RECEIVED
Jan 10 2022
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 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. Cheste1ion 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

RESPONDENTS' RETURN TO PETITION FOR REHEARING

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

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Cleaver-Brooks' Petition for Rehearing accuses this Court of having "overlooked or misapprehended everything in the case's history that led to the sanctions order," and Plaintiffs' counsel of making misrepresentations to the trial court. It confuses trial strategy for evidence, and Cleaver-Brooks' own dereliction and sloppy conduct with actions deserving praise. It ignores the express findings of both the trial court and Court of Appeals panel, and its own failure to timely and properly disclose relevant documents and information in discovery.

Cleaver-Brooks also fails to address the requirements of Rule 219 SCACR, providing no suggestion of how the panel's opinion creates a lack of uniformity in this Court's decisions. It argues the opinion "cannot remain precedent in this state's jurisprudence," failing to recognize the decision is unreported.

The unanimous panel accurately and adequately reviewed the record, agreeing with the trial court's findings of fact. The panel correctly affirmed the Honorable Jean H. Toal's order requiring Cleaver-Brooks to pay Plaintiffs' attorneys' fees, costs, and expenses which resulted from Cleaver-Brooks' failure to timely produce discovery. Cleaver-Brooks' Petition is unsupported either by the factual record or by South Carolina law, and ignores sanctions were only awarded after multiple motions and hearings about Cleaver-Brooks' failures to properly participate in discovery. For these reasons, as more fully set forth below, Plaintiffs/Respondents Timothy Howe and Jeannette Howe respectfully request the Court deny and reject Cleaver-Brooks' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

BACKGROUND FACTS

This case concerns Wayne Howe, who died of terminal mesothelioma caused by his exposures to asbestos. (R. 1616:13 – R. 1624:18.) Plaintiffs are Mr. Howe's surviving spouse, Jeannette Howe, and son and personal representative for his estate, Timothy Howe.

Before his passing, Mr. Howe testified via deposition that he worked at Bowater paper mill in Rock Hill, South Carolina 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 was exposed to asbestos while working on pipes, precipitators, and boilers at Bowater's powerhouse. (R. 1187:7-18, 1188:6-12, 1189:22 – R. 1190:4. 1188:13-17, 1194 at 19:20-23, 1197 at 29:25-30:4.)

Cleaver-Brooks was a boiler manufacturer, and it admitted to manufacturing an asbestos-containing boiler delivered to the Bowater facility where Mr. Howe worked. (R. 1234 at 42:18-25, 1234 at 43:6-21.) Thus, as both Cleaver-Brooks and Judge Toal recognized, "the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. 6.). Specifically, the critical issue was whether there was a Cleaver-Brooks boiler in the powerhouse where Mr. Howe worked.

Asbestos cases in South Carolina's Sixteenth Judicial Circuit, including this case, are governed by a Master Discovery/Scheduling Order which permits asbestos plaintiffs to utilize "Standard Interrogatories and Requests for Production of Documents. (R. 777-831.) Among other things, this discovery requested Cleaver-Brooks identify and produce documents related to all products which it sold to Mr. Howe's Bowater jobsite. (R. 820-821). Over two years into this litigation, and long after discovery responses to this discovery were due, Cleaver-Brooks produced a 25-page file for Bowater (hereinafter, "25-page Bowater file", R. 1199-1223.)

In addition to serving written discovery, Plaintiffs repeatedly attempted to depose Cleaver-Brooks' corporate representative. (R. 946, 1558, 1566, 1593, 1600.) In each deposition notice, Plaintiffs specifically requested that Cleaver-Brooks' corporate representative testify about its boiler*s*, and produce documents related to products sold to Bowater. (R. 948, 1560, 1568, 1595,

1602.) Eventually, 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 on this motion to compel 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.) Judge Toal's Order memorializing this hearing indicated "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.) Judge Toal cautioned, "Failure to comply with these representations will result in sanctions." (R. 32.)

Cleaver-Brooks eventually produced its corporate representative John Tornetta for deposition. Even then, 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.) Mr. Tornetta testified every Cleaver-Brooks boiler is assigned a unique unit number. (R. 1459 at 46:10-50:24). The 25-page Bowater file referenced two unique boiler units, numbers 0-018343 and 0-18344, (R. 1199-1223) and thus Plaintiffs believed there were two Cleaver-Brooks boilers at Bowater.

