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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal,
Chief Justice of the Supreme Court of South Carolina (Retired),
Acting Circuit Court Judge

Supreme Court Case No. 2022-000368
Court of Appeals Case No. 2019-000164
Circuit Court Case No. 2015-CP-46-3456

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeanette Howe,

Respondents,

v.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Cheste1ion Company; Beloit Corporation; Black Clawson Converting Machinery LLC, Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, A Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc. f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Enterprises, Inc. f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boe Group, Inc. f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as successor-in-interest to Buell Engineering Co.; Marsulex Environment Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies,

Inc. f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants,

Of which Cleaver Brooks, Inc. is the Appellant/Petitioner

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Cleaver-Brooks' Writ claims it is a "victim," that the trial court is guilty of "rewriting history," and that it is "without any explanation from any court as to what it did wrong or could have possibly done differently." Petition for a Writ of Certiorari, p. 10, 14, 17. In making such claims, Cleaver-Brooks ignores the express findings of the trial court and Court of Appeals, both of which determined it failed to timely and properly disclose relevant documents and information in discovery.

Cleaver-Brooks has already repeatedly been told "what it did wrong or could have possibly done differently." The Trial Court told it on multiple occasions, in both oral and written rulings. The Court of Appeals unanimously told it in its Opinion, and then confirmed its position by unanimously denying both Cleaver-Brooks' petition for rehearing and request for an *en banc* review. This Court should not have to tell Cleaver-Brooks again. Plaintiff/Respondent Timothy Howe therefore respectfully requests the Court deny Cleaver-Brooks' Petition for a Writ of Certiorari (hereinafter, "Cleaver-Brooks' Writ").

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does the Court of Appeals' unpublished opinion address a novel question of law, include a dissenting opinion, conflict with prior Supreme Court decisions, involve a substantial constitutional issue, or address a federal question in conflict with a United States Supreme Court decision?

2. Was the Court of Appeals required to restate the trial court's findings, when it explicitly stated it "agree[d] with the trial court's findings of fact," and when the record shows Cleaver-Brooks gave misleading and incomplete discovery responses?

3. Did the Trial Court abuse its discretion in determining the amount of appropriate sanctions?

COUNTER STATEMENT OF THE CASE

This case concerns Wayne Howe, who died of the terminal cancer, mesothelioma, caused by asbestos. (R. 1616:13 – R. 1624:18.) Plaintiffs were Mr. Howe's surviving spouse, Jeanette Howe,[1] and son and personal representative for his estate, Timothy Howe.

Before his passing, Mr. Howe testified he worked at Bowater paper mill in Rock Hill, South Carolina for several decades as a pipefitter and mechanic. (R. 1184:18 – R. 1187:3, R. 1191:13-15.) While there, he was exposed to asbestos from boilers, pipes, and precipitators located in 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.) It was undisputed that Cleaver-Brooks had manufactured at least one boiler used at Bowater (R. 1234 at 42:18-25, 1234 at 43:6-21). Thus, as acting Circuit Court Judge Jean 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. This order permits asbestos plaintiffs to utilize "Standard Interrogatories and Requests for Production of Documents." (R. 777-831.) Amongst this discovery were requests that Cleaver-Brooks identify and produce documents related to all products which it sold to Mr. Howe's Bowater jobsite. (R. 820-821).

In addition to serving written discovery, Plaintiffs repeatedly attempted to depose Cleaver-Brooks' corporate representative. (R. 946, 1558, 1566, 1593, 1600.) In each notice, Plaintiffs specifically requested Cleaver-Brooks' representative testify and produce documents about its boilers at Bowater. (R. 948, 1560, 1568, 1595, 1602.)

[1] Jeanette Howe has subsequently passed away.

