

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Court of Appeals Opinion No. 2021-UP-422
Court of Appeals Case No. 2019-000164
Circuit Court Case No. 2015-CP-46-3456

APPENDIX

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/k/a 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.;

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S.C. SUPREME COURT

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 Petitioner.

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STATEMENT OF ISSUES ON APPEAL

This is an appeal of a sanctions order that arises out of the asbestos docket. Following a defense verdict in Cleaver-Brooks, Inc.'s favor, the trial court sanctioned Cleaver-Brooks and ordered it to pay all of the plaintiffs' attorneys' fees for the entirety of trial, along with all of the plaintiffs' litigation costs and expenses. The sanctions exceed \$300,000. It is a shocking order, and it raises several issues for appellate review:

1. In response to in-trial testimony, Cleaver-Brooks located and produced records to the plaintiffs that same day that entirely disproved a theory of the case that the plaintiffs had never disclosed and had never raised at any point in discovery. Did the trial court err by sanctioning Cleaver-Brooks for not producing in advance of trial materials that were never the subject of any discovery request, deposition question, pretrial motion, or court order, and that had no relevancy to the case before the plaintiffs' in-trial questioning of a third-party witness?
2. Did the plaintiffs waive their objections regarding Cleaver-Brooks's documents by eliciting testimony during their case-in-chief about those documents without objection?
3. Did the trial court err when it relied on Rule 37(b)(2) of the South Carolina Rules of Civil Procedure as the jurisdictional basis for its sanctions order when there was never any discovery order in place that Cleaver-Brooks could have possibly violated?
4. Did the trial court err when it ignored the plaintiffs' counsel's admitted violations of their professional duties and obligations?
5. Did the trial court abuse its discretion when it ordered sanctions against Cleaver-Brooks, including (a) its decision to sanction Cleaver-Brooks twice for the same alleged conduct, and (b) when it issued sanctions without a legitimate evidentiary basis to support the terms of those sanctions?

STATEMENT OF THE CASE

The trial court's sanctions order reads like pure fiction. Cleaver-Brooks is still at a loss as to the basis for the order, as the trial court did not identify anything at all in the record that could possibly support any kind of sanction, much less an award to plaintiffs' counsel for over \$300,000. The complete history of the case is critical to recognizing just how far the trial court has departed from the actual record below when it issued its sanctions order. To summarize:

Before the plaintiffs attempted a failed "Matlock Moment" at trial, this case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. That sole issue drove all discovery and pretrial litigation.

At trial, though, the plaintiffs relied on a typographical error in a vendor's documents to suggest during questioning a third-party witness that there may have been a second Cleaver-Brooks boiler at Bowater. Cleaver-Brooks immediately located and produced that same day records making clear that the so-called second boiler was actually in Illinois, not at Bowater. The trial court refused to allow Cleaver-Brooks to admit those records into evidence even though the plaintiffs elicited testimony about the records and the second boiler. The jury returned a verdict in Cleaver-Brooks's favor anyway.

The trial court then sanctioned Cleaver-Brooks for over \$300,000 in attorneys' fees and costs for not producing those documents earlier. It issued this sanction even though those documents were never the subject of a discovery request or a deposition question. It issued this sanction even though the idea that there were multiple Cleaver-Brooks boilers at Bowater had never been part of the case until the plaintiffs' in-trial questioning of a third-party witness. The record in no way supports that sanctions order, as detailed below.

I. Cleaver-Brooks denied from the outset that Mr. Howe was exposed to any asbestos-containing Cleaver-Brooks product.

Mr. and Mrs. Howe filed this case on November 6, 2015, alleging that Mr. Howe developed mesothelioma resulting from exposure to asbestos at a variety of locations and from a variety of products. (R. pp. 33–69; Compl. *passim*.) Mr. Howe passed away during the pendency of the litigation. On September 23, 2016, the complaint was amended to add Mr. Howe’s son as a plaintiff both in his individual capacity and as the personal representative of Mr. Howe’s estate. (R. pp. 85–114; First Am. Compl. *passim*.)

Cleaver-Brooks manufactures boilers and boiler-room systems, and it was identified as a defendant in both the initial and the amended complaints. In its responsive pleadings, it consistently denied that Mr. Howe was ever exposed to any asbestos-containing product that Cleaver-Brooks manufactured or distributed. (*E.g.*, R. p. 76; Cleaver-Brooks Ans. to Compl. ¶ 40; R. p. 122; Cleaver-Brooks Ans. to First Am. Compl. ¶ 48.)

II. Mr. Howe asserted that he was exposed to asbestos at the Bowater Paper Mill, so Cleaver-Brooks timely produced all of its documents regarding the single boiler that it shipped to that location.

Discovery commenced, during which Mr. Howe alleged that he was exposed to asbestos while working at the Bowater Paper Mill in Rock Hill, South Carolina. (R. p. 1582; Plaintiffs’ Answers to Master Interrogatories and Requests for Disclosures at Answer to Interrogatory 4.) Before his death, Mr. Howe testified that while on site at Bowater, he only worked on boilers located in the powerhouse, not in any other buildings or facilities on the Bowater campus. (R. p. 1189; Howe Dep. 35:18–21.)

Accordingly, Cleaver-Brooks produced all of its records regarding the boiler that it shipped to the Bowater Paper Mill in 1957, which was identified as Boiler Unit Number O-18343. (R. pp. 678–738; Cleaver-Brooks Records for Boiler at “Bowater–Carolina Corporation”

(BPM 0001–61).) Cleaver-Brooks’s corporate representative testified that he determined which boiler was shipped to Bowater by searching a set of index cards that the company maintains listing what boilers are shipped to what locations. These cards are “kept alphabetically by the job site name.” (R. p. 1232; Tornetta Dep. 26:23–24 (Feb. 2, 2018).)

The job-site index card also lists by unit number which boiler or boilers were shipped to a particular job site. (R. p. 1232; *id.* 27:2–10.) Once the company identifies the relevant unit number, it can then access the commercial records regarding the relevant boiler on microfiche. (R. p. 1232; *id.* 27:11–18.)

That is how Cleaver-Brooks identified Boiler Unit Number O-18343 as the boiler it shipped to Bowater, and it is how Cleaver-Brooks secured the relevant, responsive records regarding that boiler to produce to the plaintiffs here. (R. pp. 1233, 1235; *id.* 31:22–32:6, 48:13–15.)

III. Litigation then focused exclusively on the location of the single Cleaver-Brooks boiler at the Bowater Paper Mill, without any suggestion of there being multiple Cleaver-Brooks boilers at Bowater.

Because of Mr. Howe’s own testimony and discovery responses, the remainder of the litigation focused on the location of the Cleaver-Brooks boiler at the Bowater Paper Mill: was that boiler located in the powerhouse, where Mr. Howe claimed to have worked, or was it somewhere else on the Bowater campus?

There was never any pretrial suggestion that Cleaver-Brooks had really shipped multiple boilers to Bowater. Below are pages and pages of examples of the parties’ repeated, uniform representations regarding the source of their factual dispute.

A. January 22nd: Cleaver-Brooks's Motion for Protective Order

Despite the narrow question of the location of a Cleaver-Brooks boiler at Bowater, the plaintiffs served Cleaver-Brooks with an extremely broad Rule 30(b)(6) deposition notice. Cleaver-Brooks sought a protective order regarding the overbreadth of that notice. (R. p. 868; Cleaver-Brooks's Motion for Protective Order.) In that motion, Cleaver-Brooks noted the limited scope of its dispute with the plaintiffs:

Cleaver-Brooks manufactures boilers. Plaintiffs have alleged that Cleaver-Brooks manufactured a boiler used at the Bowater Paper Mill in Rock Hill/Catawba, South Carolina which contained asbestos to which the Plaintiff was exposed, and which exposure contributed to his alleged asbestos related injuries.

On January 11, 2018, counsel for Cleaver-Brooks produced a collection of documents regarding its shipment of a boiler to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs' counsel.

(R. pp. 869–70; *id.* at 1–2 (emphasis added).)

B. January 24th: Hearing on Discovery Issues

On January 24, 2018, the circuit court held a hearing regarding a host of discovery issues in several cases involving myriad parties. During the portion of that hearing concerning the *Howe* case, the plaintiffs' national counsel reiterated time after time that the dispute with Cleaver-Brooks involved the location of a single boiler at Bowater:

In the last forty-eight hours, I was able to review Cleaver-Brooks's documents that I didn't get for fourteen months and I believe I should have that shows that Daniels was involved with installing their boiler at Bowater.

(R. p. 602; Hr'g Tr. 37:1–5 (Jan. 24, 2018) (remarks of Ms. Dean) (emphasis added).)

No one knew Cleaver boilers, but we had several people saying that he [*i.e.* Mr. Howe] worked—this is in terms of Bowater location. He worked on all the boilers in the powerhouse. I learned in January on[e] of the boilers sold to Bowater was Cleaver-Brooks.

(R. p. 622; *id.* 57:8–13 (remarks of Ms. Dean) (emphasis added).)

Counsel for Cleaver-Brooks also confirmed the limited nature of the dispute between Cleaver-Brooks and the plaintiffs:

Ms. Dean is correct. We have largely resolved the issue. Cleaver-Brooks searched their records and they did determine that they shipped a boiler to the Bowater Papermill in Catawba, South Carolina. It is a very small boiler and our information, based on several other things that are not up for dispute today but just for some context, is that that boiler was never in the powerhouse at Bowater.

(R. p. 623; *id.* 58:4–11 (remarks of Mr. Thoensen) (emphasis added).) The plaintiffs never objected to, corrected, or otherwise suggested disagreement with this recitation of the case.

C. February 2nd: First Rule 30(b)(6) Deposition of Cleaver-Brooks

On February 2, 2018, the plaintiffs deposed Cleaver-Brooks's Rule 30(b)(6) designee for the first time. Once again, national counsel for the plaintiffs confirmed over and over again that the dispute between the parties involved the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill:

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.

Q: And do you know where that boiler was located at Bowater?

A: Specifically on the site or what building, I couldn't find anything in our records that indicated specifically where it was, no.

(R. p. 1230; Tornetta Dep. 9:13–21 (Feb. 2, 2018) (emphasis added).)

Q: So Cleaver-Brooks' records verifies that there is a Cleaver-Brooks boiler at Bowater?

[objection of counsel]

A: I guess I'd say our records verify that we shipped a boiler there and it was started up. It certainly doesn't verify how long it was there, although I think there's some records that show some interaction in the '60s. But beyond that, I couldn't say when it was there or when it wasn't there.

Q: And you can confirm that asbestos was used on this specific boiler that was shipped to Bowater?

[objection of counsel]

A: Certainly there were components inside the boiler, but as we talked about earlier, when we're talking about on the outside of the boiler, I would have to say no.

Q: So you can confirm for me that asbestos-containing products were used on the inside of this boiler?

A: When it was shipped, I believe some of the components had asbestos as part of the makeup of the component, yes.

(R. p. 1234; *id.* 42:21–43:21 (emphasis added).)

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

[objection 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. p. 1234; *id.* 44:18–45:9 (emphasis added).)

Q: Do you have an opinion as to where it was located in the plant?

A: I think that's what I just gave you. I—my opinion would be it being in the powerhouse would be highly, highly unlikely. I guess we could ask the Bowater people if they have any testimony about that.

(R. p. 1239; *id.* 120:14–19 (emphasis added).)

As the plaintiffs' national counsel tediously went through Cleaver-Brooks's records with its designee, she confirmed that the records all related to a single boiler:

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

A: Correct.

(R. p. 1612; *id.* 67:9–11 (emphasis added).)

Q: This blueprint applies to the boiler that was sent to Bowater?

A: Correct.

(R. p. 1613; *id.* 72:12–14 (emphasis added).)

Q: Okay. And Cleaver-Brooks doesn't have any other records related to this specific boiler that is has not produced, correct?

[objection of counsel]

A: Correct. . . .

(R. p. 1238; *id.* 115:14–25 (emphasis added).)

