

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

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Appellate Case No. 2022-000368

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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,

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**S.C. SUPREME COURT**

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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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 6, 2022

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## REPLY IN SUPPORT OF A WRIT OF CERTIORARI

This case distills to a single point: Cleaver-Brooks was sanctioned after trial for producing documents during trial that were never requested before trial. And the sanction was the highest monetary discovery sanction issued in the State's history.

That is not fair, lawful, or logical—why would Cleaver-Brooks (or any defendant) withhold exculpatory evidence? Of course, Cleaver-Brooks did no such thing. Documents regarding a boiler in Illinois were never requested in discovery and had no relevance to the case whatsoever until the Plaintiffs attempted to confuse the jury about Cleaver-Brooks shipping a second boiler to Bowater—in York County—through in-trial questions to a third-party witness.

The clearest giveaway that the discovery sanctions order is improper is what is missing from the Plaintiffs' return brief: If documents relating to a Cleaver-Brooks boiler located in Illinois had any possible relevance in advance of trial, then the Plaintiffs no doubt would have short-circuited this appeal by simply identifying the interrogatory, document request, request for admission, or deposition question that they contend should have prompted their production. The Plaintiffs would have put that discovery request on the first page of each of their appellate filings, and they would have cited it throughout their briefs. But they didn't.

Neither did the circuit court.

Neither did the Court of Appeals.

In fact, there is no such discovery request anywhere in the record, and the reason is obvious: The entire case was about the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. The notion that there may have been a second boiler at Bowater is nothing more than a fiction conceived by the Plaintiffs after a third-party witness they put on the stand destroyed their case. That cannot be the basis for the State's largest discovery sanctions order, and certiorari is essential.

## ARGUMENT

### **I. The State’s largest discovery sanctions order is based on demonstrably incorrect affidavits of counsel.**

This Court has the constitutional charge to review the record in its entirety and find facts for itself. S.C. Const. art. V, § 5. The Plaintiffs are just as desperate for the Court never to undertake that review as Cleaver-Brooks is for it to give the record a thorough examination. And they don’t hide their desire to have the record go unseen, as the Plaintiffs devote three pages of their opposition brief to arguing that it is “inappropriate” to even question the veracity of affidavits from their counsel. (Opp’n to Pet. at 22–24.) In the Plaintiffs’ words, Cleaver-Brooks’s pleas for the Court to examine the record is nothing more than “disparaging opposing counsel.” (*Id.* at 23.)

This is a façade, and a thin one at that. Cleaver-Brooks is not lodging *ad hominem* attacks on the Plaintiffs’ counsel; they are fine people and fine lawyers.

But, to be clear: Cleaver-Brooks is directly challenging their written testimony that the Plaintiffs would not have gone to trial if they had known the materials Cleaver-Brooks produced in discovery related to only a single boiler at Bowater. (R. pp. 1293, 1301, 1430.) It is directly challenging those post-trial affidavits because they are the exclusive “evidence” upon which the circuit court based its sanctions order. (*See, e.g.*, R. pp. 5–25 (repeatedly stating that it was “reasonable” for the Plaintiffs to think that there may have been two Cleaver-Brooks boilers at Bowater because of a typographical error in Cleaver-Brooks’s production).) In other words, but for the affidavits of opposing counsel, the largest discovery sanction in South Carolina history would not exist. Therefore, Cleaver-Brooks—and this Court—cannot just take those affidavits at face value, but must evaluate them against the actual record.

The actual record reveals that those affidavits cannot possibly be true. Cleaver-Brooks explained why this is so on Pages 21 through 25 of its Petition. To reiterate, there is no way that

the Plaintiffs could have genuinely believed that the Cleaver-Brooks production indicated there were two boilers at Bowater because Cleaver-Brooks's Rule 30(b)(6) witness repeatedly testified during his two depositions that the entire production set related to a single boiler. (*See, e.g.*, R. p. 1755 (9:13–16); R. p. 1768 (42:18–20); R. pp. 1769–71 (43:22–45:9); R. pp. 1779–82 (53:18–60:7); R. p. 1785 (67:7–11); 1788–91 (70:9–73:25); 1873–1903 (227:1–257:21) (inquiring about the sales records, installation records, assembly checklist, manufacturing drawings, engineering drawings, and part descriptions for the single Cleaver-Brooks boiler sent to Bowater and confirming throughout “*[w]e’re still talking about the same 15-pound steam boiler, correct?*”).<sup>1</sup> In light of that deposition testimony, the Plaintiffs cannot plausibly suggest that they thought the Cleaver-Brooks production was really about two boilers all along. A Cleaver-Brooks witness specifically told them that wasn't true in advance of trial.<sup>2</sup>

