

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDB TRUCKING, LLC,

Appellant,

vs.

VERSA PRODUCTIONS COMPANY, INC.,

Respondent.

Supreme Court No.: 75022

District Court Case No. CV15-02349
Dept. 10

Electronically Filed
Feb 26 2018 04:51 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**DOCKETING STATEMENT
CIVIL APPEALS**

1. Judicial District: Second Judicial District

Department: 10

County: Washoe

Judge: The Honorable Elliott A. Sattler

District Ct. Case No.: CV15-02349

2. **Attorney filing this docketing statement:**

Attorneys: Nicholas M. Wiezcorek, Jeremy J. Thompson and Colleen E. McCarty

Telephone: (702) 862-8300

Firm: Clark Hill PLLC

Address: 3800 Howard Hughes Parkway Suite 500, Las Vegas, NV 89169

Client: MDB Trucking LLC

3. **Attorney(s) representing respondents(s):**

Attorney: Josh Cole Aicklen, David B. Avakian and Paige S. Shreve

Telephone: (702) 893-3383

Firm: Lewis Brisbois Bisgaard & Smith LLP

Address: 6385 S. Rainbow Boulevard, Suite 600 Las Vegas, NV 89119

Client(s): Versa Products Company Inc.

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgement | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | X Other (specify): NRCP 37 |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

Not Applicable.

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Second Judicial District Court

- Geneva M. Remmerde v. MDB Trucking, et al., Case No. CV16-00976
- James M. Bible v. MDB Trucking, et al., Case No. CV16-01914

On January 22, 2018, the Court filed Orders dismissing MDB's Cross-Claim in both of the above-referenced matters based upon the Court's Order of December 8, 2017, which is the subject of this appeal. The Notice of Entry was filed on February 8, 2018. Appellant intends to appeal these matters in the normal course.

8. Nature of the action. Briefly describe the nature of the action and the result below:

The Cross-Claim at issue filed by MDB Trucking, LLC (“MDB”) is one for Contribution from Versa Products Company, Inc. (“Versa”). On May 15, 2017, Versa filed a Motion to Strike MDB’s Cross-Claim, pursuant to NRCP 37, wherein it sought sanctions for the alleged spoliation of evidence. Following briefing and a hearing on August 29, 2017, the District Court issued an Order dated September 22, 2017 in which it found “there would be some sanctions levied on MDB for their discovery abuse: the actual sanction was not determined.” The District Court’s Order set the matter for evidentiary hearing and further stated “Each party will be familiar with *Young, supra, Nevada Power, supra*, and their progeny and present witnesses in support of their respective positions.” The District Court issued its September 22, 2017 Order without discussion of the Supreme Court’s holding in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).

The District Court held the evidentiary hearing to determine what sanctions to issue against MDB on October 13, 2017. At the conclusion of the hearing the District Court informed the parties that Versa’s Motion to Strike would be granted and that case concluding sanctions would be imposed. Thereafter, the District Court vacated the October 30, 2017 trial date and took the matter under submission. At the time it granted case concluding sanctions and vacated the trial date shortly thereafter, the District Court had nineteen (19) pre-trial motions under advisement, including MDB’s Emergency Motion to Strike Answer, Enter Judgment on Claim for Contribution and Award Attorneys’ Fees and Costs on Order Shortening Time which sought case concluding sanctions against Versa for spoliation of evidence.

The District Court subsequently entered its final written Order on December 8, 2017. Versa served MDB with Notice of Entry of the District Court’s Order on December 29, 2017, and MDB’s timely appeal followed. In imposing case concluding sanctions pursuant to NRCP 37, the District Court again failed to consider the Supreme Court’s long-standing spoliation of evidence authorities, including the limitations on the degree of sanctions to be imposed for negligent spoliation of evidence under *Bass-Davis v. Davis*.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1) Whether the District Court abused its discretion by imposing case concluding sanctions pursuant to NRCP 37, where the District Court failed to consider the Supreme Court’s long-standing spoliation of evidence jurisprudence, including the limitations on the degree of sanctions to be imposed for negligent spoliation of evidence under *Bass-Davis v. Davis*.

2) Whether the District Court committed legal error when it applied the definition of “willfulness” set forth in *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984), a child abuse prosecution, to its analysis pursuant to NRCP 37 and *Young v. Ribeiro Building Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), as to whether MDB acted willfully. In *Childers*, the definition of “willfully” was derived from the child abuse statute, NRS 200.508 and California Penal Code Section 7(1), and approved for use only in a criminal context involving child abuse. *See also Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 215 P.3d 705 (2009) (Where the legislature has explicitly applied a rule to one type of proceeding, a court construing the rule will presume it deliberately excluded the rule’s application to other types of proceedings).

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issue raised.

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the cases(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

Not applicable.

13. Assignment to the Court of Appeals or retention in the Supreme Court.

MDB respectfully asserts that this matter is presumptively retained by the Supreme Court, pursuant to NRAP 17(a)(10) and/or (11). The Supreme Court further clarified its spoliation jurisprudence in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), but it remains a question of first impression and/or inconsistency in the published decisions of the Appellate Courts what impact the *Bass-Davis* decision has on a district court's exercise of discretion to impose sanctions under NRCP 37. It is MDB's position in the instant case that the District Court failed to recognize the limitations on the degree of sanctions to be imposed for negligent or willful spoliation of evidence under *Bass-Davis* and abused its discretion in entering case concluding sanctions.

To the extent this matter could otherwise be viewed as presumptively assigned to the Court of Appeals pursuant to NRAP (17)(b)(5), MDB respectfully requests the Supreme Court retain the case despite the presumptive assignment for all of the reasons stated above.

14. **Trial.** If this action proceeded to trial, how many days did the trial last?

Not applicable.

Was it a bench or jury trial?

Not applicable.

15. **Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

16. **Date of entry of written judgment or order appealed from.**

Order signed on December 8, 2017

Order filed on December 8, 2017

Notice of Entry Order filed on December 28, 2017

[Note: As stated in Section 7, additional appeals are anticipated from the Court's Orders dated January 22, 2018 and noticed on February 8, 2018.]

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

Not applicable.

17. **Date written notice of entry of judgment or order appealed from:** December 28, 2017

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. **Date written notice of entry of Judgment or order was served:** December 28, 2017

19. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

Not applicable.

20. Date notice of appeal filed: January 29, 2018

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Not applicable.

21. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

N.R.A.P. 4(a)(1)

SUBSTANTIVE APPEALABILITY

22. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appeal from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The District Court's Order resolved all issues in dispute raised by Appellant's Cross-Claim. There is nothing remaining to be adjudicated by the parties.

N.R.A.P. 3A(b)(1) allows an appeal to be taken from the final judgment or orders of a district court.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

(1) MDB Trucking, LLC

(2) Versa Products Company, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Not applicable.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

MDB's cross-claim for Contribution against Versa.

24. Did the judgment or order appeal from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Order of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

MDB Trucking, LLC

Name of appellant

Nicholas Wiczorek, Jeremy Thompson and

Colleen E. McCarty

Name of counsel of record

2/26/2018

Date

Colleen E. McCarty

Signature of counsel of record

Nevada, Clark County

State and county where signed


CERTIFICATE OF SERVICE

I certify that on the 26th day of February, 2018, I served a copy of this completed docketing statement upon all counsel of records:

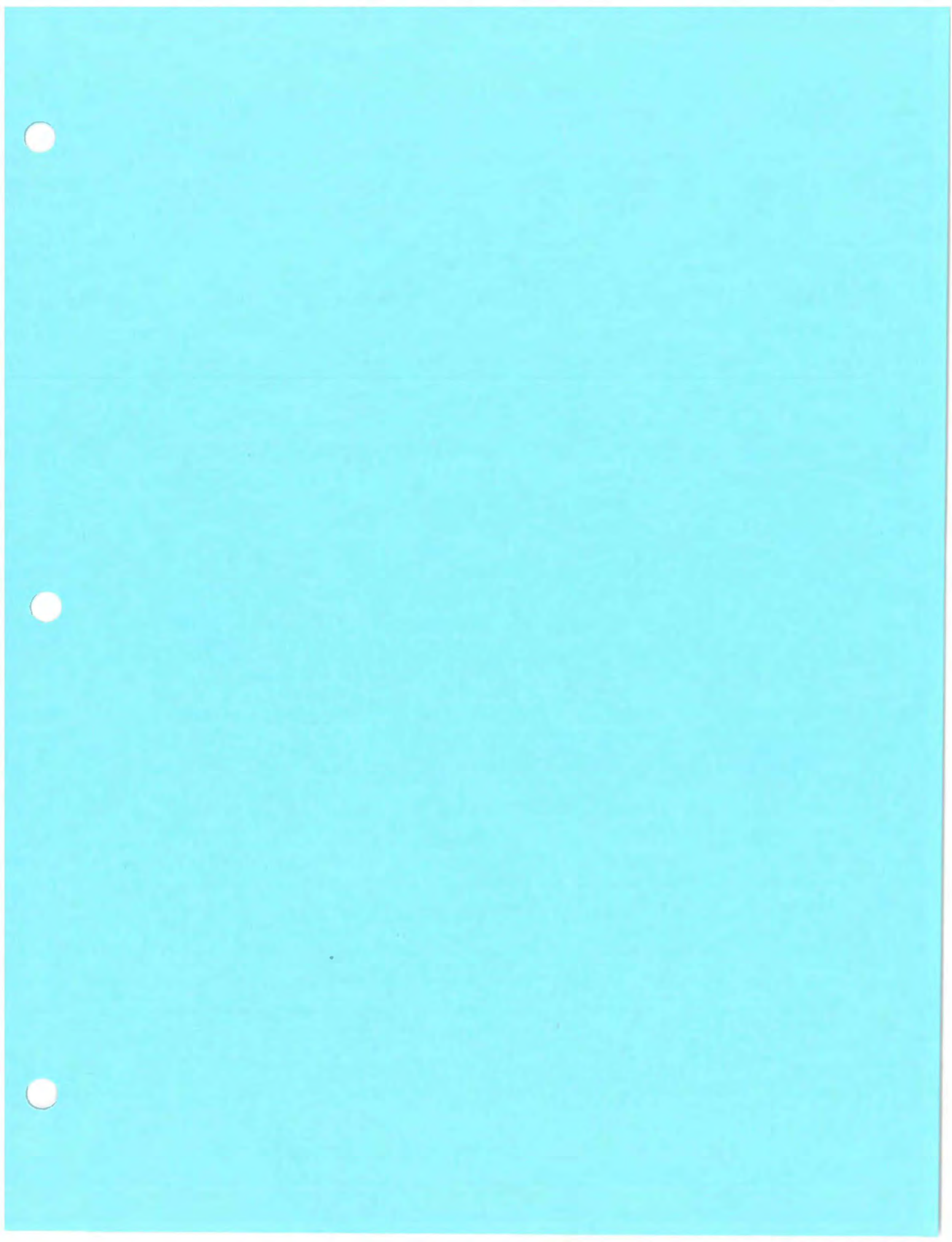
- ☐ By personally serving it upon him/her; or
☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attached a separate sheet with the addresses.)

