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

Appellate Case No. 2022-000368

RECEIVED
Oct 19 2022
S.C. SUPREME COURT

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

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babcock Borsig Power,

Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries. Defendants,

of which

Cleaver-Brooks, Inc. is the.. Petitioner.

BRIEF OF CLEAVER-BROOKS, INC.

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October 19, 2022

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ISSUES PRESENTED

The Court granted a writ of certiorari to review two questions:

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?

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 the Plaintiffs called to the stand during their own case-in-chief. The rebuttal 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 of a third-party witness in front of the jury.

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.[1] Nevertheless, the circuit court sanctioned Cleaver-Brooks at an all-time high penalty for not producing them earlier, and the Court of Appeals summarily affirmed that historically punitive order without explanation or even holding oral argument.

The sanctions order cannot stand. It runs contrary to this Court's precedent regarding a litigant's ability to respond when an adversary elicits surprise testimony in the middle of trial. It

[1] So far, the Plaintiffs have had three chances to do so in their appellate filings: their brief to the Court of Appeals, their return in opposition to rehearing at the Court of Appeals, and their return in opposition to this Court taking certiorari review. To date, their appellate briefing has totaled 89 pages, yet the Plaintiffs have never identified an actual discovery request to which the disputed materials could have conceivably been responsive. Because there is none. This black hole in the record should be dispositive of this appeal.

runs contrary to this Court's precedent regarding when discovery sanctions can be issued. It runs contrary to this case's unbroken record as to the precise factual dispute that was at issue from the pleadings through trial. And it runs contrary to common sense and logic, as the sanctions order assumes that Cleaver-Brooks knowingly withheld documents that would have fully avoided trial and any risk of liability. Accordingly, the Court should vacate the sanctions order in its entirety.

STATEMENT OF THE CASE

This Court has the constitutional charge to review the record and proceedings below with clear eyes and a clean slate. *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"). Accordingly, the Statement of the Case is paramount to this Court's *de novo* review.

This case was always about one issue: the location of a single Cleaver-Brooks boiler at the Bowater Paper Mill. As the extensive catalogue of this case's history below reveals, that sole issue drove all discovery and pretrial litigation.

At trial, a third-party witness—that the Plaintiffs called to the stand—conclusively testified that the boiler was not anywhere near where the decedent had worked at Bowater, destroying the Plaintiffs' case. Scrambling with the jury watching, the Plaintiffs pointed out a typographical error in a vendor's documents to suggest that there may have been a second Cleaver-Brooks boiler at Bowater. Cleaver-Brooks immediately located and produced that same day records making clear that the so-called second boiler was actually in Illinois, not at Bowater. The next day at trial, the Plaintiffs elicited testimony about those records and the location of the Illinois boiler, but the trial court then refused to allow Cleaver-Brooks to admit those records into evidence. The jury returned a verdict in Cleaver-Brooks's favor anyway.

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

I. <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. Before his death, he testified during a deposition 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 in the Bowater powerhouse, 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.[2]

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 the commercial records specific to the boiler shipped to Bowater and a compilation of the engineering drawings and parts descriptions for potentially asbestos-containing components. (*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. That's because the typographical error was of no consequence until the Plaintiffs' own third-party witness destroyed at trial their theory of liability that the Cleaver-Brooks boiler was in the powerhouse where Mr. Howe worked.

The Plaintiffs deposed Cleaver-Brooks's corporate representative twice and questioned him for hours regarding the company's records. He testified throughout both depositions that the records produced related to the 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

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

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.").)

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, including the pages containing the typographical error. (*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 of the single Cleaver-Brooks boiler at Bowater.

In light of Mr. Howe's testimony, the remainder of pretrial activities focused exclusively on the location of the Cleaver-Brooks boiler at Bowater: 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?

At no point during any pretrial event was there ever any suggestion that Cleaver-Brooks had really shipped multiple boilers to Bowater. Below are pages and pages of examples of the parties' repeated, uniform representations regarding the source of their factual dispute.

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

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

> Cleaver-Brooks manufactures boilers. Plaintiffs have alleged that Cleaver-Brooks manufactured ***a boiler*** used at the Bowater Paper Mill in Rock Hil/Catawba, South Carolina which contained asbestos to which the Plaintiff was exposed, and which exposure contributed to his alleged asbestos related injuries.
>
> ***
>
> On January 11, 2018, counsel for Cleaver-Brooks produced a collection of documents regarding its shipment of ***a boiler*** to the Bowater Paper Mill, pursuant to an agreement with Plaintiffs' counsel.

(R. pp. 869–70 (emphasis added).) No mention of a second boiler.

B. January 24th: Hearing on Discovery Issues

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

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

(R. p. 602, at 37:1–5 (remarks of Ms. Dean) (emphasis added).)

