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SC Court of Appeals

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 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.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING

The trial court's order is one of, if not the single largest discovery sanctions award in the history of South Carolina jurisprudence. It is a sanction of over $300,000, entered against the trial victor, and without any basis in the record. The parties agree that it is subject to *de novo* review.

Respectfully, this Court appears to have overlooked or misapprehended everything in the case's history that led to the sanctions order. Rule 221(a), SCACR. Cleaver-Brooks provided documents to the Plaintiffs in response to the Plaintiffs' in-trial surprise questioning of a third-party witness. This Court's order, however, indicates that Cleaver-Brooks should have provided those materials during discovery. That is incorrect.

Neither this Court, nor the circuit court, nor the Plaintiffs themselves, have ever cited to anything in the record to show that these documents were in fact requested or relevant at any point in discovery. The failure to identify any support for this threshold point reveals the dispositive error in this Court's decision: a sanction cannot be levied for failing to produce documents that were never requested or repsonsive in discovery. A true *de novo* review of this record leaves no doubt that the trial court's discovery sanctions award finds no basis in fact or in law, and, respectfully, it should not even be a close call.

This case's record is 1971 pages long. There is not one fact in the record that supports the sanctions award. Not one. ***And none is cited in the panel's decision.*** Cleaver-Brooks is at a loss as to what the Court thinks it should have done differently prior to promptly responding to the Plaintiffs' in-trial surprise. The panel apparently assumed that Cleaver-Brooks knowingly suppressed evidence that would have relieved it of liability—an assumption that defies reason and logic, as no defendant would withhold exculpatory evidence that could prevent a multi-week trial. And if sanctions orders are supposed to deter future misconduct, there is no way any litigant can

look to this case and its historically massive penalty as guidance, as no one—not the Plaintiffs, nor the circuit court, nor the panel—has ever identified a specific discovery request Cleaver-Brooks failed to answer that could possibly justify any sanction.

The panel's ruling should be reconsidered accordingly, including by the full Court sitting *en banc* in light of the extreme severity of the sanctions, the fact that the panel's decision chills litigants from timely responding to an adversary's in-trial surprises, and the fact that the panel's decision is irreconcilable with several controlling Supreme Court decisions, including at least:

- *Father v. South Carolina DSS*, 353 S.C. 254, 578 S.E.2d 11 (2003), which requires appellate courts to conduct a *de novo* review of all aspects of the lower court's decision when a judge issues sanctions, a review that does not appear to have happened here.

- *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), which protects, rather than punishes, parties like Cleaver-Brooks who are sandbagged at trial by an adversary's surprise questioning.

- *Baughman v. AT&T Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), and others like it that require courts to inspect the actual discovery requests prior to issuing a discovery sanction, an exercise in which no court has engaged in this case.

- Numerous cases that make clear parties like the Plaintiffs who introduce an issue into a case cannot then complain about the consequences of their own conduct.

- Numerous cases that evaluate the excessive nature of a sanction and hold that the failure to exercise any discretion is itself an abuse of discretion.

These and other grounds for rehearing and *en banc* review are discussed in greater detail below.

ARGUMENT

I. Despite the *de novo* standard of review, the panel has not identified anything in the record to support a finding that Cleaver-Brooks should have provided the Plaintiffs with materials regarding a boiler in Illinois at any time before the Plaintiffs questioned a third-party witness on that surprise issue at trial.

This case's background is not subject to any legitimate dispute, and it makes clear that Cleaver-Brooks should be praised, not sanctioned, for its immediate, proactive response to an attempted in-trial surprise by the Plaintiffs. To summarize its history and procedural posture:

The Plaintiffs alleged that Cleaver-Brooks sent a boiler to the Bowater Paper Mill in York County, South Carolina, containing asbestos that caused Mr. Howe to develop mesothelioma. (*See* R. p. 1582 (Mr. Howe's interrogatory answer listing Bowater as a worksite where he may have had asbestos exposure).)

As a result, Cleaver-Brooks produced all of its records regarding that boiler from the 1950s, including a copy of the very file folder in which those records were archived. (R. pp. 678–738.) Those records included one set of sales records, one set of shipping records, and one set of design drawings. (*Id.*)

The parties then engaged in a lengthy pretrial process to determine where, exactly, that boiler was located within the massive Bowater facility. That pretrial process is discussed in exacting detail—with nearly two-dozen citations to the record—on Pages 4 through 11 of Cleaver-Brooks's opening brief. The boiler's location was dispositive because Mr. Howe testified that he only worked on boilers located in the powerhouse, not in any other buildings on the sprawling Bowater campus. (R. p. 1189.) If the Cleaver-Brooks boiler was not in the powerhouse, then Mr. Howe could not have been exposed to any asbestos from it, and his claims would necessarily fail.

