

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDB TRUCKING, LLC,

Appellant/Cross-Respondent,

vs.

VERSA PRODUCTS COMPANY,
INC.,

Respondent/Cross-Appellant.

Supreme Court Case No. 75022

Consolidated with Case Nos. 75319,
75321, 76395, 76396 and 76397.
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[District Court Case Nos.:
CV15-02349, CV16-00976 and
CV16-01914]

JOINT APPENDIX VOLUME 12 OF 18

Consolidated Appeals from the Second Judicial District Court,
Orders Granting Motion to Strike Cross-Claim and Orders
Denying Attorneys' Fees and Granting Reduced Costs,
The Honorable Judge Elliott A. Sattler, District Court Judge

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1 came up with a mechanical block that we placed on the
2 valves so that it cannot be opened unless the
3 mechanical block is removed.

4 Q Has that worked?

5 A We have not had any inadvertent dumps.

6 Q If you could look at Exhibit 5. We've been
7 through, again, various work orders. I just want to
8 ask you a couple questions about this particular one.
9 This is an order dated February 5th, 2015. Do you see
10 that?

11 A I do.

12 Q And I guess the equipment number is 5694, so
13 that's Mr. Koski's third trailer? Does that sound
14 correct to you?

15 A That does sound correct.

16 MR. AICKLEN: No. Object. Misstates the
17 testimony.

18 THE WITNESS: 5 would be --

19 BY MR. WIECZOREK:

20 Q I'm sorry. I was corrected. I'm told this is
21 the tractor.

22 A Yes. 5694, correct.

23 Q Okay. Sorry. Forgive me for that
24 misstatement.

1 So there's various maintenance performed on that
2 date. Are you able to -- since you performed the
3 maintenance, can you tell the Court what you did that
4 day?

5 A On this work order?

6 Q Yeah.

7 A Well, it looks like we installed a new driver's
8 seat and replaced a damaged four-way cord and replaced
9 a service line, an air line, which is an air service
10 line, and replaced the number three left axle flange
11 gasket on the drive axle.

12 Q Do you happen to remember this particular
13 repair?

14 A I don't recall it specifically, but it's not
15 uncommon to make that type of repair on our tractors.

16 Q I'm sure it's not every day you replace the
17 driver's seat, so, I guess, do you recall whether this
18 was as a result of some accident or some event with the
19 tractor or just --

20 A I believe the seat was worn out. At
21 499,000 miles I imagine it was.

22 Q The testimony in this case has been that as you
23 and others at MDB made repairs to this truck and the
24 trailers, you swap out certain parts and then you threw

1 away the old parts. Is that what you did?

2 A That's correct.

3 Q After the July 2014 incident involving
4 Mr. Koski's rig did anybody ever tell you you should be
5 saving those parts?

6 A No.

7 Q Did you ever have a discussion internally at
8 MDB about whether you should be saving these parts for
9 some future purpose?

10 A No.

11 Q Do you save -- do you typically save parts
12 after you've swapped them out or replaced them if they
13 fail?

14 A No. In my opinion if they need to be replaced,
15 they need to be thrown away.

16 Q The way that you handle repairs to a truck is
17 if a repair is performed, such as Exhibit 5 on
18 February 5th, 2015, does that tell you that the problem
19 was told -- the problem was indicated to you right
20 around that date?

21 A Correct.

22 Q Would it be a fair assumption based on how you
23 perform maintenance and repairs at MDB that these
24 cables and cords you replaced on that date were

1 probably working fine on February 1st, 2015?

2 MR. AICKLEN: Object. Foundation.

3 THE COURT: Don't answer the question.

4 Do you want to lay some more foundation for that
5 question?

6 MR. WIECZOREK: Sure.

7 THE COURT: I'll sustain the objection. You can
8 ask some foundational questions.

9 MR. AICKLEN: Thank you, Your Honor.

10 BY MR. WIECZOREK:

11 Q Do you perform, I guess, preventative
12 maintenance there, like do you replace sockets or plugs
13 if nobody has complained about them or you haven't had
14 a problem with them?

15 A Correct, if we've noticed it.

16 Q So how do you notice if something doesn't look
17 right with a particular plug or socket or --

18 A Well, we just may find that the lid that keeps
19 it covered is maybe cracked or something, you know.

20 Q These are reports to you from the drivers?

21 A Usually, but not always.

22 Q On the repair order Exhibit 5, you say certain
23 cords have been damaged. Does that mean anything to
24 you in terms of what actually was the problem with that

1 cord?

2 A Well, what that means to me the way it's
3 written is someone noticed that it had either been cut
4 on the deck plate or something or has some abrasion,
5 not necessarily a damage to take it out of service, but
6 it's something that we like to correct. You know, if
7 it's cracked, the insulation may be cracked just from
8 old age or the sunshine or whatnot. We just like to
9 keep them in much better repair.

10 Q There was some testimony earlier today about a
11 witness who had a concern that the cables between the
12 seven-wire and the four-wire prong on Mr. Koski's rig
13 are somehow joined together or it was tied together.
14 Are you familiar with that?

15 A Yes.

16 Q Have you ever seen a situation where because
17 those cables were in physical contact with each other
18 they essentially rubbed off the outer insulation and
19 coating from the wire -- from the cables and resulted
20 in a wire-to-wire connection that you observed?

21 A I have never observed that, that situation.

22 Q Mr. Bigby, I don't think I have further
23 questions. Thank you.

24 THE COURT: Cross-examination, Mr. Aicklen.

1 MR. AICKLEN: Yes, sir. Thank you.

2 CROSS-EXAMINATION

3 BY MR. AICKLEN:

4 Q Mr. Bigby, looking at Exhibit 5, you mentioned
5 that you replaced a damaged four-way cord. You also
6 replaced a damaged seven-way cord; is that correct?

7 A That is correct.

8 Q And you said that you'll make repairs if we
9 notice it on the trucks, you'll make repairs on the
10 trucks, quote, if we notice it, close quote?

11 A If we observed it as in the shop, yes.

12 Q Have there been times that there have been
13 problems or mechanical defects that you did not notice
14 that went on for a length of time that the drivers had
15 to tell you about them and then you made the repairs?

16 A Not to my knowledge. Typically if the driver
17 notices it, they tell us, and we take care of it.

18 Q Right. What I'm saying is have there been
19 times when the driver has told you there's a
20 maintenance problem on the truck but you did not notice
21 it before that?

22 A Oh, me personally not seeing it?

23 Q Yes.

24 A Oh, yes. Sure.

1 Q Okay. You also mentioned that you want to
2 replace those cords, the seven and the -- the
3 seven-conductor and the four-conductor cords because
4 they will get cut on the deck plate, they will get
5 abraded, they will become cracked; is that correct?

6 A I have seen that, yes.

7 Q Okay. The seven-pin connector is always
8 energized; correct? That's the power to the ABS and
9 the lights and all those things?

10 A Correct. The auxillary circuit?

11 Q Yes.

12 A In most trucks, yes. In this particular truck,
13 yes.

14 Q Even after you put out -- or even after you
15 installed that switch, the master switch, which
16 de-energized the four-conductor cord, the
17 seven-conductor cord always had an energized wire in
18 it; correct?

19 A Correct.

20 Q And you have personally observed both the seven
21 and the four cords cut on the deck plates, abraded and
22 cracked, and you've made those repairs?

23 A I have seen it on our tractors, not necessarily
24 this one.

1 Q Right.

2 A The reason for repair would be there's probably
3 abrasion.

4 Q Okay. So you believe that the seven-conductor
5 and the four-conductor cord on this, the subject
6 tractor, those cords were probably removed and thrown
7 away because they were either cut on the deck plate,
8 abraded or cracked; is that correct?

9 A We found some deficiency in them, yes.

10 Q Thank you.

11 MR. AICKLEN: No further questions.

12 THE COURT: Mr. Wieczorek, any other questions?

13 MR. WIECZOREK: No, thank you.

14 THE COURT: You may step down, Mr. Bigby. Thank
15 you for your testimony today.

16 Mr. Wieczorek, would you like to call your next
17 witness?

18 MR. WIECZOREK: Ms. McCarty will.

19 THE COURT: Oh, Ms. McCarty. I apologize. I
20 should just say, "Would MDB like to call its next
21 witness?"

22 MS. McCARTY: Thank you, Your Honor. We will call
23 Dr. David Bosch.

24 THE COURT: Dr. Bosch, please step forward.

1 (The oath was administered.)

2 THE WITNESS: Yes.

3 THE CLERK: Just have a seat.

4 THE COURT: Sir, could you please state and spell
5 your full name for me.

6 THE WITNESS: Yes. David Bosch. First name David,
7 D-a-v-i-d, last name Bosch, B-o-s-c-h.

8 THE COURT: Go ahead.

9 Thank you for being here today, Mr. Bosch.

10 THE WITNESS: Thank you.

11 MS. McCARTY: Thank you, Your Honor.

12 DAVID BOSCH,
13 having been first duly sworn, was examined
14 and testified as follows:

15 DIRECT EXAMINATION

16 BY MS. McCARTY:

17 Q Dr. Bosch, how are you employed?

18 A I am employed doing forensic engineering
19 investigations essentially.

20 Q And you have your own company?

21 A Yes.

22 Q And you were retained on behalf of MDB by my
23 firm to represent MDB as an expert in this case; is
24 that correct?

A Yes.

1 Q Where did you study to become an engineer?

2 A Back in South Dakota in my hometown where I
3 grew up. That's where I started. I did my
4 undergraduate work there in chemical engineering.

5 Q And do you hold any advanced degrees in
6 engineering?

7 A Yes. I got tired of the weather up there and
8 decided to move down this way and ultimately got my
9 master's in mechanical engineering and my Ph.D. in
10 materials and science engineering at Arizona State
11 University.

12 THE COURT: That's a significant change from South
13 Dakota.

14 THE WITNESS: Very much so.

15 BY MS. McCARTY:

16 Q And what year was that that you earned your
17 doctorate?

18 A Spring of 1994.

19 Q You are also an ASE certified master technician
20 in medium and heavy trucks; is that correct?

21 A Yes.

22 Q Can you tell me what's required for that sort
23 of certification?

24 A Well, typically, as you can imagine, it takes

1 an extensive amount of experience of working on trucks
2 and/or education regarding working on trucks along with
3 a series of exams, eight exams, that cover everything
4 from engines to electrical.

5 Q And would it cover the type of -- strike that.
6 Would it cover maintenance on a truck like the ones we
7 are talking about today?

8 A Absolutely. Just to expand a little bit on my
9 background, I grew up in an International truck
10 dealership back in South Dakota, so I was exposed, as I
11 often say, to the grease and oil almost from the very
12 beginning. I was exposed to all of the
13 diagnostics-type work that was done in order to
14 determine what the failure -- reasons for failures and
15 a lot of times even doing redesign to try to keep
16 things from failing again.

17 Q And that would include mechanical and
18 electrical systems?

19 A Yes, hydraulics, if it had to do with a truck
20 or any other vehicle as far as that went. We were in a
21 small town, so we would essentially work on anything
22 that somebody brought in. Over the years it evolved to
23 the point where we were doing primarily trucks, but we
24 did farm tractors, forklifts, just about anything

1 anybody would drag in there.

2 Q Have you been qualified as an expert in court
3 regarding medium and heavy trucks?

4 A Yes.

5 Q Has your testimony ever been excluded or
6 limited by a court of law?

7 A Not that I'm aware of.

8 Q You have had the opportunity to sit here today
9 and listen to Mr. Mitchell's testimony?

10 A Yes.

11 Q And Mr. Mitchell's testimony was that it was
12 possible for the coatings on the seven-wire cord and
13 the four-wire cord under the correct circumstances to
14 rub together and potentially activate the Versa valve.
15 Do you agree with Mr. Mitchell?

16 A No.

17 Q Why not?

18 A Well, there are a number of reasons. First and
19 foremost, the material that's used to provide the
20 protection for these cables is multiple layered. It's
21 also designed specifically to resist abrasion and even
22 more specifically to resist abrasion with like
23 materials. So you've got that problem.

24 You've got essentially four layers of insulation

1 that would have to be worn through in order to get a
2 contact. But the coup de gras of the whole thing is in
3 this particular case is even if one of the solenoid
4 wires is activated by a live wire from the seven-wire
5 cable, there's still no circuit. And it goes back to
6 what Mr. Bigby mentioned and, that is, there is no
7 ground path, no return.

8 The master switch that he spoke about is a
9 double-pole switch. What that means effectively with
10 regard to the electrical is not only is the positive
11 wire isolated but the negative or ground wire is. So
12 if you have a situation where the seven-wire cable,
13 which has live wires in it, contacts one of the
14 solenoid wires, it will put a voltage on that wire, but
15 there can't be a current path because of this switch
16 being open that eliminates any possibility that
17 electrons can get back to the battery.

18 Q So if I'm understanding you correctly, in the
19 event that the four-prong pin somehow received
20 electricity from the seven-prong pin, it essentially
21 has no place to go?

22 A Exactly. There is no current path, no circuit.

23 Q And there is no way that the hypothesis that
24 Mr. Mitchell proffered today --

1 MR. AICKLEN: Object. Counsel is testifying.

2 THE COURT: Sustained. You can rephrase the
3 question.

4 BY MS. McCARTY:

5 Q Is there any scenario under which current from
6 the seven-prong cord having contact with the four-prong
7 cord could open the Versa valve?

8 A Anything is possible, but it's highly
9 improbable in this case.

10 Q And, in fact, the only way that the Versa
11 valves receive current is if the driver in the cab hits
12 the master switch and any one of the three trailer
13 switches; is that right?

14 A Correct.

15 Q You had the opportunity to inspect both
16 Mr. Palmer's truck and Mr. Koski's truck; is that
17 right?

18 A Yes.

19 Q And why was Mr. Palmer's truck also important
20 in this particular case?

21 A That was part of the investigation that I did.
22 As you can imagine, we were generating many hypotheses
23 for evaluation that might give us insight about what
24 had actually happened to Mr. Koski's truck. Because

1 Mr. Palmer's truck, the wiring on that truck was in a
2 different condition and it had activated in an unwanted
3 way at nearly the same time and place, it was another
4 avenue for us to gain information to add to the data
5 set for evaluation of our hypotheses.

6 Q So it was your understanding at the time that
7 both Mr. Palmer's truck and Mr. Koski's truck suffered
8 an uncommanded dump on the same day, at essentially the
9 same time, at essentially the same location?

10 A Yes.

11 Q When you inspected Mr. Palmer's truck and
12 Mr. Koski's truck, did you notice anything unique about
13 them with respect to their electrical systems?

14 A Yes.

15 Q Can you explain what the differences were?

16 A Well, there were a number of differences. And
17 we'll start at the front of the truck and go toward the
18 rear. The first thing was that the power to -- the
19 power supplying the control circuit for dumping the
20 trailers came from an existing circuit inside the cab.
21 I don't remember precisely which one it was, but it was
22 an existing and likely a fuse circuit that was in the
23 cab where apparently Ranko had chosen to take the power
24 for the dump control switches.

1 Second to that was that Mr. Palmer's truck didn't
2 have a master switch in it.

3 Third was that the wiring out on the trailers was
4 slightly different, not -- I wouldn't say necessarily
5 significantly different, but it was slightly different.

6 Q And is that because Mr. Koski's truck had been
7 modified in such a way to ensure that there was no
8 current because his truck had experienced at that time
9 three uncommanded dumps?

10 A Well, I missed one of them as we talked about
11 during my deposition, but I knew of two. So it was
12 certainly one of the things that I was looking at and
13 trying to figure out.

14 Q But you understand now there were three?

15 A Yes.

16 Q Following the two dumps within a few days of
17 each other in 2013, what do you understand were the
18 steps that MDB took to ensure that there was not
19 another uncommanded dump?

20 A Well, they did three things. I'm going to put
21 it in three headings. One of the things that they did
22 was replace the existing Versa valve. The second thing
23 that they did was to completely rewire the control
24 circuit for the dumps. And we've heard testimony

1 already today about that. But essentially what they
2 did was they separated any potential contact between
3 the components that provided the power to dump the
4 trailers from power for lights, for ABS, for everything
5 else that was on that trailer.

6 The third thing that they did, of course, was to
7 add the master switch which isolated the entire circuit
8 of the dump controls from any other electrical on the
9 truck.

10 Q Dr. Bosch, if I could turn your attention to I
11 believe it is Exhibit 7.

12 MR. AICKLEN: I object to Exhibit 7, Your Honor,
13 for the reasons stated earlier this morning. I can
14 repeat them if necessary.

