell you that I would have some, you know, number to give you and say, 'This is what it ought to be cut to.' I think --- I think perhaps it ought to be cut to a certain extent, but you know, that's certainly within your discretion and I'll leave that to you." (R. 673 at p. 67:14-20).

Cleaver-Brooks did not challenge that the trial was complicated, difficult, and took place over eight days. Nor did it challenge the fact that Plaintiffs limited their request for attorney fees to only time spent on the trial after all other Defendants had resolved. (R. 671 at p. 60:18-25). Cleaver-Brooks recognized and did not challenge Plaintiffs' counsel's experience and expertise at handling complex litigation such as asbestos trials. (R. 672 at p. 64:23 – R. 673 at p. 65:11).

Cleaver-Brooks makes the cursory argument that it should have been permitted to conduct discovery with respect to the sanctions against it. Opening Brief, p. 39. It cites to no case law or other authority for the proposition that a sanctioned party has the right to conduct discovery with respect to the sanctions.[7] And it made no attempt to actually serve any discovery in the seven months between trial and the trial court's order imposing sanctions. Even barring that, Cleaver-Brooks could still have raised any issues or questions it had about the veracity of Plaintiffs' affidavits at the sanctions hearing. (R. 657-676). To the extent Cleaver-Brooks failed to raise any questions or objections at the hearing, it waived its right to do so on appeal.

Contrary to Cleaver-Brooks' claims, the trial court did not "rubber stamp" Plaintiffs' request for fees and expenses, and did not award "the full amount requested by the Plaintiffs' counsel." (Opening Brief, p. 23-24 and FN4). Instead, the trial court cut the hourly rates for two of Plaintiffs' trial attorneys, awarding fees at the rate of $500/hour compared to the $550/hour

[7] The only case cited by Cleaver-Brooks in this section of its argument is *Conway v. Charleston Lincoln Mercury*, 363 S.C. 301, 609 S.E.2d 838 (Ct. App. 2008). This case did not involve sanctions.

requested by Plaintiffs' two senior counsel. "This Court finds that a reasonable attorneys' fee for Ms. McVey and Ms. Dean is $500/hour rather than the $550/hour requested by Plaintiffs." (R. 24) Indeed, the trial court did exactly what Cleaver-Brooks requested it do, using its discretion to cut Plaintiffs' attorney fees "to a certain extent."

C. Plaintiffs' Affidavits Supporting Their Sanctions Request Were Not Untimely.

Cleaver-Brooks argues Plaintiffs' counsels' affidavits filed in support of their request for sanctions were untimely because they were not served the same day as Plaintiffs' original request for sanctions. Citing Rule 6(d) SCRCP, Cleaver-Brooks claims it stands for the proposition that the trial court had no discretion under that rule but to exclude the affidavits. (Opening Brief, p. 35). It cites no case law to support its argument.

As an initial matter, Rule 6(d) states a motion and accompanying affidavits need only be filed ten days before a hearing, and additional or opposing affidavits need be filed only two days before a hearing. In this instance, Plaintiffs' affidavits were all served five months before the hearing, and were all filed four months before the hearing.

The Court of Appeals recently addressed an almost identical issue in *Kitchen Planners v. Friedman*, 432 S.C. 267 (2020) (*cert. denied in pertinent part*). In that case, the Defendants filed a summary judgment motion on January 17, 2017. They served an affidavit supporting that motion on April 13, 2017. The motion was then heard on April 25, 2017. The Court of Appeals affirmed the trial court's decision not to strike the affidavit as untimely pursuant to Rule 6(d) SCRCP. Rejecting the same argument Cleaver-Brooks now makes, the Court of Appeals found it determinative that the party moving to strike "did not argue it had insufficient time to respond to the affidavit." *Id.*, 432 S.C. at 285. The Court of Appeals further noted, "admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting

to an error of law, the trial court's rulings will not be disturbed on appeal." *Id*, *citing Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399 (2005).

Cleaver-Brooks has not and cannot argue it was prejudiced by the timing of the affidavits. The hearing on Plaintiffs' motion for sanctions was held on October 10, 2018, over five months after Cleaver-Brooks received them. (R. 657, R. 1435). The court's order granting Plaintiffs' request for sanctions was not entered until December 7, 2018, approximately seven months after the affidavits were served. (R. 5). Cleaver-Brooks had far more than the ten days required by Rule 6(d) SCRCP to review and respond to Plaintiffs' affidavits, and the trial court acted within its discretion when it considered them. For this additional reason, Cleaver-Brooks' appeal is without merit.