Mr. Tornetta represented there was nothing in Cleaver-Brooks' records that would tell him specifically where Cleaver-Brooks' boiler was located at Bowater. (R. 1230 at 9:17-21, R. 1236 at 53:7-12.). Mr. Tornetta also testified that Cleaver-Brooks maintained index cards which provide information about each of its boiler's unit number as well as where each boiler ends up. (R. 468 at 1524:06-1525:04, R. 1291 at 24:25 – R. 1293 at 31:11, R. 1464 at 1530:21-26, R. 1467 at 1481:7-19.) None of these index cards were produced to Plaintiffs before trial began. (R. 341:17

– R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1292 ¶ 9.) However, at trial Mr. Tornetta admitted they had been sitting in his office all along and that Plaintiffs had asked him for them months earlier during his depositions. (R. 331:13-14, R. 341:17 – R. 342:7.)

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. (R. 627-56.) The circuit court acknowledged 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 sanctions request. (R. 644 at 23-24).

Trial commenced against Cleaver-Brooks, the only remaining Defendant in this matter. (R. 1293, ¶13) Mr. Tornetta was scheduled to testify on March 16, 2018. At 11:35 p.m. the night before, Cleaver-Brooks for the first time produced certain documents to Plaintiffs (hereinafter, "the midnight documents"). (R. 1294 ¶¶ 16-17.) Included in the midnight documents were index cards showing that while boiler unit number 0-18343 had indeed been delivered to Bowater, boiler unit number 0-018344 had been delivered to a completely different facility in Illinois. (R. 8, R. 1294 ¶¶ 16-17.) Furthermore, the midnight documents for the first time revealed Cleaver-Brooks had records indicating the one boiler at Bowater was in the administration building, not the powerhouse where Mr. Howe worked. (R. 1294, ¶¶ 16-17) The next day in trial, Cleaver- Brooks, via Mr. Tornetta's testimony, for the first time took the position that the reference to boiler unit 0-18344 in the 25-page Bowater documents was a "typographical error." (R. 337:12-19, R. 345:20-21.)

Had Cleaver-Brooks timely produced the midnight documents, Plaintiffs would not have proceeded to trial against it. (R. 1294, ¶ 19.) Plaintiffs therefore again moved the trial court to sanction Cleaver-Brooks for its discovery abuses. (R. 1156, 1161.) Following a lengthy hearing (R. 657-76), Judge Toal 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.).

After Cleaver-Brooks filed a motion to alter or amend its sanctions order, Judge Toal confirmed her ruling, stating,

> 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). This appeal followed.

ARGUMENT

I. Cleaver-Brooks Failed to Satisfy the Requirements for an En Banc Rehearing

"A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219, SCACR. Cleaver-Brooks' suggestion for rehearing *en banc* fails to meet either requirement. The

panel's opinion does not purport to establish any new rule of law, nor does it criticize or decline to follow any previous Court of Appeals decision. Thus, there is no need for an *en banc* rehearing to secure or maintain uniformity of this Court's decisions.

With respect to "exceptional importance," Cleaver-Brooks' only argument is its summary statement that the panel's opinion "cannot remain precedent in this state's jurisprudence." However, the opinion is unpublished. "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(D)(2), SCACR. This is confirmed in bold, capitalized font at the beginning of the opinion issued to the Parties, which states (emphasis in original),

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS A PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 269(d0((2), SCACR

Thus Cleaver-Brooks' concern about the precedential impact of the opinion is baseless.

As Cleaver-Brooks failed to demonstrate any meritorious issue of "exceptional importance" to order an *en banc* rehearing, Respondents respectfully request Cleaver-Brooks' suggestion for an *en banc* rehearing be rejected.

II. The Panel Applied the Correct Standard of Review to this Case's History

A. The panel was not required to restate the trial court's findings of fact

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). Appellate Courts review findings of fact in matters of equity taking their own view of the evidence. *Id*. (citing S.C. Const. art. V, § 5).

