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

REPLY IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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REPLY IN SUPPORT OF REHEARING AND REHEARING EN BANC

Cleaver-Brooks began its Petition for Rehearing by arguing: “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.” (Petition at 1.)

In response, the Plaintiffs filed a 23-page opposition brief that was long on rhetoric, but omitted the one dispositive point; namely, they failed to identify “anything in the record to show that these documents were in fact requested or relevant at any point in discovery.” (Return *passim*.)

The Plaintiffs go to exhausting lengths to justify the circuit court’s sanctions order, but they fail to point out a single interrogatory, document request, request for admission, deposition question, or court order that would have prompted Cleaver-Brooks to ever recognize that the Plaintiffs thought there were actually two Cleaver-Brooks boilers on site at Bowater until they introduced this completely new theory while questioning a third-party witness at trial.

And the reason for that omission in the Plaintiffs’ opposition is obvious: The case was never, never about how many Cleaver-Brooks boilers were at Bowater. It was always, always about where on the Bowater campus a single boiler was located. The Plaintiffs said so. Cleaver-Brooks said so. Even the trial judge said so. (*See generally* Cleaver-Brooks’s Appellate Br. at 3–11 and the numerous citations to the record therein.) That did not change until the middle of trial when the Plaintiffs questioned a Bowater employee about where that boiler was located, and he wrecked their case in front of the jury by testifying that the boiler was in a building where Mr. Howe never worked.

Cleaver-Brooks laid out the case’s unbroken, irrefutable history in painstaking detail (with accurate citations to the record) in its opening appellate brief, and it summarized the history again in its Petition for Rehearing. In response, the Plaintiffs rely on nothing beyond after-the-fact *ipse*

dixit about what happened below or outright misstatements of the record. Indeed, their opposition is like a painter using watercolors, attempting to blur the record with broad-stroke statements to give the illusion that a boiler in Illinois was somehow relevant all along to a case in South Carolina when it indisputably never was.

The actual record is clear: Cleaver-Brooks did absolutely nothing wrong below. It cannot be the law of South Carolina that a party is sanctioned—at the highest reported level in the State’s jurisprudence—for not anticipating incorrect so-called “mental impressions” of its adversary. The Court should reject the arguments the Plaintiffs present in opposition that are designed to paint shades of gray where reality is black-and-white.

ARGUMENTS AND AUTHORITIES

I. The fact that the panel’s decision was unpublished is meaningless, as the sanctions remain the highest in the State’s history, and the Plaintiffs’ counsel are already citing it as precedent.

At the outset of their opposition, the Plaintiffs argue that the Court should not take Cleaver-Brooks’s rehearing request seriously because the panel’s decision is unpublished. (*See* Return at 5–6 (“Thus Cleaver-Brooks’ concern about the precedential impact of the opinion is baseless.”).) Their attempt to dismiss the entirety of this situation through a single brushstroke is a nonstarter.

The fact that the panel’s affirmance is unpublished does not change the fact that Cleaver-Brooks has been sanctioned over \$300,000—quite literally, an unprecedented amount in South Carolina’s history—for doing nothing other than promptly responding to surprise testimony that the Plaintiffs themselves elicited in the middle of trial from a third-party witness. The panel’s decision not to publish its order does not lessen the severity of its ruling or excuse the order’s failure to conform to the actual record and numerous controlling decisions of the Supreme Court.

And the Plaintiffs know it. They filed their opposition to rehearing with this Court via email at 1:06 pm on January 10, 2022. Incredibly, two hours before they made their filing with this Court, their counsel filed a discovery motion in the circuit court in which it cited the panel’s decision for “sanctions to impose for failing to permit meaningful discovery.” *See* Ex. A, Plaintiffs’ Notice of Motion and to Exclude the Deposition of Dr. Arthur Langer at 3–4, filed at 10:57 am, Jan. 10, 2022, in *Morgan v. Armstrong Int’l, Inc.*, Case No. 2020-CP-40-5731 (Richland County Ct. C.P.).

It is outrageous for the Plaintiffs to tell this Court that its panel’s decision provides no “precedential impact” when *the very same day* they cited that decision as precedent. But this is not the only instance where the Plaintiffs are attempting to blur lines in order to dodge legitimate evaluation of Cleaver-Brooks’s rehearing request, as discussed below.

II. The record is unbroken that the materials provided during trial were never relevant to this case prior to the Plaintiffs’ trial questioning of a third-party witness, and nothing in the Plaintiffs’ return identifies anything at all to the contrary.

