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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
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

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 Babock 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.

PETITION FOR A WRIT OF CERTIORARI

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March 28, 2022

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CERTIFICATION OF COUNSEL

Counsel for Cleaver-Brooks certify that it filed a petition for rehearing with the South Carolina Court of Appeals on December 16, 2021. (App'x 163.) The Court of Appeals denied that petition on February 25, 2022, rendering this Petition timely. (App'x 221.)

INTRODUCTION

This case involves what appears to be the largest monetary discovery sanction ever reported in South Carolina jurisprudence—over $300,000. After a jury returned a complete verdict in Cleaver-Brooks's favor, the trial judge for the "Asbestos Docket" ordered Cleaver-Brooks to pay all of the Plaintiffs' attorneys' fees and litigation costs associated with a multi-week trial as a post-judgment discovery sanction. It is a shocking order, due to both its historically massive penalty and the absence of a single fact in the record to support it. ***Not one.***

The asserted basis for this sanction was Cleaver-Brooks's production of documents during trial that directly rebutted a series of surprise questions the Plaintiffs asked a third-party witness during their own case-in-chief. The documents were never the subject of any discovery request, and they had no relevance to the case prior to the Plaintiffs' surprise in-court questioning.

No one—not the Plaintiffs, not the circuit court, and not the Court of Appeals—has ever identified a single discovery request to which those documents could possibly have been responsive. Nevertheless, the circuit court sanctioned Cleaver-Brooks at an all-time high penalty for not producing the never-requested materials earlier, and the Court of Appeals summarily affirmed that historically punitive order without explanation or even holding oral argument.

There is no basis in fact, law, or logic to punish Cleaver-Brooks for a defense verdict. Accordingly, the Court should grant this Petition and vacate the sanctions order and the summary order affirming it, as discussed below.

QUESTIONS PRESENTED FOR REVIEW

1. Should Cleaver-Brooks be penalized with the highest monetary discovery sanction in South Carolina history for producing records during trial that were never the subject of a discovery request, and that only became relevant to rebut surprise in-trial testimony the Plaintiffs elicited from a third-party witness during their case-in-chief?

2. Can a sanctions order be based exclusively on untimely affidavits of trial counsel containing statements that are directly contrary to the record, and which the trial court protected from any challenge or scrutiny through discovery?

STATEMENT OF THE CASE

The trial court's historically-punitive sanctions order is subject to *de novo* review, where the appellate court has a constitutional charge to review the entire record and find facts for itself. *See* S.C. Const. art. V, § 5 (directing 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"); *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)).

The Court of Appeals appears to have disregarded this constitutional requirement, as its summary order contains no discussion as to why Cleaver-Brooks should be sanctioned for its same-day production of documents to rebut an in-trial surprise from the Plaintiffs. Indeed, Cleaver-Brooks challenged the Plaintiffs and specifically requested that the Court of Appeals identify any discovery request that should have prompted an earlier production of those documents; the Plaintiffs predictably had no response, and the Court of Appeals never engaged on this dispositive point. As it stands, Cleaver-Brooks has been ordered to pay a massive penalty of over $300,000 without any court identifying what, exactly, it should have done differently below.

This Court's constitutional fact-finding function makes the Statement of the Case essential to understanding the lower courts' errors. In its opening brief to the Court of Appeals, Cleaver-Brooks's Statement of the Case was 20 pages long and laid out the procedural background of the case in painstaking detail with dozens of accurate citations to the record. (App'x 7–26.)

Due to space limitations, Cleaver-Brooks summarizes the main points of the case's history below, but strongly encourages this Court to review the Statement of the Case filed with the Court of Appeals to see for itself that Cleaver-Brooks met its discovery obligations and timely and

appropriately responded to surprise in-trial testimony by locating and producing documents that same day to rebut the Plaintiffs' attempts to mislead the jury. The record is devoid of any basis for sanctioning Cleaver-Brooks, and certainly not to the highest level of any case in the history of South Carolina's courts.

I. <u>The Plaintiffs' Allegations:</u> Mr. Howe developed mesothelioma from exposure to asbestos-containing boilers in the powerhouse at the Bowater Paper Mill.

Mr. and Mrs. Howe filed this case on November 6, 2015, against Cleaver-Brooks and dozens of other defendants, alleging that Mr. Howe developed mesothelioma resulting from exposure to asbestos while working at a variety of locations and with a variety of products. (R. pp. 33–69; 85–114.) Included among the locations where he worked was the Bowater Paper Mill in Rock Hill, South Carolina. (R. p. 1582, at Answer to Interrogatory 4.)