15 THE COURT: One moment.

16 Ms. McCarty, regarding Exhibit No. 7, is this an
17 actual exhibit or is it a demonstrative aid for the
18 purposes of the evidentiary hearing?

19 MS. McCARTY: Your Honor, it was prepared for
20 purposes of the evidentiary hearing today.

21 THE COURT: As a demonstrative aid the Court
22 wouldn't consider it as evidence, the Court would just
23 consider it as something that assists in the testimony
24 of the witness.

1 It's not evidence of anything. It's just simply
2 assisting Dr. Bosch in his testimony.

3 Mr. Aicklen, any objection to it under those
4 circumstances?

5 MR. AICKLEN: Well, my expert is not here. My
6 expert had never seen it before to challenge it. He
7 did mention that there is an error on it. I did not
8 jot down what it is. But if the Court is not going to
9 use it as evidence but rather as demonstrative, then, I
10 mean, I've stated my objections.

11 THE COURT: Well, if it's for demonstrative
12 purposes only, Ms. McCarty, then the witness can refer
13 to the demonstrative aid identified as Exhibit No. 7.

14 MS. McCARTY: Thank you, Your Honor.

15 THE COURT: If you want me to consider it as
16 evidence, then I think there would be some significant
17 concern about that, because the counsel for Versa and
18 their expert haven't had the opportunity to see it
19 prior to today.

20 MS. McCARTY: I understand, Your Honor.

21 THE COURT: Go ahead.

22 BY MS. McCARTY:

23 Q Dr. Bosch, could you please walk us through
24 this diagram beginning with what you label here as the

1 original wiring configuration.

2 A Well, the most important thing to take away
3 from the left-hand drawing is that there were -- the
4 wires from -- the wires that were there to control the
5 dump bodies were in close contact with other wires that
6 were in the seven-wire harness. And that's indicated
7 by the lower gray boxes. At the top of the lower gray
8 boxes you see a small white box that I labeled
9 seven-wire box.

10 The left two wires are the ground and the hot --
11 hots. I'll say plural -- that bring all of the wires
12 associated with the seven-wire bundle into that box.
13 For reasons unknown to me, the folks at Ranko decided
14 to split each of the wires that come from the dump
15 control switches, which are the gold boxes at the top,
16 chose to run those into the seven-wire box and
17 essentially use a circuit breaker that was in that box
18 designed for use on one of the seven-wire wires,
19 seven-wire cable wires, and then -- which puts it in
20 immediate proximity.

21 And I think we have an example there of what I'm
22 talking about. But essentially what it did is put
23 wires from the dump control circuit in immediate
24 proximity of wires -- some wires that were always hot,

1 other wires that were hot sometimes, put them in
2 immediate proximity of each other.

3 So what Mr. Bigby did -- just very briefly here,
4 Judge. You can see that there are a number of circuit
5 breakers around the circle here. There's one circuit
6 breaker for each of the circuits that come through the
7 seven-wire cable. And what Ranko did is they tied the
8 marker lights to the taillights, in other words, moved
9 a wire from one circuit breaker and put two circuits on
10 another circuit breaker and then used the circuit
11 breaker that they pulled, one to the tail where the
12 marker lights are and run that to provide circuit
13 protection for the dump circuit.

14 THE COURT: So then they would have all three dump
15 circuits going into that one circuit that you're
16 pointing to?

17 THE WITNESS: No, only the one for that trailer,
18 because there's one of these at the front of each
19 trailer.

20 THE COURT: Gotcha. Okay.

21 THE WITNESS: So for that trailer they would run it
22 literally into this box where all these other wires
23 are, two of which are always hot, some that are going
24 to be hot other times. They run it into this box and

1 then pull it back out of this box which is the red wire
2 that comes out of the white box in the lower gray box
3 down to the valve. So that became the activation wire.

4 And then what they did with the ground side of the
5 valve activation was they ran it to -- and that's the
6 black wire on the left side of the lower gold box.
7 They ran that straight up onto a post and shared the
8 ground for all of the seven-wire circuits.

9 THE COURT: Would it be fair to say, Dr. Bosch,
10 that the configuration on the left side of the
11 demonstrative aid that you've identified as original
12 wiring configuration is what Mr. --

13 THE WITNESS: Mitchell?

14 MS. McCARTY: Mr. Palmer?

15 THE COURT: Mr. Palmer. I was going to say
16 Peterson. Thank you, Ms. McCarty.

17 So the left one is what Mr. Palmer's truck looked
18 like when you saw it, the right one is what Mr. Koski's
19 truck looked like?

20 THE WITNESS: No. The left one is what Mr. Koski's
21 truck looked like before the 2013 dumps. And when they
22 made the modifications after the 2013 dumps, then it
23 looked like the right-hand drawing.

24 THE COURT: And then Mr. Palmer's truck looked

1 nothing like the left-hand drawing when you saw it?

2 THE WITNESS: It's slightly different.

3 THE COURT: Okay. I think I gotcha.

4 Go ahead.

5 BY MS. McCARTY:

6 Q And just for the record just so I can clear up
7 a couple of things, the diagram that you've drawn here
8 is specific to Mr. Koski's truck, No. 5694; is that
9 correct?

10 A Correct.

11 Q Prior to 2013 and then after July 30th of 2013;
12 correct?

13 A Thereabouts, yes.

14 Q And then the other demonstrative that you have
15 in your hand is the plug and socket for a seven-wire
16 pin system; correct?

17 A Yes, exactly.

18 Q So if you could explain then the post-dump 2013
19 configuration.

20 A Okay. I wanted to explain one more thing on
21 the first drawing --

22 Q Please do.

23 A -- just to finish the thought on the ground.

24 So I was talking about how they shared grounds with

1 the seven-wire conductor. That creates a situation
2 where there are two things going on here. First off,
3 inside this box you've got a wire that can activate the
4 trailer dump around many other wires that either are
5 hot or are hot sometimes.

6 So Mr. Bigby made an excellent decision to
7 basically go around this. And he put the -- and I
8 forget which way it was, but he basically put either
9 the tail back where it was supposed to be or the marker
10 back where it was supposed to be. So that was the way
11 that this assembly was intended to be used.

12 And then the other piece is the ground circuit --
13 when you share grounds between different circuits, you
14 can have -- if you have ground problems, you can have
15 what I call feedback through the ground that could
16 ultimately activate the valve. So what Mr. Bigby did
17 was exactly what he could do, and all he could do, was
18 to switch the wiring so that it looked like the diagram
19 on the right-hand side.

20 And the most important point here to make with
21 regard to the hearing today is what I've labeled as the
22 master switch. I think that this is the piece that
23 Mr. Mitchell has missed here. When that switch was
24 installed and we took power directly from the battery

1 and not some other circuit in the truck, we separated
2 the ground to a dedicated ground for the trailers. In
3 other words, if you look at the master switch, there's
4 a wire coming out of the right-hand side of that box.
5 That wire goes down to all three switches and provides
6 the return ground path for the switches.

7 So in Mr. Mitchell's hypotheses he's arguing that a
8 highly unlikely event could happen where two cables
9 essentially rubbed through insulation that's very
10 resistant to abrasion. And he had a situation where
11 you essentially had to go through four layers of
12 insulation, have a hot wire in the seven-wire cable
13 contact the activation wire in the four-prong cable and
14 cause the trailer to dump. That's impossible. It
15 won't happen, because there's no circuit.

16 Unless that master switch is closed, in other
17 words, turned on, there's no way for the circuit or the
18 current to get from the seven-wire to the four-wire to
19 the solenoid and back from the solenoid to the battery,
20 because that master switch is in an open position.
21 There is no current path.

22 Q So given that -- and if I'm understanding you
23 correctly, there is no way for the current as you've
24 just described to get to and activate the Versa valve

1 on the trailers?

2 A Correct. There is going to be no current flow.

3 Q So given that, if the original wiring and the
4 original sockets and original plugs were available to
5 be viewed, would there be any scenario in which they
6 would be relevant as to why the Versa valves opened on
7 July 7, 2014?

8 MR. AICKLEN: Objection. She is not the
9 determinant of what is relevant; the Court is. Also,
10 it calls for rank speculation. There's no foundation
11 to any answer he might give.

12 THE COURT: Ms. McCarty.

13 MS. McCARTY: Your Honor, I think he's just spent
14 the last ten minutes laying all the foundation about
15 his understanding of this system.

16 THE COURT: I'll overrule the objection. He can
17 answer the question. I don't think it's rank
18 speculation. As I've said before, I never know what
19 the level of speculation is. I don't know if there's
20 such a thing as rank --

21 MR. AICKLEN: This is rank. This is rank
22 speculation.

23 THE COURT: This is rank.

24 MR. AICKLEN: Rank means it smells.

1 THE COURT: I just know that speculation is the
2 objection. I don't know, again, that there are levels
3 or grades of speculation based on their level of
4 odoriferousness. But I will allow the witness to
5 answer the question.

6 And certainly, Mr. Aicklen, you may cross-examine
7 the witness regarding whatever response he gives.

8 Go ahead.

9 THE WITNESS: Yeah, the presence or lack of
10 presence of any of those parts is completely
11 irrelevant. I knew that the first day that I saw the
12 truck.

13 THE COURT: And when you say "irrelevant," you mean
14 irrelevant in your opinion, irrelevant in your
15 analysis, not irrelevant in a legal sense?

16 THE WITNESS: Oh, absolutely. I'm not going to get
17 into the legal part. It's technically irrelevant.

18 BY MS. McCARTY:

19 Q And why is that?

20 A Again, if -- unless you want to believe that
21 Mr. Koski intentionally dumped this load, there's no
22 current path. Anything can happen out on the truck
23 with regard -- well, I shouldn't say "anything." Any
24 probable thing that could happen out on the truck would

1 require that return path, and that return path does not
2 exist unless the master switch is in a closed position.

3 Q So just so I'm clear --

4 THE COURT: The return path doesn't exist if the
5 master switch is in a closed position? I just didn't
6 understand --

7 THE WITNESS: Unless it's in a closed position or
8 in an on position.

9 THE COURT: Gotcha. So if the master switch is on
10 for some reason, then it could occur, but it has to be
11 on is your testimony; correct?

12 THE WITNESS: Yes.

13 THE COURT: All right. Go ahead.

14 BY MS. McCARTY:

15 Q Just so I'm clear, if you had had the
16 opportunity to inspect the truck on the day of the
17 event, is there a possible electrical failure in the
18 system as it was modified that could have caused the
19 Versa valve to open?

20 MR. AICKLEN: Object. Foundation.

21 THE COURT: He can answer that question. Again,
22 Mr. Aicklen, you can cross-examine him on his answer,
23 but he can answer that question.

24 THE WITNESS: I couldn't rule out possible, but

1 probable, that would be next to impossible.

2 BY MS. McCARTY:

3 Q Is there a short or a break or an issue with
4 the socket, the four-pin socket that we've looked at
5 all day, that could have caused the Versa valve to
6 activate?

7 A Absolutely not.

8 Q Is there a short or a malfunction or a break in
9 the plug that we've talked about all day long that
10 could have caused the Versa valve to activate?

11 A Absolutely not.

12 Q Is there a short in the seven-wire pin or a
13 break or a loss of insulation that could have caused
14 the Versa valve to open?

15 A No.

16 Q Is there a short in the four-pin that could
17 have caused the Versa valve to open?

18 A No.

19 THE COURT: Wait a minute. You're just saying
20 definitively "no." Your testimony just a moment ago
21 was yes, it's possible. So is it possible or is it
22 definitively "no"?

23 THE WITNESS: I'm defining possible -- I'm
24 differentiating between possible and probability. The

1 probability in the scenarios that she's running past me
2 is nearly zero.

3 THE COURT: Okay. Go ahead.

4 BY MS. McCARTY:

5 Q So if these materials had been available for
6 viewing at any point during this litigation, would they
7 have provided any information to you regarding what
8 caused the Versa valve to open?

9 A No.

10 MR. AICKLEN: Object. Speculation. Foundation.

11 THE COURT: Overruled. The answer was "no."

12 Next question.

13 BY MS. McCARTY:

14 Q Mr. Mitchell also testified that because the
15 systems were not intact he had no ability to be able to
16 rule out an electrical problem. Do you agree with that
17 conclusion?

18 A Ask it one more time, please.

19 Q Sure. Mr. Mitchell testified that because the
20 original components were not available to him when he
21 went out to view the truck two years after the
22 accident, that because these components were not
23 available to him, he could not definitively rule out an
24 electrical issue on the day of the accident. Do you

1 agree with him?

2 A No, I don't.

3 Q And why not?

4 A Well, mostly for the reasons that we've already
5 discussed. Certainly -- I mean, it's become pretty
6 apparent to me today that Mr. Mitchell didn't
7 understand the function of the double-pole switch.
8 Judging by his testimony, he believes that there was a
9 ground path for the return current to get back to the
10 battery. That doesn't exist unless the master switch
11 is in the on position. I think he simply either didn't
12 understand how a double-pole switch works or missed the
13 fact that the double-pole switch was there.

14 Q Additionally, you had the opportunity to look
15 at Mr. Palmer's truck; correct?

16 A Yes.

17 Q And Mr. Palmer's truck also opened on
18 July 7th of 2014, on the same day, at the same time and
19 roughly the same location. When you inspected
20 Mr. Palmer's truck were you able to isolate a cause for
21 the Versa valve to activate in his vehicle?

22 A No.

23 MS. McCARTY: I have no further questions.

24 THE COURT: Cross-examination, Mr. Aicklen.

1 MR. AICKLEN: Thank you, sir.

2 CROSS-EXAMINATION

3 BY MR. AICKLEN:

4 Q Mr. Bosch, are you telling the Court that you
5 can do just as good a forensic investigation without
6 the original components of an electrical system?

7 A In this particular case, yes. It's unusual,
8 but in this case, absolutely.

9 Q So you wouldn't want to have looked at the
10 original four cord to see if it was abraded?

11 A It was pretty clear to me that whether the
12 four --

13 Q Yes or no, sir. You would not have wanted --

14 THE COURT: Stop. Stop, Mr. Aicklen. You can let
15 him finish the answer, you can ask me to strike the
16 answer, you can ask me to direct the witness to respond
17 in a different fashion, but please don't interrupt a
18 witness and just start talking over the top of the
19 witness. It makes it impossible for me to accurately
20 judge the witness's credibility and it also makes it
21 difficult for my court reporter to take down what
22 you're both saying at the exact same time.

23 MR. AICKLEN: Yes, sir.

24 THE COURT: So why don't you start again. Go ahead

1 with your question.

2 BY MR. AICKLEN:

3 Q You would not have wanted to look at the
4 original of all the connectors in this case?

5 A In this case it was irrelevant given the
6 configuration of the wiring that had been created by
7 Pat Bigby.

8 Q You said that -- or counsel said that, quote,
9 the only way, close quote, that there could be a
10 circuit. That's not true, is it? Things go wrong all
11 the time in mechanical components and electrical
12 systems and all those things; correct?

13 A As I indicated, I'm talking probabilities. In
14 this case, nearly zero.

15 Q True or false, sir. The reason that you
16 reconstruct accidents is because mechanical and
17 electrical systems go wrong all the time?

18 A That's one of the reasons, yes.

19 Q Okay. And when you're investigating would you
20 rather look at components that were replaced after an
21 event or the original event components?

22 A It depends.

23 Q So you're saying that you can be just as
24 accurate looking at exemplar components in this case as

1 you could if you looked at the original components that
2 were there on July 7, 2014?

3 A Yes. As I indicated, this is an unusual case.
4 This isn't typical. I have not had another case where
5 I could rule out the subject hardware as clearly as I
6 could in this case.

7 Q Did you not hear Mr. Bigby just say, sir, that
8 he saw the four- and seven-conductor cables get cut on
9 deck plates?

10 A Yes.

11 Q And get abraded?

12 A Yes.

13 Q And cracked?

14 A Yes.

15 Q But you said earlier, oh, that can't happen
16 because of the neoprene and all those things. That's
17 not true, is it?

18 MS. McCARTY: Objection. Facts not in evidence.

19 THE WITNESS: What I was --

20 THE COURT: Hold on.

21 THE WITNESS: I'm sorry. Sorry, Judge.

22 THE COURT: There's an objection.

23 Mr. Aicklen, the objection is you're asking the
24 witness to assume facts not in evidence.

1 MR. AICKLEN: No, I'm just reciting his testimony
2 back to him, Your Honor. He said that this -- he found
3 it zero -- or zero -- almost zero probability that
4 these cords could abrade or cut or crack. I just asked
5 him, "Didn't you hear the witness who worked on these
6 things just testify to that fact?"

