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Attachment 2

Order Denying Cleaver-Brooks's Motion to
Alter or Amend

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK)	SIXTEENTH JUDICIAL CIRCUIT
)	
TIMOTHY W. HOWE,)	
Individually and as Personal)	C/A NO. 15-CP-46-03456
Representative of the Estate of)	
WAYNE ERVIN HOWE, deceased,)	
and JEANETTE HOWE,)	
)	
Plaintiffs,)	ORDER DENYING CLEAVER-
)	BROOKS, INC.'S MOTION TO
v.)	ALTER OR AMEND ORDER
)	
AIR & LIQUID SYSTEMS)	RECEIVED
CORPORATION, et al.,)	
)	FEB 01 2019
Defendants.)	SC Court of Appeals
)	

Defendant Cleaver-Brooks, Inc. has moved to “alter or amend” the Court’s order of December 6, 2018, sanctioning Cleaver Brooks for abuse of the discovery and trial processes. For the reasons set forth herein, Cleaver-Brooks’s motion is DENIED.

Toward the end of trial, on March 21, 2018, this Court directed Plaintiffs to move for sanctions against Cleaver-Brooks within 10 days, with full briefing 30 days thereafter. On April 30, 2018, Plaintiffs filed a Motion for Sanctions with Statements of Fees and Costs against Cleaver-Brooks, Inc., which was fully supported by the attached evidence and affidavits of counsel. Cleaver-Brooks had ample time to respond. On December 7, 2018, this Court granted that motion.

“Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007) (internal citations omitted). Cleaver-Brooks has presented none of these grounds.

Cleaver-Brooks identifies no change in controlling law, clear error of law, or alleged manifest injustice. We are therefore left to determine whether Cleaver-Brooks has met its burden to identify new evidence not available at trial. The arguments—including the evidence—presented in Cleaver-Brooks’ motion to alter or amend the order granting sanctions were available to the parties before this Court issued its Order. For example, Cleaver-Brooks commences its motion by contending that this Court lacked jurisdiction to consider the motion for sanctions, but this issue was thoroughly briefed by both parties and addressed by this Court in issuing its Order. As with its other arguments, Cleaver-Brooks presents no new law or fact upon which this Court should reconsider its ruling.

Cleaver-Brooks cites no legal authority or factual evidence in support of the majority of its arguments. For those arguments that it attempts to buttress with evidence or filings of record, it cites evidence that was undisputedly before this Court before its December 7, 2018 Order and the parties’ briefing on the same. *See, e.g.*, Cleaver-Brooks’ Motion at ¶ 2 (citing evidence dated February 21, 2018 to March 8, 2018). This does not present grounds to alter or amend the Order.

Where Cleaver-Brooks does attempt to present new argument, again, it lacks ground in new law or evidence, and lacks logic. For example, Cleaver-Brooks suggests that Plaintiffs would have owed an obligation under Rule 11, SCRPC, and under Rules 3.1 and 3.3 of the South Carolina Rules of Professional Conduct to immediately cease trial once Cleaver-Brooks finally produced its records mid-way through trial. Cleaver-Brooks’ Motion at ¶ 6. 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. Again, Cleaver-Brooks presents no cogent grounds to alter or amend the judgment.

As another example, Cleaver-Brooks complains that no special interrogatory bolstered this Court's statement that the jury understood what the key issue was in this case. *See* Motion to Alter or Amend at ¶ 8. Cleaver-Brooks offers no legal authority for its claim that an interrogatory is required to support this Court's observation, and as a general matter the trial court is in the best position to assess the jury's attention to evidence and actions in the courtroom. *See, e.g., State v. Anderson*, 322 S.C. 89, 93, 470 S.E.2d 103, 105 (1996) (trial judge was in the best position to assess jury's attention to outburst in courtroom).

Cleaver-Brooks also questions the amount of this Court's award. Plaintiffs sought \$95,435.16 in expenses. This Court awarded \$90,835.16. Order at 21. Curiously, Cleaver-Brooks complains that this Court awarded an amount lesser than was requested by Plaintiffs. *See, e.g.,* Cleaver-Brooks' Motion at ¶ 13. This Court reached this award by reducing the hourly amount awarded to two of Plaintiffs' counsel. Order at 19-20. The amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The parties thoroughly briefed the relevant factors and this Court considered all of the relevant factors in exercising its discretion to set the fees awarded. Cleaver-Brooks offers no legal authority for its claim that this Court should further explain its

decision to reduce the award of attorneys' fees requested by Plaintiffs' attorneys. This claim, too, is without merit.

Along these lines, Cleaver-Brooks complains that this Court should not have awarded a total of \$2,881.84 to Timothy W. Howe and Wende Myers for appearing for a trial that likely would not have proceeded but for Cleaver-Brooks' sanctionable conduct. 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); SCRCP 37(b)(2) (when there has been an abuse of the discovery rules, "the court in which the action is pending may make such orders in regard to the failure as are just"). Lost wages are just and reasonable in this instance. This Court properly exercised its discretion in awarding these plaintiffs the few hundred dollars they requested for time lost at work to attend trial.

Cleaver-Brooks's other arguments have already been addressed in full by this Court, and it offers no intervening change in controlling law or new evidence not available at trial that warrants this Court's reconsideration. For the foregoing reasons, as well as those set forth in this Court's December 6, 2018 Order, this Court DENIES Cleaver-Brooks, Inc.'s Motion to Alter or Amend Order.

Additionally, because this concludes the final remaining motion before the Court, the Clerk of Court is hereby directed to enter the jury's verdict as the final judgement in this case.

AND IT IS SO ORDERED.

Jean Hoefler Toal, Chief Justice of the South
Carolina Supreme Court, Retired, Acting as
Circuit Court Judge

January _____, 2019



York Common Pleas

Case Caption: Wayne Ervin Howe , plaintiff, et al VS Air & Liquid Systems Corp ,
defendant, et al
Case Number: 2015CP4603456
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758