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 [District Court Case Nos.: CV15-02349, CV16-00976 and CV16-01914]

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant/Cross-Respondent MDB Trucking, LLC is a Nevada limited liability company and has no corporate affiliation.

2. MDB Trucking, LLC was represented in the district court and is represented in this Court by the undersigned attorneys of the law firm of Clark Hill PLLC.

Dated this 4th day of April, 2019.

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I.

ROUTING STATEMENT IN REPLY

In the same manner as the district court erred, Respondent/Cross-Appellant Versa Products Company, Inc. ("Versa") ignores this Court's prior clarification of its spoliation jurisprudence in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006) and the binding authority it provides for the proper determination of sanctions imposed pursuant to NRCP 37. Citing exclusively to cases which significantly pre-date this Court's *Bass-Davis* decision to support its claim of assignment to the Court of Appeals, the facts here merely confirm Appellant/Cross-Respondent MDB Trucking, LLC's ("MDB") assertion that this consolidated appeal should be retained by the Supreme Court. Specifically, this Court has not addressed by way of published decision a district court's proper exercise of discretion when considering sanctions, and the limitations on the degree of such sanctions, in cases involving the negligent or willful spoliation of evidence.

II.

ARGUMENT

A. The District Court Abused Its Discretion By Imposing Case-Terminating Sanctions for the Negligent Loss of Irrelevant Component Parts.

Versa argues, incorrectly, that the district court properly ignored this Court's

prior clarification of its spoliation precedents in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), and the relevance it holds for the proper determination of sanctions imposed pursuant to NRCP 37, because the instant matter is more factually aligned with the pre-*Bass-Davis* cases *Stubli v. Big D International Trucks,* 107 Nev. 309, 810 P.2d 785 (1991) and *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 747 P.2d 911 (1987). Versa's focus on *Stubli* and *Zenith*, however, is misplaced where, as here, the component parts at issue: (1) were not relevant to the underlying action and therefore not required to be retained; and (2) at worst, their spoliation was, as the district court found, a result of "benign neglect" and preclusive of case-terminating sanctions.

1. The Component Parts Were Not Required To Be Retained Because They Were Irrelevant to the Underlying Action.

Versa asserts that MDB "merely re-argues facts," while at the same time mischaracterizes testimony with respect to the component parts at issue and wholly ignores the threshold question set forth in *Bass-Davis* with regard to the pre-litigation duty to preserve evidence. *Bass-Davis v. Davis*, 122 Nev. at 450, 134 P.3d at 108. The Court in *Bass-Davis* held that, pre-litigation, the duty to preserve evidence arises once a party is on notice of a potential legal claim. *Id.* The Court explained "notice" as follows:

> Even where an action has not been commenced and there is only a potential for litigation, the litigant is

> under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.

GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) (emphasis added). Generally, cases based on negligently lost or destroyed evidence require a showing that the party controlling the evidence had notice that it was relevant at the time the evidence was lost or destroyed. *Bass-Davis v. Davis*, 122 Nev. at 449, 134 P.3d at 108. Accordingly, the burden fell to Versa to demonstrate that MDB knew, or should have known at the time the component parts were replaced, that they would be relevant to the underlying strict products liability claim.

Here, Versa wholly failed to provide any evidence that MDB knew, or reasonably should have known, that the component parts at issue would be relevant to an as-yet-filed products liability action at the time they were replaced as needed in August, 2014 through December 2015. (AA Vol. 12 PGS 1686 – 1969). Indeed, the district court concluded, as established at the evidentiary hearing, that the component parts were lost as a result of routine maintenance, not for any litigation-related purpose. (AA Vol. 12 at PG 1977). Further, at the time of the routine maintenance, MDB knew that modifications it made to the wiring system of the subject truck and trailer in 2013 eliminated any chance the truck's electrical system could inadvertently energize the Versa valve. (AA Vol. 8 PG 1165). As

such, MDB had no reason to preserve the component parts at issue at the time of their disposal.