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

(R. p. 622, at 57:8–13 (remarks of Ms. Dean) (emphasis added).) No mention of a second boiler.

Counsel for Cleaver-Brooks also confirmed the limited nature of the factual dispute:

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

(R. p. 623, at 58:4–11 (remarks of Mr. Thoensen) (emphasis added).) The Plaintiffs never objected to or suggested disagreement with this recitation of the case. No mention of a second boiler.

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

The Plaintiffs deposed Cleaver-Brooks's Rule 30(b)(6) designee twice. The first deposition took place on February 2, 2018, during which counsel for the Plaintiffs confirmed over and over again that the dispute involved the location of a single Cleaver-Brooks boiler at Bowater:

> Q: And you know that there's a Cleaver—or was ***a Cleaver-Brooks boiler*** at Bowater?
>
> A: Yes. I think we found ***a small 30 horsepower Progress model package boiler*** shipped in 1957.
>
> Q: And do you know where ***that boiler*** was located at Bowater?
>
> A: Specifically on the site or what building, I couldn't find anything in our records that indicated specifically where ***it*** was, no.

(R. p. 1755, at 9:13–21 (emphasis added).)

> Q: So Cleaver-Brooks' records verifies that there is ***a Cleaver-Brooks boiler*** at Bowater?
>
> [objection of counsel]
>
> A: I guess I'd say our records verify that we shipped ***a boiler*** there and ***it*** was started up. It certainly doesn't verify how long ***it*** was there, although I think there's some records that show some interaction in the '60s. But beyond that, I couldn't say when ***it*** was there or when ***it*** wasn't there.
>
> Q: And you can confirm that asbestos was used on ***this specific boiler*** that was shipped to Bowater?

[objection of counsel]

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

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

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

(R. p. 1768–69, at 42:21–43:21 (emphasis added).)

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

[objection of counsel]

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

(R. p. 1770–71, at 44:18–45:9 (emphasis added).)

Q: But we don't have any documentation to show where ***the Cleaver-Brooks boiler*** was at Bowater?

(R. p. 1797, at 119:22–23 (emphasis added).)

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

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

(R. p. 1798, at 120:14–19 (emphasis added).)

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

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

A: Correct.

(R. p. 1785, at 67:9–11 (emphasis added).)

Q: This blueprint applies to ***<u>the boiler</u>*** that was sent to Bowater?

A: Correct.

(R. p. 1790, at 72:12–14 (emphasis added).)

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

[objection of counsel]

A: Correct. . . .

(R. p. 1793, at 115:14–25 (emphasis added).) No mention of a second boiler.

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

Following the first deposition of its corporate representative, Cleaver-Brooks moved for summary judgment on grounds that there was no evidence that Mr. Howe had ever worked around a Cleaver-Brooks boiler. In particular, Cleaver-Brooks argued as follows: "Also, Howe testified that all of the boilers that he worked on at Bowater were in the power house, and the evidence shows that ***<u>the Cleaver-Brooks boiler</u>*** shipped to Bowater in 1957 was not in the power house." (R. p. 1085 (emphasis added).) No mention of a second boiler.

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

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

> Cleaver-Brooks has admitted that its boilers, like ***<u>the boiler shipped to Bowater in 1957</u>***, had asbestos-containing components. Additionally, Cleaver-Brooks confirmed that the specifications for ***<u>the boiler</u>*** located at

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

(R. p. 1130 (emphasis added).) No mention of a second boiler.

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

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

> Q: All right. ***The Cleaver-Brooks boiler*** that was supplied to the Bowater paper mill, do you know where at the Bowater facility ***that boiler*** was installed?
>
> [objection of counsel]
>
> A: I would have to look, but if I recall, my last deposition, I don't think there was a way we could tell from our records where ***it*** was. It was a—but I can't even off the top of my head. I didn't look at it very much before this, but I think ***it was a relatively small firetube boiler***.

(R. p. 1873, at 227:1–12 (emphasis added).)

> Q: Short story shorter, you don't know where at Bowater ***the Cleaver-Brooks boiler*** was installed. True?
>
> [objection of counsel]
>
> A: I don't have a definitive way to determine that in our records, no.

(R. p. 1874, at 228:13–18 (emphasis added).)

> Q: All right. There really is no dispute that ***the Cleaver-Brooks boiler*** at Bowater contained asbestos-containing cement, asbestos-containing gasket material, and asbestos-containing rope. Correct?
>
> [objection of counsel]
>
> A: Correct. I believe it's called out, all three of those items.

(R. p. 1892, at 246:15–22 (emphasis added).)

> Q: Do you know what ***the boiler*** Cleaver-Brooks supplied to Bowater was used for?
>
> A: I don't think I found anything in the records that gave me a direct indication of that I think I looked at during the last deposition. ***It*** is one of the smallest boilers we make.

