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8 Attorneys Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC, et. al.

16 Defendants.

17 AND ALL RELATED CASES.
18

Case No. CV16-00976

Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S REPLY
TO MDB'S OPPOSITION TO ITS
MOTION FOR ATTORNEY'S FEES AND
COSTS PURSUANT TO NRCP 37 AND
NRCP 68

19 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
20 and through it's attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
21 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby files
22 the instant Reply to MDB's Opposition to its Motion For Attorney's Fees and Costs
23 Pursuant to NRCP 37 and NRCP 68.

24 This Reply is made and based upon the attached Memorandum of Points and
25 Authorities, the Exhibits, NRCP 37, NRCP 68, NRS 18.010, NRS 18.110, NRS 18.020,
26 NRS 18.005, the pleadings and papers on file in this matter, and upon such oral
27 argument as the Court may entertain at the hearing on this Motion.
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. LEGAL ARGUMENT

3 A. Awarding VERSA Attorney's Fees and Costs Pursuant to NRCP 37 is Not
4 Unjust

5 First, MDB's Opposition ignores the Court's order in which it defined the term
6 "willfulness:"

7
8 In *Childers v. State*, 100 Nev. 280, 283, 680 P. 2d 598, 599 (1984),
9 the Nevada Supreme Court found the term willful, "implies simply a
10 purpose or willingness to commit the act or make the omission in
11 question. The word does not require in its meaning any intent to
12 violate law, or to injure another, or to acquire an advantage."
Willfulness may be found when a party fails to provide discovery
and such failure is not due to an inability on the offending party's
part. *Havas v. Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706,
708 (1980). The Nevada Supreme Court has not opined that it is
necessary to establish wrongful intent to establish willfulness.

13 See, December 8, 2017, Order granting VERSA's Motion to Strike MDB's Cross-Claim at
14 P. 7:20-27.

15 As such, and contrary to MDB's Opposition, the Court did find that MDB willfully
16 spoliated critical evidence. Further, as addressed by the Court, willfulness does not
17 require that MDB actually had any intent to harm VERSA; therefore any such argument is
18 irrelevant. Additionally, the Court held that MDB's actions "halted the adversarial
19 process." See, December 8, 2017 Order granting VERSA's Motion to Strike MDB's
20 Cross-Claim at P. 10:8-9.

21 Second, MDB fails to provide any statutory authority to support it's argument that
22 awarding attorney's fees and costs for its willful spoliation of evidence is unjust. Just
23 because MDB alone settled the Plaintiffs' cases (after refusing all of VERSA's numerous
24 settlement overtures) does not provide any factual or legal support that granting VERSA
25 attorney's fees and costs is unjust. Conversely, it would be unjust for the Court not to
26 award VERSA attorney's fees and costs, because MDB knew prior to filing its Third-Party
27 Complaint that it destroyed crucial evidence VERSA would need in order to defend its
28 case. In light of the willful destruction of evidence, MDB sued VERSA requiring them to

1 spend numerous hours and money in order to defend the case to the best of its ability.

2 The plain text of NRCP 37 does not require that MDB act with a malicious purpose
3 in order to award attorney's fees and costs. It simply requires the Court to award
4 attorney's fees and costs in addition to sanctions such as striking a party's complaint, the
5 exact sanction in this litigation. See, NRCP 37. As such, the Court should award VERSA
6 all of its attorney's fees and costs pursuant to NRCP 37 due to the Court Striking MDB's
7 Cross-Claim.

8 B. VERSA is Also Entitled to an Award of Attorney's Fees and Costs Pursuant
9 to NRCP 68

10 1. MDB Should Pay VERSA's Attorney's Fees and Costs Because its
11 Third-Party Complaint Was Not Brought and/or Maintained in Good
Faith

12 The intent of VERSA's underlying Motion is not to argue the "what if" scenario that
13 could have occurred if MDB had not spoliated critical evidence. Although MDB wishes it
14 could go back in time and change the spoliation, they cannot. As such, this factor is
15 simple - MDB knew prior to adding VERSA as a party in the action that it had destroyed
16 crucial evidence that VERSA needed to prove its defense to the cross-claims (as well as
17 evidence MDB needed to prove its own claims). Knowing that it had "left all of the 'cards'
18 in MDB's hands and left VERSA with nothing other than a theory it could neither prove
19 nor disprove," MDB filed a suit against VERSA. See, December 8, 2017, Order granting
20 VERSA's Motion to Strike MDB's Cross-Claim at P. 10:9-10. As such, there is ample
21 evidence that MDB's Third-Party Complaint was not brought and maintained in good faith.
22 As such, this factor weighs heavily toward awarding VERSA's attorneys' fees and costs
23 incurred after May 4, 2017, for rejecting VERSA's good faith offers of judgment.

24 2. VERSA's Offers of Judgment Was Reasonable in Both Time and
25 Amount and Made in Good Faith

26 VERSA served its offers of judgment on MDB prior to MDB settling the Plaintiff's
27 claims and after MDB's PMK's testified that it had destroyed critical evidence that VERSA
28 would need to defend MDB's claims. At the time of the offer of judgment, VERSA was

1 aware that MDB and VERSA's expert found no mechanical or design defect with the
2 subject valve and that MDB's actions prohibited VERSA's ability to adequately defend
3 itself in the subject litigation. As such, VERSA believed (and still believes) that it should
4 not need to offer MDB any money nonetheless the large amount it offered. However,
5 VERSA wanted to "buy its peace" to avoid costly litigation and negative publicity. MDB
6 clearly had a different agenda.

7 Lastly, contrary to MDB's Opposition, VERSA did meaningfully participate in
8 mediation. In fact, two business days after mediation, VERSA and RMC LAMAR were
9 actually able to offer the settlement authority in which MDB demanded from them during
10 mediation. However, MDB reneged and refused to even discuss settlement. That was
11 grossly unreasonable.

12 3. MDB's Rejection of VERSA's Reasonable Offer of Judgment was
13 Grossly Unreasonable

14 MDB again attempts to bring up the strengths and weakness of the underlying
15 case in support of it's reasoning for rejecting the offer of judgment. However, MDB's
16 arguments are completely irrelevant, because all of the arguments are based on a "what
17 if" case. It is easy to argue the strengths of any given case in hindsight, when your client
18 spoliated highly relevant evidence. The Court already ruled that MDB's actions prohibited
19 a jury from being able to evaluate VERSA's case because it could not test the actual
20 components on the subject truck and trailer at the time of the subject incident giving MDB
21 an unfair advantage in the litigation. As such, MDB's rejection was grossly unreasonable
22 because it was aware prior to filing suit against VERSA that its actions would have
23 consequences, including the Court striking it's Third-Party Complaint. Consequently, this
24 factor strongly favors awarding VERSA all of its requested attorney's fees and costs.

25 4. VERSA's Attorney's Fees and Costs Following the Offer of Judgment
26 are Reasonable and Justified in Amount

27 VERSA is perplexed that MDB argues that \$731.00 in attorney's fees is
28 unreasonable. MDB cites to one example as to why the \$731.00 in attorneys fees is

1 unreasonable. The example cited is for the attorney to review a document that was filed
2 in this matter. As MDB is aware, this case has not been consolidated with the other
3 related matters and different documents are filed in different cases. As the attorney on a
4 case, it is his or her job to look at the documents which are filed. MDB's argument is
5 either suggesting that the attorney not read and review documents filed in a case or
6 suggest that the attorney should do the work but just do it for free. Either way MDB's
7 argument is nonsensical. Further, the attorney only billed a .1 for review of the document
8 which is the lowest billing unit available.

9 The amount of VERSA's attorney's fees and costs are reasonable given MDB's
10 untenable legal position and destruction of critical evidence. VERSA is entitled to an
11 award of its attorney's fees and costs after May 4, 2017 through the present (and costs
12 from the case inception to the present as the prevailing party). Consequently, Defendant
13 seeks an award of \$731.00 in attorney's fees and \$413.00 in costs, totaling \$1,144.00.

14 II. CONCLUSION

15 For the foregoing reasons, VERSA requests an award of its reasonable attorney's
16 fees and costs totaling \$1,144.00 (\$731.00 in attorney's fees and \$413.00 in costs)
17 pursuant to NRCP 37 and NRCP 68. Furthermore, VERSA requests that this Court
18 award the attorney's fees and costs incurred in bringing the instant Motion. VERSA will
19 supplement the briefing with an affidavit regarding these additional fees and expenses.

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DATED this 12th of March, 2018.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th of March, 2018, a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 was served electronically via the Court's e-filing system addressed as follows:

Matthew C. Addison, Esq. Jessica L. Woelfel, Esq. McDONALD CARANO WILSON LLP 100 W. Liberty St., 10 th Floor Reno, NV 89501 RMC LAMAR HOLDINGS, INC.	Nicholas M. Wieczorek, Esq. Jeremy J. Thompson, Esq. CLARK HILL PLLC 3800 Howard Hughes Pkwy, Ste. 500 Las Vegas, NV 89169 Attorneys for MDB TRUCKING, LLC and DANIEL ANTHONY KOSKI
--	---

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

EXHIBIT A-2

FILED
Electronically
CV16-00976
2018-03-01 02:30:05 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6557212 : yvilorla

EXHIBIT A-2

TMDRY2
(By Client)

Timekeeper Time Diary
From 5/04/17 through 12/31/17

12/18/2017 2:11:18 PM howland

Page: 5

*Public/adc-sqln01#acct/LDBData

Selections: Clint-Matter: 27350-1536 to 27350-1536

Billed and Unbilled

Timekeeper: DBA1 David Avakian

Date	Description	Hours	Amount	Invoice #
C: 27350	Hartford Insurance Company			
M: 1536	Fitzsimmons, Ernest & Carol v Versa Products, Co			
5/04/17	Fact Investigation/Development: Appear For/Attend: Attend conference call with adjuster K. Decker re	.30	64.50 B	1909228
5/04/17	Fact Investigation/Development: Plan & Prepare For: Continued detailed legal analysis of all in preparation to attend conference call with adjuster K. Decker re	.50	107.50 B	1909228
5/04/17	Fact Investigation/Development: Review/Analyze: Detailed legal analysis of the redacted schematic materials from Versa (58 pages)	.50	107.50 B	1909228
5/04/17	Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel for Dragon	.10	21.50 B	1909228
5/05/17	Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of correspondence from B. Brown, Esq. re status of extending date for opposition to motion for summary judgment	.10	21.50 B	1909228
5/08/17	Fact Investigation/Development: Draft/Revise: Finalize correspondence to adjuster K. Decker re	.40	86.00 B	1909228
5/08/17	Written Discovery: Draft/Revise: Finalize Versa's amended responses to MDB's first set of requests for production of documents	.30	64.50 B	1909228
5/09/17	Written Motions and Submissions: Review/Analyze: Detailed legal analysis of MDB's motion for continuance of the hearing on motion for summary judgment with attached exhibits and declarations	.60	129.00 B	1909228
5/09/17	Fact Investigation/Development: Review/Analyze: Initial receipt, review and response to correspondence to and from adjuster K. Decker re	.20	43.00 B	1909228
5/09/17	Depositions: Review/Analyze: Initial receipt, review and legal analysis of the PMK deposition notice for RMC Lamar	.10	21.50 B	1909228
5/09/17	Fact Investigation/Development: Review/Analyze: Detailed legal analysis of the deposition of T. Shane and P. Bigby in order to analyze additional spoliation of evidence grounds motions against MDB	1.60	344.00 B	1909228
5/09/17	Expert Discovery: Research: Detailed legal analysis of NRCP 26 and cases regarding trade secrets in order to analyze motion for protective order re schematics of valves	1.40	301.00 B	1909228
5/09/17	Discovery Motions: Review/Analyze: Continued detailed legal analysis of MDB's PMK			

Blank = Billable/Unbilled * = From Time Entry E=From Error File B = Billed N = Non-billable T = Total W = Written Off

EXHIBIT A-1

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Clerk of the Court
Transaction # 6557212 : yvilorla

EXHIBIT A-1

TMDRY1
(By Date)

Timekeeper Time Diary
From 5/04/17 through 1/22/18

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Selections: Clint-Matter: 27350-1553 to 27350-1553

Billed and Unbilled

Timekeeper: DBA1 David Avakian

Date	Description	Hours	Amount	Invoice #
5/04/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel for Dragon	.10	21.50 B	1909232
	Day Total:	.10	21.50 B	
5/11/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Discovery Motions: Draft/Revise: Finalize motion for protective order	.50	107.50 B	1909232
	Day Total:	.50	107.50 B	
5/15/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Dispositive Motions: Draft/Revise: Finalize Motion for spoliation sanctions against MDB	.50	107.50 B	1909232
	Day Total:	.50	107.50 B	
	MONTH TOTAL:	1.10	236.50 B	
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6/06/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission re motion for summary judgment	.20	43.00 B	1909232
	Day Total:	.20	43.00 B	
6/22/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Written Motions and Submissions: Review/Analyze: Detailed legal analysis of Plaintiff's motion for determination of good faith settlement	.30	64.50 B	1909232
	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of non-opposition to motion for good faith settlement	.10	21.50 B	1909232
	Day Total:	.40	86.00 B	
6/28/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order granting MDB's request for a continuance to brief Opposition to Versa's motion for summary judgment	.10	21.50 B	1909232
	Day Total:	.10	21.50 B	
	MONTH TOTAL:	.70	150.50 B	
		.00	.00 N	
		.70	150.50 T	
7/07/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel	.10	21.50 B	1964174

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EXHIBIT A

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CV16-00976
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Jacqueline Bryant
Clerk of the Court
Transaction # 6557212 : yvitoria

EXHIBIT A

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1. I am an attorney licensed to practice law in the State of Nevada and am an associate in the law firm of Clark Hill PLLC, attorneys for Defendant/Cross-Claimant MDB Trucking, LLC

3. I make this Declaration in support of Cross-Claimant MDB Trucking LLC's Opposition to Cross-Defendant Versa Products Company, Inc.'s Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68 ("Opposition").

5. Attached hereto as **Exhibit A-2** is a true and correct copy of the pertinent part of Exhibit 3 to Versa's Motion filed in *Fitzsimmons v. MDB Trucking LLC et al.*, Case No. CV15-02349.

///

1 I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045)¹,
2 that the foregoing is true and correct.

3 Executed this 1st day of March, 2018.

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6 COLLEEN E. MCCARTY

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28 ¹NRS 53.045 Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury.

1 **2645**

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16 *Attorneys for Cross-Claimant*

17 *MDB Trucking, LLC*

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

20 GENEVA M. REMMERDE

21 Plaintiff,

22 vs.