The Plaintiffs’ efforts to dodge the facts and the details of the record by brushing over them with misleading broad strokes are rampant. That behavior only reinforces Cleaver-Brooks’s request for the Court to rehear this case *en banc*, as it is entitled to a *de novo* review of the facts underlying the sanctions ruling as a matter of the South Carolina Constitution. S.C. Const. art. V, § 5.

A. Generic references to “discovery” do not substitute for identifying an actual discovery request to which the materials would have been responsive, which does not exist.

The sanctions below were supposedly for discovery misconduct. (*See, e.g.*, R. p. 6 (“This is a simple issue: Cleaver-Brooks violated the discovery rules, at severe cost to Plaintiffs and waste of the resources of this Court and the jurors.”).) On appeal and again in its rehearing petition, Cleaver-Brooks has explained that it provided materials to the Plaintiffs during trial in response to

the Plaintiffs’ questioning of Art Welker, a Bowater employee, about a non-existent second Cleaver-Brooks boiler on the Bowater campus. Mr. Welker based his testimony on documents his employer, Bowater, produced to the Plaintiffs during the trial. The Cleaver-Brooks materials about the Illinois boiler were not provided earlier because they were not responsive to a single piece of discovery served by the Plaintiffs. And Cleaver-Brooks has proven its position by pointing out that no one—neither the Plaintiffs, the circuit court, nor the panel of this Court—has ever identified a single discovery request to which materials about a boiler in Illinois would have been responsive.

The Plaintiffs’ Broad Stroke: In their 23-page opposition brief, the Plaintiffs still do not identify any specific request, but instead resort to their watercolors strategy to give the impression those materials were generally responsive during the discovery process as a whole. First, they point to the “Standard Interrogatories and Requests for Production of Documents” for asbestos litigation, and argue: “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.” (Return at 2.) Later, they argue that their Rule 30(b)(6) request to Cleaver-Brooks asked it to produce “purchase order records for all asbestos-containing products sold to any Premises at Issue between 1962 and 2008.” (*Id.* at 9.) They claim that they “gave Cleaver-Brooks multiple opportunities to explain its files in two separate depositions.” (*Id.* at 16.)¹ Elsewhere, they generally describe the materials that Cleaver-Brooks provided during trial as “discoverable evidence.” (*Id.* at 14.)

¹ The portions of deposition testimony the Plaintiffs cited in support of this statement in their opposition all involve questions from the Plaintiffs regarding a single Cleaver-Brooks boiler at the Bowater facility. (Return at 16 (citing R. pp. 1230, 1232, 1234, 1236, 1237, 1260).) Rather than somehow proving the relevance of a boiler that was shipped to Illinois, those citations make it obvious that the notion of a second boiler was ***never*** part of this case before trial. That deposition testimony is examined in more detail below in Section III.

Similar references abound in the return, and Plaintiffs' argument appears to be that records provided during trial were generally responsive to general discovery requests. They are not.

The Details in the Actual Record: The boiler described in the materials provided during trial was shipped to the National Protein Corporation in Champaign, Illinois. (R. p. 741.) It was not at "Mr. Howe's Bowater jobsite," nor was it "sold to any Premises at Issue between 1962 and 2008." Mr. Howe had nothing to do with that boiler: he never worked on or around it, he never worked for the company who owned it, and he never visited the facility where it was located.

Accordingly, there is not a single discovery request or deposition question to which materials regarding that boiler are responsive. In short, whether those materials may have been "discoverable" in advance of trial does not change the fact that the Plaintiffs never engaged in any "discovery" about them. Assuming the Plaintiffs' "we knew about the typographical errors all along, but stayed silent about them and proceeded to trial accordingly" story is correct, it was their choice not to conduct any discovery at all on the issue. Neither Cleaver-Brooks nor any other litigant should be penalized for not producing documents that were never requested, for not answering questions that were never asked, or for not correcting an adversary's mistaken strategy of which it is unaware.²

This unavoidable point is dispositive here, but neither the Plaintiffs nor the panel ever addresses it.³ Worse, they both ignore the fact that the circuit court acknowledged that these materials were not responsive to any actual discovery requests yet inexplicably declared that this point "is irrelevant." (R. p. 14.)

² Nor should the Court assume that a defendant would irrationally withhold exculpatory evidence and invite a trial rather than a dismissal.

³ The panel stated that Cleaver-Brooks failed to provide these materials "despite numerous requests." (Unpub. Op. No. 2021-UP-422, ¶ 4.) The panel did not identify any of these requests; in fact, none exist.