(R. p. 1899, at 253:7–12 (emphasis supplied).) No mention of a second boiler.

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

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

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

(R. p. 1135 (emphasis added); *see also id.* (explaining that this case involved "a boiler located at Bowater," "the Cleaver-Brooks boiler at Bowater," "this boiler," "the rear door of the Cleaver-Brooks boiler at Bowater," and "the boiler's rear door").)

And as had been their practice in virtually every case pending in the asbestos docket, the Plaintiffs' counsel incorrectly claimed that Cleaver-Brooks had not made a complete production ***in other cases*** and sought sanctions for an alleged discovery violation. Their requested sanction: an order that would relieve them of their burden of proof in this case by declaring certain facts to be "established" for purposes of trial. (R. p. 1144.) But 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).) No mention of a second boiler.

H. March 9th: Hearing on Summary Judgment

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

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

(R. p. 634, at 18:16–19 (remarks of Ms. Dean) (emphasis added).) No mention of a second boiler.

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

> Well, Ms. Dean, Ms. Dean, this is a dispute between—you don't have anything from anybody on a piece of paper that says where ***it's*** located, nor do they. You have got a witness that you found who says that ***it*** was in the power house, and they've got written material from the boiler inspection people at the state and some other testimony of the Bowater's corporate rep which you all are relying on for location in a lot of places where the defendants don't know where it is that says ***it's*** in the admin building. ***So, it's just a simple factual dispute between the two of y'all as to where this boiler is located.*** They're not disputing ***it*** was sold. They are saying that all their—they don't have any records, they say, that say the location, just a sales thing, and they say ***it's*** in the admin[istration building].

(R. p. 641, at 25:6–20 (remarks of Judge Toal) (emphasis added).) No mention of a second boiler.

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

IV. <u>The Trial:</u> After a third-party witness—called by the Plaintiffs—testified that the Cleaver-Brooks boiler was not in the powerhouse, the Plaintiffs made up 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.

A. March 12th: Trial started, but a third-party produced documents that evening, which destroyed the Plaintiffs' case.

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

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

(R. p. 159, at 70:4–12 (remarks of Ms. Dean) (emphasis added).)

At 8:07 pm that evening, counsel for Resolute FP US, Inc.—the then-owner of the Bowater Paper Mill, and an entity that was not a party to this case—sent an email to counsel for both the Plaintiffs and Cleaver-Brooks attaching a set of materials that Art Welker, one of Resolute's employees who worked at Bowater, had located. (R. pp. 851–55.) Mr. Welker had been deposed in February, but—at the request of the Plaintiffs' counsel—he continued investigating the location of Cleaver-Brooks's boiler. (*E.g.*, R. pp. 229–31, 263–64, at 478:16–25, 479:25–480:19, 512:22–513:7.) Included in the documents transmitted in the evening of March 12th was a letter Mr. Welker found confirming that the Cleaver-Brooks boiler was located in the administration building, ***<u>not</u>*** in the powerhouse. (R. p. 854.) No mention of a second boiler.

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

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

That was the ballgame. Just like that, the case's sole factual dispute—the very factual dispute that the Plaintiffs had exclusively leveraged throughout the pretrial litigation, including to avoid summary judgment—had been definitively resolved by a third-party witness that the Plaintiffs themselves called during their case-in-chief.

But somewhere between the March 12, 8:07 pm email and Mr. Welker's testimony on March 15th, the Plaintiffs manufactured their "two boiler" theory.

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

This suggestion of multiple boilers was grossly misleading, and the Plaintiffs knew it. As catalogued above, 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 this discrepancy had been noted at any point in the case. It was never identified or discussed in any motions practice, at any hearings, or during any depositions, including either of the two times that the Plaintiffs deposed Cleaver-Brooks's Rule 30(b)(6) designee. It was not the subject of a single document request, interrogatory, or admission request.

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

Following the Plaintiffs' revelation of their new "two boiler" theory during trial, Cleaver-Brooks sought to find out where Boiler Unit Number O-18344 was located in order to squarely rebut to the Plaintiffs' never-before-disclosed theory. It did so the very same day the Plaintiffs attempted to mislead Mr. Welker—and the jury—through questions about a typographical error in corporate records that were over sixty years old.

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

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

Attached to that email were copies of entries from the Cleaver-Brooks job-site index system showing two things: (1) Unit Number O-18343 had been shipped to Bowater, just as Cleaver-Brooks had maintained from the outset, and just as its corporate representative had

testified during his Rule 30(b)(6) depositions; and (2) Unit Number O-18344, which the Plaintiffs misleadingly implied was at Bowater during Mr. Welker's in-trial testimony earlier in the day, had been shipped to a different company in Illinois in November 1957. (R. pp. 859–60.)

