THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate 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 Jeannette Howe ..... Respondents,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton 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 Productions, 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 Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental 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 Babock 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 whom

Cleaver-Brooks, Inc. is the ........................................................................ Appellant.

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APPELLANT'S BRIEF

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June 7, 2019

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## STATEMENT OF ISSUES ON APPEAL

This is an appeal of a sanctions order that arises out of the asbestos docket. Following a defense verdict in Cleaver-Brooks, Inc.'s favor, the trial court sanctioned Cleaver-Brooks and ordered it to pay all of the plaintiffs' attorneys' fees for the entirety of trial, along with all of the plaintiffs' litigation costs and expenses. The sanctions exceed $300,000. It is a shocking order, and it raises several issues for appellate review:

1. In response to in-trial testimony, Cleaver-Brooks located and produced records to the plaintiffs that same day that entirely disproved a theory of the case that the plaintiffs had never disclosed and had never raised at any point in discovery. Did the trial court err by sanctioning Cleaver-Brooks for not producing in advance of trial materials that were never the subject of any discovery request, deposition question, pretrial motion, or court order, and that had no relevancy to the case before the plaintiffs' in-trial questioning of a third-party witness?

2. Did the plaintiffs waive their objections regarding Cleaver-Brooks's documents by eliciting testimony during their case-in-chief about those documents without objection?

3. Did the trial court err when it relied on Rule 37(b)(2) of the South Carolina Rules of Civil Procedure as the jurisdictional basis for its sanctions order when there was never any discovery order in place that Cleaver-Brooks could have possibly violated?

4. Did the trial court err when it ignored the plaintiffs' counsel's admitted violations of their professional duties and obligations?

5. Did the trial court abuse its discretion when it ordered sanctions against Cleaver-Brooks, including (a) its decision to sanction Cleaver-Brooks twice for the same alleged conduct, and (b) when it issued sanctions without a legitimate evidentiary basis to support the terms of those sanctions?

## STATEMENT OF THE CASE

The trial court's sanctions order reads like pure fiction. Cleaver-Brooks is still at a loss as to the basis for the order, as the trial court did not identify anything at all in the record that could possibly support ***any*** kind of sanction, much less an award to plaintiffs' counsel for over $300,000. The complete history of the case is critical to recognizing just how far the trial court has departed from the actual record below when it issued its sanctions order. To summarize:

Before the plaintiffs attempted a failed "Matlock Moment" at trial, this case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. That sole issue drove all discovery and pretrial litigation.

At trial, though, the plaintiffs relied on a typographical error in a vendor's documents to suggest during questioning a third-party witness that there may have been a second Cleaver-Brooks boiler at Bowater. Cleaver-Brooks immediately located and produced that same day records making clear that the so-called second boiler was actually in Illinois, not at Bowater. The trial court refused to allow Cleaver-Brooks to admit those records into evidence even though the plaintiffs elicited testimony about the records and the second boiler. The jury returned a verdict in Cleaver-Brooks's favor anyway.

The trial court then sanctioned Cleaver-Brooks for over $300,000 in attorneys' fees and costs for not producing those documents earlier. It issued this sanction even though those documents were never the subject of a discovery request or a deposition question. It issued this sanction even though the idea that there were multiple Cleaver-Brooks boilers at Bowater had never been part of the case until the plaintiffs' in-trial questioning of a third-party witness. The record in no way supports that sanctions order, as detailed below.

## I. Cleaver-Brooks denied from the outset that Mr. Howe was exposed to any asbestos-containing Cleaver-Brooks product.

Mr. and Mrs. Howe filed this case on November 6, 2015, alleging that Mr. Howe developed mesothelioma resulting from exposure to asbestos at a variety of locations and from a variety of products. (R. pp. 33–69; Compl. *passim.*) Mr. Howe passed away during the pendency of the litigation. On September 23, 2016, the complaint was amended to add Mr. Howe's son as a plaintiff both in his individual capacity and as the personal representative of Mr. Howe's estate. (R. pp. 85–114; First Am. Compl. *passim.*)

Cleaver-Brooks manufactures boilers and boiler-room systems, and it was identified as a defendant in both the initial and the amended complaints. In its responsive pleadings, it consistently denied that Mr. Howe was ever exposed to any asbestos-containing product that Cleaver-Brooks manufactured or distributed. (*E.g.*, R. p. 76; Cleaver-Brooks Ans. to Compl. ¶ 40; R. p. 122; Cleaver-Brooks Ans. to First Am. Compl. ¶ 48.)

## II. Mr. Howe asserted that he was exposed to asbestos at the Bowater Paper Mill, so Cleaver-Brooks timely produced all of its documents regarding the single boiler that it shipped to that location.

Discovery commenced, during which Mr. Howe alleged that he was exposed to asbestos while working at the Bowater Paper Mill in Rock Hill, South Carolina. (R. p. 1582; Plaintiffs' Answers to Master Interrogatories and Requests for Disclosures at Answer to Interrogatory 4.) Before his death, Mr. Howe testified that while on site at Bowater, he only worked on boilers located in the powerhouse, not in any other buildings or facilities on the Bowater campus. (R. p. 1189; Howe Dep. 35:18–21.)

Accordingly, Cleaver-Brooks produced all of its records regarding the boiler that it shipped to the Bowater Paper Mill in 1957, which was identified as Boiler Unit Number O-18343. (R. pp. 678–738; Cleaver-Brooks Records for Boiler at "Bowater–Carolina Corporation"

(BPM 0001–61).) Cleaver-Brooks's corporate representative testified that he determined which boiler was shipped to Bowater by searching a set of index cards that the company maintains listing what boilers are shipped to what locations. These cards are "kept alphabetically by the job site name." (R. p. 1232; Tornetta Dep. 26:23–24 (Feb. 2, 2018).)

The job-site index card also lists by unit number which boiler or boilers were shipped to a particular job site. (R. p. 1232; *id.* 27:2–10.) Once the company identifies the relevant unit number, it can then access the commercial records regarding the relevant boiler on microfiche. (R. p. 1232; *id.* 27:11–18.)

That is how Cleaver-Brooks identified Boiler Unit Number O-18343 as the boiler it shipped to Bowater, and it is how Cleaver-Brooks secured the relevant, responsive records regarding that boiler to produce to the plaintiffs here. (R. pp. 1233, 1235; *id.* 31:22–32:6, 48:13–15.)

## III. Litigation then focused exclusively on the location of the single Cleaver-Brooks boiler at the Bowater Paper Mill, without any suggestion of there being multiple Cleaver-Brooks boilers at Bowater.

Because of Mr. Howe's own testimony and discovery responses, the remainder of the litigation focused on the location of the Cleaver-Brooks boiler at the Bowater Paper Mill: was that boiler located in the powerhouse, where Mr. Howe claimed to have worked, or was it somewhere else on the Bowater campus?

There was ***never*** any pretrial suggestion that Cleaver-Brooks had really shipped multiple boilers to Bowater. Below are pages and pages of examples of the parties' repeated, uniform representations regarding the source of their factual dispute.

### A. January 22nd: Cleaver-Brooks's Motion for Protective Order

Despite the narrow question of the location of a Cleaver-Brooks boiler at Bowater, the plaintiffs served Cleaver-Brooks with an extremely broad Rule 30(b)(6) deposition notice. Cleaver-Brooks sought a protective order regarding the overbreadth of that notice. (R. p. 868; Cleaver-Brooks's Motion for Protective Order.) In that motion, Cleaver-Brooks noted the limited scope of its dispute with the plaintiffs:

> Cleaver-Brooks manufactures boilers. Plaintiffs have alleged that Cleaver-Brooks manufactured ***a boiler*** used at the Bowater Paper Mill in Rock Hil/Catawba, South Carolina which contained asbestos to which the Plaintiff was exposed, and which exposure contributed to his alleged asbestos related injuries.
>
> ***
>
> On January 11, 2018, counsel for Cleaver-Brooks produced a collection of documents regarding its shipment of ***a boiler*** to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs' counsel.

(R. pp. 869–70; *id.* at 1–2 (emphasis added).)

### B. January 24th: Hearing on Discovery Issues

On January 24, 2018, the circuit court held a hearing regarding a host of discovery issues in several cases involving myriad parties. During the portion of that hearing concerning the *Howe* case, the plaintiffs' national counsel reiterated time after time that the dispute with Cleaver-Brooks involved the location of a single boiler at Bowater:

> In the last forty-eight hours, I was able to review Cleaver-Brooks's documents that I didn't get for fourteen months and I believe I should have that shows that Daniels was involved with installing ***their boiler at Bowater***.

(R. p. 602; Hr'g Tr. 37:1–5 (Jan. 24, 2018) (remarks of Ms. Dean) (emphasis added).)

> No one knew Cleaver boilers, but we had several people saying that he [*i.e.* Mr. Howe] worked—this is in terms of Bowater location. He worked on all the boilers in the powerhouse. I learned in January ***on[e] of the boilers sold to Bowater was Cleaver-Brooks***.

(R. p. 622; *id.* 57:8–13 (remarks of Ms. Dean) (emphasis added).)

Counsel for Cleaver-Brooks also confirmed the limited nature of the dispute between Cleaver-Brooks and the plaintiffs:

> Ms. Dean is correct. We have largely resolved the issue. Cleaver-Brooks searched their records and they did determine that they shipped ***a boiler*** to the Bowater Papermill in Catawba, South Carolina. ***It is a very small boiler*** and our information, based on several other things that are not up for dispute today but just for some context, is that ***that boiler*** was never in the powerhouse at Bowater.

