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.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The parties agree on one thing: the core legal principle that guides this appeal—the standard of review. In this case, the Court does not defer to the trial court's view of the facts, but instead "finds facts in accordance with its own view of the preponderance of the evidence." Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* at 248 (3d ed. 2016). The plaintiffs confirmed their agreement with this dispositive point on Page 15 of their brief: "This Court reviews findings of fact in a matter of equity taking its own view of the evidence."

This concession is dispositive because there is absolutely nothing in the record to support the sanctions order. Despite being stuffed with inflammatory rhetoric, the plaintiffs' return brief fails to rehabilitate that order in any way. This failure manifests itself in several ways: first, with respect to Cleaver-Brooks's arguments to which the plaintiffs did not even respond; second, with respect to the plaintiffs' untrue statements regarding the record below; and third, with respect to the plaintiffs' attempts to distinguish the governing law. Each is addressed below, but in reviewing this case, the Court should not lose sight of what actually happened: the jury returned a total victory ***for Cleaver-Brooks***, but the trial court granted ***the plaintiffs*** a monetary award.

This case was always about one factual dispute: Where at the Bowater Paper Mill was a single Cleaver-Brooks boiler located? Was that single boiler in the powerhouse, where Mr. Howe would have worked on it and potentially been exposed to asbestos, or was it elsewhere on the Bowater campus, where Mr. Howe would have never had any contact with it?

Pages 4 through 11 of Cleaver-Brooks's opening brief detail how crystal clear the record is on this point. All pretrial discovery and motions practice make this conclusion inescapable. In fact, on the last business day before trial, the trial judge summarized what the trial was going to be about: "So, it's just a simple factual dispute between the two of y'all as to where ***this boiler*** is

located." (R. p. 641; Hr'g Tr. 25:15–17 (Mar. 9, 2018) (remarks of Judge Toal) (emphasis added).)

During the trial, third-party Resolute FP US, Inc.—***not*** Cleaver-Brooks—produced documents that confirmed the Cleaver-Brooks boiler was not in the powerhouse, destroying the plaintiffs' case. (R. pp. 851–55; Cleaver-Brooks Trial Exhibit 24.) Scrambling with the jury watching, the plaintiffs attempted to revive their case by suddenly pretending that there were multiple Cleaver-Brooks boilers at the Bowater facility. The plaintiffs based this untested, undisclosed theory on a typographical error in a Cleaver-Brooks document, and they revealed this new theory during questions to Art Welker, a Resolute employee the plaintiffs subpoenaed to testify at trial. (R. pp. 239, 242; Trial Tr. 488:14–23, 491:17–20.)

Cleaver-Brooks was surprised and confused by the plaintiffs' line of new and irrelevant questioning, especially to a third-party witness. Nevertheless, it responded ***that same day*** to the plaintiffs' attempted in-trial ambush by locating and producing a small set of documents that were never the subject of a discovery request, and that never had any relevance to the case prior to the plaintiffs' questioning of Mr. Welker earlier that day. (R. pp. 858, 861, 863; Cleaver-Brooks Trial Exhibits 26, 27, and 29.) Those documents fully rebutted the plaintiffs' surprise questions and demonstrated how incorrect the plaintiffs' untested "two boiler" theory was.

The next day at trial, the plaintiffs questioned Cleaver-Brooks's corporate representative for less than an hour about those documents and that typographical error, and then the trial moved on. (R. pp. 336–46; Trial Tr. 686:2–696:24.) Five days later, the trial concluded, and the jury returned a verdict in Cleaver-Brooks's favor. (R. p. 579; Trial Tr. 1126:12–25.)

The trial judge sanctioned Cleaver-Brooks over $300,000 in attorneys' fees and costs simply because Cleaver-Brooks was able to promptly respond to an attempted in-trial ambush,

causing it to backfire on the plaintiffs. That shocking ruling finds no support in law, the record, or even logic—it irrationally assumes that Cleaver-Brooks knowingly withheld exculpatory records—and should be vacated.

ARGUMENTS AND AUTHORITIES

I. The plaintiffs' arguments are directly contrary to the record, as demonstrated by their numerous misstatements about this case's history and background.

Because this appeal turns on this Court's view of the record without any deference to the trial court, it is essential to note the critical instances where the plaintiffs failed to respond to Cleaver-Brooks's arguments.

For instance, the plaintiffs did not rebut or even acknowledge the history of this case prior to trial, where everyone—the plaintiffs, Cleaver-Brooks, and even the trial judge—affirmed over and over again that the sole factual dispute between the parties related to the location of a single Cleaver-Brooks boiler on the Bowater campus. (*See generally* Cleaver-Brooks's Br. at 4–11 (outlining the case's pretrial history, including all of the instances where the parties and the court acknowledged that the only dispute between the parties involved the location of one boiler at Bowater).) This is not a mere oversight. The plaintiffs cannot rebut these facts because the record is unbroken on this point.