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

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

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

But then—even though the Plaintiffs already had records showing that Unit Number O-18344 was not at Bowater, but rather in Illinois, and even though they had already confirmed during depositions that all of the records produced in advance of trial related to a single boiler—the Plaintiffs asked Mr. Tornetta about the discrepancy between Unit Numbers O-18343 and O-18344 appearing within a handful of the records in Cleaver-Brooks's pretrial production. Mr. Tornetta readily pointed out that the instances of the Unit Number O-18344 appearing within those records were typographical errors by a third-party contractor when filling out paperwork. (R. p. 336, at 686:6–8.) He explained in response to questioning from the Plaintiffs' counsel:

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

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

(R. pp. 336–37, at 686:20–687:3.)

The Plaintiffs' counsel continued with their questioning:

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

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

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

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

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

Flustered, and with the jury watching, the Plaintiffs pressed Mr. Tornetta further on where Unit Number O-18344 was located, if it was not located at Bowater:

> Q: Have you gone back since you've acknowledged that maybe you missed the different unit numbers [within Cleaver-Brooks's production regarding the boiler at Bowater] to look and see what other indicators there are about those boilers to make clear that we're talking about more than one boiler?
>
> A: I suppose in pulling out the records for wanting 344 to see where it was indicated otherwise, that that boiler 18344 was not at Bowater. So in a way, yes, I did do that to see if there was a second boiler there and it was not 18344, 18344 was in Illinois.

(R. pp. 344–45, at 694:22–695:5.)

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

> Q: When is the first time you did that [*i.e.* check Cleaver-Brooks's records to determine where Unit Number O-18344 was located] and how much time did you spend looking?
>
> A: It was yesterday afternoon.
>
> Q: Somebody texted you when Art [Welker] was on the stand?
>
> A: I don't think I got a text, I got here and was asked about it.

(R. p. 345, at 695:6–11.)

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

Amazingly, the Plaintiffs—who (a) never revealed their supposed "two boiler" theory at any point in discovery or motions practice, (b) repeatedly represented to the court that there was a single Cleaver-Brooks boiler at the Bowater Paper Mill, and (c) confirmed in depositions that all records Cleaver-Brooks produced in advance of trial were about a single boiler—claimed to be the

victims of "trial by ambush." (R. p. 362, at 712:11.) In response, Cleaver-Brooks pointed out the absurdity of the Plaintiffs' position and how this issue had never arisen at ***any*** point before Mr. Welker's testimony the day before. (R. pp. 363–65, at 713:3–715:16.) As Cleaver-Brooks explained, "you can't look for what you don't know." (R. p. 370, at 720:10–11.)

The trial court recognized that "the big lynchpin of this case was going to be whether there was a Cleaver-Brooks boiler wherever Wayne Howe worked," but nevertheless decided that Cleaver-Brooks's rebuttal records regarding Unit Number O-18344 would not be admitted into evidence on grounds that the production of those records "is a violation of the South Carolina Rules of Evidence regarding production." (R. pp. 366–69, at 716:9–11, 718:23–719:3.)

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

> Q: How many boilers did Cleaver-Brooks ship to Bowater?
>
> A: One.
>
> Q: What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.
>
> A: I think the whole unit number, if I get it correctly, is O-18343.
>
> Q: Did Cleaver-Brooks ship a boiler to Bowater with the unit number O-18344?
>
> A: No.

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

> Q: Did you find anything in your records that said field report in the top and had written as the serial number 18343?
>
> A: No.
>
> Q: And what did you conclude based upon all of your work in looking at Cleaver-Brooks files over all of the years by that fact?

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

Q: Any doubt in your mind about that?

A: No.

(R. pp. 394–95, at 744:23–745:10.)

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

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

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

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

The jury returned a verdict in Cleaver-Brooks's favor. (R. p. 579, at 1126:12–25.) The trial judge apparently instructed the Clerk of Court not to enter the verdict form during an off-the-record

conversation. (R. pp. 1648–50, at 20:21–22:18.) Nearly a year and a half later—September 13, 2019—the verdict form was uploaded to the Public Index while this appeal was pending.

V. Rewriting History in a Post-Trial Motion: 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 made an additional filing for sanctions. (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 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 untimely affidavit from each of the Plaintiffs' counsel, in which they testified 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.)

This is not believable in any way. 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. Even when opposing summary judgment, the Plaintiffs made no suggestion of there being two boilers at Bowater. And the Plaintiffs' counsel actually confirmed during multiple depositions of Cleaver-Brooks's corporate designee that all of the

records produced related to a single boiler; the Plaintiffs' in-trial suggestion otherwise was disingenuous, and so were their counsel's post-trial affidavits.