D. February 6th: Cleaver-Brooks's Motion for Summary Judgment

Following the deposition of its corporate representative, Cleaver-Brooks moved for summary judgment on grounds that there was no evidence that Mr. Howe had ever worked around a Cleaver-Brooks boiler. In particular, Cleaver-Brooks argued as follows: "Also, Howe testified that all of the boilers that he worked on at Bowater were in the power house, and the evidence shows that the Cleaver-Brooks boiler shipped to Bowater in 1957 was not in the power house." (R. p. 1085; Cleaver-Brooks's Motion for Summary Judgment at 8 (emphasis added).)

E. February 21st: Plaintiffs' Opposition to Summary Judgment

The plaintiffs opposed Cleaver-Brooks's motion for summary judgment. In their written argument, they again confirmed that the dispute was about the location of a single Cleaver-Brooks boiler at Bowater:

Cleaver-Brooks has admitted that its boilers, like the boiler shipped to Bowater in 1957, had asbestos-containing components. Additionally, Cleaver-Brooks confirmed that the specifications for the boiler located at Bowater called for the boiler to be insulated. . . . Plaintiffs submit that the exhibit [*i.e.* a boiler inspection report], in fact, supports Wayne Howe and Gilbert Small's testimony as the exhibit shows that during the time that Cleaver-Brooks insists that it shipped its boiler to Bowater, the only boilers at Bowater were located in the powerhouse.

(R. p. 1130; Plaintiffs' Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 11 (emphasis added).)

F. March 6th: Second Rule 30(b)(6) Deposition of Cleaver-Brooks

Before the summary judgment motion could be heard, the plaintiffs re-deposed Cleaver-Brooks's corporate representative. Yet again, the plaintiffs focused on the location of a single Cleaver-Brooks boiler on the Bowater campus:

Q: All right. The Cleaver-Brooks boiler that was supplied to the Bowater paper mill, do you know where at the Bowater facility that boiler was installed?

[objection of counsel]

A: I would have to look, but if I recall, my last deposition, I don't think there was a way we could tell from our records where it was. It was a—but I can't even off the top of my head. I didn't look at it very much before this, but I think it was a relatively small firetube boiler.

(R. p. 1260; Tornetta Dep. 227:1–12 (Mar. 6, 2018) (emphasis added).)

Q: Short story shorter, you don't know where at Bowater the Cleaver-Brooks boiler was installed. True?

[objection of counsel]

A: I don't have a definitive way to determine that in our records, no.

(R. p. 1260; *id.* 228:13–18 (emphasis added).)

Q: All right. There really is no dispute that the Cleaver-Brooks boiler at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope. Correct?

[objection of counsel]

A: Correct. I believe it's called out, all three of those items.

(R. p. 1264; *id.* 246:15–22 (emphasis added).)

Q: Do you know what the boiler Cleaver-Brooks supplied to Bowater was used for?

A: I don't think I found anything in the records that gave me a direct indication of that I think I looked at during the last deposition. It is one of the smallest boilers we make.

(R. p. 1266; *id.* 253:7–12 (emphasis supplied).)

G. March 8th: Plaintiffs' "Supplemental Response" in Opposition to Summary Judgment

Following its second deposition of Cleaver-Brooks, the plaintiffs filed a second memorandum in opposition to Cleaver-Brooks's motion for summary judgment. In it, the plaintiffs again made clear their belief that the factual dispute that should preempt summary judgment involved the location of a single boiler at the Bowater facility:

Not only could Cleaver-Brooks not testify as to where the boiler at Bowater was located, Mr. Tornetta confirmed that the Cleaver-Brooks boiler located at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope.

(R. p. 1135; Plaintiffs' Supplemental Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 4 (emphasis added).)

As has become their practice in virtually every case pending in the asbestos docket, the plaintiffs' counsel incorrectly claimed that Cleaver-Brooks had not made a complete production in other cases and sought sanctions for an alleged discovery violation. As their requested sanction, the plaintiffs asked the trial court to relieve them of their burden of proof in this case:

Wayne Howe was exposed to asbestos attributable to Cleaver-Brooks from asbestos-containing component parts, including gaskets, insulation and Vee Block mix, found on the Cleaver-Brooks boiler at Bowater located in the power house.

(R. p. 1144; *id.* at 13 (emphasis added).)

H. March 9th: Hearing on Summary Judgment

The trial court heard Cleaver-Brooks's motion for summary judgment on March 9, 2018, the last business day before trial. During that hearing, the plaintiffs reiterated that they wanted the court to declare a presumption in their favor with respect to the only factual dispute:

You'll see for *Howe*, it's just limited to a presumption that the boiler is in the power house and/or we're going to ask to be able to use this late-identified [by the plaintiffs] witnesses.

(R. p. 634; Hr'g Tr. 18:16–19 (Mar. 9, 2018) (remarks of Ms. Dean) (emphasis added).)

After hearing arguments of counsel, the trial court clearly recognized the limited scope of the only factual dispute between the parties. As it summarized:

Well, Ms. Dean, Ms. Dean, this is a dispute between—you don't have anything from anybody on a piece of paper that says where it's located, nor do they. You have got a witness that you found who says that it was in the power house, and they've got written material from the boiler inspection people at the state and some other testimony of the Bowater's corporate rep which you all are relying on for location in a lot of places where the defendants don't know where it is that says it's in the admin building. 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.

(R. p. 641; *id.* 25:6–20 (remarks of Judge Toal) (emphasis added).)

Thus, on the eve of trial, everyone—the plaintiffs, Cleaver-Brooks, and even the trial judge—acknowledged that the parties were going to have a jury trial regarding the location of the Cleaver-Brooks boiler on the Bowater campus. If it was in the powerhouse, then the plaintiffs would win. If it was elsewhere on the Bowater campus, then Cleaver-Brooks would win.

IV. During trial, the plaintiffs attempted to ambush Cleaver-Brooks with a never-before-disclosed suggestion that there were multiple Cleaver-Brooks boilers at Bowater, but Cleaver-Brooks immediately produced records debunking that theory.

A. March 12th: Trial started, and a third-party produced documents destroying the plaintiffs' case.

Trial began on March 12, 2018. During the plaintiffs' opening statement, they reinforced exactly what they had always told the trial court and Cleaver-Brooks: this case was about whether a Cleaver-Brooks boiler was in the Bowater powerhouse where Mr. Howe had worked.

As the plaintiffs' national counsel told the jury:

They [*i.e.* Cleaver-Brooks] have a record showing the sale of the 1957 packaged boiler that was used both for heat and processing sold to Bowater, and a bunch of replacement parts sold years and years after that that include asbestos. We have also dug into deeper, because at first we were told by Bowater they didn't have actual boilers in the powerhouse, so we started asking people and we found a coworker who has also passed away but we have his testimony that says, "I also worked in the place, that boiler was a Cleaver-Brooks boiler."

(R. p. 159; Trial Tr. 70:4–12 (remarks of Ms. Dean) (emphasis added).)

At 8:07 pm that evening, counsel for Resolute FP US, Inc.—the owner of the Bowater Paper Mill, and an entity that was not a party to this case—sent an email to counsel for both the plaintiffs and Cleaver-Brooks attaching a set of materials that Art Welker, one of Resolute's employees who worked at Bowater, had located. (R. pp. 851–55; Cleaver-Brooks Trial Exhibit 24.) Mr. Welker had been deposed in February, but—at the request of the plaintiffs' counsel—he continued investigating the location of Cleaver-Brooks's boiler between his deposition and trial. (*E.g.*, R. pp. 229–31, 263–64; Trial Tr. 478:16–25, 479:25–480:19, 512:22–513:7.) Included in the documents transmitted in the evening of March 12th was a letter Mr. Welker found confirming that the Cleaver-Brooks boiler was located in the administration building, not in the powerhouse. (R. p. 854; Cleaver-Brooks Trial Exhibit 24 at March 18, 1971 letter.)

B. March 15th, During Trial: The plaintiffs put a third-party witness on the stand and revealed their new “two boiler” theory for the first time.

On March 15, 2019, the plaintiffs presented Mr. Welker in their case-in-chief. Based on his review of those additional Bowater documents, Mr. Welker testified that he could conclusively determine that the Cleaver-Brooks boiler was in the administration building, not in the powerhouse. (R. pp. 243, 255, 264; Trial Tr. 492:4–14, 504:5–11, 513:8–14.) The plaintiffs even made the letter that resolved this factual dispute an exhibit in their own case. (R. p. 677; Plaintiffs’ Trial Exhibit 45.)

Just like that, the case’s sole factual dispute—the very factual dispute that the plaintiffs had exclusively cited throughout the pretrial litigation, including to avoid summary judgment—had been definitively resolved by a third-party witness, during the plaintiffs’ case-in-chief.

But somewhere between the March 12, 8:07 pm email and Mr. Welker’s testimony on March 15th, the plaintiffs manufactured a second factual dispute.

In the middle of Mr. Welker’s testimony, the plaintiffs argued that Cleaver-Brooks had actually shipped two boilers to Bowater. The only basis for this conjecture was a one-digit discrepancy in the unit number on some documents within Cleaver-Brooks’s production from months earlier, which they showed to Mr. Welker. (*Compare* R. p. 239; Trial Tr. 488:14–23 (noting that some documents within Cleaver-Brooks’s file identified the boiler at Bowater as Unit Number O-18343), *with* R. p. 242; Trial Tr. 491:17–20 (noting that some third-party-created records in Cleaver-Brooks’s file identified the boiler at Unit Number O-18344).)

This was the first time this discrepancy had been noted at any point in the case. It was never identified or discussed in any motions practice, at any hearings, or during any depositions, including either of the two times that the plaintiffs deposed Cleaver-Brooks’s Rule 30(b)(6) designee. It was not the subject of a single document request, interrogatory, or admission request.

C. March 15th, Evening: Cleaver-Brooks transmitted to the plaintiffs documents disproving their newly-disclosed “two boiler” theory.

Following the plaintiffs’ revelation of their new “two boiler” theory at trial, Cleaver-Brooks sought to find out where Boiler Unit Number O-18344 was located in order to properly rebut to the plaintiffs’ never-before-disclosed theory.

At 9:43 pm on March 15th, the plaintiffs’ counsel sent an email to Cleaver-Brooks’s counsel that stated as follows: “If you have any documents that show what was or was not at the Bowater location, please confirm that we already have them and that they have been bates numbered.” (R. p. 856; Cleaver-Brooks Trial Exhibit 25, at 1.)

Less than two hours later, counsel for Cleaver-Brooks responded as follows: “Although we believe that we are not obligated to produce this given that it is evidence obtained directly in response to the arguments in court today regarding unit number O-18344, Ashley [Couch, one of Cleaver-Brooks’s paralegals] will forward you a link to the documents shortly. They are too big to email.” (R. p. 858; Cleaver-Brooks Trial Exhibit 26, at 1.)

Attached to that email were copies of entries from the Cleaver-Brooks job-site index system showing two things: (1) Unit Number O-18343 had been shipped to Bowater, just as Cleaver-Brooks had maintained from the outset, and just as its corporate representative had testified during his Rule 30(b)(6) deposition; and (2) Unit Number O-18344, which the plaintiffs implied was at Bowater during Mr. Welker’s in-trial testimony earlier in the day, had actually been shipped to a different company in Illinois in November 1957. (R. pp. 859–60; *id.* at 2–3.)

Moments after that email was sent, counsel for Cleaver-Brooks emailed a link containing the commercial records regarding Unit Number O-18344 to the plaintiffs’ counsel. (R. p. 861; Cleaver-Brooks Trial Exhibit 27.) Seventeen minutes later, the plaintiffs’ counsel downloaded the commercial records for Unit Number O-18344. (R. p. 863; Cleaver-Brooks Trial Exhibit 29.)

D. March 16th: Trial resumed, and the plaintiffs elicited testimony from Cleaver-Brooks's representative disproving their "two boiler" theory.

On March 16th, the plaintiffs called John Tornetta, who was Cleaver-Brooks's Rule 30(b)(6) corporate designee, as a witness in their case-in-chief. The plaintiffs began Mr. Tornetta's testimony by having him confirm that the Cleaver-Brooks boiler at Bowater was located in the administration building, not in the powerhouse where Mr. Howe had worked. (R. pp. 277–78; Trial Tr. 627:16–628:5.)

