THE STATE OF SOUTH CAROLINA
In the 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 Jeanette Howe,

Respondents,

V.

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

Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants,

Of which Cleaver Brooks, Inc. is the Appellant

BRIEF OF RESPONDENTS

Renée M. Melançon (admitted *pro hac vice*)
Jonathan M. Holder
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Theile B. McVey
John D. Kassel
KASSEL MCVEY ATTORNEYS AT LAW
P.O. Box 1476
1330 Laurel Street
Columbia, SC 29201

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

South Carolina Rules of Civil Procedure

South Carolina Rules of Professional Conduct

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

Appellant Cleaver-Brooks challenges a sanctions order that refuses to reward Cleaver-Brooks' gamesmanship throughout pretrial and trial proceedings. From the inception of this case, Cleaver-Brooks has refused to timely produce documents that were the subject of a Master Discovery/Scheduling Order, discovery requests, deposition notices, a motion to compel, a motion for sanctions, and false representation by Cleaver-Brooks' counsel to the circuit court that Cleaver-Brooks would produce the documents forthwith. Instead, Cleaver-Brooks waited until midway through trial to ambush Plaintiffs with highly consequential documents. The award of fees and costs is narrowly tailored to that incurred during trial, which would not have occurred but for Cleaver-Brooks' discovery violations. Re-stated, the issues are as follows:

1. The circuit court properly sanctioned Cleaver-Brooks for refusing to produce documents that were court ordered and further requested by Plaintiffs over two years, where Plaintiffs were not required to disclose their trial strategy in requesting such evidence.
2. Plaintiffs did not waive their objection to Cleaver-Brooks' production of documents nearly midnight the day before Cleaver-Brooks' corporate representative was scheduled to testify.
3. The circuit court properly awarded sanctions pursuant to Rule 37(b), SCRCP, based on Cleaver-Brooks' violation of multiple discovery requests and orders, starting with the 2010 Master Discovery/Scheduling Order. (R. 777-831.)
4. The circuit court properly rejected Cleaver-Brooks' suggestion that Plaintiffs had an obligation under Rule 11, SCRCP, and Rules 3.1 and 3.3, SCRPC, to immediately cease trial once Cleaver-Brooks finally produced its records more than half way through trial.

5. The circuit court properly exercised its discretion in awarding sanctions that had not previously been imposed and that were fully supported by the record.

STATEMENT OF THE CASE

The gravamen of Cleaver-Brooks' appeal is that Plaintiffs should be blamed for the timing of Cleaver-Brooks' belated disclosure of highly consequential documents. This is not the law of South Carolina.

Since the inception of this case in November 2015, Cleaver-Brooks has been under a standing order to produce documents regarding its boilers at Mr. Howe's workplaces, including Bowater paper mill. (R. 777-831.) In January 2018, after multiple document requests, motions, and hearings before the circuit court, Cleaver-Brooks produced its 25-page file for Bowater, which included documents for two boiler unit numbers. Cleaver-Brooks' corporate representative, John Tornetta, explained that a unit number is a unique identifier for a boiler. The documentation regarding two unit numbers, coupled with Mr. Tornetta's explanation, lead Plaintiffs to understand that there were two Cleaver-Brooks boilers at Bowater. Since only one Cleaver-Brooks boiler was identified in the administration building, Plaintiffs naturally believed that the other boiler was in the powerhouse, where Mr. Howe had worked on every boiler. It was based upon this reasonable reading of the evidence that Plaintiffs proceeded to trial against Cleaver-Brooks.

Cleaver-Brooks faults Plaintiffs for not raising the "two boiler" argument until trial. Cleaver-Brooks was in possession of the same evidence as Plaintiffs, had a duty to review its own file (only 25 pages), yet did not discover that two boilers were referenced in its file until Mr. Tornetta was about to testify and then only in response to questioning by Plaintiffs at trial. Cleaver-Brooks waited until nearly midnight the day before Mr. Tornetta was scheduled to testify to produce index cards which Mr. Tornetta admitted were the first step in determining which boilers

were at a given site. Mr. Tornetta admitted that these documents had been in his office all along, but Cleaver-Brooks simply chose not to produce them. Adding insult to injury, during his testimony the next day, Mr. Tornetta for the first time claimed that the second boiler identified in the Bowater file was simply a typo; he made this determination based on the index cards which Plaintiffs had received just hours earlier. Cleaver-Brooks' refusal to produce the index cards precluded Plaintiffs from ascertaining that there was only one boiler at Bowater, and it was not in the powerhouse. If Plaintiffs had this information timely, they would not have gone to trial.

Even if Cleaver-Brooks had chosen not to review its own file and was thus unaware that two boilers were referenced in its Bowater file, Plaintiffs were under no obligation to reveal their trial strategy until the time of trial. Cleaver-Brooks' main argument—that the focus on a single boiler before trial forgave Cleaver-Brooks' discovery violations—is without merit.

There is no question that the number and location of Cleaver-Brooks' boilers at Bowater was the critical issue at trial. The fact that Cleaver-Brooks boilers contained asbestos was not at issue, as Mr. Tornetta admitted as much. The fact that asbestos in Cleaver-Brooks boilers causes mesothelioma and that Mr. Howe developed mesothelioma from exposure to asbestos were not at issue; Cleaver-Brooks even chose not to put a causation expert on the stand. The fact that Mr. Howe's family, including his wife of 50 years, suffered tremendous damages from his illness and death was not at issue; Cleaver-Brooks even declined to offer an expert on damages. As the circuit court noted, everyone recognized that the number and location of Cleaver-Brooks' boilers at Bowater was the critical issue at trial, and Cleaver-Brooks never contested this at trial. It was therefore logical that Plaintiffs would premise their decision to go to trial on the number of boilers at Bowater, as revealed in Cleaver-Brooks' own file. Thus, Cleaver-Brooks' decision to withhold key documents on this issue was extremely prejudicial to Plaintiffs.

Moreover, the circuit court's finding that Cleaver-Brooks refused to cooperate in discovery was not based solely on its belated production of the "midnight documents." Rather, Cleaver-Brooks' refusal to cooperate in discovery was the subject of a motion to compel, a motion to exclude evidence, two motions for sanctions, and multiple hearings, warnings, and orders by the circuit court both before and during trial. Cleaver-Brooks' ongoing refusal to abide by the court's order and the rules of civil procedure throughout discovery and during trial fully warrants the sanctions given.

1. **Wayne Howe died of mesothelioma caused by his exposed to asbestos.**

Wayne Howe died of mesothelioma, a cancer caused by asbestos, on March 7, 2016. (R. 85-114.) Plaintiffs' medical expert, Dr. Edwin Holstein, reviewed all of the relevant evidence and concluded that Mr. Howe's "cumulative exposures" to asbestos, including from the insulating materials in boilers, would have been a substantial factor in causing Mr. Howe's mesothelioma. (R. 1616:13 – R. 1624:18.) Before he died, Mr. Howe and his wife Jeanette filed this suit on November 9, 2015. (R. 33-69.)

2. **Mr. Howe worked on all of the boilers in the powerhouse at Bowater.**

Mr. Howe testified via trial preservation video deposition that he worked at Bowater paper mill from 1978 to 1985 for a contractor, after which he began a 22-year career working directly for Bowater as a pipefitter and mechanic. (R. 1184:18 – R. 1187:3, R. 1191:13-15.) Mr. Howe believed that he was exposed to asbestos while working on boilers at Bowater. (R. 1187:7-18.) In particular, Mr. Howe worked on boilers in the powerhouse at Bowater. (R. at 1188:6-12, R. 1189:22 – R. 1190:4.) Mr. Howe testified that he worked on *all* of the equipment in the powerhouse. (R. 1188:13-17.)

Mr. Howe's coworker at Bowater, Gilbert Small, testified that the boilers were located in the powerhouse at Bowater. (R. 1194 at 19:20-23.) Mr. Small saw Wayne Howe work on *all* of the equipment in the powerhouse, which would have included the boilers. R. 1197 at 29:25-30:4.)

The evidence therefore established that to the extent that there was a Cleaver-Brooks boiler in the powerhouse at Bowater, Mr. Howe would have worked on it. As stated by the circuit court, "[i]n 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. 6.)

3. Cleaver-Brooks has been required to produce documents regarding its boilers at Bowater since the inception of this case.

This case is governed by the Master Discovery/Scheduling Order, dated October 13, 2010. (R. 777-831.) Under that order, interrogatory responses were due by January 27, 2016 and responsive documents were due by December 14, 2017. Number 3(d)(5) of Plaintiffs' Standard Interrogatories and Request for Production of Documents request production of "[c]opies of any invoices, sale receipts or other documents which show sales" regarding "products" containing asbestos sold or distributed to Plaintiff's jobsites. (R. 820-21.) There was never any question that the discovery requests pertained to all of Cleaver-Brooks' boilers at Mr. Howe's jobsites. Cleaver-Brooks did not produce such documents regarding Bowater until January 11, 2018, over two years into this litigation and well after the deadline. (R. 1199-1223.)