A significant portion of Cleaver-Brooks' Petition is devoted to arguing the panel did not perform a *de novo* review of the record.[1] Cleaver-Brooks insultingly suggests, "this Court appears to have overlooked or misapprehended everything in the case's history that led to the sanctions order."[2] It goes on to argue "the panel's unsupported statements are squarely contrary to the actual record."[3] Finally, it dismissively asserts of the panel's opinion, "[n]ot only is it wrong, it is also illogical,"[4] and "it should not even be a close call."[5]

Cleaver-Brooks' repeatedly emphasizes that the panel's opinion does not reference any specific facts from the record, but fails to cite any authority requiring the Court of Appeals to do so. Its suggestion that the panel "overlooked. . . . everything in the case's history" is belied by the panel's statement it reviewed "the history of the case," and "agree[d] with the trial court's findings of fact." *Howe v. Air & Liquid Systems Corp*, Op. No. 2021-UP-422, 2021 WL 5626487 at *1.

As set forth in the following section, the trial court in this matter provided extensive findings of fact. The panel *agreed* with those findings, it did not blindly accept them. The Supreme Court explicitly recognized an appellate court's right to agree with a trial court's findings in *Father, supra.* "For example, where the appellate court agrees with the trial court's findings of

[1] Despite extensive criticisms for Judge Toal's decision to award sanctions in this matter, Cleaver-Brooks' cites to her treatise *Appellate Practice in South Carolina* for the proposition "the appellate court may find facts in accordance with its own view of the preponderance of the evidence. . . the South Carolina Constitution permits an appellate court to take its own view of the facts underlying the sanctions." Petition for Rehearing and Suggestion for Rehearing *En Banc,* p. 9-10. This proposition does not support Cleaver-Brooks' rehearing request. The treatise's use of the words "may" and "permits" rather than mandatory language such as "must" or "shall," and thus does not stand for the proposition that the panel was required to take its own view of the facts. To the extent this treatise is persuasive authority, it would support the panel's decision even had it not conducted its own review of the facts.

[2] Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 1.

[3] *Id.* at 6.

[4] *Id*. at 6.

[5] *Id.* at 1.

fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." 353 S.C. at 261, 578 S.E.2d at 14.

There is no indication in the panel's decision that it showed any undue deference to the trial court's findings. Instead, the panel explicitly stated it agrees those findings of fact accurately represent the history of "Cleaver-Brooks failure to cooperate with the discovery process and midtrial production of documents despite numerous requests." No. 2021-UP-422, 2021 WL 5626487 at *2. Nothing in South Carolina law required the panel to exhaustively restate the trial court's findings, and thus this attack on the panel's opinion is without merit.

B. The trial court provided extensive findings of fact.

In its zeal to blame anyone other than itself, Cleaver-Brooks argues "***No court*** has ever identified what Cleaver-Brooks allegedly did wrong here, or what it should have (or even could have) done differently."[6] It goes so far as to state, "Cleaver-Brooks should be praised, not sanctioned . . ."[7] These proclamations are unsupported by the record, as the trial court extensively detailed exactly what Cleaver-Brooks did wrong, and what it should have done differently.

The Trial Court set forth its factual findings both orally and in written orders. Its 22-page December 7, 2018 written order contains eight-and-a-half pages of "Findings of Fact." (R 5-13). Among those findings were that each Cleaver-Brooks boiler has a unique identifier number (R 6-7). The court noted, "the 25 pages which were produced by Cleaver-Brooks as the file for the Bowater site where Mr. Howe worked contained documents regarding unit numbers 18343 and 18344, both of which were shown to ship to Bowater." (R. 7).

The court explicitly recognized, "There was no discrepancy in the commercial records: all of the documents produced by Cleaver-Brooks up until it finally produced the midnight documents

[6] Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 19, emphasis in original.
[7] *Id.* at 2.

indicated unequivocally that there were two Cleaver-Brooks boilers at Bowater." (R. 7). "In Cleaver-Brooks' own words, '[e]ach Clever-Brooks boiler has a unique identification number called a unit number' . . . Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read." (R. 8)

The trial court further found, "Mid-way through trial, Cleaver-Brooks for the first time produced evidence – the 'midnight documents' – proving that one boiler that had been identified in the commercial records it had produced responsive to requests regarding Bowater in fact pertained to a boiler that was sent to Illinois, not Bowater." (R. 8).

The trial recognized that among the midnight documents was "the index card pertaining to Bowater, which showed the unique identifier for the unit number of the boiler at Bowater, was always responsive to [Plaintiff's discovery] requests." (R. 9)

Contrary to Cleaver-Brooks' claims, Judge Toal directly addressed the particular discovery requests which Cleaver-Brooks failed to answer, including 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.)