But then, even though the plaintiffs already had records showing that Unit Number O-18344 was not at Bowater, the plaintiffs asked Mr. Tornetta about the discrepancy between Unit Numbers O-18343 and O-18344 appearing within a handful of the commercial records that Cleaver-Brooks had previously produced. Mr. Tornetta readily pointed out that the instances of the Unit Number O-18344 appearing within those records were typographical errors by a third-party contractor when filling out paperwork. (R. p. 336; Trial Tr. 686:6–8.) He explained in response to questioning from the plaintiffs' counsel:

Q: Last night for the first time I am provided a card that says this repeated reference in the records to 44 isn't actually going to Bowater like it says but was going to Illinois.

A: Correct. The unit number 18344 after we understood it was a question that came up [during Art Welker's testimony], it was looked at and the records for that went to—I'm going to lose the name, but it was in Monmouth, Illinois, I believe, was the city. American Milling, I believe.

(R. pp. 336–37; Trial Tr. 686:20–687:3.)

The plaintiffs' counsel continued with their questioning:

Q: It's not just that that number [ending in 344] is referenced, it's referenced from different people in different contexts at different times, true?

A: It was referenced initially by a Mister I believe it's Tinner [a third-party contractor] who did the start-up, which then in my mind at least carried through to the invoice which is on BPM six, because they would have used his start-up report to create that invoice and then actually that invoice carried over to our remittance request, which is what they used to create the remittance request. So to me it seemed a little bit like the pass-it-down-the-lane type thing where one person said it wrong and then it kept being said wrong, that's the way I interpret it. But once I looked at the records for 18344 and saw where it was, it was very clear in my mind that this was a typographical error.

Q: That's the way you interpret it today, not last week, not last month, today.

A: I personally didn't look at it last week or last month, quite frankly I'm not sure I noticed it. I don't remember coming across that in the last week—or prior to last week or prior to last month, and I don't think anyone ever brought it up as we were going through those depositions either.

(R. pp. 338–39; Trial Tr. 688:12–689:9 (emphasis added); *see also* R. pp. 339–44; Trial Tr. 689:10–694:14 (additional discussion from Mr. Tornetta regarding how this typographical error could have started with a third-party contractor filling out paperwork and the error carried through to two additional documents).)

Flustered, the plaintiffs pressed Mr. Tornetta further on where Unit Number O-18344 was located, if it was not located at Bowater:

Q: Have you gone back since you've acknowledged that maybe you missed the different unit numbers [within Cleaver-Brooks's production regarding the boiler at Bowater] to look and see what other indicators there are about those boilers to make clear that we're talking about more than one boiler?

A: I suppose in pulling out the records for wanting 344 to see where it was indicated otherwise, that that boiler 18344 was not at Bowater.
/ So in a way, yes, I did do that to see if there was a second boiler there and it was not 18344, 18344 was in Illinois.

(R. pp. 344–45; Trial Tr. 694:22–695:5.)

In response to further questioning from the plaintiffs, Mr. Tornetta explained that Cleaver-Brooks was entirely unaware of the plaintiffs' "two boiler" theory until they revealed it during Mr. Welker's testimony the prior day at trial:

Q: When is the first time you did that [*i.e.* check Cleaver-Brooks's records to determine where Unit Number O-18344 was located] and how much time did you spend looking?

A: It was yesterday afternoon.

Q: Somebody texted you when Art [Welker] was on the stand?

A: I don't think I got a text, I got here and was asked about it.

(R. p. 345; Trial Tr. 695:6–11.)

After the plaintiffs rested their case-in-chief and the trial court heard directed verdict motions, the plaintiffs for the first time expressed concerns about Cleaver-Brooks's production of documents regarding Unit Number O-18344 and asked the court to deem them inadmissible despite having elicited testimony from Mr. Tornetta about those same documents.

Amazingly, the plaintiffs—who never revealed their supposed "two boiler" theory at any point in pretrial discovery or motions practice and who, in fact, had repeatedly represented to the court that there was a single Cleaver-Brooks boiler at the Bowater Paper Mill—claimed to be the victims of "trial by ambush." (R. p. 362; Trial Tr. 712:11.) In response, Cleaver-Brooks pointed out the absurdity of the plaintiffs' position and how this issue had never arisen at any point before Mr. Welker's testimony the day before, including over the course of multiple depositions of Mr. Tornetta. (R. pp. 363–65; Trial Tr. 713:3–715:16.) As Cleaver-Brooks explained, "you can't look for what you don't know." (R. p. 370; Trial Tr. 720:10–11.)

The trial court recognized that "the big lynchpin of this case was going to be whether there was a Cleaver-Brooks boiler wherever Wayne Howe worked," but nevertheless decided

that Cleaver-Brooks's records regarding Unit Number O-18344 would not be admitted into evidence on grounds that the production of those records "is a violation of the South Carolina Rules of Evidence regarding production." (R. pp. 366–69; Trial Tr. 716:9–11, 718:23–719:3.)

Cleaver-Brooks then recalled Mr. Tornetta to the witness stand who testified, without any objection, as follows:

Q: How many boilers did Cleaver-Brooks ship to Bowater?

A: One.

Q: What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.

A: I think the whole unit number, if I get it correctly, is O-18343.

Q: Did Cleaver-Brooks ship a boiler to Bowater with the unit number O-18344?

A: No.

(R. pp. 386–87; Trial Tr. 736:21–737:5.) Mr. Tornetta's testimony continued, again without any contemporaneous objection from the plaintiffs:

Q: Did you find anything in your records that said field report in the top and had written as the serial number 18343?

A: No.

Q: And what did you conclude based upon all of your work in looking at Cleaver-Brooks files over all of the years by that fact?

A: That the 18344 written on the field report and the supplemental field report was a typographical or written error which led to the subsequent typographical errors on the next two documents.

Q: Any doubt in your mind about that?

A: No.

(R. pp. 394–95; Trial Tr. 744:23–745:10.)

Once Mr. Tornetta's testimony concluded, Cleaver-Brooks made a proffer regarding the commercial records for Unit Number O-18344. (R. pp. 499–513; Trial Tr. 849:14–863:24; R. pp. 739–867; Cleaver-Brooks's Exhibits 11, 12, 13, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30 Presented During Proffer.)

E. March 21st: The parties presented their closing arguments and left it to the jury to determine how many Cleaver-Brooks boilers were at Bowater, which returned a verdict in Cleaver-Brooks's favor.

The trial continued, and on March 21st, the parties presented their closing arguments. In the plaintiffs' closing, they did not indicate any kind of prejudice resulting from Cleaver-Brooks's production of the commercial records regarding Unit Number O-18344; instead, they challenged the credibility of Mr. Tornetta's testimony regarding the typographical errors in the records regarding the boiler that was shipped to the Bowater Paper Mill. (R. pp. 518–20; Trial Tr. 1019:21–1021:16.) The plaintiffs even highlighted for the jury that Cleaver-Brooks had been prohibited from introducing "a single document to evidence that story" that Boiler Unit Number O-18344 was shipped to Illinois, not to Bowater. (R. p. 519; Trial Tr. 1020:16–19.)

In response, Cleaver-Brooks's counsel told the jury that it was up to them whether to believe Mr. Tornetta's testimony regarding the typographical errors in the records regarding Unit Number O-18343. (R. pp. 558–59; Trial Tr. 1059:5–1060:7.)

The jury returned a verdict in Cleaver-Brooks's favor. (R. p. 579; Trial Tr. 1126:12–25.) That verdict is not available on the Public Index, however, because the trial judge apparently instructed the Clerk of Court not to enter it during an off-the-record conversation. (R. pp. 661–62; Hr'g Tr. 20:21–22:18 (Oct. 10, 2018).)

V. Following a defense verdict, the plaintiffs sought to recover all of their trial attorneys' fees and costs based on a completely false narrative about the case's history, which the trial court granted.

On March 31, 2018, the plaintiffs filed a motion for sanctions against Cleaver-Brooks. (R. p. 1156; Plaintiffs' Motion for Sanctions.) In direct violation of Rule 6(d), SCRCP, that motion was not accompanied by any proof of such fees or costs.

On April 30, 2018, the plaintiffs re-filed their motion. (R. p. 1161; Plaintiffs' Motion for Sanctions with Statements of Fees and Costs.) This time, the plaintiffs filed nearly two thousand pages of exhibits, and ultimately requested that their lawyers be fully compensated for all of their time spent preparing for and participating in trial: \$85,800 for Ms. Dean; \$62,400 for Ms. Dean's associate, Mr. Holder; and \$77,550 for Ms. Dean's local counsel, Ms. McVey. (R. p. 1294; Dean Aff. ¶ 21; R. p. 1302; Holder Aff. ¶ 20; R. p. 1431; McVey Aff. ¶ 20.) They also requested \$95,435.16 in costs (R. p. 1311; Dean Costs Aff. ¶ 3), plus an additional \$2,881.84 for representatives from the plaintiffs' family to attend trial (R. pp. 1389, 1578; Affs. of Howe and Myers.)

All told, the plaintiffs' lawyers sought to be paid \$323,267 for a trial that they lost. The basis for their request: that Cleaver-Brooks's prompt production of documents regarding Unit Number O-18344 in response to the plaintiffs' in-trial revelation of their never-before-disclosed "two boiler" theory had "fundamentally changed the analysis of Plaintiffs' case, resulting in tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury." (R. p. 1168; Plaintiffs' Motion for Sanctions with Statement of Fees and Costs at 8.)

On May 30, 2018, Cleaver-Brooks filed an opposition memorandum. (R. p. 1391; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions.)

On October 10, 2018, the trial court held a hearing on the motion. At the hearing, the plaintiffs withdrew \$4,600 of their requested costs. (R. p. 660; Hr’g Tr. 16:1–5 (Oct. 10, 2018) (remarks of Ms. McVey).) The trial court concluded that hearing by orally indicating that it would grant the request for sanctions, “but the mandate of the order and the amounts await a little further review on my important part and will be communicated to you very shortly.” (R. p. 674; Hr’g Tr. 72:9–12 (Oct. 10, 2018) (remarks of Judge Toal).)

The plaintiffs then provided the trial court with a proposed order granting their motion, to which Cleaver-Brooks objected as being replete with demonstrably false statements, among other objections. (R. p. 1471; Letter Objecting to Plaintiffs’ Proposed Order (Nov. 2, 2018).)

On December 7, 2018, the trial court signed the plaintiffs’ proposed order and awarded them \$304,617.00, the full amount requested by the plaintiffs’ counsel with a self-imposed reduction of Ms. Dean’s and her local counsel’s hourly rates from \$550 to \$500. (R. p. 5; Sanctions Order.)

On December 17, 2018, Cleaver-Brooks filed and served a timely motion to alter or amend that sanctions order under Rule 59(e), SCRCp. (R. p. 1477; Cleaver-Brooks’s Motion to Alter or Amend.) By order dated January 4, 2019, the trial court denied Cleaver-Brooks’s Rule 59(e) motion. (R. p. 27; Order Denying Cleaver-Brooks’s Motion to Alter or Amend Order.) This appeal followed on January 30, 2019. (R. p. 1608; Notice of Appeal.)

STANDARD OF REVIEW

There is simply no basis whatsoever in the record to support the trial court’s sanctions order. Fortunately, because the sanctions order awards the plaintiffs their attorneys’ fees, this Court must take its own view of the evidence when reviewing that order, owing no deference to the trial court’s factual conclusions. As explained in former Chief Justice Toal’s treatise:

[I]n cases in which the sanctions ordered by the trial court include an award of attorneys' fees, there is an interplay between the traditional standard of review for sanctions in general—in which the appellate court determines whether the trial court has abused its discretion—and the traditional standard of review for equity cases—in which the appellate court may find facts in accordance with its own view of the preponderance of the evidence.

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

Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* at 248 (“Discovery: Sanctions”) (3d ed. 2016) (emphasis added and internal citation of numerous South Carolina cases omitted); *see also Father v. S.C. DSS*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003) (“So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts.” (citing S.C. Const. art. V, § 5)), *superseded in unrelated part by statutory amendment as reported in Clegg v. Lambrecht*, Op. No. 4498, 2009 S.C. App. LEXIS 353, at *9–10 n.5 (S.C. Ct. App. Feb. 5, 2009).¹

Only if this Court agrees with the trial court’s factual findings does it review the decision to award sanctions, and the terms of the sanctions, for an abuse of discretion. *See Father*, 353 S.C. at 261, 578 S.E.2d at 14 (“[W]here 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.”). Thus, if the Court even reaches this stage of the analysis, it must reverse the trial court’s decision if it is “controlled by an error of law or is based on unsupported factual conclusions.” *Id.*

¹ The trial court even acknowledged that it was proceeding in equity when issuing the sanctions order. (*See* R. p. 22; Sanctions Order at 18 (citing *Kilcawley v. Kilcawley*, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994)).)