Over two years into this litigation, and long after discovery responses were due, Cleaver-Brooks had still failed to produce responsive documents or a corporate representative. When Cleaver-Brooks repeatedly refused to produce such a witness or documents, Plaintiffs were forced to file a motion to compel. (R. 873-77.). A hearing was held on January 24, 2018, just months before trial. (R. 581-626.) Cleaver-Brooks represented it would finally 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.)

After this hearing, Cleaver-Brooks finally produced a 25-page file for Bowater (hereinafter, "25-page Bowater file", R. 1199-1223.) These documents repeatedly referenced two unique boiler units (R. 1199-1223). Boiler unit number 0-018343 is referenced eight times (R. 1199, 1200, 1201, 1202, 1212, 1214, 1220, 1223), and boiler unit number 0-18344 is referenced four times (R. 1203, 1204, 1205, 1208).

Cleaver-Brooks also eventually produced its corporate representative John Tornetta for deposition. However, his lack of preparation to discuss the Bowater plant and failure to produce all requested documents necessitated a second deposition. (R. 1292 ¶ 10.) During these depositions, Mr. Tornetta testified every Cleaver-Brooks boiler is assigned a unique unit number. (R. 1459 at 46:10-50:24). As the 25-page Bowater file repeatedly referenced two unique boiler units, numbers 0-018343 and 0-18344, (R. 1199-1223), 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 a Cleaver-Brooks' boiler was located at Bowater. (R. 1230 at 9:17-21, R. 1236 at 53:7-12.). Mr. Tornetta also testified 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, Mr. Tornetta admitted they had been sitting in his office all along, and Plaintiffs had asked for them months earlier. (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. (R. 1161-1390.) A hearing was held on March 9, 2018, four days before trial. (R. 627-56.) The trial 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 did not immediately rule on the sanctions request. (R. 644 at 23-24).

On March 13, 2018, trial commenced against Cleaver-Brooks. (R. 1293, ¶13) Mr. Tornetta was scheduled to testify on March 16, 2018. The night before, at 11:35 p.m., 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 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.)

As the evidence at trial showed boiler unit 0-018343 was in a separate building from the powerhouse, the fact that 0-018344 was not actually at Bowater (and thus could not have been in the powerhouse) was highly damaging to Plaintiffs' case. (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 repeated references to boiler unit 0-18344 in the 25-page Bowater documents were a "typographical error." (R. 337:12-19, R. 345:20-21.)

Had Cleaver-Brooks timely produced the midnight documents and disclosed that boiler unit 0-18344 was not actually at Bowater, Plaintiffs would not have proceeded to trial against it. (R. 1294, ¶ 19.) Plaintiffs therefore again moved for discovery sanctions. (R. 1156, 1161.) Following a lengthy hearing (R. 657-76), Judge Toal granted Plaintiffs' motion, awarding attorney fees and costs for Cleaver-Brooks' "abuse of the discovery and trial processes." (R. 5-26.) The court noted, "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.

On December 1, 2021, a unanimous Court of Appeals panel affirmed the trial court's award of sanctions against Cleaver-Brooks. (App'x 131). The Court of Appeals explicitly "agree[d] with the trial court's findings of fact and conclude[d] the trial court did not abuse its discretion in imposing sanctions in the form of attorney fees and costs on Cleaver-Brooks for failing to provide discovery." (App'x 132)

Cleaver-Brooks subsequently filed a Petition for Rehearing and a separate Petition for Rehearing *En Banc* with the Court of Appeals. The panel unanimously denied the request for rehearing, while the request for *en banc* review was rejected after being distributed to the appellate judges. (App'x 221-225)

ARGUMENT

I. The Considerations Governing Review Favor Denying Cleaver-Brooks' Writ

Rule 242(b), SCACR, sets forth this Court's considerations when determining whether to grant review, specifically referencing appeals (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of these considerations weigh in favor of this Court accepting review. The Court of Appeals' opinion is unanimous, as was its order denying Cleaver-Brooks' petition for rehearing. (App'x 131, 223). Cleaver-Brooks' petition for rehearing *en banc* was also rejected after being distributed to all Court of Appeals judges. (App'x 221). Nothing in the Court of Appeals' opinion suggests it is declining to follow or attempting to distinguish Supreme Court precedent, nor does Cleaver-Brooks raise a substantial constitutional issue which needs be addressed.