Contrary to Versa's contention that the testimony at the evidentiary hearing confirmed that current from a "cut, abrasion and/or crack (in a 4-way cord) could have caused the Versa valve to activate," in fact, Versa's citations to the record reveal no such conclusion. (Respondent's Answering Brief on Appeal and Opening Brief on Cross-Appeal ("Answering Brief") at 7). Specifically, App. Vol. 11 at 1717, cited by Versa for the above proposition, reflects the testimony of Scott Palmer, wherein he stated not that an abraded cord could have caused the Versa valve at issue to activate, but instead, confirmed generally that if a cord is abraded two wires can cross. (App. Vol. 11 at 1717). Importantly, Mr. Palmer's statement did not at all relate to the subject truck and trailer, which had been specifically modified a full year before the accident to remove any chance that the wiring could affect the operation of the Versa valve. (AA Vol. 11 PGS 1717 and 1849 – 1850). Mr. Palmer merely responded in the affirmative to the question, "have you *ever* observed where the cord will be abraded and it will abrade away the insulation such that two wires can cross?" (AA Vol. 11 PG 1717) (emphasis added).

Similarly, App. Vol. 1810-1811, cited by Versa for the above proposition, reflects the testimony of its expert, Garrick Mitchell, wherein he acknowledged not that an abraded cord could have caused the Versa valve to activate, but instead that

electrical current *could not flow* through the circuit of the subject truck and trailer to the valve unless the driver activated the master switch and the trailer switch inside the cab of the truck, which he did not do. (App. Vol. 1810-1811). And, finally, App. Vol. 12 at 1847, cited by Versa for the proposition that an abraded cord could have caused the Versa valve to activate, instead reflects the testimony of MDB's expert, Dr. David Bosch, wherein he stated that while "[a]nything is possible" it was "*highly improbable*" that current from an abraded cord could open the Versa valve, and further confirmed, as did Versa's own expert, that the only way the valve could receive electrical current was if the driver activated two switches. (App. Vol. 12 at 1847).

In short, contrary to Versa's assertions, the testimony at the evidentiary hearing made clear that the lost component parts, i.e. a plug, two sockets and two cords, were in no way tied to the activation of the Versa valve as a result of the modifications installed by MDB long before the incident. And, Versa provided no evidence to the contrary. As Versa failed to meet its burden to demonstrate that evidence was lost or destroyed which MDB should have known was in any way relevant to the underlying strict product liability claim involving the Versa valve, the district court's examination of the evidence should have concluded with a finding that no spoliation occurred and that no sanction was warranted. And, the

district court's failure to consider the relevance of the spoliated parts at the time of their disposal constituted an abuse of discretion.

2. The Proper Application of *Bass-Davis* Precludes the District Court's Imposition of Case-Terminating Sanctions.

Versa argues that *Bass-Davis* in no way limits the range of sanctions available to the district court for the negligent spoliation of evidence, and that even if it does, the instant matter is more factually aligned with *Stubli* and *Zenith,* and thus, *Bass-Davis* is inapplicable. (Answering Brief at 22). Versa's reliance on *Stubli* and *Zenith,* however, is inapt, where, as here, the lost evidence at issue was not relevant to the strict products liability claim and the district court concluded that the spoliation of evidence was negligent, not willful. (AA Vol. 12 PG 1977).

Significantly, *Stubli* and *Zenith* involved the destruction of evidence central to the Plaintiff's claims. In *Stubli*, a truck driver who was involved in a single vehicle accident brought a products liability action against the company which manufactured the truck trailer and a company which repaired the trailer's suspension system. 107 Nev. at 310, 810 P.2d at 786. This Court affirmed the district court's dismissal of the action as a discovery sanction for the destruction of the trailer, *the* evidence at issue. *Id.* at 314. In doing so, the Court explained that dismissal was appropriate because "Stubli's claims all revolve around the allegedly defective design and repair of the trailer's suspension system." *Id.* at 312. It also

concluded that the trailer was relevant. *Id.* at 314.