4. Plaintiffs filed repeated Rule 30(b)(6) deposition notices with Cleaver-Brooks.

Starting in November 2017, Plaintiffs filed repeated notices to depose Cleaver-Brooks' corporate representative. (R. 946, 1558, 1566, 1593, 1600.) In each deposition notice, Plaintiffs specifically requested that Cleaver-Brooks' corporate representative should be prepared to testify

about, *inter alia*, it boilers. (R. 948, 1560, 1568, 1595, 1602.) Thus, there was never any question that the discovery requests pertained to all of Cleaver-Brooks' boilers at Mr. Howe's jobsites.

5. Cleaver-Brooks produced its Bowater file, which indicated that it had two boilers at Bowater.

On January 11, 2018 (over two years after this case was filed), Cleaver-Brooks produced its 25-page file for Bowater, which was labeled "Bowaters-Carolina Corporation Catawba, South Carolina." (R. 1199-1223.)[1] Testimony from Cleaver-Brooks' corporate representative, John Tornetta, established that a unit number is a unique identifier for a boiler such that each boiler has its own unit number. (R. 1291 at 24:25 – R. 1293 at 31:11 (explaining that he uses a boiler's unit number, which is on the index card, to get their commercial records); R. 1464 at 1530:21-26 (explaining that an index card indicates where a boiler ends up), R. 1459 at 46:10-50:24 (explaining that each individual boiler has its own unit number); R. 1467 at 1481:7-19, R. 1468 at 1524:06-1525:04 (Cleaver-Brooks' index card would show a unit number, or model number, for a particular boiler).)

The documents in the Bowater file indicated that there were two Cleaver-Brooks boilers at Bowater – one unit number ending in "43" and one ending in "44." (R. 1199-1223.) Since both boilers were identified on documents bearing the name "Bowater"[2] in a file labeled "Bowater," (*id.*) the only information produced indicated both boilers had been at Bowater. The logic of this

[1] In contrast to the 25 pages produced by Cleaver-Brooks, one of its codefendants produced 187,000 pages in response to a document request in an asbestos case with exposure at Bowater. (R. 656.) Even though that case involved more jobsites, the difference in the number of pages produced is striking.

[2] For example, BPM 000013 is an invoice indicating that "unit number 18343" would "ship to Bowaters Carolina Corp, Catawba, South Carolina," and BPM 000005 is a remittance request for "unit no(s) 0-18344" for "Carolina Bowaters Corporation, Catawba, S.C." (R. 1199-1223.) Both of these, as well as other documents pertaining to each boiler, are in Cleaver-Brooks' Bowater file. (*Id.*)

understanding was further borne out by the fact that the numbers of the boilers—43 and 44—were sequential.

6. Plaintiffs file a motion to compel against Cleaver-Brooks; Cleaver-Brooks fails to produce documents after representing to the circuit court that it would.

On January 23, 2018, Plaintiffs were forced to file a motion to compel Cleaver-Brooks to produce a Rule 30(b)(6) corporate representative for deposition and produce documents fully responsive to Plaintiffs' requests for production. (R. 873-77.)

A hearing was held on January 24, 2018. (R. 581-626.) Counsel for Cleaver-Brooks represented that Cleaver-Brooks would produce all responsive documents that day. (R. 624:12-20.) The court's order explains, "Counsel for Cleaver Brooks represented that an order was not needed because it would produce requested documents on January 24, 2018 and produce a corporate representative witness prepared to discuss what was known or reasonably available to the company on February 2, 2018." (R. 32.) The Court cautioned, "*Failure to comply with these representations will result in sanctions.*" (*Id.* (emphasis added).)

Despite its representation to the circuit court, Cleaver-Brooks failed to produce critical documents, including the index cards, which are discussed below. (R. 1292 ¶ 9.)

7. Plaintiffs depose Cleaver-Brooks' corporate representative.

When on February 2, 2018, Plaintiffs took the initial deposition of Cleaver-Brooks' corporate representative, John Tornetta, he admitted that Cleaver-Brooks sold and shipped an asbestos-containing boiler to Bowater in 1957. (R. 1234 at 42:18-25.) Mr. Tornetta confirmed that when the boiler was shipped to Bowater, it had asbestos-containing components. (R. 1234 at 43:6-21.) Mr. Tornetta repeatedly represented that there was nothing in Cleaver-Brooks' records that would tell him where a boiler was located at Bowater. (R. 1230 at 9:17-21, R. 1236 at 53:7-12.)

Mr. Tornetta explained that to obtain the 25-page Bowater file that Cleaver Brooks had produced, he first looked at a set of index cards, which he called the "first layer" of research and which lists the unit numbers of boilers at each site where Cleaver-Brooks had boilers. (R. 1232 at 26:8-28:11.) Using that unit number, Tornetta obtained the commercial records (in this case, the 25-page Bowater file) which Mr. Tornetta called the "second layer." *Id.* It took only "roughly 30 minutes per site" to determine whether a boiler was at a certain location. (R. 1231 at 25:14-20.)

Mr. Tornetta admitted that Cleaver-Brooks had not produced the index cards. (R. 1234 at 45:2-5, R. 1236 at 50:11-20.) He represented that the index cards have "all the same information" on them that is within the 25-page Bowater file. (R. 1236 at 50:16-20.) Mr. Tornetta further admitted that even though Cleaver-Brooks doubted that its boiler was in the powerhouse, Cleaver-Brooks' own corporate representative would not "get involved in" trying to find evidence of where the boiler was actually located. (R. 1237 at 59:4-11.)

Mr. Tornetta's admitted lack of preparation to discuss the Bowater plant and failure to produce all requested documents lead to the need for a second deposition. (R. 1292 ¶ 10.) Despite Plaintiffs' efforts to conduct Tornetta's deposition sooner, his second deposition was held just six days before trial. At his second deposition, Mr. Tornetta still failed to give his opinions that he would later set forth at trial—that the reference to a second boiler in the Bowater file was a repeated typographical error—or provide the relevant index cards. (*See generally* R. 1241-84.) 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.

Mr. Tornetta's deposition also illustrated the incomplete nature of Cleaver-Brooks' records, as Mr. Tornetta could not locate documents regarding the presence of Cleaver-Brooks

boilers at locations that were identified in publicly available documents as containing Cleaver-Brooks boilers. (R. 1257 at 217:23 – R.1259 at 223:5.)

8. Plaintiffs file their first motion for sanctions against Cleaver-Brooks.

On March 8, 2018, Plaintiffs filed a motion for sanctions against Cleaver-Brooks for its abuse of the discovery process, including its repeated failure to produce documents that Cleaver-Brooks represented to counsel and to the circuit court it would produce. (R. 1161-1390.) A hearing was held on March 9, 2018, four days before trial, on the motion for sanctions. (R. 627-56.) The circuit court acknowledged that Cleaver-Brooks had engaged in a "business of not giving [Plaintiffs] sufficient information about where [Cleaver-Brooks'] boilers were located until late in the game," (R. 636 at 8-11), but the court did not then rule on the issue (R. 644 at 23-24).

9. Plaintiffs decide to proceed to trial against Cleaver-Brooks.

By March 11, 2018, the Sunday before trial, Plaintiffs had settled with all defendants except Cleaver-Brooks (R. 1293 ¶ 13.) Plaintiffs decided to proceed to trial against Cleaver-Brooks because the 25-page Bowater file indicated that there were two Cleaver-Brooks boilers at Bowater. (R. 1293-94 at ¶ 14.) Bowater's position was that all boilers were either in the administration building or the powerhouse. (*Id.*) Plaintiffs believed there was a powerful argument that at least one Cleaver-Brooks boiler was in the powerhouse, where Mr. Howe had worked on every boiler. (*Id.*) Indeed, Cleaver-Brooks appeared to recognize that there was a fact issue as it withdrew its motion for summary judgment. (R. 1294 ¶ 15.) All other issues typically in dispute in an asbestos case were largely uncontested in this case. Cleaver Brooks' own records and testimony of its corporate representative established that the boilers contained asbestos. (*See, e.g.*, R. 1234 at 43:6-21.) The type of asbestos used on the boilers (amosite) was the type national and international agencies and organizations, and even defense experts, recognize as dangerous. (R. 1614:3 –

1615:6.) No one disputed that the exposures Mr. Howe had from boiler work were significant and causative. Mr. Howe worked on the boilers in the powerhouse for years. (R. 1188:6-12.) His family had a severe loss with extraordinary damages including his wife's loss of her husband as she battled with Alzheimer's disease. (R. 1625:5-9, R. 1626:24 - R. 1627:9.) Tellingly, Cleaver-Brooks did not call any of its experts to dispute causation or damages.