Instead, Cleaver-Brooks first argues this appeal involves "the highest monetary discovery sanction ever issued in South Carolina." Cleaver-Brooks' Writ, p. 14. No citation for this claim is provided,[2] but even if true, nothing in Rule 242(b), SCACR suggests this Court should review a case merely because of the dollar amount at issue.

Cleaver-Brooks also argues the sanctions against it "cry out for immediate intervention by this Court to correct a punitive ruling below that, if unchecked, creates a precedent. . ." This argument is without merit, as the Court of Appeals' 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.

The Court of Appeals' unpublished opinion addresses the issue of discovery sanctions, which is well-tread ground in this state. The opinion does not purport to create any novel rule of law, and does not distinguish itself from any Supreme Court precedent.

Cleaver-Brooks' Writ employs the same tactic which it took during discovery . . . turning a blind eye to any information it finds unfavorable or inconvenient. It attempts to portray itself as the "victim of an in-trial surprise," *See*, Cleaver-Brooks' Writ, p. 17, 18, ignoring the fact that the "surprise" at issue was the documents Cleaver-Brooks itself produced, and the testimony of its own corporate representative.

It is undisputed the Bowater files repeatedly referenced two separate boiler numbers, and it is undisputed Cleaver-Brooks' corporate representative testified each boiler number referenced a unique boiler. It is also undisputed that it was not until trial, near the close of Plaintiffs' case-in-chief, that Cleaver-Brooks took the position that the repeated references to two boiler numbers in the Bowater files were a "typographical error."

[2] Page 15 of Cleaver-Brooks' Writ contains a table of sanctions cases cited by the Court of Appeals. However, nothing in the Court of Appeals' Opinion suggests it was providing an exhaustive list of sanctions in South Carolina cases.

Judge Toal (multiple times) and the Court of Appeals panel have already told Cleaver-Brooks exactly what it did wrong. 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." None of this Court's considerations for review favor granting Cleaver-Brooks' Writ, and for this initial reason, Plaintiff/Appellee respectfully request that it be denied.

II. The Record Demonstrates Cleaver-Brooks' Failure to Produce Accurate Discovery Responses Permeated Pretrial and Trial

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.* However, appellate courts "are not required to disregard the factual findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility and demeanor." *Kilcawley v. Kilcawley*, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994); *see also, Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct.App.1993). "As a practical matter, however, [appellate courts] are impotent to determine questions of credibility and must defer to the good judgment of the trial court who heard and observed the witnesses." *Costa and Sons Const. Co. v. Long*, 306 S.C. 465, 468, 412 S.E.2d 450 452 (Ct. App. 1991).

Cleaver-Brooks' Writ complains 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 "appears to have disregarded this constitutional requirement [to take their

own view of the facts]" 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." App'x 132.

As set forth in the following section, the trial court in this matter provided extensive findings of fact. The panel explicitly agreed with those findings, but there is no indication it blindly accepted them. This Court 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 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. This is exactly what happened in this matter. The Court of Appeals reviewed the record and agreed with the trial court's findings of fact.

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 agreed 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." App'x 134. 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 claims sanctions were awarded against it, ""without any explanation from any court as to what it did wrong or could have possibly done differently." Cleaver-Brooks' Writ, p. 14. Such claim ignores the multiple oral and written findings of the trial court, and the Court of Appeals' explicit agreement with those findings.

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

The trial court further found, "Mid-way through trial, Cleaver-Brooks for the first time produced evidence – the 'midnight documents' – proving that one boiler that had been identified in the commercial records it had produced responsive to requests regarding Bowater in fact pertained to a boiler that was sent to Illinois, not Bowater." (R. 8). The trial court also 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 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, requiring Cleaver-Brooks to produce "purchase order records for all asbestos-containing products sold to any Premises at Issue between 1962 and 2008" (R. 10-11.)