7 MS. McCARTY: That misstates his testimony.

8 THE COURT: It misstates whose testimony?

9 MS. McCARTY: Mr. Bosch's testimony -- Dr. Bosch's
10 testimony.

11 THE COURT: Well, the question wasn't involving
12 Dr. Bosch's testimony. The question was involving
13 Mr. Bigby's testimony. So the question was about what
14 Mr. Bigby testified to, that Dr. Bosch heard Mr. Bigby
15 testify that in the past Mr. Bigby has seen cracked,
16 abraded and damaged seven-prong and four-prong cords on
17 the decking. That was the testimony that Mr. Bigby
18 proffered. That was my understanding of his testimony.

19 Is that what you were asking, Mr. Aicklen?

20 MR. AICKLEN: Yes.

21 MS. McCARTY: Your Honor, I understood the question
22 was did Dr. Bosch testify that it couldn't be possible
23 for cords to abrade. If I'm incorrect, then I stand
24 corrected. That's what I was objecting to.

1 THE COURT: Okay. That's not how I understood the
2 question. I understood the question as rephrasing
3 Mr. Bigby's testimony. And the Court would note that
4 Dr. Bosch was present during Mr. Bigby's testimony. So
5 I believe it's an accurate paraphrasing of what
6 Mr. Bigby testified to.

7 Now you can ask the question again. I'll overrule
8 the objection.

9 MR. AICKLEN: Thank you, Your Honor.

10 BY MR. AICKLEN:

11 Q Wouldn't you want to look at the original
12 four-pin cord to see if it had been cut such that there
13 could have been a short to ground or another way for
14 that wire to energize? Wouldn't you want to look at
15 the original?

16 A No. Again, it's irrelevant in this case
17 because there is nothing activated at that point unless
18 at least two switches are turned to the on position.

19 Q What if Mr. Koski negligently dumped that load?
20 What if that main power switch was on?

21 A There is no evidence of that, but if it were
22 on, it sheds a different light on things, of course.

23 Q So then the main power switch is on and the
24 cord is abraded, it goes to ground, trigger; right?

1 A No.

2 Q Okay. All right. So it's your testimony that
3 in this investigation the fact that MDB threw away the
4 connectors, the sockets, the cables, all those things
5 have no effect on the outcome of your forensic
6 investigation? Is that it?

7 A Correct.

8 Q Did you, sir, ever find anything wrong with the
9 subject Versa valve?

10 A No.

11 Q Now, none of the things that you have discussed
12 today change the fact that MDB threw away all this
13 evidence; correct?

14 A Ask again, please.

15 Q None of the things that you have discussed
16 today change the fact that MDB did, in fact, throw away
17 all of this original evidence; correct?

18 A Correct.

19 MR. AICKLEN: I don't have any further questions.

20 THE COURT: Redirect based on the
21 cross-examination, Ms. McCarty.

22 MS. McCARTY: Your Honor, I have nothing further.
23 Thank you.

24 THE COURT: Thank you, Dr. Bosch. You can step

1 down.

2 THE WITNESS: Thank you, Judge.

3 THE COURT: MDB had indicated that it may be
4 calling an additional witness. Do you have another
5 witness to call?

6 MS. McCARTY: I do. Just briefly, Your Honor, if
7 we could call Mr. Anderson to the stand, please.

8 MR. AICKLEN: Your Honor, I would object.
9 Cumulative. We just had a witness, their expert,
10 testify on electrical issues. This man is an
11 electrical engineer.

12 THE COURT: I don't know what he's going to testify
13 to yet, so I don't know if it's cumulative or not. You
14 can make a contemporaneous objection if he's offering
15 the same testimony as Mr. Bosch. But as I sit here, I
16 don't know what he's going to say, so I'll hear the
17 testimony of Mr. Anderson -- or Dr. Anderson -- excuse
18 me -- and you can object as need be.

19 MR. AICKLEN: I think it's mister.

20 THE COURT: You're a mister, not a doctor?

21 MR. ANDERSON: Just a mister, yes, sir.

22 THE COURT: Well, I'm just a mister myself.

23 So go ahead.

24 (The oath was administered.)

1 THE WITNESS: Yes.

2 THE CLERK: Okay. Just have a seat.

3 THE COURT: Can you please state your full name and
4 spell it for me.

5 THE WITNESS: Erik Selmer Anderson, E-r-i-k,
6 S-e-l-m-e-r, A-n-d-e-r-s-o-n.

7 THE COURT: Mr. Anderson, you don't need to lean
8 into that microphone. You can just make yourself
9 comfortable.

10 THE WITNESS: Thank you.

11 THE COURT: Go ahead.

12 ERIK SELMER ANDERSON,
13 having been first duly sworn, was examined
14 and testified as follows:

15 DIRECT EXAMINATION

16 BY MS. McCARTY:

17 Q Mr. Anderson, how are you employed?

18 A I'm employed by Anderson Engineering. I am a
19 forensic engineer. I try to determine cause failure
20 analysis of accidents, failures, typically that deal
21 with a monetary loss or a loss of life or personal
22 injury.

23 Q And where did you study to become an engineer?

24 A I started at the University of Minnesota in
Minneapolis in chemical engineering and then

1 transferred to North Dakota State University in Fargo,
2 North Dakota. And I graduated from there with an
3 electrical and electronic engineering degree.

4 Q So you have a master's in electrical
5 engineering?

6 A I do not, no.

7 Q You have a bachelor's in electrical
8 engineering?

9 A Yes, ma'am, I do.

10 Q Thank you.

11 You've had the opportunity to hear the testimony
12 here today, including that of Dr. Bosch. It is
13 Dr. Bosch's testimony that because of the
14 modifications --

15 MR. AICKLEN: Objection. Counsel is testifying.

16 THE COURT: I haven't even heard the question yet,
17 Mr. Aicklen. Again, I understand the need to make a
18 contemporaneous objection, but the jury is not here,
19 and so it's not like if the jury hears what the
20 question is they'll be somehow prejudiced by what the
21 question is. I can hear the question and then
22 disregard it if I need to. So please just let her
23 finish the answer -- or, excuse me -- finish the
24 question.

1 And, Mr. Anderson, just wait a moment, because I
2 anticipate an objection coming.

3 So go ahead with the question, Ms. McCarty.

4 MS. McCARTY: Thank you, Your Honor.

5 BY MS. McCARTY:

6 Q Dr. Bosch has testified that there were
7 modifications made to Mr. Koski's truck and trailer in
8 2013, July of 2013. Do you understand that to be
9 correct?

10 THE COURT: No objection. Go ahead.

11 THE WITNESS: Yes, Your Honor, I do understand
12 that.

13 BY MS. McCARTY:

14 Q And Dr. Bosch has testified that because of
15 those modifications which are unique to Mr. Koski's
16 truck that there was no way for a seven-pin prong and a
17 four-pin prong -- for the seven-pin -- not prong -- I'm
18 sorry -- cord -- for the cord of one to activate or
19 energize the cord of the other such that it could open
20 any of the Versa valves. Is that your understanding of
21 the testimony today?

22 A Yes, that is my understanding.

23 Q And do you agree with Dr. Bosch?

24 MR. AICKLEN: Object. Cumulative.

1 THE COURT: Is he going to offer something
2 different or just -- is he taking the stand just to say
3 that Dr. Bosch is right?

4 MS. McCARTY: Your Honor, he is an electrical
5 engineer. So to the extent that there was any concern
6 about the level of qualifications of Dr. Bosch, I
7 wanted Mr. Anderson to also have an opportunity to
8 confirm his opinions.

9 THE COURT: Mr. Anderson can offer his own
10 opinions. He can testify possibly to what has taken
11 place, but he's not going to just bolster Dr. Bosch's
12 testimony by just saying, "Yes, Dr. Bosch is right."

13 So I'll sustain the objection. If you'd like to
14 ask a different question that Mr. Anderson can proffer
15 some different evidence or some new evidence that's not
16 needlessly cumulative under NRS 48.035, I would be
17 happy to hear it.

18 BY MS. McCARTY:

19 Q You have had the opportunity to examine
20 Mr. Koski's truck and trailers?

21 A Yes, ma'am, I have.

22 Q And during your examination were you ever able
23 to determine an electrical cause for the event on
24 July 7th of 2014?

1 A I was not, no.

2 MS. McCARTY: That's all I have, Your Honor.

3 THE COURT: Cross-examination, Mr. Aicklen.

4 CROSS-EXAMINATION

5 BY MR. AICKLEN:

6 Q When you examined Mr. Koski's truck did it have
7 the same electrical components on it that it had on
8 July 7, 2014?

9 A I believe that there were some components that
10 had been replaced.

11 MR. AICKLEN: I don't have any further questions,
12 Your Honor.

13 THE COURT: Redirect based on the cross.

14 MS. McCARTY: That's all I have, Your Honor.

15 THE COURT: Mr. Anderson, thank you for your
16 testimony. You may step down.

17 Does MDB have any additional witnesses that it
18 would like to call?

19 MS. McCARTY: We do not, Your Honor.

20 THE COURT: Okay. Counsel, why don't we go right
21 into argument regarding the motion.

22 Mr. Aicklen, it is your motion. You may begin.

23 MR. AICKLEN: Thank you, sir.

24 Your Honor, what's important here is kind of

1 two-fold if you look at Young versus Ribeiro. The
2 first areas of inquiry, a lot of them appear to be
3 public policy-type issues. And then many of the areas
4 of inquiry are personal to the litigants that are
5 involved in the litigation. And I think that the facts
6 of this case support striking this crossclaim on both
7 sets of grounds, public policy grounds and also for the
8 damage that it's done to my client's ability to defend
9 this case.

10 I know that we have heard experts say -- or MDB's
11 experts say, "Well, no, I don't need to look at the
12 original parts in order to determine that they didn't
13 cause the failure." And that just amazes me. It
14 amazes me that a forensic expert is going to get on the
15 stand and say, "No, it's okay to swap out and throw
16 away evidence and I don't need that evidence."

17 THE COURT: Mr. Aicklen, I understand that this is
18 argument, but that's not what Dr. Bosch said. He
19 didn't say that it was okay to swap out and disregard
20 evidence. He just didn't testify to that. And I
21 appreciate that argument does lend itself to a certain
22 level of hyperbole, but he didn't even intimate that.
23 He just said he didn't think he needed it under these
24 unique circumstances. That was his testimony. Like it

1 was only a minute or two ago. To paraphrase,
2 "Basically this is one of those rare cases where I
3 don't think I need it." That was his testimony.

4 MR. AICKLEN: But I asked follow-up questions to
5 him, Your Honor.

6 "You would not have wanted to look at the original
7 cords to see if they were abraded?"

8 And his response was "No."

9 And I asked him -- I said, "Well, you would not
10 have wanted to look at the original components to see
11 if there was a failure in them that had caused that
12 trigger?"

13 And he said, "No."

14 And I contend that this is intellectually -- well,
15 my opinion doesn't matter, does it?

16 Young versus Ribeiro, Your Honor, the first of the
17 factors that we have to look at is the degree of
18 willfulness of the offending party. Now, this word
19 "willfulness," I don't think that means scienter when
20 you read the case law. You don't have to have
21 Mr. Young changing dates in his address book in order
22 for the actions to be willful. It's talking about what
23 happens to the evidence. Is it lost negligently or is
24 it lost purposely? Is it thrown away?

1 And, in fact, I don't think that willful requires
2 like a bad intent. I don't think Mr. Palmer nor
3 Mr. Bigby intended to harm my client's case when they
4 threw away those parts they pulled off the system, but
5 I don't think that the law requires that they intend to
6 harm the case.

7 I think what it looks like -- what the law looks at
8 is did you throw away the evidence on purpose or did
9 you negligently lose the evidence. And the evidence in
10 this case clearly is they threw away the evidence on
11 purpose. They may not have understood that it was
12 evidence. They both testified that nobody told them,
13 "Hey, you should hold on to that." But they work for
14 MDB, and MDB is the party in this case.

15 MDB should have -- the law says that when you -- a
16 reasonable person should know that there's going to be
17 litigation that arises from an event that you have a
18 duty to save that evidence. If we do anything other
19 than strike the complaint -- what it says is that an
20 employer cannot tell its employees to hold evidence and
21 then later on say, "Oh, well, we didn't realize that
22 they had thrown it away. They didn't do it on
23 purpose."

24 You strike this answer -- or you strike this

1 crossclaim and you're telling companies, "Hey, you've
2 got to get to your employees and you've got to tell
3 them before you go altering evidence or purposefully
4 throwing away evidence, you've got to hold on to it."
5 Because there's no question that through no fault of my
6 client they do not have those connectors, those cables,
7 those sockets. It was done by MDB's employees.

8 I don't think it was done to hide evidence, but
9 they willfully destroyed it. They both said it ended
10 up in the landfill. So I think that the degree of
11 willfulness of the offending party is they did it on
12 purpose. And I know it's an adage, but ignorance is no
13 excuse. Right?

14 I heard you asking the questions. "Well, didn't
15 you know you should have to do that?"

16 "It never entered my mind."

17 Well, that doesn't buy them a pass from throwing
18 away the evidence that I need to defend my case. And I
19 don't even think it was those two individuals. It was
20 a failure on the part of their company, MDB, to
21 instruct them to have a policy. But I am telling you
22 that if you strike this crossclaim, you can bet the
23 next time something happens MDB is going to retain the
24 evidence of it.

1 So that discusses willfulness.

2 The extent to which the non-offending party would
3 be prejudiced by a lesser sanction. I know we heard
4 Mr. -- or Dr. Bosch get on the stand and say, "Oh, no,
5 I don't think it was that the cord was abraded or cut
6 or anything," even though right a few minutes before
7 that Mr. Bigby said, "Oh, I probably replaced it
8 because it was cut, abraded or had cracked and was
9 exposed."

10 Well, they threw it away, so I can't give it to
11 Mr. Mitchell and he can't compare the two pieces and
12 say, "Here it is. Here it is. This is what caused
13 it," because they threw it away. We could -- they --
14 MDB sits here and their representatives sit here and
15 say, "It was no problem, because clearly that's not
16 what -- it can't possible happen because of this master
17 switch," and all those things.

18 Well, that's great, but the evidence that I need to
19 prove what caused it, they've thrown it away. So do we
20 not -- are we going to allow them -- and basically it's
21 going to reward them if you don't strike their
22 crossclaim. It's going to reward them for throwing
23 away that evidence, because their experts can get on
24 the stand and say, "No, we don't have it, but I don't

1 need to look at it, and I know because it wasn't worn
2 through and it wasn't abraded and it wasn't cracked,"
3 even though Bigby admitted before that and said,
4 "That's probably why I threw it away."

5 But I don't have it. I can't show it to the jury.
6 I can't defend my case against them. And this is
7 crucial. And why is it crucial? Because all of their
8 experts who inspected that Versa valve say, "We can't
9 find anything wrong with it." But things don't happen
10 magically, Judge, which means that the cause of it had
11 to have been in one of these components that was thrown
12 away.

13 So what is the prejudice to me? I can't defend my
14 case. I can't show the jury what it was that actually
15 caused that belly dump to trigger.

16 THE COURT: But what about the -- I know you'll
17 eventually get there, Mr. Aicklen, but in response to
18 what you're arguing right now -- you say, "I can't
19 defend my case and that's the prejudice to me." As we
20 know, under Young versus Ribeiro the Nevada Supreme
21 Court says that courts, district courts, should
22 consider lesser sanctions or alternative sanctions in
23 lieu of case-concluding sanctions.

24 So I know you addressed in your motion the fact

1 that an adverse inference instruction could be given or
2 the Court alternatively could -- let's say for the sake
3 of argument I could say that Dr. Bosch isn't testifying
4 either. I mean, there are all kinds of other things
5 that --

6 MR. AICKLEN: Well, if they don't have an expert on
7 a products case, I think -- this isn't like the -- I'm
8 trying to think -- was it the Nissan case?

9 MR. BICK: Stackwoods.

10 MR. AICKLEN: Stackwoods. Yeah, this isn't like
11 Stackwoods. I don't think you're going to be able to
12 have a jury be the average consumer who can understand
13 a product failure on an electrical mechanical valve.

14 So if you struck their two experts, this case isn't
15 even going to go. I'm going to move for a directed
16 verdict because they can't meet the burden of proof on
17 a products liability. So that's the same result as
18 striking the crossclaim right there.