Likewise, the plaintiffs did not rebut the fundamental point that the sanctions order is based on Rule 37(b), SCRCP—which only permits a trial court to sanction a party for failing to comply with a discovery order—but it does not identify a single order that Cleaver-Brooks supposedly violated. (*See* R. pp. 5–26; Sanctions Order *passim* (failing to identify any discovery order that Cleaver-Brooks could have violated).) Nor could they, as there is no such order in the record.

Where the plaintiffs do engage, they provide surprisingly inaccurate statements. In many instances, the plaintiffs' arguments read as if they are discussing a case other than the one at bar. The number of factual misstatements is so overwhelming that it would be impossible to respond to them all within the page limits for an appellate brief. So that this Court is not misled, Cleaver-Brooks respectfully responds to several of the most obvious instances of these misstatements below.

Misstatement 1: Cleaver-Brooks's index cards provided new information that would have prevented a trial from happening in the first place.

Throughout their return brief, the plaintiffs argue that the turning point in the case came when Cleaver-Brooks produced its index card regarding the boiler it shipped to the Bowater Paper Mill. (*E.g.*, Plaintiffs' Br. at 12–13, 20.) They reproduce the index card on Page 12 of their brief, call it "highly consequential to Plaintiffs' theory of the case" on Page 13, and argue throughout that they would not have proceeded to trial if they had seen this index card. (*See, e.g.*, *id.* at 3 ("If Plaintiffs had this information timely, they would not have gone to trial.").

The Court should reject this hyperbole, as the index card for the boiler shipped to the Bowater Paper Mill does not contain a single piece of information that had not already been disclosed earlier in discovery. Below is a side-by-side comparison of the disputed index card and the file folder that contained the relevant boiler's records from ***Page 1 of Cleaver-Brooks's production***:

Index Card (R. p. 739)

Name BOWATERS-CAROLINA CORPORATION

Street Address

City CATAWABA

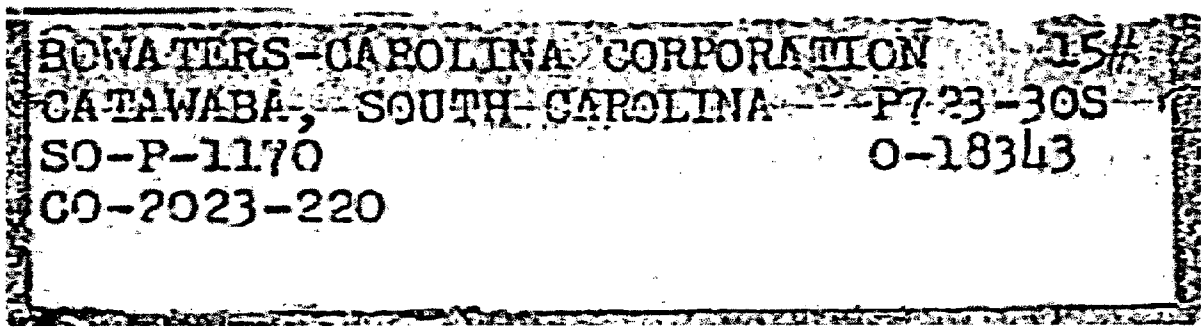
State SOUTH CAROLINA

Model Number P-723-30S

Unit Number O-18343

S. O. Number P-1170

File Folder (R. p. 678; Plaintiffs' Trial Exhibit 55; Page 1 of Cleaver-Brooks's Production)



Each contains the ***exact same information***:

- The company purchasing the boiler: Bowaters-Carolina Corporation;
- That company's location: Catawba, South Carolina;
- The boiler's model number: P-723-30S;
- The boiler's unit number: O-18343; and
- The sales order number: P-1170.

In short, there is absolutely nothing contained on the index card that was new to the case. Accordingly, the Court should not be misled by the suggestion that production of that index card belatedly supplied the case with new information, or that trial would have been avoided if the plaintiffs had known the contents of this index card.

For this same reason, the Court should reject the plaintiffs' repeated posturing that John Tornetta, Cleaver-Brooks's corporate representative, "admitted that Plaintiffs had asked for those index cards during his deposition, but that Cleaver-Brooks did not produce them." (Plaintiffs' Br. at 12, 21, 26, 38, 41.) As Mr. Tornetta explained in the very testimony cited by the plaintiffs, the index cards are simply the way that Cleaver-Brooks locates the records associated with a particular project; they are, as Mr. Tornetta testified, "a duplicate of the information in the commercial records, it just literally is the index to get to it." (R. p. 342; Trial Tr. 692:5–7.)[1] Not even the most creative interpretation of this testimony can transform it into an admission that the index cards were sought in discovery. The plaintiffs' rhetoric on this issue is empty.