There is ample support for sanctions in the record, 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.)

+ Cleaver-Brooks represented it would produce all responsive documents and produce a corporate representative (R. 32, 624:12-20.) 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, boilers 0-018343 and 0-18344. (R. 1199-1223)

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

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

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

+ Cleaver-Brooks refused to produce its index cards related to the boilers referenced in the 25-page Bowater file until it produced the midnight documents (R. 341:17 – R. 342:7, 1234 at 45:2-5, R. 1236 at 50:11-20, 1292 ¶ 9.). Cleaver-Brooks' corporate representative Mr. Tornetta admitted these index cards had been sitting in his office all along and that Plaintiffs had asked him for them months earlier during his depositions. (R. 331:13-14, R. 341:17 – R. 342:7.). Cleaver-Brooks' representative used these cards as road map to determine the references to 0-18344 in the 25-page Bowater file were a "typographical error." (R. 367:8-15).

These facts, which Cleaver-Brooks fails to address, 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 unit identification numbers of O-18343 and O-18344. (R. 365:25 – R. 367:15.) 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 Plaintiffs' request for the cards to 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. The panel also unanimously rejected Cleaver-Brooks petition for rehearing, and the combined judges of the Court of Appeals rejected a request for an *en banc* review.

Cleaver-Brooks should have reviewed the 25-page Bowater documents which it produced, and recognized it referenced two separate boiler numbers. Cleaver-Brooks should have produced the index cards for boiler 0-1343 and boiler 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, which was in a different building than the one where Mr. Howe worked. Cleaver-Brooks should have disclosed that the four separate references to boiler 0-01344 in the 25-page Bowater file were a "typographical error." The consequences of these failures were significant. Plaintiffs were deprived of critical evidence in discovery and spent considerable time and money in reliance on a factual record distorted by Cleaver-Brooks.

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

Cleaver-Brooks' Petition claims it was the "victims of an in-trial surprise" when Plaintiffs asserted their two-boiler theory during in-trial questioning. Cleaver-Brooks' Writ, p. 21. It claims *Bramlette v. Charter Medical Columbia*, 302 S.C. 68, 393 S.E.2d 917 (1990) "is on all fours- with this case," and requires the Court of Appeal's unanimous opinion be reversed. *Id.*

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 questions for witnesses 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 consistent with the sanctions against Cleaver-Brooks.

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. It is also undisputed that at no point prior to trial did Cleaver-Brooks produce evidence showing the Bowater file's repeated references to two distinct boiler numbers were a "typographical error."

Cleaver-Brooks offers no suggestion that Plaintiffs failed to disclose any relevant evidence. Instead, it claims 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." Cleaver-Brooks' Writ, p. 21.

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

[3] 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).

pursuant to this provision, and unlike the documents which Cleaver-Brooks withheld, was not subject to discovery or disclosure.

Furthermore, Plaintiffs did "investigate" and "test" their two-boiler theory, as the record before the trial court showed Cleaver-Brooks repeatedly confirmed (both in this and other matters) that each of its boiler units was assigned a unique number. (R. 6-7).

Finally, it defies reason to suggest Plaintiffs "ambushed" Cleaver-Brooks by interpreting Cleaver-Brooks' documents in exactly the manner which Cleaver-Brooks represented 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,"[4] that can only be because Cleaver-Brooks failed to read its own documents in accordance with its own representations.

It was Cleaver-Brooks which withheld discoverable evidence. The midnight documents included the "roadmap" which Cleaver-Brooks 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 Howe respectfully asks the Court deny Cleaver-Brooks' Writ.

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

IV. The Record Supports Cleaver-Brooks' Sanctions.

A. Standard of Review

In reviewing sanctions, while an appellate court 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 . . . 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).[5] The Court of Appeals' opinion correctly determined both the award of sanctions and their amount were not abuses of discretion.