An additional basis for rejecting counsel's affidavits bears highlighting in reply to the Plaintiffs' opposition brief. On Page 4 of their opposition, the Plaintiffs stated as follows: “On March 8, 2018, Plaintiffs filed a motion for sanctions against Cleaver-Brooks for its abuse of the

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<sup>1</sup> Cleaver-Brooks's production included a 61-page set of records regarding the boiler it shipped to Bowater. The production set is at Pages 678 through 738 of the record, and it includes only one set of sales records, start-up records, and blueprints for a boiler. In other words, there is not a second set of sales records, blueprints, or other materials for a second boiler in the production; the entire file obviously relates to only one boiler. The Plaintiffs themselves introduced the entire 61-page file—including a photocopy of the very file folder in which the records were located—as their own Exhibit 55 at trial. (R. p. 678.) But in a naked attempt to bolster the plausibility of their counsel's claim of “two-boilers” confusion, the Plaintiffs repeatedly told the Court that the file set was only 25 pages. (Opp'n to Pet. at 3, 5, 9, 11, 13, 15, 16 n.5, 17, 18.) That the Plaintiffs insist on consistently misrepresenting this basic, indisputable fact underscores why it is imperative for this Court to grant certiorari, review the record *de novo*, and find the facts of this case for itself.

<sup>2</sup> It is not Cleaver-Brooks's fault that the Plaintiffs chose not to ask the witness “Are these just typographical errors?” or “Why are there different unit numbers on a couple of pages within this single file?” or “How many boilers did Cleaver-Brooks ship to Bowater?” or “To where did Cleaver-Brooks ship Unit Number O-18343?” or “To where did Cleaver-Brooks ship Unit Number O-18344?” during his depositions, and their failure to do so cannot possibly serve as the basis for the largest discovery sanction in the State's history.

discovery process. (R. 1161–1390.)” But the Plaintiffs cited the wrong part of the record as support for this sentence. Instead of citing their March 8th pretrial motion, the Plaintiffs incorrectly cited their April 30th post-trial filing. Critically, their March 8th pretrial motion—the Plaintiffs’ last written filing before trial (R. pp. 1132–45)—exposes the inaccuracy of counsel’s post-trial affidavits, and deserves special scrutiny from this Court in its *de novo* capacity.

In that pretrial motion, the Plaintiffs incorrectly claimed that Cleaver-Brooks made an incomplete production in other cases, and they asked the circuit court to issue a discovery sanction in this case as a result. Their requested sanction: an order that would relieve them of their burden of proof by declaring certain facts to be “established” for purposes of trial. (R. p. 1144.) Contrary to their counsel’s post-trial representations, the Plaintiffs did not ask the circuit court to “establish” that there were multiple Cleaver-Brooks boilers at Bowater. Instead, they asked the court to “establish” the following as a fact 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.

(*Id.* (emphasis added).)

Moreover, when the Plaintiffs summarized this case in their March 8th pretrial motion, they were quite clear that there was only one Cleaver-Brooks boiler at Bowater. (*See* R. p. 1135 (explaining that this case involved “a boiler located at Bowater,” “the Cleaver-Brooks boiler at Bowater,” “the Cleaver-Brooks boiler,” “the boiler at Bowater,” “this boiler,” “the rear door of the Cleaver-Brooks boiler at Bowater,” and “the boiler’s rear door”).)<sup>3</sup>

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<sup>3</sup> The circuit court rightly denied the Plaintiffs’ motion, and observed during that hearing 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 (25:15–17) (remarks of Judge Toal).) The Plaintiffs did not change their tact until the middle of trial, when a third-party witness who the Plaintiffs

The Plaintiffs’ pretrial statements in that motion were consistent with everything else that preceded trial: This case was always about the location of a single boiler, and the Plaintiffs cannot legitimately wipe away the case’s entire history through post-trial affidavits of their counsel. Those affidavits—which were untimely under Rule 6(d), SCRCP, and which the circuit court wrongly shielded from discovery—deserve scrutiny from this Court in its constitutional *de novo* capacity, S.C. Const. art. V, § 5, as well as in its supervisory capacity over the profession, *id.* art. V, § 4, as they are the sole evidentiary basis for the largest monetary discovery sanction in the State’s history.