Cleaver-Brooks devotes a full page of its Petition to a "Table of Litigation Timeline." This timeline simply ignores the issues which led to the sanctions against it, including,

+ Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings." (R. 5)

+ 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 on this motion to compel 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.) Judge Toal's Order memorializing this hearing indicated "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.) Judge Toal cautioned, "Failure to comply with these representations will result in sanctions." (R. 32.)

+ Cleaver-Brooks' waited approximately two years, and long after discovery response were due, to produce the 25-page Bowater file. (R. 1199-1223)

+ The 25-page Bowater file produced by Cleaver-Brooks repeatedly referenced two unique Cleaver-Brook identification numbers (R. 1199-1223)

+ Plaintiffs were required to take a second deposition of Cleaver-Brooks' representative after Mr. Tornetta's admitted lack of preparation to discuss the Bowater plant and failure to produce all requested documents. (R. 1292 ¶ 10.)

+ "In Cleaver-Brooks' own words, '[e]ach Clever-Brooks boiler has a unique identification number called a unit number' . . . Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read." (R. 8)

+ Cleaver-Brooks failed to disclose any information or documents indicating the 25-page Bowater file contained multiple typographical errors suggesting there were two Cleaver-Brooks boilers at Bowater, until it produced the midnight documents near the close of Plaintiffs' case-in-chief during trial. (R. 28-29)

+ Cleaver-Brooks refused to produce its index cards related to the boilers referenced in the 25-page Bowater file until it produced the midnight documents (R. 341:17 – R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1292 ¶ 9.). Cleaver-Brooks' corporate representative Mr. Tornetta admitted these index cards had been sitting in his office all along and that Plaintiffs had asked him for them months earlier during his depositions. (R. 331:13-14, R. 341:17 – R. 342:7.)

These facts, which Cleaver-Brooks omits from its timeline, were summarized in a second written order issued by the trial court on January 4, 2019. This Order denying Cleaver-Brooks' Motion to Alter or Amend Order stated in part:

> 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. (R. 28-29)

Similarly, in its oral ruling, the Court found a "dereliction" by Cleaver-Brooks' corporate representative, Mr. Tornetta, in failing to review the 25-page Bowater file, and failing to note the documents it produced referred to two different boilers, with two different unit identification numbers of 18343 and 18344. (R. 365:25 – R. 366:21.) Judge Toal further found it was "incredibly sloppy on his [Cleaver-Brooks' corporate representative] part to have never looked at those documents." (R. 366:20-25.).

The Court went on to find Cleaver-Brooks violated its discovery duties by failing to produce its boiler index cards. "[B]ecause of the way the Cleaver-Brooks records are set up, you had to have these index cards to [tell you that's a typographical error]." (R. 367:7-10). Judge Toal recognized Mr. Tornetta himself used the index cards as "the roadmap" to determine the repeated references to boiler O-01344 in the 25-page Bowater documents were a typographical error. (R. 367:8-15). Yet Mr. Tornetta "deliberately did not give those index cards out, saying it was simply duplicative," (R. 367:8-12.) despite Plaintiff's request the cards be produced. (R. 331:13-14, R. 341:17 – R. 342:7.)

The trial court provided both written and oral findings informing Cleaver-Brooks exactly what it did wrong, and what it should have done differently. The unanimous Court of Appeals

panel explicitly agreed with those findings. Cleaver-Brooks should have reviewed 25-page Bowater documents which it produced. Cleaver-Brooks should have produced the index cards for boilers 0-1343 and 0-01344, both of which were referenced in the 25-page Bowater documents, and both of which its corporate representative personally used as a "roadmap" to determine where the boilers were delivered. Cleaver-Brooks should have timely disclosed and produced the midnight documents which showed that despite its 25-page Bowater file repeatedly referencing two unique boiler identification numbers, there was in fact only a single boiler at the Bowater facility, in a different building than the one where Mr. Howe worked.

Cleaver-Brooks' Petition employs the same tactic which it took during discovery . . . turning a blind eye to any information it finds unfavorable or inconvenient. According to its Petition, "Cleaver-Brooks is at a loss as to what the Court thinks it should have done differently . . ."[8] But Judge Toal (multiple times) and the panel have already told Cleaver-Brooks exactly what it did wrong. There is no reason a fully convened Court of Appeals should need to tell it again. To the extent Cleaver-Brooks is still ignorant of its own misconduct, that can only be because it has ignored the extensive findings issued by the trial court, and disregarded the panel's express holding that it "agree[d] with the trial court's findings of fact."