19 THE COURT: What about the adverse inference
20 instruction?

21 MR. AICKLEN: What would you tell them, Judge? If
22 you would tell them, "You must presume that if the
23 evidence had been held it would prove Aicklen's
24 defense" --

1 THE COURT: Yep.

2 MR. AICKLEN: Well, then doesn't that kind of just
3 make a charade of the trial? Shouldn't we actually
4 say -- you know, in this circumstance, rather than
5 going through that and then getting to the end of the
6 case and at the jury instruction saying, "Well, ladies
7 and gentlemen, there was willful spoliation of evidence
8 by these plaintiffs and so now I'm going to give you an
9 instruction about the loss of that evidence. You must
10 presume that if Aicklen had that evidence he would be
11 able to prove his defense to you," if it's that strong,
12 Judge, why not just strike the crossclaim right now?

13 THE COURT: Go ahead.

14 MR. AICKLEN: Does that answer your question?

15 THE COURT: It does. And I know I kind of jumped
16 into the middle of your Young versus Ribeiro analysis,
17 but the point you were trying to make is how are you
18 going to prove your case or what are you going to do.
19 So go ahead.

20 MR. AICKLEN: Okay. Thank you, sir.

21 One of the -- the next factor is whether any
22 evidence has been irreparably lost. We know that's the
23 case. It's gone. It's in the landfill per Mr. Bigby
24 and Mr. Palmer.

1 All right. So this is the one I think you just
2 asked me about, the feasibility and fairness of
3 alternative less severe sanctions such as an order
4 deeming facts relating to improperly held or destroyed
5 evidence to be admitted by the offending party. You
6 know what, Judge? I've already got that. I attached
7 it to my motion.

8 Where did I put those?

9 THE COURT: The deposition testimony or the
10 interrogatory questions?

11 MR. AICKLEN: No. Oh, here it is. No. I've
12 already got -- they admitted it. I asked them -- and I
13 attached it at page 10 of the moving -- there's a
14 question in the admission.

15 So the one about, you know, such as an order
16 deeming facts related to improperly withheld or
17 destroyed evidence to be admitted, I asked them, admit
18 the Peterbilt truck that allegedly spilled gravel on
19 the roadway in this case is not in the same exact
20 condition as it was on the date of the subject
21 incident. Admitted.

22 And, you know, it's not just throwing away that
23 evidence. They kept using it for two and a half years.
24 I mean, this is really an egregious case. This is a

1 rank case.

2 THE COURT: You and I discussed last time,
3 Mr. Aicklen -- by "last time" I mean the last time we
4 were here for oral argument on the motion as opposed to
5 the evidentiary hearing -- the fact that even you
6 didn't suggest that MDB should take the entire truck
7 and the three trailers and put them in a shed somewhere
8 during the pendency of the case. That would be
9 unreasonable.

10 MR. AICKLEN: Absolutely. And, in fact, I
11 mentioned that on -- with one of the witnesses, with
12 Mr. Palmer, this morning, I think, on cross. You
13 didn't have to pull that truck and put it into a
14 trailer, but every time you took something off you
15 could have held on to it, or if it truly was your
16 belief and Dr. Bosch and Mr. Anderson's belief that
17 there was nothing wrong in that circuit, then take that
18 whole system out, replace it.

19 It's cords and cables and sockets. It would take a
20 couple days. Take it all out, put a new one in and
21 then go drive your truck for 185,000 more miles and
22 operate my valve for 2,000 more times. Right? Do you
23 see what I mean?

24 I mean, this isn't, "Oh, well, I had the umbrella

1 that struck plaintiff in the face and I put it in my
2 garage and now I don't know where it is," which is your
3 normal negligence spoliation case. This is components,
4 multiple components, in the circuits after the lawsuit
5 is filed, after the lawsuit is served, purposefully
6 thrown away.

7 I don't need admissions, Your Honor. I've got
8 them.

9 Admit the Ranko semitrailer that allegedly spilled
10 gravel on the roadway continues to be used since the
11 accident. Admitted.

12 Admit it continues to haul trailers. Admitted.

13 Admit you continue to use and operate the Versa
14 valve. Admitted.

15 I've got the admissions. I don't need that in that
16 part of the Ribeiro analysis.

17 The policy favoring adjudication on the merits. I
18 know there's a strong policy of favoring adjudication
19 on the merits. There's also a strong due process --

20 THE COURT: I'm listening. If you think I'm
21 looking at something on my computer, I'm paying
22 attention.

23 MR. AICKLEN: That's okay.

24 THE COURT: I drive my wife crazy because I do

1 that. Just so you know, I am paying attention.

2 MR. AICKLEN: I just drive my wife crazy.

3 Did you want to see -- were you looking at page 10
4 of that motion?

5 THE COURT: No, I wasn't. I was actually pulling
6 something up on my computer, because I know that
7 there's actually a definition of willfulness in
8 criminal jurisprudence. I believe it's been applied in
9 civil cases as well. It's in Childers,
10 C-h-i-l-d-e-r-s, versus State, which is 100 Nevada 280,
11 680 P.2d 598.

12 At page 283 of the Nevada Reporter the court says,
13 "The word willfully when applied to the intent with
14 which an act is done or omitted as used in my
15 instructions implies simply a purpose or willingness to
16 commit the act or to make the omission in question.
17 The word does not require in its meaning any intent to
18 violate the law, or to injure another, or to acquire
19 any advantage."

20 The Nevada Supreme Court said that was the
21 appropriate definition of willfulness in a criminal
22 context.

23 So as you were making the argument, it popped into
24 my head that I know that there's a definition

1 criminally. I'm not quite sure if Childers versus
2 State has ever been applied in a civil context, but
3 it's the same basic concept. Willfulness is not an
4 intent to harm Versa or any of the plaintiffs in this
5 case, it's simply an intent to do the act which you're
6 doing.

7 Go ahead.

8 MR. AICKLEN: And that's always been my
9 understanding of intentional acts as well, Your Honor.
10 I don't intend to harm -- to break somebody's nose.
11 What I do is I intend to throw the punch. That's the
12 way the law looked at it. So I agree with you. I
13 believe that is correct.

14 All right. So I don't need facts deemed admitted.
15 I've already got them.

16 Okay. So we're talking about the favored policy --
17 the policy favoring adjudication on the merits. I
18 understand that that is a strong policy and we always
19 want that unless a party, who is a plaintiff, who has
20 the duty of proof and production, willfully destroys
21 evidence that prejudices my ability to defend the case.
22 And then that implicates my client's due process
23 rights.

24 And, again, I need to stress, this isn't, "I had

1 the chair that you tripped over and I put it in the
2 back of my restaurant and now two years later when my
3 depo comes I can't find it." This isn't that. Okay.
4 This is a corporation that runs a lot of trucks on the
5 road that knew they were going to be in a lawsuit. You
6 heard Mr. Palmer say, "I knew there were a lot of
7 accidents and I knew a lot of people were injured that
8 day."

9 Now, the standard to preserve evidence is if they
10 knew or should have known. If you don't -- if you
11 don't strike their answer, we're overlooking that -- or
12 strike their crossclaim. I'm so used to being on the
13 other side.

14 Anyway, if you don't strike their crossclaim, then
15 what happens to should have known? The fact that these
16 particular individuals -- I don't think Palmer nor
17 Mr. Bigby had a mean bone in their body about this,
18 but, in fact, what MDB did willfully would deprive my
19 client of due process, its ability to defend itself in
20 a very significant claim.

21 So adjudication on the merits, strong policy. My
22 client's due process rights, I would submit to you,
23 Your Honor, that MDB by their actions have negated the
24 policy of adjudicating cases on the merits.

1 This isn't "I lost something accidentally." This is
2 "I threw away multiple things over the course of years
3 and continued using the evidence for years and even
4 threw away stuff after the first lawsuit had been filed
5 and been served."

6 That's different. That is egregious. That is
7 rank.

8 Whether sanctions unfairly operate to penalize a
9 party for the misconduct of his or her attorney. I'm
10 not blaming the attorneys. You asked Mr. Palmer, "Did
11 the attorneys ever tell you to preserve this stuff?"
12 which is not a question I could ask, but it was helpful
13 for me, because -- guess what? -- it wasn't the lawyers
14 that did it. It was the party themselves.

15 So you're not going to be punishing the party for
16 the actions of a lawyer. This isn't "You gave the
17 evidence to the lawyer and he lost it and so now I'm
18 going to strike your crossclaim."

19 THE COURT: You know, it's funny, Mr. Aicklen, I
20 didn't think about the privileged nature of the
21 question that I asked. Sometimes when judges ask
22 questions attorneys are reluctant to object to a
23 judge's question.

24 MR. AICKLEN: Well, I didn't want to object to it.

1 I just --

2 THE COURT: Well, you already know what the answer
3 was, because you knew what the answer probably was, and
4 so you were more than happy to hear it would be my
5 guess. But I will put on the record that the Court
6 will not consider the response specifically to any
7 legal advice that was or was not -- or that was
8 provided to Mr. Palmer.

9 MR. AICKLEN: I think all you really have to look
10 at on that -- you don't even have to --

11 THE COURT: But clearly all I was looking for was
12 in essence not a lawyer but "Did anyone tell you not to
13 do this?" I doubt the lawyer would go speak
14 specifically to Mr. Palmer, the shop foreman, or the
15 mechanic on the truck itself and say, "Hey, watch out."

16 I was trying more to determine whether or not
17 anyone at MDB ever came to them and said preserve in
18 some way these processes by which this valve is
19 operating.

20 Go ahead.

21 MR. AICKLEN: Well, I think that the key point of
22 that, whether -- you know, the answer about the lawyer
23 doesn't really matter, as you said, but the key point
24 about it is that it was the actions of the party, not a

1 lawyer. And that is one of the elements. And that is
2 important, that you don't want to punish a party for a
3 lawyer's actions.

4 If they had given the evidence to the lawyer and
5 then the lawyer loses it, that -- that's not what
6 happened here. We have the party themselves, the ones
7 who are trying to get millions of dollars back from my
8 client, who are the ones that threw away the evidence.
9 So you're not going to be punishing the wrong party if
10 you strike their crossclaim.

11 Lastly, the need to deter both the parties and
12 future litigants from similar abuses. Again, I would
13 say to you, this case -- of any cases, this case
14 demands that the crossclaim be stricken. This isn't "I
15 lost a single piece of evidence." This is "I threw
16 away multiple pieces of evidence over the course of
17 years even after the lawsuit was filed and even after I
18 was served."

19 If these aren't the facts to strike a crossclaim,
20 then what are they? This isn't -- this isn't
21 Bass-Davis negligence. This isn't "Oh, I had the notes
22 and I put them in my desk and then I gave the desk to
23 Goodwill and now I don't have the notes." That's
24 Bass-Davis-type negligence.

1 I've handled dozens of cases where the -- let's say
2 a statue falls. I'm thinking of one right off the top
3 of my head with Bob Edwin (phonetic). A statute
4 falls -- statue, not statute -- off a shelf and hits
5 the plaintiff on the back of the head and my client
6 takes it and ships it off to an investigator and it
7 gets lost on route. That's Bass-Davis negligence.
8 That's a jury instruction.

9 But what do you have here? You've got a month
10 after the incident they pull out one of the components
11 and throw it away. Five months after that they pull
12 out two of the components and throw them away. After
13 the case is filed they pull out the components and
14 throw them away. After the case is served. And the
15 whole time my valve that they say is defective, they're
16 still using it for hundreds of thousands of miles.

17 If this is not the case to strike the crossclaim,
18 which one is? This is not negligence. This is a
19 repeated pattern over and over over the course of
20 years. And I would say to you that it is justice to
21 strike this. These are the actions of MDB who now want
22 to come back and say, "Well, we're going to benefit
23 from our actions because Aicklen can't prove that it
24 was one of these components that caused that belly

1 dump."

2 And I'm done.

3 THE COURT: Thank you, Mr. Aicklen.

4 Mr. Wieczorek or Ms. McCarty. Ms. McCarty, it
5 looks like you're ready to stand.

6 MS. McCARTY: Yes, Your Honor. Thank you.

7 As you know, I was not here for the hearing that
8 brought us here, but I have had the opportunity to
9 study the transcript in great detail. And in doing so,
10 not only did it become pretty clear to me that the
11 record was very incomplete, which I believe we have now
12 remedied that situation, but also that the case law
13 that the Court is focusing on is respectfully not the
14 correct analysis.

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

1 Bass-Davis, as you know, the cite for that is 122
2 Nevada 442, 134 P.3d 103, 2006.

3 And it said in the Walmart case that while
4 case-ending sanctions may be permitted under Rule 37,
5 quote, "The district court's discretion is tempered by
6 the requirement that the imposition be just."

7 So what does Bass-Davis tell us? The threshold
8 question under Bass-Davis when there is an alleged
9 spoliation is whether or not the alleged spoliator had
10 a duty to preserve the evidence at issue.

11 How does that duty arise? That duty arises
12 pre-litigation, which is what we have here,
13 pre-litigation that there is a duty to preserve
14 evidence when the party reasonably should know or knew
15 that it was relevant to the action.

16 Our position is because of the unique circumstance
17 of the way that truck was wired following the two Versa
18 valve failures in 2013, these parts were not in any way
19 connected to why that Versa valve failed. They simply
20 could not be.

21 It is not -- this is a not dog and pony show. This
22 is how the truck was wired. There was no way for a
23 current to slip on by. It just didn't work that way.
24 So if that's the case --

1 THE COURT: Well, actually that's not true, though.
2 Based on Dr. Bosch's testimony, there is a way. I
3 appreciate the fact that he wants to narrow the focus
4 and say it's highly unlikely that it took place, but
5 Dr. Bosch himself acknowledged that if the master
6 switch was on, then the circumstances described by
7 Mr. Mitchell could cause the dump in question.

8 So we can't say that it's impossible. He did say
9 it's highly unlikely. He was talking about
10 probabilities. The probability is very, very low. His
11 testimony is what it is. But it's not impossible that
12 it occurred.

13 MS. McCARTY: Respectfully, Your Honor -- and I
14 would agree with you to the extent that the only way it
15 would be possible is if both the master switch and the
16 trailer switch were activated. And, if you recall,
17 each of those switches has a plastic cover on it. It's
18 not a circumstance where Mr. Koski is driving down the
19 road with his cup of coffee and drops the cup and,
20 oops, hits a switch.

21 These are four actual maneuvers that have to occur.
22 You have to lift the cover on the master switch. You
23 have to lift the master switch. You then have to lift
24 the cover on the trailer switch and you have to lift

1 the trailer switch. So the only way that could occur
2 is if Mr. Koski intentionally did those things. And
3 there is zero evidence that that is what is indeed the
4 case here.

5 What we have here and what you've heard the
6 testimony of is minor routine maintenance. This is a
7 trucking company trying to keep its fleet on the road
8 and trying to do so safely.

9 THE COURT: I appreciate that. And that's why as
10 you saw in the previous oral argument and as I've
11 emphasized with Mr. Aicklen, nobody is suggesting that
12 MDB had an obligation to take this entire rig and put
13 it in a garage somewhere until the end of the
14 litigation. However, that also doesn't mean that they
15 have no obligation whatsoever.

16 And as I've thought about the case, having reviewed
17 the motion practice before and then reviewing it again
18 in anticipation of today's hearing, it's so simple what
19 could have taken place. All MDB needed to do was send
20 a letter to everyone saying, "We're doing this. If you
21 have any objection, you've got ten days to file an
22 objection." I can't remember off the top of my head if
23 that occurred. But what you can also do is just simply
24 photograph the evidence. Document it in some way. Do

1 something with it.

2 I had a spoliation case last year where the issue
3 was -- and I can't remember if I told you about this
4 during our last hearing, but the issue was just these
5 hoist ropes on an elevator and what the conditions of
6 the hoist ropes were. The elevator company came in,
7 took out the hoist ropes, got rid of them, threw them
8 away, but at least they had been photographed. There
9 was some documentation of them.

10 We don't have that here as I understand it. It's
11 just, as you say, Mr. Bigby and Mr. Peterson go in and
12 they're just doing their jobs and they're replacing
13 these things as they see is appropriate. They document
14 it with the work orders. But nobody told them, "Hey,
15 if you do anything with this truck that was involved in
16 this" --

17 And I said "Mr. Peterson." It was Mr. Palmer. I
18 apologize.

19 -- "that was involved in this massive pileup on the
20 interstate, document it in some way. Preserve those
21 things. Throw them in a box somewhere."

22 I don't know what -- you know, there's just so many
23 other obvious things that could have happened, and none
24 of them did.

1 MS. McCARTY: And I wish we --

2 THE COURT: And we're left to guess. That's the
3 problem with the whole thing, Ms. McCarty. And I
4 appreciate the difficulty it places you and
5 Mr. Wieczorek in. And just so you know, you might have
6 the stronger argument at trial. Your expert might be
7 better than their expert. But that's not really what
8 we're deciding today. This isn't the trial. It's
9 whether or not the evidence is gone such that that
10 trial wouldn't be even an effective pursuit of justice.