Mr. Howe died while the case was pending, but before his death, he testified that while on site at Bowater, he only worked on boilers located in the powerhouse, not in any other buildings on the expansive Bowater campus. (R. p. 1189, at 35:18–21.) Mr. Howe's testimony that he only worked on boilers in the powerhouse at Bowater set the stage for the remainder of the litigation.

II. <u>The Response:</u> Cleaver-Brooks searched its records to determine whether it sent any boilers to Bowater, identified a boiler it shipped in 1957, produced its entire file regarding that boiler, and presented a witness to sit for two depositions regarding that boiler.

Cleaver-Brooks manufactures boilers and boiler-room systems, and the Plaintiffs named it a defendant in both the initial and the amended complaints. In light of Mr. Howe's testimony that he worked on boilers at the Bowater Paper Mill, Cleaver-Brooks searched its records for boilers it may have sent to that facility and discovered that it shipped a small boiler to Bowater in 1957.[1]

[1] Dating to Judge Hill's time overseeing asbestos cases, the Asbestos Docket has a standing discovery order directing "product" defendants, like manufacturers such as Cleaver-Brooks, to produce responsive records if they sold or distributed "products containing asbestos to the

That boiler was identified as Boiler Unit Number O-18343, and Cleaver-Brooks produced its six-decades-old records regarding that boiler. (R. pp. 678–738.) The production set was 61 pages, and it included a photocopy of the file folder in which the boiler's records were stored, as well as the sales records, shipping records, maintenance records, design drawings, and other technical data for that boiler. (*Id.*)

Within that set of records was a typographical error on a handful of pages that misidentified the boiler's number as O-18344. (R. pp. 682, 683, 684, 687.) No one appeared to even notice this typographical error in the archived records in advance of trial—not Cleaver-Brooks, not the Plaintiffs, and not the trial judge. But that typographical error was of no consequence.

Cleaver-Brooks's corporate representative, John Tornetta, was deposed twice and was questioned for hours regarding the company's records. He testified throughout both depositions that the records produced related to a single boiler Cleaver-Brooks shipped to Bowater over 60 years ago. (*See, e.g.*, R. p. 1755, at 9:13–16 ("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. pp. 1770–71, at 44:18–45:9 ("Q: Other than those documents that we've just marked as Exhibits 4 through 7 [which include pages with the typographical error], are there any other documents in Cleaver-Brooks' possession related specifically to the boiler at Bowater? [objection] 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.").)

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employers and job sites" identified by a plaintiff in his or her work history. (R. p. 820.) Because Mr. Howe identified Bowater Paper Mill within his work history, Cleaver-Brooks searched its records and produced its file for the boiler sent to Bowater. The Plaintiffs introduced that entire file as Exhibit 55 at trial. (R. pp. 678–738.)

To ensure no doubt on the point, the Plaintiffs' counsel repeatedly confirmed during the depositions that all of the records produced by Cleaver-Brooks related to the single boiler at Bowater. (*See, e.g.*, R. p. 1768, at 42:18–20 ("Q: And the last one is Bowater, and that's where we found some records; correct? A: Yes. That 1957 boiler we were talking about earlier."); R. p. 1779, at 53:18–20 ("Q: And it's still the same model number and it's the same boiler? A: Yes."); R. p. 1785, at 67:9–11 ("Q: We're still talking about the same 15-pound steam boiler, correct? A: Correct."); R. p. 1790, at 72:12–14 ("Q: This blueprint applies to the boiler that was sent to Bowater? A: Correct."); *see generally* R. pp. 1769–91, 1873–1903 (questioning Cleaver-Brooks's representative during two different depositions about records concerning the single Cleaver-Brooks boiler at Bowater).)

III. <u>Pretrial Activities:</u> All of the parties' pretrial activities focused on the location within the Bowater campus of the single Cleaver-Brooks boiler.

In light of Mr. Howe's testimony, the remainder of pretrial activities focused exclusively 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, where Mr. Howe never would have been exposed to it?

Pages 4 through 11 of Cleaver-Brooks's opening brief to the Court of Appeals lay out in exacting detail how every pretrial task—discovery, depositions, motions, and oral arguments—focused on the parties' efforts to identify precisely where that single Cleaver-Brooks boiler was located on the Bowater campus. (App'x 9–16.) The record is unbroken on this point. As the nearly two-dozen record citations in those pages reveal, everyone agreed that the only material fact in dispute was the location of a single boiler at Bowater.

The Plaintiffs said so. (*See, e.g.*, R. p. 1874, Second Rule 30(b)(6) Dep. of Cleaver-Brooks, at 228:13–18 ("Q: Short story shorter, you don't know where at Bowater the Cleaver-Brooks boiler

was installed. True? [objection] A: I don't have any definitive way to determine that in our records, no."); R. p. 1135, Plaintiffs' Supplemental Opposition to 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 materials, and asbestos-containing rope.").)