III. Cleaver-Brooks, not Plaintiffs, Withheld Evidence and Created a Surprise Situation

Cleaver-Brooks' Petition also argues it was "sandbagged at trial by an adversary's surprise questioning."[9] It suggests "Plaintiffs tried to change the 'facts' through questioning a third-party witness about a theory they had never tested through any discovery device."[10] It claims *Bramlette*

[8] Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 1
[9] *Id.* at 2.
[10] *Id.* at 8.

v. Charter Medical Columbia, 302 S.C. 68, 393 S.E.2d 917 (1990) "is on all fours- with this case," and requires the panel's opinion be reversed.[11]

Cleaver-Brooks confuses trial strategy for evidence. *Bramlette* addresses a party's failure to disclose evidence . . . specifically a previously undisclosed expert witness opinion. It does not state nor even suggest a party is required to disclose its trial strategy or witness questioning in advance of trial. To the extent *Bramlette* is relevant to this matter, it supports the finding that a party's failure to timely produce evidence is highly prejudicial, and is entirely consistent with the trial court's sanctions and panel's opinion affirming them.

As both the trial court and unanimous panel found, it was Cleaver-Brooks, not Plaintiffs which failed to produce relevant, discoverable evidence. There is no dispute the midnight documents were always in Cleaver-Brooks' possession, contained relevant and pertinent information which was not disclosed elsewhere, and were not produced to Plaintiffs until almost the close of their case-in-chief.

Cleaver-Brooks offers no suggestion that Plaintiffs failed to disclose any relevant evidence. Instead, it suggests Plaintiffs were at fault for "their decision not to investigate, test, or disclose that theory [that there were two Cleaver-Brooks boilers at Bowater] at all in discovery."

At its core, Cleaver-Brooks' argument is that Plaintiffs' counsel should have disclosed their mental impressions, conclusions, and opinions about the evidence Cleaver-Brooks' produced. But such information is protected from disclosure by the work product doctrine, adopted by South Carolina in Rule 26(B)(3) SCRCP. This provision requires, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or

[11] *Id.* at 11.

other representative of a party concerning the litigation."[12] Plaintiffs' trial strategy is privileged pursuant to this provision, and unlike the documents which Cleaver-Brooks withheld, was not subject to discovery or disclosure.

Finally, it defies reason to suggest Plaintiffs "ambushed" Cleaver-Brooks by interpreting Cleaver-Brooks' documents in exactly the manner which Cleaver-Brooks' representative testified they were meant to be read. As Judge Toal recognized, "[i]n Cleaver-Brooks' own words, '[e]ach Cleaver-Brooks boiler has a unique identification number called a unit number' . . . Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read." (R. 8). To the extent Cleaver-Brooks faced "in-trial surprises,"[13] that can only be because Cleaver-Brooks failed to read its own documents in accordance with its own representative's testimony.

It was Cleaver-Brooks which withheld discoverable evidence. The midnight documents included the "roadmap" which Cleaver-Brooks itself used to determine there was a typographical error in the 25-page Bowater file. Cleaver-Brooks' efforts to shift the blame to Plaintiffs for not revealing their mental impressions, conclusions, or opinions are without merit, and contrary the work-product doctrine. For these additional reasons, Timothy and Janette Howe respectfully ask the Court deny Cleaver-Brooks' Petition for Rehearing *En Banc.*

[12] Courts around the country have recognized 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).

[13] Petition for Rehearing and Suggestion for Rehearing *En Banc,* p. 11

IV. The Record Supports Cleaver-Brooks' Sanctions

A. The panel correctly applied the abuse of discretion standard in reviewing the trial court's decision to award sanctions.

Cleaver-Brooks' Petition complains that the panel utilized an abuse of discretion standard in upholding the trial court's decision to award sanctions. "[The panel] concluded the circuit court did not abuse its discretion no fewer than five times."[14] In doing so, Cleaver-Brooks fails to recognize the panel was following the Supreme Court's binding precedent.

In reviewing sanctions, while appellate courts should take "its own view of the evidence," *Father, supra*, 353 S.C. at 260, 578 S.E.2d at 14, its remaining analysis is made under an abuse of discretion standard of review.