JOSH COLE AICKLEN, ESQ.
DAVID B. AVAKIAN, ESQ.
PAIGE S. SHREVE, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant
VERSA PRODUCTS COMPANY, INC.

Dated this 26th day of February, 2018.



An employee of Clark Hill PLLC



1 3860

2 Katherine F. Parks, Esq., State Bar No. 6227
3 Brian M. Brown, Esq., State Bar No. 5233
4 Thierry V. Barkley, Esq., State Bar No. 724
5 Thorndal Armstrong Delk Balkenbush & Eisinger
6 6590 S. McCarran Blvd., Suite B
7 Reno, Nevada 89509
8 (775) 786-2882
9 Attorneys for Defendant/Third-Party Plaintiff
10 MDB TRUCKING, LLC

11 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
12
13 IN AND FOR THE COUNTY OF WASHOE

14 ERNEST BRUCE FITZSIMMONS and
15 CAROL FITZSIMMONS, Husband and
16 Wife,

17 Plaintiffs,

18 vs.

19 MDB TRUCKING, LLC; RMC LAMAR
20 HOLDINGS, INC.; VERSA PRODUCTS
21 COMPANY, INC.; DANIEL ANTHONY
22 KOSKI; ABC Corporations I-X, Black and
23 White Companies, and DOES I-XX,
24 inclusive,

25 Defendants.

26 AND RELATED CROSS-CLAIM AND
27 THIRD PARTY COMPLAINT.

Case No. CV15-02349

Dept. No. 15

28 MDB TRUCKING, LLC'S CROSS-CLAIM AGAINST RMC
LAMAR HOLDINGS, INC. (fka RANCH MANUFACTURING COMPANY)
AND VERSA PRODUCTS COMPANY, INC.

Defendant and Cross-Claimant, MDB Trucking, LLC, by and through its counsel of
record Thorndal Armstrong Delk Balkenbush & Eisinger hereby brings its cross-claim against
Cross-Defendants RMC Lamar Holdings, Inc. (fka Ranch Manufacturing Company) and Versa
Products Company, Inc.

1 **FIRST CLAIM FOR RELIEF**

2 **(General Allegations)**

3 1. That Defendant/Cross-Claimant MDB Trucking, LLC was at all relevant times a
4 Nevada limited liability company authorized to conduct business within the state of Nevada.

5 2. That Cross-Defendants DOES I-10 and BLACK AND WHITE COMPANIES are
6 sued herein under fictitious names and capacities of said Defendants are not known by Cross-
7 Claimant, who ask leave of this court to amend this Cross-Claim to set forth same as they
8 become known or ascertained.

9 3. Cross-Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing
10 Company) was at all relevant times hereto a Colorado corporation engaged in the business of
11 designing and manufacturing trailers and semi-trailers and placed same into the stream of
12 commerce and was doing business in the State of Nevada.

13 4. Cross-Defendant Versa Products Company, Inc. was at all relevant times hereto a
14 New Jersey Corporation engaged in the business of designing and manufacturing pneumatic air
15 solenoid valves specifically for bottom dump trailers and gate activated controls and placed into
16 the stream of commerce and was doing business in the State of Nevada.

17 5. A First Amended Complaint was filed on May 19, 2016 in the Second Judicial
18 District Court, Case No. CV15-02349, Department 15 in which the Plaintiffs Ernest Bruce
19 Fitzsimmons and Carol Fitzsimmons prayed for damages against Defendant MDB Trucking,
20 LLC alleging negligence with regard to an accident which occurred on July 7, 2014 where a
21 Ranco trailer owned by MDB Trucking, LLC spilled a load of gravel causing an accident and
22 injury which are claims presented by Plaintiffs.

23 6. That upon information and belief, the Ranco trailer was activated inadvertently
24 causing the gates of the semi-trailer to release the subject load of gravel on the highway and was
25 defective in part or in whole as designed by Defendant RMC Lamar Holdings, Inc. (fka Ranch
26 Manufacturing Company) (also known by the trade name and trademark Ranco).

27 ///

28 ///

1 7. Cross-Defendant RMC Lamar Holdings, Inc. manufactured the subject Ranco
2 trailer in 2002 under the vehicle brand Ranco with vehicle identification number
3 1R9BP45082L008431 Idaho Plate #TE3528.

4 8. Cross-Claimant MDB Trucking, LLC was the last purchaser and end user of the
5 subject Ranco trailer.

6 9. On or about July 7, 2014, the Ranco trailer that left Cross-Defendant's control as
7 designed, assembled and manufactured by the Cross-Defendant was unreasonably dangerous and
8 defective in one or more of the following respects:

9 a. The semi-trailer was designed, assembled, and manufactured and/or
10 configured in such a manner that the Versa solenoid valve would activate inadvertently allowing
11 the gates to open and release the load carried by the trailer; and,

12 b. That the Ranco trailer was designed, assembled, manufactured, and/or
13 configured in such a manner that the Versa Valve was not equipped with a safety lock to prevent
14 inadvertent activation allowing the gates to open.

15 c. That Versa Valve manufactured an alternate safer design available in 2002
16 including a manual lock system.

17 10. On or about July 7, 2014, that Versa Valve solenoid control as a component to the
18 Ranco trailer was unreasonably dangerous and defective in one or more of the following respects:

19 a. The Versa Valve solenoid valve would activate inadvertently allowing the
20 gates to open and release the load carried by the trailer; and,

21 b. Versa Products Company, Inc. had a safer design available in the stream of
22 commerce on or before 2002 which employed a manual lock safety design that should have been
23 provided to its end use customers in lieu of the Versa Valve installed both at the time of the
24 manufacturer in 2002 and/or as a standard maintenance replacement in 2013.

25 ///

26 ///

27 ///

28 ///

1 11. That to the extent Plaintiffs were injured as a proximate result of the unreasonably
2 dangerous conditions and defects at the time of manufacturing or negligent design, such is a
3 direct and proximate result of the negligence of the Cross-Defendants; and, any negligence that
4 exists as alleged by Plaintiffs is expressly denied. Cross-Defendants were actively negligent and
5 Cross-Claimant was passively negligent.

6 12. That Cross-Defendants breached a duty of care owed to the Cross-Claimant and
7 Cross-Defendants are required to indemnify and hold Cross-Claimant harmless with respect to all
8 the allegations and liabilities set forth in the Complaint filed in this matter.

9 13. Cross-Claimant has placed Cross-Defendant RMC Lamar Holdings, Inc. on notice
10 of the claims pending in this matter prior to initiation of litigation.

11 14. That Cross-Claimant has been required to expend costs and attorneys' fees in
12 defending the negligence claims in the First Amended Complaint on file herein and for
13 prosecuting the instant Cross-Complaint.

14 **FIRST CLAIM FOR RELIEF**

15 **(Implied Indemnification as to RMC LAMAR)**

16 15. Cross-Claimant repeats and realleges each and every allegation contained in
17 paragraphs 1-14 above as if more fully set forth herein.

18 16. Cross-Claimant is therefore entitled to complete indemnity against RMC Lamar
19 Holdings, Inc. with respect to all allegations or liabilities set forth in the First Amended
20 Complaint on file in this matter.

21 17. That Cross-Claimant is therefore entitled to total costs and fees expended in the
22 defense of the claims of negligence in this matter as well as prosecution of this Cross-Complaint.

23 **SECOND CLAIM FOR RELIEF**

24 **(Contribution as to RMC LAMAR)**

25 18. Cross-Claimant repeats and realleges each and every allegation contained in
26 paragraphs 1-17 above as if more fully set forth herein.

27 ///

28 ///

1 19. Cross-Claimant is entitled to contribution from Cross-Defendant RMC Lamar
2 with respect to any settlement, judgment, awards, or any other type of resolution of the claims
3 brought forward by the Plaintiffs in their First Amended Complaint on file herein.

4 20. Cross-Claimant is therefore entitled to all costs and fees expended in the defense
5 of claims of negligence in this matter as well as prosecution of the Cross-Complaint.

6 **THIRD CLAIM FOR RELIEF**

7 **(Implied Indemnification as to VERSA)**

8 21. Cross-Claimant repeats and realleges each and every allegation contained in
9 paragraphs 1- 20 above as if more fully set forth herein.

10 22. Cross-Claimant is entitled to complete indemnity against Versa Products
11 Company, Inc. with respect to all allegations or liabilities set forth in the First Amended
12 Complaint.

13 23. That Cross-Claimant is therefore entitled to all costs and fees expended in the
14 defense of claims of negligence in this matter as well as prosecution of the Cross-Complaint.