<u>Misstatement 2:</u> The plaintiffs had no way of knowing about the typographical error in Cleaver-Brooks's records until the middle of trial.

Another common theme of the plaintiffs' return brief is that, allegedly, they were unfairly surprised to learn during trial that the records Cleaver-Brooks produced in discovery regarding Boiler Unit O-18343 contained a small handful of documents with a typographical error that misidentified that boiler as Unit O-18344. (Plaintiffs' Br. at 9, 13, 19, 25, 37.) As Mr. Tornetta testified during questioning by the plaintiffs at trial, that typographical error appears to be the result of a third-party contractor handwriting the wrong unit number on a field report, and that erroneous report was used to create subsequent billing records related to the contractor's work, carrying the typographical error forward into other documents. (R. pp. 338–39; Trial Tr. 688:15–689:1.) Plaintiffs disputed this explanation, asking the jury to conclude that there could be up to three Cleaver-Brooks's boilers at Bowater. (R. p. 520; Trial Tr. 1021:3–14.)

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[1] As explained in Cleaver-Brooks's initial brief, the commercial records for the single boiler at Bowater were produced in discovery and were the subject of two days of deposition examination by plaintiffs of Cleaver-Brooks's corporate representative. (*See* Cleaver-Brooks's Br. at 3–4 (documents produced), 6–8 (first deposition), 9–10 (second deposition).)

It is undisputed, though, that all of these records were contained in a single file for Unit O-18343. (R. p. 678; Plaintiffs' Trial Exhibit 55, at 1.) It is also undisputed that there is a single set of records for the boiler that Cleaver-Brooks shipped to Bowater.[2] Put differently, there are not multiple sets of records—for instance, there are not two sales records, two shipping records, two different maintenance records, or two different design drawings—for two different boilers sent to Bowater. The only natural conclusion to draw from these materials is that there was a single Cleaver-Brooks boiler at Bowater—which is true as a factual matter, and is the exact conclusion that the parties and the trial court reached in advance of trial. (*See* R. p. 641; Hr'g Tr. 25:15–17 (Mar. 9, 2018) (remarks of Judge Toal) ("So, it's just a simple factual dispute between the two of y'all as to where this boiler is located.").)

Despite all evidence to the contrary, the plaintiffs claim that their real trial strategy all along was to construct an entire multi-week trial around a *de minimis* typographical error buried within a set of documents about a single boiler, and to deliberately not conduct any discovery on this theory. They now pretend to have been victims of trial-by-ambush resulting from Mr. Tornetta's explanation during questioning by the plaintiffs' counsel about their untested theory. As they argue: "Plaintiffs had no way to know that Cleaver-Brooks would claim mid-way through trial that the identification of one of its boilers was a typo." (Plaintiffs' Br. at 9.) And again: "This is particularly true where the other party has no way to know that there is any error in the file." (*Id.* at 25.)

This is not credible in any way. Of course the plaintiffs "had a way to know" about this typographical error.

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[2] For reasons unknown, in their return brief, the plaintiffs repeatedly characterize this file as having only 25 pages. (*E.g.*, Plaintiffs' Br. at 2, 6 n.1, 8, 10, 12, 13, 22.) The plaintiffs themselves introduced the entire file as their Exhibit 55 at trial, and it contains 61 pages of records and boiler specifications.

For instance, they could have served an interrogatory on Cleaver-Brooks that read as follows: "State how many boilers Cleaver-Brooks shipped to the Bowater Paper Mill." But they did not.

Or, they could have served an interrogatory that read as follows: "State the unit number of the boiler or boilers that Cleaver-Brooks shipped to the Bowater Paper Mill." But they did not.

Or, they could have served an interrogatory that read as follows: "State the location or locations to which Cleaver-Brooks shipped Boiler Unit Numbers O-18343 and O-18344." But they did not.

Or, they could have served a document request that read as follows: "Produce the commercial records for Boiler Unit Numbers O-18343 and O-18344." But they did not.

Or, they could have served a request for admission that read as follows: "Admit that there was more than one Cleaver-Brooks boiler at the Bowater Paper Mill." But they did not.

Or, they could have asked Cleaver-Brooks's Rule 30(b)(6) designee the following question during his first deposition on February 2, 2018: "How many boilers did Cleaver-Brooks ship to the Bowater Paper Mill?" But they did not.