(R. p. 623; *id.* 58:4–11 (remarks of Mr. Thoensen) (emphasis added).) The plaintiffs never objected to, corrected, or otherwise suggested disagreement with this recitation of the case.

### C. February 2nd: First Rule 30(b)(6) Deposition of Cleaver-Brooks

On February 2, 2018, the plaintiffs deposed Cleaver-Brooks's Rule 30(b)(6) designee for the first time. Once again, national counsel for the plaintiffs confirmed over and over again that the dispute between the parties involved the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill:

> Q: And you know that there's a Cleaver—or was ***a Cleaver-Brooks boiler*** at Bowater?
>
> A: Yes. I think we found ***a small 30 horsepower Progress model package boiler*** shipped in 1957.
>
> Q: And do you know where ***that boiler*** was located at Bowater?
>
> A: Specifically on the site or what building, I couldn't find anything in our records that indicated specifically where ***it*** was, no.

(R. p. 1230; Tornetta Dep. 9:13–21 (Feb. 2, 2018) (emphasis added).)

> Q: So Cleaver-Brooks' records verifies that there is ***a Cleaver-Brooks boiler*** at Bowater?
>
> [objection of counsel]

A: I guess I'd say our records verify that we shipped ***a boiler*** there and ***it*** was started up. It certainly doesn't verify how long ***it*** was there, although I think there's some records that show some interaction in the '60s. But beyond that, I couldn't say when ***it*** was there or when ***it*** wasn't there.

Q: And you can confirm that asbestos was used on ***this specific boiler*** that was shipped to Bowater?

[objection of counsel]

A: Certainly there were components inside ***the boiler***, but as we talked about earlier, when we're talking about on the outside of ***the boiler***, I would have to say no.

Q: So you can confirm for me that asbestos-containing products were used on the inside of ***this boiler***?

A: When ***it*** was shipped, I believe some of the components had asbestos as part of the makeup of the component, yes.

(R. p. 1234; *id.* 42:21–43:21 (emphasis added).)

Q: Other than those documents that we've just marked as Exhibits 4 through 7, are there any other documents in Cleaver-Brooks's possession related specifically to ***the boiler*** at Bowater?

[objection of counsel]

A: So other than that, yes—or, no, there are not any more documents related to the Progress model whatever unit number we're dealing with, ***unit number O-18343*** that we show shipping to Bowater's Carolina Corporation, Catawba, South Carolina.

(R. p. 1234; *id.* 44:18–45:9 (emphasis added).)

Q: Do you have an opinion as to where ***it*** was located in the plant?

A: I think that's what I just gave you. I—my opinion would be ***it*** being in the powerhouse would be highly, highly unlikely. ***I guess we could ask the Bowater people if they have any testimony about that.***

(R. p. 1239; *id.* 120:14–19 (emphasis added).)

As the plaintiffs' national counsel tediously went through Cleaver-Brooks's records with its designee, she confirmed that the records all related to a single boiler:

> Q: We're still talking about ***the same 15-pound steam boiler***, correct?
>
> A: Correct.

(R. p. 1612; *id.* 67:9–11 (emphasis added).)

> Q: This blueprint applies to ***the boiler*** that was sent to Bowater?
>
> A: Correct.

(R. p. 1613; *id.* 72:12–14 (emphasis added).)

> Q: Okay. And Cleaver-Brooks doesn't have any other records related to ***this specific boiler*** that is has not produced, correct?
>
> [objection of counsel]
>
> A: Correct. . . .

(R. p. 1238; *id.* 115:14–25 (emphasis added).)

**D. February 6th: Cleaver-Brooks's Motion for Summary Judgment**

Following the deposition of its corporate representative, Cleaver-Brooks moved for summary judgment on grounds that there was no evidence that Mr. Howe had ever worked around a Cleaver-Brooks boiler. In particular, Cleaver-Brooks argued as follows: "Also, Howe testified that all of the boilers that he worked on at Bowater were in the power house, and the evidence shows that ***the Cleaver-Brooks boiler*** shipped to Bowater in 1957 was not in the power house." (R. p. 1085; Cleaver-Brooks's Motion for Summary Judgment at 8 (emphasis added).)

**E. February 21st: Plaintiffs' Opposition to Summary Judgment**

The plaintiffs opposed Cleaver-Brooks's motion for summary judgment. In their written argument, they again confirmed that the dispute was about the location of a single Cleaver-Brooks boiler at Bowater:

> Cleaver-Brooks has admitted that its boilers, like ***the boiler shipped to Bowater in 1957***, had asbestos-containing components. Additionally, Cleaver-Brooks confirmed that the specifications for ***the boiler*** located at Bowater called for ***the boiler*** to be insulated. . . . Plaintiffs submit that the exhibit [*i.e.* a boiler inspection report], in fact, supports Wayne Howe and Gilbert Small's testimony as the exhibit shows that during the time that Cleaver-Brooks insists that it shipped ***its boiler*** to Bowater, the only boilers at Bowater were located in the powerhouse.

(R. p. 1130; Plaintiffs' Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 11 (emphasis added).)

### F. March 6th: Second Rule 30(b)(6) Deposition of Cleaver-Brooks

Before the summary judgment motion could be heard, the plaintiffs re-deposed Cleaver-Brooks's corporate representative. Yet again, the plaintiffs focused on the location of a single Cleaver-Brooks boiler on the Bowater campus:

> Q: All right. ***The Cleaver-Brooks boiler*** that was supplied to the Bowater paper mill, do you know where at the Bowater facility ***that boiler*** was installed?
>
> [objection of counsel]
>
> A: I would have to look, but if I recall, my last deposition, I don't think there was a way we could tell from our records where ***it*** was. It was a—but I can't even off the top of my head. I didn't look at it very much before this, but I think ***it was a relatively small firetube boiler***.

(R. p. 1260; Tornetta Dep. 227:1–12 (Mar. 6, 2018) (emphasis added).)

> Q: Short story shorter, you don't know where at Bowater ***the Cleaver-Brooks boiler*** was installed. True?
>
> [objection of counsel]
>
> A: I don't have a definitive way to determine that in our records, no.

(R. p. 1260; *id.* 228:13–18 (emphasis added).)

> Q: All right. There really is no dispute that ***the Cleaver-Brooks boiler*** at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope. Correct?
>
> [objection of counsel]
>
> A: Correct. I believe it's called out, all three of those items.

(R. p. 1264; *id.* 246:15–22 (emphasis added).)

> Q: Do you know what ***the boiler*** Cleaver-Brooks supplied to Bowater was used for?
>
> A: I don't think I found anything in the records that gave me a direct indication of that I think I looked at during the last deposition. ***It*** is one of the smallest boilers we make.

(R. p. 1266; *id.* 253:7–12 (emphasis supplied).)

### G. March 8th: Plaintiffs' "Supplemental Response" in Opposition to Summary Judgment

Following its second deposition of Cleaver-Brooks, the plaintiffs filed a second memorandum in opposition to Cleaver-Brooks's motion for summary judgment. In it, the plaintiffs again made clear their belief that the factual dispute that should preempt summary judgment involved the location of a single boiler at the Bowater facility:

> Not only could Cleaver-Brooks not testify as to where ***the boiler*** at Bowater was located, Mr. Tornetta confirmed that ***the Cleaver-Brooks boiler*** located at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope.

(R. p. 1135; Plaintiffs' Supplemental Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 4 (emphasis added).)

As has become their practice in virtually every case pending in the asbestos docket, the plaintiffs' counsel incorrectly claimed that Cleaver-Brooks had not made a complete production ***in other cases*** and sought sanctions for an alleged discovery violation. As their requested sanction, the plaintiffs asked the trial court to relieve them of their burden of proof ***in this case***:

> Wayne Howe was exposed to asbestos attributable to Cleaver-Brooks from asbestos-containing component parts, including gaskets, insulation and Vee Block mix, found on ***the Cleaver-Brooks boiler*** at Bowater located in the power house.

(R. p. 1144; *id.* at 13 (emphasis added).)

### H. March 9th: Hearing on Summary Judgment

The trial court heard Cleaver-Brooks's motion for summary judgment on March 9, 2018, the last business day before trial. During that hearing, the plaintiffs reiterated that they wanted the court to declare a presumption in their favor with respect to the only factual dispute:

> You'll see for *Howe*, it's just limited to a presumption that ***the boiler*** is in the power house and/or we're going to ask to be able to use this late-identified [by the plaintiffs] witnesses.

(R. p. 634; Hr'g Tr. 18:16–19 (Mar. 9, 2018) (remarks of Ms. Dean) (emphasis added).)

After hearing arguments of counsel, the trial court clearly recognized the limited scope of the only factual dispute between the parties. As it summarized:

> Well, Ms. Dean, Ms. Dean, this is a dispute between—you don't have anything from anybody on a piece of paper that says where ***it's*** located, nor do they. You have got a witness that you found who says that ***it*** was in the power house, and they've got written material from the boiler inspection people at the state and some other testimony of the Bowater's corporate rep which you all are relying on for location in a lot of places where the defendants don't know where it is that says ***it's*** in the admin building. ***So, it's just a simple factual dispute between the two of y'all as to where this boiler is located.*** They're not disputing ***it*** was sold. They are saying that all their—they don't have any records, they say, that say the location, just a sales thing, and they say ***it's*** in the admin.