Further, unlike the instant action where there is no dispute that the component parts were lost as a result of routine maintenance, in *Stubli*, this Court concluded the loss of the trailer was "wholly due to willful actions" taken by Stubli's counsel and expert witness in anticipation of litigation. 107 Nev. at 314, 810 P.2d at 788. Indeed, in *Stubli*, discussions occurred with counsel regarding whether to invite the adverse parties to inspect the trailer prior to its disposal. *Id.* at 311. Inexplicably, however, counsel directed the expert witness to remove the pertinent portion of the trailer and discard the rest, without providing an opportunity for the adverse parties to inspect it. *Id.*

By contrast, the component parts at issue here were disposed of by MDB employees during the course of routine maintenance spanning more than a year. (AA Vol. 12 PG 1977). And, far from willful, the district court concluded that MDB did not intentionally dispose of the components in order to harm Versa, nor did its employees act with malevolence. (AA Vol. 12 PG 1977). Instead, the district court characterized MDB's actions as "complicit of benign neglect and indifference to the needs of Versa regarding discovery." (*Id.*). Absent a finding that MDB intentionally or purposefully attempted to impede the anticipated litigation, as was the circumstance in *Stubli,* the *Stubli* decision is distinguishable.

Similarly, in *Zenith*, this Court affirmed the judgment of the district court

which ordered expert testimony excluded as a sanction for the destruction of *the* evidence at issue, a television set. In *Zenith*, an insurer sought subrogation against the manufacturer of a television set for a fire in the insured's home. 103 Nev. at 649, 747 P.2d at 912. The insurer's claims all revolved around whether the fire originated in the television set. *Id.* at 651. And, as was the circumstance in *Stubli*, an expert witness hired in anticipation of litigation made the decision to dispose of the evidence. *Id.* at 650. In affirming the district court order, this Court explained that the destruction of the television set "had the effect of reserving to itself all expert testimony based upon examination of the television set," because the insurer's expert was the only expert who had the opportunity to examine the television set. *Id.* at 652.

By contrast, MDB's strict products liability action against Versa alleged that the Versa valve was unreasonably dangerous and defective in design due to its tendency to self-activate when exposed to external electromagnetic fields. (AA Vol. 8 PGS 1156 – 1159 and 1211 – 1212). Here, like the trailer in *Stubli* and the television set in *Zenith*, the Versa valve is *the* evidence at issue, not the collateral component parts. And, there is no dispute that the Versa valve was preserved and had been available to Versa and its expert throughout the pendency of the instant litigation. Unlike the Versa valve, which is central to the strict products liability action, the plug, two sockets and two cords were not relevant to the claim. And,

they were disposed of negligently during the course of routine maintenance by MDB employees, not willfully at the direction of professionals hired in anticipation of litigation. As such, the holdings of *Stubli* and *Zenith* are easily distinguishable.

This Court's more recent holding in *Bass-Davis*, however, is controlling and it was an abuse of the district court's discretion to fail to apply this clarifying precedent which limits the nature of sanctions to be imposed for negligent or willful spoliation of evidence. 122 Nev. 442, 134 P.3d 103 (2006). In *Bass – Davis*, this Court concluded that the appropriate sanction for the negligent loss of an arguably relevant surveillance video in a slip and fall action was an adverse inference jury instruction. 122 Nev. at 447, 134 P.3d at 106. This Court reasoned regarding the issue of lost evidence:

> In considering the issue of lost evidence, we necessarily revisit our 1997 decision in *Reingold v. Wet 'n Wild Nevada, Inc.* (Footnote omitted). In that case, we determined that the district court should have given a jury instruction allowing an adverse inference for lost evidence, as relevant evidence was spoliated when Wet 'n Wild followed its policy of routinely destroying records each season. We further concluded that Wet 'n Wild's evidence destruction was "willful" as defined by NRS 47.250(3), thus creating a rebuttable presumption that the evidence "'would be adverse if produced." (Footnote omitted).
>
> Given that *Reingold* seemingly embraced both an inference created by evidence not produced and a

> rebuttable presumption for evidence willfully suppressed, we take this opportunity to clarify that decision and conclude that a permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed. The NRS 47.250(3) presumption, on the other hand, applies only in cases involving willful suppression of evidence, in which the party destroying evidence intends to harm another party, i.e., to obtain a competitive advantage in the matter. In this case, involving negligent loss of evidence, the district court abused its discretion by refusing to issue an adverse inference instruction or to consider other appropriate sanctions. We therefore reverse the judgment and order of the district court and remand for a new trial consistent with this opinion.