15 **FOURTH CLAIM FOR RELIEF**

16 **(Contribution as to VERSA)**

17 24. Cross-Claimant repeats and realleges each and every allegation contained in
18 paragraphs 1-23 above as if more fully set forth herein.

19 25. Cross-Claimant is entitled to contribution from Cross-Defendant Versa Products,
20 Company, Inc. with respect to any settlement, judgment, awards, or any other type of resolution
21 of the claims brought forward by the Plaintiffs in their First Amended Complaint on file herein.

22 26. Cross-Claimant is entitled to all costs and fees expended in the defense of the
23 claims for negligence in this matter as well as prosecution of the Cross-Complaint.

24 WHEREFORE, Cross-Claimant demands judgment against Cross-Defendants as follows:

- 25 1. For implied indemnification with respect to all negligence claims brought against
26 Cross-Claimant in this matter;
- 27 2. For contribution with respect to all negligence claims brought against Cross-
28 Claimant in this matter;

- 1 3. For attorneys' fees and costs expended in this matter; and
2 4. For such other and further relief as this Court deems just and proper in the
3 premises.

4 DATED this 16th day of June, 2016.

5 THORNDAL ARMSTRONG
6 DELK BALKENBUSH & EISINGER

7 By: 

8 Katherine F. Parks, Esq., State Bar No. 6227
9 Brian M. Brown, Esq., State Bar No. 5233
10 Thierry V. Barkley, Esq., State Bar No. 724
11 6590 S. McCarran Blvd., Suite B
12 Reno, Nevada 89509
13 Attorneys for Defendant/Third-Party Plaintiff
14 MDB TRUCKING, LLC
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27 THORNDAL ARMSTRONG
28 DELK BALKENBUSH
& EISINGER
1901 S. McCarran, Suite 11
Reno, Nevada 89509
775.786.2000

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned hereby affirms that the preceding document filed in above-entitled court does not contain the social security number of any person.

DATED this 15 day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: 

Katherine E. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk
3 Balkenbush & Eisinger, and that on this date I caused the foregoing **MDB TRUCKING, LLC'S**
4 **CROSS-CLAIM AGAINST RMC LAMAR HOLDINGS, INC. (fka RANCH**
5 **MANUFACTURING COMPANY) AND VERSA PRODUCTS COMPANY, INC.** to be
6 served on all parties to this action by:

7 _____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the
8 United States mail at Reno, Nevada.

9 ☒ Second Judicial District Court Eflex ECF (Electronic Case Filing)

10 _____ hand delivery

11 _____ electronic means (fax, electronic mail, etc.)

12 _____ Federal Express/UPS or other overnight delivery fully addressed as follows:


13
14 **Joseph S. Bradley, Esq.**
15 **Bradley, Drendel & Jeanney**
16 **P.O. Box 1987**
Reno, NV 89505
Attorney for Plaintiffs

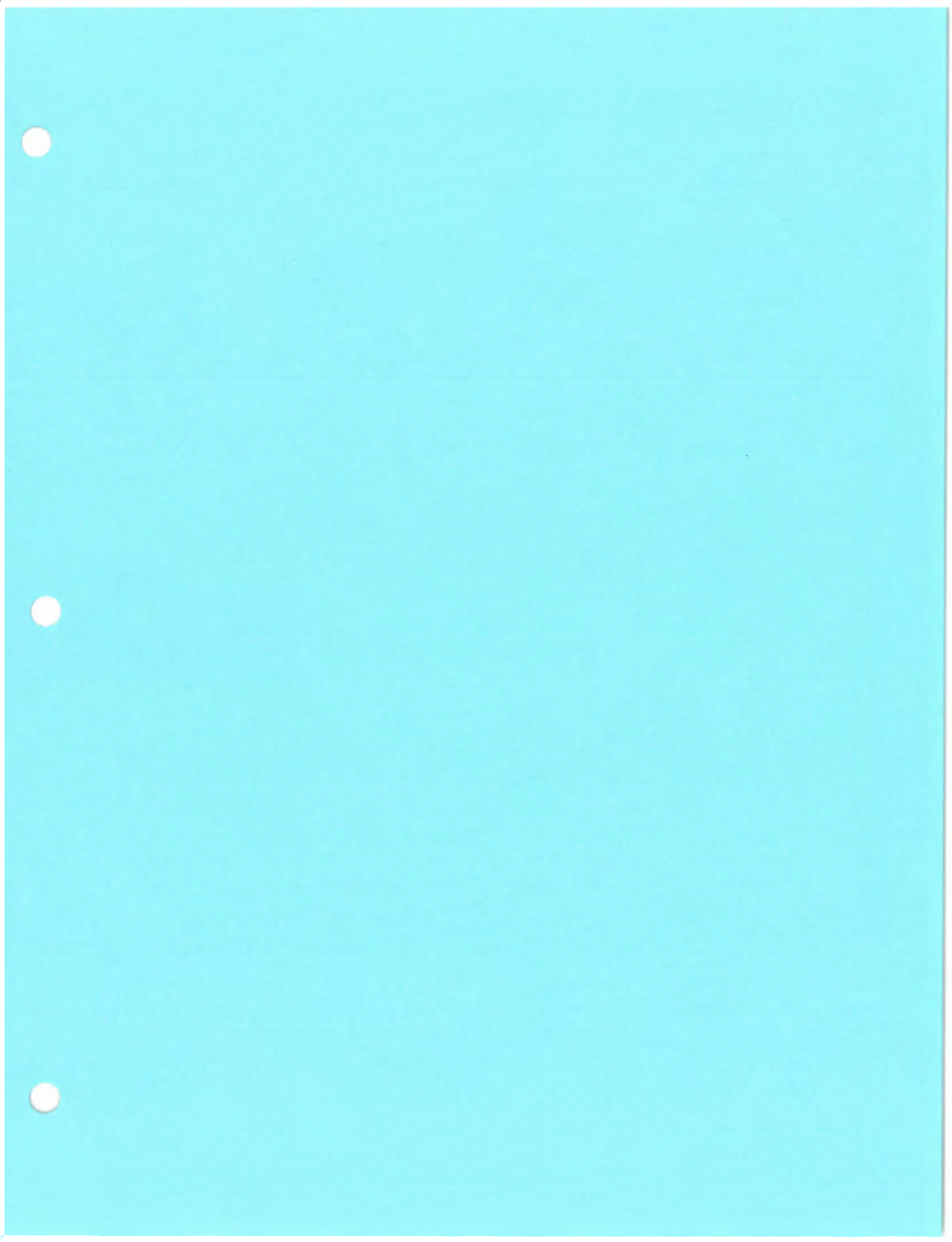
17
18 **Matthew C. Addison, Esq.**
19 **Jessica L. Woelfel, Esq.**
20 **McDonald Carano Wilson LLP**
100 W. Liberty Street, Tenth Floor
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Defendant RMC Lamar Holdings

21
22 **Josh Cole Aicklen**
23 **David B. Avakian**
24 **Lewis Brisbois Bisgaard & Smith, LLP**
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Defendant Versa Products Co., Inc.

25 DATED this 15 day of June, 2016.

26
27 **THORNDAL ARMSTRONG**
DELK BALKENBUSH
& EISINGER
28 **555 W. McCarran, Suite 215**
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(775) 784-2492


An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger



IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

¹ Versa filed the ERRATA TO DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Errata") on May 5, 2017. The Errata clarifies Versa is bringing the Motion pursuant to NRCP 37, not NRCP 35 as noted in the caption to the Motion. The reference to NRCP 35 is made only in the caption to the pleading; therefore, the Court presumes it is merely a typographical error.

1 PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO VERSA PRODUCTS
2 COMPANY, INC.'S MOTION TO STRIKE MDB TRUCKING, LLC'S CROSS-CLAIM
3 PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY
4 INSTRUCTION ("the Reply") on June 12, 2017, and contemporaneously submitted the matter for
5 the Court's consideration. The Court entered an ORDER on August 1, 2017, setting the Motion
6 for oral argument.² The Court heard the arguments of counsel on August 29, 2017, and took the
7 matter under submission.

8 The Court felt case concluding sanctions were a potential discovery sanction for the alleged
9 abuse following the oral argument. An evidentiary hearing affording both sides the opportunity to
10 present witnesses was required given this conclusion. *See generally, Nevada Power v. Fluor Illinois*,
11 108 Nev. 638, 837 P.2d 1354 (1992). The Court entered an ORDER ("the September Order") on
12 September 22, 2017, directing the parties to set the matter for an evidentiary hearing. The
13 evidentiary hearing was conducted on October 13, 2017 ("the October Hearing"). Versa called one
14 expert witness, Scott Palmer ("Palmer"), and one lay witness Garrick Mitchell ("Mitchell") at the
15 October Hearing. MDB called one expert witness, Dr. David Bosch ("Dr. Bosch"), and two lay
16 witnesses, Patrick Bigby ("Bigby") and Erik Anderson ("Anderson") at the October Hearing. The
17 Court admitted numerous exhibits during the October Hearing. The Court permitted the parties to
18 argue their respective positions. Trial was scheduled to begin on October 30, 2017. The Court was
19 aware of its obligation to make detailed findings of facts and conclusions of law. Further, the Court
20 wanted to fulfill these obligations in a thoughtful manner and in writing pursuant to the mandates of
21 the Nevada Supreme Court. The Court informed the parties the Motion would be granted and
22 vacated the trial date. The Court took the matter under submission. This written ORDER follows.

23 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
24 by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015. Numerous
25 other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, Defendant
26 Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of
27 _____

28 ² There were numerous other pre-trial motions scheduled for oral argument on the same date.

1 gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their
2 vehicles and numerous accidents occurred. The plaintiffs sustained physical and emotional injuries
3 as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY
4 COMPLAINT ("the MDB Cross-Claim") June 15, 2016. The MDB Cross-Claim had two causes
5 of action relative to Versa: Implied Indemnification and Contribution.³ MDB alleges it was not
6 Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably
7 dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB
8 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the
9 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
10 would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by
11 the trailer." The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives
12 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed
13 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,
14 3:12-18.