23 MDB TRUCKING, LLC, et al

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV16-00976

Dept. No.: 10

**CROSS-CLAIMANT MDB TRUCKING
LLC'S OPPOSITION TO CROSS-
DEFENDANT VERSA PRODUCTS
COMPANY, INC.'S MOTION FOR
ATTORNEYS' FEES AND COSTS
PURSUANT TO NRCP 37 AND NRCP 68**

26 Cross-Claimant, MDB Trucking, LLC ("MDB"), by and through its counsel of record
27 Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and Colleen E. McCarty, Esq. of the
28 law firm of Clark Hill PLLC, hereby files this Opposition to Cross-Defendant Versa Products
Company, Inc.'s Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68
("Opposition" and "Motion" respectively).

1 This Opposition is made and based on the following Memorandum of Points and
2 Authorities; the pleadings and papers on file herein; and any oral argument the Court may
3 permit at the hearing of this matter.

4 Dated this 1st day of March, 2018.

5 CLARK HILL PLLC

6
7 By: Colleen E. McCarty
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16 Telephone: (702) 862-8300
17 Attorneys for Cross-Claimant
18 MDB Trucking, LLC

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 I.

21 **INTRODUCTION**

22 As set forth in greater detail in the Argument, below, further sanctions beyond those set
23 forth in the Court's Order dated December 8, 2017 ("Order"), specifically Versa's request for
24 attorneys' fees and costs, should not be awarded under NRCP 37 because the Court did not find
25 MDB's actions to be intentional. *See GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869,
26 900 P.2d 323, 325 (1995) (further sanctions only appropriate where the court finds willful
27 noncompliance). Further, no award of attorneys' fees and costs is appropriate under NRCP 68,
28 where such an award is discretionary and all factors the Court must consider weigh in favor of
MDB. *See Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (awarding fees
and costs without consideration of four factors is an abuse of discretion).

1 For these reasons, MDB respectfully requests this Court deny all requests for attorneys'
2 fees and costs set forth in Versa's Motion.

3
4 **II.**

5 **ARGUMENT**

6 **A. MDB Should Not Be Further Sanctioned Under NRCP 37 for Its**
7 **"Benign" Actions.**

8 Further sanctions against MDB are not warranted pursuant to NRCP 37, where, as here,
9 its failure to retain certain electrical components was in no way willful or intended to harm
10 Versa. This Court already imposed the most severe sanction available to it, case ending
11 sanctions against MDB, based upon its analysis of the factors set forth in *Young v. Johnny*
12 *Ribeiro Building Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). To impose additional punishment in
13 the form of an award of attorneys' fees and costs to Versa, based upon the specific facts and
14 circumstances surrounding MDB's failure to preserve evidence, would be patently unjust. As
15 stated in its Order: "The Court does not find MDB intentionally disposed of the components in
16 order to harm Versa, nor were MDB's employees acting with any malevolence; however, the
17 Court does find MDB is complicit of benign neglect and indifference to the needs of Versa
18 regarding discovery in this action." Order at 8:20-23. "Benign neglect" and "indifference" to
19 Versa's needs, while regrettable, is not the measure of willful noncompliance generally
20 required for the magnitude of further sanctions requested by Versa under NRCP 37. *See e.g.*
21 *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

22
23
24 Further, contrary to Versa's assertions, NRCP 37(b) does not mandate the imposition of
25 attorney's fees and costs. Instead, the applicable provision states in pertinent part:

26
27 (C) *Payment of Expenses.* Instead of or in addition to the orders above, the court
28 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.

1 NRCP 37(b)(2)(C) (Emphasis added). Here, as the Court has already entered case concluding
2 sanctions against MDB for its failure to preserve evidence, further sanctions would be wholly
3 unjust, particularly in light of the substantial sums of money MDB alone paid to settle the
4 underlying personal injury actions and relieve Versa of its independent tort liability.
5

6 Further, the cases Versa cites in support of its Motion are either wholly inapposite or in
7 no way reflective of the facts and circumstances at issue here, where the failure to preserve
8 evidence was in no way an effort to hamper the litigation. For example, in *Skeen v. Valley*
9 *Bank*, 89 Nev. 301, 304, 511 P.2d 1053 (1973), attorney's fees were awarded pursuant to a
10 contractual provision, not as a sanction under NRCP 37. And, in *Skeen, Schatz v. Devitte*, 75
11 Nev. 124, 335 P.2d 783 (1959), and *Foster v. Dingwall*, 227 P.3d 1042, 227 P.3d 1042 (2010),
12 the misconduct sanctioned by the court was intentional, willful and specifically intended to
13 hinder the litigation. As this Court correctly concluded, the MDB employees who disposed of
14 certain electrical components did so in the course of the routine maintenance, and not with any
15 malicious purpose. Accordingly, Versa's request for further sanctions under NRCP 37 should
16 be denied.
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20 **B. Versa May Not Be Awarded Attorneys' Fees and Costs Pursuant to Its Offer of**
21 **Judgment Under NRCP 68.**

22 When an offeree fails to obtain a more favorable judgment than an amount offered
23 pursuant to NRCP 68, an award of attorneys' fees and costs to the offeror is not automatic and is
24 soundly within the discretion of the trial court. See, e.g. *Trustees of Carpenters v. Better Bldg.*
25 *Co.*, 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985) (quoting *Beattie v. Thomas*, 99 Nev. 579,
26 668 P.2d 268 (1983), holding that the purpose of Rule 68 "is not to force plaintiffs unfairly to
27 forego legitimate claims"). Indeed, when considering whether an award of attorneys' fees and
28

1 costs should be granted in such instances, Nevada courts must carefully evaluate the four-factor
2 test set forth by the Nevada Supreme Court in *Beattie v. Thomas*, to wit:

3 (1) whether the plaintiff's claim was brought in good faith; (2) whether
4 the defendants' offer of judgment was reasonable and in good faith in
5 both its timing and amount; (3) whether the plaintiff's decision to
6 reject the offer and proceed to trial was grossly unreasonable or in bad
7 faith; and (4) whether the fees sought by the offeror are reasonable and
8 justified in amount.

9 99 Nev. at 588-89, 668 P.2d at 274; *see also Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev.
10 318, 323, 890 P.2d 785, 789 (1995).

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

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

22 117 Nev. at 13-14, 16 P.3d at 429. Utilizing the *Beattie* factors in conjunction with the facts
23 and circumstances of the instant case, this Court should deny Versa's Motion in its entirety.

24 **1. MDB's Contribution Claim was Brought in Good Faith.**

25 Versa argues, wholly without basis, that the Cross-Claim for Contribution brought by
26 MDB had no factual or legal support. Motion at 10:23-24. As Versa is well aware, however,
27 this Court reached a different conclusion. After hearing the testimony of five key witnesses at
28 the evidentiary hearing, the Court expressed in its Order: "The Court's decision regarding the

1 issue presented in the Motion is not predicated on who has the “stronger case” or the “better
2 expert” at the evidentiary hearing. If this were the analysis the Court would agree with MDB:
3 Dr. Bosch is a very credible witness and it is likely MDB has the more compelling argument to
4 present to the jury.” Order at 11:3-6.
5

6 Far from a frivolous suit, as Versa speciously asserts, MDB’s cross-claim based on a
7 theory of strict products liability appropriately sought contribution for the defect in the Versa
8 valve which caused the subject truck and trailer to dump its load on the highway. The
9 uncommanded activation of the Versa valve caused the traffic accidents that prompted the
10 underlying personal injury claims, which MDB alone resolved. The testimony of MDB’s
11 experts, Dr. David Bosch and Erik Anderson, clearly set forth the only theory for consideration
12 by the trier of fact, i.e. that the Versa valve inadvertently activated when exposed to external
13 electromagnetic fields (“EMF”). Versa’s expert, Garrick Mitchell, offered no opinion as to the
14 cause of the subject incident. Transcript at 110:3-5. There simply can be no dispute that MDB
15 brought the cross-claim in good faith and Versa has offered no legitimate argument to the
16 contrary. Accordingly, the first *Beattie* factor weighs solidly in MDB’s favor.
17
18

19 **2. Versa’s Offers of Judgment for \$7,000 Were Grossly Unreasonable in**
20 **Both Timing and Amount and Made in Bad Faith.**

21 Versa inexplicably trumpets its service of seven (7), one thousand dollar (\$1,000.00)
22 Offers of Judgment, a total of seven thousand dollars (\$7,000.00), as the basis upon which this
23 Court should award it attorneys’ fees and costs. Motion at 11:20-22. What Versa fails to advise
24 this Court, however, and of which it is well aware, is that its Offers of Judgment amounted to
25 less than one half of one percent (0.005) of the total settlement amount MDB paid to plaintiffs
26 to settle nine,¹ not seven as Versa contends, personal injury matters. And, that MDB settled the
27
28

¹ In addition to the seven cases consolidated in *Fitzsimmons v. MDB Trucking, LLC et al*, Case No. CV15-02349, MDB settled *James Bible v. MDB Trucking, LLC et al*, Case No. CV 16-0914 and the instant matter.

1 underlying personal injury cases for less than the total amount of plaintiffs' claims. To argue
2 that Offers of Judgment totaling \$7,000 were reasonable to resolve claims in the multi-millions
3 of dollars is frankly, startling. The \$7,000 total offer could not even compensate MDB for the
4 deposition costs associated with the case, let alone begin to address the personal injury claims of
5 sixteen (16) individuals engaged in nine (9) separate lawsuits.
6

7 Not only were Versa's Offers of Judgment grossly unreasonable in amount, they were
8 also unreasonable with respect to their timing. Versa served its Offers of Judgment on May 4,
9 2017, the day before the scheduled mediation of this matter. Rather than participate in the
10 mediation in good faith, as it asserts, Versa merely appeared. Motion at 6:20-21. At the
11 mediation, Versa refused to negotiate or to contribute to the resulting settlement, yet now
12 disingenuously attempts to blame MDB for its failure to resolve the cross-claim prior to trial.
13 Motion at 6:20:21 and 7:1-3. In reality, Versa's Offers of Judgment were nothing more than a
14 tactic to avoid meaningful participation in the mediation process, and as such, were
15 unreasonable in timing and devoid of good faith.
16
17

18 Finally, Versa argues that its grossly unreasonable Offers of Judgment were somehow
19 justified because: (1) both Versa's and MDB's experts found no defect in the Versa valve
20 during destructive testing; and (2) MDB destroyed crucial evidence Versa needed to defend its
21 claims. Motion at 11:10-14. Notwithstanding that neither argument addresses the
22 reasonableness of the amount or timing of the Offers of Judgment, Versa again provides a
23 wholly self-serving and largely inaccurate account of the facts and circumstances at issue.
24

25 While it is correct that no mechanical defect was identified during destructive testing,
26 Versa was well aware that MDB's experts identified the defect in the Versa valve as its
27 susceptibility to inadvertent activation when exposed to external EMF. And, while the Court
28 never considered MDB's Emergency Motion to Strike Answer, Enter Judgment on Claim for

1 Contribution, and Award Attorneys' Fees and Costs, filed October 4, 2017, MDB discovered
2 shortly before the evidentiary hearing that Versa willfully suppressed critical evidence and
3 falsely represented the fact that Versa had concerns regarding EMF and tested for it long before
4 MDB's experts offered their opinions. By contrast, this Court concluded that MDB's failure to
5 preserve evidence was the result of routine maintenance of its vehicles and equipment and was
6 not "intended to harm Versa." Order at 9:14.
7

8 For all of these reasons, Versa's Offers of Judgment were both unreasonable in amount
9 and timing and made in bad faith. As such, the second *Beattie* factor clearly weighs in favor of
10 MDB.
11

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

14 MDB's rejection of the Offers of Judgment was neither grossly unreasonable nor in bad
15 faith, not only for the reasons stated above, but also based upon MDB's reasonable assessment
16 of the strengths and weaknesses of its case. As this Court recognized, "... Dr. Bosch is a very
17 credible witness and it is likely MDB has the more compelling argument to present to the jury."
18 Order at 11:3-6. Indeed, MDB invested significant resources to identify what caused not one,
19 but two inadvertent activations of the Versa valve with different MDB drivers only minutes
20 apart, on the same day, in the same location, and under the same circumstances. Dr. Bosch and
21 Mr. Anderson, based on significant investigation and testing, opined that the only logical
22 explanation for these inadvertent activations was a defect in the design of the Versa valve which
23 rendered it susceptible to EMF. And, Versa's expert offered no scientific explanation for the
24 failures of the Versa valve. Contrary to Versa's assertions, MDB had ample evidence to support
25 its cross-claim, while Versa provided little by way of defense.
26
27

28 Given this context, as Versa's combined Offers of Judgment for \$7,000 amounted to less
than one half of one percent (0.005) of the total amount committed by MDB to settle the

1 underlying personal injury claims, MDB not only rejected them, it considered them extended in
2 bad faith. Accordingly, MDB's decision to reject Versa's Offers of Judgment was reasonable
3 and the third *Beattie* factor weighs in MDB's favor.

4
5 **4. Versa's Purported Attorneys' Fees and Costs are Unreasonable and**
6 **Not Justified.**

7 Versa seeks attorneys' fees in the amount of \$731.00 and costs in the amount of \$413.00
8 which it claims to have incurred following the service of the combined \$7,000.00 Offers of
9 Judgment on May 4, 2017. Motion at 13:18-21. Notwithstanding the unreasonable claim for
10 costs already rebutted in Cross-Claimant MDB Trucking LLC's Motion to Retax and Settle
11 Cross-Defendant Versa Products Company Inc.'s Verified Memorandum of Costs, incorporated
12 herein by reference, Versa's purported attorneys' fees are also unreasonable and not justified.

13
14 A cursory review of the Timekeeper Diary provided by Versa in support of its Motion
15 reveals the vast majority of the claimed legal work was applicable to all of the associated cases,
16 and not specific to the instant matter. *See* Exhibit 3 to the Motion. For example, the first entry
17 dated May 4, 2017 lists a description which states: "Initial receipt, review and legal analysis of
18 the notice of association of counsel for Dragon." *See id.* The Notice of Association of Counsel
19 ("Notice") for Dragon ESP, Ltd. was also filed in the *Bible* and *Fitzsimmons* matters. And,
20 pursuant to the Timekeeper Diary submitted as an exhibit to Versa's Motion in all three cases,
21 the instant matter, *Bible* and *Fitzsimmons*, Versa billed for the review of the same Notice in
22 each case. *See* Exhibits A-1 and A-2. It is wholly unreasonable for Versa to seek fees for the
23 review of the same notice three times. And, that is but one example. Accordingly, the fourth
24 *Beattie* factor also weighs in MDB's favor and against any award of attorneys' fees and costs to
25 Versa pursuant to Rule 68.

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III.

CONCLUSION

Based upon the above analysis, MDB respectfully requests that the Court deny Versa's Motion and deny costs based upon its separate request to retax costs.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

Dated this 1st day of March, 2018.