Or, they could have asked that same question during the second deposition of Cleaver-Brooks's Rule 30(b)(6) designee on March 6, 2018. But they did not.

Or, they could have asked Cleaver-Brooks's Rule 30(b)(6) designee the following question during his first deposition: "Where did Cleaver-Brooks ship Boiler Unit Numbers O-18343 and O-18344?" But they did not.

Or, they could have asked that same question during the second deposition of Cleaver-Brooks's Rule 30(b)(6) designee. But they did not.

Or, they could have asked Cleaver-Brooks's Rule 30(b)(6) designee the following question during his first deposition: "Why do some of the records that Cleaver-Brooks produced identify the boiler at Bowater as being Unit Number O-18343, but a few say 'O-18344'?" But they did not.

Or, they could have asked that same question during the second deposition of Cleaver-Brooks's Rule 30(b)(6) designee. But they did not.

Or, they could have asked Mr. Welker during his deposition as Resolute's Rule 30(b)(6) designee: "How many Cleaver-Brooks boilers were located at Bowater?" But they did not.

The plaintiffs did none of these things. The rules of discovery provided ample opportunity for the plaintiffs to investigate the merits of their "two boiler" theory in advance of trial, but they failed to conduct even the slightest investigation into their misguided theory of the case. While it may be debatable whether a reasonable attorney would have availed him- or herself of any of the discovery devices listed above, it is not disputed that if the plaintiffs had asked even one of the above-listed deposition questions or served even one of the above-listed discovery requests, they would have learned how incorrect their position was in advance of trial.[3]

Accordingly, the Court should reject the plaintiffs' argument that they had "no way to know" that their "two boiler" theory was wrong in advance of trial, and it should reject the trial court's unsupported assertion that the plaintiffs' failure to find out that information was somehow Cleaver-Brooks's fault.

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[3] The plaintiffs devote a great deal of their brief to arguing that they are not obligated to reveal their "trial strategy" in advance of trial. (*E.g.*, Plaintiffs' Br. at 16–20.) This is certainly true. But it is equally true that the plaintiffs alone have to bear the consequences when they present a theory to the jury that they completely failed to test and confirm in the discovery process. The plaintiffs' failure to engage in even the slightest discovery regarding their "two boiler" theory is not attributable in any way to Cleaver-Brooks, and the plaintiffs alone bear full responsibility for the failure of such a strategy.

Misstatement 3: The plaintiffs disclosed the "two boiler" issue during their opening statement, so Cleaver-Brooks should have produced their records regarding Boiler Unit O-18344 during the first day of trial.

In their return brief, the plaintiffs argue that they flagged the "two boiler" issue during their opening statement, and that Cleaver-Brooks should have produced its records regarding Unit O-18344 "immediately following opening statements, when Plaintiffs made it clear that they believed more than one boiler was at Bowater." (Plaintiffs' Br. at 11, 17.) Their appellate argument could not be more misleading.

It is true that in their opening statement, the plaintiffs told the jury that "there may be multiple boilers" involved in the case, but the plaintiffs' counsel made no mention whatsoever of any discrepancy within Cleaver-Brooks's own records. Instead, ***she confirmed that Cleaver-Brooks's records indicated that a single boiler was at Bowater***, and then explained her theory that there may be other boilers based on reports from the State of South Carolina, which ultimately became a nonissue during the trial:

> The powerhouse is where we believe the boiler was at, and there may be multiple boilers. Now, why do I say that? There are boiler inspection reports now. If you want to know anything about when a boiler was inspected the State of South Carolina keeps that, but they didn't keep it in the beginning years. That 1957 boiler they have in their own records isn't [in] the state records because they weren't kept in the 50's and 60's, so that's incomplete.

(R. p. 160; Trial Tr. 71:4–12 (opening statement of Ms. Dean).)

Accordingly, the Court should reject the plaintiffs' appellate argument that they somehow disclosed the "typographical error equals two boilers" theory upon which the trial court based its sanctions order in their opening statement. It is simply not true.

Misstatement 4: Cleaver-Brooks acknowledged the "two boiler" issue during its opening statement.

As a companion to their argument that they disclosed the "two boiler" theory during their opening statement, the plaintiffs also argue that "Cleaver-Brooks' counsel made the same claim" during its opening statement. (Plaintiffs' Br. at 11.) In fact, the plaintiffs argue that Cleaver-Brooks's counsel even "confirm[ed] Plaintiffs' understanding that there was more than one Cleaver-Brooks boiler at Bowater." (*Id.* at 17.) In support of this position, the plaintiffs cite a single inadvertent use of the word "boilers" by Cleaver-Brooks's counsel during its opening statement, but that citation is ripped out of context—a context that completely exposes the falsity of the plaintiffs' argument.