ARGUMENTS AND AUTHORITIES

I. The trial court's sanctions order is contrary to the full, unbroken history of this case, including the plaintiffs' numerous representations below.

This Court should reverse the trial court's sanctions order because it is based on a complete fiction and bears no connection to the actual history of this case. The error is manifested in this sentence: "In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. p. 6; Sanctions Order at 2.)

This is entirely false. The "number of Cleaver-Brooks boilers" was never in dispute until the plaintiffs questioned Mr. Welker—a third-party witness—during trial about a fictitious second boiler after he had provided testimony that completely devastated the plaintiffs' actual theory of the case. When Cleaver-Brooks opposed the plaintiffs' sanctions motion, it certainly did dispute that the number of boilers was ever in issue: it did so throughout its opposition memorandum (*see, e.g.*, R. p. 1400; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions at 10 ("Plaintiffs' counsel apparently conceived this [two-boiler] theory weeks before trial, but never took any discovery on this theory.")), and it did so in its letter objecting to the plaintiffs' proposed order (*see, e.g.*, R. p. 1471; Letter Objecting to Plaintiffs' Proposed Order at 1 (Nov. 2, 2018) ("The 'number of Cleaver-Brooks boilers' was never in dispute until after documents from Bowater Paper Mill produced in trial revealed that the Cleaver-Brooks boiler was in the administration building." (emphasis in original))).

To suggest that the number of Cleaver-Brooks boilers was in issue at any point before Mr. Welker's trial testimony is both nonsensical and disingenuous. For one, the boiler that the plaintiffs now pretend they believed may have been at Bowater—Unit Number O-18344—was always located in Illinois. It would make no sense at all for Cleaver-Brooks to suppress

exculpatory evidence on this exact issue. Defendants crave Rule 12 and Rule 56 motions, not trials. If Cleaver-Brooks had documents that it knew would have or even might have foreclosed a potential trial on this issue, it would have had zero incentive to keep those materials to itself until after it had incurred the financial and emotional expense of starting a trial.

Moreover, the case's unbroken, undisputed history should give this Court full confidence that Cleaver-Brooks did not irrationally withhold production of exculpatory documents until the middle of trial. The plaintiffs' own conduct during each phase of the litigation confirms that those documents were not relevant until the plaintiffs manufactured and revealed their "two boiler" theory during Mr. Welker's testimony at trial, as summarized below.

Plaintiffs' Representations During Hearings. The trial court held multiple pretrial hearings. Every time, the plaintiffs confirmed to the trial court that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 622; Hr'g Tr. 57:8–13 (Jan. 24, 2018) ("He worked on all the boilers in the powerhouse. I learned in January on[e] of the boilers sold to Bowater was Cleaver-Brooks.") (remarks of Ms. Dean); R. p. 634; Hr'g Tr. 18:16–19 (Mar. 9, 2018) ("You'll see for *Howe*, it's just limited to a presumption that the boiler is in the power house and/or we're going to ask to be able to use this late-identified [by the plaintiffs] witnesses.") (remarks of Ms. Dean).)

Plaintiffs' Representations During Rule 30(b)(6) Depositions. The plaintiffs twice deposed Cleaver-Brooks's corporate designee. Both times, the plaintiffs confirmed to Cleaver-Brooks that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 1230; Tornetta Dep. 9:13–21 (Feb. 2, 2018) ("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. Q: And do you

know where that boiler was located at Bowater? A: Specifically on the site or what building, I couldn't find anything in our records that indicated specifically where it was, no."); R. p. 1260; Tornetta Dep. 228:13–18 (Mar. 6, 2018) ("Q: Short story shorter, you don't know where at Bowater the Cleaver-Brooks boiler was installed. True? [objection of counsel] A: I don't have a definitive way to determine that in our records, no.").

Plaintiffs' Representations in Written Submissions. The parties filed numerous pretrial memoranda with the trial court. Every time, the plaintiffs confirmed that the only issue in dispute was the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. (*See, e.g.*, R. p. 1130; Plaintiffs' Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 11 ("Plaintiffs submit that the exhibit [*i.e.* a boiler inspection report], in fact, supports Wayne Howe and Gilbert Small's testimony as the exhibit shows that during the time that Cleaver-Brooks insists that it shipped its boiler to Bowater, the only boilers at Bowater were located in the powerhouse."); R. p. 1135; Plaintiffs' Supplemental Response in Opposition to Cleaver-Brooks's Motion for Summary Judgment at 4 ("Not only could Cleaver-Brooks not testify as to where the boiler at Bowater was located, Mr. Tornetta confirmed that the Cleaver-Brooks boiler located at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope.")).

Plaintiffs' Silence Throughout. Not only did the plaintiffs' affirmatively proclaim that the only disputed issue was the location of a single Cleaver-Brooks boiler at Bowater, they also never disputed this point when others parroted back this narrow issue as being the only factual dispute between the parties.

For instance, when Cleaver-Brooks sought a protective order for the plaintiffs' Rule 30(b)(6) deposition notice on grounds of overbreadth, it noted that the limited dispute involved

allegations “that Cleaver-Brooks manufactured a boiler used at the Bowater Paper Mill in Rock Hill/Catawba, South Carolina which contained asbestos to which the Plaintiff was exposed, and which exposure contributed to his alleged asbestos related injuries.” (R. p. 869; Cleaver-Brooks’s Motion for Protective Order at 1.) In that same filing, Cleaver-Brooks also explained that it had “produced a collection of documents regarding its shipment of a boiler to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs’ counsel.” (R. p. 870; *id.* at 2.)

If the plaintiffs believed that the scope of the case exceeded the location of that single boiler, or if the plaintiffs truly believed—as they suddenly claimed in the middle of trial—that the documents that Cleaver-Brooks produced related to multiple boilers, they would have naturally corrected Cleaver-Brooks’s statements and made clear that the case was really about multiple boilers. But they did not. Only silence.

Likewise, the documents that Cleaver-Brooks produced during discovery were all within a folder labeled “O-18343,” making it obvious that Cleaver-Brooks understood those records related to this single boiler. (R. p. 678; BPM 000001.) If the plaintiffs truly believed that folder contained records about an additional boiler, they would have naturally served a document request, an interrogatory, or a request for admission regarding that additional boiler. Or, if there was any legitimate confusion as to which boiler or boilers those records related, the plaintiffs would have naturally asked the Rule 30(b)(6) designee about that additional boiler during either of his depositions. But they did not. Only silence.

Perhaps most telling is their silence in response to remarks of the trial judge herself. During a hearing on the last business day before trial, the trial court condensed the case to its single issue: “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." (R. p. 641; Hr'g Tr. 25:15–20 (Mar. 9, 2018) (remarks of Judge Toal).) Once more, if the plaintiffs believed that the scope of the case exceeded the location of that single boiler, they would have naturally corrected the trial judge's observation and made clear that the case was really about multiple boilers. But, once again, they did not. Only silence.

* * * * *

The upshot of this is that Cleaver-Brooks cannot possibly be sanctioned for its mid-trial production of documents (1) that were never requested (2) about a boiler that was in Illinois (3) in response to a mid-trial surprise from the plaintiffs during Mr. Welker's testimony. In fact, the South Carolina Supreme Court has addressed this exact situation and held that it is error to exclude such rebuttal evidence from trial.

In *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), a psychiatric patient at Charter Rivers committed suicide, and his estate sued Charter Rivers for negligence. During discovery, the plaintiff's expert disclosed an opinion regarding the alleged negligence of Kim Stroud, one of Charter Rivers's occupational therapists. *Id.* at 74, 393 S.E.2d at 917. At trial, though, the plaintiff's expert witness offered opinion testimony regarding both Ms. Stroud and Barbara Higdon, a psychiatric nurse at Charter Rivers. *Id.*

In response to this mid-trial surprise, Charter Rivers sought to offer testimony from a previously undisclosed expert witness, Nurse Jennifer Savitz. *Id.* As proffered, Nurse Savitz's testimony would have directly rebutted the plaintiff's expert's opinion testimony regarding Ms. Higdon that was first disclosed during trial. *Id.* Nevertheless, the trial court refused to allow Charter Rivers to present Nurse Savitz's testimony to the jury. *Id.*

The Supreme Court reversed. It held the trial court's exclusion of Nurse Savitz's rebuttal testimony was reversible error, even under an abuse-of-discretion standard, because Charter Rivers "was clearly prejudiced by the exclusion of this evidence" that was offered to directly respond to the plaintiff's in-trial surprise expert testimony regarding Ms. Higdon's conduct. *Id.*

If the trial court's sanctions order in this case was the law, Charter Rivers would have been the party sanctioned in *Bramlette*: first, for not correctly guessing that the plaintiff's expert would have an opinion regarding Ms. Higdon; and second, for not providing Nurse Savitz's testimony in advance of trial to rebut that undisclosed opinion.

That would be outrageous, of course. But that is the exact outcome of the trial court's sanctions order here; it has punished Cleaver-Brooks for promptly responding in real-time to a sneak attack from the plaintiffs in the middle of a trial. This is backwards, and the trial court has penalized the wrong party here.

Bramlette makes clear that the trial court was wrong to exclude Cleaver-Brooks's documents regarding Unit Number O-18344 from being admitted at trial. It also makes clear that the trial court was even more wrong to sanction Cleaver-Brooks over \$300,000 for a production it promptly made in response to the plaintiffs' in-trial surprise.

Because this Court must review the facts and draw its own conclusions without deference to the trial court's ruling, it should find that sanctions are wholly improper here and reverse and vacate the sanctions order accordingly. There is simply no basis for that order anywhere in the record below.

II. The plaintiffs waived any argument for sanctions by questioning witnesses about the very documents upon which their request for sanctions is based, and by doing so without objection.

The trial court's sanctions order is improper not only because it is belied by the case's entire record and procedural history, but also because the plaintiffs themselves opened the door to Cleaver-Brooks's production of records regarding Unit Number O-18344 by asking questions about that boiler to both Art Welker, a third-party witness, and John Tornetta, Cleaver-Brooks's corporate designee, during the plaintiffs' case-in-chief. (*See* R. pp. 239–42; Trial Tr. 488:14–491:20 (questioning Mr. Welker regarding Unit Number O-18344); R. pp. 336–47; Trial Tr. 686:2–697:19 (questioning Mr. Tornetta regarding Unit Number O-18344).)

The plaintiffs did not object to Cleaver-Brooks's production of records regarding Unit Number O-18344 or any testimony about those records until after they had rested their case, and after the trial court resolved Cleaver-Brooks's motion for a directed verdict. (R. p. 359; Trial Tr. 709:10.) That objection came far too late and operates as a waiver in two ways.

First, the plaintiffs—not Cleaver-Brooks—were the party who put the location of Unit Number O-18344 at issue, and they opened that door in the middle of trial during Mr. Welker's testimony. As a matter of South Carolina law, a party who raises a previously unknown issue in trial waives its objections to the presentation of rebuttal evidence. *See, e.g., Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) (“A litigant cannot complain of prejudice by reason of an issue he has placed before the court.”); *Bramlette*, 302 S.C. at 74, 393 S.E.2d at 917 (reversing a trial court's exclusion of evidence produced during trial to rebut surprise trial testimony from the plaintiff); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence

would be incompetent or irrelevant had it been offered initially.” (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))) (brackets supplied by the *Stroman* court).

Accordingly, the plaintiffs waived any right they had to complain regarding Cleaver-Brooks’s production of records regarding Unit Number O-18344 when they began questioning Art Welker about that boiler, as Cleaver-Brooks was “entitled to introduce evidence” to rebut the misleading questions that the plaintiffs asked of Mr. Welker.