Cleaver-Brooks said so. (*See, e.g.*, R. p. 1085, Cleaver-Brooks Mot. for Summ. J. at 8 ("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.").)

Even the trial judge said so, as she summarized the status of the case 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, at 25:15–17 (remarks of Judge Toal) (emphasis added).)

With this universal understanding of the lone factual dispute, the stage was set for trial, where the jury would hear competing evidence and decide where on the Bowater campus the Cleaver-Brooks boiler was located. If it was in the powerhouse, Mr. Howe would win. If it was anywhere other than the powerhouse, Cleaver-Brooks would win.

IV. The Trial: After a third-party witness testified that the Cleaver-Brooks boiler was not in the powerhouse, the Plaintiffs created a new theory on the fly that there may have been two Cleaver-Brooks boilers at Bowater, prompting Cleaver-Brooks to immediately locate and produce records debunking that new theory.

Trial began on March 12, 2018. During opening statements, the Plaintiffs reinforced to the jury that the dispositive question for it to answer involved the location at Bowater of the boiler that Cleaver-Brooks shipped there in 1957. (R. p. 159, at 70:4–12.) But that evening, counsel for Resolute FP US, Inc.—which owned Bowater Paper Mill at the time of trial, and which 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.) Included in the documents transmitted by Resolute's counsel was a letter from 1971 confirming that the Cleaver-Brooks boiler was located in the administration building on the Bowater campus, ***not*** in the powerhouse. (R. p. 854.)

Despite this crushing evidence, the Plaintiffs continued with trial. On March 15th, the Plaintiffs called Mr. Welker to the witness stand during their case-in-chief. With the jury watching, Mr. Welker testified that he conclusively determined that the Cleaver-Brooks boiler was in the administration building, not in the powerhouse. (R. p. 243, at 492:4–14; R. p. 255, at 504:5–11; R. p. 264, at 513:8–14; *see also* R. p. 677.) That was the ballgame.

Just like that, the case's sole factual dispute had been definitively resolved by a third-party witness, adversely to the Plaintiffs, and during the Plaintiffs' case-in-chief. But somewhere between the March 12th email from Resolute's counsel and the March 15th in-trial testimony, the Plaintiffs attempted to manufacture a second factual dispute.

In the middle of Mr. Welker's testimony, the Plaintiffs asked him questions suggesting that Cleaver-Brooks had actually shipped two boilers to Bowater. The only basis for this conjecture was the one-digit typographical error that appeared within Cleaver-Brooks's production of records for its boiler at Bowater. (*Compare* R. p. 239, at 488:14–23 (noting some records identify the boiler as Unit Number O-18343), *with* R. p. 242, at 491:17–20 (noting some records identify the boiler as Unit Number O-18344).)

This suggestion of multiple boilers was grossly misleading, and the Plaintiffs knew it. As catalogued above in Section II, they had already confirmed through hours of deposition questions that all of the materials Cleaver-Brooks produced related to a single boiler. It was highly improper to suggest otherwise to the jury, especially through a third-party witness.

But this was also the first time in the case that anyone had noted this typographical error. This discrepancy—and the Plaintiffs' brand new "two boilers" theory of the case—was never identified or discussed in any motions practice, at any hearings, or at any point in the pretrial process.

Following the Plaintiffs' in-trial surprise, Cleaver-Brooks sought to find out where the boiler with the Unit Number O-18344 was located so that it could fully rebut the Plaintiffs' misleading, never-before-disclosed theory. The very same day that the Plaintiffs sprung this on Cleaver-Brooks, Cleaver-Brooks located and served on the Plaintiffs a copy of its records regarding that boiler, which was sold in 1957 to the National Protein Corporation in Champaign, Illinois—not to a job site where Mr. Howe had ever worked or visited. (R. pp. 741–74, 858–63.)

At trial the next day, the Plaintiffs called Cleaver-Brooks's corporate designee as an adverse witness and, for the first time, asked him about this one-digit discrepancy. In response to the Plaintiffs' questions, he testified that it was obviously a typographical error that had been made by a third-party contractor when filling out a form over 60 years ago, that no one had noticed the typographical error earlier, and that "I don't think anyone ever brought it up as we were going through those depositions either." (R. pp. 338–39, at 688:12–689:9.) He also testified that Cleaver-Brooks had not even been aware of Unit Number O-18344 until the Plaintiffs questioned Mr. Welker about it the previous day at trial, but that once the Plaintiffs revealed their misleading theory, Cleaver-Brooks investigated its records to rebut what the Plaintiffs were wrongly implying to the jury through their questions to Mr. Welker and confirmed that boiler was in Illinois. (R. pp. 336–37, at 686:20–687:3; R. pp. 344–45, at 694:22–695:11.)