15 Versa has denied its product is defective and further denies any responsibility for the spilling
16 of the gravel. Additionally, Versa filed DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS
17 COMPANY, INC.'S ANSWER TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND
18 CAROL FITZSIMMONS' FIRST AMENDED COMPLAINT AND CROSS-CLAIM AGAINST
19 MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE ("the
20 Versa Cross-Claim") on June 29, 2016. The Versa Cross-Claim alleges one cause of action against
21 MDB: Contribution. Versa alleges MDB "negligently operated, maintained, owned, serviced and/or
22 entrusted the subject trailer...." The Versa Cross-Claim, 10:17-18. Versa and MDB are the only
23 remaining parties in this litigation: all of the plaintiffs consolidated into these proceedings, and all
24 of the other defendants have been dismissed and/or settled.

25
26
27 ³ Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS CROSS-
28 CLAIMANT, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT
TO NRCF 12(B)(5) ("the MTD") on June 27, 2016. The Court granted the MTD on October 19, 2016. The only
remaining cause of action alleged by MDB against Versa is for Contribution.

1 The Motion avers MDB has destroyed or disposed of critical evidence which directly
2 impacts Versa's ability to represent itself in the instant litigation. Specifically, the Motion contends
3 after the accident MDB continued to use the truck in question; failed to keep the truck in the same
4 condition as it was on the day in question; serviced the truck routinely; repaired and replaced the
5 electrical systems that control the solenoid which operated the Versa valve; and failed to take steps
6 to preserve this critical evidence knowing litigation was highly probable. The Opposition contends
7 there has been no spoliation of evidence in this case. Further, the Opposition posits there was
8 nothing more than routine maintenance done on the trailer; therefore, Versa's ability to defend itself
9 has not been impaired.

10 The Motion avers MDB had a duty to preserve the discarded electrical systems in
11 anticipation of the underlying action. In *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648,
12 651, 747 P.2d 911, 914 (1987), the Nevada Supreme Court held, "even where an action has not been
13 commenced and there is only a potential for litigation, the litigant is under a duty to preserve the
14 evidence which it knows or reasonably should know is relevant to the action." The Motion
15 concludes the appropriate sanction for the failure to preserve this crucial evidence should be
16 dismissal of the entire action. See generally *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88,
17 787 P.2d 777 (1990), and NRCP 37.

18 Discovery sanctions are within the discretion of the trial court. See *Stubli v. Big D Int'l*
19 *Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991), and *Kelly Broadcasting v. Sovereign*
20 *Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). "Generally, sanctions may only be
21 imposed where there has been willful noncompliance with the court's order, or where the adversary
22 process has been halted by the actions of the unresponsive party." *Zenith*, 103 Nev. at 651, 747
23 P.2d at 913 (citing *Finkelman v. Clover Jewelers Blvd. Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609
24 (1975) and *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).
25 *Accord GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).
26 Dismissal of an entire action with prejudice is a dramatic punishment for a discovery abuse. The
27 Nevada Supreme Court cautions district courts the use of such a Draconian sanction should be
28 approached with caution. "The dismissal of a case, based upon a discovery abuse such as the

1 destruction or loss of evidence, 'should be used only in extreme situations; if less drastic sanctions
2 are available, they should be utilized.'" *GNLV*, 111 Nev. at 870, 900 P.2d at 326 (citation omitted).
3 Additionally, the *Nevada Power* Court held it was an abuse of discretion for a district court to grant
4 case concluding sanctions without an evidentiary hearing. The *Nevada Power* Court held the party
5 facing a case terminating sanction needs an "opportunity to present witnesses or to cross-examine
6 [the movant] or their experts with regard to [the discovery violations]." *Nevada Power*, 108 Nev. at
7 646, 837 P.2d at 1360. *Cf. Bahena v. Goodyear Tire & Rubber Co. ("Bahena II")*, 126 Nev. 606,
8 612, 245 P.3d 1182, 1186 (2010).

9 The Nevada Rules of Civil Procedure provide that a party who fails to comply with discovery
10 orders or rules can be sanctioned for that failure. NRCP 37(b). Sanctions against a party can be
11 graduated in severity and can include: designation of facts to be taken as established; refusal to allow
12 the disobedient party to support or oppose designated claims or defenses; prohibition of the
13 offending party from introducing designated matters in evidence; an order striking out pleadings or
14 parts thereof or dismissing the action; or rendering a judgment by default against the disobedient
15 party. NRCP 37(b)(2). Case concluding sanctions need not be preceded by other less severe
16 sanction. *GNLV*, 111 Nev. at 870, 900 P.2d at 325. A disobedient party can also be required to pay
17 the reasonable expenses, including attorney fees caused by the failure. NRCP 37(b)(2)(E).

18 The *Young* Court adopted an eight factor analysis ("the *Young* factors") district courts must
19 go through if they feel a discovery abuse is so severe it warrants dismissal. The *Young* Court held,
20 "every order of dismissal with prejudice as a discovery sanction be supported by an express, careful
21 and preferably written explanation of the court's analysis of the pertinent factors." *Young*, 106 Nev.
22 at 93, 787 P.2d at 780. The *Young* factors are as follows: (1) the degree of willfulness of the
23 offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser
24 sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse;
25 (4) whether any evidence has been irreparably lost; (5) the feasibility and fairness of less severe
26 sanctions; (6) the policy favoring adjudication on the merits; (7) whether sanctions unfairly operate
27 to penalize a party for the misconduct of his or her attorney; and (8) the need to deter parties and
28 future litigants from similar abuses. *Id.* In discovery abuse situations where possible case-

1 concluding sanctions are warranted, the trial judge has discretion in deciding which factors are to be
2 considered on a "case-by-case" basis. *Bahena II*, 126 Nev. at 610, 245 P.3d at 1185 (citing *Higgs v.*
3 *State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010)). The *Young* factor list is not exhaustive and the
4 Court is not required to find that all factors are present prior to making a finding. "Fundamental
5 notions of fairness and due process require that discovery sanctions be just and . . . relate to the
6 specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325.

7 The Nevada Supreme Court has addressed orders of case concluding sanctions on numerous
8 occasions. The *Zenith* Court found a party whose agent destroyed and/or lost a television prior to
9 the commencement of the underlying action, after the party's expert had an opportunity to test the
10 television and opine on the television as a cause of a fire, had committed a discovery abuse
11 warranting case concluding sanctions.⁴ The *Zenith* Court held, "[t]he actions [of the appellant] had
12 the effect of reserving to itself all expert testimony based upon examination of the television set."
13 103 Nev. at 652, 747 P.2d at 914.

14 The *Kelly Broadcasting* Court held the striking of an answer and entry of a judgment in favor
15 of the non-offending party (Kelly) was an appropriate sanction for failing to complete discovery by
16 the offending party (Sovereign). *Kelly Broadcasting*, 96 Nev. at 192, 606 P.2d at 1092. Sovereign
17 argued a lesser sanction of striking only the affirmative defense to which the interrogatories applied
18 was a more appropriate sanction. The *Kelly Broadcasting* Court disagreed, noting "[t]he question is
19 not whether this court would as an original matter have entered a default judgment as a sanction for
20 violating a discovery rule; it is whether the trial court abused its discretion in so doing. We do not
21 find an abuse of discretion in this case." *Id.*

22 The *Stubli* Court upheld case concluding sanctions when the appellant or its agents failed to
23 preserve evidence related to the cause of a trucking accident. The respondent provided expert
24 affidavits which posited the cause of the accident could have been something other than the
25 respondent's work on the truck. "The experts further asserted that appellant's failure to preserve the
26

27 ⁴ The trial court actually struck the appellant's expert witness from the trial. The appellant indicated it had insufficient
28 evidence to proceed without its expert and the trial court granted summary judgment in favor of the respondent. *Zenith*,
103 Nev. at 651, 747 P.2d at 913.

1 [truck and its components] had made it impossible for respondents to establish their defense theory.”
2 *Stubli*, 107 Nev. at 312, 810 P.2d at 787. *See also*, *North American Properties v. McCarran*
3 *International Airport*, 2016 WL 699864 (Nev. Supreme Court 2016). *But see*, *GNLV, supra* (case
4 concluding sanctions not appropriate when other evidence existed which experts could use to assist
5 in their analysis including the statements of witnesses who saw the spoliated evidence).

6 The Court has considered the arguments of counsel, all of the pleadings on file in the instant
7 action, the testimony of the witnesses at the evidentiary hearing, the exhibits admitted at that
8 hearing, and the relevant case law discussed, *supra*. The issue presented in the case is actually very
9 narrow: MDB claims it was a defective solenoid manufactured by Versa that malfunctioned causing
10 a truck full of gravel to dump onto one of the two busiest roadways in Washoe County. MDB does
11 not dispute the electrical systems were not preserved in anticipation of the trial or potential testing.
12 MDB took no steps to warn its employees to keep any components in the electrical system should
13 they need to be replaced. There are no pictures taken of the electrical system or the components.
14 MDB’s employees cannot testify to the condition of the components when they were replaced.
15 Versa avers there were other potential causes of the malfunction, including an electrical issue. Versa
16 further contends it cannot present these issues to the jury in support of its defense because the
17 evidence no longer exists. The Court reviews the *Young* factors as follows:

18 1. Willfulness

19 The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598,
20 599 (1984), the Nevada Supreme Court found the term willful, “implies simply a purpose or
21 willingness to commit the act or to make the omission in question. The word does not require in its
22 meaning any intent to violate law, or to injure another, or to acquire any advantage.” Willfulness
23 may be found when a party fails to provide discovery and such failure is not due to an inability on
24 the offending party’s part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980).
25 The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to
26 establish willfulness.
27
28

1 Clearly MDB should have anticipated extensive litigation as a result of the incident that
2 occurred on July 7, 2014. This was not a mere "slip and fall" where the putative plaintiff initially
3 claims he/she is not injured only later to come back and sue. There were numerous accidents and
4 injuries as a result of collisions occurring on a highway. MDB, or its counsel, had to know there
5 would be litigation as a result of these events. The Court heard no testimony that MDB took any
6 steps to preserve the truck or trailer in any way. There was no testimony indicating memorialization
7 of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck
8 and trailer continued to be in use after the events of July 7, 2014. It was subject to "routine"
9 maintenance. The Court may have condoned the continued use of the truck, and even the trailer, had
10 there been *any* steps taken to preserve the appearance of these items as they existed at the time of the
11 event, or prior to the "routine" maintenance. The memorialization did not occur.