But by ignoring the details of the discovery requests below, the panel not only endorsed sanctioning a party for not producing materials that were never requested in discovery, it also failed to follow the Supreme Court’s clear guidelines for appellate review of discovery sanctions. *See, e.g., Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) (instructing that any allegedly deficient discovery response must be evaluated “in light of the question asked,” rather than in a generic vacuum); *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 proper (quoting *Carver v. Salt River Valley Water Users’ Ass’n*, 446 P.2d 492, 496 (Ariz. 1968))); *cf. Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) (holding that when a party attempts to use new exhibits that were not disclosed before trial, the court “should consider the reason the new information was not provided earlier”). The panel’s disregard of the actual record and controlling Supreme Court authority requires rehearing.

B. The Plaintiffs’ opening statement never suggested their supposed belief that Cleaver-Brooks’s records identified two different boilers at Bowater.

Not only were records regarding a boiler in Illinois never requested in discovery, the Plaintiffs never addressed or even referenced that boiler prior to asking Mr. Welker questions about it on the stand during trial. Mr. Welker’s brand new testimony was the first time that boiler ever had any potential relevance to this case, and Cleaver-Brooks rightly responded to it the very same day. (*See generally* Cleaver-Brooks’s Appellate Br. at 12–14 and the numerous citations to the record therein.) Cleaver-Brooks’s immediate rebuttal of surprise trial testimony elicited by the Plaintiffs was fully consistent with controlling Supreme Court precedent, which holds that it is an abuse of discretion for a circuit court to exclude evidence that rebuts an adversary’s in-trial surprise testimony. *Bramlette v. Charter Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990).

The Plaintiffs’ Broad Stroke: In their opposition, the Plaintiffs challenge that Mr. Welker’s testimony was the first time this notion of a second boiler was revealed. Instead, they imply that they revealed this theory during their opening statement, but Cleaver-Brooks continued to wrongly withhold materials and let trial proceed to an evidentiary presentation. (*See* Return at 16 (“Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements. Yet Cleaver-Brooks waited until nearly midnight toward the end of Plaintiffs’ 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.”).)⁴ Not so.

The Details in the Actual Record: It is true the Plaintiffs told the jury during their opening statement that there may be multiple boilers at Bowater. But contrary to the illusion presented in their opposition brief, the Plaintiffs actually confirmed to the jury that Cleaver-Brooks’s records showed only one boiler. Instead, the Plaintiffs explained a “two boilers” theory to the jury they derived from records held by the State of South Carolina, **not from anything in Cleaver-Brooks’s records**—a theory that they eventually abandoned over the course of trial.

The full excerpt from the trial transcript exposes the misleading suggestion of the Plaintiffs’ opposition brief:

The powerhouse is where we believe the boiler was at, and there may be multiple boilers. Now, why do I say that? There are boiler inspection reports now. If you want to know anything about when a boiler was inspected the State of South Carolina keeps that, but they didn’t keep it in the beginning years. **That 1957 boiler they have in**

⁴ As a further example of the Plaintiffs blurring lines that are actually clear within the record, their return describes the Cleaver-Brooks records about the boiler it shipped to Bowater as “the 25-page Bowater file” in **at least twenty places**. But the full file is actually 61 pages of commercial records and design drawings; the Plaintiffs know this because they introduced the entire file as Exhibit 55 at trial. (R. pp. 678–738.) The Plaintiffs’ repeated insistence on saying that the complete file was two-fifths of its true size underscores why it is imperative for the full Court to conduct a *de novo* review of the record.

their own records isn't [in] the state records because they weren't kept in the 50's and 60's, so that's incomplete.

(R. p. 160; Trial Tr. 71:4–12 (Plaintiffs' opening statement) (emphasis added).) To be clear, the massive Bowater facility had numerous boilers, which is why the Plaintiffs sued numerous boiler manufacturers in this case; however, there was *never* any suggestion that Cleaver-Brooks's records indicated more than one Cleaver-Brooks boiler on the campus, including during the Plaintiffs' opening statement. The Court should reject the Plaintiffs' attempt to artfully blur through innuendo facts that are clear in the record.

C. The location of the Cleaver-Brooks boiler at Bowater was determined by evidence produced by Bowater, not by Cleaver-Brooks.

As discussed throughout Cleaver-Brooks's appellate filings, the sole issue on which this case proceeded to trial was the location of a single Cleaver-Brooks boiler on the Bowater campus: Was it located in the powerhouse, where Mr. Howe could have been exposed to asbestos fibers from the boiler, or was it located in the administration building where Mr. Howe never worked? (*See generally* Cleaver-Brooks's Appellate Br. at 3–11 and the numerous citations to the record therein.) Or, as the circuit court put it 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. They're not disputing it was sold. They are saying that all their—they don't have any records, they say, that say the location, just a sales thing, and they say it's in the admin[istration building at Bowater].” (R. p. 641; Hr'g Tr. 25:6–30 (remarks of Judge Toal to Ms. Dean).)