The Plaintiffs closed their case-in-chief and then, stunningly, sought sanctions against Cleaver-Brooks because of Cleaver-Brooks's prompt response to the Plaintiffs' in-trial surprise

from the day before. Cleaver-Brooks responded by pointing out the absurdity of the Plaintiffs' position and how the "two boilers" theory had never been a part of the case before the Plaintiffs attempted to mislead the jury through their questions to Mr. Welker.

Despite recognizing that "the big lynchpin of this case was going to be whether there was a Cleaver-Brooks boiler wherever Wayne Howe worked," and despite the fact that the Plaintiffs themselves had already questioned Cleaver-Brooks's designee about the location of Unit Number O-18344 in their own case-in-chief, the trial judge excluded Cleaver-Brooks's records regarding that boiler because their production in rebuttal to the Plaintiffs' in-trial surprise questioning was "a violation of the South Carolina Rules of Evidence regarding production." (*See generally* R. pp. 359–77, at 709:11–727:4 (transcribing request for sanctions, response to same, and the trial judge's remarks and rulings).)

All told, the parties spent perhaps an hour of trial time on this issue on March 16th. The case then moved on to the remainder of the evidentiary presentation, motions, and closing arguments. The case was sent to the jury on March 21st, which returned a verdict in Cleaver-Brooks's favor. (R. p. 579, at 1126:12–25.)

V. <u>Rewriting History in a Post-Trial Motion:</u> The trial judge sanctioned Cleaver-Brooks over $300,000 based on representations from Plaintiffs' counsel claiming they would not have taken the case to trial if they had known there was only one Cleaver-Brooks boiler at Bowater.

On March 31, 2018—ten days after the jury returned its defense verdict—the Plaintiffs filed a motion for discovery sanctions against Cleaver-Brooks. (R. p. 1156.) They did not accompany that motion with any affidavits or other proof supporting the relief they requested, in violation of Rule 6(d), SCRCP.

One month later, they filed a similar motion. (R. p. 1161.) This time, they filed nearly 2,000 pages of exhibits, including supporting affidavits, requesting that their lawyers be fully

compensated for all of their time spent preparing for and participating in trial, as well as for litigation costs and lost wages for the Plaintiffs' family members to attend trial. (R. pp. 1161–1390, 1424–35.) This fee-shifting request by the loser at trial was outrageous.

The hook for their motion was an assertion by the Plaintiffs' counsel that they somehow thought Cleaver-Brooks's records indicated it had supplied two boilers to Bowater, and they claimed they would not have taken the case to trial in the first place if they had known that there was only one Cleaver-Brooks boiler at Bowater. (R. pp. 1293–94, ¶¶ 14–19; R. pp. 1301–02, ¶¶ 14–18; R. p. 1430, ¶¶ 14–18.)

These assertions are directly contrary to the record. As catalogued above, everything about this case had focused on the location of a single Cleaver-Brooks boiler at Bowater; the record is extensive, uniform, and indisputable on this point. And the Plaintiffs actually confirmed during multiple depositions of Cleaver-Brooks's corporate designee that all of the records produced related to a single boiler; their in-trial suggestion otherwise was disingenuous, and so were their post-trial statements.

Cleaver-Brooks objected to this every way it knew how: the expiration of the trial court's jurisdiction to consider post-judgment motions, the Plaintiffs' untimely submission of affidavits, the misstatements of counsel that attempted to reframe the entire case as if there had been a genuine dispute about the number of Cleaver-Brooks boilers at Bowater, the lack of any discovery requests from the Plaintiffs that sought records regarding a boiler in Illinois, the Plaintiffs' waiver of the issue by introducing evidence to the jury confirming that there was only one boiler at Bowater, the fact that post-trial sanctions were improper because the trial court had already sanctioned Cleaver-Brooks during trial by excluding documents showing that the mythical second boiler was in Illinois, the grossly disproportionate award requested, and the trial court's refusal to allow Cleaver-

Brooks to conduct discovery into the evidentiary basis for the sanctions request. (*See generally* R. pp. 1391–1423, 1470–76.)

The trial court granted the Plaintiffs' motion and, with a minor reduction the Plaintiffs voluntarily imposed on themselves, sanctioned Cleaver-Brooks for the entirety of the Plaintiffs' attorneys' fees and costs for trial. (R. p. 25.) Even though the trial court relied on Rule 37(b)(2), SCRCP, as the basis for its sanctions order (R. p. 14), it never identified a single interrogatory, document request, request for admission, deposition question, or court order that would have prompted Cleaver-Brooks to produce materials related to a boiler in Illinois at any moment before the Plaintiffs questioned a third-party witness about it in front of the jury at trial. (R. pp. 5–25.)