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 affidavits, the incorrect statements 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 questionable evidentiary basis for the sanctions request. (*See generally* R. pp. 1391–1423, 1470–76.)

On October 10, 2018, the trial court held a hearing on the motion, during which the Plaintiffs withdrew $4,600 of their requested costs. (R. p. 1644, at 16:1–5 (remarks of Ms. McVey).) Following the hearing, the Plaintiffs provided the trial court with a proposed order granting their motion, to which Cleaver-Brooks objected as being replete with demonstrably inaccurate statements, among other objections. (R. p. 1471.)[3]

On December 7, 2018, the trial court signed the Plaintiffs' proposed order and awarded them $304,617.00, the full amount requested by the Plaintiffs' counsel with a self-imposed

[3] Numerous of these statements are catalogued as well in Cleaver-Brooks's appellate filings. (App'x 42–44, 149–50.)

reduction of Ms. Dean's and her local counsel's hourly rates from $550 to $500. (R. p. 5.)[4] Cleaver-Brooks has been unable to locate a single case in South Carolina jurisprudence with a monetary penalty this high as a purported discovery sanction.

Even though the trial court relied exclusively 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.)

On December 17, 2018, Cleaver-Brooks filed and served a timely motion to alter or amend that sanctions order under Rule 59(e), SCRCP. (R. p. 1477.) By order dated January 4, 2019, the trial court denied Cleaver-Brooks's Rule 59(e) motion. (R. p. 27.) This appeal followed on January 30, 2019. (R. p. 1608.)

VI. Still No Explanation for Sanctions on Appeal: 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

[4] Standing alone, this rubber-stamping of the Plaintiffs' request was an error of law warranting reversal. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

of the appeal: the sanctions order was subject to *de novo* review. (App'x 26–27 (Cleaver-Brooks's Brief), 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 of Appeals included a 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 of Appeals 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 or for records regarding a boiler with unit number O-18344. In fact, there is not even one such request, or even a suggestion of such a 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 question a third-party witness in front of the jury about it, rather than dismissing a case that was no longer supported by credible evidence. And they did so despite being told time and again by Cleaver-Brooks's corporate designee that the Cleaver-Brooks records produced in discovery showed only one boiler at Bowater, a point that the Plaintiffs never once disputed prior to Mr. Welker's testimony at trial.

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.

Accordingly, Cleaver-Brooks timely sought rehearing, which the Court of Appeals denied on February 25, 2022. (App'x 136, 223.)[5] Cleaver-Brooks then sought a writ of certiorari, which this Court granted on all issues presented.

STANDARD OF REVIEW

Perhaps the most important legal principle in this case is the standard of review. There is simply no basis whatsoever in the record to support the trial court's sanctions order, and—as a matter of constitutional law—this Court must take its own view of the evidence when reviewing that order. S.C. Const. art. V, § 5; *see Father v. S.C. DSS*, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003) ("So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts." (citing S.C. Const. art. V, § 5)), *superseded in unrelated part by statutory amendment as reported in Clegg v. Lambrecht*, Op. No. 4498, 2009 S.C. App. LEXIS 353, at *9–10 n.5 (S.C. Ct. App. Feb. 5, 2009).

[5] When opposing Cleaver-Brooks's petition for rehearing, the Plaintiffs assured the Court of Appeals that rehearing was unnecessary because its unpublished decision carries no "precedential impact." (App'x 173.) The very same day it filed that brief, the Plaintiffs' counsel cited that unpublished decision in support of yet another sanctions motion filed in the circuit court against a different defendant. (App'x 217–18.) This misleading conduct should inform the Court's evaluation of the affidavits of counsel on which the sanctions order is based.

The Plaintiffs, as they must, agree on this point. (*See* App'x 74 ("This Court reviews findings of fact in a matter of equity taking its own view of the evidence.").)

And so does the trial judge. *See* Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* at 248 ("Discovery: Sanctions") (3d ed. 2016) ("Generally, the standard of review in equity cases takes precedence [when reviewing a sanctions order that includes attorneys' fees], as the South Carolina Constitution permits an appellate court to take its own view of the facts underlying the sanctions."); R. p. 22 (acknowledging that the court was proceeding in equity).

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

ARGUMENT

While this case's record is extensive, the legal issues that control this appeal are simple and straightforward. As it stands, Cleaver-Brooks won this case at trial by jury, yet has been slapped with the largest monetary 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 finds no support in the record of this case or the law governing these issues, and it demands reversal.

I. Discovery sanctions cannot be issued against a party for not producing documents that were never the subject of any discovery request, and that were not relevant until the middle of trial.