The Plaintiffs' Broad Stroke: When reciting the alleged prejudice about the timing of Cleaver-Brooks's in-trial production of new documents, the Plaintiffs describe what those documents contained. Blended into that summary is the following sentence: “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.” (Return at 4; *see also id.* at 12 (stating that the materials Cleaver-Brooks provided during trial “showed that . . . there was in fact only a single boiler at the Bowater facility, in a different building than the one where Mr. Howe worked”).) This is incorrect.⁵

The Details in the Actual Record: The documents identifying where at Bowater the boiler was located were produced by Bowater, not by Cleaver-Brooks. They can be found on Pages 851 through 855 of the record, which includes the cover email from Bowater’s counsel producing those documents. Bowater produced those records to the Plaintiffs three days *before* the Plaintiffs put Mr. Welker—a Bowater representative—on the witness stand, where he confirmed for the jury that those documents show the Cleaver-Brooks boiler was located in the administration building. (R. pp. 243, 255, 264; Trial Tr. 492:4–14, 504:5–11, 513:8–14.) This is when the Plaintiffs first revealed their “two boilers” theory. (R. p. 242; *id.* 491:17–25.) The Court should not be misled by yet another set of statements that are squarely contrary to the actual record.

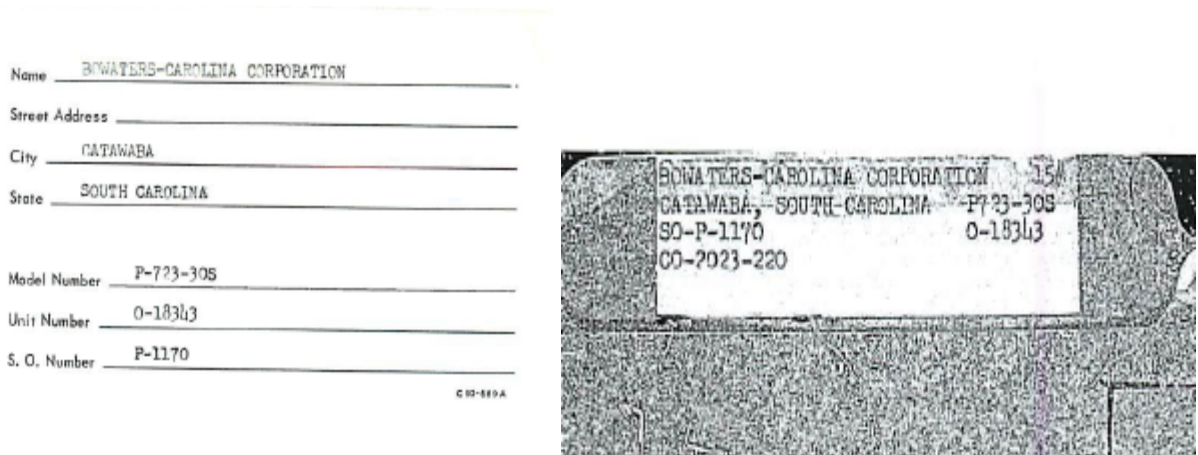
D. The index card regarding the boiler sent to Bowater did not reveal any new information.

Finally, in addition to claiming that records regarding the boiler in Illinois should have been produced earlier in discovery—again, without ever identifying a single request to which those materials would have been responsive—the Plaintiffs complain that Cleaver-Brooks belatedly produced an index card regarding the boiler that was at Bowater. (Return at 3, 4, 10, 11.) The circuit court even reproduced that index card in its sanctions order. (R. p. 10.) But that index card did not change a single fact at trial.

⁵ The only thing the Plaintiffs cite for this incorrect statement is the affidavit of its national counsel on which the sanctions order is based. (Return at 4 (citing R. p. 1294 (affidavit of Ms. Dean)).)

The Plaintiffs’ Broad Stroke: The Plaintiffs would have the Court believe that this index card had a talismanic effect on the case. In their broad-brush fashion, they claim that this index card “provide[s] information about each of [Clever-Brooks’s] boilers’ unit number as well as where each boiler ends up,” and that its mid-trial production finally showed that “boiler unit O-18343 had indeed been delivered to Bowater.” (Return at 3, 4.)