[5] In addition to being permitted under Rule 37, SCRCP, sanctions were also appropriate under Rule 11, SCRCP (based upon Cleaver-Brooks' signed 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 if this Court determines Rule 37 was not the proper mechanism to sanction Cleaver-Brooks, it would be harmless error, as such sanctions were also appropriate under Rule 11 and the Court's inherent equitable powers.

B. The evidence supports sanctions against 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 produced 25 pages of documents concerning its boilers at Mr. Howe's Bowater jobsite, and that this 25-page Bowater file contained references to two unique boiler identification numbers. In "Cleaver-Brooks' own words, 'Each Clever-Brooks boiler has a unique identification number called a unit number.'" (R. 8).

Plaintiffs gave Cleaver-Brooks multiple opportunities to explain its files in two separate depositions. (R. 1230 at 9:17-21, R. 1232 at 26:8-28:11, R. 1234 at 45:2-5, R. 1236 at 50:11-20, R. 1236 at 53:7-12, R. 1237 at 59:4-11, R. 1260 at 228:4-18.) Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements. (R. 139:12.) Yet Cleaver-Brooks waited until nearly midnight toward the end of Plaintiffs' case-in-chief to review its files and produce records disclosing the 25-page Bowater file's repeated references to two separate boilers were "typographical errors."

Cleaver-Brooks' representative admitted he utilized its boiler index cards as a "roadmap" to determining the Bowater documents contained repeated "typographic errors." (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 to Cleaver-Brooks, and despite Plaintiffs' request such cards be produced. R. 331:13-14, R. 341:17 – R. 342:7. The fact Cleaver-Brooks itself needed 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 "obviously a typographical error." Cleaver-Brooks' Writ, p. 9. The multiple typographical errors were only "obvious" to Cleaver-Brooks because it had access to relevant and responsive documents it failed to produce.

Cleaver-Brooks, through its own deliberate decision not to produce relevant, discoverable documents, and the failure of its corporate representative to carefully review the documents which it did produce, deprived Plaintiffs of the opportunity to discover the 25-page Bowater file contained typographical errors. Plaintiffs went to trial believing Cleaver-Brooks produced all relevant, discoverable documents in its possession, believing Cleaver-Brooks' corporate representative carefully reviewed the documents it produced, and believing the documents Cleaver-Brooks produced were accurate. Plaintiffs relied upon Cleaver-Brooks' representations that each boiler had its own unique identification number, and reached the only rational conclusion . . . 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 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.

C. The record supports the amount of sanctions.

The Court of Appeals also correctly determined the amount of sanctions awarded was not an abuse of discretion, as 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 attorney fees, for a party's failure to make or cooperate in discovery. Rule 37(b), SCRCP; *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (affirming award of attorney 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 attorney 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 attorney 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 attorney 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 attorney fees for discovery abuse, including failure to produce material, relevant evidence).

Further, Courts around the country, including the U.S. Supreme Court, have awarded or approved fees comparable to or exceeding those at issue in this matter. *See, e.g., Chambers v.*

NASCO, 501 U.S. 32 (1991) ($996,644.65 in fees and expenses); *Goodyear Tire & Rubber Company v. Haeger*, 137 S.Ct. 1178 (2017) (remanding award of attorney fees for reconsideration, but noting the defendant's own submissions possibly conceded approximately $2 million in fees)[6]; *International Business Machines v. ACS Human Services*, 999 N.E.2d 880 (Ind. Ct. App. 2013) ($425,178.85); *In re Tobacco Cases I*, 216 Cal.App.4th 570 (2013), ($2,943,920.63); *Abner v. Kansas City S. Ry. Co*., 541 F.3d 372, 380 (5th Cir. 2008) ($446,777.12); and *Gierlinger v. Gleason*, 160 F.3d 858, 873-83 (2d Cir. 1998) (reversing order that improperly limited fees to only $104,949, finding trial court should have used a *higher* hourly rate based on "current market rates").