CLARK HILL PLLC

By: Colleen E. McCarty

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

Nevada Bar No. 12503

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Nevada Bar No. 13186

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Telephone: (702) 862-8300

Attorneys for Cross-Claimant

MDB Trucking, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on
3 this 1st day of March, 2018, I served a true and correct copy of **CROSS-CLAIMANT**
4 **MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA**
5 **PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS**
6 **PURSUANT TO NRCP 37 AND NRCP 68** via electronic means, by operation of the Court's
7 electronic filing system upon each party in this case who is registered as an electronic case
8 filing user with the Clerk, or by U.S. Mail, postage prepaid thereon, to:
9

10 JOSH COLE AICKLEN, ESQ.
11 DAVID B. AVAKIAN, ESQ.
12 PAIGE S. SHREVE, ESQ.
13 LEWIS BRISBOIS BISGAARD & SMITH LLP
14 6385 S. Rainbow Blvd., Suite 600
15 Las Vegas, Nevada 89118
16 Attorneys for Defendant
17 VERSA PRODUCTS COMPANY, INC.



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An employee of Clark Hill PLLC

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INDEX OF EXHIBITS

Exhibit A: Declaration of Colleen E. McCarty

Exhibit A-1: pertinent part of Exhibit 3 to Cross-Defendant Versa Products Company, Inc.'s Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68 ("Motion") filed in James Bible v. MDB Trucking LLC et al., Case No. CV16-01914

Exhibit A-2: Pertinent part of Exhibit 3 to Versa's Motion filed in Fitzsimmons v. MDB Trucking LLC et al., Case No. CV15-02349

EXHIBIT 5

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3 Nevada Bar No. 009502
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6 6385 S. Rainbow Boulevard, Suite 600
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7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

NOTICE OF ENTRY

19
20
21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

1 PLEASE TAKE NOTICE that the Order was entered by the above-entitled Court on
2 the 22nd day of January, 2018, a copy of which is attached hereto as Exhibit 1 and made
3 a part hereof.

4 **AFFIRMATION**

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

7 DATED this 8th day of February, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

10
11
12 By /s/ Josh Cole Aicklen

13 JOSH COLE AICKLEN

Nevada Bar No. 007254

14 DAVID B. AVAKIAN

Nevada Bar No. 009502

15 PAIGE S. SHREVE

Nevada Bar No. 013773

16 6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

17 Attorneys for Defendant/Cross-Defendant

18 VERSA PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

Exhibit 1

Order

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018 a true and correct copy of NOTICE OF ENTRY was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

FILED
Electronically
CV16-00976
2018-02-08 01:13:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6522570

EXHIBIT 1

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

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

DANIEL ANTHONY KOSKI; MDB TRUCKING,
LLC; et al.,

Defendants.

ORDER

Presently before the Court is THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

This case arises from a personal injury action. A COMPLAINT was filed by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case number CV15-02349.

¹ The issues presented in the Motion were fully briefed in FITZSIMMONS, et al. v. MDB TRUCKING, LLC, et al., CV15-02349.

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and JAMES BIBLE v. MDB
3 TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant action was filed on May 2,
4 2016. The Bible Action was filed September 20, 2016. It is alleged in all three actions that on July
5 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently
6 spilled a load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose
7 control of their vehicles and numerous accidents occurred resulting in the three separate cases. The
8 plaintiffs sustained physical and emotional injuries as a result of the accidents. In response to the
9 complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT ("the MDB Cross-
10 Claim") June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa: Implied
11 Indemnification and Contribution.² MDB alleges it was not Koski's negligence that caused the
12 gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design
13 and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 4:6-8. Therefore, MDB
14 brought the Cross-Claim against the manufacturers of the trailer and its components, including
15 Versa. MDB avers Versa produced a solenoid valve which would, "activate inadvertently allowing
16 the gates to open and release the load [of gravel] carried by the trailer." The MDB Cross-Claim, 4:9-
17 11. MDB also claims there were safer alternatives available to Versa; the solenoid valve was
18 unreasonably dangerous and defective; and Versa failed to provide appropriate safety mechanisms
19 regarding the solenoid valve. The MDB Cross-Claim, 4:15-22.

20 The Motion is the same as the motion practice in the Fitzsimmons Action and the Bible
21 Action. The issues are identical, as are the relevant parties. The Court issued an ORDER ("the
22 December Order") on December 8, 2017, in the Fitzsimmons Action. The December Order
23 conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny*
24 *Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCP 37. The Court found in the
25 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of

26
27 ² Versa filed THIRD PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS
28 THIRD PARTY PLAINTIFF, MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) ("the MTD") on July 19, 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 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
2 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
3 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
4 Motion.³

5 It is hereby **ORDERED** THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY,
6 INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING,
7 LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE,
8 FOR AN ADVERSE JURY INSTRUCTION is **GRANTED**. MDB TRUCKING, LLC'S CROSS-
9 CLAIM is **DISMISSED**.

10 DATED this 22 day of January, 2018.

11 
12 ELLIOTT A. SATTLER
13 District Judge
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28 ³ The Court notes D.C.R. 13(3) states, "[f]ailure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same." Versa has not moved to have the Motion granted under this standard.

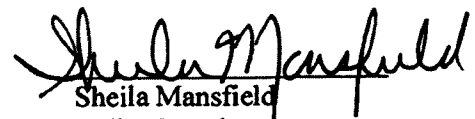
1
2
3 **CERTIFICATE OF MAILING**

4 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
5 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
6 the County mailing system for postage and mailing with the United States Postal Service in Reno,
7 Nevada, a true copy of the attached document addressed to:

8
9
10
11 **CERTIFICATE OF ELECTRONIC SERVICE**

12 I hereby certify that I am an employee of the Second Judicial District Court of the State of
13 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
14 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
15 of electronic filing to the following:

16
17 MATTHEW ADDISON, ESQ.
18 JOSH AICKLEN, ESQ.
19 KATHERINE PARKS, ESQ.
20 BRIAN BROWN, ESQ.
21 THIERRY BARKLEY, ESQ.
22 SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS M. WIECZOREK, ESQ.

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25 Sheila Mansfield
26 Judicial Assistant
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EXHIBIT "A"

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 I. Willfulness

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

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

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

24 *II. The possibility of a lesser sanction*

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

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

17
18 ⁵ At oral argument counsel for MDB stated:

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

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

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

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

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

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

22
23 ⁶ Q: Okay. You also mentioned that you want to replace those cords, the seven and the – the seven-conductor and the
24 four-conductor cords because they will get cut on the deck plate, they will get abraded, they will become cracked; is that
25 correct?

26 A: I have seen that, yes.

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

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

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

13 IV. Whether evidence is irreparably lost

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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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

EXHIBIT 4

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8 Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.
9

10 IN THE SECOND JUDICIAL DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
TRUCKING, LLC; DOES I-X and ROE I-V,

16 Defendants.
17

18 MDB TRUCKING, LLC, a Nevada limited
liability company,

19 Third-Party Plaintiff,

20 vs.

21 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA
PRODUCTS COMPANY, INC., a New
22 Jersey corporation; THE MODERN
GROUP GP-SUB, INC., a Texas
23 corporation and general partnership;
DRAGON ESP, LTD., a Texas limited
24 partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,
25

26 Third-Party Defendants.
27
28

Case No. CV16-00976
Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S MOTION
TO STRIKE DEFENDANT/THIRD-PARTY
PLAINTIFF MDB TRUCKING, LLC's
THIRD-PARTY COMPLAINT PURSUANT
TO NRCP 35; OR IN THE ALTERNATIVE,
FOR AN ADVERSE JURY INSTRUCTION

1 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO
2 STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S THIRD-
3 PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN
4 ADVERSE JURY INSTRUCTION

5 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
6 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
7 Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS BISGAARD & SMITH, LLP, and
8 hereby request an Order dismissing Defendant/Third-Party Plaintiff MDB TRUCKING,
9 LLC's Third-Party Complaint against it, or in the alternative issuing an adverse jury
10 instruction.
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1 This Motion is based upon the Memorandum of Points and Authorities; the Affidavit
2 of David B. Avakian, Esq. included herein; NRCP 37; NRS 47.250; the Exhibits attached
3 hereto; and any other evidence the Court may entertain at the Hearing on this Motion.

4 DATED this 15th day of May, 2017

5 Respectfully submitted,

6 LEWIS BRISBOIS BISGAARD & SMITH LLP
7
8

9 By /s/ David B. Avakian

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12 DAVID B. AVAKIAN
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1 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO
2 STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S THIRD-
3 PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN
4 ADVERSE JURY INSTRUCTION

4 STATE OF NEVADA)
5 COUNTY OF CLARK) ss.

6
7 DAVID B. AVAKIAN, ESQ., being first duly sworn, deposes and states as follows:

8 1. I am a Partner at LEWIS BRISBOIS BISGAARD & SMITH LLP, and am duly
9 licensed to practice law in the State of Nevada.

10 2. I am competent to testify to the matters set forth in this Affidavit, and will do
11 so if called upon.

12 3. I am an attorney of record representing Third-Party Defendant VERSA
13 PRODUCTS COMPANY, INC. in the subject lawsuit currently pending in Department 10
14 of the Second Judicial District Court for the State of Nevada, Case Number CV16-00976.

15 4. Attached hereto as Exhibit 1 is a true and correct copy of MDB's Third-Party
16 Complaint.

17 5. Attached hereto as Exhibit 2 is a true and correct copy of the Deposition
18 Transcript of MDB's PMK, Scott Palmer, Volume III.

19 6. Attached hereto as Exhibit 3 is a true and correct copy of the Deposition
20 Transcript of MDB's PMK, Scott Palmer, Volume II.

21 7. Attached hereto as Exhibit 4 is a true and correct copy of the Deposition
22 Transcript of MDB's PMK, Scott Palmer, Volume I.

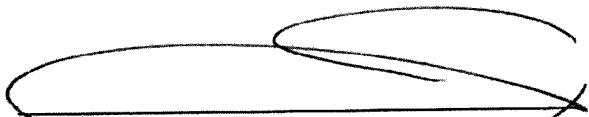
23 8. Attached hereto as Exhibit 5 is a true and correct copy of the Declaration by
24 David R. Bosch, Ph.D.

25 9. Attached hereto as Exhibit 6 is a true and correct copy of MDB's Responses
26 to VERSA's Requests for Admissions.

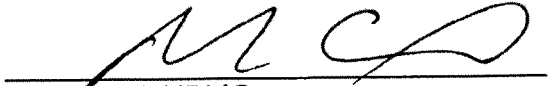
27 10. Attached hereto as Exhibit 7 is a true and correct copy of the Deposition
28 Transcript of Tracy Shane.

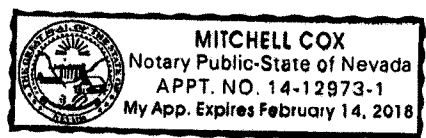
1 11. Attached hereto as Exhibit 8 is a true and correct copy of the Deposition
2 Transcript of Patrick Bigby.

3 FURTHER AFFIANT SAYETH NAUGHT.

4
5 
6 DAVID B. AVAKIAN, ESQ.

7 SUBSCRIBED AND SWORN to before me
8 this 5th day of May, 2017.

9 
10 NOTARY PUBLIC
11 In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant/Third-Party Plaintiff, MDB TRUCKING, LLC ("hereinafter referred to as
4 "MDB"), has brought a Third-Party Complaint¹ against VERSA PRODUCTS COMPANY,
5 INC. (hereinafter referred to as "VERSA"), in which it asserts a contribution claim against
6 VERSA for a personal injury claims brought by Plaintiffs, Ernest Fitzsimmons and Carol
7 Fitzsimmons ("Fitzsimmons"); Angela Wilt ("Wilt"); Rosa, Benjamin, Cassandra and
8 Natalie Robles ("Robles"); Sonya Corthell ("Corthell"); Beverly, Patrick and Ryan
9 Crossland ("Crossland"); Olivia and Naykyla John ("John"); Kandise Baird ("Kins"); James
10 Bible ("Bible"); and Geneva Remmerde ("Remmerde") (collectively referred to as
11 "Plaintiffs"). See, MDB's Third-Party Complaint against VERSA, a true and correct copy
12 attached hereto as Exhibit 1. Plaintiffs were driving westbound on IR80 when a semi-
13 trailer driven by Daniel Koski and owned by Defendant/Third-Party Plaintiff MDB spilled
14 gravel on the freeway, causing multiple automobile accidents and the injuries alleged by
15 the Plaintiffs. MDB's contribution claim is based on its allegation that the inadvertent
16 gravel dump was due to an alleged "defect" with the VERSA valve on the subject trailer.

17 In discovery, *MDB admitted that the VERSA valve did not have any product defect*
18 *or design defect. See Exhibit 2 at P. 97:16-25;98:1-17.* MDB's forensic experts, are
19 *investigating "the sources of electro magnetic fields"* that could have "energized" the
20 valve at issue. See, Exhibit 5.

21
22
23 ¹ There are a total of nine different lawsuits filed by the Plaintiffs. All except for two of the above mentioned
24 lawsuits have been consolidated for discovery and trial purposes. The remaining two cases, James Bible
25 (CV16-01914) and Geneva Remmerde (CV16-00976), have been consolidated for discovery purposes
only. VERSA is named as a direct defendant in all nine cases, except for Remmerde. VERSA is only a
Third-Party Plaintiff/Defendant in that case.

26 In all nine of the above-mentioned lawsuits, MDB filed cross-claims/third-party Complaints against
27 VERSA for equitable indemnity and contribution. VERSA filed a Motion to Dismiss MDB's Indemnity claim
28 against VERSA in all nine cases. The Court granted VERSA's Motion to Dismiss, leaving MDB with a
cross-claim for contribution only against VERSA.

1 Simply put, MDB had a duty to preserve all relevant evidence and it did not. MDB
2 was aware that the subject truck valve and trailers are critically relevant to this matter as
3 they are the centerpiece of the resulting litigation. Thus, because MDB was on notice
4 that the truck and trailers, including the valve components, were relevant to this litigation,
5 MDB had a pre and post litigation duty to preserve the evidentiary value contained within
6 the truck and trailers by removing such evidence from service.

7 However, MDB did not take the subject truck trailers and valve out of service after
8 the subject incident and continued to keep them in service for over two years after the
9 subject incident and a year and a half after the first lawsuit was filed. The only reason
10 MDB removed the subject truck and trailers out of service were because the experts in
11 the subject litigation removed the subject valve for destructive testing. See, Exhibit 3 at
12 P. 84:19-24. Further, after the subject litigation and even after the first lawsuit was filed,
13 *MDB discarded the electrical component parts that are used in activating the subject*
14 *valve. See, Exhibit 3 at P. 169:16-22.* In doing so, MDB intentionally spoliated critical
15 evidence that VERSA absolutely requires to defend against MDB's baseless Third-Party
16 Complaint.