(R. p. 641; *id.* 25:6–20 (remarks of Judge Toal) (emphasis added).)

Thus, on the eve of trial, everyone—the plaintiffs, Cleaver-Brooks, and even the trial judge—acknowledged that the parties were going to have a jury trial regarding the location of the Cleaver-Brooks boiler on the Bowater campus. If it was in the powerhouse, then the plaintiffs would win. If it was elsewhere on the Bowater campus, then Cleaver-Brooks would win.

## IV. During trial, the plaintiffs attempted to ambush Cleaver-Brooks with a never-before-disclosed suggestion that there were multiple Cleaver-Brooks boilers at Bowater, but Cleaver-Brooks immediately produced records debunking that theory.

### A. March 12th: Trial started, and a third-party produced documents destroying the plaintiffs' case.

Trial began on March 12, 2018. During the plaintiffs' opening statement, they reinforced exactly what they had always told the trial court and Cleaver-Brooks: this case was about whether a Cleaver-Brooks boiler was in the Bowater powerhouse where Mr. Howe had worked. As the plaintiffs' national counsel told the jury:

> They [*i.e.* Cleaver-Brooks] have a record showing the sale of ***the 1957 packaged boiler*** that was used both for heat and processing sold to Bowater, and a bunch of replacement parts sold years and years after that that include asbestos. We have also dug into deeper, because at first we were told by Bowater they didn't have actual boilers in the powerhouse, so we started asking people and we found a coworker who has also passed away but we have his testimony that says, "I also worked in the place, ***that boiler*** was a Cleaver-Brooks boiler."

(R. p. 159; Trial Tr. 70:4–12 (remarks of Ms. Dean) (emphasis added).)

At 8:07 pm that evening, counsel for Resolute FP US, Inc.—the owner of the Bowater Paper Mill, and an entity that was not a party to this case—sent an email to counsel for both the plaintiffs and Cleaver-Brooks attaching a set of materials that Art Welker, one of Resolute's employees who worked at Bowater, had located. (R. pp. 851–55; Cleaver-Brooks Trial Exhibit 24.) Mr. Welker had been deposed in February, but—at the request of the plaintiffs' counsel—he continued investigating the location of Cleaver-Brooks's boiler between his deposition and trial. (*E.g.*, R. pp. 229–31, 263–64; Trial Tr. 478:16–25, 479:25–480:19, 512:22–513:7.) Included in the documents transmitted in the evening of March 12th was a letter Mr. Welker found confirming that the Cleaver-Brooks boiler was located in the administration building, ***not*** in the powerhouse. (R. p. 854; Cleaver-Brooks Trial Exhibit 24 at March 18, 1971 letter.)

**B. March 15th, During Trial: The plaintiffs put a third-party witness on the stand and revealed their new "two boiler" theory for the first time.**

On March 15, 2019, the plaintiffs presented Mr. Welker in their case-in-chief. Based on his review of those additional Bowater documents, Mr. Welker testified that he could conclusively determine that the Cleaver-Brooks boiler was in the administration building, not in the powerhouse. (R. pp. 243, 255, 264; Trial Tr. 492:4–14, 504:5–11, 513:8–14.) The plaintiffs even made the letter that resolved this factual dispute an exhibit in their own case. (R. p. 677; Plaintiffs' Trial Exhibit 45.)

Just like that, the case's sole factual dispute—the very factual dispute that the plaintiffs had exclusively cited throughout the pretrial litigation, including to avoid summary judgment—had been definitively resolved by a third-party witness, during the plaintiffs' case-in-chief.

But somewhere between the March 12, 8:07 pm email and Mr. Welker's testimony on March 15th, the plaintiffs manufactured a second factual dispute.

In the middle of Mr. Welker's testimony, the plaintiffs argued that Cleaver-Brooks had actually shipped two boilers to Bowater. The only basis for this conjecture was a one-digit discrepancy in the unit number on some documents within Cleaver-Brooks's production from months earlier, which they showed to Mr. Welker. (*Compare* R. p. 239; Trial Tr. 488:14–23 (noting that some documents within Cleaver-Brooks's file identified the boiler at Bowater as Unit Number O-18343), *with* R. p. 242; Trial Tr. 491:17–20 (noting that some third-party-created records in Cleaver-Brooks's file identified the boiler at Unit Number O-18344).)

This was the first time this discrepancy had been noted at any point in the case. It was never identified or discussed in any motions practice, at any hearings, or during any depositions, including either of the two times that the plaintiffs deposed Cleaver-Brooks's Rule 30(b)(6) designee. It was not the subject of a single document request, interrogatory, or admission request.

### C. March 15th, Evening: Cleaver-Brooks transmitted to the plaintiffs documents disproving their newly-disclosed "two boiler" theory.

Following the plaintiffs' revelation of their new "two boiler" theory at trial, Cleaver-Brooks sought to find out where Boiler Unit Number O-18344 was located in order to properly rebut to the plaintiffs' never-before-disclosed theory.

At 9:43 pm on March 15th, the plaintiffs' counsel sent an email to Cleaver-Brooks's counsel that stated as follows: "If you have any documents that show what was or was not at the Bowater location, please confirm that we already have them and that they have been bates numbered." (R. p. 856; Cleaver-Brooks Trial Exhibit 25, at 1.)

Less than two hours later, counsel for Cleaver-Brooks responded as follows: "Although we believe that we are not obligated to produce this given that it is evidence obtained directly in response to the arguments in court today regarding unit number O-18344, Ashley [Couch, one of Cleaver-Brooks's paralegals] will forward you a link to the documents shortly. They are too big to email." (R. p. 858; Cleaver-Brooks Trial Exhibit 26, at 1.)

Attached to that email were copies of entries from the Cleaver-Brooks job-site index system showing two things: (1) Unit Number O-18343 had been shipped to Bowater, just as Cleaver-Brooks had maintained from the outset, and just as its corporate representative had testified during his Rule 30(b)(6) deposition; and (2) Unit Number O-18344, which the plaintiffs implied was at Bowater during Mr. Welker's in-trial testimony earlier in the day, had actually been shipped to a different company in Illinois in November 1957. (R. pp. 859–60; *id.* at 2–3.)

Moments after that email was sent, counsel for Cleaver-Brooks emailed a link containing the commercial records regarding Unit Number O-18344 to the plaintiffs' counsel. (R. p. 861; Cleaver-Brooks Trial Exhibit 27.) Seventeen minutes later, the plaintiffs' counsel downloaded the commercial records for Unit Number O-18344. (R. p. 863; Cleaver-Brooks Trial Exhibit 29.)

### D. March 16th: Trial resumed, and the plaintiffs elicited testimony from Cleaver-Brooks's representative disproving their "two boiler" theory.

On March 16th, the plaintiffs called John Tornetta, who was Cleaver-Brooks's Rule 30(b)(6) corporate designee, as a witness in their case-in-chief. The plaintiffs began Mr. Tornetta's testimony by having him confirm that the Cleaver-Brooks boiler at Bowater was located in the administration building, not in the powerhouse where Mr. Howe had worked. (R. pp. 277–78; Trial Tr. 627:16–628:5.)

But then, even though the plaintiffs already had records showing that Unit Number O-18344 was not at Bowater, the plaintiffs asked Mr. Tornetta about the discrepancy between Unit Numbers O-18343 and O-18344 appearing within a handful of the commercial records that Cleaver-Brooks had previously produced. Mr. Tornetta readily pointed out that the instances of the Unit Number O-18344 appearing within those records were typographical errors by a third-party contractor when filling out paperwork. (R. p. 336; Trial Tr. 686:6–8.) He explained in response to questioning from the plaintiffs' counsel:

> Q: Last night for the first time I am provided a card that says this repeated reference in the records to 44 isn't actually going to Bowater like it says but was going to Illinois.
>
> A: Correct. The unit number 18344 after we understood it was a question that came up [during Art Welker's testimony], it was looked at and the records for that went to—I'm going to lose the name, but it was in Monmouth, Illinois, I believe, was the city. American Milling, I believe.

(R. pp. 336–37; Trial Tr. 686:20–687:3.)

The plaintiffs' counsel continued with their questioning:

> Q: It's not just that that number [ending in 344] is referenced, it's referenced from different people in different contexts at different times, true?

A: It was referenced initially by a Mister I believe it's Tinner [a third-party contractor] who did the start-up, which then in my mind at least carried through to the invoice which is on BPM six, because they would have used his start-up report to create that invoice and then actually that invoice carried over to our remittance request, which is what they used to create the remittance request. So to me it seemed a little bit like the pass-it-down-the-lane type thing where one person said it wrong and then it kept being said wrong, that's the way I interpret it. But once I looked at the records for 18344 and saw where it was, it was very clear in my mind that this was a typographical error.

Q: That's the way you interpret it today, not last week, not last month, today.

A: 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, and ***I don't think anyone ever brought it up as we were going through those depositions either***.

(R. pp. 338–39; Trial Tr. 688:12–689:9 (emphasis added); *see also* R. pp. 339–44; Trial Tr. 689:10–694:14 (additional discussion from Mr. Tornetta regarding how this typographical error could have started with a third-party contractor filling out paperwork and the error carried through to two additional documents).)

Flustered, the plaintiffs pressed Mr. Tornetta further on where Unit Number O-18344 was located, if it was not located at Bowater:

Q: Have you gone back since you've acknowledged that maybe you missed the different unit numbers [within Cleaver-Brooks's production regarding the boiler at Bowater] to look and see what other indicators there are about those boilers to make clear that we're talking about more than one boiler?