122 Nev. at 445, 134 P.3d at 105 (emphasis added).

Under any fair reading of *Bass-Davis*, therefore, the only appropriate sanction, if any, for MDB's failure to preserve the plug, two sockets and two cords in question would be an adverse inference jury instruction. The district court made clear that it "does not find MDB intentionally disposed of the components in order to harm Versa," but it "does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery." (AA Vol. 12 PG 1977).

As the evidence here at most points to the mere negligence of MDB, any sanction with a greater consequence than an adverse inference jury instruction warrants reversal. Certainly the district court's issuance of terminating sanctions pursuant to NRCP 37(b)(2), based solely on its assessment of the factors set forth in *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88, 787 P.2d 777 (1980),

constituted an abuse of discretion. This Court may seize the opportunity to clarify the scope of its prior decisions and establish firm guidance for evidentiary spoliation motions.

B. The District Court Abused Its Discretion in Finding the *Young v. Ribeiro* Factors Justified a Sanction of Dismissal.

The district court's sanctions order is based on a false syllogism. The careful examination it purports to take of the factors set forth in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) starts with the false premise that the electrical components were critical to Versa's defense and ends with the improperly drawn conclusion that their pre-litigation disposal as a result of routine maintenance impacted Versa's ability to defend itself in the litigation.

In fact, as acknowledged in the district court's sanction order, Versa initial and primary defense to MDB's cross-claim for contribution, as well as throughout the underlying personal injury action, was that MDB "negligently operated, maintained, owned, serviced and/or entrusted the subject trailer…." (AA Vol. 12 PG 1972). The argument that electrical components of the truck and trailer may have malfunctioned to cause the trailer to dump was a clear afterthought, upon receipt of records showing the routine maintenance. Versa never actually argued, and more importantly never actually produced evidence to establish, that this

evidence was, in fact, the "critical evidence" they claimed. (AA Vol. 12 PG 1973).

And, the district court in turn, never made any such finding in its sanction order. Instead, the district court simply confirmed its finding of the disposal of the electrical components and proceeded with its faulty analysis of the *Young v. Ribeiro* factors. And, Versa reiterates nothing more than the same conclusions in its Answering Brief. Reviewing the *Young v. Ribeiro* factors, however, starting with the true premise that there is no finding, or evidence to support a finding, that the electrical components were material to Versa's defense, to the contrary the evidence deduced at the evidentiary hearing showed they were immaterial to Versa's defense, clearly illustrates the district court's abuse of discretion.

1. The Willfulness Factor.

Here, the district court stated it "does not find MDB intentionally disposed of the components in order to harm Versa" and that at most "MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery in this action." (AA Vol. 12 PG 1977). The district court applied a criminal law standard of willfulness, which simply requires a willingness to commit an act, when the heightened standard for spoliation sanctions requires willful noncompliance with discovery requirements. *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). This Court has recognized

that courts have the inherent equitable power to dismiss actions, but only where that discretion is exercised for "abusive litigation practices." *Young v. Ribeiro*, 106 Nev. at 92, 787 P.2d at 779 (citation omitted). Where, in the instant case, no evidence that was actually relevant was lost, and where no intent to harm Versa's defense was shown, the first *Young v. Ribeiro* factor fails.

2. The Possibility of a Lesser Sanction, Relative Severity of the Sanction and Feasibility and Fairness of a Lesser Sanction Factors.

In disregarding other sanction options, the district court summarily concluded that it "can conceive of no other sanction [than dismissal] which would be appropriate under the circumstances," again without a finding or evidence that the electrical components at issue were actually relevant to Versa's defense. (AA Vol. 12 PGS 1978 and 1980). The district court further extrapolated that Versa was therefore "deprived" of "any ability to prove its case." (Emphasis in original.) (Vol. 12 PG 1980). In making this finding, the district court ignored the fact that it had previously recognized Versa's multiple theories of defense, and it summarily disregarded the case law on spoliation instructions, despite their inclusion and obvious applicability. The district court abused its discretion when, instead of actually applying the standards for a rebuttable presumption or an adverse inference, it simply disposed of them in favor of dismissal. Accordingly, the second, third and fifth *Young v. Ribeiro* factors fail.