The Details in the Actual Record: The Plaintiffs knew this information all along, and any suggestion otherwise is wrong. The index card does nothing more than replicate the data that is on the cover of the file folder containing the records for the boiler sent to Bowater. Below is a side-by-side comparison of the index card on the left (R. p. 739) and the top of the file folder on the right (R. p. 678, which was the Plaintiffs’ trial exhibit 55):



Just as a card in a library’s card catalog system does not contain anything other than information found on the spine of a book, this Cleaver-Brooks index card does not contain any information that is not already found on the cover of the file folder that Cleaver-Brooks produced and that the Plaintiffs themselves put into evidence at trial. They both contain the name of the customer (Bowaters–Carolina Corporation), the boiler’s destination (Catawba, South Carolina), the boiler’s model number (P-723-30S), the boiler’s unit number (O-18343), and the sales order

number (P-1170). There is not one piece of information contained on the index card that had not already been produced in the case.

Moreover, Cleaver-Brooks's corporate representative explained all of this to counsel for the Plaintiffs during his deposition. In response to specific questions, he described the meaning of each data point on the file folder. (R. pp. 1775–76; Dep. Tr. 49:8–50:10.) He then testified that the index card “doesn't add anything to the information” that he had just detailed from the file folder. (R. p. 1776; Dep. Tr. 50:11–20.)

The Plaintiffs' attempt to create the impression that production of a duplicative index card during trial was in any way meaningful, much less prejudicial or something to be sanctioned, is directly contrary to the record itself. As with their numerous other efforts to blur an otherwise clear picture that emerges from a full review of the record, the Court should reject the Plaintiffs' broad-strokes arguments regarding Cleaver-Brooks's index card and, instead, should undertake an *en banc* review of this appeal.

III. The Court should not credit the *post hoc* testimony from counsel on which the sanctions order hinges, as the Plaintiffs confirmed through deposition questioning that all materials in Cleaver-Brooks's file related to a single boiler.

Finally, Cleaver-Brooks argued that the sanctions order should be vacated because the affidavits on which it is based were procedurally improper, and because the testimony from counsel was not credible in any way. (Petition at 15–19.)

The Plaintiffs do not legitimately respond to the procedural objections. Instead, they argue that Cleaver-Brooks was not “prejudiced” by their failure to comply with Rule 6(d), SCRCP's mandatory timing requirement for filing affidavits (Return Br. at 19 n.17), and they feign ignorance as to why Cleaver-Brooks would need discovery regarding testimony that resulted in the largest discovery sanction in South Carolina history (*id.* at 20 & n.19).

The Plaintiffs bristle at Cleaver-Brooks’s challenges to the credibility of its counsel’s affidavits. Putting their watercolors strategy to the test, the Plaintiffs argue that they “interpret[ed] Cleaver-Brooks’ documents in exactly the manner in which Cleaver-Brooks’ representative testified they were meant to be read” by assuming a typographical error in one digit of a boiler number on four pages of a 61-page file created in the 1950s meant that there were really two boilers at Bowater. (*Id.* at 14.) They defend that “interpretation” as counsel’s “mental impressions,” which the Plaintiffs claim they had no obligation to disclose, test, or confirm through discovery. (*Id.* at 13–14.) And they then attempt to shield that “evidence” from any scrutiny by arguing that challenges to counsel’s testimony “are inappropriate, and contrary to the professional standards which govern attorneys in this State.” (*Id.* at 21.) According to the Plaintiffs, by defending itself against the only “evidence” on which the sanctions order is based, Cleaver-Brooks has done “nothing more than bring the legal profession into disrepute.” (*Id.* at 22–23.)

But the actual record tells an entirely different story and presents a clear picture, free of the blurred lines and shades of gray that the Plaintiffs strain to create.

The Court can be confident that the Plaintiffs did not actually interpret the typographical errors to mean that a second boiler was at Bowater, and that counsel’s post-trial statements to the contrary are incorrect, because the Plaintiffs actually deposed Cleaver-Brooks’s corporate representative about those file materials. Instead of asking him about any discrepancy in boiler unit numbers, the Plaintiffs confirmed that all of the pages in the file—**including pages that contained the error**—were about a single boiler. That questioning began:

Q: And you know that there’s a Cleaver—or was a Cleaver-Brooks boiler at Bowater?

A: Yes. I think we found a small 30 horsepower Progress model package boiler shipped in 1957.

(R. p. 1755; Dep. Tr. 9:13–16.) Counsel then confirmed that the entire file related to a single boiler:

Q: Do the documents that have been produced in this case that we have marked as—for the record, I’ll go through it more slowly—Exhibit 4 will be BPM000001 through BPM000025 [which include pages with the typographical error].