3. Cleaver-Brooks' "In-trial Surprise" was Caused by its Failure to Read its Own Records.

Cleaver-Brooks repeatedly blames Plaintiffs for the "in-trial surprise" that the 25-page Bowater file contained references to two different boilers. (Opening Brief, p. 1-2, 28, 30-31). This surprise was not the result of Plaintiffs' actions, but was due to Cleaver-Brooks' failure to read its own records.

Cleaver-Brooks argues *Bramlette v. Charter Medical Columbia*, 302 S.C. 68, 393 S.E.2d 917 (1990) "is on all fours- with this case," and requires the Court of Appeal's unanimous opinion be reversed. (Opening Brief, p. 31). In making such an argument, Cleaver-Brooks confuses trial strategy for evidence.

Bramlette addresses a party's failure to disclose evidence . . . specifically a previously undisclosed expert witness opinion. It does not state nor even suggest a party is required to disclose its trial strategy or questions for witnesses in advance of trial. To the extent *Bramlette* is relevant

to this matter, it supports the finding that a party's failure to timely produce evidence is highly prejudicial, and supports sanctioning Cleaver-Brooks.

As both the trial court and unanimous Court of Appeals panel found, it was Cleaver-Brooks, not Plaintiffs, which failed to produce relevant, discoverable evidence in a timely manner. There is no dispute the midnight documents were always in Cleaver-Brooks' possession, contained relevant and pertinent information which was not disclosed elsewhere, and were not produced to Plaintiffs until almost the close of their case-in-chief. It is also undisputed that at no point prior to trial did Cleaver-Brooks produce evidence showing the Bowater file's repeated references to two distinct boiler numbers were "typographical errors."

At its core, Cleaver-Brooks' argument is that Plaintiffs' counsel should have disclosed their mental impressions, conclusions, and opinions about Cleaver-Brooks' own files. Such information is protected from disclosure by the work product doctrine, adopted by South Carolina in Rule 26(B)(3), SCRCP. This provision requires, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[8] Plaintiffs' trial strategy was privileged pursuant to this provision, and unlike the documents which Cleaver-Brooks withheld, was not subject to discovery or disclosure.

Cleaver-Brooks criticizes Plaintiffs' discovery efforts, suggesting Plaintiffs "failed to investigate, test, or disclose that [two boiler] theory at all in advance of trial." (Opening Brief, p.

[8] Courts around the country have recognized parties have a strong interest in protecting their trial strategy. Courts have emphasized that "once the lawsuit is filed, the waiver of work-product protection ends. This temporal limitation flows from the enhanced interest in protecting against disclosure of trial strategy and planning." *JJK Mineral Co., LLC v. Swiger*, 292 F.R.D. 323, 337 (N.D.W. Va. 2013) (citing *Dunhall Pharm., Inc. v. Discus Dental*, 994 F. Supp. 1202, 1206 (C.D. Cal.1998)). A party's case strategy is so elementally un-discoverable that it is considered "pure" attorney work product. *Nutramax Labs., Inc. v. Twin Labs. Inc*., 183 F.R.D. 458, 470 (D. Md. 1998). As the Fourth Circuit has recognized, forcing a party to reveal their trial strategy during motion practice can cause actual prejudice. *Forrester v. Penn Lyon Homes, Inc*., 553 F.3d 340, 343 (4th Cir. 2009).

32). Such arguments attempt to reverse the parties' respective duties during discovery. The 25-page Bowater file and the midnight documents were Cleaver-Brooks documents, which have been in Cleaver-Brooks' possession for nearly six decades and throughout the entire timeframe of this case. It was Cleaver-Brooks which had the obligation to produce all relevant records nearly two years before it actually did, and it was Cleaver-Brooks which had the obligation to produce a fully prepared witness to testify about these documents.