This glaring omission should have been dispositive. How can a party be sanctioned for a supposed discovery violation when the documents at issue were never requested in discovery in the first place? Without explanation, the trial court deemed it "irrelevant" that there is not a single discovery request to which those materials could possibly have been responsive. (R. p. 14.)

VI. <u>Still No Explanation for Sanctions on Appeal:</u> The Court of Appeals summarily affirmed the largest discovery sanctions order in South Carolina history without any explanation as to what Cleaver-Brooks did wrong or could have done differently.

After denial of its timely Rule 59 motion, Cleaver-Brooks appealed the sanctions order to the Court of Appeals. In their briefing to that court, the parties agreed on the most important issue of the case: the sanctions order was subject to *de novo* review. (App'x 26–27 (Cleaver-Brooks's Brief); App'x 74 (Plaintiffs' Brief).) Despite this clean-slate standard of review and the absence of a single fact in the record that supports sanctioning Cleaver-Brooks, the Court of Appeals summarily affirmed the unprecedented sanctions order. There was no oral argument. And there was no genuine explanation in the summary order for that court's decision.

Instead of any discussion of the case's extensive history, the court included a single sentence within Paragraph 4 that appears to reveal its rationale: "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." (App'x 134, ¶ 4.)

The court did not cite to anything in support of this sentence, and, respectfully, this statement is incorrect. There were not "numerous requests" for records regarding a boiler in Illinois; in fact, there is not even one such request anywhere in the record. (R. pp. 1–1971.)

Cleaver-Brooks can make this assertion with total confidence because neither the Court of Appeals, nor the circuit court, nor the Plaintiffs themselves have ever identified anything in the record showing that those records were ever requested. Records regarding a boiler in Illinois had absolutely no relevance to the case until the moment the Plaintiffs decided to misleadingly suggest to a third-party witness that there were two boilers at Bowater, and did so knowing that the Cleaver-Brooks records—as confirmed by Resolute's own production—showed only one boiler there.

Not only did the Court of Appeals seemingly fail to undertake even a basic investigation of the record on this dispositive point, it appears to have assumed Cleaver-Brooks irrationally suppressed production of exculpatory materials. No defendant would knowingly withhold from production documents that disprove liability, yet that is what the Court of Appeals must have assumed in order to conclude that Cleaver-Brooks should have provided records regarding a boiler in Illinois at some unidentified point before trial.

Cleaver-Brooks timely sought rehearing, which the Court of Appeals denied on February 25, 2022. (App'x 136, 221.) This Petition follows, and the Court should readily vacate the State's largest monetary discovery sanction ever issued.

ARGUMENT

As it stands, Cleaver-Brooks won this case at trial, yet has been slapped with the largest discovery sanction in this State's history—over $300,000—without any explanation from any court as to what it did wrong or what it could possibly have done differently. Respectfully, this historic injustice demands review and reversal by the Supreme Court.

I. Certiorari review is warranted because this case involves the largest discovery sanction in South Carolina jurisprudence, but there is nothing in the record to support it.

The Court should exercise its certiorari discretion to review this case because it involves the highest monetary discovery sanction ever issued in South Carolina. The severe, unprecedented nature of the sanctions warrants review by the Supreme Court. *See* Rule 242(b), SCACR (indicating that certiorari review is reserved for cases where "there are special and important reasons").

As far as Cleaver-Brooks can discern, there is not another case in the State's jurisprudence that even comes close to the penalty here. As the table on the following page demonstrates, even a cursory comparison of this case with those cited by the Court of Appeals in its summary decision—including several cases where a party was a serial offender of discovery rules and court orders—makes obvious how disproportionate the sanctions here are compared to precedent in this State:[2]

Table of Cases Cited by the Court of Appeals on Following Page

[2] If the Court believes that the trial court's sanctions order is subject to any kind of deferential standard of review, it should still grant this Petition and vacate the order for an abuse of discretion. There is simply no basis at all for sanctions here and, as the table on the following page demonstrates, the sanction issued is grossly excessive by any measure.