[Discussion of Counsel]

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

[Discussion of Counsel]

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

(R. pp. 1769–71; *id.* 43:22–45:9.) Counsel proceeded to go through the file, page by page, and confirmed that the materials in the file related to the same boiler. That portion of the examination begins on Page 1775 of the record—“I want you to start with the very first page, BPM00001.” (*id.* 49:8–9)—and continues to include pages that contained the typographical error:

Q: **And it’s still the same model number and it’s the same boiler?**

A: **Yes.**

Q: Will you turn with me to BPM5.

A: Okay.

Q: And this is a remittance request?

A: Correct.

Q: In 1958?

A: Yes, it looks like when you look at the signature above the field representative signature, there’s by, and it looks like the last name could be Jones.

Q: And the next page is included with this field report, correct, BPM9?

A: Yes.

* * * * *

Q: Okay. And so these notes we're looking at at BPM9, they are likely written by Mr. Tiner, correct?

A: It looks that way, and that was—in my experience in looking at these, those are—that's a sheet that's usually used for any type of narrative report somebody decides they want to document on a site.

Q: And if this boiler is supposed to be a small boiler, why does it take two or three weeks to be properly fired?

[Objection of Counsel]

A: I'm not sure what you're talking about the two or three weeks to be properly fired.

Q: I'm sorry, I should have directed you to that. The last two lines on these handwritten notes.

A: Oh, where it says this unit will be properly fired on natural gas 10,000 Btu in about two or three weeks. Is that what you're talking about?

Q: Yes, sir.

(R. pp. 1779–82; *id.* 53:18–60:7 (emphasis added).)

And counsel confirmed throughout the examination that all of these materials related to a single boiler, not two as the Plaintiffs claimed after losing at trial:

Q: And if you can look with me on the next page, BPM19.

A: Okay.

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

A: **Correct.**

(R. p. 1785; *id.* 67:7–11 (emphasis added).)

The examination continued by confirming the remainder of the Cleaver-Brooks file included the “assembly checklist,” “manufacturing drawings,” “engineering drawings” and “part descriptions” for the single boiler it shipped to Bowater, and concluded with a long discussion about what that boiler would have been used for at Bowater. (R. pp. 1788–91; *id.* 70:9–73:25; R. pp. 1873–1903; *id.* 227:1–257:21.) Nowhere did any question or any answer indicate anything other than what was obvious to all parties: there was one Cleaver-Brooks boiler at Bowater, and no one ever disputed that point until the Plaintiffs began asking Mr. Welker questions about a non-existent second boiler during his trial testimony after he had definitively told the jury that the Cleaver-Brooks boiler was in the administration building, destroying the Plaintiffs’ case.

In light of these pages and pages of deposition testimony where the Plaintiffs’ counsel confirmed that all of the documents in Cleaver-Brooks’s file related to a single boiler at Bowater, counsel’s broad-stroke story that the Plaintiffs went to trial solely on the incorrect “mental impression” that the Cleaver-Brooks file indicated there were two boilers present at Bowater simply cannot be believed.

Counsel’s *post hoc* narrative is further belied by the fact that this “two boilers” theory does not appear anywhere at all in the record until Mr. Welker’s in-trial testimony. If the Plaintiffs’ truly built an entire trial around that untested theory—a trial they claim cost them over \$300,000 in fees and litigation expenses—then surely that theory would have made an appearance somewhere else in the case: motions practice, pretrial filings, discovery, arguments to the circuit court, opening statements, or even questioning of other witnesses at trial. But it does not appear anywhere prior to, and barely even after, Mr. Welker’s testimony. On that, the record is clear, without any of the blurry images that the Plaintiffs are attempting to paint. (R. pp. *passim.*)

Counsel's *post hoc* narrative is further belied by the fact that, if it is true, then the decision to continue with trial after Cleaver-Brooks pointed out that the so-called second boiler was in Illinois is an admitted violation of Rules of Professional Conduct 3.1 and 3.4, as the Plaintiffs would have been presenting a claim to the jury for which they knew there was no basis in fact. Of course, Cleaver-Brooks did not move for such sanctions because it does not believe that the Plaintiffs actually went to trial thinking there were two Cleaver-Brooks boilers at Bowater in the first place. It is obvious the Plaintiffs knew all along that there were not two boilers; they admitted as much over and over again in their written submissions, their deposition questions, and their arguments to the circuit court. On that point as well, the record is clear, and their counsel's post-trial testimony to the contrary in support of sanctioning Cleaver-Brooks is not believable.