The index cards which ultimately disclosed the location of both boilers referenced in the 25-page Bowater file are kept in Cleaver-Brooks' corporate representative's office, and thus should have been easily accessible to him throughout this case. He admitted that using these index cards, "I can get to the commercial records relatively quickly in a matter of minutes . . ." (R. 331:13-23, R. 341:17-342:7). However, Mr. Tornetta never even attempted to do so until midway through trial, because he failed to carefully review the 25-page Bowater file and see there were two boilers referenced. As he admitted at trial, "I personally didn't look at it last week or last month, quite frankly I'm not sure I noticed it. I don't remember coming across that in the last week – or prior to last week or prior to last month . . ." (R. 339 at 4-7). The fact that Mr. Tornetta was unprepared to testify about a mere 25 pages of production at two separate depositions was a breach of Cleaver-Brooks' discovery duties, not Plaintiffs'.

Further, contrary to Cleaver-Brooks' arguments, Plaintiffs *did* investigate the theory there were two Cleaver-Brooks' boilers at Bowater theory. The record before the trial court showed Cleaver-Brooks repeatedly confirmed (both during discovery in this matter and in other cases) each of its boiler units was assigned a unique number. (R. 1245 at 168:7-13, R. 1249 at 186:16-19, R. 1392, R. 1459 at 46:10- R. 1460 at 50:24, R. 1464 at 1530:17-1531:9, 1467 at 1481:7-19). Cleaver-Brooks represented that a unique boiler number meant a unique boiler, and Plaintiffs took

Cleaver-Brooks at its word. Cleaver-Brooks produced the 25-page Bowater file showing two unique boilers at Mr. Howe's jobsite, and Plaintiffs interpreted those documents exactly as Cleaver-Brooks represented they should be read. Nothing in the documents produced raised a suspicion that they contained a "typographical error" with respect to the boiler unit numbers. There were multiple references to a second unit, on Cleaver-Brooks' documents, and in handwriting.

Plaintiffs' discovery also specifically inquired about the index cards which were not produced until mid-trial. It was these cards, which Cleaver-Brooks simply "don't ever produce," which Cleaver-Brooks needed and relied upon to refute the two-boiler theory. This theory was not the result of Plaintiffs' failing to conduct discovery, it was the logical and inevitable *result* of that discovery.

Cleaver-Brooks' suggestion that Plaintiffs were for some reason required to disclose to Cleaver-Brooks that its own records referenced two boiler numbers is unsupported by the law or any rational argument. Nor does Cleaver-Brooks cite to any authority to support its argument that the questions a party asks in discovery somehow limit the arguments it makes at trial.

It defies reason to suggest Plaintiffs "ambushed" Cleaver-Brooks with the very records it produced, or with the very testimony its corporate representative provided. As Judge Toal recognized, "[i]n Cleaver-Brooks' own words, '[e]ach Cleaver-Brooks boiler has a unique identification number called a unit number' . . . Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read." (R. 8). Cleaver-Brooks' "in-trial surprise" was due only to its own failure to read its own documents in the manner prescribed by its own corporate representative.

Cleaver-Brooks' efforts to shift the blame to Plaintiffs for not revealing their mental impressions, conclusions, or opinions are without merit, and contrary the work-product doctrine.

Its claim that it was unfairly surprised by the contents of its own documents is equally without merit. For these additional reasons, the Court should affirm the sanctions against Cleaver-Brooks.

4. The Court of Appeals was not Required to Restate the Trial Court's Findings of Fact.

Cleaver-Brooks also attacks the Court of Appeals, claiming it failed to provide a sufficient explanation for its decision. However, nothing in South Carolina law requires an appellate court to restate a trial court's findings of fact when it agrees with them. This Court has explicitly recognized an appellate court's right to agree with a trial court's findings. "For example, *where the appellate court agrees with the trial court's findings of fact*, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Father,* 353 S.C. at 261, 578 S.E.2d at 14, emphasis added). That is exactly what happened here.

Cleaver-Brooks complains there is "no explanation for sanctions on appeal" and no "explanation as to what Cleaver-Brooks did wrong or could have done differently." (Opening Brief, p. 24). Once again, the record refutes Cleaver-Brooks' claims. The trial court set forth exactly what Cleaver-Brooks did wrong in multiple hearings, during trial, and in multiple written orders. (R. 5-26, R. 27-31, R. 32, R. 359- 374, R. 581-626, R. 657-676). The Court of Appeals agreed with these findings after reviewing the record, and affirmed the trial court's orders.