3. The Policy Factors.

Similar to its spoliation sanctions discussion, the district court discusses the factors of favoring adjudication on the merits and the need to deter future discovery abuses, but it never actually undertakes the analysis. The district court, again based on the false premise that electrical components that were material to Versa's defense were lost, reaches the conclusion that Versa could not place its case before the jury or have it evaluated. Far from balancing the sixth and seventh *Young v. Ribeiro* factors, the district court abused its discretion by simply denying their application outright in favor of dismissal.

C. The District Court Abused Its Discretion By Failing to Apply the Relevant *Frazier* Factors and Awarding Versa $12,206.49 in Excess Expert Witness Fees.

A district court's decision to award $13,709.49 in expert witness fees in the underlying case on appeal in Case No. 76395, which is $12,206.49 above the $1,500 presumed statutory cap, is reviewed for an abuse of discretion. *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 373 (Nev. Ct. App. 2015). In making such an award to Versa specifically for the services of one expert, Garrick Mitchell ("Mitchell"), the district court abused its discretion by failing to mention, let alone consider, the factors set forth in *Frazier*. (AA Vol. 18 PG 3009). Contrary to Versa's Answering Brief, the entirety of the district court's analysis consisted of one paragraph in which it spoke generally of Versa's need for an expert to disprove

MDB's theory that the valve manufactured by Versa malfunctioned and extrapolated the conclusion that Versa's retention of Mitchell was "not unreasonable." (*Id.*). In so doing, the district court failed to provide any "express, careful and preferably written explanation" of any analysis of the "factors pertinent to determining the reasonableness" of the excess expert witness fees requested by Versa. *Frazier*, 357 P.3d at 377.

Before reaching any conclusion that special circumstances exist to deviate from the $1,500 statutory cap, the district court was required to specifically evaluate the factors pertinent to Versa's request from and among the following several factors: "(1) the importance of the expert's testimony to the party's case; (2) the degree to which the expert's opinion aided the trier of fact in deciding the case; (3) whether the expert's reports or testimony were repetitive of other expert witnesses; (4) the extent and nature of the work performed by the expert; (5) whether the expert had to conduct independent investigations or testing; (6) the amount of time the expert spent in court, preparing a report, and preparing for trial; (7) the expert's area of expertise; (8) the expert's education and training; (9) the fee actually charged to the party who retained the expert; (10) the fees traditionally charged by the expert on related matters; (11) comparable experts' fees charged in similar cases; and (12) if an expert is retained outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert

where the trial was held. *Frazier*, 357 P.2d at 377-78 (numbers in parentheses added). No such evaluation took place, however; the district court's order at best simply identified the amount of expert fees Versa requested and the performance of "extensive analysis and evaluation, which required two site inspections." (AA Vol. 18 PG 3009).

As MDB argued in its motion to retax costs below, none of the pertinent *Frazier* factors, had they been applied, justified the award of Versa's requested $13,706.49 in expert witness fees. (AA Vol. 14 PGS 2414 – 2416). Specifically, Mitchell's testimony did not aid the Court in deciding the case. Mitchell's testimony was repetitive of MDB's expert, Dr. Bosch. Mitchell did not conduct any independent testing. As a mechanical engineer, Mitchell did not possess the requisite knowledge, education or training in the relevant areas of electrical engineering and electricity to warrant any additional award beyond the presumed statutory cap. And, no evidence was deduced concerning fees Mitchell traditionally charged for related matters or fees charged by comparable experts for similar cases.

The district court abused its discretion by not expressly or carefully evaluating the *Frazier* factors and awarding Versa expert witness fees in excess of the presumed statutory cap totaling $12,206.49, which amount should be reversed.

D. The District Court Abused Its Discretion by Awarding Versa Up to $43,488.02 in Unjustified Costs.

The district court awarded Versa a total of $43,488.02 in costs in the underlying cases on appeal in Case Nos. 76395, 76396 and 76397. (AA Vol. 18 PG 3011; AA Vol. 18 PG 3021; and AA Vol. 18 PG 3032). Versa argues in its Answering Brief that these respective cost awards were all proper because it was a prevailing party as to the costs in question and/or the costs in question did not pre-date its offer of judgment and/or the costs in question were specifically taxable. Versa, however, misstates the law in relying on each of these arguments.