> 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. 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.

Father, 353 S.C. at 261, 578 S.E.2d at 14-15, internal citations omitted. An 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). The sanctions authorized by Rule 37(d) are available even to a discovering party who has not spoken up about his adversary's silence, and sanctions may be imposed even in the absence of a discovery order from the court. *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & No Dollars*, 430 S.C. 594, 599, 846 S.E.2d 14, 16-17 (2020).[15] The panel's opinion correctly determined both the award of sanctions, as well as their amount, were not an abuse of discretion.

---

[14] Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 10.

[15] In addition to being permitted under TR 37, sanctions were also appropriate under TR 11 (based upon Cleaver-

B. The evidence supports the sanctions imposed on Cleaver-Brooks

i. The trial court did not abuse its discretion in sanctioning Cleaver-Brooks

It is undisputed "the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. 6.). It is further undisputed that prior to trial, Cleaver-Brooks only produced 25 pages of documents concerning its boilers at Mr. Howe's Bowater jobsite, and that the 25-page Bowater file contained references to two unique boiler identification numbers. In "Cleaver-Brooks' own words, 'Each Clever-Brooks boiler has a unique identification number called a unit number'" (R. 8).

Plaintiffs gave Cleaver-Brooks multiple opportunities to explain its files in two separate 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 until nearly midnight toward the end of Plaintiff's case-in-chief to search its files and produce records disclosing the 25-page Bowater file's repeated references to two separate boilers were typographical errors.

Cleaver-Brooks was able to discover these typographical errors after utilizing its boiler index cards as a "roadmap." (R. 367:8-15). Yet until producing them with the midnight documents, Cleaver-Brooks "deliberately did not give those index cards out, saying it was simply duplicative." (R. 367:8-12.). This refusal was despite the fact they were always readily available

---

Brooks' signing discovery responses producing the 25-page Bowater file, despite such file containing misleading documents which indicated there were two of its boilers at Bowater) as well as pursuant to the Court's inherent equitable powers. "Courts have the inherent power to do all things reasonably necessary to ensure 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). Thus, even were this Court to determine TR 37 was not the proper mechanism to sanction Cleaver-Brooks, it would be harmless error, as such sanctions were also appropriate under TR 11 and the Court's inherent equitable powers.

to Cleaver-Brooks, and despite Plaintiffs' request such cards be produced during Cleaver-Brooks' corporate representative deposition. R. 331:13-14, R. 341:17 – R. 342:7. The fact Cleaver-Brooks itself utilized its index cards to gather the midnight documents belies its assertion that the repeated references to two boilers in the 25-page Bowater file were "a clear typographical error."[16] The typographical error was only "clear" to Cleaver-Brooks because it had access to relevant and responsive documents it failed to produce.

Thus, Cleaver-Brooks, through its own deliberate and inappropriate decision not to produce relevant, discoverable documents, and the failure of its corporate representative to carefully review the documents in Cleaver-Brooks possession, deprived Plaintiffs of the opportunity to discover the 25-page Bowater file contained typographical errors. Plaintiffs went to trial under the mistaken presumption that Cleaver-Brooks had produced all relevant, discoverable documents in its possession, with the mistaken presumption Cleaver-Brooks' corporate representative would have carefully reviewed the documents it produced, and with the mistaken assumption that the documents Cleaver-Brooks produced would be accurate. Plaintiffs relied upon the sworn testimony of Cleaver-Brooks' corporate representative, who testified each boiler had its own unique identification number, and reached the only possible conclusion that the 25-page Bowater file's references to two separate boiler numbers meant there were two separate boilers at Bowater.

In awarding sanctions against Cleaver-Brooks, Judge Toal stated,

> 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 its 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

[16] *Id.* at 5.

> obey the rules of discovery, I think an award of attorneys' fees and expenses is appropriate.

(R. 674 at 70:8-22.)

The evidence from the record was more than sufficient to support the trial court's decision to impose sanctions under the abuse of discretion standard, and the Court of Appeals panel correctly affirmed Judge Toal's order.

ii. The trial court did not abuse its discretion in determining the amount of sanctions

The panel also correctly determined the amount of sanctions awarded was not an abuse of discretion. 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)).

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).

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.