17 Therefore, and pursuant to NRCP 37, VERSA respectfully requests that the Court
18 strike MDB TRUCKING, LLC's Third-Party Complaint against VERSA, or in the
19 alternative issue an adverse jury instruction against MDB due to MDB's failure to
20 preserve key evidence that is crucial to VERSA's defense.

21 **II. FACTUAL BACKGROUND**

22 On March 6-8, 2017, VERSA took the deposition of MDB's 30(b)(6) witness, Scott
23 Palmer. During Mr. Palmer's deposition, he testified that the subject valve did not have a
24 defect. Mr. Specifically, Mr. Palmer testified:

25 Q. I'm going to ask you the same question again for after the
26 July 2014 incident on Trailer 6775. Did MDB in their investigation
27 after the dump-- again, this is right after, not since litigation-- did
28 MDB find any defect with that Versa valve?

28 MR. PALMER: No. That remained in service until such time
 litigation started.

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Q. And on that same trailer, the same Versa valve, did MDB in their investigation right after the subject incident -- again, pre-litigation, right after -- did MDB discover any design defect with the Versa valve?

MR. PALMER: No. But, once again, we weren't looking for any sort of design defects or functionality defects. It worked.

Q. Okay.

MR. PALMER: To the best of our knowledge it still worked.

See, Exhibit 2 at P. 97:16-25;98:1-17.

Additionally, during Mr. Palmer's deposition, he testified that MDB performed numerous repair work on the subject truck and trailers after the subject incident which relate directly to providing electricity to the VERSA valve. Mr. Palmer testified to the following repairs:

Q. MDBMAINT 129, can you -- we'll transition a little bit, but can you start with the date of the work order and what this work order was for.

MR. PALMER: 12/18/14 is the date.

Q. And what was this work order for?

MR. PALMER: It was for the screws being loose on the four-way. So they were tightened and tested.

Four-way -- the four-way cable refers to the leftover cable that plugs in the front of the trailer that operates the Versa valves or operates whatever -- whatever particular trailer you plug it into, it operates something.

On end up, it operates the tailgate; on bottom dumps, it operates the Versa valves that dump the trailers.

So it came in for the gates not operating with the switch. And one of the wires was loose, so we tightened it in and put it back in service.

See, Exhibit 4 at P. 90:7-22.

Q. Okay. We can go to the next one.
Can you tell me the date on this one, please.

MR. PALMER: 2/5/15.

Q. And what is this work order for?

1 MR. PALMER: We put a new driver's seat in it. And then we
2 replaced the seven-way and four-way cords, cables, and
3 replaced leaking axle flange gasket.

4 Q. Okay. So is this four-way cord different from the work
5 order we discussed of the four-way plug in MDBMAINT
6 129?

7 MR. PALMER: No, it would be the same -- it would be the same cord. But
8 this one, on the prior one, on 12/18/14, we replaced - we tightened the
9 screws on the plug itself.

10 On this work order on 2/5/15, we actually replaced the seven-way cable and
11 the four-way cable.

12 Id. at P. 91:10-23.

13 Q. Okay. And here, he replaced the four-way cord?

14 MR. PALMER: Yes, and the seven-way cord.

15 Id. at P. 92:6-7.

16 Q. Okay. I'm going to go to the next one. This would be MDBMAINT
17 160. Can you tell me the date on this one and what occurred, please.

18 MR. PALMER: It's August 5th, 2014. And Pat Bigby replaced the four-way
19 socket on the front of 6773.

20 At least, I am assuming that's what he replaced. It could be the four-way
21 socket on the front or the back. It doesn't distinguish between the two on
22 this work order. But I'm assuming it's the one on the front. That's the one
23 that gets unplugged and plugged all the time, and we replace them as soon
24 as -- any issues whatsoever, we replace them.

25 Id. at P. 103:19-25;104:1-4.

26 Q. Okay. You can go to the next one. MDBMAINT 170, can you tell me
27 the date and what occurred on this one, please.

28 MR. PALMER: 12/18/14. And this would have been another replace the
four-way socket. And I didn't write on there either, where - whether it was
the front or the rear, but I'm assuming it's the front again.

Id. P. 105:21-25;106:1-2.

Further, Mr. Palmer testified that it was normal for MDB to replace the four-way
socket that is used to send electricity to the VERSA valve at least every four to five
months. Id. at P. 106:14-17. In fact, Mr. Palmer even testified to replacing and discarding
the four-way plug and cords *four months* after the first lawsuit was filed:

1 Q. All right. We'll go to the next one. This is MDB 273. And can you tell
2 me the date on this one and what occurred.

3 MR. PALMER: 12/2/15?

4 Q. Uh-huh.

5 MR. PALMER: Replaced -- pulled out four-way plug. Replaced four-
6 way plug. Issues still exist. Found all wires pulled out of - at tractor. Also
7 reattach wires and tested okay.

8 Q. So this one indicates -- it says issues still exist. Was there -- is there
9 another work order that would have been performed indicating that
10 there was an issue there prior?

11 MR. PALMER: No, this is another -- this probably happened when the
12 driver came to the yard, unhooked his trailer and its hoses and electrical,
13 pulled out from underneath the trailer to hook up to a different trailer and
14 forgot to unhook his four-way. I don't have -- I don't know, and I don't have
15 a memory of that. That's probably what happened.

16 So the four-way stayed plugged into the trailer. When he pulled away, it
17 yanked -- pulled the plug off the end of the cord.

18 So if you read this, Pat put a new plug on the end of the cord, but it still
19 didn't work. And then he found out that it also pulled out the other end of the
20 wiring on the tractor, it pulled it that hard. So he reattached the wires on
21 both ends, and then it worked okay.

22 Q. Okay. So the -- Pat indicating issues still exist?

23 MR. PALMER: No, he said -- yeah, he replaced four-way plug, issues
24 still exist. Then he found all the wires pulled out at the tractor, also
25 reattached wires and tested okay.

26 Id. at P. 94:2-25;95:1-5.

27 Finally, MDB admits that the subject truck was not in the same condition as it was
28 at the time of the subject incident and the subject truck and trailers continued to be used
at the time MDB responded to VERSA's Requests for Admissions. Specifically, MDB
admitted:

29 REQUEST FOR ADMISSION NO. 13:

30 Admit that the Peterbuilt truck that allegedly spilled gravel on
31 the roadway in this case is not in the same exact condition as
32 it was at the time of the subject incident.

33 RESPONSE TO REQUEST FOR ADMISSION NO. 13:

34 Admitted.

1 REQUEST FOR ADMISSION NO. 14:

2 Admit that the Ranco semi-trailer that allegedly spilled
3 gravel on the roadway in this case continues to be used
 since the subject incident.

4 RESPONSE TO REQUEST FOR ADMISSION NO. 14:

5 Admitted.

6 REQUEST FOR ADMISSION NO. 15:

7 Admit that the Peterbuilt semi-trailer that allegedly spilled
8 gravel on the roadway in this case continues to be used to
 haul trailers since the subject incident.

9 RESPONSE TO REQUEST FOR ADMISSION NO. 15:

10 Admitted.

11 See, Exhibit 6 at P. 4:8-22.

12 REQUEST FOR ADMISSION NO. 24:

13 Admit that you or someone on your behalf continued to use
14 and operate the subject VERSA valve on the same subject
 trailer from the time of the subject incident to the present.
15 RESPONSE TO REQUEST FOR ADMISSION NO. 24:

16 Admitted.

17 Id. at P. 6:8-12

18 REQUEST FOR ADMISSION NO. 26:

19 Admit that the subject VERSA valve has now been operated
 hundreds of times after the subject incident.

20 RESPONSE TO REQUEST FOR ADMISSION NO. 26:

21 Admitted with the qualification that by the addition of the pin
22 lock system, MDB cannot determine when the VERSA valve
 may have failed by self-activating.

23 Id. at P. 6:18-23.

24 III. LEGAL ARGUMENT

25 A. MDB Had a Legal Duty to Preserve All Relevant Evidence

26 It is well established in Nevada that a party is entitled to have the jury instructed on
27 all of her case theories that are supported by the evidence. Bass-Davis v. Davis, 122 Nev.
28 442, 447, 134 P.3d 103, 106 (2006). Accordingly, even when an action has not been

1 commenced and there is only a potential for litigation, the litigant is under a duty to
2 preserve evidence which it knows or reasonably should know is relevant to the action.
3 Fire Ins. Exch. v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987).
4 Thus, where a party is on notice of potential litigation, the party is subject to sanctions for
5 actions taken which prejudice the opposing party's discovery efforts. Fire Ins. Exch. v.
6 Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987)

7 Here, as the Court is aware, the instant case does not involve a negligible fender
8 bender. Contrarily, this case involves a serious twenty car accident, resulting from when
9 one of MDB's trucks released a truckload of material onto a busy interstate highway. With
10 so many parties involved and due to the gravity of the event, *it is clear that MDB was on*
11 *notice that there was potential litigation on the horizon* where liability would be an issue.
12 MDB was well-aware that both police and EMT's were on scene and numerous people
13 were transported to local hospitals with serious injuries. Moreover, as MDB's truck,
14 trailers and the subject VERSA valve are the centerpiece of the resulting litigation, MDB
15 knew, or should have reasonably known, that the truck, trailers and valve were relevant to
16 the instant litigation. Thus, because MDB was on notice that the truck and trailers were
17 relevant to potential litigation, MDB had a pre-litigation duty to preserve the evidentiary
18 value contained within the truck, trailers and valve by removing such evidence from
19 service and continued use.

20 Moreover, as MDB's Third-Party Complaint against VERSA asserts that the
21 subject valve caused or contributed to the accident because it allegedly operated
22 inadvertently, MDB *was on notice and knew*, or should have reasonably known, *that any*
23 *parts*, mechanical, electrical, or otherwise, that are *related to the valve's operation*, (in
24 any capacity), *are relevant to the instant litigation*. Thus, because MDB was on notice that
25 all parts related to the subject valve were relevant to potential litigation, MDB had a pre
26 and post litigation duty to preserve the evidentiary value contained within such evidence
27 by retaining the evidence instead of conveniently discarding, and ultimately destroying,
28 such critical evidence.

1 Simply put, MDB's actions of not preserving the aforementioned evidence not only
2 goes staunchly against case law and the spirit of the discovery rules, but it also
3 *detrimentially affects VERSA's ability to defend itself* from MDB's baseless lawsuit by
4 removing crucial evidence that supports VERSA's liability theories. Accordingly, in the
5 interest of upholding the validity of Nevada's discovery rules and remedying the
6 outstanding injustice, both case law and statutory law dictate that this Court should
7 sanction MDB. Indeed, without an appropriate sanction, MDB's discovery violations
8 unfairly tip the scales of justice in MDB's favor.

9 **B. This Court Should Strike MDB's Third-Party Complaint Because of MDB's**
10 **Discovery Violations Pursuant to NRCP 37 and Prevailing Case Law**

11 ***1. MDB's Discovery Violations Are Abusive Litigation Practices***

12 Nevada allows for the dismissal of a case based upon an offending party's abuse
13 of discovery. GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 870, 900 P.2d 323, 325
14 (1995). Indeed, the Nevada Rules of Civil Procedure permit the Court to strike out
15 pleadings or dismiss an action entirely for discovery abuses. See NRCP 37(b)(2)(C).
16 Additionally, a district court has the inherent equitable power to dismiss actions as a
17 sanction for abusive litigation practices. Parkinson v. Bernstein, Nos. 59947, 61089, 2014
18 Nev. Unpub. LEXIS 2176, at *1 (Dec. 22, 2014).

19 Dismissal is a proper sanction where a plaintiff possesses the evidence at issue
20 but disposes of it before filing a complaint. CSA Serv. Ctr., LLC v. Air Design Sys., LLC,
21 No. 57674, 2013 Nev. Unpub. LEXIS 686, at *8 (May 31, 2013). Dismissal of a party's
22 complaint as a sanction does not need to be "preceded by other less severe sanctions."
23 CSA Serv. Ctr., LLC v. Air Design Sys., LLC, No. 57674, 2013 Nev. Unpub. LEXIS 686, at
24 *7 (May 31, 2013). A court's authority to impose sanctions "is rooted in a court's
25 fundamental interest in protecting its own integrity and that of the judicial process."
26 Halverson v. Hardcastle, 123 Nev. 245, 261 n.26, 163 P.3d 428, 440 (2007) (quoting
27 Cummings v. Wayne County, 210 Mich. App. 249, 533 N.W.2d 13, 14 (Mich. Ct. App.
28 1995).

1 Here, MDB is knowingly pursuing a meritless claim against VERSA and,
2 disappointingly, MDB has destroyed evidence that VERSA could have used to dispel the
3 baseless claims. As the record unequivocally demonstrates, MDB's expert has asserted
4 that *the subject valve does not suffer from any design or manufacturing defect.* See,
5 Exhibit 2 at P. 97:16-25;98:1-17.

6 Again, MDB has readily admitted that there were no mechanical issues or defects
7 with the subject valve; *yet, MDB is still pursuing a claim* against VERSA under the pretext
8 that VERSA is somehow liable because an independent, inexplicable energy force
9 activated the subject valve. See, Exhibit 5.

10 To muddy the waters even more, MDB not only continued to operate the subject
11 truck, trailer, and valve at issue in this case, but MBD, *while on notice* to preserve
12 relevant evidence, *removed and threw away* the electrical components that control the
13 subject valve. See, Exhibit 3 at P. 169:16-22; Exhibit 6 at P. 4:13-22. Mr. Palmer testified
14 to the same:

15 Q. Okay. Did you save the plugs that you changed after the July 2014
16 event until the time that the forensic inspection, electrical inspection
17 had occurred?

18 MR. PALMER: No.

19 Q. What did you do with the plugs or any plugs that you changed on the
20 subject trailers?

21 MR. PALMER: We throw them in the garbage after that, yeah.

22 See, Exhibit 3 at P. 169:16-22.

23 To state the obvious, such electrical components support VERSA's defense that
24 something other than the valve itself (such as a defect or malfunction like the electrical
25 components MDB destroyed) activated the subject valve and caused the underlying
26 accident. Accordingly, applying Parkinson, because *MDB destroyed highly relevant*
27 *evidence that VERSA requires to prove the case is meritless*, this Court should strike
28

MDB's Third-Party Complaint against VERSA to curtail any further unnecessary litigation costs and free up the Court's docket for cases with actual veracity.