Plaintiffs made clear their theory that more than one Cleaver-Brooks boiler had been at Bowater from the moment of opening statements, maintaining that there were "specific boilers in this case sold by Cleaver-Brooks." (R. 139:12 (emphasis added).) Cleaver-Brooks' counsel made the same claim, referring during opening statements to "Cleaver-Brooks boilers sold to the Bowater Paper Mill. . . ." (R. 170:5 (emphasis added).)

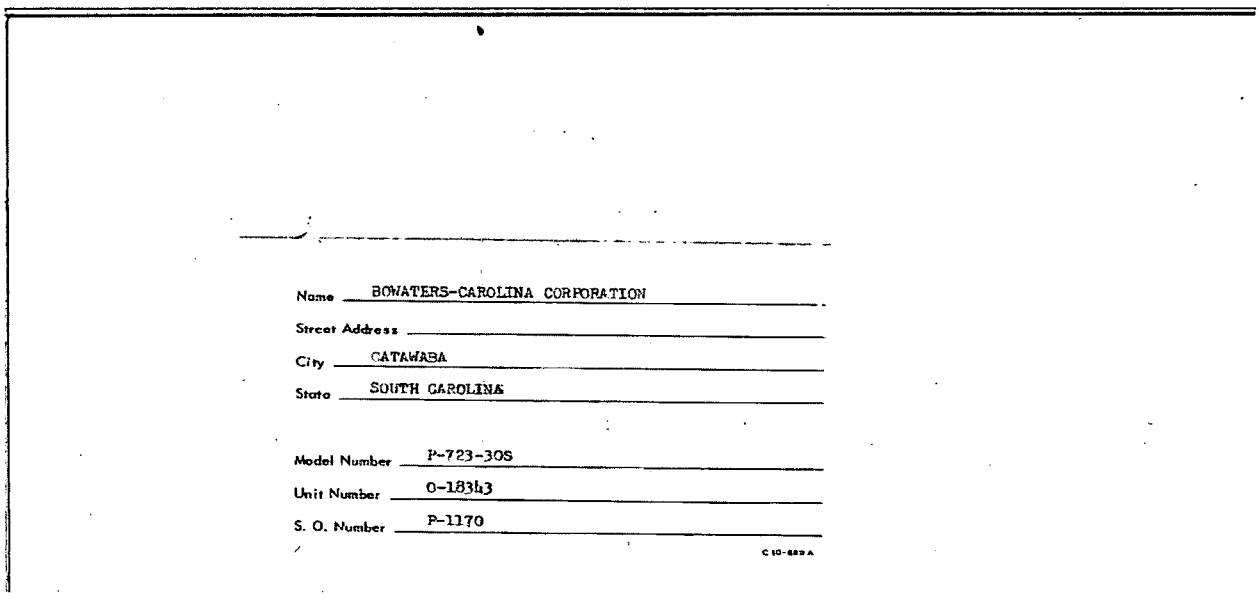
Plaintiffs' perception of the evidence was borne out by the evidence at trial. Bowater's corporate representative, Arthur Welker, confirmed that two unit numbers, and thus two boilers, were identified in the Cleaver-Brooks' Bowater file. (R. 239:14- R. 243:1.) Mr. Welker further testified that the main place a boiler would be located is the powerhouse. (R. 227:9-12.) The only other place where a boiler would be located was the administration building. (R. 228:7-13.) He testified that he found one document referencing Cleaver-Brooks, and it showed that a Cleaver-Brooks boiler went into the administration building. (R. 243:4-12.) Given that the documents produced by Cleaver-Brooks indicated two Cleaver-Brooks boilers at the Bowater facility, if only one of them was in the administration building, then the other one must have been in the powerhouse.

10. Cleaver-Brooks produces its "midnight documents" the night before its corporate representative is scheduled to testify.

Mr. Welker's testimony regarding the two boiler units in Cleaver-Brooks' Bowater file prompted Mr. Tornetta to look in his files, including the index cards, that had been in his office all

along. (R. 331:13-14, R. 341:17 – R. 342:7.) This was the first time he scrutinized this evidence despite being asked about it at his deposition. (*Id.*) Despite his failure to examine Cleaver-Brooks' own Bowater file, Mr. Tornetta recognized that the 25 pages would have been "manageable" to review. (R. 329:18-22.)

At 11:35 on March 15, 2018, on the night before Mr. Tornetta was scheduled to testify at trial, Cleaver-Brooks emailed to Plaintiffs documents that they had not yet produced but had been requested for over two years, including the index cards. (R. 1294 ¶¶ 16-17.) Cleaver-Brooks' corporate representative admitted that Plaintiffs had asked for those index cards during his deposition, but that Cleaver Brooks did not produce them. (R. 341:17 – R. 342:7.) It was not until the day before his testimony that Mr. Tornetta realized that two boilers were referenced in the Bowater file and he finally looked back to the index cards to find out what happened to the second boiler. (R. 344:22 – R. 345:8.) One of the index cards Cleaver-Brooks produced midway throughout trial pertains specifically to "Bowaters-Carolina Corporation" and had long been the subject of discovery requests:



Name BOWATERS-CAROLINA CORPORATION
Street Address
City CATAWABA
State SOUTH CAROLINA

Model Number P-723-30S
Unit Number 0-18343
S. O. Number P-1170

It was not until the production of these midnight documents that Plaintiffs learned that of the two boilers in Cleaver-Brooks' 25-page file labeled "Bowater," only one had actually gone to Bowater. (R. 1294 ¶¶ 16-17.) Moreover, the midnight documents indicated that the one boiler at Bowater was in the administration building, not the powerhouse. (*Id.*) Mr. Tornetta scrambled to explain his belated production as "a written error that became a typographical error" "in [his] mind." (R. 337:17-19, R. 345:20-21.) This was a new, undisclosed opinion.

The midnight documents and undisclosed opinions of the corporate witness were highly consequential to Plaintiffs' theory of the case, and if Plaintiffs had been in possession of the midnight documents before trial started, Plaintiffs would not have proceeded to trial against Cleaver-Brooks. (R. 1294 ¶ 18.)

11. The circuit court excludes the late-produced documents.

Noting the "dereliction" of Cleaver-Brooks' corporate representative, the circuit court granted Plaintiffs' motion to exclude the late-produced documents. (R. 365:25 – R. 369:3.) The court noted, "it's been known for some time that the lynchpin of this case was going to be whether there was Cleaver Brooks boiler wherever Wayne Howe worked. . . ." (R. 366:9-11.) The court found a "dereliction" on the part of Mr. Tornetta, stating that it was "incredibly sloppy on his part to have never looked at those documents." (R. 366:20-25.) The court noted that Cleaver-Brooks should have looked at its own file and noticed the numerical discrepancy. (R. 366:25-367:8.) The index cards were necessary to identify the typographical error, yet Mr. Tornetta "deliberately did not give those index cards out, saying it was simply duplicative." (R. 367:8-12.) The court concluded that producing the documents at such a late stage in the trial violated the rules of discovery. (R. 367:15-19.) With the exception of the index card for boiler 43, which Cleaver-

Brooks admitted was at Bowater, the court struck the midnight documents based on Cleaver-Brooks' violation of the Rules of Evidence regarding production. (R. 368:23 – R. 369:3.)

Later in the trial, Plaintiffs indicated that they would be seeking sanctions for costs and attorneys' fees. (R. 1628:8-13.) The court directed Plaintiffs to move for sanctions within 10 days. (R. 580:12-24.)

12. The circuit court sanctions Cleaver-Brooks.

Plaintiffs moved the circuit court to sanction Cleaver-Brooks for its discovery abuses before and during trial. (R. 1156, 1161.) Following a lengthy hearing (R. 657-76), the circuit court granted Plaintiffs' motion, awarding attorneys' fees and costs for Cleaver-Brooks' "abuse of the discovery and trial processes." (R. 5-26.) The court further noted that "Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings." (R. 5.) The court narrowly tailored the award only for time spent trying the case against Cleaver-Brooks. (R. 24.)

The court found that Cleaver-Brooks could not escape sanctions by questioning Plaintiffs' trial strategy. (R. 16.) Plaintiffs had given Cleaver-Brooks every opportunity to explain its files before trial, and even after Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements, Cleaver-Brooks still waited many days to double check its files. (R. 16-17.)

Thereafter, Cleaver-Brooks filed a motion to alter or amend the Order, which the circuit court denied. (R. 27-31.) The court rejected Cleaver-Brooks' suggestion that Plaintiffs had an obligation under Rule 11, SCRCP, and under Rules 3.1 and 3.3 of the South Carolina Rules of Professional Conduct to immediately cease trial once Cleaver-Brooks finally produced its records mid-way through trial:

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

(R. 28-29 (emphasis added).)