Table: Cases Involving Discovery Sanctions Cited by the Court of Appeals

Discovery Sanctions Cases Cited by the Court of Appeals	**Monetary Sanctions**	**Other Sanctions?**	**Number of Discovery Orders Violated**
Davis v. Parkview Apartments, 409 S.C. 266 (2014)	Fees never determined, even after remand	Yes	At least 3 identified in appellate decision
Barnette v. Adams Bros. Logging, 355 S.C. 588 (2003)	None	Yes, as to one plaintiff	At least 4 identified in appellate decision
Richardson v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency, 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)
McNair v. Fairfield County, 379 S.C. 462 (Ct. App. 2008)	None	Yes	At least 3 identified in appellate decision
Temple v. Tec-Fab, Inc., 370 S.C. 383 (Ct. App. 2006)	None	Yes	At least 1 identified in appellate decision
QZO, Inc. v. Moyer, 358 S.C. 246 (Ct. App. 2004)	None	Yes	At least 1 identified in appellate decision
Scott v. Greenville Hous. Auth., 353 S.C. 639 (Ct. App. 2003)	Yes, but unspecified and not appealed	Yes	At least 1 identified in appellate decision
Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193 (Ct. App. 1999)	$1,775	Yes	At least 4 identified in appellate decision
This Case	***$304,617***	***Yes***	***0 identified by the Court of Appeals, the circuit court, or the Plaintiffs***

The Court of Appeals compounded the error by deferring to the trial court on all issues, rather than undertaking the *de novo* review of the record to which Cleaver-Brooks is entitled. S.C. Const. art. V, § 5; *Father*, 353 S.C. at 261, 578 S.E.2d at 14. Despite this constitutional standard, the Court of Appeals provided no discussion of this case's facts. Instead, it passively 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 when issuing its historically punitive discovery sanction. (App'x 132–35, ¶ 1 (one time), ¶ 2 (one time), ¶ 4 (three times).)

But the trial court's "findings of fact" cannot possibly stand on their own and are entitled to no deference. As detailed in a table in Cleaver-Brooks's opening appellate brief, the trial court's "findings of fact" either do not contain any supporting citations (because there is nothing in the record to support them), or are outright incorrect. (App'x 42–44.)

For instance, the trial court repeatedly assigned various "admissions" to Cleaver-Brooks's corporate representative, but it 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. (App'x 43–44.)

Elsewhere, the trial court attributed certain discovery tasks to Cleaver-Brooks that were actually discovery efforts for Resolute—Mr. Welker's employer—to undertake, and the record is clear on that incorrect "finding of fact" as well. (App'x 43.)

As such, the largest discovery sanctions ruling in South Carolina law currently stands on supposed factual findings that are either directly contrary to the record or simply imposed without any evidentiary support. The Constitution protects litigants against such abuses, and this Court should grant certiorari to undertake the *de novo* review to which Cleaver-Brooks is entitled.

II. The sanctions ruling and its subsequent affirmance ignore basic principles that govern discovery and civil procedure.

Certiorari review is also essential here because the sanctions order turns the entire civil discovery process on its head and disregards several settled principles that this Court has reiterated time and again. Rule 242(b)(3), SCACR. Each error provides an independent basis for granting this Petition; taken together, they cry out for immediate intervention by this Court to correct a punitive ruling below that, if unchecked, creates a precedent where a loser at trial is rewarded for fabricating a reason for its loss in order to recoup the expenses of trial from the winner.

A. This Court allows parties like Cleaver-Brooks who are victims of an in-trial surprise to rebut that new evidence.

This is not the first time a defendant has been forced at trial to respond to surprise evidence from a plaintiff, but it does appear to be the first time the victim of the surprise has been sanctioned.

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-irrelevant and unproduced, now-relevant evidence. This Court unanimously reversed and held the trial court's rulings were an abuse of discretion, observing that the defendant "was clearly prejudiced by the exclusion of this evidence" designed to rebut the plaintiff's new testimony. *Id.*

Bramlette is on all-fours with this case. After Mr. Welker—a third-party witness—crippled their case by testifying that the Cleaver-Brooks boiler was not in the powerhouse where Mr. Howe worked, the Plaintiffs questioned him regarding a brand new theory that there was a second Cleaver-Brooks 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 by locating and then producing records showing

that the "second" boiler was actually located in Illinois where Mr. Howe had never worked. *Bramlette* fully endorses Cleaver-Brooks's prompt response.

The Court of Appeals cited a dozen cases in its summary order, but *Bramlette*—the true controlling authority—is not one of them. Nor is *Bramlette* an isolated case. This 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 this Court). This is just such an occasion, as Cleaver-Brooks was a victim of "unexpected testimony" elicited by the Plaintiffs in trial about a boiler that was actually located in Illinois—even though the Plaintiffs knew the records they were using to mislead the witness all related to a single Cleaver-Brooks boiler at Bowater.

If allowed to stand, the sanctions order would render litigants helpless to correct surprise misinformation that its adversary communicates to the jury. Because that flies in the face of the principle that the victim of an in-trial surprise must be allowed to timely respond, and certainly without fear of being sanctioned, the Court should grant certiorari and vacate the rulings below.

B. This Court requires any discovery ruling to identify with specificity the defect in a party's discovery response as a prerequisite to sanctions.