It is well-settled in Nevada that costs cannot be awarded to a party unless that party is the "prevailing party" in an action. NRS 18.020; *Nevada N. R. R. v. Ninth Judicial Dist. Court*, 51 Nev. 201, 204-05, 273 P. 177, 178 (1928) (in determining which party is the "prevailing party," courts must primarily consider "the end attained"). In the instant matter, MDB settled all of the Plaintiffs' causes of action without any contribution from Versa. MDB thereafter pursued a cross-claim against Versa under a strict products liability theory, i.e. the uncommanded activation of the Versa valve when exposed to external electromagnetic fields. Costs pertaining, then, to the depositions of the personal injury plaintiffs and their authorizations for medical records related only to their case-specific claims and in no way related to whether the Versa valve was defective and subjected Versa to

MDB's cross-claim for Contribution, the only claim upon which Versa prevailed. As such, the district court abused its discretion in awarding costs on this basis.

Additionally, Versa based all of its costs claims "[u]pon Versa's Offer of Judgment under NRCP 68," and related documents. (AA Vol. 14 PG 2321). And, the sworn statement of Versa's counsel placed all of the costs being sought in the time period after it served MDB with an Offer of Judgment on May 4, 2017. (AA Vol. 13 PG 2006). Versa should not have been allowed to ignore its prior filings, completely contradict itself in opposition to MDB's motion to retax and settle costs, and make an eleventh-hour argument for the application of NRS 18.020. Versa's offers of judgment were the stated bases for its entitlement to costs, and, as such, the district court abused its discretion by awarding costs incurred prior to serving its offers of judgment.

Finally, statutes permitting an award of costs must be strictly construed. *Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998). NRS 18.005(2) limits taxable costs for depositions to reporters' fees and the cost for one copy of each deposition. The district court abused its discretion in granting Versa's request for costs and denying MDB's motion to retax and settle costs for courier fees for the delivery of depositions, compact disc fees, exhibit fees, and other miscellaneous fees not provided for in the applicable statute.

For any one or more of the reasons stated above, the total amount of costs of $43,488.02 awarded by the district court Versa must be reversed.

E. The District Court Did Not Abuse Its Discretion By Denying Versa's Motion for Attorneys' Fees in Its Entirety.

1. The District Court Correctly Determined Not to Sanction MDB for Its "Benign" Actions.

Additional sanctions by way of attorneys' fees against MDB were not warranted pursuant to NRCP 37, where its failure to retain certain electrical components was in no way willful or intended to harm Versa. The district court had already, albeit improperly, imposed the most severe sanction available to it, case ending sanctions against MDB, based upon its analysis of the factors set forth in *Young v. Johnny Ribeiro Building Inc.,* 106 Nev. 88, 787 P.2d 777 (1990). To impose additional punishment in the form of an award of nearly $230,000.00 in attorneys' fees to Versa, based upon the specific facts and circumstances surrounding MDB's failure to preserve evidence, would have been patently unjust. As stated in its order: "Although dismissal of MDB's claim against Versa was warranted, it was a severe sanction. Further sanctions would be unjust." (AA Vol. 18 PG 3007). The district court concluded that MDB's failure to preserve the component parts at issue was the result of "benign neglect and indifference to the needs of Versa regarding discovery in this action." (AA Vol. 12 PG 1977). "Benign neglect" and "indifference" to Versa's needs, while regrettable, is not the

measure of willful noncompliance required for the magnitude of further sanctions requested by Versa under NRCP 37. *See e.g. GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

Further, NRCP 37(b) does not mandate the imposition of attorney's fees and costs. Instead, the applicable provision states in pertinent part:

> (C) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

NRCP 37(b)(2)(C) (emphasis added). Here, as the district court had already entered case concluding sanctions against MDB for its failure to preserve evidence, further significant sanctions would have been unjust and frankly, draconian, particularly in light of the substantial sums of money MDB alone paid to settle the underlying personal injury actions and relieve Versa of its independent tort liability.