STANDARD OF REVIEW

As a general matter, since the decision whether to impose sanctions is a decision for the judge, not the jury, it sounds in equity rather than at law. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). This Court reviews findings of fact in a matter of equity taking its own view of the evidence. *Id.* (citing S.C. Const. art. V, § 5).

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

> The "abuse of discretion" standard urged by Father does, however, play a role in the appellate review of a sanctions award. An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *See, e.g., Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 553 S.E.2d 110 (2001) (emphasis supplied). For example, **where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard.** *Cf., McDowell v. South Carolina Dep't of Soc. 15 Serv.*, 304 S.C. 539, 405 S.E.2d 830 (1991) (in reviewing attorney's fee sanction imposed pursuant to S.C. Code Ann. § 15–77–300, appellate court looks to whether acts of party sanctioned had reasonable basis in law and fact).

Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 261, 578 S.E.2d 11, 14–15 (2003) (emphasis added). As the Supreme Court of South Carolina has recently recognized, "[a]n 'abuse of discretion' occurs when the trial court's order is controlled by an error of law or when there is no

evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (2016). Neither has occurred here.

Taking its own view of the evidence, this Court may quickly agree with Justice Toal's observations of Cleaver-Brooks' sanctionable conduct throughout the course of discovery and trial, as illustrated in the record. The circuit court's decision to award sanctions, and the terms of those sanctions, are fully supported under an abuse of discretion standard. Cleaver-Brooks' appeal is without merit.

ARGUMENT

I. The circuit court's sanctions order is consistent with the history of the case.

Cleaver-Brooks' primary argument is that Plaintiffs were at fault in declining to reveal their trial strategy before the time of trial. Cleaver-Brooks offers no law supporting such claim, because there is none. It was not Plaintiffs' duty to disclose to Cleaver-Brooks Plaintiffs' trial strategy before trial, nor was it Plaintiffs' responsibility to educate Cleaver-Brooks as to how to read its own files, which formed the basis of Plaintiffs' trial strategy. That is, Plaintiffs developed their trial strategy based on Cleaver-Brooks' Bowater file, and Cleaver-Brooks was equally capable of reviewing and interpreting its own file. Its failure to do so until midway through trial is not an error of Plaintiffs' making. Cleaver Brook's theory that they were a victim of a trial surprise rests on the idea that it was surprised by Plaintiffs' understanding of its records, which were not novel but based on testimony of Cleaver-Brooks' representative that each unit number represented a separate boiler. Plaintiffs had no basis in testimony or records to surmise a mistake was made and repeated multiple times in Cleaver-Brooks' records. Claiming it was a typo/mistake acknowledges that Plaintiffs' reading of Cleaver-Brooks' records would normally be accurate. There was no testimony or records to suggest a mistake at the start of trial. Rather records were

produced well into trial and the testimony about the typos provided on the stand, with no notice.

Nor did Plaintiffs engage in a "sneak attack" "in the middle of trial," as Cleaver-Brooks complains. App. Br. at 28. Cleaver-Brooks had access to its file long before Plaintiffs did, and indeed refused to disclose its file until two years into the litigation. Cleaver-Brooks then refused to disclose other evidence, such as the index cards, until the middle of trial, when it was helpful to Cleaver-Brooks. Of course, this evidence should have been produced far earlier in response to discovery requests. Even if it was appropriate for Cleaver-Brooks to withhold this evidence until trial, it could have produced it immediately following opening statements, when Plaintiffs made it clear that they believed more than one boiler was at Bowater. (R. 139 at 12 ("the specific boilers in this case sold by Cleaver-Brooks") (emphasis added).) Cleaver-Brooks' counsel clearly recognized Plaintiffs' argument, as they too referred to "boilers" plural during their opening statement, thus confirming Plaintiffs' understanding that there was more than one Cleaver-Brooks boiler at Bowater. (R. 170 at 5 ("Cleaver-Brooks boilers sold to the Bowater Paper Mill" (emphasis added).) It was Cleaver-Brooks, not Plaintiffs, that engaged in a "sneak attack" "in the middle of trial" in the late production of the documents and new testimony of its representative that the records were mistaken.

Citing its own statements that only one Cleaver-Brooks boiler at Bowater was at issue, Cleaver-Brooks claims that Plaintiffs should have "corrected Cleaver-Brooks's statements and made clear that the case was really about multiple boilers." App. Br. at 26. Cleaver-Brooks cites no law for its proposition that a plaintiff must disclose its trial strategy before trial. In *Sessions v. Withers*, 327 S.C. 409, 415, 488 S.E.2d 888, 892 (Ct. App. 1997), the court explained that "a plaintiff must be allowed to control his own case and choose what claims will be presented and how they will be presented to the jury." That includes developing his trial strategy, when and how

plaintiff sees fit. Other courts have elaborated on this premise.

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

Contrary to Cleaver-Brooks' assumption that Plaintiffs should have raised their "double boiler" theory during discovery, the evidence that a party develops during discovery may differ from the evidence that a party presents at trial. As one court explained, "[i]t also must be recognized that evidence presented at trial is often not what a party wants to disclose voluntarily during discovery." *Lucas v. Pactiv Corp.*, No. CIV. 5:08CV00079, 2009 WL 5197838, at *3 (W.D. Va. Dec. 22, 2009). "Simply put, the purpose of discovery is to ascertain facts, whereas the purpose of trial is to prove or disprove the various allegations and defenses presented in the pleadings." *Id.* Plaintiffs were entitled to use discovery to ascertain facts regarding Cleaver-Brooks' boilers at Bowater even without educating Cleaver-Brooks on how to read its own Bowater file. Plaintiffs were also entitled to expect that Cleaver-Brooks would comply with the rules and produce the documents requested, not hide them away in Mr. Tornetta's office.

In this case, the nature and content of Cleaver-Brooks' Bowater file was useful to Plaintiffs

not just for trial strategy but also as a cross-examination point against Mr. Tornetta. Like a plaintiff's trial strategy, cross-examination points need not be revealed until trial. Indeed, a party may have competing trial strategies, including whether or not to cross-examine a witness at all. *See Ohler v. United States*, 529 U.S. 753, 758 (2000).

Here, Cleaver-Brooks cannot escape sanctions by questioning Plaintiffs' trial strategy or arguing that it should have been disclosed before trial. Cleaver-Brooks argued before the circuit court that Plaintiffs had every opportunity to take discovery to resolve any confusion regarding the unit numbers in the Bowater file. This summarizes the problem: Plaintiffs had no inkling that there was any such confusion, particularly since Cleaver-Brooks had produced the Bowater-specific file in response to discovery requests specific to Bowater. While faulting Plaintiffs for failing to recognize confusion in its own file, Cleaver-Brooks simultaneously admitted that it too failed to recognized such confusion, did not do so until trial and then only in response to questioning by Plaintiffs.

Cleaver-Brooks cites no authority for its premise that it can escape sanctions for its failure to abide by the discovery rules because it disagreed with Plaintiffs' trial strategy. Plaintiffs gave Cleaver-Brooks' representative every opportunity to explain its files during both of his depositions. (R. 1230 at 9:17-21, R. 1232 at 26:8-28:11, R. 1234 at 45:2-5, R. 1236 at 50:11-20, R. 1236 at 53:7-12, R. 1237 at 59:4-11, R. 1260 at 228:4-18.) Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements. (R. 139:12.) Yet Cleaver-Brooks waited days, until the eve of Mr. Tornetta's testimony, to double-check its files. This is conduct eligible for sanctions.

In response to Plaintiffs' motion to exclude the midnight documents, the circuit court noted that Plaintiffs were under no obligation to reveal their trial strategy regarding the two boilers at Bowater earlier than they had:

> What they say is they noticed that disparity and they are the kind of lawyers that do notice those kinds of things. I don't think they're obligated to tell y'all that. They had one little old something that they were going to hang their hat on to say, "Hey, there were two boilers here," and did a good job of elucidating that theory yesterday, and I think **they were entitled to do that without violating the rules of having to disclose their theory, because you all had these records just like they did**, but the person I point the finger to big time is Mr. Tornetta for letting this occur.

(R. 367:25 - R. 368:10 (emphasis added).)

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

Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Mr. 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. (R. 331:13-14, R. 341:17 – R. 342:7.) Cleaver-Brooks' lackadaisical attitude does not forgive the time and resources wasted at trial as a result of its mishandling of its own documents. The circuit court rightly found that Cleaver-Brooks'

behavior was "sloppy" and noted its corporate representative's "dereliction." (R. 366:20-23.) While errors happen, it is imperative that an error be both rectified in the moment and that a consequence deter such errors from happening again in the future. As the circuit court properly found, sanctions are warranted.