2. A Young Factor Analysis Supports the Court Striking MDB's Third-Party Complaint

While dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case. See, Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). The factors a Court may properly consider include, but are not limited to:

- 1) the degree of willfulness of the offending party;
- 2) the extent to which the non-offending party would be prejudiced by a lesser sanction;
- 3) the severity of the sanction of dismissal relative to the severity of the discovery abuse;
- 4) whether any evidence has been irreparably lost;
- 5) the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party;
- 6) the policy favoring adjudication on the merits;
- 7) Whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and
- 8) the need to deter both the parties and future litigants from similar abuses.

Id.

a. MDB Willfully Destroyed Evidence Pertinent to VERSA's Liability Defense

The first factor of the Young analysis specifically addresses the degree of willfulness of the offending party. Young, 106 Nev. at 93. The Nevada Supreme Court found conduct willful when the violating party fails to disclose evidence in way that demonstrates "active concealment" or appears to be "intentional or at least highly reckless." N. Am. Props. v. McCarran Int'l Airport, No. 61997, 2016 Nev. Unpub. LEXIS 487, at *9 (Feb. 19, 2016)

Here, after being on notice to preserve all relevant evidence, MDB: 1) compromised the evidence's integrity by continuing to operate the subject truck, trailers,

1 and subject valve for two years; and 2) actively destroyed evidence by removing and
2 trashing components involved with how the subject valve activates. See, Exhibit 3 at P.
3 169:16-22; Exhibit 4 at P. 84:19-24; Exhibit 6 at P. 4:13-22. MDB should have removed
4 the subject truck, trailers and valve from service immediately after the accidents to
5 preserve their condition as they existed at the time of the accident. However, MDB
6 continued to habitually use such evidence in its business operations, thus corrupting the
7 integrity of the evidence. Id. Consequently, MDB's tainting of the evidence created a
8 highly prejudicial situation for VERSA because MDB essentially destroyed the very
9 evidence VERSA requires to defend its case.

10 Moreover, knowing that MDB's main theory of liability against VERSA was that the
11 subject valve was somehow "energized," MDB removed and spoliated electrical parts that
12 activated the subject valve. See, Exhibit 5. Put simply, *MDB discarded the electrical*
13 *component parts that are used in activating the subject valve.* Such conduct appears
14 intentional or, at the very least, highly reckless considering the magnitude of the instant
15 case and the competing theories of liability. Moreover, such conduct appears intentional
16 or highly reckless when viewed in the proper context that such evidence supports
17 VERSA's defense that its valve functioned properly. Accordingly, applying Young and N.
18 AM. Props., because MBD's intentional or reckless conduct rises to a level of willfulness,
19 MBD's destruction of evidence and its failure to preserve the integrity of evidence weighs
20 in favor of this Court striking MDB's Third-Party Complaint against VERSA.

21 b. A Lesser Sanction Would Adversely Harm Versa Because it Would
22 Needlessly Increase Litigation Costs and Severely Prejudice
VERSA's Liability Defense

23 The second factor of the Young analysis specifically addresses the extent to which
24 the non-offending party would be prejudiced by a lesser sanction. See, Young, 106 Nev.
25 at 93. The Nevada Supreme Court looks to whether the problems caused by the
26 discovery violation are substantial and correctable when determining prejudice. N. Am.
27 Props. 2016 Nev. Unpub. LEXIS 487 at *9.

1 Here, a lesser sanction would prejudice VERSA for two reasons. First, a lesser
2 sanction would force VERSA to approach trial without crucial defense evidence while
3 simultaneously rewarding MDB for its conduct. Second, a lesser sanction needlessly
4 increases VERSA's litigation costs and does nothing to remedy the discovery abuses.
5 Versa is unable to test the electrical component parts to determine if there was a
6 malfunction which activated the valve. Accordingly, applying Young, because a lesser
7 sanction would not remedy MDB's spoliation of critical evidence, a lesser sanction will
8 only force VERSA to incur unnecessary and expensive litigation costs. Thus, this factor
9 strongly weighs in favor of the Court striking MDB's Third-Party Complaint.

10 c. Dismissal of MDB's Third-Party Complaint Balances the Harm of
11 MDB's Destruction of Evidence Necessary for VERSA to Assert a
Proper Defense

12 The third factor of the Young analysis addresses the severity of the sanction of
13 dismissal relative to the severity of the discovery abuse. See, Young, 106 Nev. at 93.
14 Courts have held that severe sanctions are warranted when the aggravating party
15 *violates both the letter and spirit* of the discovery rules. See, N. Am. Props., 2016 Nev.
16 Unpub. LEXIS 487 at *10.

17 Here, the instant discovery violations are a text book example of conduct that
18 violates both the letter and spirit of discovery: *MDB threw away key evidence that VERSA*
19 *needs to prove its case.* See, Exhibit 3 at P. 169:16-22. Such conduct has a nullifying
20 effect on VERSA's ability to defend itself in this matter. Essentially, MDB's destruction of
21 evidence functions indirectly as an informal dismissal of VERSA's defenses. Accordingly,
22 applying Young and N. Am. Props., because MDB's actions have a similar effect as a
23 dispositive Motion, dismissal of MDB's Third-Party Complaint is proportionate to MDB's
24 discovery abuses and, therefore, this factor weighs in favor of the Court striking MDB's
25 Third-Party Complaint.
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1 d. Unquestionably, MBD Irreparably Destroyed Highly Relevant
2 Evidence

3 The fourth factor of the Young analysis addresses whether any evidence has been
4 irreparably lost. Young, 106 Nev. at 93. Although evidence may not be irreparably lost,
5 the Court may hold this factor against the aggravating party if the abusive conduct greatly
6 undermines the utility of the subject evidence by robbing the aggrieved party of the
7 opportunity to carefully review and consider the evidence before trial. See, N. Am. Props.
8 2016 Nev. Unpub. LEXIS 487 at *11.

9 Here, this is an open and closed case - *MDB irreparably lost evidence*. See,
10 Exhibit 3 at P. 169:16-22. MDB threw away the electrical components that relate to the
11 core issue of why the subject valve activated. Id. Additionally, through the continued
12 used of the truck, trailers, and subject valve after the accident, MDB forever destroyed
13 VERSA's ability to investigate the condition of such evidence as it existed at the time of
14 the accidents. See, Exhibit 4 at P. 84:19-24; Exhibit 6 at P. 4:8-22. Accordingly, applying
15 Young and N. Am. Props., because MDB irreparably spoliated evidence, which unduly
16 prejudice VERSA, this factor strongly weighs in favor of the Court striking MDB's Third-
17 Party Complaint.
18

19 e. An Alternative Sanction Would Not Be Fair to VERSA Since MDB's
20 Destruction of Evidence Has a Nullifying Effect on VERSA's
21 Defenses

22 The fifth factor of the Young analysis addresses the feasibility and fairness of
23 alternative, less severe sanctions, such as an order deeming facts relating to improperly
24 withheld or destroyed evidence to be admitted by the offending party. Young, 106 Nev. at
25 93. The purpose of alternative sanctions is to restore the prejudiced party to the same
26 position it would have been absent the discovery violation. See, Turner v. Hudson Transit
27 Lines, 142 F.R.D. 68, 74 (S.D.N.Y. 1991).
28

1 Here, MDB's discovery violations have undermined VERSA's liability defenses by
2 destroying key evidence and, thus, such violations have created unequal footing in favor
3 of MDB as the parties approach trial. Although it is feasible to administer a lesser
4 sanction, it is both unquestionably unfair and economically unsound. The indirect
5 consequence of allowing a lesser sanction is that such action sends a message that the
6 discovery rules are only bark, with no bite. A lesser sanction will force VERSA to
7 approach trial with essential tools missing from its tool belt - the crucial evidence that
8 MDB destroyed. More importantly, as outlined above, a lesser adverse instruction
9 sanction requires additional unnecessary and costly litigation fees. Accordingly, applying
10 Young, as any other sanction would not be as fair as dismissing MDB's meritless Third-
11 Party Complaint, this factor strongly weighs in favor of the Court striking MDB's Third-
12 Party Complaint.

13 f. Public Policy Favors Dismissing this Meritless Claim

14 The sixth factor of the Young analysis addresses the public policy favoring
15 adjudication on the merits. Young, 106 Nev. at 93. Although courts favor adjudicating
16 cases on their merits, gross discovery abuses will qualify as circumstances when case-
17 ending sanctions, or sanctions that effectively act as case-ending sanctions, are
18 appropriate. See, Foster v. Dingwall, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (not
19 hearing the case on its merits appropriate when relevant evidence been irreparably lost
20 due to the willful actions).

21 Here, under normal circumstances, policy favors that a Court adjudicate a
22 traditional case on its merits. However, the instant case is distinguishable from a
23 traditional case for two reasons. First, MDB's expert has readily admitted that the subject
24 valve has no design or manufacturing defects. See, Exhibit 2 at P. 97:16-25;98:1-17;
25 Exhibit 5; Exhibit 7 at P. 84:25;85:1-12; Exhibit 8 at P.118:6-19. Second, ***MDB destroyed***
26 ***key defense evidence***, which constituted a gross discovery abuse and created an unjust
27 chilling effect on VERSA's liability defenses. See, Exhibit 3 at P. 169:16-22; Exhibit 6 at
28 P. 4:8-22; P. 6:8-23. Accordingly, applying Young and Foster, because MDB's Third-

1 Party Complaint is meritless and MDB irreparably destroyed key defense evidence, this
2 factor strongly weighs in favor of the Court striking MDB's Third-Party Complaint.

3 g. Whether Sanctions Unfairly Operate to Penalize a Party for the
4 Misconduct of His or Her Attorney

5 The sixth factor of the Young analysis addresses whether sanctions unfairly
6 operate to penalize a party for the misconduct of his or her attorney. Young at 93.

7 Here, at this point in litigation, there is no evidence in the record to suggest that
8 MDB's counsel had an part in the destruction of the subject evidence. Accordingly,
9 applying Young, because *MDB actively destroyed evidence on its own volition*, void of
10 counsel's misconduct, this factor strongly weighs in favor of the Court striking MDB's
11 Third-Party Complaint.

12 h. This Is a Perfect Example of the Abuses that Case Law and the
13 Discovery Rules seek to Prohibit and, thus, this Court Should Use
14 this Opportunity to Deter Future Similar Conduct

15 The last factor of the Young analysis addresses the need to deter both the parties
16 and future litigants from similar abuses. Young, 106 Nev. at 93. Courts have held that
17 discovery *sanctions are applicable* as to deterring future conduct *when there is underlying*
18 *abusive conduct at issue*. See, GNLV Corp., 111 Nev. at 871.

19 Here, MDB's conduct has undermined the Nevada's Rules of Civil Procedure and
20 the very spirit of discovery. This case stems from an accident *involving multiple vehicles*
21 *and serious injuries*. If ever there was a time to preserve evidence, this is the case.
22 However, MDB saw it fit to destroy critical defense evidence while on actual notice (i.e.
23 after the first Complaint was filed) that such evidence was relevant to the subject
24 litigation. See, Exhibit 3 at P. 169:16-22; Exhibit 6 at P. 4:8-22; P. 6:8-23. Allowing for
25 anything less than dismissal of MDB's Third-Party Complaint would establish an improper
26 precedent and could lead to a slippery slope of allowable discovery abuses. Accordingly,
27 applying Young and GNLV Corp., because the Court needs to deter similar future
28 conduct analogous to MDB's instant conduct, this factor strongly weighs in favor of the

1 Court striking MDB's Third-Party Complaint.

2 3. Nevada Statutory and Case Law Allows for a Rebuttable Presumption that
3 Evidence Willfully Suppressed Would Be Adverse to the Suppressing Party
4 if Produced

5 When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable
6 presumption that *the evidence would be adverse if produced*. Bass-Davis v. Davis, 122
7 Nev. 442, 448, 134 P.3d 103, 106 (2006). A rebuttable presumption is a rule of law by
8 which the finding of a basic fact gives rise to a presumed fact's existence, unless the
9 presumption is rebutted. Van Wart v. Cook, 557 P.2d 1161, 1163 (Okla. Civ. App. 1976).
10 However, the party seeking the presumption's benefit has the burden of demonstrating
11 that the evidence was destroyed with intent to harm. Bass-Davis v. Davis, 122 Nev. 442,
12 448, 134 P.3d 103, 107 (2006).

13 When such evidence is produced, the presumption that the evidence was adverse
14 applies, and the burden of proof shifts to the party who destroyed the evidence. Id. To
15 rebut the presumption, the destroying party must then prove, by a preponderance of the
16 evidence, that the destroyed evidence was not unfavorable. Id. If not rebutted, the fact-
finder then presumes that the evidence was adverse to the destroying party. Id.

17 Here, as addressed in the Young analysis, MDB willfully destroyed crucial
18 evidence that is pertinent to VERSA's liability defenses. See, Exhibit 3 at P. 169:16-22;
19 Exhibit 6 at P. 4:8-22; P. 6:8-23. With MDB's continual use of the subject truck, trailers,
20 and valve after the subject accident, MDB corrupted the integrity and value of such
21 evidence. Such continued use after being on notice to preserve evidence demonstrates
22 MDB's intent to harm the integrity of the evidence and harm VERSA's defense of the
23 case. Additionally, MDB's cognizant destruction of the key electrical components, that
24 cause the valve to activate, demonstrate by a preponderance of the evidence that MDB
25 intended to harm VERSA by destroying the evidence that supports VERSA's liability
26 defenses. Id. MBD may try to hide behind a procedural argument that it threw away the
27 critical evidence as part of its business operations; however, such an argument would
28 constitute a red hearing because MDB should not have even operated the subject truck,

1 trailers and valve to artificially create a situation that called for replacement and repair of
2 such components. Id. Accordingly, applying Bass-Davis, because MDB intentionally
3 suppressed and destroyed crucial evidence, this Court should advise the jury that such
4 evidence would be adverse against MDB if MDB had properly produced such evidence.

5 4. At a Minimum, Nevada Case Law Provides for an Adverse Inference
6 Instruction that the Evidence MDB Destroyed May Have Been Unfavorable
7 to MDB

8 Unlike a rebuttable presumption, an adverse inference has been defined as "[a]
9 logical and reasonable conclusion of a fact not presented by direct evidence but which, by
10 process of logic and reason, a trier of fact may conclude exists from the established
11 facts." Bass-Davis v. Davis, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006). An inference
12 simply allows the trier of fact to determine, based on other evidence, that a fact exists. Id.
13 *An inference should be permitted when evidence is negligently lost or destroyed, without*
14 *the intent to harm another party.* Id. at 449. The adverse inference provides the
15 necessary mechanism for restoring the evidentiary balance. Id. Generally, in cases based
16 on negligently lost or destroyed evidence, an adverse inference instruction is tied to a
17 showing that the party controlling the evidence had notice that it was relevant at the time
18 when the evidence was lost or destroyed. Id. at 450.