11 As I reviewed one of the cases that we all know
12 about in this issue -- and it's -- I always forget the
13 first name -- Fire Insurance Exchange versus Zenith
14 Radio Corporation, 103 Nevada 648, 747 P.2d 911, a 1987
15 case, the court at page 651 says, "Generally sanctions
16 may only be imposed where there has been a willful
17 noncompliance with the court's order" -- that's not the
18 case here -- "or where the adversarial process has been
19 halted by the actions of the unresponsive party."

20 That's what Mr. Aicklen is arguing is that the
21 adversarial process is impacted. I'm not looking at
22 this point at who's got the better expert, who might
23 win at trial assuming everything comes in as you all
24 expect it to. It's the adversarial process that is

1 thwarted by this evidence that even Mr. Bigby suggested
2 maybe it happened. You know, Mr. Bigby suggested --

3 You have a concerned look on your face.

4 MS. McCARTY: I'm not sure what you're referring
5 to.

6 THE COURT: Mr. Bigby testified that he had seen
7 facts consistent with what Mr. Mitchell talked about
8 previously regarding the trucks, that is, the abrading,
9 the cracking, the rubbing. So when that testimony came
10 in from your witness, it put a different spin on the
11 case. He didn't come in and say, "That's never
12 happened. I've never seen that before. It's
13 impossible. We always have them up off the deck that
14 you see in those pictures."

15 He actually came in and said, "Yeah, I've seen that
16 before."

17 MS. McCARTY: Your Honor, I think Mr. Bigby's
18 testimony was that he hadn't seen a situation where the
19 seven-pin and the four-pin had abraded to the point
20 where the two wires energized. So I would respectfully
21 disagree with --

22 THE COURT: That's true. He never said that. But
23 he did acknowledge on questions, frankly, by
24 Mr. Wiczorek that the circumstances, that being the

1 abrading, the degradation of the casing, the rubbing,
2 it has happened, and he has replaced these seven-pin
3 and the four-pin cords in the past because that exact
4 thing has happened.

5 Now, I appreciate what you're saying. Your
6 argument is he didn't say that he's ever seen it such
7 that then they -- you know, they basically break in the
8 same spot, touch each other, cause the activation.
9 You're right. He didn't say any of that. But it's one
10 more thing that Mr. Aicklen is arguing that "Look, even
11 Mr. Bigby said this has happened in the past," "this"
12 being the degradation in some fashion of the casing on
13 the seven-pin and the four-pin wires.

14 MS. McCARTY: And, I guess, Your Honor, I would
15 have to take you back to even if in the circumstance
16 here all of those wires were bare and they were all
17 touching each other and there were sparks flying,
18 unless the master switch and the trailer switch were
19 engaged, nothing happens. There is no path.

20 That's the point. These parts, whether or not they
21 are the original or not, have nothing to do with
22 anything. They cannot cause the activation.

23 I have read lots of briefs making light of the EMF
24 theory. This is why we had to look outside of the

1 truck. There is no possible way for that to occur.
2 So, yes, if they abraded -- of course they abrade at
3 times. But even if they did, even if these wires have
4 no insulation, you cannot activate the valve. That is
5 the focus of this lawsuit. What caused that valve to
6 activate? And these parts are not relevant to that
7 question. And under Bass v. Davis, if they are not
8 relevant, no sanctions.

9 What else does Bass v. Davis tell us? Bass v.
10 Davis tells us that with respect to willfulness -- what
11 does willfulness mean? Well, Bass v. Davis tells us
12 what willfulness means. And it says the court limited
13 the -- "that the party intentionally or willfully
14 destroyed the evidence in an effort to harm the other
15 party's case." That's at 448. "The effort to harm the
16 other party's case."

17 There is no evidence here that Mr. Bigby and
18 Mr. Palmer were doing anything other than their jobs.
19 They have trucks to keep on the road. They do a very
20 good job of maintaining them. It did not occur to them
21 that they should be doing something else because there
22 is a case, there is a lawsuit.

23 THE COURT: But doesn't that just encourage
24 behavior that allows a corporation not to look down the

1 line at its employees and tell them to do anything? It
2 allows them to disregard the fact that there may be a
3 lawsuit or disregard their responsibilities to preserve
4 evidence in support of that lawsuit that is discussed
5 also in the Fire Insurance Company case where the court
6 addresses that issue. And it talks about --

7 I'm just trying to look where it was.

8 MS. McCARTY: Sure.

9 THE COURT: Oh, it's at page 651 into 652. It
10 says, "Where a party is on notice of potential
11 litigation, the party is subject to sanctions or
12 actions taken which prejudice the opposing party's
13 discovery efforts. In each of these cases cited above,
14 the defendant was the party who impeded discovery."

15 So it doesn't mean that there has to be actual
16 litigation in place. It's the potential of litigation.
17 And no one is arguing in this case that there wasn't
18 the potential for litigation. Everybody knew. But
19 what you're saying, to paraphrase, Ms. McCarty, is
20 "Just don't do anything." You know, the boss doesn't
21 have to tell the worker to do anything because the
22 worker is just going to keep doing the work like the
23 two guys did in this case. They just kept doing a
24 great job, doing their jobs, plugging along, keeping

1 the trucks on the road. And so we should just ignore
2 the fact that they should have maybe done something,
3 they should have been told something by management or
4 their boss about what to do with the evidence in this
5 case.

6 MS. McCARTY: Your Honor, under different
7 circumstances I would agree with you, but Bass v. Davis
8 tells us that in pre-litigation posture the question is
9 whether or not the alleged spoliated evidence is
10 relevant to the action. Mr. Palmer and Mr. Bigby, even
11 if they had an inkling that they should have preserved
12 these things, which we know they did not, they also
13 knew that these parts were not relevant to what caused
14 the activation, because they are the ones who made the
15 modifications to the truck.

16 THE COURT: But they're not -- it's not relevance
17 in that sense. It's relevant in the 48.015 sense.
18 It's not relevant in what Mr. Bigby might think is
19 appropriate. With all due respect to Mr. Bigby, as a
20 mechanic he's not sitting there deciding what is and
21 isn't relevant in the litigation before us.

22 His job is -- his thought process is "Okay. Now
23 I've cut this cord out. Do I need it anymore? No.
24 Garbage." And that's what he did.

1 But it's not relevant in the sense that he's
2 looking at it and saying, "Is this going to become
3 important in the litigation that I know will result as
4 a consequence of the 20 plus accidents that occurred
5 when the truck dumped the gravel into the road?"

6 That's not the relevance he's looking at. He's
7 looking at "Do I need this anymore? No. Garbage."

8 MS. McCARTY: Correct. The relevance issue is
9 yours to determine, whether or not these parts have any
10 relevance to the cause of action. That's what Bass v.
11 Davis tells us. Bass v. Davis also tells us if they
12 are not relevant, sanctions are not warranted.

13 If you disagree and you believe that they are
14 relevant, the only possible option for a sanction in
15 this particular circumstance where there is zero
16 evidence of willfulness, malicious intent to interfere
17 with the other party's case, the only option you have
18 is a permissive adverse inference jury instruction.

19 THE COURT: What about striking your expert?

20 MS. McCARTY: That is not an option.

21 THE COURT: Why?

22 MS. McCARTY: Because Bass v. Davis says it isn't.

23 THE COURT: Where?

24 MS. McCARTY: Bass v. Davis says you have two

1 options.

2 THE COURT: Hold on a second. Let me pull up the
3 case, because I don't have it here on the bench. One
4 moment.

5 Give me the cite that you're looking at.

6 MS. McCARTY: 448.

7 THE COURT: Give me the full cite so I can pull it
8 up.

9 MS. McCARTY: I'm sorry. 122 Nevada 442 at 448.

10 THE COURT: Hold on.

11 MS. McCARTY: Also, Your Honor, while you're there,
12 I would point you to the Walmart case, which is the
13 Supreme Court of Nevada No. 48488, which I'm submitting
14 to you is an unpublished decision but it's persuasive.
15 And that would be on page 3. And it states --

16 THE COURT: What's the citation for that?

17 MS. McCARTY: 48488.

18 THE COURT: Is that a Westlaw citation?

19 MS. McCARTY: No, it's the Nevada Supreme Court
20 case number.

21 THE COURT: I need at least a Westlaw citation.

22 MS. McCARTY: I'm sorry, Your Honor. It is an
23 unpublished --

24 THE COURT: Stop. Stop, please. I apologize for

1 getting frustrated.

2 Now I have to tell you, Ms. McCarty, we don't talk
3 at the same time. So if I'm talking -- I know it's
4 weird, but if I'm talking you've got to stop talking so
5 my court reporter can have both of us on the record.

6 What year was the Walmart case published?

7 MS. McCARTY: 2008.

8 THE COURT: Then I will not consider it. The
9 Nevada Supreme Court in ADKT 0504 clearly stated that
10 parties can cite to unpublished dispositions of the
11 Nevada Supreme Court that are issued after January
12 1st of 2016. Many attorneys have failed to actually
13 read the ADKT and seem to think that it means that now
14 we just cite to any unpublished disposition of the
15 Nevada Supreme Court that has ever been issued. That's
16 not true.

17 When Justice Hardesty as the chief justice issued
18 that ADKT, it was very clear what it said. You can
19 cite to things after January 1st of 2016. I can tell
20 you, because I've discussed it with Justice Hardesty,
21 it makes sense that that's what they chose to do,
22 because they issued it in December or November of 2015,
23 if I remember correctly. And so the supreme court knew
24 going forward that their unpublished dispositions would

1 be citeable, and so maybe they write them in a
2 different fashion or they realize that they may be
3 cited and so they just do things a little bit
4 differently.

5 So I don't go back and read old opinions of the
6 Nevada Supreme Court prior to January 1st of 2016 if
7 they're unpublished dispositions, because I don't
8 believe that they are appropriate legal authority.

9 So that's my thought on the Walmart case unless
10 it's been cited in some recent disposition of the
11 Nevada Supreme Court. Then I would look at it. But --
12 and I would have to say parenthetically, Ms. McCarty, I
13 find it hard to believe that the Nevada Supreme Court
14 would issue such a far reaching and sweeping decision
15 as you're suggesting in the Walmart opinion in an
16 unpublished disposition.

17 If they intended to change the law, the whole
18 purpose -- or make a significant clarification in the
19 law, the whole purpose of publishing those dispositions
20 or publishing a disposition would be to put that out
21 there, but they're not. So if it's that old, nine
22 years old at this point, and they haven't chosen to do
23 it in some other fashion, I'm not quite sure if it even
24 has the relevance that you're suggesting.

1 I am on page 448 of the Bass-Davis disposition,
2 Bass-Davis versus Davis. What do you want me to look
3 at?

4 MS. McCARTY: When evidence is willfully
5 suppressed, the statute creates a rebuttable
6 presumption. When it is not willfully suppressed,
7 Bass-Davis instructs that what is appropriate is an
8 adverse inference instruction. Bass-Davis does not
9 provide for striking experts and ending cases for a
10 spoliation allegation.

11 THE COURT: Okay. Go ahead.

12 MS. McCARTY: Your Honor, so pursuant to Bass-Davis
13 it is our position that if you were to find that these
14 pieces and parts should have been preserved, the most
15 that you can do is to provide for a permissive adverse
16 inference jury instruction.

17 And, Your Honor, I would suggest to you that
18 supplemental briefing may be helpful here if you're at
19 all interested in that which is why I had attempted to
20 get the supplement to you when I did, although, albeit,
21 much too close to the hearing.

22 As you have heard today, we have a situation where
23 there were two uncommanded dumps in 2013 within a
24 couple of days of each other involving Versa valves --

1 a Versa valve. Following that dump in 2013 MDB took
2 three steps to ensure that it wouldn't happen again.
3 They replaced the Versa valve, they modified the wiring
4 system, and they installed the master switch. And that
5 was by design to eliminate the possibility of an
6 electrical malfunction.

7 One year later they have two uncommanded dumps on
8 the same day, same time, the same place, involving two
9 entirely different trucks and trailer sets. Because
10 they had already changed -- modified the wiring in
11 Mr. Koski's truck, and here we are again, at that point
12 they install the pin system on all of their trucks, the
13 entirety of their fleet.

14 Since that time -- that was July 7th of 2014. The
15 first lawsuit in this case wasn't filed until September
16 of 2015. The experts in this matter did not go to see
17 these vehicles until September, October of 2016. So by
18 Mr. Aicklen's argument, MDB is supposed to cease all
19 business operations for two years while everybody
20 figures out what they're doing? It doesn't make sense.

21 THE COURT: He hasn't suggested that, Ms. McCarty.
22 As I told Mr. Aicklen, I appreciate the fact that
23 argument is the time for a certain amount of rhetorical
24 flourish, but he didn't suggest that. That's just

1 inaccurate.

2 So go ahead.

3 Specifically he never said you have to store the
4 trucks. I asked him about that in his argument. He
5 said, "No, I'm not suggesting they should have done
6 that until we got around to checking it out."

7 MS. McCARTY: I think the testimony that I was
8 referring to was the concern that the trucks and
9 trailers continued to be used.

10 THE COURT: That's true. They certainly were.

11 MS. McCARTY: And despite what I read in the
12 transcript from the last hearing where there was lots
13 of discussion about the entire wiring system being
14 changed and everything being ripped out, what we know
15 from the evidence today is the repairs were very minor
16 and there were very few of them. What we have is a
17 socket that was replaced, a cord that was replaced and
18 a plug that was replaced.

19 THE COURT: Excuse me, Mr. Aicklen. I can hear you
20 and I can't hear her.

21 MR. AICKLEN: I apologize.

22 THE COURT: You don't need to talk out loud.

23 Go ahead, Ms. McCarty.

24 MS. McCARTY: My point is, Your Honor, this was not

1 some wholesale destruction of evidence. We're talking
2 about a couple of minor repairs over a two-year period
3 of time.

4 And I guess I'll wrap it up, Your Honor. It is our
5 position -- and I would encourage you to please study
6 Bass v. Davis -- that the Young versus Ribeiro factors
7 simply are not at play here. Young versus Ribeiro is a
8 discovery abuse case. We don't have discovery abuse
9 here. This is a spoliation case.

10 In spoliation there are two options. One -- well,
11 three options. If you believe that the evidence that
12 was spoliated was not relevant to the cause of action,
13 which is our position here, because none of these parts
14 can possibly be the cause of the uncommanded dump,
15 they're not relevant and there are no sanctions
16 warranted.

17 If you disagree and you believe that they are
18 relevant, at that point your options -- if you believe
19 that it was merely negligent, which is what the
20 testimony here certainly provides, then the only option
21 is an adverse inference jury instruction. If you
22 disagree and you find that it's willful, your option is
23 a rebuttable presumption.

24 Just to cover my bases, I'll run through Young very

1 quickly for you.

2 THE COURT: Okay.

3 MS. McCARTY: The degree of willfulness of the
4 offending party. There is no evidence of willfulness
5 here. These gentlemen were running a business, making
6 sure their trucks were safe so that no one else got
7 hurt. And they certainly didn't throw anything away
8 because they were aware of a lawsuit or because it
9 might influence the lawsuit.

10 To the extent the non-offending party would be
11 prejudiced by a lesser sanction. As Dr. Bosch has
12 testified, there is no prejudice here, because those
13 parts could not be the explanation for why the valve
14 opened. There is no prejudice.

15 The severity of the sanction of dismissal relative
16 to the severity of the discovery abuse. There's
17 nothing willful here. There's nothing maniacal here.
18 They were doing their jobs. And it was a very, very
19 long time before an expert showed up and said, "Hey, I
20 want to see something."

21 This is -- this very much is akin to Bass v. Davis.
22 They were doing their jobs and following their usual
23 day-to-day protocols. To dismiss this case on that
24 basis would be unjust.

1 Whether any evidence has been irreparably lost.

2 Well, the evidence is gone. I can't argue with that.

3 Feasibility and fairness of alternative less severe
4 sanctions such as an order deeming facts relating to
5 the withheld or destroyed evidence to be admitted by
6 the offending party. Certainly it's our position that
7 there are no sanctions warranted here because this
8 evidence had nothing to do with our case. However, if
9 you disagree, the only thing that would be appropriate
10 here would be a permissive adverse inference jury
11 instruction.

12 The policy of favoring adjudication on the merits.
13 We are adjudicating on the merits.

14 Whether sanctions unfairly operate to penalize a
15 party for the misconduct of her or her attorney.
16 That's not applicable here.