The sole authority Cleaver-Brooks cites in support of its main argument is *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990), which is readily distinguishable. In *Bramlette*, the supreme court found that the defendant should have been allowed to admit evidence which had not been previously disclosed to rebut new evidence presented by the plaintiff for the first time at trial. In contrast here, Cleaver-Brooks cannot cite any new evidence that Plaintiffs offered at trial, but merely complains that it did not ascertain Plaintiffs' trial strategy before trial, which was simply to read Cleaver-Brooks' documents in the manner that Cleaver-Brooks' representative said they were to be read. In juxtaposition from the events in *Bramlette*, in this case it was the defendant, Cleaver-Brooks, that for the first time disclosed new evidence at trial, despite Plaintiffs' repeated requests for that very evidence. Unlike this case, in *Bramlette* there was no abuse of the discovery process by the defendant.

After a full review of the evidence, this Court, like the circuit court, should find that Cleaver-Brooks engaged in sanctionable behavior. The circuit court did not abuse its discretion in awarding fees and costs.

II. Plaintiffs did not waive any argument for sanctions.

Cleaver-Brooks argues that Plaintiffs "opened the door to Cleaver-Brooks' production of records regarding Unit Number O-18344" by questioning Bowater's corporate representative, Mr. Welker, and Mr. Tornetta on those records. App. Br. at 29. On the contrary, it was Cleaver-Brooks who opened the door with the production of its Bowater file which identified two separate units at

Bowater—O-18343 and O-18344. Given that the issue at trial was Cleaver-Brooks' boilers at Bowater, it was logical that Plaintiffs would raise both boilers at trial. Plaintiffs were entitled to ask witnesses about both boilers, which Cleaver-Brooks had put at issue by listing both of them in its Bowater file.

The cases Cleaver-Brooks cites for its argument that Plaintiffs somehow opened the door pertain to issues that the objecting party placed before the court, which is not the case here. *See Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) (objecting defendant "opened the door" to victim's testimony of attempted rape by introducing the nature of their relationship); *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990) (party introduced new evidence of employee's negligence); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (where defense counsel raised issue of prior acts of theft, the State could question witness as to prior crimes involving stealing money); *State v. Worthy*, 239 S.C. 449, 464, 123 S.E.2d 835, 842 (1962), *overruled by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (defendant unilaterally attempted to change his plea, with no prior agreement or involvement of the State).

As a matter of policy, a party cannot produce critical documents for the first time during trial and then protest when the opposing party seeks clarifying information at trial. There were only 25 pages in Cleaver-Brooks' Bowater file, and approximately one-third pertain to the O-18344 boiler. Cleaver-Brooks waited over two years after the case had been filed to produce this file; it had ample time to inspect its own documents. Cleaver-Brooks then waited until the middle of trial to produce its index cards, which it also had ample time to inspect. Cleaver-Brooks waited until in court over half way through trial to give the opinion that its own records were riddled with mistakes. In contrast, Plaintiffs had a matter of hours between production of these "midnight

documents" and Mr. Tornetta's testimony the next morning to assess the documents, appreciate their import, and determine what relevant information was needed from Cleaver-Brooks' corporate representative. Plaintiffs had a matter of moments to react to the new opinion testimony of Mr. Tornetta given during trial. These acts are the definition of ambush, not waiver. (R. 362:4-16; *see also* R. 366:13-21 (also describing this as "dereliction" on the part of Cleaver-Brooks' corporate representative).)

Mr. Tornetta's new testimony and opinions that he had not provided at either of his two depositions. That testimony brought additional surprise, including (1) the fact that Mr. Tornetta believed the second unit number listed in the Bowater file was a typo, and (2) the second unit went to another location. This testimony was not provided in advance of trial. Cleaver-Brooks violated the rules of discovery once when it produced key documents at midnight mid-way through trial, and then again when it offered new testimony that had not been provided in advance of trial despite two depositions of its corporate representative. Cleaver-Brooks hammered home on this testimony on its examination of Tornetta and again in its closing statement. (*E.g.*, R. 554:12-15 ("Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping ***a*** boiler to Bowater in 1957").) This was, quite clearly, trial by ambush.

It bears noting that the circuit court considered and rejected Cleaver-Brooks' waiver argument. The court agreed there was no waiver with respect to boiler O-18344, where the only document Plaintiffs had used in questioning Mr. Tornetta was the index card for boiler O-18343, the boiler that Cleaver-Brooks agrees was at Bowater. (R. 360:24 – R. 361:16.) It was this midnight document only–pertaining to the O-18343 boiler, not the O-18344 boiler—that Plaintiffs presented to the jury.

The court further agreed that Plaintiffs had not waived an ability to seek sanctions:

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

(R. 1628:14-16.)

Cleaver-Brooks' authorities on waiver do not apply. In *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997), the defendant did not object to the expert witness testimony at trial at all. Likewise, in *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986), defense counsel failed to raise multiple objections at trial. In contrast to *Burton* and *Cogdill*, Plaintiffs objected to the new documents at trial. Plaintiffs' right to sanctions was preserved by Plaintiffs' objection to the documents following Cleaver-Brooks' motion for directed verdict (R. 358:20 – R. 369:3) and request during trial to move for sanctions at a later time (R. 1628:8-16). Plaintiffs did not waive their motion for sanctions.

III. The sanctions order is procedurally proper.

A. The documents were subject to multiple discovery requests and orders.

Cleaver-Brooks argues that it did not have to produce its documents regarding boiler O-18344 because they were not responsive to the discovery requests and hence not subject to an order. Cleaver-Brooks misses the point. Plaintiffs' discovery requests pertained to documents relevant to Mr. Howe's worksites. Plaintiffs had no interest in accessing Cleaver-Brooks' files pertaining to irrelevant sites, nor could Plaintiffs have anticipated that Cleaver-Brooks would produce such documents. Cleaver-Brooks, by producing documents apparently relevant to a completely unrelated location, put that location at issue. Worse, Cleaver-Brooks confused the issue by producing those documents as "commercial records" of Bowater, where Mr. Howe had worked,

and later playing "gotcha" to reveal midway through trial that the documents were unrelated to Bowater but were mere typos. All of this confusion on the part of Cleaver-Brooks was the result of its failure to review a mere 25 pages of its own file and its failure to carefully maintain that file in the first place. Cleaver-Brooks' sloppiness does not excuse its failure to comply with the discovery rules.

Cleaver-Brooks admits that it was not until mid-way through trial, and only when triggered by testimony at trial, that its corporate representative finally examined its Bowater file that Cleaver-Brooks had produced to Plaintiffs two months earlier and for the first time discovered Cleaver-Brooks' error. (R. 344:22 – R. 345:8.) Under Rules 26 and 34, a party must produce relevant documents, not random documents like a file identifying a boiler irrelevant to the action at hand. This is particularly true where the other party has no way to know that there is any error in the file.

Citing a case pertaining to interrogatories, and not requests for production, Cleaver-Brooks claims that the circuit court was tasked with evaluating the discovery response in light of the question asked. App. Br. at 32 (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991)). Even if this were a requirement for document production, which Cleaver-Brooks has not established, the circuit court met this standard. The court found that the "midnight documents" – which included the index card for the boiler that was indisputably at Bowater, O-18343 – were responsive to Plaintiffs' Standard Interrogatories and Request for Production of Documents. (R. 10.) That discovery specifically requested "documents which show sales" pertaining to products containing asbestos to job sites at which plaintiff was employed, which included Bowater. By producing them as documents pertaining to sales of boilers to Bowater, Cleaver-Brooks put the midnight documents regarding both boilers at issue. The court found that

the documents are also subject to the document request attached to the Rule 30(b)(6) notices to take the deposition of Cleaver-Brooks' corporate representative requiring the company to produce "purchase order records for all asbestos-containing products sold to any Premises at Issue between 1962 and 2008" (R. 10-11.) The court further noted that the documents were subject to Plaintiffs' motion to compel, and Plaintiffs had asked for the documents, as the court recognized at trial. (*Id.*) As the circuit court found, there were myriad discovery requests for the midnight documents. (*Id.*) But as Mr. Tornetta admitted, Cleaver-Brooks just chose not to produce them. (R. 341:25- R. 342:7.)

Rule 34, SCRCP, provides that a party shall produce documents within their "possession, custody or control." As the language of Rule 34 makes clear and as the courts have confirmed, a request for production need not be confined to documents or other items in a party's possession, but instead may properly extend to items that are in that party's "control." Rule 34(a)(1), SCRCP. In interpreting the identical provision of the Federal Rules, courts have held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465-69 (6th Cir. 1995); *Mercy Catholic Med. Cntr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). This rule includes the duty of a corporate representative to identify pertinent documents prior to the time of deposition.