Second, the plaintiffs withheld their objections to Cleaver-Brooks’s records regarding Unit Number O-18344 until after they had concluded questioning Mr. Tornetta about that boiler. They even presented to the jury a portion of the records that Cleaver-Brooks transmitted in response to the plaintiffs’ “two boiler” theory. (R. p. 335; Trial Tr. 685:8–15.) By silently withholding their objection and allowing that information to come into evidence, the plaintiffs waived their right to object to that testimony or those documents. *See State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) (“Failure to object when the evidence is offered constitutes a waiver of the right to object.”); *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) (“The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.”).

At bottom, it is fundamentally unfair to allow a party to induce the production of additional documents, present testimony about those documents to a jury, and then complain when it is dissatisfied with the witness’s responses. This kind of posturing is prohibited as a matter of South Carolina law. *See State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) (“He cannot complain of an error which his own conduct has induced.”), *overruled in unrelated part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Because the plaintiffs created the very situation upon which the sanctions order is based, this Court should vacate the sanctions order due to the plaintiffs' waiver of any objections regarding Cleaver-Brooks's production of records to rebut the plaintiffs' in-trial surprise testimony.

III. The sanctions order is procedurally improper.

In addition to being belied by the entire factual record of this case, the sanctions order is procedurally improper. The trial court relied on Rule 37(b) as the exclusive basis for exercising post-judgment jurisdiction here, but that rule is facially inapplicable in this case. The trial court also ignored the plaintiffs' counsel's conduct under Rule 11 and related rules of professional responsibility, which would have been violated if their post-judgment story is to be believed. Each error is discussed below in turn.

A. Rule 37(b)(2) only applies when a party violates a discovery order, which does not exist here because the plaintiffs never requested documents about Unit Number O-18344.

The first procedural error in the sanctions order is its singular reliance on Rule 37(b)(2), SCRCP, as the jurisdictional nexus for awarding sanctions. (R. p. 14; Sanctions Order at 10.) That rule authorizes sanctions when “a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f)” Rule 37(b)(2), SCRCP (emphasis added).

That rule is facially inapplicable here. There is no such discovery order that Cleaver-Brooks could have possibly violated, as there was never any order directing Cleaver-Brooks to produce documents related to Unit Number O-18344. The plaintiffs never allege that Cleaver-

Brooks violated any discovery order, nor did the trial court identify any in its sanctions order. This is critical, because Rule 37(b)(2) is only operative when a litigant defies a discovery order.

The reason there is no such order in this case is straightforward: the plaintiffs never conducted any discovery at all regarding Unit Number O-18344. As the trial court noted in its sanctions order, “Plaintiffs’ discovery requests pertained to documents relevant to Wayne Howe’s worksites.” (R. p. 15; Sanctions Order at 11.) It is undisputed that Unit Number O-18344 was not at a worksite that Mr. Howe ever visited. Accordingly, there was no reason for Cleaver-Brooks to produce records regarding that boiler or that worksite until the middle of trial when the plaintiffs, for the first time, suggested that they thought this boiler was at Bowater.

Puzzlingly, the trial court dismissed this argument as “irrelevant” (R. p. 14; Sanctions Order at 10) and as “miss[ing] the point.” (R. p. 15; *id.* at 11.) But it is not “irrelevant”; it is dispositive.

The South Carolina Supreme Court has been clear that when a party alleges that another has given an incomplete discovery response, the court has an obligation to evaluate the response “in light of the question asked.” *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991). No such evaluation took place here. Instead, the trial court simply declared that Cleaver-Brooks should have produced documents related to Unit Number O-18344 because, according to the trial court, those records are responsive to a standard interrogatory in asbestos cases that called for production of “‘documents which show sales’ pertaining to products containing asbestos to job sites at which plaintiff was employed, which included Bowater.” (R. p. 10; Sanctions Order at 6.)² Indisputably, the trial court is wrong.

² Even with this citation, the trial court failed to identify a specific interrogatory or document request.

Unit Number O-18344 was shipped to a facility in Illinois, not to any worksite that Mr. Howe ever visited. Accordingly, there is no way to claim that records regarding that boiler were responsive to a discovery request that was pegged to locations Mr. Howe worked. Had the trial court evaluated those records “in light of the question asked,” it would have recognized that they were not responsive to any discovery requests served on Cleaver-Brooks, and it would have recognized how incredibly inequitable it is to sanction Cleaver-Brooks for not producing documents that were never requested, while also fully excusing the plaintiffs’ own failures to conduct any discovery at all on an issue they claim they were aware of all along.

In any event, it cannot be the law that a party can be sanctioned for not producing records that were never requested, or for allegedly violating a discovery order that does not even exist. Because no such discovery order exists here, the trial court erred by relying on Rule 37(b)(2) as its jurisdictional basis for awarding sanctions. Moreover, the time for filing any other post-judgment motion has long since expired and cannot be extended. *See* Rule 6(b), SCRCF (“The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them.”). Accordingly, the trial court’s ruling should be vacated for lack of jurisdiction.

B. Assuming the plaintiffs’ counsel’s statements are true, the sanctions order improperly rewards them for ignoring their obligations and duties under Rule 11 and the Rules of Professional Conduct.

The second procedural error in the sanctions order involves the trial court’s disregard of counsel’s professional duties of candor and not to present non-meritorious claims.

The sanction issued here represents all of the plaintiffs’ attorneys’ fees for their alleged time spent working on this case from the day before trial through the verdict, plus all of the plaintiffs’ alleged trial expenses, plus time away from work for Mr. Howe’s children to attend

trial. (R. p. 25; Sanctions Order at 21.) The trial court based its decision to award such an enormous sanction on this assertion by the plaintiffs' national counsel: "If Plaintiffs had been in possession of the midnight documents [*i.e.* the records regarding Unit Number O-18344] before trial started, Plaintiffs would not have proceed to trial against Cleaver-Brooks." (R. p. 1294; Dean Aff. ¶ 19.)

Cleaver-Brooks does not believe that this statement of counsel is true, but it was denied the opportunity to conduct discovery to test the veracity of this assertion. That denial of discovery is reversible error, as it precluded Cleaver-Brooks any opportunity to find out the truth of counsel's assertions that were the keystone of the sanctions order.³ *See Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2008) ("Where 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.").

Nevertheless, based on the information already available, there are several reasons why Cleaver-Brooks does not believe that counsel's statement is true.

First, Cleaver-Brooks produced documents about Unit Number O-18344 on March 15th. The jury returned its verdict on March 21st, almost a full week later. The plaintiffs certainly did not stop the trial and dismiss their claims upon receiving these records; instead, they pressed forward with several additional days of trial. This belies any suggestion that the plaintiffs would have stopped the litigation if they had seen documents regarding Unit Number O-18344 in advance of trial.

³ Cleaver-Brooks sought such discovery in multiple filings. (R. p. 1409; Cleaver-Brooks's Opposition to Plaintiffs' Motion for Sanctions at 19; R. p. 1481; Cleaver-Brooks's Motion to Alter or Amend at 5.) The trial court did not address this issue in either of its orders.

Second, even after receiving the records regarding Unit Number O-18344, the plaintiffs continued arguing to the jury that the core factual dispute between Cleaver-Brooks and the plaintiffs was the location of a Cleaver-Brooks boiler at Bowater. In her closing argument, the plaintiffs' national counsel—the same attorney who swore under oath that the plaintiffs would never have proceeded to trial if they had known that Unit Number O-18344 was in Illinois—repeatedly argued as follows:

A boiler operating in February of '58 is not in a building that doesn't exist.
Unit 18343 is not the boiler put in the administration building, that's the
first thing we know cleanly.

* * *

So the next thing we have to prove is not just that was in the powerhouse,
but because Wayne Howe spent so much time there, that's why we were
focusing on the powerhouse that he worked with that boiler.

* * *

Direct evidence. Cleaver-Brooks was there in the powerhouse.

(R. pp. 518, 524, 528; Trial Tr. 1019:2–6, 1025:13–16, 1029:6–7.) The plaintiffs' closing argument confirmed that the true factual dispute between the parties at the close of trial was the same as it had been since the outset of the litigation: identifying the location of the only Cleaver-Brooks boiler on the Bowater campus, not how many Cleaver-Brooks boilers were there.

At bottom, the plaintiffs did not let the production of records regarding Unit Number O-18344 in response to their attempted mid-trial surprise slow them down or even alter their actual trial strategy to convince a jury that Boiler Unit O-18343 was in the powerhouse at Bowater where Mr. Howe had worked. Standing alone, this is sufficient to discredit the plaintiffs' counsel's self-serving post-trial statement about the preeminent importance of those documents. But if counsel's statement is to be believed and taken at face value, it is an admission of violations of multiple rules governing attorney conduct.

Rule 11(a), SCRPC, provides that every pleading must be signed by an attorney, and that signature operates as a certificate that the lawyer has read the pleading and “that to the best of his knowledge, information and belief there is good ground to support it.” This is similar to Rule 3.1 of the South Carolina Rules of Professional Conduct, which directs attorneys not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous” And, as a corollary principle, Rule 3.3 requires “candor toward the tribunal,” including not making false statements of fact or offering “evidence that the lawyer knows to be false.” S.C. Rules of Professional Conduct Rule 3.3(a)(1), (3).

If the plaintiffs truly believed that the records regarding Unit Number O-18344 dispelled every remaining factual dispute in the case, they had an obligation to cease the proceedings on March 15th, dismiss their claims against Cleaver-Brooks, and report this dismissal to the trial court. They did none of those things. By issuing a sanctions order based on the notion that the entire trial would never have happened but for Cleaver-Brooks’s failure to produce records regarding Unit Number O-18344, the trial court rewarded the plaintiffs’ counsel for ignoring their duties of candor and to bring only meritorious claims.

This is fundamentally inequitable and is squarely contrary to every policy embodied in Civil Rule 11 and in Professional Conduct Rules 3.1 and 3.3. Accordingly, to the extent that the Court credits the plaintiffs’ counsel’s representation that the plaintiffs would not have proceeded to trial had they reviewed records regarding Unit Number O-18344 in advance of trial—again, documents that they never requested or asked anyone about at any point before the middle of trial—the trial court’s order should be reversed because it encourages and even rewards counsel for ignoring their professional duties of candor and not to misuse judicial resources.

IV. If the Court believes that Cleaver-Brooks has done anything at all wrong here, the sanctions are grossly disproportionate and amount to an abuse of discretion.

Only if the Court, after taking its own independent review of the case's facts, believes that Cleaver-Brooks did anything wrong here does the analysis transition into the specifics of the trial court's sanctions order. That is reviewed for an abuse of discretion, which exists when the trial court's ruling lacks factual support, when the trial court commits an error of law, or when the trial court fails to exercise any discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without any evidentiary support. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). The trial court's sanctions order is replete with failures in each of these three abuse-of-discretion categories, as explained below.

A. In virtually every respect, the sanctions order lacks any factual support.

The sanctions order is loaded with factual statements upon which the trial court based its enormous sanctions decision, but for which there is no evidentiary support anywhere in the record. For instance:

<u>Sanctions Order</u>	<u>Statement in Sanctions Order</u>	<u>Citation in Support of Statement</u>
Page 2 (R. p. 6)	"In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers."	Nothing cited in support of statement in the order, because it is not true. (<i>See</i> Argument I <i>supra</i> .)

<u>Sanctions Order</u>	<u>Statement in Sanctions Order</u>	<u>Citation in Support of Statement</u>
Page 7 (R. p. 11)	“Cleaver-Brooks’ corporate representative Tornetta admitted at trial that Plaintiffs had explicitly asked for those index cards during his deposition.”	The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210–11; Ex. A to Plaintiffs’ Reply in Support of Sanctions.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (<i>See</i> Argument III.A <i>supra</i> .)
Page 7 (R. p. 11)	“By Cleaver-Brooks’ admission, it was again reminded of its obligation to supplement its document production when, following Art Welker’s February 20, 2018 deposition, Plaintiffs again asked Cleaver-Brooks to produce responsive documents.”	The sanctions order cites Page 5 of Cleaver-Brooks’s memorandum in opposition to sanctions, but that memorandum states that the “Plaintiffs’ counsel requested that Bowater”— <u>not</u> Cleaver-Brooks—“continue to look for documents related to the Cleaver-Brooks boiler.” (R. p. 1395.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true.
Page 9 (R. p. 13)	“Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Tornetta admitted that they had been sitting in his office all along and that Plaintiffs had asked him for them months ago during his depositions.”	The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210–11; Trial Tr. 121:12–122:11.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (<i>See</i> Argument III.A <i>supra</i> .)