That the entire case distilled down to this single factual dispute was so obvious and undisputed that the trial judge observed on the last business day before trial: "So, it's just a simple factual dispute between the two of y'all as to where this boiler is located." (R. p. 641.)

But in the middle of trial, and not a moment before, the Plaintiffs changed their story and alleged that Cleaver-Brooks may have sent two boilers to Bowater. They did so after Art Welker—a third-party witness who worked for Bowater, and who the Plaintiffs themselves called to trial—testified in response to the Plaintiffs' questioning at trial that the Cleaver-Brooks boiler was in a

building in which Mr. Howe never worked. (R. pp. 243, 255, 264 (Welker's trial testimony); R. p. 677 (Bowater document placing the Cleaver-Brooks boiler in the administration building).)

Clearly, the Plaintiffs were embarrassed, and understandably so. With the jury and Mr. Howe's family watching, their entire case had vanished under their own questioning of a third-party witness they had called to the stand. To save face, they seemingly made up a new theory on the fly—that there may have been a second Cleaver-Brooks boiler on site—that had never, not once, been mentioned before.

Spontaneously and without evidentiary support, the Plaintiffs announced a new theory based on a typographical error on a handful of pages within Cleaver-Brooks's file that misstated one digit in the unit number of the boiler at Bowater. The Plaintiffs never asked anyone about that typo in discovery—not even Cleaver-Brooks's corporate representative, who was deposed twice. They never brought the typo to anyone's attention before trial. They never mentioned it to the trial judge. They never mentioned it to Cleaver-Brooks. And they never mentioned it to Mr. Welker before questioning him cold in front of the jury.

To be sure, Cleaver-Brooks had no idea what the Plaintiffs were even talking about when they began questioning Mr. Welker—again, a Bowater witness that the Plaintiffs called to trial—about the typo. But in light of the Plaintiffs' questions to Mr. Welker and an evening email from the Plaintiffs' counsel, Cleaver-Brooks located, reviewed, and provided that same day documents to the Plaintiffs showing that the boiler associated with that mistyped unit number was in a facility in Illinois, not at the Bowater Paper Mill in York County. (R. pp. 741–74.) Cleaver-Brooks explained in a cover email it was voluntarily providing materials regarding this never-before-mentioned and previously-irrelevant boiler "directly in response to the arguments in court today" from the Plaintiffs. (R. pp. 858.)

The Plaintiffs' new theory, which had never before been disclosed or tested in discovery, was demonstrably wrong. The Plaintiffs themselves confirmed as much through questioning Cleaver-Brooks's corporate representative the next day at trial, who testified that the Plaintiffs' new theory was based on a clear typographical error, and who also testified that the issue was never raised before the previous day's in-trial questioning of Mr. Welker. (R. pp. 336–39, 345; Trial Tr. 686:24–687:3, 688:12–689:9, 695:6–11.) After less than an hour of questioning, the trial moved on for nearly another week before the jury returned a defense verdict.

Despite Cleaver-Brooks being surprised at trial and promptly responding to the Plaintiffs' new attack, the trial court sanctioned Cleaver-Brooks by excluding those materials at trial. (R. pp. 366–69.) After trial, it again sanctioned Cleaver-Brooks over $300,000 in fees and costs, citing Rule 37, SCRCP—a rule governing discovery—as the basis for that sanction. (R. p. 14.) In affirming that enormous monetary sanction, a panel of this Court repeatedly indicated, ***without any citation or explanation***, that documents about a boiler in Illinois that Mr. Howe never encountered were somehow responsive to discovery requests and should have been produced before trial:

- "As to whether the trial court's order is contrary to the history of the case, we agree with the trial court's findings of fact and conclude the trial court did not abuse its discretion in imposing sanctions in the form of attorneys' fees and costs on Cleaver-Brooks for failing to provide discovery." (Unpub. Op. No. 2021-UP-422, ¶ 1.) The panel did not cite anything in the record in support of the notion that Cleaver-Brooks "fail[ed] to provide discovery."

- "Further, sanctions are imposed by the court at its discretion based on the conduct of the parties." (*Id.* ¶ 2.) The panel did not cite anything to indicate what "conduct" could have subjected Cleaver-Brooks to potentially the State's largest discovery sanction.