In order to comply with Rule 30(b)(6), the corporation has an affirmative duty to ensure that its designee has knowledge of all information on the noticed topics reasonably available to the corporation and is prepared to provide complete, binding answers on that information. (R. 1286, *Ethox Chem., LLC v. Coca–Cola Co.*, No. 6:12-cv-1682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014).) This Rule is not met when a corporate representative fails to examine the corporate

documents until mid-way through trial. Cleaver-Brooks' production of documents was misleading, did not comply with the Rules, did not comply with the multiple Rule 30(b)(6) notices, did not comply with the Asbestos Trial Docket Amended General Scheduling Order, and did not comply with multiple rulings by the circuit court. (R. 674 at 70.) The circuit court, as "the court in which the action is pending [could] make such orders in regard to the failure [to provide discovery] as are just. . . ." SCRCP 37(b)(2). The action was pending before the circuit court, which was empowered to sanction Cleaver-Brooks. Such sanction was an appropriate remedy under Rule 37.

B. Cleaver-Brooks' invocation of Rule 11 and the Rules of Professional Conduct is unfounded.

Ironically, Cleaver-Brooks, which flouted multiple discovery rules for over two years, demands discovery of Plaintiffs' counsel, who Cleaver-Brooks claims was untruthful. If Cleaver-Brooks truly believed there had been any professional impropriety, it would have made a Rule 11 motion, contacted the Bar, or taken advantage of the opportunity to request discovery on the issue during the lengthy October 10, 2018 hearing. It chose not to. (R. 668 at 47:18-21.) In fact, Cleaver-Brooks did not even raise its Rule 11 claim until the hearing on the motion for sanctions, not in its original briefing, and at that time Cleaver-Brooks' trial counsel represented to the court that she had no intention of making a Rule 11 motion. (*Id.*) Instead, Cleaver-Brooks now hurls accusations against Plaintiffs' counsel based on no evidence whatsoever. That is unprofessional and without foundation.

Plaintiffs' counsel had an ethical duty to their client. (R. 671 at 58:20-23.) Counsel cannot stop trial every time unfavorable evidence is belatedly introduced, but has an obligation in zealously representing one's client to ascertain whether there is a way to salvage the case. Hence Plaintiffs' argument at the close of trial that, even if there was one Cleaver-Brooks boiler at

Bowater, it was actually in the powerhouse where Mr. Howe had worked and not in the administration building, as Cleaver-Brooks claimed.

Moreover, in denying Cleaver-Brooks' motion for directed verdict, the circuit court noted that, notwithstanding the midnight documents and Mr. Tornetta's testimony regarding the same, there was still a conflict of evidence from which the jury could find in Plaintiffs' favor:

> I find that the evidence, at least a scintilla and maybe more conflicted on that point and susceptible to different interpretations used in the standards for this stage of the trial where the evidence is viewed in the light most favorable to the non-moving party, **there is a conflict in the evidence with respect to whether there was one boiler or two boilers because of the various records that have been introduced. And even if there is just one boiler there is a conflict in the evidence as to what interpretation there is to be made of the restart records and where the boiler was then located**, and even in the opening statement of defense, defense shows a drawing and photographs of the boiler in questions, which is the smallest package boiler that Cleaver-Brooks makes that is still a piece of equipment, which because other testimony might well be used as a supplementary boiler in process activities at the paper mill rather than simply something that satisfied – that would supply steam to an office building for I suppose using in radiators and hot water and things of that nature. It might well be that the jury would conclude that this is much too large a piece of machinery to have been used for the small technical purpose for which Cleaver-Brooks contends it was used, which was as a power supply to the administrative building. So all of those things pose as I see it a genuine issue of material fact as to these matters at this moment, the close to the plaintiff's case, I do not find that a directed verdict is warranted.

(R. 355:9 – R. 356:9 (emphasis added).)

Cleaver-Brooks jumps to the conclusion that because Plaintiffs would not have taken the trial risk if Cleaver-Brooks had disclosed the relevant records does not mean that those records "dispelled every remaining factual dispute in the case." This is a leap. There were other factual arguments to suggest the boiler was in the powerhouse, but they were less compelling. Given that the product Cleaver-Brooks sold was filled with various asbestos parts and sold during a time when it had every reason to be aware of the dangers (both uncontested issues), there was a good faith basis to proceed even with this limited evidence placing the asbestos-filled boilers in the

powerhouse. That does not however undermine Ms. Dean's claim that it was not advisable for Plaintiffs' client to take the risk associated with trial had Cleaver-Brooks provided basic information about the mistakes in its Bowater records timely. Even with sanctions, Cleaver-Brook's actions resulted in loss for the family, the lawyers, the jury, and the court.

Cleaver-Brooks' Rule 11 argument is based on its claim that Plaintiffs presented non-meritorious claims. The circuit court, which sat through the entire trial and was aware of all the evidence and counsel's arguments, disagreed with Cleaver-Brooks' position. Contrary to Cleaver-Brooks' claim that the circuit court did not address the Rule 11 issue, the court fully considered and ruled on the issue:

> Cleaver-Brooks suggests that Plaintiffs would have owed an obligation under Rule 11, SCRCP, and under Rules 3.1 and 3.3 of the South Carolina Rules of Professional Conduct to immediately cease trial once Cleaver-Brooks finally produced its records mid-way through trial. Cleaver-Brooks' Motion [to Alter or Amend Order] at ¶ 6. Cleaver-Brooks entirely and disingenuously ignores the reality of Plaintiffs' learning this information near the end of their case-in-chief, approximately midnight before the testimony of Cleaver-Brooks' corporate representative who had twice testified inconsistent with the "midnight" documents during his two prior depositions, and after months of evaluating this case consistent with Cleaver-Brooks' own interpretation of its own records, which Cleaver-Brooks itself discovered (near the end of Plaintiffs' case-in-chief) to be in error. **As a result of Cleaver-Brooks' failure to produce these long-requested documents sooner, Plaintiffs lacked ample time to evaluate them in the midst of trial and make a decision to cease the same upon receiving the documents**. This Court, having sat through the trial and observed the parties' conduct, was fully aware of these issues and considered them in rendering its Order granting sanctions against Cleaver-Brooks. Again, Cleaver-Brooks presents no cogent grounds to alter or amend the judgment.

(R. 28-29.)

Cleaver-Brooks also accuses the circuit court of failing to give it the opportunity to conduct discovery to test the veracity of counsel's statement. Cleaver-Brooks never asked to conduct discovery on opposing counsel's veracity, but instead requested discovery "regarding the reasonableness of the Plaintiffs' fees and costs." (R. 1481 ¶ 15.) The circuit court clearly found

there was sufficient evidence, including extensive documentation regarding fees and costs, to rule on this issue, and it considered all relevant factors in making its ruling. (R. 27-30.)

In any event, depositions of opposing counsel should be limited to circumstances where the parties seeking to take the deposition have shown that: (1) no means exists to obtain the information other than to depose opposing counsel; (2) the information sought is relative and non-privileged; and (3) the information is critical to the preparation of the case. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001) (finding no abuse of discretion on the part of the district court in refusing to allow such deposition under this standard). Cleaver-Brooks has not established these elements. "Encouragement of this type of deposition disrupts the adversarial system, lowers the standards of the profession, adds to the burdensome time and costs of litigation, and detracts from the quality of client representation." *Shelton, supra.* The court would have been correct to deny such discovery, had it been requested. The circuit court did not abuse its discretion in rejecting Cleaver-Brooks' argument that Plaintiffs' counsel flouted Rule 11, SCRCP, or Rules 3.1 and 3.3 of the South Carolina Rules of Professional Conduct. (R. 28.) Cleaver-Brooks' argument on this issue is baseless and below the standards expected of reputable attorneys.

IV. The sanctions are proportionate to the discovery and trial abuse.

The sanctions were narrowly tailored to Cleaver-Brooks' sanctionable behavior. As the circuit court found, but for Cleaver-Brooks' failure to timely produce the index cards, the trial "in all probability would not have been tried." (R. 674 at 70:2-4.) Indeed, Plaintiffs' counsel has affirmed that "[i]f Plaintiffs had been in possession of the midnight documents before trial started, Plaintiffs would not have proceeded to trial against Cleaver Brooks." (R. 1294 ¶ 19.)

Justice Toal sanctioned Cleaver-Brooks for its ongoing discovery abuse, including at trial:

> The defendant Cleaver-Brooks who had already been criticized by me with its failure to honor discovery requests is the reason that this matter went to trial and was in trial the length of time it was, and therefore I – as a sanction for [Cleaver-Brooks'] failure to obey the rules of discovery and my directives in the various hearings that I have on this matter, some of which do not result in separate orders, but all of which result in oral orders and directives by me for the defendant to produce their records, but as a sanction for Cleaver-Brooks' failure to honor those directives and failure to obey the rules of discovery, I think an award of attorneys' fees and expenses is appropriate.

(R. 674 at 70:8-22.) The fees and costs were directly related to the trial time spent on boiler O-18344, as they were requested only for time spent trying the case against Cleaver-Brooks. (R. 24.) Cleaver-Brooks' argument that the circuit court failed to take this into account is simply inaccurate. Each of the sanctions awarded by the circuit court is supported by the record.