12 It would have been simple to inform the shop staff to photograph the truck and trailer on or
13 about July 7, 2014. It would have required minimal effort to inform the shop staff to preserve any
14 electrical parts taken off the truck or trailer during the maintenance. If these steps had been taken
15 the Court would be looking at this case through the prism of *GNLV* because both parties would have
16 had alternative ways to prove or disprove their theory of the case. Based on the inaction of MDB in
17 preserving or memorializing the condition of the truck and trailer the Court must view this case
18 through the prism of *Stubli* and *Zenith*: MDB alone has the ability to call experts to support their
19 position. Versa's expert has a theory he can neither confirm nor refute based on the loss of the
20 electrical components. The Court does not find MDB intentionally disposed of the components in
21 order to harm Versa, nor were MDB's employees acting with any malevolence; however, the Court
22 does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding
23 discovery in this action.

24 II. The possibility of a lesser sanction

25
26 The second *Young* factor is possible prejudice to Versa if a lesser sanction were imposed.
27 The Court would consider lesser sanctions, including an adverse inference instruction, a rebuttable
28 presumption instruction, and the striking of the MDB's expert as alternative sanctions. The Court

1 does not find any of these sanctions strike the appropriate balance between MDB's actions and the
2 harm imposed on Versa's case. Should the Court strike Dr. Bosch from being a witness at the trial
3 MDB would be in the same position as the appellant in *Zenith*: unable to prove its case given the
4 lack of expert testimony and subject to a motion for summary judgment. This outcome would be a
5 patent waste of limited judicial resources and of the jury's time. The Court does not find an adverse
6 inference instruction pursuant to NRS 47.250(3) and *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d
7 103 (2006), is appropriate under the circumstances before the Court.⁵ As noted by the *Zenith* Court,
8 "[t]he actions of [MDB] had the effect of reserving to itself all expert testimony based upon
9 examination of the [electronic components]. Any adverse presumption which the court might have
10 ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the
11 expert witness." *Zenith*, 103 Nev. at 652, 747 P.2d at 914. Additionally, an adverse inference
12 instruction requires an "intent to harm another party through the destruction and not simply the
13 intent to destroy evidence." *Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106. The Court does not find
14 MDB intended to harm Versa by destroying or disposing of the electrical components; therefore, it
15 could not give this instruction. The Court can conceive of no other sanction which would be
16 appropriate under these circumstances.

17
18 ⁵ At oral argument counsel for MDB stated:

19 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
20 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
21 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
22 not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
23 Procedure 37 for an allegation of spoliation."

24 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
25 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
26 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
27 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
28 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
up the case number provided by counsel on the Nevada Supreme Court webpage. Troublingly, the Court was unable to
verify the veracity of the proposition proffered by MDB *because the parties agreed to dismiss their proceedings and*
the Nevada Supreme Court vacated the order upon which MDB makes its argument. The Nevada Supreme Court had
granted a Writ of Mandamus on January 31, 2008; however, it withdrew that order on a subsequent date. The Nevada
Supreme Court webpage indicates the parties contacted the Supreme Court on February 2, 2008, and indicated they had
settled their case. The Nevada Supreme Court entered an order vacating the January 31, 2008, order upon which MDB
relies and "den[ie]d the petition as moot" on February 13, 2008. In short, the "case" MDB relies upon does not even
exist.

1 III. The severity of the sanction of dismissal relative to the severity of the discovery abuse

2
3 "The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme
4 situations; if less drastic sanctions are available, they should be utilized." *GNLV*, 111 Nev. at 870,
5 900 P.2d at 325 (citing *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that
6 granting the Motion effectively ends the case. The Court does not take this action lightly. The *only*
7 issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway.
8 The Court finds MDB's disposal of the electronic components without memorializing them in any
9 way effectively halted the adversarial process. It left all of the "cards" in MDB's hands and left
10 Versa with nothing other than a theory it could neither prove nor disprove. MDB could simply rely
11 on its expert during trial and argue Versa had no proof of its theory and the theory itself was
12 preposterous. This is the position taken by MDB at the evidentiary hearing. Versa is left with no
13 way of verifying its theory of the case.

14 Counsel for MDB directed the Court's attention at the evidentiary hearing to the strength of
15 their expert (Dr. Bosch) and the weakness of Versa's expert (Palmer). Counsel further emphasized
16 the lack of plausibility of the Palmer's conclusions that it could have been an abraded wire which
17 caused an electrical failure rather than some issue with the solenoid or the Versa valve. The Court is
18 not convinced this should be the deciding factor in resolving the issue of case concluding sanctions
19 for the following reasons:

- 20 1. MDB's own employee (the same employees who serviced the truck and trailer)
21 acknowledged at the evidentiary hearing that the abrasions Palmer referenced actually do
22 occur;⁶ and

23
24 ⁶ Q: Okay. You also mentioned that you want to replace those cords, the seven and the – the seven-conductor and the
25 four-conductor cords because they will get cut on the deck plate, they will get abraded, they will become cracked; is that
26 correct?

27 A: I have seen that, yes.

1 2. Dr. Bosch had to acknowledge, though grudgingly and with great circumspection, that it
2 was possible though highly unlikely the electrical system could have caused the valve in
3 question to open.⁷

4 The Court's decision regarding the issue presented in the Motion is not predicated on who has
5 the "stronger case" or the "better expert" at the evidentiary hearing. If this were the analysis the
6 Court would agree with MDB: Dr. Bosch is a very credible witness and it is likely MDB has the
7 more compelling argument to present to the jury. This, however, is not the issue. The issue in the
8 Court's analysis is MDB's actions deprived Versa of *any* ability to prove its case: the adversarial
9 process was stymied by MDB regarding the most critical pieces of evidence. Had MDB's witnesses
10 testified the abrasions never occur, or abrasions were photographed and/or documented and none
11 existed on this truck, the Court's conclusion may have been different. Here we know it *could have*
12 *occurred* as Palmer suggested.

13 IV. Whether evidence is irreparably lost

14 Clearly the relevant evidence is lost. The employees of MDB testified at the evidentiary
15 hearing the electronic components had been thrown away.

16 V. The feasibility and fairness of a less severe sanctions

17 The Court discussed the possibility of less severe sanctions in section II. The same analysis
18 applies here. There does not appear to be any sanction short of case concluding sanctions which
19 would be appropriate under the circumstances of this case. The Court also acknowledges that
20 progressive sanctions are not always necessary. The circumstances presented in the Motion are
21 unique and the most severe sanction is appropriate.

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25 ⁷Q: Is there any scenario under which current from the seven-prong cord having contact with the four-prong cord could
26 open the versa valve?

27 A: Anything is possible, but it's highly improbable in this case.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Dr. Bosch), 161:5-9. Dr. Bosch's
testimony clearly established he did not believe there was a short or other electrical failure that caused the valve to open.

1
2 VI. The policy favoring adjudication on the merits; and

3 VII. The need to deter parties and future litigants from similar abuse
4

5 The Court considers the sixth and eighth *Young* factors together. Nevada has a strong policy,
6 and the Court firmly believes, that cases should be adjudicated on their merits. *See, Scrimmer v. Dist.*
7 *Court*, 116 Nev. 507, 516-517, 998 P.2d 1190, 1196 (2000). *See also, Kahn v. Orme*, 108 Nev. 510,
8 516, 835 P.2d 790, 794 (1992). Further, there is a need to deter litigants from abusing the discovery
9 process established by Nevada law. When a party repeatedly and continuously engaged in discovery
10 misconduct the policy of adjudicating cases on the merits is not furthered by a lesser sanction.
11 *Foster*, 126 Nev. at 65, 227 P.3d at 1048. The case *sub judice* is not one of systemic discovery
12 abuse. However, the Court concludes to allow the case to go forward as it is currently postured
13 would be the antithesis of allowing it to proceed "on the merits." The merits of Versa's case would
14 not be able to be evaluated by the jury because Versa could not test its theory on the actual
15 components. The jury would be left to guess about what may have occurred rather than weigh the
16 competing theories presented. MDB would have an overwhelmingly unfair advantage given its
17 action.

18 The Court balances the laudable policy of trial on the merits against the need to deter future
19 litigants from abusing the discovery process. The Court turns back to the *Zenith* Court's direction to
20 all potential litigants regarding their duty to preserve evidence. The *Zenith* Court stated, "[i]t would
21 be unreasonable to allow litigants, by destroying physical evidence prior to a request for production,
22 to sidestep the district court's power to enforce the rules of discovery." *Id.* 103 Nev. at 651, 747
23 P.2d at 913. *Accord, Colfer v. Harmon*, 108 Nev. 363, 832 P.2d 383 (1992). To allow this case to
24 go forward, when the only evidence which may have supported Versa's defense was in the sole
25 possession of MDB and MDB did nothing to preserve or document that evidence, would set a
26 dangerous precedent to similarly situated parties in the future. It would also be antithetical to a
27 potential litigant's obligation to preserve the very evidence it may have to produce during discovery.
28

1 When the Court balances the sixth and eighth *Young* factor it concludes dismissal of MDB's claims
2 against Versa are appropriate.