- "We also agree with the trial court that the 'midnight documents' were requested by the Howes, and Rule 37(b)(2), SCRCP, applies as Clever-Brooks violated the discovery order by not producing the requested documents until mid-way through trial." (*Id.* ¶ 3.) The panel did not identify to which discovery request records regarding a Cleaver-Brooks boiler in Illinois that Mr. Howe had never been around could possibly have

been responsive. Neither did the trial court. Neither have the Plaintiffs. That is because there is no such discovery request. The issue did not exist until the Plaintiffs questioned Mr. Welker at trial about a mythical second boiler.

- "We also find the trial court did not abuse its discretion in awarding the Howes attorneys' fees and costs due to Cleaver-Brooks' failure to cooperate with the discovery process and mid-trial production of documents despite numerous requests." (*Id.* ¶ 4.) The panel did not identify any way in which Cleaver-Brooks "fail[ed] to cooperate with the discovery process." Nor did the panel cite any of the supposed "numerous requests" for materials regarding a boiler in Illinois with which Mr. Howe never had any contact. That is because there is not even one such discovery request in the record.

These unsupported references in the panel's summary decision are the entirety of this Court's assessment of the case. The absence of any reference to the record by the panel is not surprising because neither the circuit court or the Plaintiffs themselves were able to identify anything in the record that could support these statements.

In fact, the panel's unsupported statements are squarely contrary to the actual record. They make evident that the *de novo* review to which Cleaver-Brooks is entitled by the South Carolina Constitution has not yet happened, as demonstrated by the table on the following page:

Table of Litigation Timeline Identifying When Materials
Regarding a Boiler in Illinois Became Relevant to Case on Following Page

Stage of Litigation	Litigation Activity	Yes	No	Citation to Record
Pleadings	Did the Plaintiffs allege in their pleadings that there were multiple Cleaver-Brooks boilers at the Bowater Paper Mill?		√	R. pp. 33–69, 85–114 (both complaints)
Discovery	Did the Plaintiffs serve an interrogatory asking about Cleaver-Brooks boilers located anywhere other than at Mr. Howe's worksites?		√	N/A
Discovery	Did the Plaintiffs serve a document request seeking records related to boilers located anywhere other than at Mr. Howe's worksites?		√	N/A
Discovery	Did the Plaintiffs serve a request for admission regarding boilers located anywhere other than at Mr. Howe's worksites?		√	N/A
Discovery	During his first deposition, did the Plaintiffs ask Cleaver-Brooks's corporate representative about boilers located anywhere other than at Mr. Howe's worksites, or about the typographical error in Cleaver-Brooks's records?		√	N/A
Discovery	During his second deposition, did the Plaintiffs ask Cleaver-Brooks's corporate representative about boilers located anywhere other than at Mr. Howe's worksites, or about the typographical error in Cleaver-Brooks's records?		√	N/A
Pretrial	Did the trial judge suggest that the case may involve multiple Cleaver-Brooks boilers at the Bowater Paper Mill, or that Mr. Howe may have been exposed to a Cleaver-Brooks boiler anywhere other than at Bowater?		√	R. p. 641; Hr'g Tr. 25:6–20 (remarks of Judge Toal)
Trial	Did the Plaintiffs suggest in their opening statement to the jury that Cleaver-Brooks's records indicated there were multiple boilers at Bowater Paper Mill, or that Mr. Howe was exposed to a Cleaver-Brooks boiler anywhere other than at Bowater?		√	R. p. 159; Trial Tr. 70:4–12 (Plaintiffs' opening statement)
Trial	Did the Plaintiffs question Art Welker, a third-party witness, regarding a supposed second Cleaver-Brooks boiler at Bowater Paper Mill during their case in chief?	√		R. pp. 239, 242; Trial Tr. 488:14–23, 491:17–20 (testimony of Mr. Welker)

The ***very same day*** the Plaintiffs asked Mr. Welker surprise questions about a supposed second boiler at Bowater, Cleaver-Brooks found and provided to the Plaintiffs documents that directly addressed and rebutted the Plaintiffs' incorrect presentation. (R. pp. 856–63.) These were not "midnight" documents; they were "never before requested, yet located and produced the same day that the Plaintiffs raised a brand new issue in front of the jury, which is a remarkable accomplishment in the midst of a multi-week trial" documents.

Against this background, it is fundamentally wrong to sanction—at what appears to be the highest reported discovery sanction in the history of South Carolina jurisprudence—Cleaver-Brooks for not producing materials that were never requested in discovery and that were never relevant to the case before the Plaintiffs tried to change the "facts" through questioning a third-party witness about a theory they had never tested through any discovery device.