A. The sanctions order is fully supported by the evidence.

Cleaver-Brooks attempts to poke holes at the circuit court's order granting sanctions. None of its challenges succeed. For example, Cleaver-Brooks complains that the circuit court failed to cite any evidence for its statement that "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 boilers. (R. 6.) The court could not have cited anything in order to prove a negative. Instead, the court correctly explained its observation of the evidence and argument throughout the course of trial. It was supported however by Cleaver-Brooks' admission of asbestos content in its boiler and its decision not to call any expert to question causation or damages (which were significant).

Cleaver-Brooks complains that the circuit court did not cite the correct trial transcript to support its statements that Mr. Tornetta admitted at trial that Plaintiffs had explicitly asked for the index cards and he admitted that they had been sitting in his office all along. These statements are, in fact, fully supported by the evidence. (R. 331:13-14, R. 341:17 – R. 342:7.)

The court also explained its statement that the jury understood that the key issue in the case was the number and location of boilers at Bowater. (R. 19-20.) The court explained that Cleaver-Brooks itself commenced its questioning of its corporate representative with questions about the number and location of its boilers:

> Q So John, you've known me for a long time, I'm going to go right to the questions. **I want to start by asking for the answers to some of the very basic questions that are at issue in this case** and then I am going to go back and talk about the basis for your answers, okay?
> A Okay.
> Q Did Cleaver-Brooks ship a boiler to the Bowater Paper Mill in Catawba, South Carolina?
> A Yes.
> * * *
> 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 0-18343.
> Q **Did Cleaver-Brooks ship a boiler to Bowater with the unit number 0-18344?**
> A No.

(R. 386:6 – R. 387:5.) As the court explained, Cleaver-Brooks repeatedly made clear to the jury that the location of the unit was *not* Bowater. (R. 387:3-5. R. 393:2-4.)

The court noted that Cleaver-Brooks made the issue whether there was a Cleaver-Brooks boiler in the powerhouse the starting point of its closing argument. (R. 20.) Further, the court explained that Cleaver-Brooks' counsel reminded the jury that the evidence showed only one boiler at Bowater, pointing out, for example, that "Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping ***a*** boiler to Bowater in 1957," and "all of the asbestos containing components in the Cleaver-Brooks boiler shipped to Bowater were inside ***that*** boiler." (R. 20 (emphasis added)).) Cleaver-Brooks walked the jury through its supporting evidence, admonishing that "Mr. Tornetta said this 18344 boiler was never at Bowater."

explaining away the unit number issue as "mistakes happen," and dismissing Plaintiffs' key witness on the exposure issue. (*Id.*) Thus, the jury was reminded again and again of the key issue, and the court's statement that the jury understood the issue before it is fully supported by the evidence. *See also, e.g. State v. Anderson,* 322 S.C. 89, 93, 470 S.E.2d 103, 105 (1996) (trial judge was in the best position to assess jury's attention to outburst in courtroom). The circuit court did not abuse its discretion in reciting its factual findings in support of its ruling.

Cleaver-Brooks inaccurately argues that it was not served with two affidavits until a month after Plaintiffs filed their motion for sanctions. The affidavits in question were in support of Plaintiffs' Motion for Sanctions with Statement of Fees and Costs, which was filed on April 30, 2018. (R. 1291, 1578.) Two of the affidavits were served concurrent with the motion, with one affidavit served the next day. (R. 1427.) All of the exhibits in support of the motion were served via email as they were voluminous and email service is the court's practice. On June 4, 2018, after Cleaver-Brooks claimed it had not been served with the affidavits, Plaintiffs filed and served them via a Notice of Filing Affidavits in Support of Plaintiffs' Motion for Sanctions with Statements of Fees and Costs. (R. 1424.)

There has not been prejudice to Cleaver-Brooks. The clear purpose of Rule 6(d) is to prevent unfair surprise by eleventh hour filings. *Orsi v. Kirkwood,* 999 F.2d 86 (4th Cir. 1993). That is, a party may not file a motion unsupported by any evidence only to spring the evidence on the opposing party on a later date. *McGinnis v. Se. Anesthesia Assocs., P.A.*, 161 F.R.D. 41, 42 (W.D.N.C. 1995). That is not what happened here—Cleaver-Brooks was in possession of the affidavits at the time the brief was filed and one day thereafter. To strike the affidavits would conflict with Rule 6(d)'s ultimate objective of resolving this motion on its merits. *Id.*

Even if the affidavits were served untimely, the court had ample other evidence to reach its conclusion. The amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The court had evidence before it to consider the relevant factors a court considers when determining attorneys' fees. (R. 1161-1181.) In short, even if the Court finds that the service of the affidavits was not timely, such ruling would not vacate the sanctions order.

B. Exclusion of Cleaver-Brooks' records regarding unit O-18344 did not preclude the sanction of attorneys' fees and costs.

Rule 37(b)(2), SCRCP, permits more than one sanction for the same wrong:

> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending **may make such orders in regard to the failure as are just, and among others the following:**
>
> * * *
>
> (B) 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;
>
> In lieu of any of the foregoing orders **or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure**, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(b)(2), SCRCP (emphasis added). Thus, the court was entitled to issue such orders as are just, including both striking evidence and imposing fees and costs.

Pursuant to Rule 37(b)(2), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just." *Temple v. Tec-Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006). "Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery

can show a lack of prejudice," sanctions must be imposed, or a resulting verdict must be reversed. *Id.* While "[t]he imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court, ... whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules." *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, overleniency must be avoided. *Id.*

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), a party failed to disclose the existence of a videotape of the plaintiff in a personal injury case which was relevant to the issue of damages. This Court stated "[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." *Id.* "Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Cleaver Brooks' failure to cooperate with the discovery process irrevocably prejudiced Plaintiffs' ability to present their claims to the jury. The harm from the late disclosure was clear, as the jury was aware that the key issue was the number and location of boilers at Bowater. Plaintiffs' argument on this issue was eviscerated by Cleaver-Brooks' late-produced documents. This is not the first time Cleaver-Brooks has refused to cooperate with the discovery process. In *Bumgardner v. ABB, Inc., et al.*, C/A. No. 10-CP-29-855, South Carolina Court of Common Pleas of Lancaster County, Cleaver-Brooks refused to produce any discovery for any location where Mr.

Bumgardner testified to working on boilers until a co-worker identified them by name. Due to that failure, discovery was not produced until weeks before trial. When produced, Cleaver-Brooks only produced some documents. Upon deposing Cleaver-Brooks' corporate representative, Plaintiffs' counsel learned that Cleaver-Brooks provided all records showing the non-asbestos insulation and specifically withheld the records (for the same boilers) showing asbestos insulation. (*See* R. 1148 at 40:10 – R. 1150 at 45:7; R. 1151 at 189:13 – R. 1152 at 194:1.) This resulted in the Honorable Judge Hill ordering a last-minute deposition of Cleaver-Brooks within 48 hours of the start of trial. (R. 1154-55.)

Even if the court finds that Rule 37 was not an appropriate vehicle for the sanction, the ruling was well grounded in equity. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 310 S.E.2d 440, 279 S.C. 592 (Ct. App. 1983). As in that case, the sanction was necessary to insure justice for the Plaintiffs and to deter Cleaver-Brooks from further machinations.

Although the court in this case excluded from evidence the midnight documents regarding the Illinois boiler, that did not cure Mr. Tornetta's surprise testimony regarding the typo in the Bowater file. The revelation of the typo—which was not alleged in his two depositions—undermined Plaintiffs' claim that there were two Cleaver-Brooks boilers at Bowater. Finally, it is well-settled that a ruling on the admission of evidence is within the trial judge's discretion and will not be disturbed absent an abuse thereof and a showing of prejudice. *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990). There was no grounds here to overturn the exclusion of evidence or the proper imposition of a sanction of fees and costs.

C. The circuit court did not abuse its discretion in setting the sanction.

1. The circuit court did not abuse its discretion in awarding attorneys' fees.

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). Here, discovery had long since passed, and the case was in the middle of trial when Cleaver-Brooks decided to produce critical records which Plaintiffs had requested months previously and which were responsive to a standing order in effect when the case was initiated two years earlier. Plaintiffs were extremely prejudiced, as the newly produced documents and the corporate representative's accompanying and previously-undisclosed testimony vastly undermined Plaintiffs' main argument at trial. The belated disclosure was nothing short of willful, as even the corporate representative admitted that Plaintiffs had asked for the production, which request he dismissed by stating that Cleaver-Brooks simply chose not to produce its index cards.