Moments later in that same opening statement, Cleaver-Brooks's counsel made clear to the jury that this case was about the location of a single Cleaver-Brooks boiler. The full portion of that transcript, beginning with the phrase cited by the plaintiffs, is reproduced below to ensure that the Court is not misled by the plaintiffs' argument:

> And you will see some evidence that Cleaver-Brooks boilers[4] sold to the Bowater Paper Mill had some asbestos containing refractory in them, put in at the factory and then sent out. This is a picture of the Bowater Paper Mill, and it's a big facility. And you see those big stacks there, some of those stacks go where field erected boilers are, the big multistoried ones, and that's important because some of these stacks are where the powerhouse is at Bowater, and that's because Cleaver-Brooks only sold ***a package boiler***. They sold ***this boiler*** and we know, we have some documents we believe you will see in evidence, that we sold ***this boiler*** in 1957, built ***it*** in the factory, shipped ***it*** to Bowater. The door gasket, which is—goes around the rear door and the front door, you'll see this—I believe you'll see this exact piece of evidence here on the left, the door gasket was 38 and one quarter inches in diameter. I believe you will hear some evidence that the opening for ***that boiler***, the actual inside was 12 inches. And that's important because one of the questions you're going to be asked in this case is to evaluate some evidence about whether or not Mr.

[4] This is the word that the plaintiffs cite multiple times in their brief as "proof" that Cleaver-Brooks was aware of their "two boiler" theory from the outset of trial. (Plaintiffs' Br. at 11, 17.)

> Howe was working on a Cleaver-Brooks boiler. Some of the evidence you're going to hear is he was inside the boilers at the powerhouse, and we believe you're going to hear evidence that shows that ***the Cleaver-Brooks boiler that got sent to Bowater*** isn't the kind of boiler that a person can get inside. You will also hear that ***the Cleaver-Brooks boiler that was sold to Bowater in 1957*** did not have any asbestos containing insulation on ***it*** when ***it*** was insulated at the factory and covered with metal ***it*** was not asbestos containing insulation.

(R. pp. 170–71; Trial Tr. 81:4–82:7 (emphasis added).)

The passage above indicates nothing other than the unremarkable point that Cleaver-Brooks was prepared to address with the jury the sole factual dispute that had animated this case from the outset: where at Bowater was the single Cleaver-Brooks boiler located. It certainly does not support the plaintiffs' argument that Cleaver-Brooks actually acknowledged their "two boiler" theory during its opening statement. The single use of the plural noun in one sentence of a twelve-page opening statement made before the plaintiffs even revealed their "two boiler" theory is clearly not a "confirmation" of the plaintiffs' undisclosed theory. The Court should reject the plaintiffs' illusory argument accordingly.

Misstatement 5: Cleaver-Brooks violated the asbestos docket scheduling order and another order during the course of discovery by not producing documents regarding Boiler Unit O-18344.

While the plaintiffs fail to address the fact that the sanctions order did not identify a single order that Cleaver-Brooks supposedly violated—which is a prerequisite for sanctions under Rule 37(b), SCRCP—they do argue that Cleaver-Brooks violated two orders: the "Asbestos Trial Docket Amended General Scheduling Order," and an order entered on February 23, 2018. (Plaintiffs' Br. at 8, 27, 38.) The plaintiffs' own argument, however, reveals their error.

The plaintiffs' argue that Cleaver-Brooks violated these orders by not producing documents related to Unit O-18344 earlier in the case, but they readily acknowledge—as they must—that Cleaver-Brooks's discovery obligations only extended to "all of Cleaver-Brooks'

boilers at Mr. Howe's jobsites." (*Id.* at 5, 6; *see also id.* at 26 (conceding that the scope of discovery was limited to "job sites at which plaintiff was employed, which included Bowater").)

Unit O-18344 was located at a facility in Illinois, not at Bowater, and not at one of "Mr. Howe's jobsites," as Mr. Tornetta testified in response to the plaintiffs' questions at trial. (R. p. 345; Trial Tr. 695:3–5.) Cleaver-Brooks could not have violated any order regarding the production of materials relevant to "Mr. Howe's jobsites" by not producing documents that were never requested by the plaintiffs about a boiler that was not located anywhere that Mr. Howe worked. As Mr. Tornetta explained, Cleaver-Brooks was not even aware of this issue until the plaintiffs questioned Mr. Welker, a third-party witness, during the trial about Unit O-18344. (*Id.* 695:6–11.) And because the plaintiffs chose not to conduct any discovery about their "two boiler" theory, there were no discovery requests at all about Unit O-18344 and thus no way there could be any order regarding production of those documents.