Counsel's *post hoc* narrative is further belied by the fact that, if true, it assumes that Cleaver-Brooks knowingly withheld exculpatory evidence. No defendant would knowingly withhold information that, if produced, would exempt it from all liability and avoid the risks and costs of a multi-week trial. But in order to be believable, counsel's statements must assume that irrational behavior from Cleaver-Brooks. That is simply not "plausible." *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.").

Cleaver-Brooks was wrongly denied the opportunity to further examine counsel's testimony about what the Plaintiffs believed about Cleaver-Brooks's records in advance of trial. That denial alone requires reversal. *See Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2008) (explaining that "[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”).

CONCLUSION

Cleaver-Brooks is entitled to a *de novo* review of the facts underlying the circuit court’s sanctions order, which appears to be the largest discovery sanction issued in the State’s history. The circuit court failed to identify any actual facts that appear in the record that support its order. The panel did not, either. And when challenged on rehearing to identify a single fact in the record that supports the sanctions ruling, the Plaintiffs also failed to do so.

Instead, the Plaintiffs opposed rehearing this case *en banc* by telling the Court:

- No one will cite the panel’s decision as precedent.
- Cleaver-Brooks’s materials about a boiler in Illinois should have been produced in response to discovery requests about Mr. Howe’s jobsites.
- The Plaintiffs disclosed their “two boilers” theory during opening statements.
- Cleaver-Brooks’s complete file for the boiler at Bowater contained only 25 pages.
- Cleaver-Brooks belatedly produced documents at trial showing where on the Bowater campus the boiler was located.
- The Plaintiffs learned that Cleaver-Brooks had shipped boiler O-18343 to Bowater only after receiving an index card about that boiler.
- The Plaintiffs believed that the file folder containing the records for the boiler Cleaver-Brooks sent to Bowater contained records for multiple boilers, even though the file folder was emblazed with the “O-18343” unit number on the front, and even though counsel spent hours confirming through deposition testimony that all of the records in the folder related to a single boiler.

Each of these statements is incorrect. The numerous citations to the record in this reply brief, in Cleaver-Brooks’s Petition for Rehearing, and in its appellate briefing reveal a clear picture of what happened below, despite the Plaintiffs’ best efforts to blur those proceedings with misleading broad-stroke arguments.

Accordingly, the Court should grant Cleaver-Brooks's petition, rehear this case *en banc*, and vacate the State's most punitive discovery sanctions order because it lacks any basis in the record and is contrary to numerous controlling decisions of the South Carolina Supreme Court.

Respectfully submitted,

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Attorneys for Cleaver-Brooks, Inc.

January 18, 2022

Exhibit A

Plaintiffs' Discovery Motion in *Morgan v. Armstrong
Int'l, Inc.* (filed Jan. 10, 2022)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
EDWARD R. MORGAN, SR., and)	C/A NO. 2020-CP-40-05731
DOROTHY A. MORGAN,)	
)	<i>In Re:</i>
Plaintiffs,)	Asbestos Personal Injury Litigation
)	Coordinated Docket
v.)	
)	
ARMSTRONG INTERNATIONAL,)	
INC., et al.)	
)	
Defendants.)	

**PLAINTIFFS’ NOTICE OF MOTION AND TO EXCLUDE
THE DEPOSITION OF DR. ARTHUR LANGER**

On, November 30, 2021, Foster Wheeler, with no notice or consultation or tender for discovery, noticed a trial preservation deposition of their expert witness Dr. Arthur Langer.¹ *See Exhibit A* (Deposition Notice of Dr. Arthur Langer), attached hereto. Nor did counsel for Foster Wheeler, when asked, make any reasonable explanation why it was necessary to preserve Dr. Langer’s testimony via videotape and could not be presented via remote testimony.²

Because counsel for Foster Wheeler refused to explain why Dr. Langer could not testify remotely or provide a reasonable opportunity to discover Dr. Langer’s opinions, Plaintiffs filed a Motion for Protection to preclude counsel for Foster Wheeler Corporation (“Foster Wheeler”)

¹ *See* Email between Jennifer Techman and Trey Branham, December 3, 2021, attached as *Exhibit B* regarding the appropriateness of conducting the a trial preservation deposition immediately following a discovery deposition and offering to allow Dr. Langer to participate remotely at the time of trial. No response from Mrs. Techman or any other counsel from Foster Wheeler was ever received. Plaintiffs followed up again on December 8, 2021, again with no response. *See* Email from Trey Branham to Jennifer Techman attached as *Exhibit C*.