17 And the need to deter both the parties and future
18 litigants from similar abuses. Your Honor, if there
19 were abuses, I would agree that there would be a need
20 to deter them, but there is nothing intentional here.
21 This lawsuit had nothing to do with why those gentlemen
22 switched out a plug or a socket, absolutely nothing.

23 THE COURT: But, Ms. McCarty, I think that goes
24 more to the slippery slope argument that we are often

1 told to avoid. So let's just say I adopt the analysis
2 that you're putting forward here that this wasn't a big
3 deal, but then what happens the next time and the next
4 time and the next time until you get to a point where
5 we keep moving a little bit farther down the road and
6 eventually maybe it does more dramatically impact
7 someone's case?

8 I appreciate your saying it doesn't -- this doesn't
9 impact Mr. Aicklen's ability to put his case on at all
10 because it's totally irrelevant. But the concern I
11 think that the supreme court addresses in Young versus
12 Ribeiro is discouraging other people from making those
13 types of determinations on their own. You want to
14 discourage that type of behavior in general, a general
15 deterrence analysis as opposed to a specific deterrence
16 analysis, from a party in particular.

17 And so, if anything, you're probably right. In
18 this case Mr. Palmer and Mr. Bigby will never do this
19 again. The specific deterrence issue is not really a
20 concern. And I don't say that lightly or tongue in
21 cheek. They understand because they had to come here
22 to court and testify. I'm sure they're saying, "Boy, I
23 wish I would have thought of that. It would have
24 solved a lot of problems."

1 So that deterrence is never going to happen again.
2 But in Young we're also talking about a broader concept
3 of general deterrence, how do we deter parties in
4 general from making these types of decisions that can
5 dramatically impact how the cases are prosecuted by
6 both sides. That's -- I don't think that it's a
7 strong -- I don't think your argument is going to be
8 particularly persuasive regarding the deterrence aspect
9 of it, but there are eight factors and they all have
10 different weights.

11 MS. McCARTY: And I think the deterrence factor is
12 most important when you have a situation where you have
13 parties who are trying to impact litigation, when you
14 have a situation where people are throwing things away
15 because they think it's going to help them or they
16 think it's going to hurt the other party's case.

17 We don't have that here. Not only do we not have
18 it here, the parts are not relevant. They're not going
19 to be the thing that figures out what happened here,
20 because the truck wasn't wired that way.

21 In closing, Your Honor, we would ask that you deny
22 Versa's motion in its entirety, but to the extent that
23 you find that sanctions are somewhat -- are required,
24 it is our position that the most you can find is that a

1 permissive adverse inference instruction is
2 appropriate.

3 THE COURT: Thank you, Ms. McCarty.

4 MS. McCARTY: Thank you.

5 THE COURT: Mr. Aicklen, before you start arguing,
6 hold on a second.

7 Mr. Aicklen and Ms. McCarty, I want you to know
8 what I was just looking at. Mr. Aicklen in his moving
9 papers cited to two separate unpublished dispositions.
10 And so I chastised Ms. McCarty about referencing
11 unpublished dispositions of the Nevada Supreme Court.

12 One of the dispositions or one of the cases that
13 Mr. Aicklen cites to in his May 15th, 2017, motion
14 is -- where did it go? -- Parkinson versus Bernstein,
15 P-a-r-k-i-n-s-o-n versus Bernstein, B-e-r-n-s-t-e-i-n.
16 That's an unpublished disposition.

17 The other unpublished disposition that he cites to
18 is North American Properties versus McCarran
19 International Airport. That case is 2016 Westlaw
20 699864, a 2016 case.

21 I would caution you, Mr. Aicklen, from ever citing
22 that case again in any capacity, because the Nevada
23 Supreme Court recently amended ADKT 0504 and
24 unpublished dispositions of the Nevada Court of Appeals

1 are uncitable for any purpose whatsoever as of
2 September -- hold on. That's what I was pulling up.

3 When I glanced down at it -- because I do print out
4 all the cases that everybody cites to and I read them.
5 Judge Tao -- or, strike that. Oh, no, I apologize.
6 Now I'm just kind of getting a little lost in my own
7 minutia.

8 Judge Tao was the presiding judge in Las Vegas. He
9 was not the presiding judge on the court of appeals.
10 So North American Properties versus McCarran is a
11 citeable case even under the most recent iteration of
12 ADKT 0504, because it was published after January 1st
13 of 2016.

14 MR. AICKLEN: So do you take back your
15 chastisement?

16 THE COURT: I will not chastise you. I just looked
17 down and as I was reviewing it -- it's here on the
18 bench. I just glanced down and I saw Judge Tao's name
19 and I instantly thought it was a case from the court of
20 appeals, and it is not. It is a case from the supreme
21 court. It's an appeal from a ruling by Judge Tao down
22 in Las Vegas.

23 Go ahead.

24 MR. AICKLEN: Your Honor, I do not have much to

1 say. After listening to Ms. McCarty I don't think
2 there's much I need to say. I think you know what our
3 position is.

4 There were two things Mr. Bick kindly pointed out
5 to me, that in Bass-Davis v. Davis the Nevada Supreme
6 Court was looking at the issue of willful versus
7 negligent in fashioning jury instructions. It didn't
8 say that's the only thing that you could do. And they
9 said that if it was willful, then you could use a
10 presumption, and if it was negligence, you could use
11 inference. So I think when you read back through that
12 you're going to find that that was the issue on
13 Bass-Davis.

14 Obviously the Court can strike crossclaims, they
15 can strike complaints, they can strike answers. We see
16 it done for spoliation all the time. So I think that's
17 enough about Ms. McCarty telling you that you can't
18 strike the crossclaim.

19 And then the second thing that I really didn't
20 understand, but I will try to address it, is their
21 logic that there's no harm here because it was okay to
22 throw away that evidence because three years later
23 their experts determined the evidence wasn't relevant
24 as a cause of the belly dumping. I just absolutely do

1 not understand that.

2 All I can say to you is that based upon their
3 actions I don't have the physical evidence to prove
4 that those items that they threw away didn't cause this
5 to occur.

6 And the last point would be -- and I know you heard
7 me say it under my breath. I'll say it now on the
8 record -- it wasn't a socket. It was two sockets. It
9 wasn't a cord. It was two cords. It wasn't a
10 connector. It was multiple acts over the course of
11 years even after litigation had started and even after
12 they had been served with it.

13 So I think that your evaluation of what is willful,
14 the Court's determination of what is willful, is
15 accurate. I don't think you have any better evidence
16 of willful. If it doesn't require scienter, it just
17 requires a desire to act, all these actions were
18 willful. And if it's willful and it harms my client's
19 rights and it's over and over again -- as I said,
20 honestly, this is egregious. If this is not the case
21 to strike a complaint, then I don't know what the facts
22 are. And with that, I will rest.

23 THE COURT: I'm just going to check something
24 quickly, counsel. Relax for a moment.

1 We'll briefly be in recess. I need to go research
2 something. Court is in recess for probably about ten
3 minutes.

4 (A recess was taken.)

5 THE COURT: We'll go back on the record in
6 Fitzsimmons versus MDB Trucking. All the parties are
7 present.

8 As a preliminary matter, I would like to thank you
9 for your giving me a couple of extra minutes to go look
10 at a case. I think everyone is here from Las Vegas
11 except for Mr. Bick.

12 You're here locally; right?

13 MR. BICK: That's correct.

14 THE COURT: You get to drive home quickly. So I'm
15 sure everybody wants to leave on Friday and get back to
16 the airport so they can fly back to Vegas, but I did
17 want to go check that Bass-Davis case, because the way
18 it was cited by Ms. McCarty caused me some concern.
19 The concern was that I was not recalling the case
20 correctly.

21 My recollection of the case, Bass-Davis versus
22 Davis, 122 Nevada 442, a 2006 case, was more consistent
23 with Mr. Bick's recollection that he provided to
24 Mr. Aicklen. Bass-Davis versus Davis is a jury

1 instruction case, but it is not a case that supports
2 the broad proposition that when one is dealing with the
3 spoliation of evidence the only thing that courts can
4 do is either grant an adverse inference instruction or
5 a rebuttal presumption instruction.

6 The supreme court in Bass-Davis versus Davis does
7 discuss those. That's the whole focus of the case is
8 whether or not given the circumstances of that case and
9 the loss of the videotape that shows the interior of
10 the 7-Eleven was deserving of either a rebuttable
11 presumption or an adverse inference instruction.

12 And in the end the Nevada Supreme Court concluded
13 that such an instruction was appropriate and the
14 instruction was not given by the district court judge
15 and, therefore, the case was reversed and remanded.
16 But there is nothing in that case, as I reviewed it
17 again, that supports the proposition that all of the
18 other case law associated with the spoliation of
19 evidence is simply thrown out the window and that the
20 only things that we get now with spoliation are adverse
21 inference and rebuttable presumption instructions, if
22 anything.

23 If that were the case, it would be overturning
24 decades of case law in the state of Nevada. And I will

1 go and check, but I don't think that there is any
2 subsequent case from the Nevada Supreme Court that is
3 published and citeable that supports that proposition
4 that Bass-Davis versus Davis means with a spoliation
5 case all you're looking at is jury instructions.

6 So with that in mind, what I'm going to tell the
7 parties is this: There is a case that I believe is
8 almost directly on point with the facts and
9 circumstances of this case. No two cases are
10 identical, but curiously enough, the case in question
11 actually involves a truck and repairs to the truck and
12 what happened with pieces of the truck that were taken
13 off. That case is Stubli, S-t-u-b-l-i, versus Big D
14 International Trucks, Incorporated, 107 Nevada 309, 810
15 P.2d 785, a 1991 case. And the facts of the case are
16 very similar. They're not identical, but they're very
17 similar to the facts and circumstances of this case.

18 The Nevada Supreme Court at page 310 under the
19 section facts says as follows: "On June 27th, 1984,
20 appellate, Lawrence Stubli, a self-employed truck
21 driver, was involved in a single vehicle accident while
22 driving his tractor-trailer rig on Interstate 80 in
23 Wyoming. The accident occurred when the rig went off
24 the highway into the median and rolled onto its right

1 side. The damaged trailer was subsequently stored at a
2 wrecking yard in Rock Springs, Wyoming.

3 "Stubli's 45-foot refrigerator trailer was
4 manufactured by respondent, the Budd," B-u-d-d,
5 "Company and purchased by Stubli in 1981. Stubli
6 claims that from the outset he experienced misalignment
7 problems with the trailer's suspension system. As an
8 apparent consequence of these problems, one of the
9 suspension system components, the right front springer
10 hanger, eventually separated from the trailer frame.
11 Respondent, Big D International Trucks of Reno, Nevada,
12 repaired the broken springer hanger by welding it back
13 to the trailer frame in December of 1983.

14 "Following the accident, Stubli submitted a claim
15 to his insurer, Northwestern National Insurance
16 Company. The claim was handled by WRG Claims
17 Management of Milwaukee, Wisconsin, and investigated by
18 Mark Ingersoll of Idaho Intermountain Claims.

19 "During the investigation and pursuant to WRG's
20 instructions, Ingersoll retained a mechanical engineer,
21 Dr. Rudy Limpert," L-i-m-p-e-r-t, "to inspect the
22 trailer wreckage for mechanical defects before it was
23 discarded as salvage.

24 "After examining and photographing the damaged

1 trailer, Limpert submitted the photographs and detailed
2 report of his findings to Ingersoll on September 20th
3 of 1994."

4 There is some other discussion about what happens,
5 but then on page 311 the court goes on to say, "Neither
6 Budd nor Big D received an invitation to inspect the
7 wreckage. Instead, McCarthy instructed Limpert by
8 letter dated February 6th, 1985, to go to the storage
9 area and, quote, disengage the bogie," b-o-g-i-e,
10 "which is a sliding axle assembly, and transport the
11 same to your storage facility.

12 "In turn, Limpert instructed his assistant, a
13 Mr. Andrews, to go out and get the failed part.
14 Andrews then had a storage yard worker sever the right
15 front springer hanger and that portion of the trailer
16 frame from which the front springer hanger had
17 separated from the remainder of the trailer.

18 "By letter dated February 18th, 1985, Limpert
19 advised McCarthy that the, quote, slider assembly and
20 associated parts, close quote, had been removed and
21 placed in Limpert's storage facility."

22 And then eventually the rest of the truck -- and
23 I'm not reading anymore, but the rest of the truck is
24 just discarded. And it was argued that Big D who had a

1 different theory of the case was prejudiced based on
2 the spoliation of the evidence. They thought it was
3 something else other than the springer hanger that
4 caused the accident in question.

5 The Nevada Supreme Court in Stubli versus Big D
6 International Trucks, Incorporated, actually applied
7 the Young versus Ribeiro standard and went through a
8 thorough analysis, including talking about lesser
9 included -- or, excuse me -- lesser sanctions, how they
10 would be ineffective, the fact that, you know, it was a
11 key issue in the case, the piece of equipment in
12 question.

13 And so it's not that there's no case law on point
14 in Nevada. I think it's unique that there's some case
15 law directly on point in Nevada that deals with
16 specifically trucks and injury -- or damage and what
17 we're supposed to do and how we're supposed to preserve
18 the evidence.

19 Counsel, in Young versus Ribeiro the Nevada Supreme
20 Court directs district courts to provide written -- I
21 always forget what it is. Hold on. It's on page 93 of
22 the Nevada Reporter, 106 Nevada, page 93. The court
23 says, quote, "We will further require that every order
24 of dismissal with prejudice as a discovery sanction be

1 supported by an express, careful and preferably written
2 explanation of the court's analysis of the pertinent
3 factors that are articulated."

4 The Court would note that in Young versus Ribeiro
5 Judge Whitehead, who at the time was the presiding
6 judge in Department 1 of the Second Judicial District,
7 wrote an 18-page order describing all of the things
8 that he found mandated the dismissal of the action.

9 I think it would be inappropriate of me to try and
10 articulate at this hour why I believe that the granting
11 of the motion is appropriate. However, I'm also very
12 cognizant of the fact that the parties are preparing
13 for trial, that they are continuing to file motions in
14 anticipation of a trial that is scheduled to begin on
15 October 30th --

16 Is that correct, Ms. Clerk?

17 THE CLERK: Yes, Your Honor.

18 THE COURT: -- on October 30th of 2017.

19 So what I will tell you is this: It is the Court's
20 intention to grant the Versa motion regarding the
21 spoliation of the evidence and to dismiss the
22 crossclaim for contribution. The Court will not put on
23 the record now the reasons therefor. However, I will
24 enter a written order fully detailing the Court's

1 analysis of the Young versus Ribeiro factors which I do
2 believe still apply.

3 I will tell you, Ms. McCarty and Mr. Wieczorek, if
4 I believe that additional briefing is necessary, I will
5 let you know, but I will also go back and look and I
6 will do my own additional research to determine if
7 there are any issues that I have missed that are
8 consistent with what Ms. McCarty has argued. And if
9 there are, I will certainly give the parties the
10 opportunity to address those. I will file an order
11 directing the parties to file a supplemental brief.

12 Mr. Aicklen, I can tell you, I'm not going to read
13 their supplemental brief prior to writing my order. So
14 they're not going to get a head start on the argument.
15 If I think I need some additional information from the
16 parties, I will let the parties know, and we will start
17 with a new briefing round based on my order, not based
18 on any motion that's filed by either party prior to
19 that order.

20 So I'm telling you that because I don't want anyone
21 to waste any more time and effort preparing for trial
22 on October 30th. It would be a waste of time at this
23 point.

24 If in my review of the case I come to the

1 conclusion that I am wrong about what I have orally
2 told you today, the consequence will be that your trial
3 date of October 30th of 2017 will be vacated and we
4 won't have a trial date set.

5 I'm telling you that I just simply based on my
6 calendar do not believe I can do the written order and
7 give it the analysis that the supreme court expects
8 under these heightened standards of review that are
9 called for in a Young versus Ribeiro order. I know
10 what my schedule looks like for the next two weeks. I
11 have a jury trial in a criminal matter starting on
12 Monday, I have another jury trial starting on the next
13 week, and then I have you guys scheduled for the 30th.

14 So I just don't think that it's going to happen
15 between now and then. I wish I could get the order
16 written and get it out to you before the 30th, but I
17 just don't think that I will. I don't like promising
18 things that I can't deliver.

19 So what I'm telling you is that your trial date is
20 vacated. I am 95 percent sure as I sit here that I
21 will grant Versa's motion. If I find for some reason
22 that that decision is incorrect based on my analysis of
23 the transcript and my reading of the cases and the
24 additional legal research that I do, I will let the

1 parties know and we will have to reschedule the trial
2 date, but as it stands right now, the Court anticipates
3 granting Versa's motion and, therefore, the trial of
4 October 30th will be unnecessary.