**II. Certiorari is warranted because of the historic nature of the sanctions order, and because it runs contrary to hornbook South Carolina civil procedure.**

In addition to scrutinizing its suspect evidentiary basis, the sanctions order merits certiorari review because, as far as Cleaver-Brooks can tell, it is far and away the highest monetary sanction ever imposed in South Carolina jurisprudence. *See* Rule 242(b), SCACR (indicating that the Court considers certiorari review when “there are special and important reasons”). In response to this straightforward point, the Plaintiffs offer two responses.

First, the Plaintiffs opaquely suggest that this may not be the State’s largest-ever discovery sanction. (Opp’n to Pet. at 7.) They provide nothing to support this position. And then they reveal how misguided this position is later in their brief when they resort to citing orders from the United States Supreme Court and elsewhere—but, predictably, nothing in South Carolina—to suggest that the sanctions amount is somehow justifiable, which it is not. (*Id.* at 19–20.)<sup>4</sup>

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themselves called to the stand testified that the Cleaver-Brooks boiler was located in the administration building, where Mr. Howe never worked. Only after that third-party witness destroyed their case with the jury watching did the Plaintiffs concoct their misleading “two-boilers” theory, which they entirely failed to test through discovery.

<sup>4</sup> The cases cited by the Plaintiffs only reinforce Cleaver-Brooks’s chief argument: Discovery sanctions cannot be issued in the absence of a discovery request seeking the materials in the first place—and neither the Plaintiffs, nor the circuit court, nor the Court of Appeals has ever identified any discovery request that would have prompted production of records regarding a boiler located

Second, the Plaintiffs ask the Court to shrug off the massive sanctions order because the Court of Appeals affirmed it in an unpublished opinion, which should not be cited as precedent. (*Id.* at 7.) But then they did exactly that. The very same counsel who represent the Plaintiffs in this case are already citing the Court of Appeals’s order as controlling South Carolina law in their discovery motions at the circuit court. (*E.g.*, App’x 217–18.)

Even if the sanctions order was not historically punitive and based on a false evidentiary basis, it still warrants certiorari review and reversal because it runs contrary to numerous established precedents regarding basic civil procedure in South Carolina:

**Rebutting an In-Trial Surprise:** This Court has held that a party who is the subject of in-trial surprise testimony must be able to rebut it. *Bramlette v. Charter Med.-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990); *Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982). The sanctions order turns this principle on its head by punishing Cleaver-Brooks for immediately responding to the Plaintiffs’ attempts to mislead a third-party witness with questions about a “second” boiler at Bowater. In their opposition brief, the Plaintiffs weakly attempt to distinguish this case from *Bramlette*’s controlling principle by arguing that their efforts to mislead a witness in front of the jury was simply “trial strategy,” rather than new evidence. (Opp’n to Pet. at 13.) The Court should readily reject this argument, as the answers the Plaintiffs sought to elicit from that witness were certainly surprise evidence or—in *Reed*’s words—“unexpected testimony.” 277 S.C. at 316, 286 S.E.2d at 388.

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in Illinois. *See, e.g., Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184 (2017) (evaluating discovery sanctions when Goodyear knowingly and intentionally refused to produce internal test results for its G159 tire “even though [the Haegers] had requested (both early and often) ‘all testing data’ related to the G159”).

Relatedly, this Court has long held 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). Because the Plaintiffs themselves introduced the third-party testimony that prompted Cleaver-Brooks to produce rebuttal records during trial, they waived any ability to complain about Cleaver-Brooks’s prompt response. The twin principles that (1) a litigant must be able to respond to an in-trial surprise and (2) the party who creates the in-trial surprise waives the right to balk at the response have been ignored. The Plaintiffs do not offer any defense of these legal errors, nor did the lower courts address them.

**Examining Discovery Requests:** This Court has held that before a party can be subject to discovery sanctions, the circuit court must examine “the question asked” to assess whether the discovery response was sufficient. *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); *see 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))). No such examination has happened here; incredibly, the circuit court even deemed this inquiry to be “irrelevant” and held that comparing Cleaver-Brooks’s answers to the Plaintiffs’ actual discovery requests “misses the point.” (R. pp. 14–15.) The Court of Appeals likewise ignored this governing principle, passively saying that the Plaintiffs made “numerous requests” for documents regarding a boiler in Illinois without ever identifying any such request. (App’x 134.)

But there are not “numerous requests” for those records. In fact, there is not a single one. No one—not the Plaintiffs, not the circuit court, and not the Court of Appeals—has ever identified any discovery request that should have prompted Cleaver-Brooks to recognize that the Plaintiffs sought materials regarding a boiler in Illinois in advance of trial.