² *Id.* (stating only “[w]ith omicron now in the US, who knows what the state of things will be at the time of trial.”).

from conducting a trial direct examination Dr. Langer on December 20, 2021. See Exhibit D attached.

As the noticed date for Dr. Langer's deposition approached, Plaintiffs advised counsel for Foster Wheeler, that given the pending motion for protection, they did not intend to appear at the deposition of Dr. Langer. See Email from Trey Branham to Jennifer Techman, January 5, 2022, attached as Exhibit E. Still counsel for Foster Wheeler ignored Plaintiffs.

On January 6, 2022, despite Plaintiffs' pending Motion for Protection and the unresponded to inquiries to counsel, counsel for Foster Wheeler conducted a trial examination of Dr. Langer in the absence of Plaintiffs' counsel.

As a result of Foster Wheeler counsel's refusal to work with or, at a minimum, provide a reasonable explanation and timetable for Dr. Langer's testimony and then, without presence of Plaintiffs' counsel and over their objection, to seek to preserve trial testimony, Plaintiffs now request that this Court exclude the deposition testimony of Dr. Langer.

LAW AND ARGUMENT

A. Full and Fair Discovery is Mandated by the Rules of Civil Procedure

Rule 26 of the South Carolina Rules of Civil Procedure provides that "[d]iscovery of facts known and opinions held by experts . . . may be obtained by any discovery method . . ." SCRPC 26(b)(4)(A). In order for discovery to be meaningful, Plaintiff must be afforded the opportunity to discover Dr. Langer's opinions and prepare a meaningful cross in advance of the testimony he seeks to present to the jury. This is so because

[t]he gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. The rights of discovery provided by the Rules gives the trial lawyer the means to

be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.

CEL Products, LLC v. Rozelle, 357 S.C. 125, 132 (Ct. App. 2004)(emphasis added)(internal citations omitted). Here, counsel for Foster Wheeler clearly determined to prejudice the Plaintiffs by seeking to have Plaintiffs conduct discovery of Foster Wheelers' expert mere minutes before being forced to conduct a trial cross of that same expert.

Here, unlike some experts in this litigation, no lawyer at Dean Omar Branham Shirley, LLP has a recollection of ever deposing Dr. Langer. As a result of Foster Wheeler's gamesmanship and the absence of even the most basic professional courtesy, Plaintiffs' counsel has been deprived of "the means to be prepared for trial." *CEL Products, LLC* at 132.

B. Exclusion of Evidence is Proper where the Rule of Discovery are Not Followed.

The South Carolina Supreme Court has found that where the failure to provide discovery causes a trial to become a "guessing game" or "one of ambush" the exclusion of evidence is proper. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434 (2009)(affirming the exclusion of evidence by a special master where a party failed to disclose evidence). Here, seeking to perform a trial preservation deposition of an expert witness without any meaningful opportunity to discovery Dr. Langer's opinion is certainly trial by ambush.

In determining what sanction to impose for failing to permit meaningful discovery, the trial court weigh the nature of the discovery, "the discovery posture of the case, willfulness and the degree of prejudice." *Id.* at 435, *see also Howe v. Air & Liquid Systems*, 2021 WL 5626487 *1 (Ct. App. December 1, 2021)(affirming the trial court sanctions and noting that "[d]iscovery is the

quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed.”)

Foster Wheeler undeniably have trampled on Plaintiffs discovery rights. Here, Dr. Langer is an expert witness for Foster Wheeler who presumably offered testimony to exonerate the boiler manufacturer from liability. Discovery in the Morgan case is still ongoing. Plaintiffs attempted to work with Foster Wheeler’s lawyers to take a discovery deposition a reasonable time before Dr. Langer’s trial preservation, but Foster Wheeler’s lawyers willfully refused to discuss the matter and proceeded to conduct their direct examination without Plaintiffs’ counsel and before their motion for protection could be decided.

Lastly, the prejudice, if Dr. Langer is not excluded is severe. The jury would hear the unchallenged opinion of Dr. Langer and, even if Plaintiffs had appeared and attempted to cross examine Dr. Langer, Foster Wheeler’s intentional effort to deny Plaintiffs a meaningful opportunity to conduct discovery also created substantial prejudice.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that this Honorable Court issue an order excluding the testimony of Dr. Langer.

Respectfully submitted,

/s/ Theile B. McVey

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ATTORNEYS FOR PLAINTIFF

January 10, 2022

Columbia, SC

RECEIVED

Jan 18 2022

SC Court of Appeals

PROOF OF SERVICE

I, the undersigned Attorney 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: Reply in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*

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January 18, 2022