There is no way Cleaver-Brooks could have been expected to, much less required to, produce documents relating to that boiler until the plaintiffs raised the issue at trial. Accordingly, the Court should reject the argument that Cleaver-Brooks violated any discovery order here.

<u>Misstatement 6:</u> Cleaver-Brooks has accused the plaintiffs' counsel of committing a violation of Rule 11.

In their return brief, the plaintiffs argue that Cleaver-Brooks has accused them of a Rule 11 violation, and resort to calling Cleaver-Brooks's counsel "unprofessional" and argue that this whole situation is "below the standards expected of reputable lawyers." (Plaintiffs' Br. at 28, 31.) This is a strawman argument, and the Court should not credit it or the plaintiffs' over-the-top rhetoric.

To be clear, Cleaver-Brooks has not accused the plaintiffs' attorneys of violating Rule 11 or its companion rules of professional conduct. Rather, Cleaver-Brooks has argued and is

arguing the exact opposite: that there was no Rule 11 violation during trial because the "two boiler" theory was not, in fact, the only reason this case was taken to trial. It is clear that Cleaver-Brooks is not arguing that plaintiffs violated Rule 11 during trial because ***if*** the plaintiffs' position that they would not have gone to trial if they had known about the location of Unit O-18344 is to be believed, then it would have been a violation of the rules for the plaintiffs to proceed with their case after learning this information. If this occurred, the sanctions order would have to be reversed because it would reward the plaintiffs for ignoring their obligations not to present non-meritorious claims. But this is not what Cleaver-Brooks is arguing.

Rather, Cleaver-Brooks does not believe it is true that the plaintiffs would have abandoned their case if they had known where Unit O-18344 was located in advance of trial. As thoroughly outlined in Cleaver-Brooks's opening brief, the location of that boiler was ***never*** a part of this case prior to trial. Instead, the only factual dispute between the parties related to the location of a Cleaver-Brooks—Unit O-18343—within the Bowater campus. (Cleaver-Brooks's Br. at 4–11, 23–27, 33–36.) The "two boiler" theory was only interjected once Mr. Welker—a witness whom the plaintiffs subpoenaed to testify—produced documents at trial showing that Unit O-18343 was located in the administration building where Mr. Howe never worked.

Until this in-trial revelation by Mr. Welker, plaintiffs themselves reaffirmed time and again that this case was about the location of a single boiler at the Bowater Paper Mill. As their counsel summarized the case when deposing Cleaver-Brooks's corporate representative the first time: "So Cleaver-Brooks' records verifies [sic] that there is ***a Cleaver-Brooks boiler*** at Bowater?" (R. p. 1234; Tornetta Dep. 42:21–22 (Feb. 2, 2018) (emphasis added).) And as their counsel reiterated when deposing Cleaver-Brooks's corporate representative a second time: "Short story shorter, you don't know where at Bowater ***the Cleaver-Brooks boiler*** was installed.

True?" (R. p. 1260; Tornetta Dep. 228:13–15 (Mar. 6, 2018) (emphasis added).) And as their counsel argued in opposition to summary judgment: "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).)

That factual dispute was resolved when Mr. Welker—a third-party witness—testified at trial that he found a document at Bowater indicating that the Cleaver-Brooks boiler was located in the administration building, not in the powerhouse where Mr. Howe worked. In the aftermath of Mr. Welker's crippling testimony on this issue, the plaintiffs were left to scramble to hold their case together. Given that it was never an issue at any point in the pretrial proceedings, the plaintiffs seem to have concocted the fiction that there were two Cleaver-Brooks boilers at Bowater in real-time in response to Mr. Welker's revelation. Cleaver-Brooks immediately rebutted that brand new theory, the case moved on, and the "two boiler" issue was ultimately addressed for barely an hour or so out of a trial that lasted eight days.

It is simply not credible to believe that the entire trial would have been avoided by the disclosure of information that was a mere blip on the radar of the trial as a whole, that had never been requested by the plaintiffs, and that had absolutely no relevance to the case until the plaintiffs cobbled together a new theory on the fly after being dealt a fatal blow by a third-party witness. But Cleaver-Brooks has not accused the plaintiffs' attorneys of committing a Rule 11 violation, and in fact has specifically argued that they did not violate that rule because the merit of their lawsuit never depended on the location of Unit O-18344. The Court should not be misled by the plaintiffs' argument and inflammatory rhetoric on this issue.

Misstatement 7: The plaintiffs timely served affidavits with their motion for sanctions.

In its opening brief, Cleaver-Brooks argued that the trial court committed an error of law by considering the plaintiffs' affidavits when ruling on the sanctions motion because they were untimely under Rule 6(d), SCRCP, which provides that any affidavits supporting a motion "shall be served with the motion." (Cleaver-Brooks's Br. at 40.) In response, the plaintiffs argue that their affidavits were timely filed with the motion on April 30, 2018. (Plaintiffs' Br. at 34.)