Not only is it wrong, it is also illogical. If Cleaver-Brooks had any clue that the Plaintiffs would suggest at trial that there was a second Cleaver-Brooks boiler at Bowater, it would have produced records immediately disproving such a wild theory—which is exactly what it did the very same day the Plaintiffs raised the issue through questions to Mr. Welker. Cleaver-Brooks had every incentive to produce materials that would have avoided a trial. No litigant would ever withhold its own exculpatory evidence. If it had known that the Plaintiffs might contend that it had a second boiler at Bowater, Cleaver-Brooks would have unquestionably produced documents disproving that theory. We know that it would have unquestionably done so because that is exactly what Cleaver-Brooks did within a matter of hours of learning about the Plaintiffs' curveball theory. A *de novo* review of the record leaves no doubt that the panel overlooked or misapprehended what led to the discovery sanctions order, as it lacks any basis in the record, and the panel's decision should be reconsidered accordingly.

II. The panel's decision is contrary to numerous established points of South Carolina law.

Not only is the panel's affirmance of the massive discovery sanctions order wrong on the facts and based on incorrect and illogical assumptions, it also overlooks or misapprehends controlling South Carolina law in several key respects. Rule 221(a), SCACR. Although the panel's order cites numerous rules and cases for generalized propositions of South Carolina law regarding discovery, it fails to account for the specific issues that are presented by this case and the specific cases and legal authorities that govern here. All told, the controlling authorities leave no doubt that reversal is required, yet those specific controlling principles do not appear among the panel's generalized string cites. These legal errors are detailed below, and each provides an independent basis for reconsideration and rehearing *en banc*.

A. The standard of review is *de novo*, not abuse of discretion.

As discussed above, the South Carolina Constitution requires a *de novo* review of both the facts and the law at issue in the circuit court's sanctions order. *See* S.C. Const. art. V, § 5 (explaining that when evaluating an equitable ruling, such as an award of attorneys' fees, the appellate court "shall review the findings of fact as well as the law").

The Supreme Court has enforced this constitutional standard. *See Father*, 353 S.C. at 261, 578 S.E.2d at 14 ("So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts." (citing S.C. Const. art. V, § 5)).

This standard is hornbook law in South Carolina. *See* Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* at 248 ("Discovery: Sanctions") (3d ed. 2016) ("[I]n cases in which the sanctions ordered by the trial court include an award of attorneys' fees . . . the appellate court may find facts in accordance with its own view of the preponderance of the evidence. Generally,

the standard of review in equity cases takes precedence, as the South Carolina Constitution permits an appellate court to take its own view of the facts underlying the sanctions.").

And the Plaintiffs even conceded this point in their appellate brief. (Pls.' Br. at 14 ("This Court reviews findings of fact in a matter of equity taking its own view of the evidence.").)

Despite this constitutional mandate, the panel does not appear to have undertaken this review. Without any discussion or explanation, it stated that "we agree with the trial court's findings of fact" and then concluded the circuit court did not abuse its discretion no fewer than five times. (Unpub. Op. No. 2021-UP-422, ¶ 1 (one time), ¶ 2 (one time), ¶ 4 (three times).)

But the trial court's "findings of fact" cannot possibly stand on their own. As explained above, they are without any support at all in the record. And as detailed in the table on Pages 37 through 39 of Cleaver-Brooks's opening brief, the trial court's "findings of fact" either do not contain any supporting citations (in fact, there is nothing in the record to support them), or are outright incorrect.

For instance, the trial court repeatedly attributed various "admissions" to Cleaver-Brooks's corporate representative, but the trial court supported those "findings" with citations to a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers—evidence that has no bearing on the issues on appeal, and that has nothing to do with Cleaver-Brooks in the first place. (Cleaver-Brooks's Opening Br. at 38–39.)

Elsewhere, the trial court attributed certain discovery tasks to Cleaver-Brooks that were actually discovery efforts for Bowater—Mr. Welker's employer—to undertake, and the record is clear on that incorrect "finding of fact" as well. (*Id.* at 38.)

Respectfully, because the actual record is unbroken on the propriety of Cleaver-Brooks's actions, and because the trial court's order either lacks supporting authority or is demonstrably

wrong, this Court should reconsider the panel's order that adopted the "findings of fact" below without discussion or analysis. It should do so *en banc*. And it should do so consistent with the constitutional *de novo* standard of review.