<u>Sanctions Order</u>	<u>Statement in Sanctions Order</u>	<u>Citation in Support of Statement</u>
Page 14 (R. p. 18)	"Cleaver-Brooks chooses its words carefully, and misleadingly, because its corporate representative admitted that Plaintiffs had requested the index cards at his deposition, Trial Trans. at 121:12-122:11—whether that request was on the record is of no moment."	The sanctions order includes a citation to the trial transcript in support of this statement, but the portion of the transcript that is cited involves a discussion about a records custodian affidavit from the Dallas Public Library and a membership list of the American Society of Mechanical Engineers, neither of which have anything to do with Mr. Tornetta or Cleaver-Brooks. (R. pp. 210-11; Trial Tr. 121:12-122:11.) The sanctions order does not include a citation to anything in the record that actually supports the statement in the order, because it is not true. (<i>See</i> Argument III.A <i>supra</i> .)
Page 14 (R. p. 18)	"The documents [regarding Unit Number O-18344] were discussed during both of Tornetta's depositions, at which, Tornetta admitted, he was asked to produce the index cards."	Nothing cited in support of this statement in the order, because it is not true.
Page 15 (R. p. 19)	"Without question, the jury understood that the key issue in the case was the number and location of boilers at Bowater."	Nothing cited in support of this statement in the order, because it is pure speculation.
Page 17 (R. p. 21)	"Here, a discovery sanction is warranted both to penalize Cleaver-Brooks and because Cleaver-Brooks continues to hide such documents in other cases, such that deterrence is required."	Nothing cited in support of this statement in the order, because it is not true.

The complete absence of any factual support for these statements, which predominated the sanctions order, as well as the sanctions order's complete detachment from the actual record of the case that is detailed in the preceding sections of this brief, makes clear that the trial court abused its discretion when it decided to sanction Cleaver-Brooks.

Moreover, the record should also lack any evidentiary support for the plaintiffs' counsel's fees and litigation expenses. All of the proof that the plaintiffs produced in support of their sanctions motion were six affidavits: two from their lead national counsel, one from the national counsel's associate, one from their local counsel, and two from Mr. Howe's children. (R. pp. 1291, 1299, 1311, 1389, 1428, 1578; Affidavits from Dean, Holder, McVey, Howe, and Myers.) The plaintiffs filed their motion for sanctions on March 31, 2018 (R. p. 1156), but they did not serve Cleaver-Brooks with those supporting affidavits from national counsel and one of the Howe children until April 30, 2018, and they did not serve the local counsel's affidavit until May 1, 2018. (R. p. 1424; Plaintiffs' Notice of Filing Affidavits in Support of Motion for Sanctions.)

This was too late by a full month. Rule 6(d), SCRCP, specifically requires that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion," not at some later date. Cleaver-Brooks properly objected to those affidavits. (R. p. 1475; Letter Objecting to Plaintiffs' Proposed Order at 5; R. p. 1480; Cleaver-Brooks's Motion to Alter or Amend at 4.) The plaintiffs never moved to be excused from complying with Rule 6(d)'s timely service requirement, but the trial court ignored both the plaintiffs' noncompliance and Cleaver-Brooks's objections without any explanation.

Because the plaintiffs' only evidence in support of their sanctions request violated Rule 6(d), those affidavits should be stricken from the record, and the trial court's sanctions order should be vacated for lack of any proof to support its factual findings.

B. The sanctions order erroneously held that the trial court's exclusion of Cleaver-Brooks's records regarding Unit Number O-18344 was not a sanction, which is an error of law.

In addition to being factually baseless, the sanctions order is also based on an incorrect legal premise. As discussed above, the trial court did not have jurisdiction under Rule 37(b)(2),

SCRCP, to issue sanctions because Cleaver-Brooks did not violate any discovery order in this case. However, assuming *arguendo* that this rule has any applicability here, the trial court incorrectly held that its exclusion of Cleaver-Brooks's records regarding Unit Number O-18344 at trial was somehow not a sanction. (See R. pp. 20–21; Sanctions Order at 16–17 (“Exclusion of evidence is not a sanction.”).)

This is wrong as a matter of law. Rule 37(b)(2)(B), SCRCP, specifically identifies excluding evidence at trial as a sanction for a violation of this rule: “An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.” Accordingly, the trial court’s belief that it should impose monetary sanctions against Cleaver-Brooks for a perceived violation of discovery order—again, which is simply not true—because it had not yet sanctioned Cleaver-Brooks is incorrect as a matter of law and constitutes an abuse of discretion that should be reversed.

C. The trial court exercised no discretion at all when awarding the plaintiffs the entirety of their requested fees and expenses, including costs that bear absolutely no connection to the trial of this case.

Finally, the trial court abused its discretion by granting the plaintiffs’ sanctions motion in full without giving their request any scrutiny at all. The plaintiffs initially requested fees and costs of \$323,267. (R. p. 1294; Dean Fees Aff. ¶ 21; R. p. 1302; Holder Aff. ¶ 20; R. p. 1431; McVey Aff. ¶ 20; R. p. 1311; Dean Costs Aff. ¶ 3; R. pp. 1389, 1578; Affs. of Howe and Myers.) They then self-imposed a rate reduction for their lead national counsel and local counsel—both dropping from \$550 an hour to \$500—and self-imposed an elimination of \$4,600 of their requested costs in a proposed order, which the trial court subsequently signed without any alteration, amendment, or analysis. The trial court’s failure to conduct any legitimate review of the plaintiffs’ requested fees and costs amounts to an abuse of discretion in several respects.

Billing Identical Hours. The lawyers did not produce any kind of detailed records of their time spent working on the case. This is concerning, though, because the plaintiffs' national counsel and her associate both reported working the exact same amount of time each and every day leading up to and through trial. (*Compare* R. p. 1294; Dean Fees Aff. ¶ 21; *with* R. p. 1302; Holder Aff. ¶ 20.) The trial court dismissed this evidentiary concern without any inquiry, instead noting that these attorneys work together and, thus, would naturally have hours identical to one another. (R. p. 24; Sanctions Order at 20.) The refusal to allow any discovery on this issue, and the failure of the trial court to even scrutinize the issue *sua sponte*, is an abuse of discretion for failing to exercise any discretion at all.

Failure to Segregate Trial Time Spent on Boiler O-18344. The trial court also failed to analyze what portion of the trial was attributable to Cleaver-Brooks's production of records regarding Unit Number O-18344. Given that the plaintiffs were still arguing in their closing argument about the location of the Cleaver-Brooks boiler within the Bowater campus, it is simply not credible, nor is there any evidentiary support, to attribute the entire trial to Cleaver-Brooks's failure to produce records that were never requested about a boiler that was never anywhere near a jobsite at which Mr. Howe ever worked.

At most, questions about those records occupied perhaps an hour or less of trial time. (R. pp. 335–47; Trial Tr. 685:8–697:19.) But the trial court did not engage in any analysis to parse what portion of the trial was attributable to Cleaver-Brooks's production of records regarding a boiler in Illinois (virtually none), versus what portion of trial was attributable to the real issue in dispute regarding the location the Cleaver-Brooks boiler on the Bowater campus (virtually the entirety). Instead, the trial court blindly awarded the plaintiffs every penny of attorneys' fees that they requested without any analysis whatsoever, an award that is wildly disproportionate to any

alleged wrong by Cleaver-Brooks. As before, the trial court's failure to exercise any discretion is itself an abuse of discretion that requires reversal.

Expenses Unrelated to Trial. Just as with the plaintiffs' requested fees, the trial court failed to provide any analysis at all regarding their requested trial costs, which were \$90,835.16. (R. p. 25; Sanctions Order at 21.) However, the plaintiffs requested reimbursement for a crush of costs that have no connection at all to this trial, generally, or to responding to Cleaver-Brooks's production of records regarding Unit Number O-18344. In particular:

- **Transcripts:** The plaintiffs requested, and the trial court awarded, \$5,323.72 in costs for transcripts of depositions, hearings, and trial, including \$300 for cancelling a court reporter. (R. pp. 1312–13; Dean Costs Aff. ¶¶ 8–9.) Those expenses have nothing to do with issues regarding Unit Number O-18344, and they are all improperly awarded here.
- **Expert Costs:** The plaintiffs requested, and the trial court awarded, \$33,182.22 for their various expert witnesses. (See R. p. 1313; Dean Costs Aff. ¶ 10 (requesting \$37,782.22 in expert fees); R. p. 660; Hr'g Tr. 16:1–10 (Oct. 10, 2018) (withdrawing \$4,600 of the plaintiffs' requested expert fees).) Those witnesses all testified before any issue related to Unit Number O-18344 was even raised at trial. Cleaver-Brooks cannot possibly be responsible for witnesses that the plaintiffs called in their case-in-chief before the plaintiffs revealed their “two boiler” theory, particularly when those charges also include each expert's general, non-trial work on the case.
- **Vendor Costs:** The plaintiffs requested, and the trial court awarded, \$38,787.30 for them to hire a third-party vendor to provide paralegal services. (R. p. 1312; Dean Costs Aff. ¶ 7.) Among those charges is a \$1,600 charge for trial support from March 8th through March 10th (when there was no trial); a \$2,100 charge for trial support on March 22nd (a day after trial); and a \$1,600 charge for trial support (two days after trial). (R. pp. 1355–56; Dean Costs

Aff. Ex. 4 at Invoice 357 and Invoice 360.) Also included was a charge for \$10,507.30 for “expenses,” but there was no detail provided at all to support such an enormous “expense.” (R. p. 1357; Dean Costs Aff. Ex. 4 at Invoice 363.) Cleaver-Brooks cannot legitimately be charged costs for paralegal services at trial on days when there was no trial, or thousands of dollars in unknown paralegal expenses.

- Lodging: The plaintiffs requested, and the trial court awarded, \$10,180.40 in hotel costs. (R. p. 1312; Dean Costs Aff. ¶ 4.) Within that sum were several duplicative charges, including three identical entries for the exact same charge of \$1,056.72 on March 18th, and two identical entries for the exact same charge of \$1,056.72 on March 19th. (R. pp. 1319–23; Dean Costs Aff. Ex. 1 at March 18th and March 19th Entries.) Cleaver-Brooks cannot legitimately be charged multiple times for duplicative costs.

- Transportation: The plaintiffs requested, and the trial court awarded, \$1,749.75 for transportation costs. (R. p. 1312; Dean Costs Aff. ¶ 5.) Within that sum was a charge for \$101.98 to an entity known as “Blacklane GmbH” out of Berlin, Germany; \$165.70 in charges for Uber services during trial; a charge for \$1,361.16 for a rental car and \$72.56 charges for gasoline, which would make the Uber charges seem unnecessary; a charge for \$10.04 for Uber services a day after trial; and a charge for \$22.27 for Lyft services four days after trial. (R. pp. 1332–44; Dean Costs Aff. Ex. 2.) Cleaver-Brooks cannot legitimately be charged for superfluous taxi services, costs to an unknown German entity, and charges after the trial is over.

- Family Members’ Hourly Wages: The plaintiffs requested, and the trial court awarded, \$2,881.84 in wages for Timothy Howe and Wende Myers—Mr. Howe’s children—to attend trial. (R. pp. 1389, 1578; Howe and Myers Affs.) There is no basis at all in the law for awarding such lost wages.

Cleaver-Brooks does not believe that it can reasonably be responsible for any of the plaintiffs' alleged costs and expenses, as it did absolutely nothing wrong here. However, the trial court failed to account for or even analyze any of the myriad problems in the plaintiffs' overreaching request to be compensated for numerous litigation expenses that have absolutely nothing to do with the trial, generally, and nothing to do with Cleaver-Brooks's records regarding Unit Number O-18344, specifically. Accordingly, the trial court's refusal to exercise any discretion with respect to the plaintiffs' requested expenses amounts to an abuse of discretion that requires reversal.

CONCLUSION

As detailed above, this case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. That sole issue drove all discovery and pretrial litigation and makes evident the errors in the sanctions order on appeal.