As a corollary principle, this Court has made clear that any evaluation of a party's discovery conduct must consider the specifics of a discovery request and the corresponding response. For instance, in *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991), the 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"); *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); *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))).

The sanctions order is directly contrary to this fundamental point of discovery. It singularly relies on Rule 37(b)(2), SCRCP, as the basis of the court's authority to sanction Cleaver-Brooks (R. p. 14), but that rule only allows discovery sanctions when a party "fails to obey an order" regarding discovery. Not only is there no such order anywhere in the record, the trial court held that it was "irrelevant" whether records regarding a boiler in Illinois had been requested in discovery in the first place. (R. p. 14.) But the absence of any discovery request seeking those records—not one interrogatory, document request, request for admission, or deposition question—is hardly "irrelevant"; ***it is dispositive under Rule 37 and this Court's decisions***.

The summary affirmance does no better than the trial court's order. As discussed above in Section VI of the Statement of the Case, the Court of Appeals stated without citation or support that Cleaver-Brooks failed to produce documents regarding a boiler in Illinois in advance of trial "despite numerous requests." (App'x 134, ¶ 4.)

The Court of Appeals did not identify any such requests. Neither did the trial court. Neither did the Plaintiffs themselves. That's because there are no such requests. A boiler in Illinois had

nothing to do with this case until the moment the Plaintiffs' attempted to mislead the jury by asking a third-party witness questions about it. The Plaintiffs never tested their "two boilers" theory in discovery, and their failure to undertake any discovery to test their new theory before presenting it to the jury is in no way Cleaver-Brooks's fault. The law cannot condone penalizing a party for not producing in discovery materials that were never even requested.

At bottom, the lower courts ignored the scope of Rule 37 and this Court's settled law regarding how to assess alleged discovery misconduct. They did not evaluate Cleaver-Brooks's discovery responses "in light of the question asked." *Baughman*, 306 S.C. at 108, 410 S.E.2d at 541. They never considered "the precise nature" of the discovery at issue. *Laney*, 262 S.C. at 60, 202 S.E.2d at 15. And they never "consider[ed] the reason the new information was not provided earlier." *Reed*, 277 S.C. at 316, 286 S.E.2d at 388. Certiorari review is essential to correct the lower courts' failure to follow this Court's settled precedent for analyzing discovery conduct.

C. This Court requires parties to live with the consequences of their litigation decisions, including the Plaintiffs' introduction at trial of an issue that they failed to test or confirm in discovery.

In South Carolina, if a party introduces an issue into a case, it waives the ability to complain about the resulting consequences of that decision. *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).

There is no dispute that the Plaintiffs first disclosed their misleading "two boilers" theory during in-trial questioning of Mr. Welker. It does not appear anywhere else in the case's extensive record. Accordingly, the Plaintiffs had 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-Brooks's same-day response to their litigation maneuvering. *See, e.g.*, *State v. McDaniel*, 168 N.E.3d 910, 913 (Ohio Ct. App. 2021) ("Sometimes, a case helps illustrate the wisdom of a familiar adage, like don't ask a question you don't know the answer to.").[3]

Rather than enforcing this well-established point of South Carolina law, both the circuit court and the Court of Appeals excused the Plaintiffs' failure to test the "two boilers" theory in advance of presenting it to the jury, and they improperly shifted the cost of that failure from the Plaintiffs to Cleaver-Brooks. Because litigants are not to be rewarded for doing an incomplete job in discovery, but instead waive the ability to complain about circumstances of their own creation, certiorari review is necessary to bring this case back in line with this Court's settled precedent.

III. The sanctions order is based on untimely affidavits on which no discovery was permitted despite significant factual and legal issues.

Finally, the Court should grant certiorari review of this matter because the sanctions would not have been issued but for testimony from the Plaintiffs' counsel that if they had only known that there was a single Cleaver-Brooks boiler at Bowater, they would not have taken the case to trial in the first place. Given the Court's supervisory authority over the profession, S.C. Const. art.

[3] Of course, the Plaintiffs knew that the typographical error on a handful of pages did not mean that there was a second Cleaver-Brooks boiler at Bowater because Cleaver-Brooks's designee testified throughout his depositions that the materials Cleaver-Brooks produced related to a single boiler. (Statement of the Case, *supra* § II.)

V, § 4, a historically severe sanctions order that is rooted in testimony from counsel makes certiorari review particularly appropriate.

Each of the Plaintiffs' three attorneys swore under oath as follows:

> Plaintiffs decided to proceed to trial against Cleaver Brooks because the 25 pages of commercial records [*sic*: 61 pages] produced by Cleaver Brooks stated that there were two boilers at Bowater.