The amount of attorney 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). Cleaver-Brooks' motion incorrectly asserts these affidavits were untimely. In fact, the affidavits were timely filed on April 30, 2018 and May 1, 2018, and served to Cleaver-Brooks via e-mail on

[6] In *Goodyear*, the case was remanded because the trial court's sanctions award included expenses which would have been incurred even absent the wrongdoer's discovery violations. In this case, Judge Toal limited Plaintiffs' expenses only to its trial costs and expenses, all of which were incurred against Cleaver-Brooks, the sole remaining Defendant at the time of trial. Thus, the fees and expenses in this case are squarely in line with those contemplated by the U.S. Supreme Court in *Goodyear*.

May 1, 2018. (R. 1424). Further, Cleaver-Brooks cannot argue that it was prejudiced by the timing of the 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 until 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). Further, Cleaver-Brooks was 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 criticism of rates charged by lawyers from other places[7] "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).[8]

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

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

[8] 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.

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). Cleaver-Brooks' writ claims it was denied discovery regarding Plaintiffs' request for sanctions, but cites to no authority which entitles it to discovery as to the amount of sanctions against it, and cites to nothing in the record showing that it ever even attempted to serve such discovery in the seven months which passed between Plaintiffs' motion and the Order granting it. Cleaver-Brooks also fails to address the fact it had the opportunity to raise questions or issues about Plaintiffs' counsels' affidavits at the hearing on the matter.

The trial court ultimately cut the hourly rates for two of Plaintiffs' three trial attorneys, awarding fees at the rate of $500/hour compared to the $550/hour requested by Plaintiffs for Plaintiffs' two senior counsel. (R. 23-24) Indeed, the trial court did exactly what Cleaver-Brooks requested it do, using its discretion to cut Plaintiffs' fees "to a certain extent."

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

Finally, Cleaver Brooks' Petition accuses Plaintiffs' counsel of "fabricating a reason for its loss,"[9] 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; 1301, ¶14; 1430, ¶14.) Such arguments are inappropriate, and contrary to the professional standards which govern attorneys in this State.

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

[9] *Id.* at 17, 19.

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."

This Court has taken a dim view of attorneys disparaging opposing counsel. "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....' *In re Anonymous Member of the South Carolina Bar*, 392.S.C. 328, 334, 709 S.E.2d 633, 636 (2011),

> 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.

Cleaver-Brooks' Petition suggests Plaintiffs were required by the rules of professional conduct to immediately cease trial once they received the midnight documents. Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 16. However, Cleaver-Brooks declined to file a Rule 11, SCRCP, motion on this issue with the trial court. (R. 668 @ p. 47:18-48:2)

Cleaver-Brooks also fails to recognize there are pragmatic reasons not to try even meritorious cases. All lawsuits involve the weighing of the time, costs, emotional investment, and expenses of going to trial against the likelihood of success. Rule 3.1 S.C. Rules of Prof'l Conduct

requires only that a Plaintiff have 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 "non-frivolous" reason for doing so, particularly in cases such as this which involve difficult and complex facts, expert testimony, and rules of law, and involve incredibly emotionally taxing wrongful death claims. 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). Thus, Cleaver-Brooks' suggestion that Plaintiffs were required to immediately dismiss their case after receiving the midnight document is without merit.

In its zealous quest to absolve Cleaver-Brooks of the blame for its sanctions, it resorted to accusing Plaintiffs' counsel of making untrue statements in affidavits submitted 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 respectfully ask this Court to deny Cleaver-Brook's Writ.

CONCLUSION

For the foregoing reasons, Plaintiffs/Respondents Timothy Howe respectfully requests the Court reject and deny Cleaver-Brooks' Petition for Writ of Certiorari.

Respectfully submitted, April 26, 2022

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