Plaintiffs submitted four affidavits in support of their request for expenses and attorney fees incurred over the course of the eight-day trial for this matter. (R. 1291, 1299, 1313, 1427).[17]

[17] Cleaver-Brooks' motion incorrectly asserts these affidavits were untimely filed "a full month" late. Petition for Rehearing and Suggestion for Rehearing *En Banc,* p. 15. In fact, the affidavits were timely filed on April 30, 2018 and May 1, 2018, and served to Cleaver-Brooks via e-mail on May 1, 2018. (R. 1424). Further, Cleaver-Brooks cannot seriously argue that it was somehow prejudiced by the timing of affidavits. The hearing on Plaintiffs' motion was held on October 10, 2018, over five months after Cleaver-Brooks received the affidavits. (R. 657). The Court's order granting Plaintiffs' request for sanctions was not entered December 7, 2018, a full seven months after the affidavits were served. (R. 5)

In addition, the trial court held a hearing on the matter on October 10, 2018 (R. 657). During this hearing, Plaintiffs' counsel appeared and volunteered to answer any questions the Court had about the amount of its requested sanctions. (R. 661 at p. 18:16-17, R. 671 at p. 58:25 – 672 at p. 63:21) Cleaver-Brooks was also given ample opportunity to present evidence and/or object to the amount of Plaintiffs' requested sanctions (R. 667 at p. 44:17 – R. 670 at p. 55:16).

During this hearing, Cleaver-Brooks acknowledged Plaintiffs' counsel included "a high ranking member of the plaintiffs' bar in South Carolina," (R. 672 at p. 64:23 – R 673 at p. 65:1) and that criticisms of rates charged by lawyers from other places[18] "is borne out of jealousy." (R. 673 at p. 66:4-6). Cleaver-Brooks' counsel repeatedly declined to suggest an alternate hourly rate (R. 673 at p. 66- R. 57), instead informing the trial court, "I can't sit here and tell you that I would have some, you know, number to give you and say, 'This is what it ought to be cut to.' I think --- I think perhaps it ought to be cut to a certain extent, but you know, that's certainly within your discretion and I'll leave that to you." (R. 673 at p. 67:14-20).[19]

Cleaver-Brooks did not challenge that the trial was complicated, difficult, and took place over eight days. Nor did it challenge the fact that Plaintiffs limited their request for attorney fees to only time spent on the trial after all other Defendants had resolved. (R. 671 at p. 60:18-25). Cleaver-Brooks recognized and did not challenge Plaintiffs' counsel's experience and expertise at handling complex litigation such as asbestos trials (R. 672 at p. 64:23 – R. 673 at p. 65:11).

[18] Plaintiffs' counsel Jessica Dean practices in Texas, where the firm of Dean, Omar, Braham, Shirley is located.

[19] Cleaver-Brooks' suggestion that it was reversible error not to permit discovery on the issues of sanctions is not supported by reference to any case or trial rule, and ignores the reality that Plaintiffs' counsel directly addressed its challenges, as well as other questions from the trial court, during the October 10, 2018 hearing. (R. 657 – 676) Cleaver-Brooks identifies no areas of inquiry it would have addressed in discovery that it was not given the opportunity to address during the hearing itself.

The trial court ultimately cut the hourly rates for two of Plaintiffs' three attorneys, awarding fees at the rate of $500/hr compared to the $550/hr requested by Plaintiffs for Plaintiffs' two senior counsel. (R. 23-24) Thus, contrary to Cleaver-Brooks' claims, Judge Toal did not "rubber stamp" Plaintiffs' request. Indeed, the trial court did exactly what Cleaver-Brooks requested it do, using its discretion to cut Plaintiffs' fees "to a certain extent."

C. Cleaver-Brooks' accusations that Plaintiffs' counsel made misrepresentations to the trial court are inappropriate

Finally, Cleaver Brooks' Petition accuses Plaintiffs' counsel of making 'red face" misrepresentations to the trial court,[20] when counsel submitted an affidavit disclosing Plaintiff would not have proceeded to trial against it if they had been in possession of the midnight documents before trial started. (R. 1294, ¶ 19.)[21] Per its Petition, "Cleaver-Brooks does not believe this statement is credible in any way."[22] Such arguments are inappropriate, and contrary to the professional standards which govern attorneys in this State.

---

[20] *Id.* at 19.