Their position is puzzling. The plaintiffs filed a motion for sanctions on March 31, 2018. (R. p. 1156.) They now concede in their return brief that they did not file or serve affidavits supporting it until a month later. (Plaintiffs' Br. at 34.) Accordingly, those affidavits were untimely as a matter of law and should not be considered as evidence. Because they cannot be considered, the trial court's sanctions order should be vacated for lack of evidentiary support.

Alternatively, if the plaintiffs are now arguing that they cured the timeliness problem with their affidavits by withdrawing their March 31st motion in order to have affidavits accompany their April 30th motion, the trial court's order should be vacated because it lacked jurisdiction to consider such a belated post-trial motion. The jury returned its verdict on March 21, 2018. A trial court loses jurisdiction to consider post-trial motions ten days after the verdict is rendered. *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."); *id.* 50(e) (requiring motions to be filed within ten days); *id.* 52(b) (same); *id.* 59(b) (same); *id.* 59(e) (same). Accordingly, if the plaintiffs are now claiming that their untimely affidavits were timely because they accompanied a new motion on April 30th, the trial court's sanctions order should be vacated for lack of jurisdiction to consider that untimely motion.

<u>Misstatement 8:</u> Cleaver-Brooks did not seek discovery regarding the plaintiffs' request for sanctions.

Attempting to inoculate themselves from addressing the legitimacy of their allegations regarding their sanctions request, the plaintiffs argue that Cleaver-Brooks "never asked to conduct discovery" regarding those allegations, so the trial court was justified in not permitting any discovery into the facts underlying the enormous sanction it ultimately issued. (Plaintiffs' Br. at 30.)

This is not true. In its memorandum opposing the sanctions motion, Cleaver-Brooks specifically argued that it "must be given a full and complete opportunity to conduct discovery on all facts upon which the requested relief is based, including written discovery and depositions. Imposing the requested sanction without giving Cleaver-Brooks an opportunity to fully investigate and challenge the alleged foundation for it would violate fundamental notions of due process." (R. p. 1409; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions at 19.) Cleaver-Brooks could not have been more direct in raising this issue below, and the plaintiffs' position that it was not raised is false.

Cleaver-Brooks takes no pleasure in seeking discovery from other lawyers, but it also takes no pleasure in being accused of discovery violations or in being sanctioned over $300,000 for a problem that it played no part in creating. In any event, like so many other issues addressed above, the plaintiffs' argument that Cleaver-Brooks did not seek discovery is squarely rebutted by the record, and the Court should reject it accordingly.

II. The plaintiffs do not legitimately refute the case law that controls this appeal.

As noted at the outset of this brief, the parties agree on the legal issue of primary importance to this appeal; namely, that this Court reviews the record with fresh eyes and without deference to the trial court when analyzing the challenged sanctions order. There are, however,

three legal issues that Cleaver-Brooks raised in its opening brief to which the plaintiffs responded, but their responses do not legitimately rebut Cleaver-Brooks's arguments.

Responding to In-Trial Surprises. First, Cleaver-Brooks cited *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), for the proposition that a party must be permitted to respond to surprises raised by the opposing party in trial, including by introducing new evidence that had never been requested in discovery and that was never relevant to the case prior to the in-trial surprise. (Cleaver-Brooks's Br. at 27–28.) In response, the plaintiffs claim that *Bramlette* is "readily distinguishable" because it was the defendant in *Bramlette* who was required to respond to new in-trial arguments from the plaintiff. (Plaintiffs' Br. at 21.)

It makes no sense that the plaintiffs would claim that this is a distinguishing point for *Bramlette*, because it is the exact same scenario that is presented by the facts of this case. Here, just as in *Bramlette*, the defendant Cleaver-Brooks produced records during trial in response to the plaintiffs' never-before-disclosed "two boiler" theory. It produced those records the very same day that the plaintiffs revealed this theory. And Cleaver-Brooks even noted that its production of those records was "directly in response to the arguments in court today regarding unit number O-18344," which the plaintiffs raised when questioning Mr. Welker in front of the jury. (R. p. 858; Cleaver-Brooks Trial Exhibit 26, at 1.)

Bramlette is immediately on point, and it makes the error of the sanctions order obvious. The plaintiffs' attempt to distinguish that case is nonsensical and ultimately futile.