3 *VIII. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her*
4 *attorney*

5
6 There is no evidence to show MDB's counsel directed MDB to destroy or fail to memorialize
7 the evidence in question. The Court finds this factor to be inapplicable to the *Young* analysis.

8 "Fundamental notions of fairness and due process require that discovery sanctions be just
9 and . . . relate to the specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (citing
10 *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court recognizes that discovery sanctions should
11 be related to the specific conduct at issue. The discovery abuse in this case crippled one party's
12 ability to present its case. Weighing all eight factors above the Court concludes the dismissal of the
13 MDB Cross-Claim is appropriate. Due to the severity of MDB's discovery abuse there are no lesser
14 sanctions that are suitable.

15 It is hereby **ORDERED** DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
16 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
17 CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO
18 NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is
19 **GRANTED**. MDB TRUCKING, LLC'S CROSS-CLAIM is DISMISSED.

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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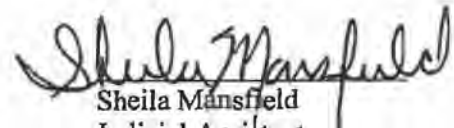
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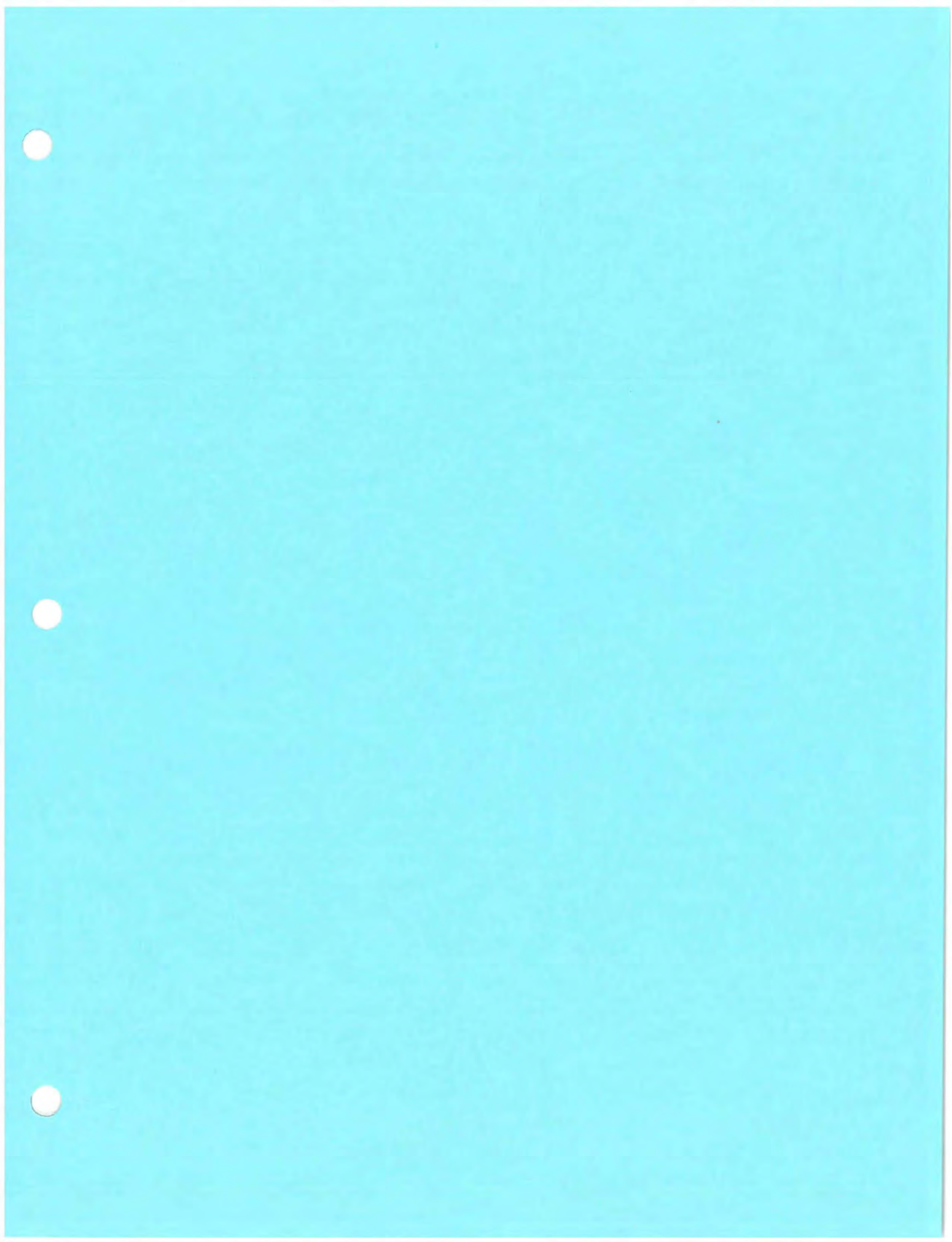
Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of December, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
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9
10 IN THE SECOND JUDICIAL DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 ERNEST BRUCE FITZIMMONS and
CAROL FITZSIMMONS, Husband and
Wife,

13 Plaintiffs,

14 vs.

15 MDB TRUCKING, LLC, et. al.

16 Defendants.

17 AND ALL RELATED CASES.
18

Case No. CV15-02349

Dept. 10

NOTICE OF ENTRY

19
20
21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

1 PLEASE TAKE NOTICE that the Order was entered by the above-entitled Court on
2 the 8th of December, 2017, a copy of which is attached hereto as **Exhibit 1** and made a
3 part hereof.

4 **AFFIRMATION**

5 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document
6 filed in this court does not contain the social security number of any person

7 DATED this 12²⁸ day of December, 2017

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

10
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LIST OF EXHIBITS

Exhibit 1 Order

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I, am an employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP, and that on this 28th day of December, 2017, I did cause a true
copy of the foregoing NOTICE OF ENTRY to be served via the electronic filing system
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EXHIBIT 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

¹ Versa filed the ERRATA TO DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Errata") on May 5, 2017. The Errata clarifies Versa is bringing the Motion pursuant to NRCP 37, not NRCP 35 as noted in the caption to the Motion. The reference to NRCP 35 is made only in the caption to the pleading; therefore, the Court presumes it is merely a typographical error.

1 PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO VERSA PRODUCTS
2 COMPANY, INC.'S MOTION TO STRIKE MDB TRUCKING, LLC'S CROSS-CLAIM
3 PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY
4 INSTRUCTION ("the Reply") on June 12, 2017, and contemporaneously submitted the matter for
5 the Court's consideration. The Court entered an ORDER on August 1, 2017, setting the Motion
6 for oral argument.² The Court heard the arguments of counsel on August 29, 2017, and took the
7 matter under submission.

8 The Court felt case concluding sanctions were a potential discovery sanction for the alleged
9 abuse following the oral argument. An evidentiary hearing affording both sides the opportunity to
10 present witnesses was required given this conclusion. *See generally, Nevada Power v. Fluor Illinois*,
11 108 Nev. 638, 837 P.2d 1354 (1992). The Court entered an ORDER ("the September Order") on
12 September 22, 2017, directing the parties to set the matter for an evidentiary hearing. The
13 evidentiary hearing was conducted on October 13, 2017 ("the October Hearing"). Versa called one
14 expert witness, Scott Palmer ("Palmer"), and one lay witness Garrick Mitchell ("Mitchell") at the
15 October Hearing. MDB called one expert witness, Dr. David Bosch ("Dr. Bosch"), and two lay
16 witnesses, Patrick Bigby ("Bigby") and Erik Anderson ("Anderson") at the October Hearing. The
17 Court admitted numerous exhibits during the October Hearing. The Court permitted the parties to
18 argue their respective positions. Trial was scheduled to begin on October 30, 2017. The Court was
19 aware of its obligation to make detailed findings of facts and conclusions of law. Further, the Court
20 wanted to fulfill these obligations in a thoughtful manner and in writing pursuant to the mandates of
21 the Nevada Supreme Court. The Court informed the parties the Motion would be granted and
22 vacated the trial date. The Court took the matter under submission. This written ORDER follows.

23 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
24 by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015. Numerous
25 other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, Defendant
26 Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of
27

28 ² There were numerous other pre-trial motions scheduled for oral argument on the same date.

1 gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their
2 vehicles and numerous accidents occurred. The plaintiffs sustained physical and emotional injuries
3 as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY
4 COMPLAINT (“the MDB Cross-Claim”) June 15, 2016. The MDB Cross-Claim had two causes
5 of action relative to Versa: Implied Indemnification and Contribution.³ MDB alleges it was not
6 Koski’s negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
7 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
8 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the
9 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
10 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
11 the trailer.” The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives
12 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed
13 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,
14 3:12-18.

15 Versa has denied its product is defective and further denies any responsibility for the spilling
16 of the gravel. Additionally, Versa filed DEFENDANT/CROSS-CLAIMANT VERSA PRODUCTS
17 COMPANY, INC.’S ANSWER TO PLAINTIFFS ERNEST BRUCE FITZSIMMONS AND
18 CAROL FITZSIMMONS’ FIRST AMENDED COMPLAINT AND CROSS-CLAIM AGAINST
19 MDB TRUCKING, LLC; DANIEL ANTHONY KOSKI; AND DOES I-X, INCLUSIVE (“the
20 Versa Cross-Claim”) on June 29, 2016. The Versa Cross-Claim alleges one cause of action against
21 MDB: Contribution. Versa alleges MDB “negligently operated, maintained, owned, serviced and/or
22 entrusted the subject trailer...” The Versa Cross-Claim, 10:17-18. Versa and MDB are the only
23 remaining parties in this litigation: all of the plaintiffs consolidated into these proceedings, and all
24 of the other defendants have been dismissed and/or settled.

25
26
27 ³ Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS CROSS-
28 CLAIMANT, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT
TO NRCP 12(B)(5) (“the MTD”) on June 27, 2016. The Court granted the MTD on October 19, 2016. The only
remaining cause of action alleged by MDB against Versa is for Contribution.