The moment that the plaintiffs revealed their never-before-disclosed, never-before-discovered "two boiler" theory in the middle of trial, Cleaver-Brooks responded immediately and produced documents that same day demonstrating the error in the plaintiffs' new theory.

Parties should be encouraged to promptly produce materials during trial that respond to new issues that emerge from in-trial testimony. The trial court's order here, though, punishes Cleaver-Brooks for immediately locating and producing documents regarding a boiler that was never relevant to the case until the plaintiffs' in-trial surprise questions to a third-party witness.

This should not be sanctionable conduct, and as a matter of South Carolina law, it is not sanctionable conduct. Accordingly, the trial court's sanctions order should be reversed and vacated in full.

Respectfully submitted,

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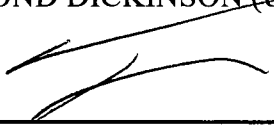
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CERTIFICATE OF COMPLIANCE

SC Court of Appeals

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

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June 7, 2019

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

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SC Court of Appeals

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. 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 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

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STATEMENT OF ISSUES ON APPEAL

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

The evidence therefore established that to the extent that there was a Cleaver-Brooks boiler in the powerhouse at Bowater, Mr. Howe would have worked on it. As stated by the circuit court, "[i]n its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the 'lynchpin' of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers." (R. 6.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Plaintiffs depose Cleaver-Brooks' corporate representative.

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

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

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

Mr. Tornetta’s admitted lack of preparation to discuss the Bowater plant and failure to produce all requested documents lead to the need for a second deposition. (R. 1292 ¶ 10.) Despite Plaintiffs’ efforts to conduct Tornetta’s deposition sooner, his second deposition was held just six days before trial. At his second deposition, Mr. Tornetta still failed to give his opinions that he would later set forth at trial—that the reference to a second boiler in the Bowater file was a repeated typographical error—or provide the relevant index cards. (*See generally* R. 1241-84.) Plaintiffs had no way to know that Cleaver-Brooks would claim mid-way through trial that the identification of one of its boilers was a typo.

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

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

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

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

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

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

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

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

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

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

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

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

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

Name BOWATERS-CAROLINA CORPORATION
Street Address _____
City CATAWABA
State SOUTH CAROLINA
Model Number P-723-30S
Unit Number O-18343
S. O. Number P-1170

C 10-882 A

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

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

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

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

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

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

12. The circuit court sanctions Cleaver-Brooks.

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Mr. Tornetta admitted that they had been sitting in his office all along and that Plaintiffs had asked him for them months ago during his depositions. (R. 331:13-14, R. 341:17 – R. 342:7.) Cleaver-Brooks' lackadaisical attitude does not forgive the time and resources wasted at trial as a result of its mishandling of its own documents. The circuit court rightly found that Cleaver-Brooks'

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

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

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

II. Plaintiffs did not waive any argument for sanctions.

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

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

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

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

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

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

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

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

MS. DEAN: . . . Your Honor, Ms. McVey had made a request on Friday that these actions were somewhat a lynch pin of our case, fundamentally fact of how we approached this trial. We want to seek -- I just want to make sure that if we seek sanctions for costs or time after trial we haven't waived anything.

THE COURT: You have already completely talked about how fundamental it was to your case so forth and so on, that is very well protected in the record as I view it.

(R. 1628:14-16.)

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

III. The sanctions order is procedurally proper.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(R. 28-29.)

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

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

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

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

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

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

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

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

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

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

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

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

Q So John, you've known me for a long time, I'm going to go right to the questions. **I want to start by asking for the answers to some of the very basic questions that are at issue in this case** and then I am going to go back and talk about the basis for your answers, okay?

A Okay.

Q Did Cleaver-Brooks ship a boiler to the Bowater Paper Mill in Catawba, South Carolina?

A Yes.

* * *

Q **How many boilers did Cleaver-Brooks ship to Bowater?**

A One.

Q What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.

A I think the whole unit number, if I get it, correctly is 0-18343.

Q **Did Cleaver-Brooks ship a boiler to Bowater with the unit number 0-18344?**

A No.

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

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

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

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

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

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

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

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

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending **may make such orders in regard to the failure as are just, and among others the following:**

* * *

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

In lieu of any of the foregoing orders **or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure**, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

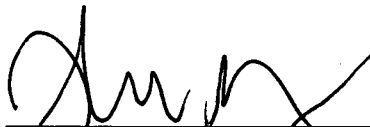
hearing on a motion to compel that all documents would be produced that day. As a result, Plaintiffs were forced to file a motion to compel, two motions for sanctions, both before and during trial, as well as a motion to strike the late-disclosed documents. Cleaver-Brooks' failure to abide by the discovery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

CONCLUSION

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

CERTIFICATE OF COUNSEL

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



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JUN 19 2019

SC Court of Appeals

June 14, 2019

Columbia, South Carolina.

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

RECEIVED

JUN 07 2019

SC Court of Appeals

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/k/a 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

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June 7, 2019

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

ARGUMENTS AND AUTHORITIES

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

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

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

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

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

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

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

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

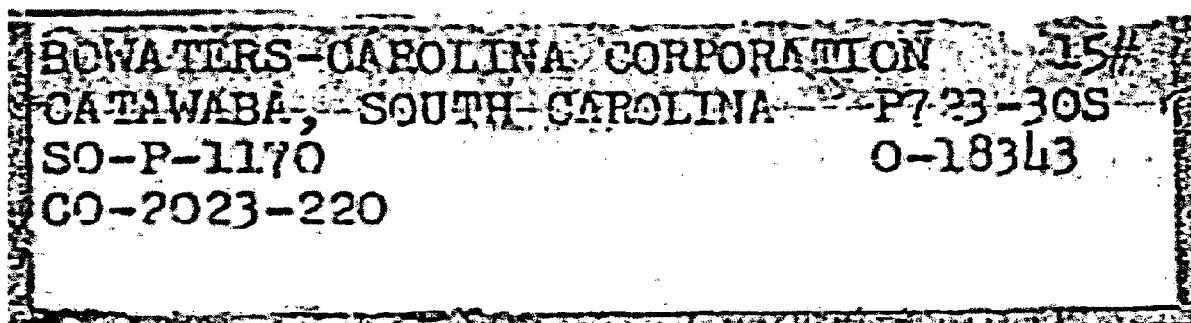
Index Card (R. p. 739)

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

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

CIC-287A

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



Each contains the exact same information:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And you will see some evidence that Cleaver-Brooks boilers⁴ sold to the Bowater Paper Mill had some asbestos containing refractory in them, put in at the factory and then sent out. This is a picture of the Bowater Paper Mill, and it’s a big facility. And you see those big stacks there, some of those stacks go where field erected boilers are, the big multistoried ones, and that’s important because some of these stacks are where the powerhouse is at Bowater, and that’s because Cleaver-Brooks only sold a package boiler. They sold this boiler and we know, we have some documents we believe you will see in evidence, that we sold this boiler in 1957, built it in the factory, shipped it to Bowater. The door gasket, which is—goes around the rear door and the front door, you’ll see this—I believe you’ll see this exact piece of evidence here on the left, the door gasket was 38 and one quarter inches in diameter. I believe you will hear some evidence that the opening for that boiler, the actual inside was 12 inches. And that’s important because one of the questions you’re going to be asked in this case is to evaluate some evidence about whether or not Mr.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

True?” (R. p. 1260; Tornetta Dep. 228:13–15 (Mar. 6, 2018) (emphasis added).) And as their counsel argued in opposition to summary judgment: “Not only could Cleaver-Brooks not testify as to where the boiler at Bowater was located, Mr. Tornetta confirmed that the Cleaver-Brooks boiler located at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope.” (R. p. 1135; Plaintiffs’ Supplemental Response in Opposition to Cleaver-Brooks’s Motion for Summary Judgment at 4 (emphasis added).)

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

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

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

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

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

Alternatively, if the plaintiffs are now arguing that they cured the timeliness problem with their affidavits by withdrawing their March 31st motion in order to have affidavits accompany their April 30th motion, the trial court's order should be vacated because it lacked jurisdiction to consider such a belated post-trial motion. The jury returned its verdict on March 21, 2018. A trial court loses jurisdiction to consider post-trial motions ten days after the verdict is rendered. *See* Rule 6(b), SCRCF ("The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them."); *id.* 50(e) (requiring motions to be filed within ten days); *id.* 52(b) (same); *id.* 59(b) (same); *id.* 59(e) (same). Accordingly, if the plaintiffs are now claiming that their untimely affidavits were timely because they accompanied a new motion on April 30th, the trial court's sanctions order should be vacated for lack of jurisdiction to consider that untimely motion.

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

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

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

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

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

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

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

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

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

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

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

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

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

Waiver. Finally, Cleaver-Brooks argued that the plaintiffs waived any argument that could support their sanctions request by (1) opening the door to the whole “two boiler” issue during trial, and (2) not objecting contemporaneously at trial when this issue was being addressed. (Cleaver-Brooks’s Br. at 29–31.) As a matter of South Carolina law, each of these circumstances operates as a waiver. *See, e.g., Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) (“A litigant cannot complain of prejudice by reason of an issue he has placed before the court.”); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to

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

introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.” (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))) (brackets supplied by the *Stroman* court); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) (“Failure to object when the evidence is offered constitutes a waiver of the right to object.”).

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

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

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

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

CONCLUSION

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

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

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

Signature Page Attached

Respectfully submitted,

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June 7, 2019

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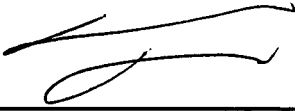
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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

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

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June 7, 2019

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.; Albany
International Corp.; Asten-Johnson, Inc.; Aurora Pump
Company; A.W. Chesterton Company; Borg Warner
Morse TEC, Inc., as successor to Borg-Warner
Corporation; 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; Fluor
Enterprises, Inc., f/k/a Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel Services
Corporation; Foster Wheeler Energy Corporation;
General Electric Company; The Gorman-Rupp
Company; Goulds Pumps, Incorporated; Ingersoll-Rand
Company; 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; SEPCO Corporation; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; and Zurn Industries, Defendants,

Of which Cleaver Brooks, Inc. is the Appellant.

Appellate Case No. 2019-000164

Appeal From York County
Jean Hoefer Toal, Acting Circuit Court Judge

Unpublished Opinion No. 2021-UP-422
Submitted September 1, 2021 – Filed December 1, 2021

AFFIRMED

Matthew Todd Carroll, of Womble Bond Dickinson (US) LLP, of Columbia; M. Elizabeth O'Neill, of Womble Bond Dickinson (US) LLP, of Charlotte, NC; and Steven James Pugh, of Richardson Plowden & Robinson, PA, of Columbia, all for Appellant.

Theile Branham McVey and John D. Kassel, both of Kassel McVey, of Columbia; and Renee Melancon and Jonathan Marshall Holder, both of Dean Omar Branham Shirley, LLP, of Dallas, TX, all for Respondents.

PER CURIAM: Cleaver-Brooks, Inc. (Cleaver-Brooks) appeals an order requiring it to pay all of the attorneys' fees, costs, and expenses for Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin

Howe, Deceased, and Jeannette Howe (the Howes). Cleaver-Brooks argues (1) the trial court's order is contrary to the history of the case; (2) the Howes waived any argument for sanctions by questioning the witnesses about documents upon which their request for sanctions was based; (3) the court's sanctions order is procedurally improper; and (4) the sanctions are grossly disproportionate and amount to an abuse of discretion. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court's order is contrary to the history of the case, we agree with the trial court's findings of fact and conclude the trial court did not abuse its discretion in imposing sanctions in the form of attorneys' fees and costs on Cleaver-Brooks for failing to provide discovery. *See* Rule 26(b)(1), SCRCP ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."); Rule 34(a), SCRCP (allowing any party to request from any other party "any designated documents, or electronically stored information (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained [and] translated, if necessary, by the respondent through detection devices into reasonably usable form) . . . which are in the possession, custody or control of the party upon whom the request is served"); Rule 37(b)(2), SCRCP (providing "[i]f a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust"); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003) ("The 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."); *id.* ("Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed."); *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("The imposition of sanctions is generally entrusted to the sound discretion of the [trial c]ourt." (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987))); *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003) ("[W]here 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."); *id.* ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.").