19 Here, in the event that the Court does not find that MDB willfully attempted to
20 suppress and destroy the subject evidence, the Court should at least remedy the current
21 inequity by issuing an adverse inference against MDB. The evidence demonstrates that
22 MDB at a minimum negligently destroyed evidence by continuing to operate the subject
23 truck, trailers and valve and discarded components that relate directly to how the valve
24 activates. See, Exhibit 3 at P. 169:16-22; Exhibit 6 at P. 4:8-22; P. 6:8-23. Accordingly,
25 although the current situation calls for the Court to order more severe sanctions, the
26 Court should at a minimum issue an adverse inference against MDB.
27
28

1 IV. CONCLUSION

2 Based on the foregoing, VERSA respectfully requests that the Court grant
3 VERSA's Motion and strike MDB's Third-Party Complaint, or in the alternative, issue an
4 adverse instruction against MDB.

5 AFFIRMATION

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

8 DATED this 15th day of May, 2017

9 Respectfully submitted,

10 LEWIS BRISBOIS BISGAARD & SMITH LLP

11
12
13 By /s/ David B. Avakian

14 JOSH COLE AICKLEN
15 Nevada Bar No. 007254
16 DAVID B. AVAKIAN
17 Nevada Bar No. 009502
18 PAIGE S. SHREVE
19 Nevada Bar No. 013773
20 6385 S. Rainbow Boulevard, Suite 600
21 Las Vegas, Nevada 89118
22 Attorneys for Third-Party Defendant
23 VERSA PRODUCTS COMPANY, INC.
24
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EXHIBIT LIST

- Exhibit 1 MDB's Third-Party Complaint Against VERSA
- Exhibit 2 Deposition Transcript of Scott Palmer, Volume III
- Exhibit 3 Deposition Transcript of Scott Palmer, Volume II
- Exhibit 4 Deposition Transcript of Scott Palmer, Volume I
- Exhibit 5 Declaration by David R. Bosch, Ph.D
- Exhibit 6 MDB's Responses to VERSA's Requests for Admission
- Exhibit 7 Deposition Transcript of Tracy Shane
- Exhibit 8 Deposition Transcript of Patrick Bigby

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2017, a true and correct copy of MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION was served via U.S. Mail addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
MORRIS POLICH & PURDY LLP
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

Katherine F. Parks, Esq.
Brian M. Brown, Esq.
Thierry V. Barkley, Esq.
THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER
6590 S. McCarran, Ste. B
Reno, Nevada 89509
P: 775-786-2882
Attorneys MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

EXHIBIT 3

Date	Description	Hours	Amount	Invoice #
5/04/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel for Dragon	.10	21.50 B	1909234
	Day Total:	.10	21.50 B	
5/11/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Discovery Motions: Draft/Revise: Finalize motion for protective order	.50	107.50 B	1909234
	Day Total:	.50	107.50 B	
5/15/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Dispositive Motions: Draft/Revise: Finalize Motion for spoliation sanctions against MDB	.50	107.50 B	1909234
	Day Total:	.50	107.50 B	
	MONTH TOTAL:	1.10	236.50 B	
		.00	.00 N	
		1.10	236.50 T	
6/06/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission re motion for summary judgment	.20	43.00 B	1909234
	Day Total:	.20	43.00 B	
6/22/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Written Motions and Submissions: Review/Analyze: Detailed legal analysis of Plaintiffs motion for determination of good faith settlement	.30	64.50 B	1909234
	Day Total:	.30	64.50 B	
	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of non-opposition to MDB's motion for good faith settlement	.10	21.50 B	1909234
	Day Total:	.40	86.00 B	
6/28/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order granting MDB's request for a continuance to brief Opposition to Versa's motion for summary judgment	.10	21.50 B	1909234
	Day Total:	.10	21.50 B	
	MONTH TOTAL:	.70	150.50 B	
		.00	.00 N	
		.70	150.50 T	
7/07/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel	.10	21.50 B	1964176

Blank = Billable/Unbilled * = From Time Entry E=From Error File B = Billed N = Non-billable T = Total W = Written Off

Date	Description	Hours	Amount	Invoice #
7/10/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Dispositive Motions: Review/Analyze: Detailed legal analysis of Plaintiff's Opposition to motion for summary judgment	.10	21.50 B	
	Day Total:			
7/13/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the request for submission for motion for determination of good faith settlement	.30	64.50 B	1964176
	Day Total:			
	MONTH TOTAL:	.30	64.50 B	
8/01/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order scheduling hearing on various motions	.10	21.50 B	1964176
	Day Total:			
8/03/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission re motion for protective order	.10	21.50 B	
	Day Total:			
8/07/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of MDB's objection to request for submission on motion for protective order	.20	43.00 B	1964176
	Day Total:			
8/09/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order setting hearing on motion for protective order	.20	43.00 B	
	Day Total:			
8/17/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of Modern and Dragon's offer of judgment for \$1,000	.10	21.50 B	1964176
	Day Total:			
	MONTH TOTAL:	.10	21.50 B	
	MONTH TOTAL:	.70	150.50 B	
		.00	.00 N	
		.70	150.50 T	

Blank = Billable/Unbilled * = From Time Entry E=From Error File B = Billed N = Non-billable T = Total W = Written Off

Date	Description	Hours	Amount	Invoice #
12/07/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the return of jury fees	.10	21.50 B	2021410
	Day Total:	.10	21.50 B	
12/12/17	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission on motion to strike	.20	43.00 B	2021410
	Day Total:	.20	43.00 B	
	MONTH TOTAL:	.30	64.50 B	
		.00	.00 N	
		.30	64.50 T	
1/22/18	27350-1555 Hartford Insurance Company Remmerde, Geneva v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order dismissing MDB's cross-claim	.10	21.50	
	Day Total:	.10	21.50	
	MONTH TOTAL:	.10	21.50 B	
		.00	.00 N	
		.10	21.50 T	
	TIMEKEEPER TOTAL:	3.40	731.00 B	
		.00	.00 N	
		3.40	731.00 T	

Date	Description	Hours	Amount	Invoice #
FINAL TOTAL:		3.40	731.00	B
		.00	.00	N
		3.40	731.00	T

Blank = Billable/Unbilled * = From Time Entry E=From Error File B = Billed N = Non-billable T = Total W = Written Off

FILED
Electronically
CV16-00976
2018-02-09 10:01:55 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6524529 : pmsewell

EXHIBIT 2

1 JOSH COLE AICKLEN
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7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S
VERIFIED MEMORANDUM OF COSTS

19
20 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
21 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
22 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and submits the
23 following Verified Memorandum of Costs to be recovered against Third-Party Plaintiff
24 MDB TRUCKING, LLC pursuant to NRS 18.005; NRS 18.020; and NRS 18.110.

25 This Memorandum of Costs and Disbursements is based upon VERSA's Offer of
26 Judgment under NRCP 68, NRS 18.005, NRS 18.020, and NRS 18.110, the pleadings
27 and papers on file herein, the verification of attorneys' fees and costs by defense counsel,
28 and any evidence to be considered by this Court.

1 VERSA submits its verified Memorandum of Costs within five (5) days of entry of
2 Judgment pursuant to NRS 18.110(1).

3 The undersigned hereby verifies, under penalty of perjury, that the following costs
4 were incurred by Defendant in the defense of this matter:

5 COSTS FROM LEWIS BRISBOIS BISGAARD & SMITH, LLP (LBBS)

6 1. Court Filing Fees \$ 413.00

7 LEGAL COSTS: \$413.00

8 AFFIRMATION

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

11 DATED this 9th day of February, 2018

12 Respectfully Submitted,

13 LEWIS BRISBOIS BISGAARD & SMITH LLP

14
15
16 By /s/ Josh Cole Aicklen

17 JOSH COLE AICKLEN
18 Nevada Bar No. 007254
19 DAVID B. AVAKIAN
20 Nevada Bar No. 009502
21 PAIGE S. SHREVE
22 Nevada Bar No. 013773
23 6385 S. Rainbow Boulevard, Suite 600
24 Las Vegas, Nevada 89118
25 Attorneys for Third-Party Defendant VERSA
26 PRODUCTS COMPANY, INC.
27
28

1 AFFIDAVIT OF JOSH COLE AICKLEN IN SUPPORT OF THIRD-PARTY DEFENDANT
2 VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS

3 STATE OF NEVADA }
4 COUNTY OF CLARK } SS.

5 I, JOSH COLE AICKLEN, ESQ., do declare and state as follows:

6 1. I am an Owner of Lewis Brisbois Bisgaard & Smith LLP, and am duly
7 licensed to practice law in the State of Nevada. I am competent to testify to the matters
8 set forth in this Affidavit, and will do so if called upon. I am the attorney of record
9 representing Third-Party Defendant VERSA PRODUCTS COMPANY, INC. in the subject
10 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
11 State of Nevada, Case Number CV16-00976.

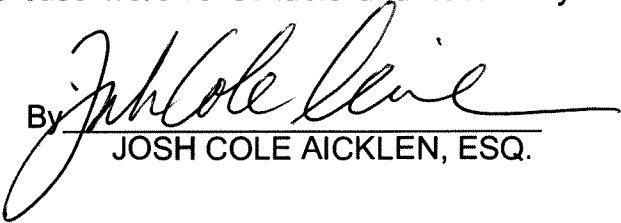
12 2. I participated in the entirety of the litigation, which culminated in an
13 evidentiary hearing on October 13, 2017 in the FITZSIMMONS and REMMERDE matter
14 with the Court finding in favor of Defendant and striking MDB's Third-Party Complaints.

15 3. The total costs in the case were \$413.00.

16 4. The entirety of the costs in this case were reasonable and customary for
17 Washoe County.

18
19
20 SUBSCRIBED AND SWORN to before
me this 9th day of February, 2018.

21
22 NOTARY PUBLIC in and
23 for said COUNTY and STATE

By 
JOSH COLE AICKLEN, ESQ.

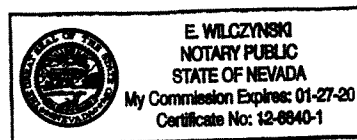


EXHIBIT 1

27350-1555
Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc
Date: 8/08/16
WIP Seq#: 513,682,140
Amount: 213.00

Date / Time 7/19/2016 8:28:33 AM

Cashier WashoeAPI

Transaction ID 30992413

\$213.00 Amount

Court Fees Court Filing Fee
Submission ID 5614156

Payment Summary : Visa payment for \$213.00.
Payment Acct Last4 : *****6392
Billing Name : Stacy Bowers
Billing Address : 6385 South Rainbow Boulevard
Las Vegas, NV 89118
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbristbois.com

27350-
1555

IAFD /
1st Appeal
M / Dismiss

Signature _____

Description: Filing fee of/for _____

Vendor: 82739 Wells Fargo Commercial Card Services
Voucher: 2035444 Distribution
Doc ID: 0001NGCW Page 259 4789353 Distribution Level

27350-1555

Date / Time 5/3/2017 1:30:30 PM Cashier WashoeAPI
Transaction ID 47998777 \$200.00 Amount
Court Fees CourtFilingFee
Submission ID 6082213
Payment Summary : Mastercard payment for \$200.00.
Payment Acct Last4 : *****0164
Billing Name : Stacy Bowers
Billing Address : 633 W. 5th St., Ste. 4000
Los Angeles, CA 90071
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbrisbois.com

Signature Motion for Summary Judgment

27350-1555
Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc
Date: 6/14/17
WIP Seq#: 546,027,920
Amount: 200.00

Vendor: 94005 Comerica Commercial Card Services
Voucher: 2146974 Distribution 5098731 Distribution Level
Doc ID: 0001TUFN Page 184

Stat: blank-WIP Open, W-WIP Written-off, B-Billed & Unpaid, P-Paid, SN-Sent to client for direct payment, PW-partially paid/partially written-off.
Source: A/P-Accounts Payable Vendor Not Paid; A/P-P-Accounts Payable-Vendor Paid; DSB-Disb entry; APWFL-A/P Workflow

46

EXHIBIT 1

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Nevada Bar No. 013773
5 Paige.Shreve@lewisbrisbois.com
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Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Third-Party Defendant
VERSA PRODUCTS COMPANY, INC.
9

10 IN THE SECOND JUDICIAL DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
TRUCKING, LLC; DOES I-X and ROE I-V,

16 Defendants.

17 MDB TRUCKING, LLC, a Nevada limited
18 liability company,

19 Third-Party Plaintiff,

20 vs.

21 RMC LAMAR HOLDINGS, INC., a
Colorado corporation; VERSA
22 PRODUCTS COMPANY, INC., a New
Jersey corporation; THE MODERN
23 GROUP GP-SUB, INC., a Texas
corporation and general partnership;
24 DRAGON ESP, LTD., a Texas limited
partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,

25 Third-Party Defendants.
26
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Case No. CV16-00976
Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S OFFER
OF JUDGMENT TO THIRD-PARTY
PLAINTIFF MDB TRUCKING, LLC

1 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S OFFER OF
2 JUDGMENT TO THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC

3 Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by and through its
4 attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and Paige S.
5 Shreve, Esq., of the law firm LEWIS BRISBOIS BISGAARD & SMITH, LLP, pursuant to
6 NRCP 68(c)(2), offers to Third-Party Plaintiff MDB TRUCKING, LLC the total sum of one
7 thousand dollars and zero cents (\$1,000.00) and a waiver of any presently or potentially
8 recoverable attorney's fees, costs and interest in full and final settlement of the above-
9 referenced case.

10 This offer shall not be construed to allow MDB TRUCKING, LLC to seek costs,
11 attorney's fees, or prejudgment interest from the Court in addition to the amount stated in
12 the offer, should MDB TRUCKING, LLC accept the offer.

13 Pursuant to N.R.C.P. 68, this Offer shall be open for a period of ten (10) days from
14 the date of service of this Offer. In the event this Offer of Judgment is accepted by MDB
15 TRUCKING, LLC, VERSA PRODUCTS COMPANY, INC. will obtain a dismissal of the
16 claim as provided by N.R.C.P. 68(d) rather than to allow judgment to be entered against
17 VERSA PRODUCTS COMPANY, INC. Accordingly, and pursuant to these rules and
18 statutes, judgment against VERSA PRODUCTS COMPANY, INC. could not be entered
19 unless ordered by the District Court.