B. The Supreme Court protects, not punishes, parties like Cleaver-Brooks who are forced to respond to an adversary's attempt to present new "evidence" at trial.

This is not the first time a litigant has been forced at trial to respond to surprise evidence from an adversary, but it does appear to be the first time the victim of the surprise has been sanctioned—in fact, sanctioned twice for the same "conduct." In *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990), the trial court permitted the plaintiff's expert witness to present a previously-undisclosed opinion to the jury, but it prevented the defendant from rebutting that new opinion with its own previously-undisclosed, now-relevant evidence. The Supreme Court unanimously reversed, holding the trial court's rulings were an abuse of discretion and observing that the defendant "was clearly prejudiced by the exclusion of this evidence" designed to rebut the plaintiff's previously-undisclosed testimony. *Id.*

Bramlette is on all-fours with this case. After Mr. Welker gave testimony crippling their case, the Plaintiffs shifted gears and questioned him regarding a brand new theory about a potential second boiler at Bowater. Just as the defendant in *Bramlette* was entitled to rebut a new opinion offered by that plaintiff at trial, Cleaver-Brooks was entitled to respond to the Plaintiffs' in-trial surprise, and it did so the very same day. *Bramlette* fully endorses Cleaver-Brooks's response.

The panel's decision here cites a dozen cases, but *Bramlette*—the true controlling authority—is not one of them. The full Court should reconsider its ruling to bring this case in line with *Bramlette* and the protections it gives litigants like Cleaver-Brooks who must be allowed to respond to in-trial surprises without fear of being sanctioned for defending against the surprise.

C. Before a party can be sanctioned for an alleged discovery violation, the court must identify with specificity what discovery requirement the party supposedly violated.

In each paragraph of its order, the panel indicated that Cleaver-Brooks had been deficient in the discovery process: "failing to provide discovery" (Unpub. Op. No. 2021-UP-422, ¶ 1), "sanctions are imposed . . . based on the conduct of the parties" (*id.* ¶ 2), "violated the discovery order by not producing the requested documents" (*id.* ¶ 3), and "failure to cooperate with the discovery process and mid-trial production of documents despite numerous requests" (*id.* ¶ 4).

But no court—neither the trial court, nor the panel of this Court—has ever identified what discovery request Cleaver-Brooks supposedly ignored or how Cleaver-Brooks supposedly violated any discovery order. Neither have the Plaintiffs, for that matter. But that is the key point of law when assessing a party's discovery conduct.

In *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991), the Supreme Court—citing a federal treatise—explained that any perceived deficient discovery response had to be evaluated "in light of the question asked." *Baughman* considered allegedly-deficient interrogatory responses, but its point is universal across all tools of discovery: a court cannot deem a party's discovery response to be deficient if it does not first examine the actual request posed. *See, e.g.*, *Oncology & Hematology Assocs. of S.C. v. S.C. DHEC*, 387 S.C. 380, 383–85, 387–89, 692 S.E.2d 920, 922–25 (2010) (reproducing in their entirety six requests for production and three interrogatories, deeming them to be "abusive and beyond the pale," and then "declin[ing] to rewrite and narrowly tailor oppressive discovery requests so as to make them proper"); *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12, 15 (1974) (explaining that a court must consider "[t]he precise nature" of discovery when assessing whether a sanction is warranted (quoting *Carver v. Salt River Valley Water Users' Ass'n*, 446 P.2d 492, 496 (Ariz. 1968))).

To be sure, the Supreme Court recognizes that "[t]here are times when a party should be permitted to use witnesses, exhibits, photographs, etc. which have not been disclosed ***before*** trial because of circumstances arising ***after*** the trial has begun, *e.g.*, unexpected testimony." *Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) (emphasis supplied by the Supreme Court). This is just such an occasion, as Cleaver-Brooks was a victim of "unexpected testimony," elicited by the Plaintiffs from a third-party witness, about a boiler that was actually located in Illinois.

But the Supreme Court's instruction about what comes next—the trial judge "should consider the reason the new information was not provided earlier," *id.*—has never happened here. Stunningly, the circuit court held that whether materials regarding the Plaintiffs' new "two boilers" theory were responsive to any actual discovery requests "is irrelevant." (R. p. 14.) The fact those materials were not responsive to any interrogatory, document request, request for admission, deposition question, or order from the circuit court is hardly irrelevant—***it is dispositive***.[1] The panel committed legal error when it affirmed the lower court's order without inspecting or identifying any actual discovery request or order to which those materials were supposedly responsive, and its decision should be reconsidered accordingly.