Examining Discovery Requests. Second, Cleaver-Brooks argued that the trial court erred when it generically concluded that Cleaver-Brooks should have produced records regarding an irrelevant boiler earlier in the case. (Cleaver-Brooks's Br. at 32.) As discussed above, the plaintiffs' only discovery requests sought materials associated with Mr. Howe's jobsites, which

did not include Unit O-18344. As a matter of South Carolina law, a trial court must consider "the question asked" when reviewing the adequacy of a party's discovery response, but that did not happen here. *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991).

In response, the plaintiffs argue that *Baughman*'s standard is inapplicable because *Baughman* is "a case pertaining to interrogatories, and not requests for production." (Plaintiffs' Br. at 25.) They do not explain how this is a distinguishing point, because it is not.[5] If a document is not within the scope of a request for production, a party cannot be punished for not producing it. It is impossible for a trial court to know whether a document is within the scope of a request without considering the request itself, but the trial court did no such analysis here. *Baughman*'s guideline is squarely applicable to this case, and the plaintiffs' attempt to distance the sanctions order from that case is just as futile as their attempt to distinguish *Bramlette*.

Waiver. Finally, Cleaver-Brooks argued that the plaintiffs waived any argument that could support their sanctions request by (1) opening the door to the whole "two boiler" issue during trial, and (2) not objecting contemporaneously at trial when this issue was being addressed. (Cleaver-Brooks's Br. at 29–31.) As a matter of South Carolina law, each of these circumstances operates as a waiver. *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."); *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

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[5] *Oncology & Hematology Associates of South Carolina v. South Carolina DHEC*, 387 S.C. 380, 692 S.E.2d 920 (2010), is a recent example of the South Carolina Supreme Court carefully reviewing requests for production when analyzing their legitimacy. There, the Court reversed a trial court's five discovery orders, vacated a party's requests for production, and specifically "decline[d] to rewrite and narrowly tailor [the] oppressive discovery requests so as to make them proper." *Id.* at 389, 692 S.E.2d at 925. To suggest that a court should not actually review a document request to see if an adverse party's response is proper makes no sense and finds no support in South Carolina law.

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); *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.").

The plaintiffs' argue that the Court should ignore each of these cases and excuse the plaintiffs' waiver "[a]s a matter of policy" because they were surprised by Mr. Tornetta's testimony at trial regarding the typographical error. (Plaintiffs' Br. at 22–24.) This argument misses the mark.

The plaintiffs do not identify any authority that would support a court setting aside a uniform body of case law regarding waiver "as a matter of policy," and Cleaver-Brooks is not aware of any such authority. Instead, the "policy" of South Carolina law is clear that a party "cannot complain of an error which his own conduct has induced." *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962), *overruled in unrelated part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). And the record is clear that the plaintiffs' own conduct in presenting a theory in trial upon which no discovery had been made is the basis for all that followed:

- The plaintiffs alone raised the "two boiler" issue at trial. (*See* R. pp. 239–42; Trial Tr. 488:14–491:20 (questioning Mr. Welker on this issue).)
- They alone questioned Cleaver-Brooks's witness on the issue without objection. (*See* R. pp. 336–47; Trial Tr. 686:2–697:19 (questioning Mr. Tornetta on this issue).)
- They alone introduced the index card to the jury. (R. p. 335; Trial Tr. 685:8–15.)
- They alone waited until after resting their case-in-chief and until after Cleaver-Brooks moved for a directed verdict to object to Cleaver-Brooks's production of rebuttal documents. (R. p. 359; Trial Tr. 709:10.)
- And, as discussed above in response to Misstatement 2, they alone are responsible for not conducting any discovery whatsoever on this issue in advance of trial.

There is no "policy" that excuses this landslide of conduct that has always constituted a waiver as a matter of South Carolina law. The Court should reject the plaintiffs' argument on this final legal point accordingly.

CONCLUSION

The "American Rule" is that each party to litigation bears its own costs and expenses except in those cases where fees are shifted by contract or statute. *S.C. DOT v. Revels*, 411 S.C. 1, 9, 766 S.E.2d 700, 704 (2014). A defense verdict is not an extraordinary circumstance justifying reversal of or deviation from this basic tenant of American jurisprudence.

There is no support at all in the record for the trial court's sanctions order, to which this Court owes no deference. The plaintiffs' repeated misstatements about the record's contents, this case's history, and the law governing this appeal only confirm this unmistakable conclusion.

At bottom, Cleaver-Brooks should be applauded for reacting as quickly and as transparently as it did to the plaintiffs' in-trial surprise by locating and producing rebuttal documents the very same day that the plaintiffs' revealed their new "two boiler" theory. That kind of rapid response—particularly in the heat of a trial—should be encouraged for future litigants, and this Court should vacate the trial court's baseless sanctions order accordingly.

Signature Page Attached

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CERTIFICATE OF COMPLIANCE

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

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