A: I suppose in pulling out the records for wanting 344 to see where it was indicated otherwise, that that boiler 18344 was not at Bowater. So in a way, yes, I did do that to see if there was a second boiler there and it was not 18344, 18344 was in Illinois.

(R. pp. 344–45; Trial Tr. 694:22–695:5.)

In response to further questioning from the plaintiffs, Mr. Tornetta explained that Cleaver-Brooks was entirely unaware of the plaintiffs' "two boiler" theory until they revealed it during Mr. Welker's testimony the prior day at trial:

> Q: When is the first time you did that [*i.e.* check Cleaver-Brooks's records to determine where Unit Number O-18344 was located] and how much time did you spend looking?
>
> A: It was yesterday afternoon.
>
> Q: Somebody texted you when Art [Welker] was on the stand?
>
> A: I don't think I got a text, I got here and was asked about it.

(R. p. 345; Trial Tr. 695:6–11.)

After the plaintiffs rested their case-in-chief and the trial court heard directed verdict motions, the plaintiffs for the first time expressed concerns about Cleaver-Brooks's production of documents regarding Unit Number O-18344 and asked the court to deem them inadmissible despite having elicited testimony from Mr. Tornetta about those same documents.

Amazingly, the plaintiffs—who never revealed their supposed "two boiler" theory at any point in pretrial discovery or motions practice and who, in fact, had repeatedly represented to the court that there was a single Cleaver-Brooks boiler at the Bowater Paper Mill—claimed to be the victims of "trial by ambush." (R. p. 362; Trial Tr. 712:11.) In response, Cleaver-Brooks pointed out the absurdity of the plaintiffs' position and how this issue had never arisen at ***any*** point before Mr. Welker's testimony the day before, including over the course of multiple depositions of Mr. Tornetta. (R. pp. 363–65; Trial Tr. 713:3–715:16.) As Cleaver-Brooks explained, "you can't look for what you don't know." (R. p. 370; Trial Tr. 720:10–11.)

The trial court recognized that "the big lynchpin of this case was going to be whether there was a Cleaver-Brooks boiler wherever Wayne Howe worked," but nevertheless decided

that Cleaver-Brooks's records regarding Unit Number O-18344 would not be admitted into evidence on grounds that the production of those records "is a violation of the South Carolina Rules of Evidence regarding production." (R. pp. 366–69; Trial Tr. 716:9–11, 718:23–719:3.)

Cleaver-Brooks then recalled Mr. Tornetta to the witness stand who testified, without any objection, as follows:

> Q: How many boilers did Cleaver-Brooks ship to Bowater?
>
> A: One.
>
> Q: What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.
>
> A: I think the whole unit number, if I get it correctly, is O-18343.
>
> Q: Did Cleaver-Brooks ship a boiler to Bowater with the unit number O-18344?
>
> A: No.

(R. pp. 386–87; Trial Tr. 736:21–737:5.) Mr. Tornetta's testimony continued, again without any contemporaneous objection from the plaintiffs:

> Q: Did you find anything in your records that said field report in the top and had written as the serial number 18343?
>
> A: No.
>
> Q: And what did you conclude based upon all of your work in looking at Cleaver-Brooks files over all of the years by that fact?
>
> A: That the 18344 written on the field report and the supplemental field report was a typographical or written error which led to the subsequent typographical errors on the next two documents.
>
> Q: Any doubt in your mind about that?
>
> A: No.

(R. pp. 394–95; Trial Tr. 744:23–745:10.)

Once Mr. Tornetta's testimony concluded, Cleaver-Brooks made a proffer regarding the commercial records for Unit Number O-18344. (R. pp. 499–513; Trial Tr. 849:14–863:24; R. pp. 739–867; Cleaver-Brooks's Exhibits 11, 12, 13, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30 Presented During Proffer.)

**E. March 21st: The parties presented their closing arguments and left it to the jury to determine how many Cleaver-Brooks boilers were at Bowater, which returned a verdict in Cleaver-Brooks's favor.**

The trial continued, and on March 21st, the parties presented their closing arguments. In the plaintiffs' closing, they did not indicate any kind of prejudice resulting from Cleaver-Brooks's production of the commercial records regarding Unit Number O-18344; instead, they challenged the credibility of Mr. Tornetta's testimony regarding the typographical errors in the records regarding the boiler that was shipped to the Bowater Paper Mill. (R. pp. 518–20; Trial Tr. 1019:21–1021:16.) The plaintiffs even highlighted for the jury that Cleaver-Brooks had been prohibited from introducing "a single document to evidence that story" that Boiler Unit Number O-18344 was shipped to Illinois, not to Bowater. (R. p. 519; Trial Tr. 1020:16–19.)

In response, Cleaver-Brooks's counsel told the jury that it was up to them whether to believe Mr. Tornetta's testimony regarding the typographical errors in the records regarding Unit Number O-18343. (R. pp. 558–59; Trial Tr. 1059:5–1060:7.)

The jury returned a verdict in Cleaver-Brooks's favor. (R. p. 579; Trial Tr. 1126:12–25.) That verdict is not available on the Public Index, however, because the trial judge apparently instructed the Clerk of Court not to enter it during an off-the-record conversation. (R. pp. 661–62; Hr'g Tr. 20:21–22:18 (Oct. 10, 2018).)

## V. Following a defense verdict, the plaintiffs sought to recover all of their trial attorneys' fees and costs based on a completely false narrative about the case's history, which the trial court granted.

On March 31, 2018, the plaintiffs filed a motion for sanctions against Cleaver-Brooks. (R. p. 1156; Plaintiffs' Motion for Sanctions.) In direct violation of Rule 6(d), SCRCP, that motion was not accompanied by any proof of such fees or costs.

On April 30, 2018, the plaintiffs re-filed their motion. (R. p. 1161; Plaintiffs' Motion for Sanctions with Statements of Fees and Costs.) This time, the plaintiffs filed nearly two thousand pages of exhibits, and ultimately requested that their lawyers be fully compensated for all of their time spent preparing for and participating in trial: $85,800 for Ms. Dean; $62,400 for Ms. Dean's associate, Mr. Holder; and $77,550 for Ms. Dean's local counsel, Ms. McVey. (R. p. 1294; Dean Aff. ¶ 21; R. p. 1302; Holder Aff. ¶ 20; R. p. 1431; McVey Aff. ¶ 20.) They also requested $95,435.16 in costs (R. p. 1311; Dean Costs Aff. ¶ 3), plus an additional $2,881.84 for representatives from the plaintiffs' family to attend trial (R. pp. 1389, 1578; Affs. of Howe and Myers.)

All told, the plaintiffs' lawyers sought to be paid $323,267 for a trial that they lost. The basis for their request: that Cleaver-Brooks's prompt production of documents regarding Unit Number O-18344 in response to the plaintiffs' in-trial revelation of their never-before-disclosed "two boiler" theory had "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." (R. p. 1168; Plaintiffs' Motion for Sanctions with Statement of Fees and Costs at 8.)

On May 30, 2018, Cleaver-Brooks filed an opposition memorandum. (R. p. 1391; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions.)

On October 10, 2018, the trial court held a hearing on the motion. At the hearing, the plaintiffs withdrew $4,600 of their requested costs. (R. p. 660; Hr'g Tr. 16:1–5 (Oct. 10, 2018) (remarks of Ms. McVey).) The trial court concluded that hearing by orally indicating that it would grant the request for sanctions, "but the mandate of the order and the amounts await a little further review on my important part and will be communicated to you very shortly." (R. p. 674; Hr'g Tr. 72:9–12 (Oct. 10, 2018) (remarks of Judge Toal).)

The plaintiffs then provided the trial court with a proposed order granting their motion, to which Cleaver-Brooks objected as being replete with demonstrably false statements, among other objections. (R. p. 1471; Letter Objecting to Plaintiffs' Proposed Order (Nov. 2, 2018).)

On December 7, 2018, the trial court signed the plaintiffs' proposed order and awarded them $304,617.00, the full amount requested by the plaintiffs' counsel with a self-imposed reduction of Ms. Dean's and her local counsel's hourly rates from $550 to $500. (R. p. 5; Sanctions Order.)

On December 17, 2018, Cleaver-Brooks filed and served a timely motion to alter or amend that sanctions order under Rule 59(e), SCRCP. (R. p. 1477; Cleaver-Brooks's Motion to Alter or Amend.) By order dated January 4, 2019, the trial court denied Cleaver-Brooks's Rule 59(e) motion. (R. p. 27; Order Denying Cleaver-Brooks's Motion to Alter or Amend Order.) This appeal followed on January 30, 2019. (R. p. 1608; Notice of Appeal.)

## STANDARD OF REVIEW

There is simply no basis whatsoever in the record to support the trial court's sanctions order. Fortunately, because the sanctions order awards the plaintiffs their attorneys' fees, this Court must take its own view of the evidence when reviewing that order, owing no deference to the trial court's factual conclusions. As explained in former Chief Justice Toal's treatise:

> [I]n cases in which the sanctions ordered by the trial court include an award of attorneys' fees, there is an interplay between the traditional standard of review for sanctions in general—in which the appellate court determines whether the trial court has abused its discretion—and the traditional standard of review for equity cases—in which ***the appellate court may find facts in accordance with its own view of the preponderance of the evidence***.
>
> Generally, ***the standard of review in equity cases takes precedence***, as the South Carolina Constitution permits an appellate court to take its own view of the facts underlying the sanctions.

Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* at 248 ("Discovery: Sanctions") (3d ed. 2016) (emphasis added and internal citation of numerous South Carolina cases omitted); *see also Father v. S.C. DSS*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003) ("So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts." (citing S.C. Const. art. V, § 5)), *superseded in unrelated part by statutory amendment as reported in Clegg v. Lambrecht*, Op. No. 4498, 2009 S.C. App. LEXIS 353, at *9–10 n.5 (S.C. Ct. App. Feb. 5, 2009).[1]

Only if this Court agrees with the trial court's factual findings does it review the decision to award sanctions, and the terms of the sanctions, for an abuse of discretion. *See Father*, 353 S.C. at 261, 578 S.E.2d at 14 ("[W]here 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."). Thus, if the Court even reaches this stage of the analysis, it must reverse the trial court's decision if it is "controlled by an error of law or is based on unsupported factual conclusions." *Id.*

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[1] The trial court even acknowledged that it was proceeding in equity when issuing the sanctions order. (*See* R. p. 22; Sanctions Order at 18 (citing *Kilcawley v. Kilcawley*, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994)).)

## ARGUMENTS AND AUTHORITIES

### I. The trial court's sanctions order is contrary to the full, unbroken history of this case, including the plaintiffs' numerous representations below.

This Court should reverse the trial court's sanctions order because it is based on a complete fiction and bears no connection to the actual history of this case. The error is manifested in this sentence: "In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. p. 6; Sanctions Order at 2.)

This is entirely false. The "number of Cleaver-Brooks boilers" was ***never*** in dispute until the plaintiffs questioned Mr. Welker—a third-party witness—during trial about a fictitious second boiler after he had provided testimony that completely devastated the plaintiffs' actual theory of the case. When Cleaver-Brooks opposed the plaintiffs' sanctions motion, it certainly did dispute that the number of boilers was ever in issue: it did so throughout its opposition memorandum (*see, e.g.*, R. p. 1400; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions at 10 ("Plaintiffs' counsel apparently conceived this [two-boiler] theory weeks before trial, but never took any discovery on this theory.")), and it did so in its letter objecting to the plaintiffs' proposed order (*see, e.g.*, R. p. 1471; Letter Objecting to Plaintiffs' Proposed Order at 1 (Nov. 2, 2018) ("The 'number of Cleaver-Brooks boilers' was ***never*** in dispute until after documents from Bowater Paper Mill produced in trial revealed that the Cleaver-Brooks boiler was in the administration building." (emphasis in original)).

To suggest that the number of Cleaver-Brooks boilers was in issue at any point before Mr. Welker's trial testimony is both nonsensical and disingenuous. For one, the boiler that the plaintiffs now pretend they believed may have been at Bowater—Unit Number O-18344—was always located in Illinois. It would make no sense at all for Cleaver-Brooks to suppress

exculpatory evidence on this exact issue. Defendants crave Rule 12 and Rule 56 motions, not trials. If Cleaver-Brooks had documents that it knew would have or even might have foreclosed a potential trial on this issue, it would have had zero incentive to keep those materials to itself until after it had incurred the financial and emotional expense of starting a trial.

Moreover, the case's unbroken, undisputed history should give this Court full confidence that Cleaver-Brooks did not irrationally withhold production of exculpatory documents until the middle of trial. The plaintiffs' own conduct during each phase of the litigation confirms that those documents were not relevant until the plaintiffs manufactured and revealed their "two boiler" theory during Mr. Welker's testimony at trial, as summarized below.

**Plaintiffs' Representations During Hearings.** The trial court held multiple pretrial hearings. Every time, the plaintiffs confirmed to the trial court that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 622; Hr'g Tr. 57:8–13 (Jan. 24, 2018) ("He worked on all the boilers in the powerhouse. I learned in January on[e] of the boilers sold to Bowater was Cleaver-Brooks.") (remarks of Ms. Dean); R. p. 634; Hr'g Tr. 18:16–19 (Mar. 9, 2018) ("You'll see for *Howe*, it's just limited to a presumption that the boiler is in the power house and/or we're going to ask to be able to use this late-identified [by the plaintiffs] witnesses.") (remarks of Ms. Dean).)

**Plaintiffs' Representations During Rule 30(b)(6) Depositions.** The plaintiffs twice deposed Cleaver-Brooks's corporate designee. Both times, the plaintiffs confirmed to Cleaver-Brooks that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 1230; Tornetta Dep. 9:13–21 (Feb. 2, 2018) ("Q: And you know that there's a Cleaver—or was a Cleaver-Brooks boiler at Bowater? A: Yes. I think we found a small 30 horsepower Progress model package boiler shipped in 1957. Q: And do you

know where that boiler was located at Bowater? A: Specifically on the site or what building, I couldn't find anything in our records that indicated specifically where it was, no."); R. p. 1260; Tornetta Dep. 228:13–18 (Mar. 6, 2018) ("Q: Short story shorter, you don't know where at Bowater the Cleaver-Brooks boiler was installed. True? [objection of counsel] A: I don't have a definitive way to determine that in our records, no.").)

**Plaintiffs' Representations in Written Submissions.** The parties filed numerous pretrial memoranda with the trial court. Every time, the plaintiffs confirmed that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 1130; Plaintiffs' Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 11 ("Plaintiffs submit that the exhibit [*i.e.* a boiler inspection report], in fact, supports Wayne Howe and Gilbert Small's testimony as the exhibit shows that during the time that Cleaver-Brooks insists that it shipped its boiler to Bowater, the only boilers at Bowater were located in the powerhouse."); R. p. 1135; Plaintiffs' Supplemental Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 4 ("Not only could Cleaver-Brooks not testify as to where the boiler at Bowater was located, Mr. Tornetta confirmed that the Cleaver-Brooks boiler located at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope.").)

**Plaintiffs' Silence Throughout.** Not only did the plaintiffs' affirmatively proclaim that the only disputed issue was the location of a single Cleaver-Brooks boiler at Bowater, they also never disputed this point when others parroted back this narrow issue as being the only factual dispute between the parties.

For instance, when Cleaver-Brooks sought a protective order for the plaintiffs' Rule 30(b)(6) deposition notice on grounds of overbreadth, it noted that the limited dispute involved

allegations "that Cleaver-Brooks manufactured a boiler used at the Bowater Paper Mill in Rock Hill/Catawba, South Carolina which contained asbestos to which the Plaintiff was exposed, and which exposure contributed to his alleged asbestos related injuries." (R. p. 869; Cleaver-Brooks's Motion for Protective Order at 1.) In that same filing, Cleaver-Brooks also explained that it had "produced a collection of documents regarding its shipment of a boiler to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs' counsel." (R. p. 870; *id.* at 2.)

If the plaintiffs believed that the scope of the case exceeded the location of that single boiler, or if the plaintiffs truly believed—as they suddenly claimed in the middle of trial—that the documents that Cleaver-Brooks produced related to multiple boilers, they would have naturally corrected Cleaver-Brooks's statements and made clear that the case was really about multiple boilers. But they did not. Only silence.

Likewise, the documents that Cleaver-Brooks produced during discovery were all within a folder labeled "O-18343," making it obvious that Cleaver-Brooks understood those records related to this single boiler. (R. p. 678; BPM 000001.) If the plaintiffs truly believed that folder contained records about an additional boiler, they would have naturally served a document request, an interrogatory, or a request for admission regarding that additional boiler. Or, if there was any legitimate confusion as to which boiler or boilers those records related, the plaintiffs would have naturally asked the Rule 30(b)(6) designee about that additional boiler during either of his depositions. But they did not. Only silence.

Perhaps most telling is their silence in response to remarks of the trial judge herself. During a hearing on the last business day before trial, the trial court condensed the case to its single issue: "So, it's just a simple factual dispute between the two of y'all as to where this boiler is located. They're not disputing it was sold. They are saying that all their—they don't have any

records, they say, that say the location, just a sales thing, and they say it's in the admin[istration] building." (R. p. 641; Hr'g Tr. 25:15–20 (Mar. 9, 2018) (remarks of Judge Toal).) Once more, if the plaintiffs believed that the scope of the case exceeded the location of that single boiler, they would have naturally corrected the trial judge's observation and made clear that the case was really about multiple boilers. But, once again, they did not. Only silence.

* * * * *

The upshot of this is that Cleaver-Brooks cannot possibly be sanctioned for its mid-trial production of documents (1) that were never requested (2) about a boiler that was in Illinois (3) in response to a mid-trial surprise from the plaintiffs during Mr. Welker's testimony. In fact, the South Carolina Supreme Court has addressed this exact situation and held that it is error to exclude such rebuttal evidence from trial.

In *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), a psychiatric patient at Charter Rivers committed suicide, and his estate sued Charter Rivers for negligence. During discovery, the plaintiff's expert disclosed an opinion regarding the alleged negligence of Kim Stroud, one of Charter Rivers's occupational therapists. *Id.* at 74, 393 S.E.2d at 917. At trial, though, the plaintiff's expert witness offered opinion testimony regarding both Ms. Stroud and Barbara Higdon, a psychiatric nurse at Charter Rivers. *Id.*

In response to this mid-trial surprise, Charter Rivers sought to offer testimony from a previously undisclosed expert witness, Nurse Jennifer Savitz. *Id.* As proffered, Nurse Savitz's testimony would have directly rebutted the plaintiff's expert's opinion testimony regarding Ms. Higdon that was first disclosed during trial. *Id.* Nevertheless, the trial court refused to allow Charter Rivers to present Nurse Savitz's testimony to the jury. *Id.*

The Supreme Court reversed. It held the trial court's exclusion of Nurse Savitz's rebuttal testimony was reversible error, even under an abuse-of-discretion standard, because Charter Rivers "was clearly prejudiced by the exclusion of this evidence" that was offered to directly respond to the plaintiff's in-trial surprise expert testimony regarding Ms. Higdon's conduct. *Id.*

If the trial court's sanctions order in this case was the law, Charter Rivers would have been the party sanctioned in *Bramlette*: first, for not correctly guessing that the plaintiff's expert would have an opinion regarding Ms. Higdon; and second, for not providing Nurse Savitz's testimony in advance of trial to rebut that undisclosed opinion.