A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery. SCRCP 37(b); *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees incurred during contempt hearing for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court

granted trial preparation costs and attorneys' fees for defendant's failure to produce consequential documents until trial); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for defendant's discovery abuses, including late production of consequential documents); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (trial court awarded attorneys' fees for discovery abuse, including failure to produce material, relevant evidence). Indeed, a court may award attorneys' fees and costs for the entire time spent at trial and pretrial. *Cf. Abner v. Kansas City S. Ry. Co.*, 541 F.3d 372, 380 (5th Cir. 2008) (awarding plaintiffs attorneys' fees in excess of $400,000); *Gierlinger v. Gleason*, 160 F.3d 858, 873-83 (2d Cir. 1998) (awarding fees for entire time spent pretrial and at trial and remanding for calculation of attorneys' fees to exceed $100,000).

Cleaver-Brooks' failure to cooperate with the discovery process and eleventh-hour disclosure of critical documents irrevocably prejudiced Plaintiffs' ability to present their claims against Cleaver-Brooks and deprived Plaintiffs of the choice whether to proceed to trial in the first place. This is behavior that begs to be sanctioned.

As a general rule, the amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) (citing *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989)). The award must be reasonable and supported by adequate findings. *Id.* The court should consider (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Burton*, 358 S.C. at 358, 594 S.E.2d at 898.

Statements of attorneys' fees for the trial lawyers are detailed in the Affidavits of Attorneys Dean, McVey, and Holder. (R. 1291, 1299, 1427.)

Cleaver-Brooks does not challenge any of these factors, though it does mischaracterize counsel's roles in the case. Ms. Dean is partner at Dean, Omar, Branham, Shirley in Dallas; Mr. Holder is an associate at the same firm. Ms. McVey is a partner at Kassel McVey in Columbia, South Carolina. All three attorneys played an active role in the trial of the case, from trial strategy to examining witnesses. Cleaver-Brooks' attempt to differentiate the attorneys as "national" versus "local" is baseless.

The gravamen of Cleaver-Brooks' complaint is that the circuit court did not adequately analyze counsel's identical billing hours and failed to segregate time spent on boiler O-18344. Both arguments lack merit.

First, the circuit court did not abuse its discretion in awarding fees for the same number of hours worked by two of plaintiffs' counsel. (R. 1291, 1299.) As the circuit court explained, plaintiffs' counsel represented during argument that they were both working together, nearly around the clock in preparation for trial. (R. 24.) This is not uncommon when as associate works with a partner. "It thus comes as no surprise that their hours would mirror each other." (*Id.*) Indeed, Plaintiffs' counsel work on a contingency, not hourly, basis, and thus estimated to the best of their ability their hours worked, which in this case would have been identical for hand-in-hand work. The court found that the hours were supported by "the degree of preparation required by a trial of this length and scope as well as by counsel's performance at trial, none of which Cleaver-Brooks questions." (*Id.*) The court did not abuse its discretion in reaching these findings.

Second, Cleaver-Brooks claims that the court should have segregated attorneys' fees for time spent on boiler O-18344. The circuit court noted that "Plaintiffs have only requested fees for

time spent beginning on the Sunday before trial started when Cleaver Brooks was the only remaining Defendant, as well as the depositions of Mr. Tornetta the Cleaver Brooks representative. Thus, all time requested by Plaintiffs was due only to trying the case against Cleaver Brooks." (R. 24.) It would have made no sense for the court to attempt to parse time for that spent on boiler O-18344 because the entire trial emanated from Cleaver-Brooks' ongoing sanctionable conduct in failing to disclose evidence requested in discovery. As the court noted, the trial "in all probability would not have been tried" but for Cleaver-Brooks' failure to timely produce its documents. (R. 674 at 70:2-4.) Moreover, the circuit court did not sanction Cleaver-Brooks merely for time spent at trial discussing boiler O-18344. The court sanctioned Cleaver-Brooks for its ongoing abuse of the discovery process, which far exceeded the date of its belated production of the midnight documents. (*Id.*)

Finally, Cleaver-Brooks' argument that the midnight documents were never requested is without merit; even its corporate representative admitted that Plaintiffs had asked for the index cards during his deposition, and he had testified that Cleaver-Brooks did not produce its index cards. (R. 341:17 – R. 342:7.) Cleaver-Brooks attempts to frame the issue too narrowly, claiming that the documents regarding boiler O-18344 were never explicitly requested. Plaintiffs could not know that Cleaver-Brooks would produce an inaccurate file and only later, midway through trial, admit its inaccuracy. Cleaver-Brooks put the documents regarding boiler O-18344 at issue by including that boiler in its files that purported to pertain only to Bowater. They should have been produced, as Cleaver-Brooks tacitly acknowledged when it produced those documents in the middle of trial.

In sum, the attorneys' fees requested in this case are reasonable, and the circuit court did not abuse its discretion in setting the award.

2. The circuit court did not abuse its discretion in awarding costs.

Most of Cleaver-Brooks' complaints about the costs awarded stem from its belief that fees and costs should not have been awarded for the entire trial. As shown above, this argument is without merit, as Cleaver-Brooks' failure to timely produce the midnight documents pervaded the trial and such evidence was germane to Plaintiffs' decision whether to go to trial in the first place. Thus, the costs for the transcripts, expert witnesses, and other expenses for the entire trial, and not just pertaining to unit O-18344, were properly awarded.

Contrary to Cleaver-Brooks' claims the three lawyers involved were not national counsel, local counsel, and an associate. Rather, all three lawyers had an active role in the case (both in front of the jury and behind the scene) working extensive hours to represent their clients. The fact that they at times had to drive separately is not telling. The fact that they worked together as a team nearly all waking hours reflects dedication to an effort that a trial judge is in the best position to assess. The work and expenses of the trial technician were also detailed. The trial judge was there to see the equipment set up and torn down, the video editing (Cleaver-Brooks conducted a Sunday deposition before trial that had to be cut and edited, and Mr. Howe's testimony was by video because he had passed). Plaintiffs address Cleaver-Brooks' other specific complaints about the costs as follows.

First, vendor costs to prepare for and wrap up the trial and its materials were incurred both before and after trial, and they were incurred because of the trial. The circuit court was in the best position to observe this. With respect to expenses, vendors were responsible for such tasks as photocopying reams of documents, which is not inexpensive but is critical during trial. No vendor costs whatsoever would have been incurred but for Plaintiffs' decision to proceed to trial based on misinformation supplied by Cleaver-Brooks. The circuit court properly awarded those costs.

Second, as Plaintiffs have already attested, the lodging fees included the "war room" that counsel required during the trial. (R. 1311-12 at ¶ 4.) A "war room" is typically necessary for both plaintiffs and defendants during a trial of this scope involving a significant number of attorneys, paralegals, and documents. This cost was incurred strictly because of trial. The court did not abuse its discretion in awarding this cost.

Third, some duplication of rental car and car service was inevitable given the sheer number of attorneys and support staff who needed to travel between the courthouse and the hotel at different times, to say nothing of airport transfers (such as by Blacklane GmbH), including after the conclusion of trial. Again, this cost was a direct result of the trial and was properly awarded.

Last, Cleaver-Brooks complains about the modest sum awarded to Mr. Howe's family members for hourly wages lost sitting through trial. (R. 1388, 1578.) The selection of a sanction for discovery violations is within the circuit court's discretion. *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990); SCRCP 37(b)(2) (when there has been an abuse of the discovery rules, "the court in which the action is pending may make such orders in regard to the failure as are just"). But for the late production of Cleaver Brooks' documents, Timothy Howe and Wende Myers would not have had to take time off from work to attend a trial that would not have occurred. Setting aside the emotional toll this took on them, they should be compensated for the time they were forced to take off from work. The circuit court properly found lost wages just and reasonable in this instance.

In sum, all of the costs are limited strictly to those incurred as a result of Cleaver-Brooks' late disclosure of the midnight documents. Cleaver-Brooks held back those documents, including the index card for the boiler at Bowater, despite multiple discovery requests, despite multiple warnings and orders from the court, and despite misrepresenting to the circuit court during a

hearing on a motion to compel that all documents would be produced that day. As a result, Plaintiffs were forced to file a motion to compel, two motions for sanctions, both before and during trial, as well as a motion to strike the late-disclosed documents. Cleaver-Brooks' failure to abide by the discovery rules was fully sanctionable. The court did not abuse its discretion in awarding fees and costs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the circuit court's ruling.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules.*

Theile B. McVey (16682)
tmcvey@kassellaw.com
John D. Kassel (SC Bar 3286)
jkassel@kassellaw.com
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
P O Box 1476
Columbia, South Carolina 29202-1476
803-256-4242
803-256-1952 (Facsimile)
Other email: emoultrie@kassellaw.com

Renée M. Melancon (admitted *pro hac vice*)
DEAN OMAR BRANHAM SHIRLEY, LLP
300 N. Market Street, Suite 300
Dallas, Texas 75202
Telephone: (214) 722-5990
rmelancon@dobslegal.com

ATTORNEYS FOR RESPONDENTS

June 14, 2019

Columbia, South Carolina.