The circuit court based sanctions exclusively on Rule 37(b)(2), SCRCP, (R. p. 14.) The sanctions order violates several familiar principles that govern discovery and civil procedure, including Rule 37 itself, the standards for evaluating the propriety of discovery responses, whether to admit newly-produced evidence to rebut an in-trial surprise, and a party's inability to object once it opens the door to an issue. Each is discussed below.

Rule 37(b)(2) is facially inapplicable. Rule 37(b)(2)—titled "Failure to Comply with Order"—authorizes discovery sanctions only when a party "fails to obey an order" regarding discovery. But there is no such order anywhere in the record. The absence of any order renders inapplicable on its face the sole legal authority on which the circuit court based its sanctions order.

The discovery requested controls the analysis. When one party alleges that another has given an incomplete discovery response, the trial court has an obligation to evaluate the response "in light of the question asked." *Baughman v. AT&T Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991); *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 several requests in their entirety, deeming them to be "abusive and beyond the pale," and then "declin[ing] to rewrite and narrowly tailor oppressive discovery requests so as to make them proper"); *Laney v. Hefley*, 262 S.C. 54, 60, 202 S.E.2d 12, 15 (1974) (explaining that a court must consider "[t]he precise nature" of discovery when assessing whether a sanction is warranted (quoting *Carver v. Salt River Valley Water Users' Ass'n*, 446 P.2d 492, 496 (Ariz. 1968))); *cf. Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) (holding that when a party attempts to use new exhibits that were not disclosed before trial, the court "should consider the reason the new information was not provided earlier").

The circuit court refused to engage in this analysis here, instead dismissing the fact that the Plaintiffs never conducted discovery regarding a supposed second boiler as "irrelevant" and as "miss[ing] the point." (R. pp. 14–15.) But this is not "irrelevant"; it is dispositive.

Cleaver-Brooks cannot be sanctioned for failing to produce documents that were never requested in discovery. And there is no genuine dispute that those documents were never requested: neither the Plaintiffs, nor the circuit court, nor the Court of Appeals has ever identified even one discovery request that could have possibly prompted Cleaver-Brooks to produce records regarding a boiler in Illinois that Mr. Howe never encountered. Not a single interrogatory. Not a single document request. Not a single request for admission. Not a single deposition question. Cleaver-Brooks has made this point over and over again in its appellate filings. The Plaintiffs' sustained silence in response tells the story of why the sanctions order must be vacated.[6]

Nor is there any genuine dispute that those records had no relevance to the case until the moment the Plaintiffs started questioning Mr. Welker—a third-party witness—about a so-called second boiler in the middle of trial. Prior to that mid-trial line of questioning, each and every litigation activity related solely to identifying the location of a single Cleaver-Brooks boiler at Bowater. The Statement of the Case contains dozens of citations to the record confirming this unavoidable point, and even the trial judge said so on the eve of trial when she summarized: "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).) The Plaintiffs' in-trial attempt to change the scope of this case cannot give rise to discovery sanctions against Cleaver-Brooks.

[6] The Court of Appeals puzzlingly stated that these records would have been responsive to "numerous requests." (App'x 134.) Respectfully, this is simply not true, and that court's failure to identify even one such request in its summary opinion proves the point.

At bottom, the lower courts ignored this Court's settled law regarding how to assess potential 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. The refusal to engage in this required analysis and recognize that Cleaver-Brooks did absolutely nothing wrong here requires vacating the sanctions order.

A party must be able to rebut mid-trial surprises. If a party introduces new evidence during trial, its adversary must be able to rebut that in-trial surprise, even if the rebuttal evidence was not previously disclosed.

For instance, in *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990), a psychiatric patient at Charter Rivers committed suicide, and his estate sued Charter Rivers for negligence. During discovery, the plaintiff's expert disclosed an opinion regarding the alleged negligence of Kim Stroud, one of Charter Rivers's occupational therapists. *Id.* at 74, 393 S.E.2d at 917. At trial, though, the plaintiff's expert offered opinion testimony regarding not only Ms. Stroud, but also regarding Barbara Higdon, a psychiatric nurse at Charter Rivers. *Id.*

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

This Court reversed. It held the trial court's exclusion of Nurse Savitz's rebuttal testimony was reversible error, even under an abuse-of-discretion standard, because Charter Rivers "was

clearly prejudiced by the exclusion of this evidence" that was offered to directly respond to the plaintiff's in-trial surprise expert testimony regarding Ms. Higdon's conduct. *Id.*

Bramlette is on all-fours with this case. After Mr. Welker—a third-party witness—destroyed their case, the Plaintiffs questioned him regarding a brand new theory that there was a second boiler at Bowater. Just as the defendant in *Bramlette* was entitled to rebut a new opinion offered by that plaintiff at trial, Cleaver-Brooks was entitled to respond to the Plaintiffs' in-trial surprise, and it did so the very same day. *Bramlette* fully endorses, and in fact required the admissibility of, the prompt rebuttal to the Plaintiffs' new theory. The fact that Cleaver-Brooks won despite the limitations placed on its response only emphasizes the impropriety of the sanction.