5 Anything else on behalf of Versa, Mr. Aicklen?

6 MR. AICKLEN: No. Thank you, Your Honor.

7 THE COURT: On behalf of MDB, Mr. Wieczorek?

8 MR. WIECZOREK: Yes, Your Honor, briefly. So I
9 understand the Court's ruling and I understand the
10 Court's scheduling issues. To the extent the Court has
11 left itself open for perhaps reconsideration of its
12 stated intention, I wish to make the Court aware of the
13 fact that one of those motions pending before you is
14 MDB's motion against Versa for terminating sanctions
15 based on discovery abuses which came out within the
16 last 90 days as we were dealing with Peter Paul
17 documents. I'm not suggesting two wrongs make a right,
18 but that motion to the extent -- or it was second in
19 time to Versa's motion -- raises pretty much the same
20 issues and the same level of indignity on the MDB side
21 that Versa experiences.

22 If the Court is inclined to rethink its position on
23 Versa's motion, I think the Court should also spend
24 some time thinking about MDB's position on its

1 affirmative motion which, again, has been submitted.

2 THE COURT: Okay. I will.

3 MR. WIECZOREK: I appreciate that.

4 THE COURT: I will.

5 Anything else on behalf of MDB, Mr. Wieczorek?

6 MR. WIECZOREK: No, thank you, Your Honor.

7 THE COURT: Thank you, everybody.

8 Court is in recess. Have a nice weekend.

9 MR. AICKLEN: Thank you too, Your Honor.

10 THE COURT: Hold on a second. Before we leave, my
11 clerk reminded me of something and I forgot to do it.

12 Exhibit No. 9. Counsel, I had said that Exhibit
13 No. 9 is admitted. However, Exhibit No. 9 are all of
14 the pieces of equipment that were just being used as
15 demonstrative aids during the hearing. I don't know if
16 you want to leave those with the court. They'll be
17 marked as an exhibit. They were just used for
18 demonstrative purposes during the course of the
19 hearing.

20 So, Mr. Wieczorek, if you want to keep those --

21 MR. WIECZOREK: I would rather leave them with your
22 clerk, Your Honor.

23 THE COURT: You just don't want to have to take
24 them on the plane again?

1 MR. WIECZOREK: Pretty much. So if you don't
2 mind --

3 THE COURT: You can keep them and throw them in the
4 garbage on the way out the door. I don't care. It's
5 just if we admit them, they're going to become part of
6 the file and --

7 MR. WIECZOREK: All joking aside, depending on the
8 Court's order and depending on decisions that are above
9 my chain of command, there may be other proceedings, so
10 I think we probably should have them as part of the
11 record.

12 THE COURT: I appreciate that. The chain of
13 command comment is not necessary. I understand every
14 time I make a decision somebody is disappointed and
15 there might be an appeal. And I promise you, I do not
16 take it personally. So you probably don't care if I do
17 take it personally.

18 Anyway, thank you, everybody, for your argument
19 today.

20 They will be marked as Exhibit No. 9 and admitted.
21 Any objection to that, Mr. Aicklen?

22 MR. AICKLEN: No, sir.

23 THE COURT: Okay. So then that entire bag of stuff
24 will all become Exhibit No. 9.

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Court is in recess.

(The proceedings were concluded at 3:45 p.m.)

--o0o--

1 STATE OF NEVADA)
) ss.
2 COUNTY OF WASHOE)
3

4 I, LORI URMSTON, Certified Court Reporter, in and
5 for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me
7 at the time and place therein set forth; that the
8 proceedings were recorded stenographically by me and
9 thereafter transcribed via computer under my
10 supervision; that the foregoing is a full, true and
11 correct transcription of the proceedings to the best
12 of my knowledge, skill and ability.

13 I further certify that I am not a relative nor an
14 employee of any attorney or any of the parties, nor am
15 I financially or otherwise interested in this action.

16 I declare under penalty of perjury under the laws
17 of the State of Nevada that the foregoing statements
18 are true and correct.

19 DATED: At Reno, Nevada, this 6th day of
20 November, 2017.

21
22 LORI URMSTON, CCR #51

23
24 _____
LORI URMSTON, CCR #51

Exhibits

Title: FITZSIMMONS ETAL VS. MDB TRUCKING, LLC, ETAL
DEFENDANT/CROSS-CLAIMANT: MDB TRUCKING, LLC
PATY: NICHOLAS WIECZOREK, ESQ., and COLLEEN MCCARTY, ESQ.
DEFENDANT/CROSS-DEFENDANT: VERSA PRODUCTS COMPANY, INC.
DATY: JOSH AICKLEN, ESQ., and KENNETH BICK, ESQ.

Case No: **CV15-02349** Dept. No: **10** Clerk: **M. WHITE** Date: **10/13/17**

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	MDB	WORK ORDER MDBMAINT 000224	10/13/17	No Obj.	10/13/17
2	MDB	WORK ORDER MDBMAINT 000159,000199, 000244, 000245	10/13/17	No Obj.	10/13/17
3	MDB	WORK ORDER MDBMAINT 000160	10/13/17	No Obj.	10/13/17
4	MDB	WORK ORDER MDBMAINT 000129	10/13/17	No Obj.	10/13/17
5	MDB	WORK ORDER MDB-000318	10/13/17	No Obj.	10/13/17
6	MDB	WORK ORDER MDB-000273	10/13/17	No Obj.	10/13/17
7	MDB	MDB Diagram 1	10/13/17	Obj; sustained	
		Intentionally left blank	10/13/17		
9	MDB	Demonstrative Exhibit	10/13/17	No Obj.	10/13/17
10	VERSA	MDB TRUCKING Work Order dated 12/18/2014, bates stamped MDB 186	10/13/17	No Obj.	10/13/17

Exhibits

Title: **FITZSIMMONS ETAL VS. MDB TRUCKING, LLC, ETAL**
DEFENDANT/CROSS-CLAIMANT: **MDB TRUCKING, LLC**
PATY: **NICHOLAS WIECZOREK, ESQ., and COLLEEN MCCARTY, ESQ.**
DEFENDANT/CROSS-DEFENDANT: **VERSA PRODUCTS COMPANY, INC.**
DATY: **JOSH AICKLEN, ESQ., and KENNETH BICK, ESQ.**

Case No: **CV15-02349** Dept. No: **10** Clerk: **M. WHITE** Date: **10/13/17**

Exhibit No.	Party	Description	Marked	Offered	Admitted
11	VERSA	Photographs of tractor trailer cables and sockets	10/13/17	No Obj.	10/13/17

WORK ORDER

MDB Trucking

EQUIP. No. 6275

Date 8-1-13

Required Priority
High Med Low

Date completed 8-2-13

By Pat

miles _____
hr meter _____

- | | | | |
|---|---|--|---|
| <input checked="" type="checkbox"/> inspect | <input type="checkbox"/> PM1 | <input type="checkbox"/> diagnose | <input type="checkbox"/> tire psi check |
| <input checked="" type="checkbox"/> lube | <input type="checkbox"/> PM2 | <input type="checkbox"/> remove/repl. | <input type="checkbox"/> tire repair |
| <input type="checkbox"/> repair | <input type="checkbox"/> PM3 | <input type="checkbox"/> weld repair | <input type="checkbox"/> tire survey |
| <input type="checkbox"/> clean/wash | <input type="checkbox"/> PM4 | <input type="checkbox"/> fabricate | <input type="checkbox"/> tire rotate |
| | <input type="checkbox"/> parts in stock | <input type="checkbox"/> parts ordered | <input type="checkbox"/> tire replace |

Additional: Investigate unintentional gate opening

WORK DONE	PARTS/SUPPLIES USED
Replaced Versa valve and reduced	1) DEE-5609 Pressure gauge
Dump valve circuit from valve to	1) VGR-K-4593-206-0012 Silcoport dump valve
Track. Insulating Dump coil circuit	1) RZ-5014 PkK Tx wraps
Removed coil case ground from	1) Male 4 way plug
circuit	40' ± 2 wire cord

Notes: _____

Performed by Pat Location yard Total Time _____

MDBMAINT000224

MDBMAINT000224

AA001938
MDB 240

No. CWIS-02349
MOB

vs.

Versa

MOB Ex. 1

Admitted: 10/13, 2017
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy



WORK ORDER

MDB Trucking

EQUIP. No. 6723

Date 7-7-14

Date completed 7-7-14

By Scott

Required Priority
High / Med / Low

miles _____
hr meter _____

- | | | | |
|---|---|---|---|
| <input checked="" type="checkbox"/> inspect | <input type="checkbox"/> PM1 | <input type="checkbox"/> diagnose | <input type="checkbox"/> tire psi check |
| <input type="checkbox"/> lube | <input type="checkbox"/> PM2 | <input type="checkbox"/> remove/replace | <input type="checkbox"/> tire repair |
| <input type="checkbox"/> repair | <input type="checkbox"/> PM3 | <input type="checkbox"/> weld repair | <input type="checkbox"/> tire survey |
| <input type="checkbox"/> clean/wash | <input type="checkbox"/> PM4 | <input checked="" type="checkbox"/> fabricate | <input type="checkbox"/> tire rotate |
| | <input type="checkbox"/> parts in stock | <input type="checkbox"/> parts ordered | <input type="checkbox"/> tire replace |

Additional: Install lockout device for Versa-Valve

WORK DONE	PARTS/SUPPLIES USED
Fabricate & install lockout device for Versa-Valve	1 Versa-Valve Lock
	1 stainless steel Hairpin clip
	MISC bolts to attach
	MISC. steel Flatbar

Notes: Provide positive lockout of Versa valve while traveling on Highway

Performed by Scott Location _____ Total Time _____

MDBMAINT000159

MDBMAINT000159

No. CV15-02349
MOB

vs.

Versa

MOB Ex. 2

Admitted: 10/13, 2017
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy



No. CV15-02349
MOB

vs.

Versa
MOB Ex. 3

Admitted: 10/13, 2017
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy



No. CV15-02349
MOB

vs.

Versa
MOB Ex. 4

Admitted: 10/13, 20 17
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy



WORK ORDER

MDB Trucking

EQUIP. No. 5694

Date 2-5-15

Required Priority
High Med Low

Date completed 2-5-15

By Scott

miles 499746
hr meter _____

- | | | | |
|-------------------------------------|---|---|---|
| <input type="checkbox"/> inspect | <input type="checkbox"/> PM1 | <input type="checkbox"/> diagnose | <input type="checkbox"/> tire psi check |
| <input type="checkbox"/> lube | <input type="checkbox"/> PM2 | <input type="checkbox"/> remove/replace | <input type="checkbox"/> tire repair |
| <input type="checkbox"/> repair | <input type="checkbox"/> PM3 | <input type="checkbox"/> weld repair | <input type="checkbox"/> tire survey |
| <input type="checkbox"/> clean/wash | <input type="checkbox"/> PM4 | <input type="checkbox"/> fabricate | <input type="checkbox"/> tire rotate |
| | <input type="checkbox"/> parts in stock | <input type="checkbox"/> parts ordered | <input type="checkbox"/> tire replace |

Additional: Replace Drivers seat / Replace 7way & 4 way cords / Replace leaking Air Plunge gasket

WORK DONE	PARTS/SUPPLIES USED
<u>Replaced drivers seat with new</u>	<u>1) Seat</u>
<u>Replaced damaged 7way cord</u>	<u>1 1/2" 7way cord</u>
<u>Replaced damaged 4way cord</u>	<u>1 1/2" 4way cord</u>
<u>Replaced damaged Service air line</u>	<u>1 1/2" 3/4 Lat Air Line 1) 3/8 Swell</u>
<u>Replaced #35 axle Plunge gasket</u>	<u>1) Axle Plunge gasket (stock)</u>

Notes: _____

Performed by Pat

Location Shop

Total Time 6

No. CV15-02349

MDB

vs.

Verson

MDB Ex. 5

Admitted: 10/13, 20 17

JACQUELINE BRYANT, CLERK

By [Signature]
Deputy



No. CV15-02349
MOB

vs.

Versa

MOB Ex. 6

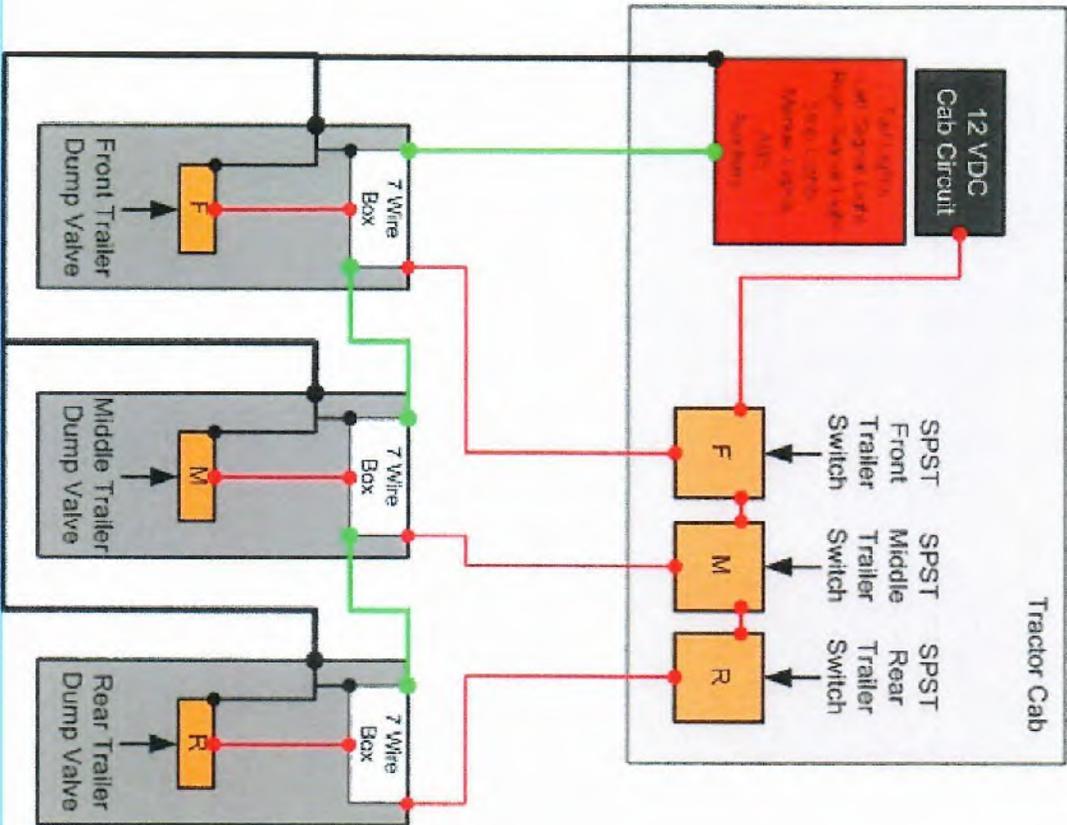
Admitted: 10/13, 20 17
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy

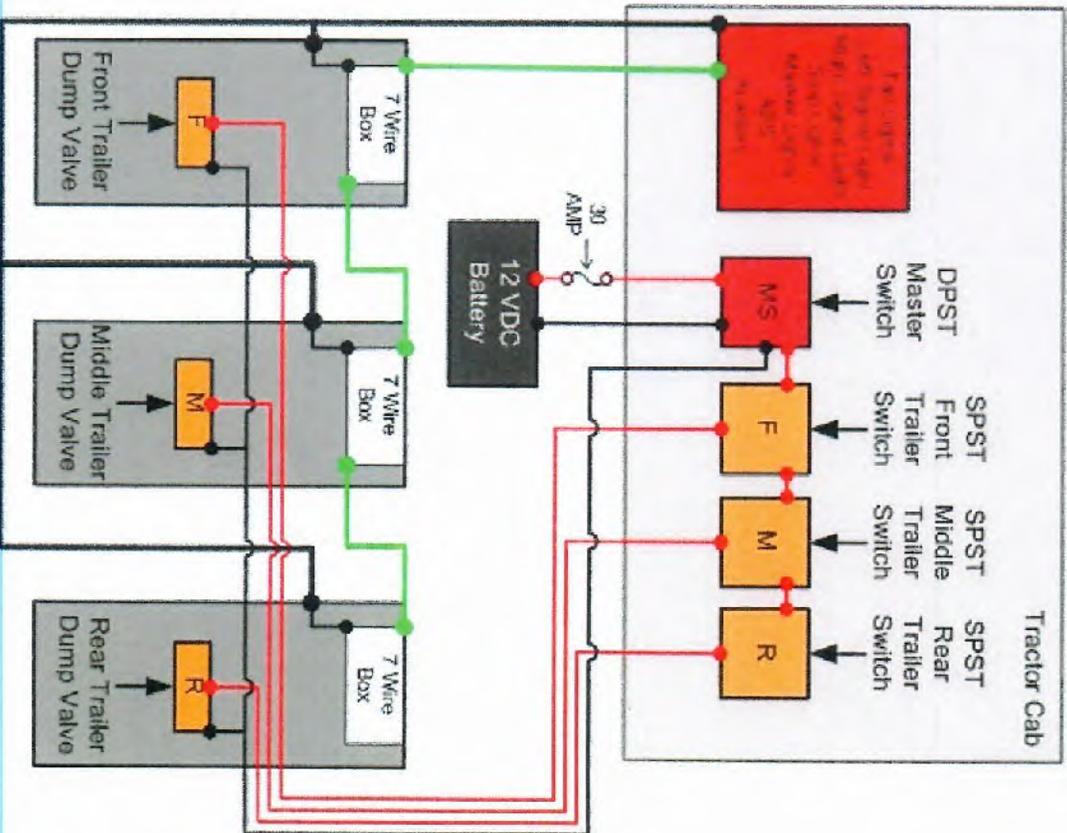


MDB Trucking
FEI

Original Wiring Configuration



Post July 2013 Wiring Configuration





No. CN15-02349
MOB

vs.