D. The Plaintiffs cannot create a surprise situation and then complain about the consequences of their own actions.

The record is uniform that the Plaintiffs first raised their "two boilers" theory in the middle of trial when questioning Mr. Welker, and not a moment before. As a matter of South Carolina law, the Plaintiffs have to live with the consequences of their decision not to investigate, test, or disclose that theory at all in discovery, and they waived any ability to complain about Cleaver-

[1] For this reason, the trial court's reliance on Rule 37(b)(2), SCRCP, and the panel's affirmance are both legal error. By its own terms, that rule permits sanctions only when a party has violated a discovery order, which is certainly not the case here if, as the trial court ruled, the question of whether they were ever requested "is irrelevant." (R. p. 14.) Reconsideration should follow.

Brooks's same-day response to their litigation maneuvering. *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 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 Supreme Court); *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) ("He cannot complain of an error which his own conduct has induced."), *overruled in unrelated part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

The panel disregarded all of this authority because there was a typo in Cleaver-Brooks's historic records. But the existence of a typographical error in records that are at least 60 years old is not the source of the Plaintiffs' problem; it was the Plaintiffs' in-trial decision to suddenly pretend that a typo from six decades ago somehow meant that a second Cleaver-Brooks boiler was present at Bowater without conducting even the slightest discovery on that point or ever bringing the typo to Cleaver-Brooks's attention. Had they tested their theory through ***any*** discovery—Cleaver-Brooks listed samples of discovery that could have been, but never were, served on Pages 8 and 9 of its reply brief to this Court—the Plaintiffs would have known of their mistake before learning about it in trial.[2] The Plaintiffs' decision to stay silent about a typo that they noticed is not Cleaver-Brooks's fault, and hornbook South Carolina law requires the Plaintiffs to bear the consequences of their own litigation decisions. The Court should reconsider its order accordingly.

[2] Of course, Cleaver-Brooks knew nothing about the Plaintiffs' misunderstanding because the Plaintiffs never raised the point until the middle of trial. It cannot be the law that one party can be sanctioned for a mistake its adversary makes when its adversary never discloses its mistake.

E. Even assuming *arguendo* that Cleaver-Brooks did anything wrong—it did not—there is no evidentiary support for the grossly disproportionate sanction.

If the Court is truly convinced that Cleaver-Brooks has done something improper here, the sanctions award should still be vacated. The panel did not account for numerous errors of law committed below regarding the Plaintiffs' "evidence" supporting sanctions. These include:

- **Untimely Affidavits:** Rule 6(d), SCRCP, is mandatory and unambiguous: "When a motion is to be supported by affidavit, the affidavit shall be served with the motion," and it provides no discretion to excuse this requirement. Here, there is no dispute that the Plaintiffs did not file any affidavits with their motion for sanctions. In fact, the Plaintiffs concede that they missed that deadline by a full month, as explained on Page 16 of Cleaver-Brooks's reply brief.

Those untimely affidavits cannot be considered, and without them, there is no evidentiary basis for the panel's statement that the set of documents Cleaver-Brooks provided in response to the Plaintiffs' surprise questions to Mr. Welker "was important to the Howes' decision to go to trial in the first place." (Unpub. Op. No. 2021-UP-422, ¶ 4.)[3] The panel's summary order did not address this issue, but it is dispositive and should be reconsidered.

- **Discovery Wrongly Barred on Affidavits:** Assuming *arguendo* that untimely affidavits from the Plaintiffs' counsel can be considered, Cleaver-Brooks has been wrongfully denied the opportunity to conduct discovery on counsel's representations. This is a clear error.

The circuit court sanctioned Cleaver-Brooks for all of the Plaintiffs' trial costs and attorneys' fees based on the following statement from the Plaintiffs' national counsel: "If Plaintiffs

[3] It is inconceivable that Cleaver-Brooks (or any defendant, for that matter) would knowingly withhold materials from the Plaintiffs that would have secured a dismissal of this case without the expense and risk of a trial. If the Plaintiffs had done anything at all to let anyone know that the location of this second boiler "was important to [their] decision to go to trial in the first place," Cleaver-Brooks would have immediately let them know it was in Illinois—just as it did when the issue first arose in the middle of trial.

had been in possession of the midnight documents [*i.e.* the "never before requested, yet located and produced the same day that the Plaintiffs raised a brand new issue in front of the jury, which is a remarkable accomplishment in the midst of a multi-week trial" documents] before trial started, Plaintiffs would not have proceeded to trial against Cleaver-Brooks." (R. p. 1294; Dean Aff. ¶ 19.)