Finally, the cases Versa offered for the district court's consideration were either inapposite or in no way reflective of the facts and circumstances at issue in the case, where the failure to preserve evidence was in no way an effort to hamper the litigation. For example, in *Skeen v. Valley Bank*, 89 Nev. 301, 304, 511 P.2d 1053 (1973), attorney's fees were awarded pursuant to a contractual provision, not

as a sanction under NRCP 37. And, in *Skeen*, *Schatz v. Devitte*, 75 Nev. 124, 335 P.2d 783 (1959), and *Foster v. Dingwall*, 126 Nev. 56, 227 P.3d 1042 (2010), the misconduct sanctioned by the court was intentional, willful and specifically intended to hinder the litigation. As the district court correctly concluded, the MDB employees who disposed of certain component parts did so in the course of the routine maintenance and not with any malicious purpose. The district court properly denied Versa's request for further sanction by way of attorney's fees on this basis.

2. The District Court Correctly Concluded Versa Was Also Not Entitled to Attorney's Fees Pursuant to NRCP 68.

When an offeree fails to obtain a more favorable judgment than an amount offered pursuant to NRCP 68, an award of attorneys' fees and costs to the offeror is not automatic and is soundly within the discretion of the trial court. *Trustees of Carpenters v. Better Bldg. Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985) (quoting *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), holding that the purpose of Rule 68 "is not to force plaintiffs unfairly to forego legitimate claims"). Indeed, when considering whether an award of attorneys' fees and costs should be granted in such instances, Nevada courts must carefully evaluate the four-factor test set forth by the Nevada Supreme Court in *Beattie*, to wit:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was

> reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

99 Nev. at 588-89, 668 P.2d at 274; *see also Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 323, 890 P.2d 785, 789 (1995).

After weighing the foregoing factors, the district court may, where warranted, award up to the full amount of the fees and costs requested; on the other hand, where the court has failed to consider these factors and has made no findings based on evidence that the attorneys' fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested. *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274. Furthermore, in *Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424 (2001), the Nevada Supreme Court reasoned in affirming the lower court's decision not to award attorneys' fees:

> Even though the district court did not explicitly address each factor separately in its order, where it considered each of the Beattie factors, the district court's refusal to award attorneys' fees was not an abuse of discretion.

117 Nev. at 13-14, 16 P.3d at 429. Utilizing the *Beattie* factors in conjunction with the facts and circumstances of the instant case, this district court correctly denied Versa's motion for attorneys' fees in its entirety.

a. MDB's Contribution Claim Was Brought in Good Faith.

Versa argued without basis that MDB's cross-claim for contribution had no factual or legal support. The district court, however, reached a different conclusion. After hearing the testimony of five key witnesses at the evidentiary hearing, the Court expressed in its order: "The Court's decision regarding the issue presented in the Motion is not predicated on who has the 'stronger case' or the 'better expert' at the evidentiary hearing. If this were the analysis the Court would agree with MDB: Dr. Bosch is a very credible witness and it is likely MDB has the more compelling argument to present to the jury." (AA Vol. 12 PG 1980).

Far from a frivolous suit, MDB's cross-claim based on a theory of strict products liability appropriately sought contribution for the defect in the Versa solenoid valve which caused the subject truck and trailer to dump its load of gravel on the highway. The inadvertent activation of the Versa solenoid valve caused the traffic accidents that prompted the underlying personal injury claims, which MDB alone resolved. The testimony of MDB's experts, Dr. David Bosch and Erik Anderson, clearly set forth the only viable theory for consideration by the trier of fact, i.e. that the Versa valve inadvertently activated when exposed to external electromagnetic fields. Versa's expert, Garrick Mitchell, offered no opinion as to the cause of the subject incident. There was no legitimate dispute that MDB

brought its cross-claim in good faith and that Versa offered no legitimate argument to the contrary.

b. Versa's Offers of Judgment for $7,000 Were Grossly Unreasonable in Timing and Amount and Made in Bad Faith.

Versa argued below that its service of seven $1,000.00 offers of judgment, for a total offer for all of the personal injury cases of $7,000.00, was the basis upon which the district court should have awarded it attorneys' fees of nearly $230,000.00. (AA Vol. 13 PGS 2003 – 2019). However, Versa's offers of judgment amounted to less than one-half of one percent (0.5%) of the total settlement amount MDB paid to plaintiffs to settle the nine underlying personal injury cases. As MDB argued, it settled the underlying personal injury cases for less than the total amount of the plaintiffs' claims. Versa's argument that its offers of judgment totaling $7,000.00 were reasonable to resolve claims with risk potential in the multi-millions of dollars was untenable. The $7,000.00 total offer would not compensate MDB for the costs associated with the case, let alone cover the personal injury claims of numerous individuals engaged in multiple separate lawsuits.