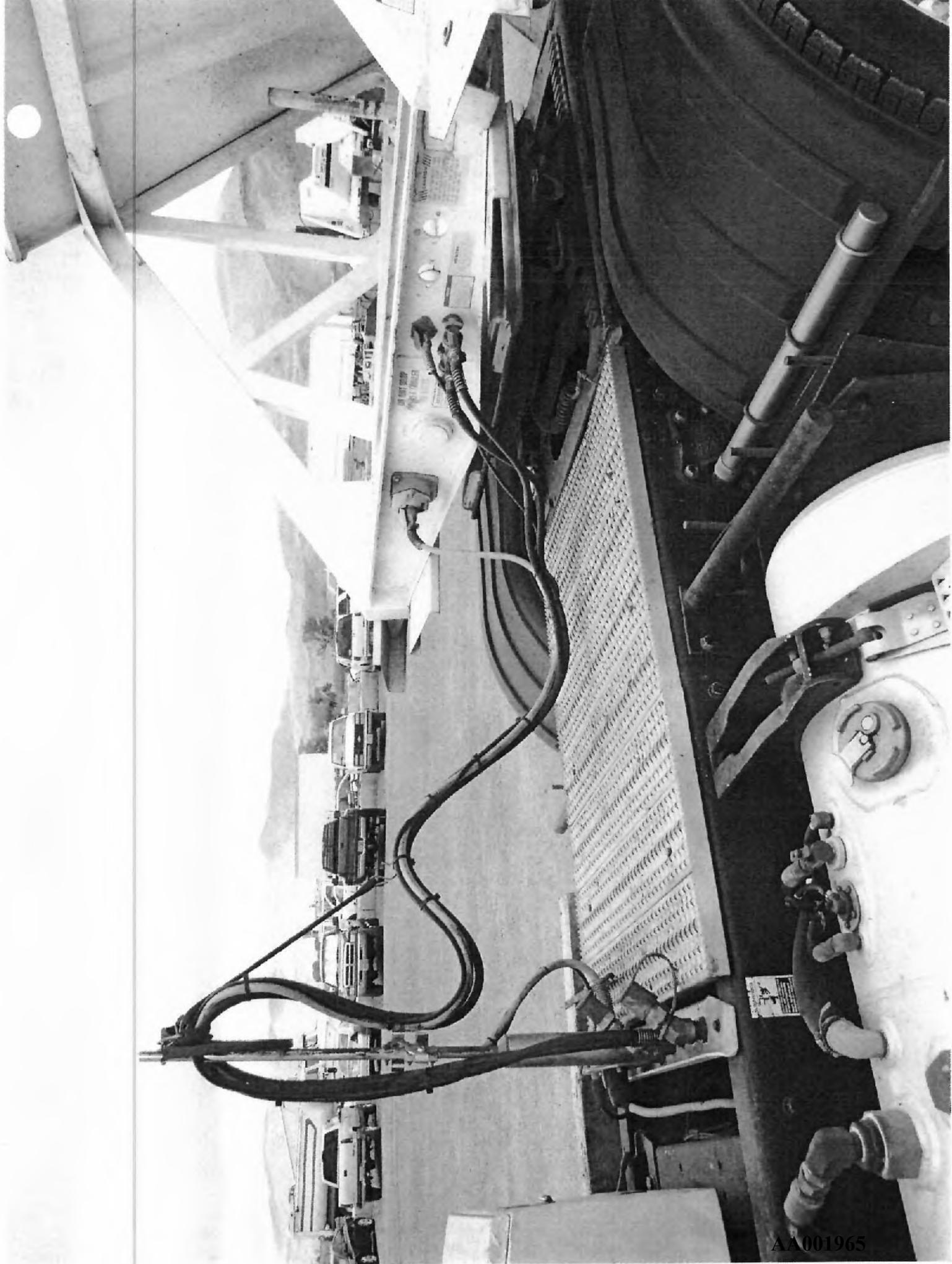
Versa

Versa Ex. 10

Admitted: 10/13, 2017
JACQUELINE BRYANT, CLERK

By [Signature]
Deputy





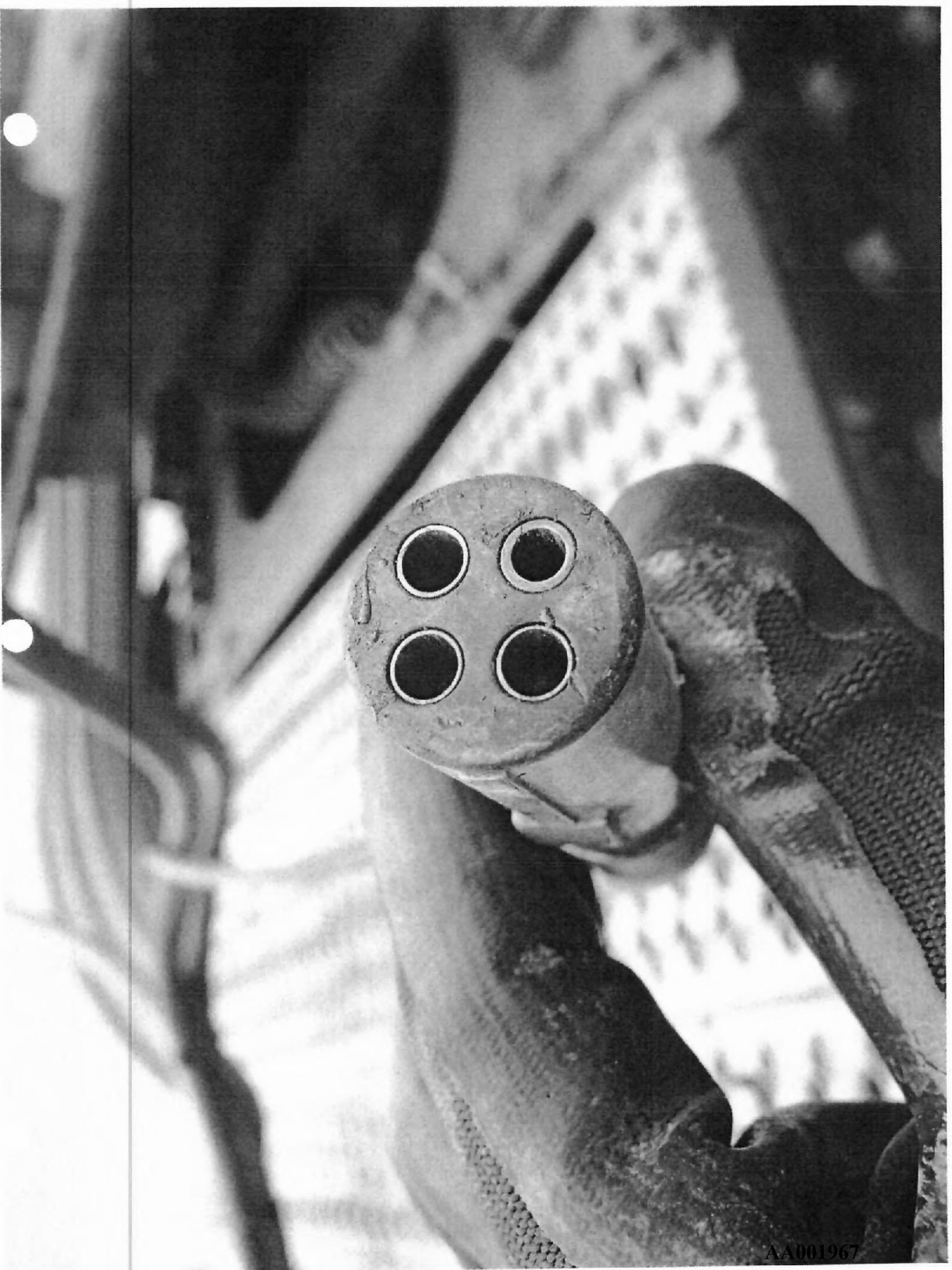
AA001965

**DO NOT DROP
MISSET TRAILER
ON GATES**

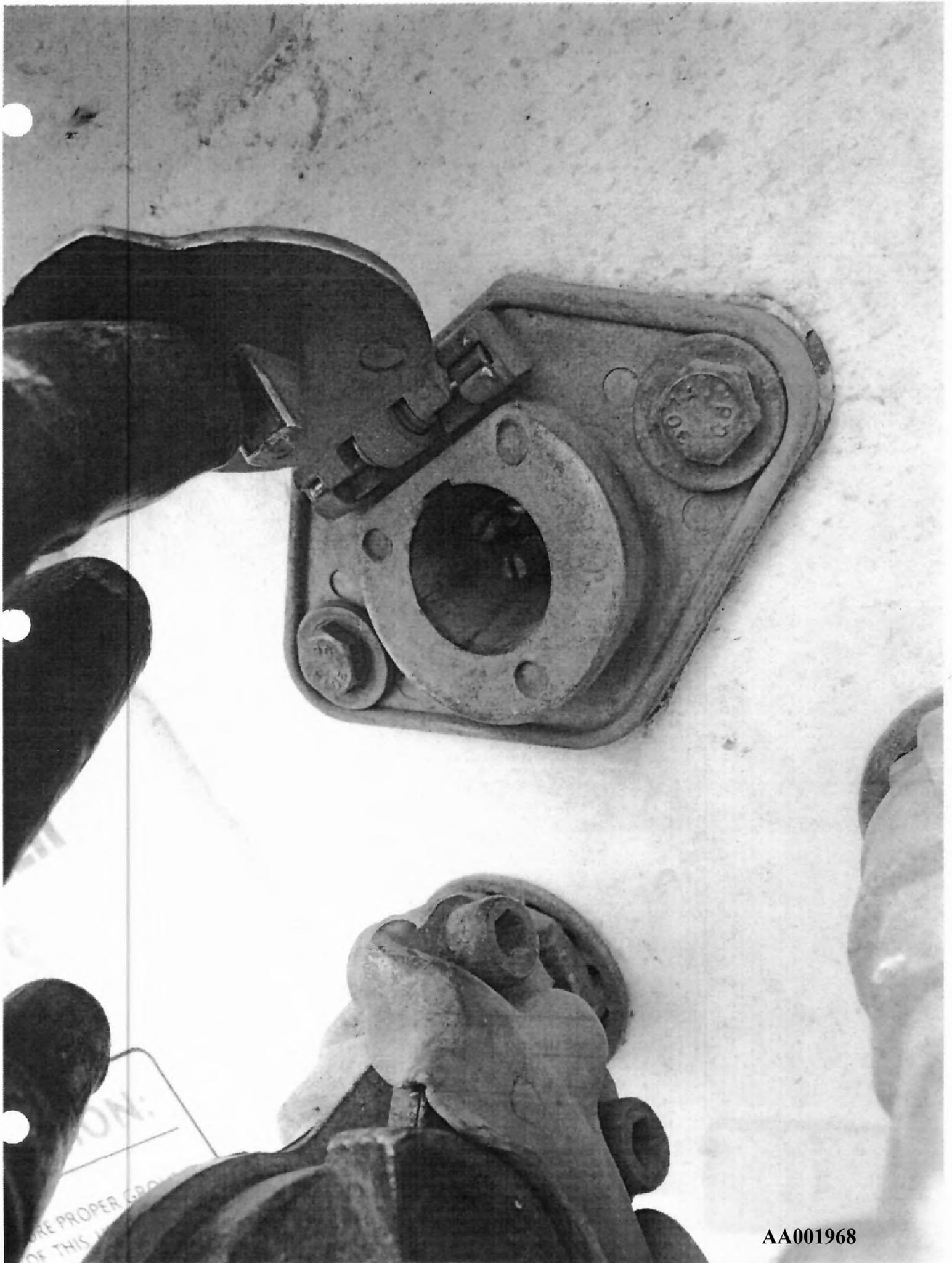
ATTENTION:
NO INSURE PROGRAMS
INC. OF POLYMER
THREES AND
POSSIBLE FROM THE

NOTICE:
If the ABS indicator lamp
comes on, do not drive until
the lamp goes out. If the lamp
comes on and stays on when you
stop the vehicle, the ABS may
not be working properly.
Do not drive until the lamp
goes out. Do not attempt to
diagnose or repair the ABS
system. For more information,
call 1-800-4-A-ABS.

This Trail
ME
Meritor Tire It
When the tire light is
illuminated, it means the
tire is low on air. For
a service fee
(888) 728-9333



AA001967



AA001968

ON:
RE PROPER GR
OF THIS

No. CW15-02349

MDB

vs.

Versa

Versa Ex. 11

Admitted: 10/13, 2017

JACQUELINE BRYANT, CLERK

By [Signature]

Deputy



1
2
3 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR THE COUNTY OF WASHOE

5 ***

6 ERNEST BRUCE FITZSIMMONS, et al.,

7 Plaintiffs,

Case No. CV15-02349

8
9 vs.

Dept. No. 10

10 MDB TRUCKING, LLC; et al.,

11 Defendants.
12 _____ /

13 **ORDER**

14 Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
15 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
16 CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT
17 TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the
18 Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA
19 PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking,
20 LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S
21 MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2,
22 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA
23

24 _____
25 ¹ Versa filed the ERRATA TO DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS
26 COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB
27 TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE
28 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
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28 ⁴ The trial court actually struck the appellant’s expert witness from the trial. The appellant indicated it had insufficient 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
20 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
21 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
22 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
Procedure 37 for an allegation of spoliation."

23 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
24 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
25 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
26 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
27 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
28 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

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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
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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CERTIFICATE OF MAILING

Pursuant to NRCF 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:

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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:

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18
- 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.

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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

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21 TO: ALL INTERESTED PARTIES:

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LIST OF EXHIBITS

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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 with the Court and addressed as follows:

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Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

/s/ Susan Kingsbury
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 1

4845-3057-6394.1

AA001988

1
2
3 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR THE COUNTY OF WASHOE

5 ***

6 ERNEST BRUCE FITZSIMMONS, et al.,

7 Plaintiffs,

Case No. CV15-02349

8
9 vs.

Dept. No. 10

10 MDB TRUCKING, LLC; et al.,

11 Defendants.
12 _____/

13 **ORDER**

14 Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT
15 VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-
16 CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT
17 TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the
18 Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA
19 PRODUCTS, INC. ("Versa") on May 15, 2017.¹ Defendant/Cross-Claimant, MDB Trucking,
20 LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S
21 MOTION TO STRIKE AND/OR SPOILIATION INSTRUCTIONS ("the Opposition") on June 2,
22 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA
23

24 _____
25 ¹ Versa filed the ERRATA TO DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS
26 COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB
27 TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE
28 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 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
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28 ⁴ The trial court actually struck the appellant’s expert witness from the trial. The appellant indicated it had insufficient
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
20 Recently the Nevada Supreme Court has declared that the Bass versus Davis case is the prevailing case on the
21 spoliation of evidence, not Young versus Ribeiro. And in a case called Walmart Stores, Inc. versus the Eighth
22 Judicial District, No. 48488, January 31st of 2008, the court said, "It is an abuse of discretion for a district court
23 not to consider the case of Bass-Davis versus Davis when imposing sanctions pursuant to Nevada Rule of Civil
24 Procedure 37 for an allegation of spoliation."

25 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
26 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
27 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
28 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
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

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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
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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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