(R. p. 1293, Dean Aff. ¶ 14.)

> Plaintiffs decided to proceed to trial against Cleaver Brooks because the 25 pages of commercial records [*sic*: 61 pages] produced by Cleaver Brooks suggested that there were two boilers at Bowater, with one boiler in the powerhouse, where Howe worked.

(R. p. 1301, Holder Aff. ¶ 14.)

> Plaintiffs decided to proceed to trial against Cleaver Brooks because the 25 pages of commercial records [*sic*: 61 pages] produced by Cleaver Brooks suggested that there were two boilers at Bowater, with one boiler in the powerhouse, where Howe worked.

(R. p. 1430, McVey Aff. ¶ 14.)[4]

These affidavits were not filed or served with the Plaintiffs' motion on March 31, 2018. That alone should have resulted in their exclusion as a matter of law under Rule 6(d), SCRCP, which provides that "[w]hen a motion is to be supported by affidavit, the affidavit shall be served with the motion" and does not give the trial court discretion to excuse an untimely affidavit. But the substance of the affidavits is more problematic than a technical failure under the procedural rules, as there are several obvious inconsistencies between the affidavits and the record facts.

First, Cleaver-Brooks's corporate designee was deposed in two separate sittings for several hours at a time, during which the Plaintiffs' counsel confirmed that the documents Cleaver-Brooks

[4] The Cleaver-Brooks file for the boiler at issue is actually 61 pages; the Plaintiffs know this, as they introduced the entire file as Exhibit 55 at trial. (R. pp. 678–738.)

produced all related to a single boiler at Bowater. In fact, counsel consistently peppered the depositions with questions specifically designed to confirm that the entire set of records related to just one boiler. To highlight just three questions posed as counsel walked the witness through Cleaver-Brooks's document production:

> Q: And the last one is Bowater, and that's where we found some records; correct?
>
> A: Yes. That 1957 boiler we were talking about earlier.

(R. p. 1768, at 42:18–20.)

> Q: And it's still the same model number and it's still the same boiler?
>
> A: Yes.

(R. p. 1779, at 53:18–20.)

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

(R. p. 1785, at 67:9–11.) There is simply no way the Plaintiffs can plausibly contend they believed Cleaver-Brooks's records showed two boilers at Bowater when the Cleaver-Brooks designee testified over and over again that the entire file related to a single boiler.

Second, this "two boilers" theory does not appear anywhere at all in the record until the Plaintiffs' in-trial questioning of Mr. Welker. 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—all of which had previously framed the case as a dispute about the location of a single boiler at Bowater. But it does not appear anywhere prior to, and barely even after, Mr. Welker's testimony. On that, the record is clear. (R. pp. 1–1971)

Third, if these statements by counsel are actually true, then the Plaintiffs' 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 boilers at Bowater in the first place. It is obvious the Plaintiffs did not predicate their entire liability strategy on the "two boilers" theory; 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. (*E.g.*, App'x 9–16.)[5]

Fourth, these statements by counsel necessarily assume 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 story must assume such 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.").

Neither the trial court nor the Court of Appeals scrutinized counsel's statements or addressed their untimely submission under Rule 6(d), and those courts also denied Cleaver-Brooks the opportunity to further examine, challenge, or scrutinize counsel's testimony through discovery.

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[5] On appeal, the Plaintiffs argued that they were entitled to keep this "two boilers" trial strategy a secret. (App'x 76–78.) That is certainly true, but they alone should bear the consequences of failing to test that supposed strategy in advance of trial through discovery, and they alone should bear the consequence of suggesting to the jury that there may have been two boilers at Bowater after being told directly by Cleaver-Brooks's corporate designee during his depositions that all of the records it produced related to a single boiler.

That denial alone amounts to prejudice requiring 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"). Accordingly, the Court should grant this Petition in order to undertake a legitimate review of counsel's statements on which the historic sanctions order is based.

CONCLUSION

The unbroken record makes clear that this case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. That sole issue drove the entirety of this litigation until Mr. Welker testified in trial that the boiler was in a building at Bowater where Mr. Howe never worked. Scrambling with the jury watching, the Plaintiffs revealed a brand new "two boilers" theory of the case that had never before been mentioned in the case, and that the Plaintiffs knew was misleading. Cleaver-Brooks immediately rebutted that surprise testimony by producing documents the very same day.

As a matter of South Carolina law, this is not sanctionable conduct. But the lower courts have not only sanctioned Cleaver-Brooks for its prompt response, they have done so to the highest amount in South Carolina jurisprudence. Respectfully, the Court should grant this Petition and vacate the lower courts' rulings, which are inconsistent with both the factual record and numerous decisions and principles established by this Court

Signature Page Attached

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