[21] Cleaver-Brooks' Petition also suggests Plaintiffs were required by Trial Rule 11 to immediately cease trial once they received the midnight documents. Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 16. However, Cleaver-Brooks explicitly declined to file a TR 11 motion with the trial court (R. 668 @ p. 47:18-48:2). Furthermore, Cleaver-Brooks' argument fails to recognize there is a pragmatic distinction between the decision to go to trial, which involves the weighing of the time, costs, emotional investment, and expenses of going to trial against the likelihood of success. Cleaver-Brooks also fails to recognize the balancing of these considerations might be different before a trial starts and before trial expenses are incurred, and after significant time and expense has also been invested after trial commences.TR 11(a) and Rule 3.1 S.C. Rules of Prof'l conduct establish completely different standards. TR 11 applies to the signing of documents, not the decision to try or continue trying a case, and requires only "good grounds" to support the pleading, motion or paper. Similarly, Rule 3.1 S.C. Rules of Prof'l Conduct requires only a "basis in law and fact . . . that is not frivolous." Put simply, it can be pragmatically wise not to start a trial even if there are "good grounds" or a "non-frivolous" reason for doing so. The fact the trial court declined to enter a directed verdict supports a finding that Plaintiffs had "good grounds" and a "non-frivolous" basis to continue trial after the disclosure of the midnight documents well into Plaintiffs' case-in-chief. (R 355-356).

[22] *Id.* at 16.

South Carolina lawyers "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude,* 296 S.C. 510, 512, 374 S.E.2d 495, 497 (1988).

Rule 402(k), SCACR establishes the requirements for the admission to practice law in South Carolina, and contains the "Lawyer's Oath." This oath includes the clause, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in also in writing and oral communications."

South Carolina's Supreme Court has taken a dim view of attorneys disparaging opposing counsel. In *In re Anonymous Member of the South Carolina Bar*, 392.S.C. 328, 334, 709 S.E.2d 633, 636 (2011), the South Carolina Supreme Court made clear, "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice. Additionally, a lawyer is subject to discipline for 'engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute....'

> The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally . . . Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.

Id., 392 S.C. at 337, 709 S.E.2d at 638.

In its zealous quest to absolve Cleaver-Brooks of the blame for its sanctions, Cleaver-Brooks' counsel have resorted to accusing Plaintiffs' counsel of making untrue statements in an affidavit to the trial court. Such accusations are not supported by the record, any evidence, the trial court's extensive findings of fact, nor the unanimous panel's opinion. Such conduct disparages the integrity of the judicial process, and does nothing

more than bring the legal profession into disrepute. For these final reasons, Timothy Howe and Jeanette Howe respectfully ask this Court to deny Cleaver-Brook's petition for rehearing *en banc*.

CONCLUSION

For the foregoing reasons, Plaintiffs/Respondents Timothy Howe and Jeannette Howe respectfully request the Court reject and deny Cleaver-Brooks' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

Respectfully submitted, January 10, 2022

s/Theile B. McVey
Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
John D. Kassel (SC Bar 3286)
jkassel@kassellaw.com
KASSEL MCVEY ATTORNEYS AT LAW
P.O. Box 1476
1330 Laurel Street
Columbia, SC 29201
803-256-4242
803-256-1952 (Facsimile)
Other email: emoultrie@kassellaw.com

Jonathan M. Holder
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Attorneys for Respondents

PROOF OF SERVICE

I, _____, the undersigned of the law offices of DEAN OMAR BRANHAM SHIRLEY, LLP, Attorneys for Respondents, do hereby certify that I have served the below parties in this action with a copy of the pleading specified below by mailing a copy of the same, postage prepaid, to the following addresses:

Pleading served: Respondents' Return to Petition for Rehearing *En Banc*

Parties served:

M. Todd Carroll
todd.carroll@wbd-us.com
Womble Bond Dickinson (US) LLP
1221 Main Street
Suite 1600
Columbia SC 29201

M. Elizabeth O'Neill
elizabeth.oneill@wbd-us.com
Womble Bond Dickinson (US) LLP
301 South College Street, Suite 3500
Charlotte NC 28202

Steven J. Pugh
spugh@richardsonplowden.com
Richardson Plowden & Robinson, PA
1900 Barnwell St.
P.O. Box 7788
Columbia SC 29201

Attorneys for Appellant

_____