In opposition, the best the Plaintiffs can muster is to point to the “Standard Interrogatories and Requests for Production of Documents” for cases on the “Asbestos Docket,” but even then they concede that those “standard” requests only directed Cleaver-Brooks to “identify and produce documents related to all products which it sold to Mr. Howe’s Bowater jobsite.” (Opp’n to Pet. at 2 (citing R. pp. 820–21); *see also id.* at 2 (indicating that the Plaintiffs sought to depose a Cleaver-Brooks representative about its products “at Bowater”); *id.* at 10 (noting that the circuit court acknowledged that the discovery requests were limited to “job sites at which plaintiff was employed, which included Bowater”).) Records regarding a boiler in Illinois that was not “sold to Mr. Howe’s Bowater jobsite” are, by definition, not responsive to those discovery requests.

Nor did Cleaver-Brooks somehow put “both boilers at issue” in advance of trial, as the Plaintiffs argue (Opp’n to Pet. at 10), by producing a set of records containing a typographical error entered by a third-party contractor sixty years ago. As discussed above, the Cleaver-Brooks corporate designee testified in two depositions in advance of trial that the entire production set related to only one boiler, fully eliminating any unintentional (and unknown) implication that there was another boiler in play.

It is inescapable that the “second” boiler was never “at issue” until the middle of trial, when the Plaintiffs asked questions to Art Welker—an employee of Resolute FP US, Inc., which owned Bowater at the time of trial, and which was not a party to the case—suggesting that there were multiple Cleaver-Brooks boilers at Bowater. (R. pp. 239 (488:14–23), 242 (491:17–20).)

Because nothing in discovery could have prompted Cleaver-Brooks to produce records related to a boiler in Illinois before that moment at trial, Cleaver-Brooks cannot be subject to discovery sanctions. *See Reed*, 277 S.C. at 316, 286 S.E.2d at 388 (directing trial judges to “consider the reason the new information was not provided earlier” when a party provides new

evidence to rebut an in-trial surprise). The Plaintiffs offer no response to this legal argument,<sup>5</sup> nor did the circuit court or the Court of Appeals engage in this analysis required by this Court's established precedent.

\* \* \* \* \*

The gravity of the sanctions order and its failure to adhere to numerous of this Court's principles governing civil procedure and discovery compel further appellate review and reversal. The Plaintiffs' opposition brief does not provide any legitimate arguments to the contrary, instead begging the Court to simply ignore the errors below or—as discussed herein in Footnote 5—excuse those errors as falling within the trial court's "inherent equitable powers." The South Carolina Constitution directs otherwise, and the Court should grant certiorari review accordingly.

### **III. The Plaintiffs' opposition brief regularly misstates facts in the record.**

In addition to sidestepping the legal errors below and trying to insulate affidavits of its counsel from any scrutiny, the Plaintiffs scatter misstatements of the record throughout their opposition brief, all with the apparent goal of suggesting that Cleaver-Brooks waived certain arguments or conceded certain points. So that the Court is not misled, those points and their rebuttals are summarized in the chart on the following pages. But the frequency with which the Plaintiffs' misstate the record reinforces that they are desperate for the Court not to undertake any *de novo* examination here, and reinforces why certiorari review is essential.

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<sup>5</sup> Tellingly, the Plaintiffs actually pivot from defending the circuit court's decision as a discovery sanction, and instead suggest that it may be defensible as part of the circuit court's exercise of its "inherent equitable powers." (Opp'n to Pet. at 16 n.5.) Not only does this argument all but concede that the circuit court erred in issuing a discovery sanction under Rule 37, it only brings the need for certiorari review to the forefront: The South Carolina Constitution counts on this Court to review equitable rulings with clear eyes and a clean slate. *See* S.C. Const. art. V, § 5 ("The Court shall have jurisdiction only in cases of equity, and ***in such appeals they shall review the findings of fact as well as the law***, except in cases where the facts are settled by a jury and the verdict not set aside.") (emphasis added).