That would be outrageous, of course. But that is the exact outcome of the trial court's sanctions order here; it has punished Cleaver-Brooks for promptly responding in real-time to a sneak attack from the plaintiffs in the middle of a trial. This is backwards, and the trial court has penalized the wrong party here.

*Bramlette* makes clear that the trial court was wrong to exclude Cleaver-Brooks's documents regarding Unit Number O-18344 from being admitted at trial. It also makes clear that the trial court was even more wrong to sanction Cleaver-Brooks over $300,000 for a production it promptly made in response to the plaintiffs' in-trial surprise.

Because this Court must review the facts and draw its own conclusions without deference to the trial court's ruling, it should find that sanctions are wholly improper here and reverse and vacate the sanctions order accordingly. There is simply no basis for that order anywhere in the record below.

**II. The plaintiffs waived any argument for sanctions by questioning witnesses about the very documents upon which their request for sanctions is based, and by doing so without objection.**

The trial court's sanctions order is improper not only because it is belied by the case's entire record and procedural history, but also because the plaintiffs themselves opened the door to Cleaver-Brooks's production of records regarding Unit Number O-18344 by asking questions about that boiler to both Art Welker, a third-party witness, and John Tornetta, Cleaver-Brooks's corporate designee, during the plaintiffs' case-in-chief. (*See* R. pp. 239–42; Trial Tr. 488:14–491:20 (questioning Mr. Welker regarding Unit Number O-18344); R. pp. 336–47; Trial Tr. 686:2–697:19 (questioning Mr. Tornetta regarding Unit Number O-18344).)

The plaintiffs did not object to Cleaver-Brooks's production of records regarding Unit Number O-18344 or any testimony about those records until ***after*** they had rested their case, and ***after*** the trial court resolved Cleaver-Brooks's motion for a directed verdict. (R. p. 359; Trial Tr. 709:10.) That objection came far too late and operates as a waiver in two ways.

First, the plaintiffs—not Cleaver-Brooks—were the party who put the location of Unit Number O-18344 at issue, and they opened that door in the middle of trial during Mr. Welker's testimony. As a matter of South Carolina law, a party who raises a previously unknown issue in trial waives its objections to the presentation of rebuttal evidence. *See, e.g.*, *Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) ("A litigant cannot complain of prejudice by reason of an issue he has placed before the court."); *Bramlette*, 302 S.C. at 74, 393 S.E.2d at 917 (reversing a trial court's exclusion of evidence produced during trial to rebut surprise trial testimony from the plaintiff); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence

would be incompetent or irrelevant had it been offered initially." (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))) (brackets supplied by the *Stroman* court).

Accordingly, the plaintiffs waived any right they had to complain regarding Cleaver-Brooks's production of records regarding Unit Number O-18344 when they began questioning Art Welker about that boiler, as Cleaver-Brooks was "entitled to introduce evidence" to rebut the misleading questions that the plaintiffs asked of Mr. Welker.

Second, the plaintiffs withheld their objections to Cleaver-Brooks's records regarding Unit Number O-18344 until after they had concluded questioning Mr. Tornetta about that boiler. They even presented to the jury a portion of the records that Cleaver-Brooks transmitted in response to the plaintiffs' "two boiler" theory. (R. p. 335; Trial Tr. 685:8–15.) By silently withholding their objection and allowing that information to come into evidence, the plaintiffs waived their right to object to that testimony or those documents. *See State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."); *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.").

At bottom, it is fundamentally unfair to allow a party to induce the production of additional documents, present testimony about those documents to a jury, and then complain when it is dissatisfied with the witness's responses. This kind of posturing is prohibited as a matter of South Carolina law. *See State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) ("He cannot complain of an error which his own conduct has induced."), *overruled in unrelated part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Because the plaintiffs created the very situation upon which the sanctions order is based, this Court should vacate the sanctions order due to the plaintiffs' waiver of any objections regarding Cleaver-Brooks's production of records to rebut the plaintiffs' in-trial surprise testimony.

## III. The sanctions order is procedurally improper.

In addition to being belied by the entire factual record of this case, the sanctions order is procedurally improper. The trial court relied on Rule 37(b) as the exclusive basis for exercising post-judgment jurisdiction here, but that rule is facially inapplicable in this case. The trial court also ignored the plaintiffs' counsel's conduct under Rule 11 and related rules of professional responsibility, which would have been violated if their post-judgment story is to be believed. Each error is discussed below in turn.

### A. Rule 37(b)(2) only applies when a party violates a discovery order, which does not exist here because the plaintiffs never requested documents about Unit Number O-18344.

The first procedural error in the sanctions order is its singular reliance on Rule 37(b)(2), SCRCP, as the jurisdictional nexus for awarding sanctions. (R. p. 14; Sanctions Order at 10.) That rule authorizes sanctions when "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) . . . ." Rule 37(b)(2), SCRCP (emphasis added).

That rule is facially inapplicable here. There is no such discovery order that Cleaver-Brooks could have possibly violated, as there was never any order directing Cleaver-Brooks to produce documents related to Unit Number O-18344. The plaintiffs never allege that Cleaver-

Brooks violated any discovery order, nor did the trial court identify any in its sanctions order. This is critical, because Rule 37(b)(2) is only operative when a litigant defies a discovery order.

The reason there is no such order in this case is straightforward: the plaintiffs never conducted any discovery at all regarding Unit Number O-18344. As the trial court noted in its sanctions order, "Plaintiffs' discovery requests pertained to documents relevant to Wayne Howe's worksites." (R. p. 15; Sanctions Order at 11.) It is undisputed that Unit Number O-18344 was not at a worksite that Mr. Howe ever visited. Accordingly, there was no reason for Cleaver-Brooks to produce records regarding that boiler or that worksite until the middle of trial when the plaintiffs, for the first time, suggested that they thought this boiler was at Bowater.

Puzzlingly, the trial court dismissed this argument as "irrelevant" (R. p. 14; Sanctions Order at 10) and as "miss[ing] the point." (R. p. 15; *id.* at 11.) But it is not "irrelevant"; it is dispositive.

The South Carolina Supreme Court has been clear that when a party alleges that another has given an incomplete discovery response, the court has an obligation to evaluate the response "in light of the question asked." *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991). No such evaluation took place here. Instead, the trial court simply declared that Cleaver-Brooks should have produced documents related to Unit Number O-18344 because, according to the trial court, those records are responsive to a standard interrogatory in asbestos cases that called for production of "'documents which show sales' pertaining to products containing asbestos to job sites at which plaintiff was employed, which included Bowater." (R. p. 10; Sanctions Order at 6.)[2] Indisputably, the trial court is wrong.

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[2] Even with this citation, the trial court failed to identify a specific interrogatory or document request.

Unit Number O-18344 was shipped to a facility in Illinois, not to any worksite that Mr. Howe ever visited. Accordingly, there is no way to claim that records regarding that boiler were responsive to a discovery request that was pegged to locations Mr. Howe worked. Had the trial court evaluated those records "in light of the question asked," it would have recognized that they were not responsive to any discovery requests served on Cleaver-Brooks, and it would have recognized how incredibly inequitable it is to sanction Cleaver-Brooks for not producing documents that were never requested, while also fully excusing the plaintiffs' own failures to conduct any discovery at all on an issue they claim they were aware of all along.

In any event, it cannot be the law that a party can be sanctioned for not producing records that were never requested, or for allegedly violating a discovery order that does not even exist. Because no such discovery order exists here, the trial court erred by relying on Rule 37(b)(2) as its jurisdictional basis for awarding sanctions. Moreover, the time for filing any other post-judgment motion has long since expired and cannot be extended. *See* Rule 6(b), SCRCP ("The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them."). Accordingly, the trial court's ruling should be vacated for lack of jurisdiction.

### B. Assuming the plaintiffs' counsel's statements are true, the sanctions order improperly rewards them for ignoring their obligations and duties under Rule 11 and the Rules of Professional Conduct.

The second procedural error in the sanctions order involves the trial court's disregard of counsel's professional duties of candor and not to present non-meritorious claims.

The sanction issued here represents all of the plaintiffs' attorneys' fees for their alleged time spent working on this case from the day before trial through the verdict, plus all of the plaintiffs' alleged trial expenses, plus time away from work for Mr. Howe's children to attend

trial. (R. p. 25; Sanctions Order at 21.) The trial court based its decision to award such an enormous sanction on this assertion by the plaintiffs' national counsel: "If Plaintiffs had been in possession of the midnight documents [*i.e.* the records regarding Unit Number O-18344] before trial started, Plaintiffs would not have proceed to trial against Cleaver-Brooks." (R. p. 1294; Dean Aff. ¶ 19.)