Cleaver-Brooks engaged in a pattern of discovery obstruction that continued over the course of the entire litigation, including well into trial. It delayed producing critical documents for nearly two years, causing the trial court to find it engaged in "a business of not giving [Plaintiffs] sufficient information about where [Cleaver-Brooks'] boilers were located until late in the game," and to describe Cleaver-Brooks' responses as a "very late disclosure." (R. 636 at 8-11, 20-23). "Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings." (R. 5.)

Once it finally produced documents, the production was incomplete and contained incorrect information. Despite originally producing only 25 pages from its files, Cleaver-Brooks failed to carefully read its own documents and realize they referenced two separate boilers. Judge Toal described this conduct as "incredibly sloppy," and "a terrible lapse in doing his job of checking these records...." (R. 366:20-35, R. 368:12-13). This dereliction was misleading and prejudicial to Plaintiffs, as it caused them to believe there were two Cleaver-Brooks boilers at Bowater when that was not the case.

Finally, Cleaver-Brooks failed to produce the midnight documents, which were necessary to understand the 25-page Bowater file contained "typographical errors," until well into trial (R. 28-29, R. 1294, ¶18). Because Cleaver-Brooks did not review the midnight documents, much less produce them until the middle of trial, Plaintiffs proceeded to trial with an incorrect understanding of the facts and evidence on this critical issue. This misconduct was set forth by Judge Toal over the course of multiple hearings and in two separate written orders.

As for what Cleaver-Brooks could have done differently, Judge Toal explained that, too. "[S]uch errors could have been discovered through earlier, timely production of the documents, and not ambush production in the middle of trial." (R. 8). Had Cleaver-Brooks simply reviewed the 25-page Bowater file, it would have known that it contained multiple erroneous references to a second boiler. It could then have produced the midnight documents before trial and eliminated the need for an ambush production. If Cleaver-Brooks had taken these simple steps, it would have avoided "tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury." (R. 13).

5. Cleaver-Brooks' Accusations that Plaintiffs' Counsel Made Misrepresentations to the Trial Court are Inappropriate.

Finally, Cleaver-Brooks inappropriately accuses Plaintiffs' counsel of "rewriting history," and describes the affidavits of Plaintiffs' counsel as "not believable in any way." (Opening Brief, p. 22). Cleaver-Brooks argues, "this Court cannot just take those affidavits at face value," and, "[o]f course, the Plaintiffs knew that the typographical error on a handful of pages did not mean that there was a second Cleaver-Brooks boiler at Bowater." (*Id.* at 32, FN7). Not done with their attempts to slander Plaintiffs' counsel, Cleaver-Brooks proclaims, "There is no way that the Plaintiffs could have genuinely believed that the Cleaver-Brooks production indicated there were two boilers at Bowater." (*Id.* at 35).

In short, Cleaver-Brooks accuses Plaintiffs' counsel of lying in their affidavits. Cleaver-Brooks makes this accusation despite the trial court, which presided over all discovery issues and the trial itself, finding not only was Plaintiffs' interpretation of the documents reasonable, it was the *only* conclusion that could be reached when reading those documents in accordance with Cleaver-Brooks' representative's testimony. Judge Toal found "no discrepancy in the commercial records: all of the documents produced by Cleaver-Brooks up until it finally produced the midnight documents indicated unequivocally that there were two Cleaver-Brooks boilers at Bowater." (R. 7). "In Cleaver-Brooks' own words, '[e]ach Clever-Brooks boiler has a unique identification number called a unit number' . . . Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read." (R. 8) After reviewing the record, the Court of Appeals "agreed with the trial court's findings of fact" and affirmed the award of sanctions. (App'x 131, 132).