20 This Offer of Judgment is made solely for the purposes intended by N.R.C.P. 68
21 and is not to be construed as an admission in any form, shape or manner that VERSA
22 PRODUCTS COMPANY, INC. is liable for any of the allegations made by Plaintiffs and/or
23 MDB TRUCKING, LLC in the Complaint or Third-Party Complaint. Nor is it an admission
24 that Plaintiffs and/or MDB TRUCKING, LLC is entitled to any relief, including, but not
25 limited to, an award of damages, attorney's fees, costs or interest. By virtue of this Offer,
26 VERSA PRODUCTS COMPANY, INC. waives no defenses asserted in its Answer to
27 Plaintiffs' Complaints and MDB TRUCKING, LLC Third-Party Complaint.
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DATED this 4th day of May, 2017

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ David B. Avakian

JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
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Attorneys for Third-Party Defendant **VERSA**
PRODUCTS COMPANY, INC.

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8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.
9

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA
12

13 GENEVA M. REMMERDE,

14 Plaintiff,

15 vs.

16 DANIEL ANTHONY KOSKI; MDB
TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.
18

19 AND ALL RELATED CASES.
20

Case No. CV16-00976

Dept. 10

**THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S MOTION
FOR ATTORNEYS' FEES AND COSTS
PURSUANT TO NRCP 37 AND NRCP 68**

21 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
22 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
23 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby
24 submits its Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68.

25 This Motion is made and based upon the pleadings and papers on file in this
26 matter, Nevada Rule of Civil Procedure 37, Nevada Rule of Civil Procedure 68, the
27 attached Memorandum of Points and Authorities, the entire record in this case, the
28 attached Affidavit of Josh Cole Aicklen, Esq., the Verified Memorandum of Fees and

1 Costs, filed concurrently herewith, the attached exhibits, and any such argument as the
2 Court may entertain at the hearing on this Motion.

3 DATED this 9th day of February, 2018.

4 Respectfully Submitted,

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6
7

8 By /s/ Josh Cole Aicklen

9 JOSH COLE AICKLEN

10 Nevada Bar No. 007254

11 DAVID B. AVAKIAN

12 Nevada Bar No. 009502

13 PAIGE S. SHREVE

14 Nevada Bar No. 013773

15 6385 S. Rainbow Boulevard, Suite 600

16 Las Vegas, Nevada 89118

17 Attorneys for Defendant/Cross-Defendant

18 VERSA PRODUCTS COMPANY, INC.
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1 **AFFIDAVIT OF JOSH COLE AICKLEN, ESQ. IN SUPPORT OF**
2 **THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S**
3 **MOTION FOR ATTORNEYS' FEES, COSTS AND INTEREST PURSUANT TO NRCP 37**
4 **AND NRCP 68**

4 STATE OF NEVADA)
5 COUNTY OF CLARK) ss.

6 JOSH COLE AICKLEN, ESQ., being first duly sworn, deposes and states as
7 follows:

8 1. I am an Owner of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am
9 duly licensed to practice law in the State of Nevada. I am competent to testify to the
10 matters set forth in this Affidavit, and will do so if called upon. I am the attorney of record
11 representing Third-Party Defendant VERSA PRODUCTS COMPANY, INC. in the subject
12 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
13 State of Nevada, Case Number CV16-00976.

14 2. I am a member of the United States Supreme Court Bar; the California
15 State Bar since 1990; and the Nevada State Bar since 2000.

16 3. I am admitted in the Ninth Circuit Court of Appeals, the United States
17 Central District Court of California and the U.S. District Court of Nevada.

18 4. I graduated from the University of Southern California in 1985 with a
19 Bachelor of Arts degree in Political Science. I graduated from Whittier College School of
20 Law with a Juris Doctor degree, Magna Cum Laude, in 1990. From 1990 until the present
21 the majority of my work has been representing defendants in general liability civil
22 litigation. Prior to moving to Las Vegas, I was Adjunct Professor of Law at Whittier
23 College School of Law, teaching courses on legal research and writing and civil discovery
24 practice. In twenty eight years of practicing law, I reasonably estimate that I have taught
25 approximately 85 legal and professional workshop courses, including classes on how to
26 detect and litigate fraudulent claims; seminar courses on jury selection; trying jury trials in
27 automobile accident cases; legal writing; employment law; electronic discovery; trial
28 skills; conducting mock trials; and civil procedure. I reasonably estimate that I have tried

1 approximately 95 cases to jury verdict or court judgment. In 2001, after 11 years of civil
2 practice, I received an AV rating by the Martindale-Hubbell peer review rating system. I
3 billed my time in this matter at \$235.00 per hour which I believe to be very reasonable.

4 5. During the defense of this case, I supervised the work and activities of
5 Partner David B. Avakian, Esq., associates Paige S. Shreve, Esq., Bradley M. Marx,
6 Esq., and Robert Loftus, Esq., and Senior Associate Brandon D. Wright, Esq. Mr.
7 Avakian's time was billed at \$215.00; Mrs. Shreve, Mr. Marx, and Mr. Loftus' times were
8 billed at \$175.00; and Mr. Wright's time was billed at \$185.00. All of the aforementioned
9 counsel are licensed and in good standing in the State of Nevada.

10 6. On May 4, 2017, VERSA served MDB with an Offer of Judgment in the
11 amount of \$1,000.00. See, Offer of Judgment dated May 4, 2017, true and correct copies
12 of which are attached as Exhibit 1. MDB rejected VERSA's Offer of Judgment.

13 5. From May 4, 2017 to the present, VERSA incurred a total of \$731.00 in
14 attorneys' fees and \$413.00 in costs defending against MDB's claims. See, Verified
15 Memorandum of Attorneys' Fees and Costs, attached as Exhibit 2; see also, Redacted
16 copies of attorneys' fees and invoices, true and correct copies of which are attached
17 hereto as Exhibit 3.

18 7. The aforesaid legal services and costs were actually and necessarily
19 incurred and were reasonable in amount.

20 8. Counsel's work included communication with counsel for the other parties,
21 review of multiple parties pleadings and papers, preparing VERSA's pleadings and
22 papers for the Court, extensive law and motion practice, communication with the client,
23 trial preparation and conducting an evidentiary hearing.

24 9. Attached hereto as Exhibit 4 is a true and correct copy of VERSA's Motion
25 to Strike MDB's Third-Party Complaint pursuant to NRCP 37 (pleading only).
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1 10. Attached hereto as Exhibit 5 is a true and correct copy of the Notice of Entry
2 of Order Granting VERSA's Motion to Strike MDB's Third-Party Complaint pursuant to
3 NRCP 37.

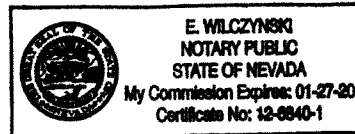
4 FURTHER AFFIANT SAYETH NAUGHT.

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7 
8 JOSH COLE AICKLEN, ESQ.

9 SUBSCRIBED AND SWORN to before me
10 this 9th day of February, 2018.

11 

12 NOTARY PUBLIC
13 In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant/Third-Party Plaintiff, MDB TRUCKING, LLC (“hereinafter referred to as
4 “MDB”), brought Third-Party/Cross-Claims¹ against VERSA PRODUCTS COMPANY,
5 INC. (hereinafter referred to as “VERSA”), in which it asserted a contribution claim
6 against VERSA for personal injury claims brought by Plaintiffs, Ernest Fitzsimmons and
7 Carol Fitzsimmons (“Fitzsimmons”); Angela Wilt (“Wilt”); Rosa, Benjamin, Cassandra and
8 Natalie Robles (“Robles”); Sonya Corthell (“Corthell”); Beverly, Patrick and Ryan
9 Crossland (“Crossland”); Olivia and Naykyla John (“John”); Kandise Baird (“Kins”); James
10 Bible (“Bible”); and Geneva Remmerde (“Remmerde”) (collectively referred to as
11 “Plaintiffs”). Plaintiffs were driving westbound on IR80 when a semi-trailer driven by
12 Defendant Daniel Koski and owned by Defendant/Third-Party Plaintiff MDB spilled gravel
13 on the freeway, causing multiple automobile accidents and the injuries alleged by the
14 Plaintiffs. MDB’s contribution claim was based on its allegation that the inadvertent
15 gravel dump was due to an alleged “defect” with the VERSA valve on the subject trailer.

16 II. PROCEDURAL HISTORY

17 MDB first served VERSA with a Third-Party Complaint on June 27, 2016.
18 Plaintiffs’, Defendants’ and Third-Party Defendants’ conducted discovery over the next
19 several months. On May 4, 2017, VERSA served an Offer of Judgment to MDB for the
20 amount of \$1,000.00. See, Exhibit 1. On May 5, 2017, the parties attended mediation in
21 an attempt to resolve this matter. All the claims were settled with the Plaintiffs.

22 _____
23 ¹ There are a total of nine different lawsuits filed by the Plaintiffs. All except for two of the above mentioned
24 lawsuits have been consolidated for discovery and trial purposes. The remaining two cases, James Bible
25 (CV16-01914) and Geneva Remmerde (CV16-00976), have been consolidated for discovery purposes
only. VERSA is named as a direct defendant in all nine cases, except for Remmerde. VERSA is only a
Third-Party Plaintiff/Defendant in that case.

26 In all nine of the above mentioned lawsuits, MDB filed cross-claims/third-party action against VERSA
27 for Indemnity and Contribution. VERSA filed a Motion to Dismiss MDB’s Indemnity claim against VERSA in
all nine cases. The Court granted VERSA’s Motions to Dismiss the indemnity claims, leaving MDB with a
cross-claim for contribution only against VERSA. All Plaintiffs have settled their personal injury claims.

1 Unfortunately, MDB and VERSA were unable to resolve the cases. In an attempt to
2 resolve the matters, two business days later VERSA offered the amount MDB requested
3 at mediation, but MDB refused to even discuss settlement. On May 15, 2017, VERSA
4 filed its Motion to Strike MDB's Third-Party Complaint pursuant to NRCP 37. See, Exhibit
5 4. On May 22, 2017, VERSA's Offer of Judgment.J to MDB lapsed. On December 12,
6 2017, VERSA filed its request for submission on its Motion to Strike MDB's Third-Party
7 Complaint. On January 22, 2018, granted VERSA's Motion to Strike incorporating the
8 December Order from the FITZSIMMONS matter.

9 Due to MDB's refusal to resolve the case, the parties began preparing for a costly
10 jury trial. Simply put, MDB rejected VERSA's Offer of Judgment and refused to even
11 negotiate. On October 13, 2017, a couple weeks before trial, the Court held an
12 evidentiary hearing on VERSA's Motion to Strike MDB's Cross-Claim for spoliation of
13 evidence. MDB and VERSA called numerous experts and witnesses to testify and issued
14 several subpoenas. The Court ultimately agreed with VERSA's arguments, holding that
15 "due to the severity of MDB's discovery abuse there are no lesser sanctions that are
16 suitable" and struck MDB's Cross-Claim against VERSA due to repeated and egregious
17 spoliation of critical evidence. See, Exhibit 5.

18 MDB's claims against VERSA have always been highly suspect, as the experts
19 found the VERSA valve performed as intended and MDB destroyed critical evidence
20 VERSA needed for its defense. MDB's stricken Third-Party claims clearly did not beat
21 VERSA's \$1,000.00 Offer of Judgment. MDB's refusal to accept VERSA's Offer of
22 Judgment caused VERSA to incur significant attorneys' fees and litigation expenses.
23 Lastly, MDB knew it had spoliated critical evidence to prove its case prior to asserting its
24 Third-Party claims against VERSA. Therefore, VERSA is also entitled to an award of
25 attorneys' fees and costs pursuant to NRCP 37.

26 III. LEGAL ARGUMENT

27 Nevada law permits an award of attorneys' fees if authorized under a statute, rule
28 or contract. See, Thomas v. City of N. Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063

(2006). A claim for attorneys' fees must be made by motion and supported by competent evidence. See, NRCP 54(d)(2)(A). VERSA is entitled to recover attorneys' fees against MDB pursuant to its May 4, 2017 Offer of Judgment and MDB's failure to obtain a more favorable judgment pursuant to NRCP 68. VERSA moves to recover its reasonable attorneys' fees and costs given its Offer of Judgment and the Court's January 22, 2018 order granting VERSA's Motion to Strike MDB's Third-Party Complaint. See, Exhibits 2, 3 and 5. Additionally, VERSA is entitled to recover attorneys' fees and costs against MDB pursuant to NRCP 37 for MDB's spoliation of evidence.

A. VERSA is Entitled to Its Attorneys' Fees And Costs Pursuant to NRCP 37

NRCP 37(b) provides that where a Court strikes a party's pleading, "[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party . . . to pay the reasonable expenses, including attorney's fees. . . unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Indeed, where a Court strikes a party's pleading, awarding attorney's fees and costs is warranted. See, Skeen v. Valley Bank, 89 Nev. 301, 511 P.2d 1053 (1973); Schatz v. Devitte, 75 Nev. 124, 335 P.2d 783 (1959); Foster v. Dingwall, 227 P.3d 1042, 227 P.3d 1042 (2010). The Court has broad power in terms of the sanctions that can be invoked when a party fails to participate in the discovery process. See, Temora Trading Co. v. Perry, 98 Nev. 229, 231, 645 P.2d 436, 437, cert. denied, 459 U.S. 1070, 103 Sup.Ct. 489, 74. L.Ed. 2d 632 (1982); Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)(The District Court dismissed Young's Complaint and ordered Young to pay JRBI's attorneys' fees and costs as a sanction for his willful fabrication of evidence and lies.); Havas v. Bank of Nev., 96 Nev. 567, 613 P.2d 706 (1980).

MDB destroyed critical electrical evidence in this case which denied VERSA the ability to defend itself against MDB's unfounded claims. There is no substantial justification for MDB's failure to preserve the evidence other than to obstruct discovery and frustrate the progress of this litigation. Because MDB was "complicit of benign

1 neglect and indifference to the needs of Versa regarding discovery in this action,” MDB
2 significantly prejudiced VERSA’s ability to defend against MDB’s Third-Party claims, while
3 at the same time substantially increasing VERSA’ attorneys’ fees and costs. See, Exhibit
4 5. Consequently, the Court should award VERSA its attorneys’ fees and costs incurred in
5 the suit pursuant to the plain language of NRCP 37.

6 B. VERSA is Entitled to an Award of Attorneys’ Fees And Costs Pursuant to
7 NRCP 68

8 VERSA is entitled to an award of its attorneys’ fees and costs pursuant to NRCP
9 68 from the date it served its offer (May 4, 2017) to the day MDB pays VERSA’s fees and
10 costs.

11 NRCP 68 states, in relevant part:

12 (e) Failure to Accept Offer. If the offer is not accepted within
13 10 days after service, it shall be considered rejected by the
14 offeree and deemed withdrawn by the offeror. Evidence of the
15 offer is not admissible except in a proceeding to determine
16 costs and fees. The fact that an offer is made but not
17 accepted does not preclude a subsequent offer. . . Any offeree
18 who fails to accept the offer may be subject to the penalties of
19 this rule.