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*, 277 S.C. at 316, 286 S.E.2d at 388 (emphasis supplied by this Court). This is just such an occasion, as Cleaver-Brooks was a victim of "unexpected testimony" elicited by the Plaintiffs from a third-party witness in trial about a boiler that was actually located in Illinois—even though the Plaintiffs knew that the records they were using to mislead the witness all related to a single Cleaver-Brooks boiler in the Bowater administration building, far from where Mr. Howe worked in the powerhouse.

A party must live with the consequences of its litigation decisions. 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.").

The Plaintiffs—not Cleaver-Brooks—called Mr. Welker to the stand and elicited testimony that destroyed their original theory of the case. There is no dispute that the Plaintiffs first disclosed their misleading "two boilers" theory during in-trial questioning of Mr. Welker. And there is no dispute that they failed to investigate, test, or disclose that theory at all in advance of trial. [7] To be sure, it does not appear anywhere else in the case's extensive record.

Because the Plaintiffs opened the door to the issue, they are barred as a matter of law from seeking sanctions when Cleaver-Brooks responded, as they must live with the consequences of their own litigation decisions. *See 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 this 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).

Moreover, rather than immediately objecting to Cleaver-Brooks's rebuttal materials, the Plaintiffs themselves made the decision to question Cleaver-Brooks's corporate designee about the location of the so-called second boiler and to show the jury a portion of those records, and they then sat silently when Cleaver-Brooks asked similar questions to the same witness. (R. p. 335, at 685:8–15; R. pp. 386–87, at 736:21–737:5; R. pp. 394–95, at 744:23–745:10.) It is settled law that the "[f]ailure to object when the evidence is offered constitutes a waiver of the right to object."

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[7] 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 in discovery related to a single boiler. (Statement of the Case, *supra* §§ II & III.)

State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997); *see Reed*, 277 S.C. at 317, 286 S.E.2d at 388 (holding a party waived its objection to new evidence when it questioned a witness about the evidence but "fail[ed] to reserve an objection" before the questioning).

South Carolina law does not allow a party to induce the production of additional documents, present testimony about those documents to a jury, and then complain when it is dissatisfied with the witness's responses. But instead of making the Plaintiffs live with the consequences of their litigation decisions and strategy, the lower courts excused the Plaintiffs' failure to test their "two boilers" theory in advance of presenting it to the jury, and those courts 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, this Court should vacate the sanctions order that punishes Cleaver-Brooks for the Plaintiffs' own litigation choices.

II. The sanctions order was improperly based on untimely affidavits of counsel that are directly contrary to the record.

Along with relying on an inapplicable procedural rule as the legal basis for sanctioning Cleaver-Brooks and disregarding well-settled principles of South Carolina law concerning discovery and civil procedure, the circuit court relied on faulty affidavits of the Plaintiffs' counsel as the factual hook for its order.

The sanctions order awarded the Plaintiffs all of their attorneys' fees and costs associated with their decision to take this case to trial, and it based that ruling on the sworn testimony of the Plaintiffs' attorneys that they only moved forward with trial because they supposedly believed that Cleaver-Brooks's pretrial document production indicated that it had shipped two boilers to Bowater. Those affidavits are the only "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 monetary discovery sanction in South Carolina history would not exist.

As a matter of constitutional law, this Court cannot just take those affidavits at face value; instead, it must scrutinize and test them against the actual record. *See* S.C. Const. art. V, § 5 (*de novo* review); *id.* art. V, § 4 (supervisory capacity over profession). Those affidavits wither under such an examination.

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.)[8]

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[8] Cleaver-Brooks's pretrial 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 engineering drawings for a boiler. The Plaintiffs themselves introduced the entire 61-page set of records as their own Exhibit 55 at trial. But in a naked attempt to bolster the plausibility of their counsel's claim of "two-boilers" confusion, the Plaintiffs have repeatedly told every court—including this one (Pls.' Opp'n to Cert. at 3, 5, 9, 11, 13, 15, 16 n.5, 17, 18)—that the set was only 25 pages. Just as counsel's representation to the Court of Appeals that no one will cite its unpublished decision while they simultaneously did exactly that (*supra* n.5) should prompt the Court to closely scrutinize these affidavits, the fact the

These affidavits were not filed or served with the Plaintiffs' motion on March 31, 2018. That failure 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. Without these affidavits, the circuit court's order loses its only evidentiary basis and can be vacated on that ground alone.