Versa's offers of judgment were also unreasonable with respect to their timing. Versa served its offers of judgment on May 4, 2017, the day before the scheduled mediation of this matter. Then, rather than participate in the mediation

in good faith, as it claimed, Versa merely appeared. At the mediation, Versa refused to negotiate or to contribute to the resulting settlement, and thereafter attempted to blame MDB for its failure to also resolve the cross-claim prior to trial. In reality, Versa's offers of judgment were properly seen as little more than a tactic to avoid meaningful participation in the mediation process, and as such, were unreasonable in timing.

For all of these reasons, the district court correctly concluded that Versa's offers of judgment were unreasonable in amount and timing and made in bad faith.

c. MDB's Decision to Reject Versa's Offers of Judgment in the Total Amount of $7,000 Was Reasonable and in Good Faith.

MDB's rejection of the offers of judgment was neither grossly unreasonable nor in bad faith, not only for the reasons stated above, but also based upon MDB's reasonable assessment of the strengths and weaknesses of its case. As the district court recognized in its sanctions order "Dr. Bosch is a very credible witness and it is likely MDB has the more compelling argument to present to the jury." (AA Vol. 12 PG 1980). Indeed, MDB invested significant resources to identify what caused not one, but two inadvertent activations of the Versa valve with different MDB drivers only minutes apart, on the same day, in the same location, and under the same circumstances. Dr. Bosch and Mr. Anderson, based on significant investigation and testing, opined that the only logical explanation for these

inadvertent activations was a defect in the design of the Versa valve which rendered it susceptible to inadvertent activation. And, Versa's expert offered no scientific explanation for the failures of the Versa solenoid valve. Contrary to Versa's assertions, MDB had ample evidence to support its cross-claim, while Versa provided little by way of defense other than to seek to exploit the alleged destroyed evidence.

Given this context, i.e. Versa's combined offers of judgment for $7,000.00, which amounted to less than one half of one percent (0.5%) of the total amount expended by MDB to settle the underlying personal injury claims, MDB was justified in not only rejecting them, but also considering them extended in bad faith. Accordingly, the district court properly determined MDB's decision to reject Versa's offers of judgment was reasonable and found the third *Beattie* factor in MDB's favor.

d. Versa's Purported Attorneys' Fees and Costs Were Grossly Unreasonable and Not Justified.

As regards the final *Beattie* factor, the district court correctly determined Versa's purported attorneys' fees were unreasonable and not justified. MDB did not dispute the significant amount of work performed by Versa's counsel in the instant matter, indeed, its counsel expended virtually identical effort. It was because MDB knew the monetary cost of that effort, however, that it challenged

the amount requested. During the time period at issue, MDB incurred significantly less in attorney fees, specifically more than 60% less than the amount claimed by Versa. And, it did so while charging nearly identical rates for its attorneys. Absent some clear explanation as to why Versa incurred so much more in attorneys' fees than MDB for essentially the same services at the same rates, the amounts claimed Versa were understandably rejected as unreasonable and not justified. Thus, the fourth *Beattie* factor also weighed in MDB's favor and against any award of attorneys' fees to Versa pursuant to Rule 68.

III.

CONCLUSION

For all of the foregoing reasons, MDB respectfully requests that this Court reverse the district court's order granting Versa's motion to strike, inclusive of terminating sanctions, and remand the matter for further proceedings consistent with this Court's holding in *Bass-Davis*, as well as for resolution of all motions under submission and for trial on the merits.

Additionally, MDB requests that, in the event this Court's determination does not render moot the district court's subsequent orders involving attorneys' fees and costs, this Court shall then affirm the district court's denial of Versa's request

for attorneys' fees and further reduce Versa's costs as stated herein.

Dated this 4th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this Reply Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,239 words.

3. Finally, I hereby certify that I have read this Reply Brief and, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of April, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this 4th day of April, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL** by the method indicated to the counsel stated below:

- ☐ **BY U.S. MAIL**: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.

- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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