Cleaver-Brooks does not believe that this statement of counsel is true, but it was denied the opportunity to conduct discovery to test the veracity of this assertion. That denial of discovery is reversible error, as it precluded Cleaver-Brooks any opportunity to find out the truth of counsel's assertions that were the keystone of the sanctions order.[3] *See Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2008) ("Where these [discovery] rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required.").

Nevertheless, based on the information already available, there are several reasons why Cleaver-Brooks does not believe that counsel's statement is true.

First, Cleaver-Brooks produced documents about Unit Number O-18344 on March 15th. The jury returned its verdict on March 21st, almost a full week later. The plaintiffs certainly did not stop the trial and dismiss their claims upon receiving these records; instead, they pressed forward with several additional days of trial. This belies any suggestion that the plaintiffs would have stopped the litigation if they had seen documents regarding Unit Number O-18344 in advance of trial.

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[3] Cleaver-Brooks sought such discovery in multiple filings. (R. p. 1409; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions at 19; R. p. 1481; Cleaver-Brooks's Motion to Alter or Amend at 5.) The trial court did not address this issue in either of its orders.

Second, even after receiving the records regarding Unit Number O-18344, the plaintiffs continued arguing to the jury that the core factual dispute between Cleaver-Brooks and the plaintiffs was the location of a Cleaver-Brooks boiler at Bowater. In her closing argument, the plaintiffs' national counsel—the same attorney who swore under oath that the plaintiffs would never have proceeded to trial if they had known that Unit Number O-18344 was in Illinois—repeatedly argued as follows:

> A boiler operating in February of '58 is not in a building that doesn't exist. Unit 18343 is not the boiler put in the administration building, that's the first thing we know cleanly.
>
> * * *
>
> So the next thing we have to prove is not just that was in the powerhouse, but because Wayne Howe spent so much time there, that's why we were focusing on the powerhouse that he worked with that boiler.
>
> * * *
>
> Direct evidence. Cleaver-Brooks was there in the powerhouse.

(R. pp. 518, 524, 528; Trial Tr. 1019:2–6, 1025:13–16, 1029:6–7.) The plaintiffs' closing argument confirmed that the true factual dispute between the parties at the close of trial was the same as it had been since the outset of the litigation: identifying the location of the only Cleaver-Brooks boiler on the Bowater campus, ***not*** how many Cleaver-Brooks boilers were there.

At bottom, the plaintiffs did not let the production of records regarding Unit Number O-18344 in response to their attempted mid-trial surprise slow them down or even alter their actual trial strategy to convince a jury that Boiler Unit O-18343 was in the powerhouse at Bowater where Mr. Howe had worked. Standing alone, this is sufficient to discredit the plaintiffs' counsel's self-serving post-trial statement about the preeminent importance of those documents. But if counsel's statement is to be believed and taken at face value, it is an admission of violations of multiple rules governing attorney conduct.

Rule 11(a), SCRCP, provides that every pleading must be signed by an attorney, and that signature operates as a certificate that the lawyer has read the pleading and "that to the best of his knowledge, information and belief there is good ground to support it." This is similar to Rule 3.1 of the South Carolina Rules of Professional Conduct, which directs attorneys not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." And, as a corollary principle, Rule 3.3 requires "candor toward the tribunal," including not making false statements of fact or offering "evidence that the lawyer knows to be false." S.C. Rules of Prof'l Conduct Rule 3.3(a)(1), (3).

If the plaintiffs truly believed that the records regarding Unit Number O-18344 dispelled every remaining factual dispute in the case, they had an obligation to cease the proceedings on March 15th, dismiss their claims against Cleaver-Brooks, and report this dismissal to the trial court. They did none of those things. By issuing a sanctions order based on the notion that the entire trial would never have happened but for Cleaver-Brooks's failure to produce records regarding Unit Number O-18344, the trial court rewarded the plaintiffs' counsel for ignoring their duties of candor and to bring only meritorious claims.

This is fundamentally inequitable and is squarely contrary to every policy embodied in Civil Rule 11 and in Professional Conduct Rules 3.1 and 3.3. Accordingly, to the extent that the Court credits the plaintiffs' counsel's representation that the plaintiffs would not have proceeded to trial had they reviewed records regarding Unit Number O-18344 in advance of trial—again, documents that they never requested or asked anyone about at any point before the middle of trial—the trial court's order should be reversed because it encourages and even rewards counsel for ignoring their professional duties of candor and not to misuse judicial resources.

## IV. If the Court believes that Cleaver-Brooks has done anything at all wrong here, the sanctions are grossly disproportionate and amount to an abuse of discretion.

Only if the Court, after taking its own independent review of the case's facts, believes that Cleaver-Brooks did anything wrong here does the analysis transition into the specifics of the trial court's sanctions order. That is reviewed for an abuse of discretion, which exists when the trial court's ruling lacks factual support, when the trial court commits an error of law, or when the trial court fails to exercise any discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without any evidentiary support. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). The trial court's sanctions order is replete with failures in each of these three abuse-of-discretion categories, as explained below.

### A. In virtually every respect, the sanctions order lacks any factual support.

The sanctions order is loaded with factual statements upon which the trial court based its enormous sanctions decision, but for which there is no evidentiary support anywhere in the record. For instance:

| Sanctions Order | Statement in Sanctions Order | Citation in Support of Statement |
|---|---|---|
| Page 2 (R. p. 6) | "In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." | Nothing cited in support of statement in the order, because it is not true. (*See* Argument I *supra.*) |

| **Sanctions Order** | **Statement in Sanctions Order** | **Citation in Support of Statement** |
|---|---|---|
| Page 7 (R. p. 11) | "Cleaver-Brooks' corporate representative Tornetta admitted at trial that Plaintiffs had explicitly asked for those index cards during his deposition." | The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210–11; Ex. A to Plaintiffs' Reply in Support of Sanctions.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (*See* Argument III.A *supra.*) |
| Page 7 (R. p. 11) | "By Cleaver-Brooks' admission, it was again reminded of its obligation to supplement its document production when, following Art Welker's February 20, 2018 deposition, Plaintiffs again asked Cleaver-Brooks to produce responsive documents." | The sanctions order cites Page 5 of Cleaver-Brooks's memorandum in opposition to sanctions, but that memorandum states that the "Plaintiffs' counsel requested that Bowater"—***not*** Cleaver-Brooks—"continue to look for documents related to the Cleaver-Brooks boiler." (R. p. 1395.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. |
| Page 9 (R. p. 13) | "Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Tornetta admitted that they had been sitting in his office all along and that Plaintiffs had asked him for them months ago during his depositions." | The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210–11; Trial Tr. 121:12–122:11.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (*See* Argument III.A *supra.*) |

| Sanctions Order | Statement in Sanctions Order | Citation in Support of Statement |
|---|---|---|
| Page 14 (R. p. 18) | "Cleaver-Brooks chooses its words carefully, and misleadingly, because its corporate representative admitted that Plaintiffs had requested the index cards at his deposition, Trial Trans. at 121:12–122:11—whether that request was on the record is of no moment." | The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210–11; Trial Tr. 121:12–122:11.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (*See* Argument III.A *supra.*) |
| Page 14 (R. p. 18) | "The documents [regarding Unit Number O-18344] were discussed during both of Tornetta's depositions, at which, Tornetta admitted, he was asked to produce the index cards." | Nothing cited in support of this statement in the order, because it is not true. |
| Page 15 (R. p. 19) | "Without question, the jury understood that the key issue in the case was the number and location of boilers at Bowater." | Nothing cited in support of this statement in the order, because it is pure speculation. |
| Page 17 (R. p. 21) | "Here, a discovery sanction is warranted both to penalize Cleaver-Brooks and because Cleaver-Brooks continues to hide such documents in other cases, such that deterrence is required." | Nothing cited in support of this statement in the order, because it is not true. |

The complete absence of any factual support for these statements, which predominated the sanctions order, as well as the sanctions order's complete detachment from the actual record of the case that is detailed in the preceding sections of this brief, makes clear that the trial court abused its discretion when it decided to sanction Cleaver-Brooks.

Moreover, the record should also lack any evidentiary support for the plaintiffs' counsel's fees and litigation expenses. All of the proof that the plaintiffs produced in support of their sanctions motion were six affidavits: two from their lead national counsel, one from the national counsel's associate, one from their local counsel, and two from Mr. Howe's children. (R. pp. 1291, 1299, 1311, 1389, 1428, 1578; Affidavits from Dean, Holder, McVey, Howe, and Myers.) The plaintiffs filed their motion for sanctions on March 31, 2018 (R. p. 1156), but they did not serve Cleaver-Brooks with those supporting affidavits from national counsel and one of the Howe children until April 30, 2018, and they did not serve the local counsel's affidavit until May 1, 2018. (R. p. 1424; Plaintiffs' Notice of Filing Affidavits in Support of Motion for Sanctions.)

This was too late by a full month. Rule 6(d), SCRCP, specifically requires that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion," not at some later date. Cleaver-Brooks properly objected to those affidavits. (R. p. 1475; Letter Objecting to Plaintiffs' Proposed Order at 5; R. p. 1480; Cleaver-Brooks's Motion to Alter or Amend at 4.) The plaintiffs never moved to be excused from complying with Rule 6(d)'s timely service requirement, but the trial court ignored both the plaintiffs' noncompliance and Cleaver-Brooks's objections without any explanation.

Because the plaintiffs' only evidence in support of their sanctions request violated Rule 6(d), those affidavits should be stricken from the record, and the trial court's sanctions order should be vacated for lack of any proof to support its factual findings.