But the substance of the affidavits is more problematic than a technical failure under the procedural rules. The actual record reveals that they cannot possibly be true, as there is no way that the Plaintiffs could have genuinely believed that the Cleaver-Brooks production indicated there were two boilers at Bowater. The reason is obvious: Cleaver-Brooks's Rule 30(b)(6) witness repeatedly testified in his depositions that the entire production set related to a single boiler.

The Plaintiffs deposed Cleaver-Brooks's designee twice. Instead of asking him about any discrepancy in boiler unit numbers, the Plaintiffs acknowledged that all of the pages produced—***including pages that contained the typographical error***—were about a single boiler. That questioning began:

> Q: And you know that there's a Cleaver—or was a Cleaver-Brooks boiler at Bowater?
>
> A: Yes. I think we found a small 30 horsepower Progress model package boiler shipped in 1957.

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

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

Plaintiffs insist on consistently misstating the basic, indisputable size of the Cleaver-Brooks materials underscores why it is imperative for this Court to review the whole record *de novo* and find the facts of this case for itself.

[Discussion of Counsel]

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

[Discussion of Counsel]

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

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

> Q: And it's still the same model number and it's the same boiler?
>
> A: Yes.
>
> Q: Will you turn with me to BPM5.
>
> A: Okay.
>
> Q: And this is a remittance request?
>
> A: Correct.
>
> Q: In 1958?
>
> A: Yes, it looks like when you look at the signature above the field representative signature, there's by, and it looks like the last name could be Jones.
>
> Q: And the next page is included with this field report, correct, BPM9?
>
> A: Yes.
>
> * * * * *
>
> Q: Okay. And so these notes we're looking at at BPM9, they are likely written by Mr. Tiner, correct?

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

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

[Objection of Counsel]

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

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

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

Q: Yes, sir.

(R. pp. 1779–82, at 53:18–60:7.)

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

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

A: Okay.

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

A: ***Correct.***

(R. p. 1785, at 67:7–11 (emphasis added).)

The examination continued by confirming that the remainder of the records included the "assembly checklist," "manufacturing drawings," "engineering drawings" and "part descriptions" for the single boiler that was shipped to Bowater, and concluded with a long discussion about what that boiler would have been used for at Bowater. (R. pp. 1788–91, at 70:9–73:25; R. pp. 1873–1903, at 227:1–257:21.)

Nowhere did any question or any answer indicate anything other than what was obvious to all parties and the trial judge: there was one Cleaver-Brooks boiler at Bowater, and no one ever disputed that point until the Plaintiffs began asking Mr. Welker questions about a non-existent second boiler during his trial testimony after he had definitively told the jury that the Cleaver-Brooks boiler was in the administration building, destroying the Plaintiffs' case.

In light of 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.[9]

Along with direct testimony in the record telling them that the entire production was about a single boiler, the Plaintiffs' counsel's story is further belied by several additional points:

Complete Absence in the Record. Their "two boiler" theory does not appear anywhere at all in the record until Mr. Welker's in-trial testimony. If the Plaintiffs truly built an entire trial around that untested theory—a trial they claim cost them over $300,000 in fees and litigation expenses—then surely that theory would have made an appearance somewhere else in the case: motions practice, pretrial filings, discovery, arguments to the circuit court, opening statements, or even questioning of other witnesses at trial. But it does not appear anywhere prior to, and barely even after, Mr. Welker's testimony. On that, the record is clear.

Presenting an Indefensible Position to the Jury. If it is true that the Plaintiffs actually went to trial because they thought that there were two Cleaver-Brooks boilers at Bowater, their

[9] 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.

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 knew all along that there were not two boilers; they admitted as much over and over again in their written submissions, their deposition questions, and their arguments to the circuit court. (*See* Statement of the Case *supra* § III.) On that point as well, the record is clear.

Assumes Irrational Behavior. Their statements 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. Defendants crave Rule 12 and Rule 56 motions, not trials. But in order to be believable, counsel's story must assume 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.").

The circuit court wrongly denied Cleaver-Brooks the opportunity to test these and other statements in the affidavits of Plaintiffs' counsel through discovery—another error of law, *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")—but they are demonstrably wrong based on the unambiguous record.

The Court, in its *de novo* review, should not credit those affidavits at all, but instead should find the facts on its own. And because there is not a single fact in the record that supports sanctioning Cleaver-Brooks in any way, the sanctions order should be vacated, and this case concluded.

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 trial court's decision to punish Cleaver-Brooks with South Carolina's highest-ever discovery sanction or the Court of Appeals's summary order affirming the sanction. This Court should dissolve the sanctions order because it was based on nothing more than a post-trial ruse 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, and Cleaver-Brooks respectfully requests that the Court vacate the sanctions order and end this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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