1 The Motion avers MDB has destroyed or disposed of critical evidence which directly
2 impacts Versa's ability to represent itself in the instant litigation. Specifically, the Motion contends
3 after the accident MDB continued to use the truck in question; failed to keep the truck in the same
4 condition as it was on the day in question; serviced the truck routinely; repaired and replaced the
5 electrical systems that control the solenoid which operated the Versa valve; and failed to take steps
6 to preserve this critical evidence knowing litigation was highly probable. The Opposition contends
7 there has been no spoliation of evidence in this case. Further, the Opposition posits there was
8 nothing more than routine maintenance done on the trailer; therefore, Versa's ability to defend itself
9 has not been impaired.

10 The Motion avers MDB had a duty to preserve the discarded electrical systems in
11 anticipation of the underlying action. In *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648,
12 651, 747 P.2d 911, 914 (1987), the Nevada Supreme Court held, "even where an action has not been
13 commenced and there is only a potential for litigation, the litigant is under a duty to preserve the
14 evidence which it knows or reasonably should know is relevant to the action." The Motion
15 concludes the appropriate sanction for the failure to preserve this crucial evidence should be
16 dismissal of the entire action. See generally *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88,
17 787 P.2d 777 (1990), and NRC 37.

18 Discovery sanctions are within the discretion of the trial court. See *Stubli v. Big D Int'l*
19 *Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991), and *Kelly Broadcasting v. Sovereign*
20 *Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). "Generally, sanctions may only be
21 imposed where there has been willful noncompliance with the court's order, or where the adversary
22 process has been halted by the actions of the unresponsive party." *Zenith*, 103 Nev. at 651, 747
23 P.2d at 913 (citing *Finkelman v. Clover Jewelers Blvd. Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609
24 (1975) and *Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973)).
25 *Accord GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).
26 Dismissal of an entire action with prejudice is a dramatic punishment for a discovery abuse. The
27 Nevada Supreme Court cautions district courts the use of such a Draconian sanction should be
28 approached with caution. "The dismissal of a case, based upon a discovery abuse such as the

1 destruction or loss of evidence, 'should be used only in extreme situations; if less drastic sanctions
2 are available, they should be utilized.'" *GNLV*, 111 Nev. at 870, 900 P.2d at 326 (citation omitted).
3 Additionally, the *Nevada Power* Court held it was an abuse of discretion for a district court to grant
4 case concluding sanctions without an evidentiary hearing. The *Nevada Power* Court held the party
5 facing a case terminating sanction needs an "opportunity to present witnesses or to cross-examine
6 [the movant] or their experts with regard to [the discovery violations]." *Nevada Power*, 108 Nev. at
7 646, 837 P.2d at 1360. *Cf. Bahena v. Goodyear Tire & Rubber Co. ("Bahena II")*, 126 Nev. 606,
8 612, 245 P.3d 1182, 1186 (2010).

9 The Nevada Rules of Civil Procedure provide that a party who fails to comply with discovery
10 orders or rules can be sanctioned for that failure. NRCP 37(b). Sanctions against a party can be
11 graduated in severity and can include: designation of facts to be taken as established; refusal to allow
12 the disobedient party to support or oppose designated claims or defenses; prohibition of the
13 offending party from introducing designated matters in evidence; an order striking out pleadings or
14 parts thereof or dismissing the action; or rendering a judgment by default against the disobedient
15 party. NRCP 37(b)(2). Case concluding sanctions need not be preceded by other less severe
16 sanction. *GNLV*, 111 Nev. at 870, 900 P.2d at 325. A disobedient party can also be required to pay
17 the reasonable expenses, including attorney fees caused by the failure. NRCP 37(b)(2)(E).

18 The *Young* Court adopted an eight factor analysis ("the *Young* factors") district courts must
19 go through if they feel a discovery abuse is so severe it warrants dismissal. The *Young* Court held,
20 "every order of dismissal with prejudice as a discovery sanction be supported by an express, careful
21 and preferably written explanation of the court's analysis of the pertinent factors." *Young*, 106 Nev.
22 at 93, 787 P.2d at 780. The *Young* factors are as follows: (1) the degree of willfulness of the
23 offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser
24 sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse;
25 (4) whether any evidence has been irreparably lost; (5) the feasibility and fairness of less severe
26 sanctions; (6) the policy favoring adjudication on the merits; (7) whether sanctions unfairly operate
27 to penalize a party for the misconduct of his or her attorney; and (8) the need to deter parties and
28 future litigants from similar abuses. *Id.* In discovery abuse situations where possible case-

1 concluding sanctions are warranted, the trial judge has discretion in deciding which factors are to be
2 considered on a “case-by-case” basis. *Bahena II*, 126 Nev. at 610, 245 P.3d at 1185 (citing *Higgs v.*
3 *State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010)). The *Young* factor list is not exhaustive and the
4 Court is not required to find that all factors are present prior to making a finding. “Fundamental
5 notions of fairness and due process require that discovery sanctions be just and . . . relate to the
6 specific conduct at issue.” *GNLV*, 111 Nev. at 870, 900 P.2d at 325.

7 The Nevada Supreme Court has addressed orders of case concluding sanctions on numerous
8 occasions. The *Zenith* Court found a party whose agent destroyed and/or lost a television prior to
9 the commencement of the underlying action, after the party’s expert had an opportunity to test the
10 television and opine on the television as a cause of a fire, had committed a discovery abuse
11 warranting case concluding sanctions.⁴ The *Zenith* Court held, “[t]he actions [of the appellant] had
12 the effect of reserving to itself all expert testimony based upon examination of the television set.”
13 103 Nev. at 652, 747 P.2d at 914.

14 The *Kelly Broadcasting* Court held the striking of an answer and entry of a judgment in favor
15 of the non-offending party (Kelly) was an appropriate sanction for failing to complete discovery by
16 the offending party (Sovereign). *Kelly Broadcasting*, 96 Nev. at 192, 606 P.2d at 1092. Sovereign
17 argued a lesser sanction of striking only the affirmative defense to which the interrogatories applied
18 was a more appropriate sanction. The *Kelly Broadcasting* Court disagreed, noting “[t]he question is
19 not whether this court would as an original matter have entered a default judgment as a sanction for
20 violating a discovery rule; it is whether the trial court abused its discretion in so doing. We do not
21 find an abuse of discretion in this case.” *Id.*

22 The *Stubli* Court upheld case concluding sanctions when the appellant or its agents failed to
23 preserve evidence related to the cause of a trucking accident. The respondent provided expert
24 affidavits which posited the cause of the accident could have been something other than the
25 respondent’s work on the truck. “The experts further asserted that appellant’s failure to preserve the
26

27 ⁴ The trial court actually struck the appellant’s expert witness from the trial. The appellant indicated it had insufficient
28 evidence to proceed without its expert and the trial court granted summary judgment in favor of the respondent. *Zenith*,
103 Nev. at 651, 747 P.2d at 913.

1 [truck and its components] had made it impossible for respondents to establish their defense theory.”
2 *Stubli*, 107 Nev. at 312, 810 P.2d at 787. *See also*, *North American Properties v. McCarran*
3 *International Airport*, 2016 WL 699864 (Nev. Supreme Court 2016). *But see*, *GNLV, supra* (case
4 concluding sanctions not appropriate when other evidence existed which experts could use to assist
5 in their analysis including the statements of witnesses who saw the spoliated evidence).

6 The Court has considered the arguments of counsel, all of the pleadings on file in the instant
7 action, the testimony of the witnesses at the evidentiary hearing, the exhibits admitted at that
8 hearing, and the relevant case law discussed, *supra*. The issue presented in the case is actually very
9 narrow: MDB claims it was a defective solenoid manufactured by Versa that malfunctioned causing
10 a truck full of gravel to dump onto one of the two busiest roadways in Washoe County. MDB does
11 not dispute the electrical systems were not preserved in anticipation of the trial or potential testing.
12 MDB took no steps to warn its employees to keep any components in the electrical system should
13 they need to be replaced. There are no pictures taken of the electrical system or the components.
14 MDB’s employees cannot testify to the condition of the components when they were replaced.
15 Versa avers there were other potential causes of the malfunction, including an electrical issue. Versa
16 further contends it cannot present these issues to the jury in support of its defense because the
17 evidence no longer exists. The Court reviews the *Young* factors as follows:

18 I. Willfulness

19
20 The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598,
21 599 (1984), the Nevada Supreme Court found the term willful, “implies simply a purpose or
22 willingness to commit the act or to make the omission in question. The word does not require in its
23 meaning any intent to violate law, or to injure another, or to acquire any advantage.” Willfulness
24 may be found when a party fails to provide discovery and such failure is not due to an inability on
25 the offending party’s part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980).
26 The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to
27 establish willfulness.
28

1 Clearly MDB should have anticipated extensive litigation as a result of the incident that
2 occurred on July 7, 2014. This was not a mere "slip and fall" where the putative plaintiff initially
3 claims he/she is not injured only later to come back and sue. There were numerous accidents and
4 injuries as a result of collisions occurring on a highway. MDB, or its counsel, had to know there
5 would be litigation as a result of these events. The Court heard no testimony that MDB took any
6 steps to preserve the truck or trailer in any way. There was no testimony indicating memorialization
7 of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck
8 and trailer continued to be in use after the events of July 7, 2014. It was subject to "routine"
9 maintenance. The Court may have condoned the continued use of the truck, and even the trailer, had
10 there been *any* steps taken to preserve the appearance of these items as they existed at the time of the
11 event, or prior to the "routine" maintenance. The memorialization did not occur.