Cleaver-Brooks does not believe this statement is credible in any way. At no point before questioning Mr. Welker at trial did the Plaintiffs ever suggest that they thought Cleaver-Brooks's records showed a second boiler at Bowater. Not once.

If the presence of a second boiler at Bowater was truly ***the*** determinative issue, presumably the Plaintiffs would have done at least a *de minimis* amount of discovery on that theory in advance of trial. Perhaps an interrogatory. Or a document request. Or a request for admission. Or asking Cleaver-Brooks's corporate representative about that theory during either of his two depositions. Or deposing Bowater's representative, Mr. Welker, about it. Or correcting the trial judge when she announced the day before the trial started that "it's just a simple factual dispute between the two of y'all as to where this boiler is located." (R. p. 641.) But none of that happened. That's because this case was always about the location of a single boiler at the Bowater Paper Mill—the case's unbroken history, and the Plaintiffs' own conduct, confirm this indisputable point.

Likewise, if the presence of a second boiler at Bowater was truly ***the*** determinative issue, then the Plaintiffs would have had a professional obligation to cease the trial once they realized their theory was false. Rule 11(a), SCRCP; Rule 3.1, S.C. Rules of Prof'l Conduct. But they certainly did not stop trial; they continued forward for nearly another week, which further belies any suggestion that this notion of a second boiler was ever a relevant point before trial.

Cleaver-Brooks argued that it needed to conduct discovery on the truthfulness of counsel's representations (R. pp. 1409, 1481), but the trial court did not address this point in its sanctions

rulings. Cleaver-Brooks then argued the same point to this Court (Cleaver-Brooks's Br. at 34; Reply Br. at 17), but the panel also failed to address this issue. But "[w]here these [discovery] rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2008). Reconsideration is therefore necessary.

- **Sanction is Grossly Excessive and Shows No Discretion Exercised:** As explained in Cleaver-Brooks's briefs, trial time spent dealing with the "second boiler is in Illinois" issue amounted to perhaps one hour. (R. pp. 335–47; Trial Tr. 685:8–697:19.) Nevertheless, instead of awarding the Plaintiffs fees associated with that hour of their time (which also would have been improper, as no sanction is warranted here), the circuit court awarded the Plaintiffs ***all*** of their requested fees and ***all*** of their requested costs associated with the ***entire*** trial.

The circuit court's rubber-stamping of the Plaintiffs' sanctions request indicates that the circuit court failed to exercise any discretion at all regarding this issue. That alone requires reversal. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without any evidentiary support. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

The panel did not address this legal error in its summary opinion. Instead, it stated—again, without any discussion or explanation—that "the amount of attorneys' fees awarded was reasonable." (Unpub. Op. No. 2021-UP-422, ¶ 4.) But the panel's "reasonableness" conclusion cannot withstand any kind of legitimate scrutiny.

The very cases the panel cited in its summary ruling demonstrate how disproportionate and excessive the sanctions awarded here are:

Discovery Sanctions Cases Cited by the Panel	**Monetary Sanctions**	**Other Sanctions?**	**Number of Discovery Orders Violated**
Davis v. Parkview Apartments, 409 S.C. 266 (2014)	Fees never determined, even after remand	Yes	At least 3 identified in appellate decision
Barnette v. Adams Bros. Logging, 355 S.C. 588 (2003)	None	Yes, as to one plaintiff	At least 4 identified in appellate decision
Richardson v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency, 430 S.C. 594 (Ct. App. 2020)	None	Yes	No orders; the solicitor simply refused to respond to any discovery at all in advance of trial, so sanctions issued under Rule 37(d)
McNair v. Fairfield County, 379 S.C. 462 (Ct. App. 2008)	None	Yes	At least 3 identified in appellate decision
Temple v. Tec-Fab, Inc., 370 S.C. 383 (Ct. App. 2006)	None	Yes	At least 1 identified in appellate decision
QZO, Inc. v. Moyer, 358 S.C. 246 (Ct. App. 2004)	None	Yes	At least 1 identified in appellate decision
Scott v. Greenville Hous. Auth., 353 S.C. 639 (Ct. App. 2003)	Yes, but unspecified and not appealed	Yes	At least 1 identified in appellate decision
Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193 (Ct. App. 1999)	$1,775	Yes	At least 4 identified in appellate decision
This Case	***$304,617***	***Yes***	***0 identified by the panel, the circuit court, or the Plaintiffs***

At bottom, Cleaver-Brooks responded to an in-trial surprise from the Plaintiffs. It responded by producing materials that were directly responsive to that surprise the very same day the Plaintiffs raised the issue. The Plaintiffs spent no more than an hour at trial addressing the

issue. The trial then continued for nearly a week before the jury found in favor of Cleaver-Brooks. But if the Plaintiffs had prevailed at trial, their sanctions motion surely would have never been filed.