The trial court was certainly in the best position to judge the parties' conduct throughout both pre-trial discovery motions and the trial itself, and pursuant to South Carolina law, this Court can and should give credence to the trial court's observations about the parties' representations

and the veracity of their positions regarding discovery. *Regions Bank,* 394 S.C. at 249, 715 S.E.2d at 352, *Carpenter*, 381 S.C. at 501, 673 S.E.2d at 822. There is no ambivalence to Judge Toal's observations that Cleaver-Brooks engaged in wrongful discovery conduct:

> Cleaver-Brooks' production of erroneous evidence and failure to timely produce other evidence was extremely prejudicial to Plaintiffs' trial strategy and fundamentally changed the analysis of Plaintiffs' case, resulting in tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury. Cleaver-Brooks shrugs its shoulders and claims that it simply did not notice that two boilers were listed in the Bowater commercial file until prompted by Plaintiffs to double-check its records mid-way through trial. As a matter of policy a party should not be rewarded for failing to examine its own files that it produces in discovery, making inaccurate claims about limited documents (namely that the index cards were the same as the commercial records) and then profit from that failure by misleading opposing counsel.

(R. 13).

> This Court, having sat through the trial and observed the parties' conduct, was fully aware of these issues and considered them in rendering its Order granting sanctions against Cleaver-Brooks.

(R. 28-29). The Court of Appeals agreed with the trial court's findings of fact. (App'x 131, 132).

The trial court and Court of Appeals were not the only ones who accepted the statements in Plaintiffs' counsel's affidavits. Cleaver-Brooks itself accepted the affidavits as true in their trial briefing, stating, "Plaintiffs' counsel acknowledges that they had noticed this discrepancy in the unit number references prior to trial and built their trial theory around it." (R. 1392).

Cleaver-Brooks' appellate arguments are inappropriate and contrary to the professional standards which govern attorneys in this State. South Carolina lawyers "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude,* 296 S.C. 510, 512, 374 S.E.2d 495, 497 (1988).

Rule 402(k) SCACR establishes the requirements for the admission to practice law in South Carolina and contains the "Lawyer's Oath." This oath includes the clause, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in also in writing and oral communications."

Cleaver-Brooks' appellate briefing violates this oath. This Court has taken a dim view of attorneys disparaging opposing counsel. "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice. Additionally, a lawyer is subject to discipline for 'engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute....' *In re Anonymous Member of the South Carolina Bar*, 392.S.C. 328, 334, 709 S.E.2d 633, 636 (2011).

> The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally . . . Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.

Id., 392 S.C. at 337, 709 S.E.2d at 638.

Cleaver-Brooks suggests Plaintiffs were required by the rules of professional conduct to immediately cease trial once they received the midnight documents. (Opening Brief, p. 39). However, Cleaver-Brooks explicitly declined to file a motion on this issue with the trial court (R. 668 at 47:18-48:2), thereby waiving this argument on appeal. *See, e.g., South Carolina Farm Bureau Mut. Ins. v. S.E.C.U.R.E Underwriters*, 347 S.C. 333, 343,554 S.E.2d 870, 875 (2001) ("An issue must be raised to and ruled on by the trial court for an appellate court to review the issue.")

The fact the trial court declined to enter a directed verdict (R 355-356)[9] supports a finding that Plaintiffs had good grounds to continue trial after the disclosure of the midnight documents. Cleaver-Brooks' suggestion that Plaintiffs were required to immediately dismiss their case after receiving the midnight documents is without merit.

In its zealous quest to absolve itself of the blame for its sanctions, Cleaver-Brooks resorted to accusing Plaintiffs' counsel of making untrue statements in affidavits submitted to the trial court. Such accusations are not supported by the record, any evidence, the trial court's extensive findings of fact, nor the unanimous Court of Appeals' opinion. Such conduct disparages the integrity of the judicial process, and does nothing more than bring the legal profession into disrepute. For these final reasons, Timothy Howe respectfully asks this Court to affirm the sanctions order against Cleaver-Brooks.

CONCLUSION

The record shows Cleaver-Brooks' discovery responses in this matter were untimely, incomplete, misleading, and false. It provides overwhelming support for this court to agree with the trial court's findings of fact regarding Cleaver-Brooks' discovery abuses.

Given Cleaver-Brooks' abuse of the discovery process, this Court should also find the trial court did not abuse its discretion either in deciding to sanction Cleaver-Brooks, or in determining the amount of those sanctions. For these reasons, Respondent Timothy Howe respectfully requests this Court affirm the discovery sanctions against Cleaver-Brooks.

[9] Cleaver-Brooks has not appealed this denial.

Respectfully submitted, November 18, 2022

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