**B. The sanctions order erroneously held that the trial court's exclusion of Cleaver-Brooks's records regarding Unit Number O-18344 was not a sanction, which is an error of law.**

In addition to being factually baseless, the sanctions order is also based on an incorrect legal premise. As discussed above, the trial court did not have jurisdiction under Rule 37(b)(2),

SCRCP, to issue sanctions because Cleaver-Brooks did not violate any discovery order in this case. However, assuming *arguendo* that this rule has any applicability here, the trial court incorrectly held that its exclusion of Cleaver-Brooks's records regarding Unit Number O-18344 at trial was somehow not a sanction. (*See* R. pp. 20–21; Sanctions Order at 16–17 ("Exclusion of evidence is not a sanction.").)

This is wrong as a matter of law. Rule 37(b)(2)(B), SCRCP, specifically identifies excluding evidence at trial as a sanction for a violation of this rule: "An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence." Accordingly, the trial court's belief that it should impose monetary sanctions against Cleaver-Brooks for a perceived violation of discovery order—again, which is simply not true—because it had not yet sanctioned Cleaver-Brooks is incorrect as a matter of law and constitutes an abuse of discretion that should be reversed.

### C. The trial court exercised no discretion at all when awarding the plaintiffs the entirety of their requested fees and expenses, including costs that bear absolutely no connection to the trial of this case.

Finally, the trial court abused its discretion by granting the plaintiffs' sanctions motion in full without giving their request any scrutiny at all. The plaintiffs initially requested fees and costs of $323,267. (R. p. 1294; Dean Fees Aff. ¶ 21; R. p. 1302; Holder Aff. ¶ 20; R. p. 1431; McVey Aff. ¶ 20; R. p. 1311; Dean Costs Aff. ¶ 3; R. pp. 1389, 1578; Affs. of Howe and Myers.) They then self-imposed a rate reduction for their lead national counsel and local counsel—both dropping from $550 an hour to $500—and self-imposed an elimination of $4,600 of their requested costs in a proposed order, which the trial court subsequently signed without any alteration, amendment, or analysis. The trial court's failure to conduct any legitimate review of the plaintiffs' requested fees and costs amounts to an abuse of discretion in several respects.

**Billing Identical Hours.** The lawyers did not produce any kind of detailed records of their time spent working on the case. This is concerning, though, because the plaintiffs' national counsel and her associate both reported working the exact same amount of time each and every day leading up to and through trial. (*Compare* R. p. 1294; Dean Fees Aff. ¶ 21; *with* R. p. 1302; Holder Aff. ¶ 20.) The trial court dismissed this evidentiary concern without any inquiry, instead noting that these attorneys work together and, thus, would naturally have hours identical to one another. (R. p. 24; Sanctions Order at 20.) The refusal to allow any discovery on this issue, and the failure of the trial court to even scrutinize the issue *sua sponte*, is an abuse of discretion for failing to exercise any discretion at all.

**Failure to Segregate Trial Time Spent on Boiler O-18344.** The trial court also failed to analyze what portion of the trial was attributable to Cleaver-Brooks's production of records regarding Unit Number O-18344. Given that the plaintiffs were still arguing in their closing argument about the location of the Cleaver-Brooks boiler within the Bowater campus, it is simply not credible, nor is there any evidentiary support, to attribute the entire trial to Cleaver-Brooks's failure to produce records that were never requested about a boiler that was never anywhere near a jobsite at which Mr. Howe ever worked.

At most, questions about those records occupied perhaps an hour or less of trial time. (R. pp. 335–47; Trial Tr. 685:8–697:19.) But the trial court did not engage in any analysis to parse what portion of the trial was attributable to Cleaver-Brooks's production of records regarding a boiler in Illinois (virtually none), versus what portion of trial was attributable to the real issue in dispute regarding the location the Cleaver-Brooks boiler on the Bowater campus (virtually the entirety). Instead, the trial court blindly awarded the plaintiffs every penny of attorneys' fees that they requested without any analysis whatsoever, an award that is wildly disproportionate to any

alleged wrong by Cleaver-Brooks. As before, the trial court's failure to exercise any discretion is itself an abuse of discretion that requires reversal.

**Expenses Unrelated to Trial.** Just as with the plaintiffs' requested fees, the trial court failed to provide any analysis at all regarding their requested trial costs, which were $90,835.16. (R. p. 25; Sanctions Order at 21.) However, the plaintiffs requested reimbursement for a crush of costs that have no connection at all to this trial, generally, or to responding to Cleaver-Brooks's production of records regarding Unit Number O-18344. In particular:

- Transcripts: The plaintiffs requested, and the trial court awarded, $5,323.72 in costs for transcripts of depositions, hearings, and trial, including $300 for cancelling a court reporter. (R. pp. 1312–13; Dean Costs Aff. ¶¶ 8–9.) Those expenses have nothing to do with issues regarding Unit Number O-18344, and they are all improperly awarded here.

- Expert Costs: The plaintiffs requested, and the trial court awarded, $33,182.22 for their various expert witnesses. (*See* R. p. 1313; Dean Costs Aff. ¶ 10 (requesting $37,782.22 in expert fees); R. p. 660; Hr'g Tr. 16:1–10 (Oct. 10, 2018) (withdrawing $4,600 of the plaintiffs' requested expert fees).) Those witnesses all testified before any issue related to Unit Number O-18344 was even raised at trial. Cleaver-Brooks cannot possibly be responsible for witnesses that the plaintiffs called in their case-in-chief before the plaintiffs revealed their "two boiler" theory, particularly when those charges also include each expert's general, non-trial work on the case.

- Vendor Costs: The plaintiffs requested, and the trial court awarded, $38,787.30 for them to hire a third-party vendor to provide paralegal services. (R. p. 1312; Dean Costs Aff. ¶ 7.) Among those charges is a $1,600 charge for trial support from March 8th through March 10th (when there was no trial); a $2,100 charge for trial support on March 22nd (a day after trial); and a $1,600 charge for trial support (two days after trial). (R. pp. 1355–56; Dean Costs

Aff. Ex. 4 at Invoice 357 and Invoice 360.) Also included was a charge for $10,507.30 for "expenses," but there was no detail provided at all to support such an enormous "expense." (R. p. 1357; Dean Costs Aff. Ex. 4 at Invoice 363.) Cleaver-Brooks cannot legitimately be charged costs for paralegal services at trial on days when there was no trial, or thousands of dollars in unknown paralegal expenses.

- Lodging: The plaintiffs requested, and the trial court awarded, $10,180.40 in hotel costs. (R. p. 1312; Dean Costs Aff. ¶ 4.) Within that sum were several duplicative charges, including three identical entries for the exact same charge of $1,056.72 on March 18th, and two identical entries for the exact same charge of $1,056.72 on March 19th. (R. pp. 1319–23; Dean Costs Aff. Ex. 1 at March 18th and March 19th Entries.) Cleaver-Brooks cannot legitimately be charged multiple times for duplicative costs.

- Transportation: The plaintiffs requested, and the trial court awarded, $1,749.75 for transportation costs. (R. p. 1312; Dean Costs Aff. ¶ 5.) Within that sum was a charge for $101.98 to an entity known as "Blacklane GmbH" out of Berlin, Germany; $165.70 in charges for Uber services during trial; a charge for $1,361.16 for a rental car and $72.56 charges for gasoline, which would make the Uber charges seem unnecessary; a charge for $10.04 for Uber services a day after trial; and a charge for $22.27 for Lyft services four days after trial. (R. pp. 1332–44; Dean Costs Aff. Ex. 2.) Cleaver-Brooks cannot legitimately be charged for superfluous taxi services, costs to an unknown German entity, and charges after the trial is over.

- Family Members' Hourly Wages: The plaintiffs requested, and the trial court awarded, $2,881.84 in wages for Timothy Howe and Wende Myers—Mr. Howe's children—to attend trial. (R. pp. 1389, 1578; Howe and Myers Affs.) There is no basis at all in the law for awarding such lost wages.

Cleaver-Brooks does not believe that it can reasonably be responsible for ***any*** of the plaintiffs' alleged costs and expenses, as it did absolutely nothing wrong here. However, the trial court failed to account for or even analyze any of the myriad problems in the plaintiffs' overreaching request to be compensated for numerous litigation expenses that have absolutely nothing to do with the trial, generally, and nothing to do with Cleaver-Brooks's records regarding Unit Number O-18344, specifically. Accordingly, the trial court's refusal to exercise any discretion with respect to the plaintiffs' requested expenses amounts to an abuse of discretion that requires reversal.

## CONCLUSION

As detailed above, this case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. That sole issue drove all discovery and pretrial litigation and makes evident the errors in the sanctions order on appeal.

The moment that the plaintiffs revealed their never-before-disclosed, never-before-discovered "two boiler" theory in the middle of trial, Cleaver-Brooks responded immediately and produced documents that same day demonstrating the error in the plaintiffs' new theory.

Parties should be encouraged to promptly produce materials during trial that respond to new issues that emerge from in-trial testimony. The trial court's order here, though, punishes Cleaver-Brooks for immediately locating and producing documents regarding a boiler that was never relevant to the case until the plaintiffs' in-trial surprise questions to a third-party witness.

This should not be sanctionable conduct, and as a matter of South Carolina law, it is not sanctionable conduct. Accordingly, the trial court's sanctions order should be reversed and vacated in full.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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