12 It would have been simple to inform the shop staff to photograph the truck and trailer on or
13 about July 7, 2014. It would have required minimal effort to inform the shop staff to preserve any
14 electrical parts taken off the truck or trailer during the maintenance. If these steps had been taken
15 the Court would be looking at this case through the prism of *GNLV* because both parties would have
16 had alternative ways to prove or disprove their theory of the case. Based on the inaction of MDB in
17 preserving or memorializing the condition of the truck and trailer the Court must view this case
18 through the prism of *Stubli* and *Zenith*: MDB alone has the ability to call experts to support their
19 position. Versa's expert has a theory he can neither confirm nor refute based on the loss of the
20 electrical components. The Court does not find MDB intentionally disposed of the components in
21 order to harm Versa, nor were MDB's employees acting with any malevolence; however, the Court
22 does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding
23 discovery in this action.

24 *II. The possibility of a lesser sanction*

25
26 The second *Young* factor is possible prejudice to Versa if a lesser sanction were imposed.
27 The Court would consider lesser sanctions, including an adverse inference instruction, a rebuttable
28 presumption instruction, and the striking of the MDB's expert as alternative sanctions. The Court

1 does not find any of these sanctions strike the appropriate balance between MDB's actions and the
2 harm imposed on Versa's case. Should the Court strike Dr. Bosch from being a witness at the trial
3 MDB would be in the same position as the appellant in *Zenith*: unable to prove its case given the
4 lack of expert testimony and subject to a motion for summary judgment. This outcome would be a
5 patent waste of limited judicial resources and of the jury's time. The Court does not find an adverse
6 inference instruction pursuant to NRS 47.250(3) and *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d
7 103 (2006), is appropriate under the circumstances before the Court.⁵ As noted by the *Zenith* Court,
8 "[t]he actions of [MDB] had the effect of reserving to itself all expert testimony based upon
9 examination of the [electronic components]. Any adverse presumption which the court might have
10 ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the
11 expert witness." *Zenith*, 103 Nev. at 652, 747 P.2d at 914. Additionally, an adverse inference
12 instruction requires an "intent to harm another party through the destruction and not simply the
13 intent to destroy evidence." *Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106. The Court does not find
14 MDB intended to harm Versa by destroying or disposing of the electrical components; therefore, it
15 could not give this instruction. The Court can conceive of no other sanction which would be
16 appropriate under these circumstances.

17
18 ⁵ At oral argument counsel for MDB stated:

19 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
20 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
21 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
22 not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
23 Procedure 37 for an allegation of spoliation."

24 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
25 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
26 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
27 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
28 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
up the case number provided by counsel on the Nevada Supreme Court webpage. Troublingly, the Court was unable to
verify the veracity of the proposition proffered by MDB *because the parties agreed to dismiss their proceedings and
the Nevada Supreme Court vacated the order upon which MDB makes its argument.* The Nevada Supreme Court had
granted a Writ of Mandamus on January 31, 2008; however, it withdrew that order on a subsequent date. The Nevada
Supreme Court webpage indicates the parties contacted the Supreme Court on February 2, 2008, and indicated they had
settled their case. The Nevada Supreme Court entered an order vacating the January 31, 2008, order upon which MDB
relies and "den[ie]d the petition as moot" on February 13, 2008. In short, the "case" MDB relies upon does not even
exist.

1 III. The severity of the sanction of dismissal relative to the severity of the discovery abuse

2
3 “The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme
4 situations; if less drastic sanctions are available, they should be utilized.” *GNLV*, 111 Nev. at 870,
5 900 P.2d at 325 (citing *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that
6 granting the Motion effectively ends the case. The Court does not take this action lightly. The *only*
7 issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway.
8 The Court finds MDB’s disposal of the electronic components without memorializing them in any
9 way effectively halted the adversarial process. It left all of the “cards” in MDB’s hands and left
10 Versa with nothing other than a theory it could neither prove nor disprove. MDB could simply rely
11 on its expert during trial and argue Versa had no proof of its theory and the theory itself was
12 preposterous. This is the position taken by MDB at the evidentiary hearing. Versa is left with no
13 way of verifying its theory of the case.

14 Counsel for MDB directed the Court’s attention at the evidentiary hearing to the strength of
15 their expert (Dr. Bosch) and the weakness of Versa’s expert (Palmer). Counsel further emphasized
16 the lack of plausibility of the Palmer’s conclusions that it could have been an abraded wire which
17 caused an electrical failure rather than some issue with the solenoid or the Versa valve. The Court is
18 not convinced this should be the deciding factor in resolving the issue of case concluding sanctions
19 for the following reasons:

- 20 1. MDB’s own employee (the same employees who serviced the truck and trailer)
21 acknowledged at the evidentiary hearing that the abrasions Palmer referenced actually do
22 occur;⁶ and

23
24 ⁶ Q: Okay. You also mentioned that you want to replace those cords, the seven and the – the seven-conductor and the
25 four-conductor cords because they will get cut on the deck plate, they will get abraded, they will become cracked; is that
26 correct?

27 A: I have seen that, yes.

28 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Patrick Bigby), 154:1-6.

1 2. Dr. Bosch had to acknowledge, though grudgingly and with great circumspection, that it
2 was possible though highly unlikely the electrical system could have caused the valve in
3 question to open.⁷

4 The Court's decision regarding the issue presented in the Motion is not predicated on who has
5 the "stronger case" or the "better expert" at the evidentiary hearing. If this were the analysis the
6 Court would agree with MDB: Dr. Bosch is a very credible witness and it is likely MDB has the
7 more compelling argument to present to the jury. This, however, is not the issue. The issue in the
8 Court's analysis is MDB's actions deprived Versa of *any* ability to prove its case: the adversarial
9 process was stymied by MDB regarding the most critical pieces of evidence. Had MDB's witnesses
10 testified the abrasions never occur, or abrasions were photographed and/or documented and none
11 existed on this truck, the Court's conclusion may have been different. Here we know it *could have*
12 *occurred* as Palmer suggested.

13 IV. Whether evidence is irreparably lost

14 Clearly the relevant evidence is lost. The employees of MDB testified at the evidentiary
15 hearing the electronic components had been thrown away.

16 V. The feasibility and fairness of a less severe sanctions

17 The Court discussed the possibility of less severe sanctions in section II. The same analysis
18 applies here. There does not appear to be any sanction short of case concluding sanctions which
19 would be appropriate under the circumstances of this case. The Court also acknowledges that
20 progressive sanctions are not always necessary. The circumstances presented in the Motion are
21 unique and the most severe sanction is appropriate.

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26 ⁷Q: Is there any scenario under which current from the seven-prong cord having contact with the four-prong cord could
27 open the versa valve?

28 A: Anything is possible, but it's highly improbable in this case.

TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Dr. Bosch), 161:5-9. Dr. Bosch's
testimony clearly established he did not believe there was a short or other electrical failure that caused the valve to open.

1
2 VI. The policy favoring adjudication on the merits; and

3 VII. The need to deter parties and future litigants from similar abuse
4

5 The Court considers the sixth and eighth *Young* factors together. Nevada has a strong policy,
6 and the Court firmly believes, that cases should be adjudicated on their merits. *See, Scrimmer v. Dist.*
7 *Court*, 116 Nev. 507, 516-517, 998 P.2d 1190, 1196 (2000). *See also, Kahn v. Orme*, 108 Nev. 510,
8 516, 835 P.2d 790, 794 (1992). Further, there is a need to deter litigants from abusing the discovery
9 process established by Nevada law. When a party repeatedly and continuously engaged in discovery
10 misconduct the policy of adjudicating cases on the merits is not furthered by a lesser sanction.
11 *Foster*, 126 Nev. at 65, 227 P.3d at 1048. The case *sub judice* is not one of systemic discovery
12 abuse. However, the Court concludes to allow the case to go forward as it is currently postured
13 would be the antithesis of allowing it to proceed “on the merits.” The merits of Versa’s case would
14 not be able to be evaluated by the jury because Versa could not test its theory on the actual
15 components. The jury would be left to guess about what may have occurred rather than weigh the
16 competing theories presented. MDB would have an overwhelmingly unfair advantage given its
17 action.

18 The Court balances the laudable policy of trial on the merits against the need to deter future
19 litigants from abusing the discovery process. The Court turns back to the *Zenith* Court’s direction to
20 all potential litigants regarding their duty to preserve evidence. The *Zenith* Court stated, “[i]t would
21 be unreasonable to allow litigants, by destroying physical evidence prior to a request for production,
22 to sidestep the district court’s power to enforce the rules of discovery.” *Id.* 103 Nev. at 651, 747
23 P.2d at 913. *Accord, Colfer v. Harmon*, 108 Nev. 363, 832 P.2d 383 (1992). To allow this case to
24 go forward, when the only evidence which may have supported Versa’s defense was in the sole
25 possession of MDB and MDB did nothing to preserve or document that evidence, would set a
26 dangerous precedent to similarly situated parties in the future. It would also be antithetical to a
27 potential litigant’s obligation to preserve the very evidence it may have to produce during discovery.
28

1 When the Court balances the sixth and eighth *Young* factor it concludes dismissal of MDB's claims
2 against Versa are appropriate.


3 *VIII. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her*
4 *attorney*

5
6 There is no evidence to show MDB's counsel directed MDB to destroy or fail to memorialize
7 the evidence in question. The Court finds this factor to be inapplicable to the *Young* analysis.

8 "Fundamental notions of fairness and due process require that discovery sanctions be just
9 and . . . relate to the specific conduct at issue." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (citing
10 *Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court recognizes that discovery sanctions should
11 be related to the specific conduct at issue. The discovery abuse in this case crippled one party's
12 ability to present its case. Weighing all eight factors above the Court concludes the dismissal of the
13 MDB Cross-Claim is appropriate. Due to the severity of MDB's discovery abuse there are no lesser
14 sanctions that are suitable.

15 It is hereby **ORDERED** DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
16 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
17 CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO
18 NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION is
19 **GRANTED**. MDB TRUCKING, LLC'S CROSS-CLAIM is DISMISSED.

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of December, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 8 day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS WIECZOREK, ESQ.


Sheila Mansfield
Judicial Assistant