The Plaintiffs' *post hoc*, self-serving statement that they would have never proceeded to trial against Cleaver-Brooks if they had only known in advance about materials that had no relevance before trial, and that which occupied virtually no time at trial, does not pass the red-face test. *See Aguirre v. State*, 402 S.W.3d 664, 668 n.13 (Tex. Crim. App. 2013) ("A plausible answer is one that passes the 'red face' test; that is, one must be able to answer the question responsibly without one's face turning red or blushing with embarrassment."). The circuit court was wrong to accept that statement via an untimely affidavit; it was wrong to deny Cleaver-Brooks the opportunity to test that statement through discovery; and it was wrong to exercise no discretion when approving an award in excess of $300,000 based on that statement. Because the panel did not address any of these legal errors in its summary opinion, that opinion should be reconsidered.

CONCLUSION

Cleaver-Brooks was at a loss for why it was sanctioned by the circuit court. It remains at a loss after receiving the panel's summary decision. ***No court*** has ever identified what Cleaver-Brooks allegedly did wrong here, or what it should have (or even could have) done differently. Nothing in the record supports any sanctions here, and—like the circuit court—the panel did not identify anything at all in the record that could support sanctioning Cleaver-Brooks.

To the contrary, Cleaver-Brooks's immediate response to being subjected to an in-trial surprise is fully endorsed by the Supreme Court's *Bramlette* decision, yet no court has ever even mentioned that controlling case when reviewing this situation. Nor did the panel account for myriad controlling points of law when reviewing this matter: the *de novo* standard of review;

discovery sanctions cannot be issued without a careful inspection of the discovery actually sought; Cleaver-Brooks cannot be sanctioned for a problem the Plaintiffs created; and the supposed evidentiary basis for the award was inadmissible, untested in discovery, and, because it was accepted without any exercise of discretion, resulted in sanctions that were grossly excessive and disproportionate to any prior award in South Carolina jurisprudence.

Accordingly, Cleaver-Brooks respectfully requests that the Court reconsider the panel's decision and vacate the sanction below.

SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 219, SCACR, Cleaver-Brooks requests that the Court rehear this matter *en banc*. Though the standards for *en banc* consideration are narrow, this case readily meets them, as the panel's summary decision affirms what appears to be the largest discovery sanction in the State's history, and it does so (1) without reference to anything in the record that could support the sanction (because there is nothing), and (2) without accounting for or even referencing numerous controlling Supreme Court decisions on dispositive points of law.

As explained in detail above, the sanctions decision below is unjust. It does not punish Cleaver-Brooks for disregarding a court order. It does not punish Cleaver-Brooks for failing to respond to specific discovery requests. Instead, it appears to punish Cleaver-Brooks for doing nothing more than taking an asbestos case to verdict, and winning.

This is not the law of South Carolina. It cannot remain precedent in this state's jurisprudence. The entire Court should reconsider this matter in its *en banc* capacity, set aside the panel's *per curiam* summary ruling, and vacate the circuit court's sanctions order.

Respectfully submitted,

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December 16, 2021

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PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

Pleading: Petition for Rehearing and Suggestion for Rehearing *En Banc*

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Dec 16 2021
SC Court of Appeals

December 16, 2021

Via Electronic Filing
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Re: Timothy Howe v. Air & Liquid Systems Corp. (Cleaver-Brooks)
Appellate Case No. 2019-000164
Petition for Rehearing and Suggestion for Rehearing *En Banc*

Dear Ms. Kitchings:

Please find attached for filing with the Court a Petition for Rehearing and Suggestion for Rehearing *En Banc*. We are e-filing this motion pursuant to Section (b)(1) of Supreme Court Order 2021-08-25-02, and we are also serving this motion via email on counsel for the Respondents, as permitted by Section (d)(1) of that Order.

Pursuant to Section (c) of that Order, we shall mail the filing fee that accompanies this request within five days of this filing.

We appreciate the Court's consideration of this motion. If we can provide any additional materials or information, please do not hesitate to call on us.

Best regards,

/s/ M. Todd Carroll

cc: Counsel for Respondents