**Table: Misstatements of the Record in the Plaintiffs' Opposition Brief**

<b><u>The Plaintiffs' Statements</u></b>	<b><u>What the Actual Record Contains</u></b>
<p>Cleaver-Brooks produced 25 pages of records for the boiler it shipped to Bowater Paper Mill in Catawba, South Carolina. (Opp'n to Pet. at 3, 5, 9, 11, 13, 15, 16 n.5, 17, 18.)</p>	<p>The production set was 61 pages. (R. pp. 678–738.) The Plaintiffs know this, as they introduced the entire 61-page set as their Exhibit 55 at trial. The production set includes sales records, start-up records, parts lists, blueprints, and other documents for only a single boiler. (<i>See</i> Footnote 1, <i>supra</i>.)</p>
<p>Cleaver-Brooks violated its “discovery duties” by not producing the “index card” for its boiler at Bowater. (Opp'n to Pet. at 12–13, 17.)</p>	<p>This is a red herring. The index card (R. p. 739) contains no more information than that which was already printed on the front of the file folder that was produced to the Plaintiffs (R. p. 678), just as cards in a library’s card catalog system contain nothing more than the same information printed on the spine of a book. A side-by-side of the index card and the cover of the file folder is on Page 205 of the Appendix, fully demonstrating the misleading nature of the Plaintiffs’ argument.</p>
<p>“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.” (Opp'n to Pet. at 11.)</p>	<p>This is untrue. As noted in Cleaver-Brooks’s letter opposing the Plaintiffs’ proposed draft sanctions order, the Plaintiffs claim that this “admission” was actually “off the record,” and Cleaver-Brooks denies any such “admission.” (R. p. 1474.) In any event, Mr. Tornetta made no such admission anywhere in the record.</p>
<p>Cleaver-Brooks was generally derelict in discovery. (Opp'n to Pet. at 11.)</p>	<p>This is also a red herring. Cleaver-Brooks was sanctioned for not producing documents related to a boiler in Illinois in advance of trial. The back-and-forth of the parties in discovery generally is irrelevant to the issues before the Court, which concern the production of a specific set of materials that were never requested in discovery and had no relevance to the case until the middle of trial. And in all events, Cleaver-Brooks satisfied its discovery obligations throughout the litigation.</p>

**Table (Continued): Misstatements of the Record in the Plaintiffs’ Opposition Brief**

<b><u>The Plaintiffs’ Statements</u></b>	<b><u>What the Actual Record Contains</u></b>
<p>“It is undisputed ‘the “lynchpin” of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers.’” (Opp’n to Pet. at 17 (quoting R. p. 6).)</p>	<p>This so-called “lynchpin” was never raised at any point in advance of trial. This sentence first appeared in a draft sanctions order that the Plaintiffs wrote for the circuit court, and Cleaver-Brooks immediately objected. (R. p. 1471.) The “number” of boilers was <b><i>never</i></b> part of this case until midway through trial.</p>
<p>“Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements.” (Opp’n to Pet. at 17.)</p>	<p>In her opening statement, the Plaintiffs’ counsel suggested that records maintained by the State of South Carolina may lead the jury to conclude that there were multiple boilers at Bowater. (R. p. 160 (71:6–12).) However, she specifically told the jury that the Cleaver-Brooks records revealed only one boiler. (R. pp. 130 (50:20–22), 159 (70:4–12).) The suggestion that something in Cleaver-Brooks’s documents supported the “two-boilers” theory was never raised until after Art Welker destroyed the Plaintiffs’ case by testifying that the one Cleaver-Brooks boiler at Bowater was not in the powerhouse, but instead was in the administration building—a part of the Bowater facility where Mr. Howe never worked. Obviously, if the Plaintiffs believed that Cleaver-Brooks’s records actually indicated it shipped multiple boilers to Bowater, their counsel would not have told the jury exactly the opposite during opening statements.</p>
<p>Cleaver-Brooks waived challenges to the fees requested. (Opp’n to Pet. at 20–22.)</p>	<p>Cleaver-Brooks objected to every aspect of the fees requested. (<i>See generally</i> R. pp. 1404–09, 1474–76, 1480–81.)</p>

## CONCLUSION

This is not a case where there are two sides to the story and a factfinder could reasonably see it either way. In reality, there is not one fact in the record that supports the circuit court's decision to punish Cleaver-Brooks with South Carolina's highest-ever discovery sanction. The Plaintiffs know that if the Court scrutinizes what happened below, the sanctions order will dissolve because it was based on nothing more than a post-trial rouse that is completely belied by everything that happened in the case before and during trial.

In addition to finding no factual support in the record below, the sanctions order runs contrary to this Court's settled precedent regarding the discovery process and when a party may respond to new information or testimony during trial. Accordingly, it should not be allowed to stand. Cleaver-Brooks respectfully requests that the Court grant its Petition for a Writ of Certiorari, review the sanctions order, and vacate it.

Respectfully submitted,

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