2. As to whether the Howes waived any argument for sanctions by questioning the witnesses about documents upon which their request for sanctions is based, we find Cleaver-Brooks put unit number 0-18344 at issue by listing both unit numbers in its Bowater file; thus, the Howes were entitled to ask the witnesses about the boilers without waiving their right to sanctions for failure to provide discovery. *Cf. Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) ("A litigant cannot complain of prejudice by reason of an issue he has placed before the court."). Further, sanctions are imposed by the court at its discretion based on the conduct of the parties. *See* Rule 37(b)(2), SCRPC (providing the court in which an action is pending may award sanctions in regard to the failure to comply with an order compelling discovery as are deemed just by the court); *Floyd v. Thornton*, 220 S.C. 414, 425-26, 68 S.E.2d 334, 339 (1951) ("One may not on review complain of a ruling which he has invited or induced the trial court to make."). We additionally find the Howes preserved their right to move for sanctions by their objection to the "midnight documents" following Cleaver-Brooks' motion for directed verdict and their request during trial to move for sanctions at a later time. *See Richardson on Behalf of 15th Cir. Drug Enft Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 598, 846 S.E.2d 14, 16 (Ct. App. 2020) ("The text of Rule 37, SCRPC, tells us a party does not need to file a motion to compel to request a sanction for another party's failure to answer a properly served discovery request. A party served with written discovery has a duty to answer it, unless the party objects based on a stated reason or moves for a protective order."); *id.* at 599, 846 S.E.2d at 16 ("The sanctions authorized by Rule 37(d) are therefore available even to a discovering party who has not spoken up about his adversary's silence."); *id.* ("The distinction between the two subdivisions [of Rule 37] is that there must be an order of the [c]ourt before sanctions are imposed under subdivision (b), while under subdivision (d)[,] a party may move directly for the imposition of sanctions.").

3. As to whether the court's sanctions order is procedurally improper, we find no error in the court's decision to instruct the clerk of court to wait to enter the verdict until after the court rendered its decision on the motion for sanctions against Cleaver-Brooks. *See* Rule 58, SCRPC (providing "upon a general verdict of a jury, . . . the clerk, *unless the court otherwise orders*, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court"

(emphasis added)). We also agree with the trial court that the "midnight documents" were requested by the Howes, and Rule 37(b)(2), SCRCF, applies as Cleaver-Brooks violated the discovery order by not producing the requested documents until mid-way through trial. *See* Rule 37(b)(2) (allowing for sanctions for failure to provide discovery).

4. As to whether the sanctions are grossly disproportionate and amount to an abuse of discretion, we find the court was permitted to exclude the "midnight documents" and award sanctions in the form of attorneys' fees and costs. *See* Rule 37(b)(2), SCRCF (permitting more than one sanction for the same wrong). We also find the trial court did not abuse its discretion in awarding the Howes attorneys' fees and costs due to Cleaver-Brooks' failure to cooperate with the discovery process and mid-trial production of documents despite numerous requests. *See McNair v. Fairfield Cnty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008) ("Under Rule 37(b)(2)(C), SCRCF, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action."); *Davis*, 409 S.C. at 283, 762 S.E.2d at 544 (determining the sanctions imposed were not unduly harsh in light of the appellants' willful and repeated failure to comply with various orders of the trial court, which resulted in unnecessary delay and prejudice to the respondents); *McNair*, 379 S.C. at 467, 665 S.E.2d at 832-33 (finding "the severe sanction" of dismissal was appropriate in light of the defendant's failure to produce documents seven and a half months after the trial court granted the plaintiff's motion to compel, which this court determined amounted to willful disobedience and resulted in delay and prejudice to the plaintiff's right to have the claim heard); *Temple v. Tec-Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544-545 (Ct. App. 2006), *aff'd in part, rev'd in part on other grounds*, 381 S.C. 597, 675 S.E.2d 414 (2009) (finding the trial court did not abuse its discretion when it excluded evidence as a sanction for defendant's actions in failing to provide, until the day before trial, documents pursuant to an order compelling production); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding the trial court properly considered the severity of the sanction when it struck a pleading based on the appellant's intentional defiance of the trial court's order and his willful destruction of evidence); *Scott*, 353 S.C. at 652, 579 S.E.2d at 158 (noting the trial court had the option to completely strike a party's pleadings in the matter as a sanction for its failure to cooperate in discovery); *Griffin Grading & Clearing, Inc.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (finding the striking of the defendant's answer as a discovery sanction was warranted based on the defendant's egregious failure to comply meaningfully with four prior orders compelling discovery, even after being warned of the consequences of its failure to

comply and after being assessed attorney's fees); *id.* ("In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice."); *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (stating "[a] trial judge's exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion" and "[t]he burden is on the party appealing from the order to demonstrate the trial court abused its discretion"). Furthermore, we find the amount of attorneys' fees awarded was reasonable. *See* Rule 37(b)(2), SCRCF (providing a trial court may award reasonable expenses, including attorneys' fees, for a party's failure to cooperate in discovery); *Burton v. York Cnty. Sheriffs Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) (stating the amount of attorneys' fees to be awarded in a case is within the discretion of the trial judge); *id.* at 358, 594 S.E.2d at 898 (noting the six factors a court considers when determining the amount of attorneys' fees are: "(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."). Finally, we find the requested litigation costs were supported with an affidavit as required by Rule 54(d), SCRCF, and were within the court's discretion because Cleaver-Brooks' failure to timely produce the "midnight documents" pervaded the trial and that evidence was important to the Howes' decision to go to trial in the first place.

AFFIRMED.¹

HUFF, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED

Dec 16 2021

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.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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December 16, 2021

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PETITION FOR REHEARING

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

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

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

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

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

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

- *Father v. South Carolina DSS*, 353 S.C. 254, 578 S.E.2d 11 (2003), which requires appellate courts to conduct a *de novo* review of all aspects of the lower court’s decision when a judge issues sanctions, a review that does not appear to have happened here.
- *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), which protects, rather than punishes, parties like Cleaver-Brooks who are sandbagged at trial by an adversary’s surprise questioning.
- *Baughman v. AT&T Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), and others like it that require courts to inspect the actual discovery requests prior to issuing a discovery sanction, an exercise in which no court has engaged in this case.
- Numerous cases that make clear parties like the Plaintiffs who introduce an issue into a case cannot then complain about the consequences of their own conduct.
- Numerous cases that evaluate the excessive nature of a sanction and hold that the failure to exercise any discretion is itself an abuse of discretion.

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

- “As to whether the trial court’s order is contrary to the history of the case, we agree with the trial court’s findings of fact and conclude the trial court did not abuse its discretion in imposing sanctions in the form of attorneys’ fees and costs on Cleaver-Brooks for failing to provide discovery.” (Unpub. Op. No. 2021-UP-422, ¶ 1.) The panel did not cite anything in the record in support of the notion that Cleaver-Brooks “fail[ed] to provide discovery.”
- “Further, sanctions are imposed by the court at its discretion based on the conduct of the parties.” (*Id.* ¶ 2.) The panel did not cite anything to indicate what “conduct” could have subjected Cleaver-Brooks to potentially the State’s largest discovery sanction.
- “We also agree with the trial court that the ‘midnight documents’ were requested by the Howes, and Rule 37(b)(2), SCRCF, applies as Cleaver-Brooks violated the discovery order by not producing the requested documents until mid-way through trial.” (*Id.* ¶ 3.) The panel did not identify to which discovery request records regarding a Cleaver-Brooks boiler in Illinois that Mr. Howe had never been around could possibly have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Brooks's same-day response to their litigation maneuvering. *See, e.g., Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004) ("A litigant cannot complain of prejudice by reason of an issue he has placed before the court."); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))) (brackets supplied by the Supreme Court); *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) ("He cannot complain of an error which his own conduct has induced."), *overruled in unrelated part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

SUGGESTION FOR REHEARING *EN BANC*

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

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

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

Respectfully submitted,

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December 16, 2021

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Dec 16 2021

SC Court of Appeals

PROOF OF SERVICE

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

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

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Dec 16 2021

SC Court of Appeals

December 16, 2021

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Timothy Howe v. Air & Liquid Systems Corp. (Cleaver-Brooks)
Appellate Case No. 2019-000164
Petition for Rehearing and Suggestion for Rehearing *En Banc*

Dear Ms. Kitchings:

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

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

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

Best regards,

/s/ M. Todd Carroll

cc: Counsel for Respondents

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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. Chestelion 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

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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 boilers, 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 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)

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 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)
- + 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) SCRPC. 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 Cleaver-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 places¹⁸ “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

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Jan 10 2022

SC Court of Appeals

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:

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Jan 18 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 Jeannette 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. 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
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January 18, 2022

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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.

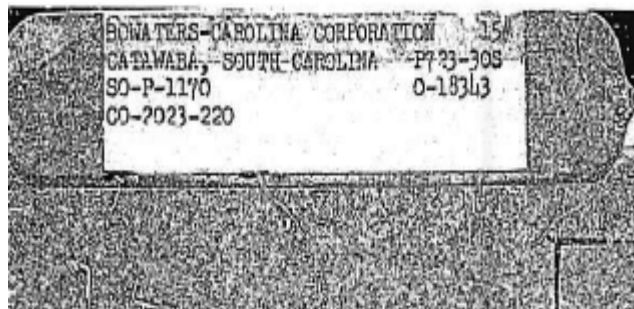
⁵ The only thing the Plaintiffs cite for this incorrect statement is the affidavit of its national counsel on which the sanctions order is based. (Return at 4 (citing R. p. 1294 (affidavit of Ms. Dean)).)

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 [Cleaver-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):

Name BOWATERS-CAROLINA CORPORATION
Street Address _____
City CATAWBA
State SOUTH CAROLINA
Model Number P-723-30S
Unit Number O-18343
S. O. Number P-1170

C 10-889A



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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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 . . ." SCRCP 26(b)(4)(A). In order for discovery to be meaningful, Plaintiff must be afforded the opportunity to discovery 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

Theile B. McVey (SC Bar No. 16682)

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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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/s/ M. Todd Carroll

January 18, 2022



The South Carolina Court of Appeals

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February 25, 2022

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M. Elizabeth O'Neill, Esquire
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Columbia SC 29201

Re: Timothy Howe v. Air & Liquid Systems (Cleaver-Brooks)
Appellate Case No. 2019-000164

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR.

Very truly yours,

V. Claire Allen

CLERK

cc: Theile Branham McVey, Esquire
Jonathan Marshall Holder, Esquire
Renee Melancon, Esquire
John D. Kassel, Esquire
The Honorable Jean Hoefer Toal

The South Carolina Court of Appeals

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.; Albany
International Corp.; Asten-Johnson, Inc.; Aurora Pump
Company; A.W. Chesterton Company; Borg Warner
Morse TEC, Inc., as successor to Borg-Warner
Corporation; 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; Fluor
Enterprises, Inc., f/k/a Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel Services
Corporation; Foster Wheeler Energy Corporation;
General Electric Company; The Gorman-Rupp
Company; Goulds Pumps, Incorporated; Ingersoll-Rand
Company; 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;
SEPCO Corporation; Sterling Fluid Systems (USA)
LLC; Trane U.S., Inc., f/k/a American Standard, Inc.,
f/k/a American Radiator & Standard Manufacturing

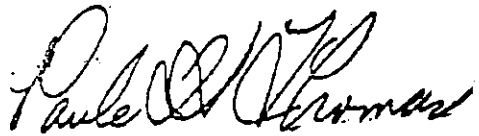
Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; and Zurn Industries, Defendants,

Of which Cleaver Brooks, Inc. is the Appellant.

Appellate Case No. 2019-000164

ORDER

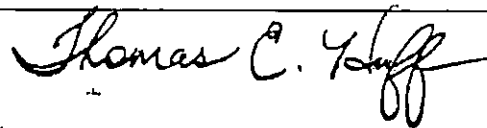
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

Matthew Todd Carroll, Esquire
M. Elizabeth O'Neill, Esquire
Steven James Pugh, Esquire
Theile Branham McVey, Esquire
Jonathan Marshall Holder, Esquire
Renee Melancon, Esquire

FILED
Feb 25 2022

John D. Kassel, Esquire
The Honorable Jean Hoefer Toal