20 (f) Penalties for Rejection of Offer. If the offeree rejects an
21 offer and fails to obtain a more favorable judgment,

22 (1) the offeree cannot recover any costs or attorney’s
23 fees and shall not recover interest for the period after the
24 service of the offer and before the judgment; and

25 (2) the offeree shall pay the offeror’s post-offer costs,
26 applicable interest on the judgment from the time of the offer
27 to the time of entry of the judgment and reasonable attorney’s
28 fees, if any be allowed, actually incurred by the offeror from
the time of the offer.

23 See, NRCP 68 (emphasis added).

24 Offer of Judgment encourage settlement and punish unreasonable rejections of
25 the opposing party’s reasonable settlement offers. The offer of judgment rules penalize
26 an unreasonable plaintiff (by way of awarding adverse attorneys’ fees and costs) for
27 rejecting a defendant’s offer after a plaintiff fails to receive a more favorable judgment at
28 trial. See, Albios v. Horizon, 122 Nev. 409, 418, 132 P.3d 1022, 1012 (2006). The Court

1 should punish MDB in this matter because it rejected VERSA's \$1,000.00 per Plaintiff
2 Offer of Judgment and then its Cross-Claim was stricken due to spoliation of evidence.

3 The Court must consider the following when evaluating whether to award
4 attorneys' fees following the rejection of an Offer of Judgment and then the failure to
5 recover at trial:

- 6 • Whether the plaintiff's claim was brought in good faith;
- 7 • Whether the defendant's offer of judgment was reasonable and in
8 good faith in both its time and amount;
- 9 • Whether the plaintiff's decision to reject the offer and proceed to
10 trial was grossly unreasonable or in bad faith; and
- 11 • Whether the fees and costs sought as punishment for rejecting the
12 Offer of Judgment and then failing to receive a more favorable jury
13 award are reasonable and justified given the litigation.

14 See, RTTC Communications LLC v. Saratoga Flier, Inc., 121 Nev. 34, 41, 110 P.3d 24, 28
15 (2005); Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001); Uniroyal Goodrich Tire
16 Company v. Mercer, 111 Nev. 318, 323, 890 P.2d 785, 789 (1995); Beattie v. Thomas, 99
Nev. 579, 588-89, 688 P.2d 268, 274 (1983).

17 While no single Beattie factor is determinative, a review of the factors proves this
18 Court should award VERSA its attorneys' fees and costs following MDB's unreasonable
19 rejection of VERSA's Offer of Judgment. See e.g., Yamaha Motor Co., U.S.A. v. Arnoult,
20 114 Nev. 233, 252 n. 16, 955 P.2d 661, 673 (1998).

21 1. MDB Should Pay VERSA's Attorneys' Fees and Costs Because its
22 Cross-Claim Was Not Brought and/or Maintained in Good Faith

23 MDB's claims were not brought and/or maintained in good faith because it had no
24 factual (or legal) basis to recover damages from VERSA, arising from MDB's truck
25 dumping a load of gravel on the interstate. MDB destroyed crucial evidence VERSA
26 needed to prove its defense to the Third-Party claims. Even knowing it destroyed critical
27 evidence, MDB disagreed and refused to even negotiate. VERSA sought to "buy its
28 peace" from MDB on May 4, 2017 despite these issues in order to avoid costly litigation.

1 See, Exhibit 1. In addition, VERSA agreed to pay MDB the settlement amount it
2 requested within five (5) days of the mediation. MDB refused to negotiate. MDB,
3 however, rejected VERSA's Offer of Judgment and then failed to recover anything from
4 VERSA, as the Court struck its Cross-Claims due to willful destruction of crucial evidence.
5 See, Exhibit 5. Consequently, MDB's claims against VERSA were not brought and/or
6 maintained in good faith and MDB should pay VERSA's attorneys' fees and costs
7 incurred after May 4, 2017, for rejecting VERSA's good faith Offer of Judgment.

8 2. VERSA's Offer of Judgment Was Reasonable in Both Time and Amount
9 and Made in Good Faith

10 VERSA has maintained throughout the litigation that MDB had no evidence to
11 support its Third-Party claims that the subject valve was defective and that it caused the
12 subject incident. Both VERSA and MDB's experts found no defect with the VERSA valve
13 when it was subjected to destructive testing. More importantly, MDB destroyed crucial
14 evidence VERSA needed to defend MDB's claims. In light of all of this, VERSA wanted to
15 "buy its peace" to avoid costly litigation and negative publicity. MDB clearly had a
16 different agenda.

17 On May 4, 2017, VERSA served Offer of Judgment to Plaintiff for \$1,000.00.
18 VERSA's Offer of Judgment was more than reasonable given the fact that MDB had
19 destroyed the evidence needed for VERSA to defend itself in this matter.

20 VERSA's \$1,000.00 Offer of Judgment should have resolved these matters. MDB,
21 however, rejected VERSA's Offer of Judgment, choosing trial over settlement. VERSA's
22 Offer of Judgment was reasonable (and made in good faith) in every way. MDB's refusal
23 to accept it was not. Consequently, this factor weighs strongly in favor of awarding
24 VERSA its attorneys' fees and costs.

25 3. MDB's Rejection of VERSA's Reasonable Offer of Judgment was
26 Grossly Unreasonable

27 MDB's rejections of VERSA's \$1,000.00 Offer of Judgment was grossly
28 unreasonable. MDB's case against VERSA was highly suspect and unsupported from

1 day one. VERSA informed MDB it could not recover against them because they
2 destroyed crucial evidence and had no evidence to support its Third-Party claims that
3 there was any defect or malfunction with the VERSA valve. In fact, both MDB and
4 VERSA's experts all opined that the valve worked as it was intended and had no
5 mechanical defect. MDB failed to listen to its own experts and rejected VERSA's Offer of
6 Judgment.

7 MDB unreasonably rejected VERSA's Offer of Judgment, forcing VERSA to incur
8 significant litigation expenses defending against MDB's unfounded case. MDB's rejection
9 of VERSA's Offer of Judgment was grossly unreasonable, given the expert testimony and
10 destructive testing; MDB's destruction of critical evidence; and VERSA's Offer of
11 Judgment amounts. Ultimately, the Court agreed with VERSA's characterization of
12 MDB's destruction of evidence, further bolstering VERSA's arguments that MDB's
13 rejection of VERSA's Offer of Judgment was grossly unreasonable. Consequently, this
14 factor strongly favors awarding VERSA its attorneys' fees and costs.

15 4. VERSA's Attorneys' Fees and Costs Following the Offer of Judgment
16 are Reasonable and Justified in Amount

17 VERSA's attorneys fees following service of its Offer of Judgment (May 4, 2017)
18 on MDB are reasonable and justified in amount considering MDB's destruction of
19 evidence, the lack of evidence of any valve defect, and the amount of work involved in the
20 defense of the case. In Nevada, "the method upon which a reasonable fee is determined
21 is subject to the discretion of the court," which "is tempered only by reasons of fairness."
22 See, Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 864 (2005). The lodestar
23 approach is the most appropriate approach for this case, and involves the simple
24 multiplication of the number of hours spent by the hourly rate. The lodestar approach
25 applies the following factors in determining the fee award:

26 (1) the qualities of the advocate: his [counsel's] ability, his
27 training, education, experience, professional standing and
28 skill; (2) the character of the work to be done: its difficulty, its
intricacy, its importance, time and skill required, the
responsibility imposed and the prominence and character of

1 the parties where they affect the importance of the litigation;
2 (3) the work actually performed by the lawyer: the skill, time
and attention given to the work; (4) the result: whether the
attorney was successful and what benefits were derived.

3 Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349 (1969).
4

5 The lodestar approach favors awarding the attorneys' fees and costs reasonably
6 incurred by VERSA. This matter necessitated an expert witness, over a dozen
7 depositions (including travel), detailed analysis of thousands of pages of maintenance
8 records, extensive motion practice, hearing preparation, trial preparation, etc. Mr.
9 Aicklen, Mr. Avakian, Ms. Shreve (and others) all worked diligently on this matter. See,
10 Exhibit 2 and 3. The quality of Mr. Aicklen and Mr. Avakian's trial advocacy cannot be
11 disputed given their expertise, trial experience and results.

12 The nuanced evaluation of this matter's evidence and issues of law required
13 significant work by VERSA's defense team. The factual and legal issues in this matter
14 were intricate, including: analyzing MDB's maintenance records; the scope of
15 admissibility of MDB's many experts; the destruction of crucial evidence; and the
16 evaluation of legal authority and documents to refute MDB's claims against VERSA.

17 The amount of VERSA's attorneys' fees and costs are reasonable given MDB's
18 questionable legal position and destruction of critical evidence. VERSA is entitled to an
19 award of its attorneys' fees and costs after May 4, 2017, to the present. Consequently,
20 Defendant seeks an award of \$731.00 in attorneys' fees and \$413.00 in costs, totaling
21 \$1,144.00 See, Exhibits 1, 2 and 3.

22 III. CONCLUSION

23 For the foregoing reasons, VERSA requests an award of its attorneys' fees and
24 costs totaling \$1,144.00 (\$731.00 in attorneys' fees and \$413.00 in costs) pursuant to
25 NRCP 37 and NRCP 68. Furthermore, VERSA requests that this Court award the
26 attorneys' fees and costs incurred in bringing the instant Motion. VERSA will supplement
27 its Reply with an affidavit regarding these additional fees and expenses.

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AFFIRMATION

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

DATED this 9th of February, 2018.

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen
JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
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Attorneys for Defendant/Cross-Defendant
VERSA PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

- Exhibit 1 Offer of Judgment, May 4, 2017
- Exhibit 2 Verified Memorandum of Costs
- Exhibit 3 Redacted Copies of Attorneys' Fees and Invoices
- Exhibit 4 VERSA's Motion to Strike MDB's Third-Party Complaint Pursuant to
NRCP 37
- Exhibit 5 Notice of Entry of Order Granting VERSA's Motion to Strike MDB's
Third-Party Complaint Pursuant to NRCP 37

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2018, a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRS 68 was served electronically via the Court's e-filing system addressed as follows:

Matthew C. Addison, Esq. Jessica L. Woelfel, Esq. McDONALD CARANO WILSON LLP 100 W. Liberty St., 10 th Floor Reno, NV 89501 RMC LAMAR HOLDINGS, INC.	Nicholas M. Wieczorek, Esq. Jeremy J. Thompson, Esq. CLARK HILL PLLC 3800 Howard Hughes Pkwy, Ste. 500 Las Vegas, NV 89169 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

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

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS, INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS ("the Memorandum of Costs"). Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the CROSS-CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on March 1, 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S

1 REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS
2 PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the Motion for Fees") on
3 March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.
4

5 Also before the Court is the CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION
6 TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
7 VERIFIED MEMORANDUM OF COSTS ("the Motion to Retax") filed by MDB on February 20,
8 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
9 OPPOSITION TO THIRD-PARTY PLAINTIFF MDB TRUCKING LLC'S MOTION TO
10 RETAX COSTS ("the Opposition to the Motion to Retax") on March 8, 2018. MDB filed the
11 REPLY TO OPPOSITION TO MOTION TO RETAX COSTS ("the Reply in Support of the
12 Motion to Retax") on March 19, 2018, and contemporaneously submitted the matter for the
13 Court's consideration. The Court heard oral argument on the Motion for Fees and the Motion to
14 Retax on April 6, 2018, at which time the Court took the matters under advisement.
15
16

17 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
18 by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the
19 Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case
20 number CV15-02349. Numerous other plaintiffs were joined into the Fitzsimmons Action. Two
21 additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and
22 JAMES BIBLE V. MDB TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant
23 action was filed on May 2, 2016. The Bible Action was filed September 20, 2016. It is alleged in
24 all three actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a
25 truck for MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the
26 driving plaintiffs to lose control of their vehicles and numerous accidents occurred. The plaintiffs
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1 sustained physical and emotional injuries as a result of the accidents. In response to the Complaint,
2 MDB filed a THIRD-PARTY COMPLAINT (“the MDB Cross-Claim”) June 22, 2016. The MDB
3 Cross-Claim had two causes of action relative to Versa: Implied Indemnification and
4 Contribution.¹ MDB alleges it was not Koski’s negligence that caused the gravel to spill; rather, the
5 spill was caused by the “unreasonably dangerous and defective” design and manufacture of the
6 trailer that held the gravel. The MDB Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-
7 Claim against the manufacturers of the trailer and its components, including Versa. MDB avers
8 Versa produced a solenoid valve which would, “activate inadvertently allowing the gates to open
9 and release the load [of gravel] carried by the trailer.” The MDB Cross-Claim, 3:10-11. MDB also
10 claims there were safer alternatives available to Versa; the solenoid valve was unreasonably
11 dangerous and defective; and Versa failed to provide appropriate safety mechanisms regarding the
12 solenoid valve. The MDB Cross-Claim, 3:12-18.

15 The Court entered an ORDER (“the January Order”) on January 22, 2018, granting the
16 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.’S MOTION TO STRIKE
17 DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC’S THIRD-PARTY
18 COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE
19 JURY INSTRUCTION (“the Motion to Strike”).² The Court found MDB’s disposal of the
20 electrical systems that control the solenoid which operated the Versa valve crippled Versa’s ability
21 to present its case. As a result, the Court dismissed MDB’s sole remaining claim against Versa.
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26 ¹ Versa filed THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
27 THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) (“the MTD”) on July 19, 2016. The Court granted the MTD on October 19, 2016.

28 ² The Court incorporated by reference the ORDER entered December 22, 2017 (“the December Order”), on identical
issues in the Fitzsimmons Action.

1 The Court finds Versa is not entitled to an award of attorneys' fees. In general, a district
2 court may not award "attorney fees... unless authorized to do so by a statute, rule or contract."
3 *U.S. Design & Constr. v. I.B.W.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). NRCP
4 68 provides:

5
6 (a) The Offer. At any time more than 10 days before trial, any party may serve an
7 offer in writing to allow judgment to be taken in accordance with its terms and
8 conditions.

9 ...

10 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a
11 more favorable judgment,

12 (1) the offeree cannot recover any costs or attorney's fees and shall not recover
13 interest for the period after the service of the offer and before the judgment;
14 and

15 (2) the offeree shall pay the offeror's post-offer costs, applicable interest on
16 the judgment from the time of the offer to the time of entry of the judgment
17 and reasonable attorney's fees, if any be allowed, actually incurred by the
18 offeror from the time of the offer....

19 An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of the
20 following factors:

21 (1) whether the plaintiff's claim was brought in good faith; (2) whether the
22 defendants' offer of judgment was reasonable and in good faith in both its timing and
23 amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was
24 grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror
25 are reasonable and justified in amount.

26 *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). A court may only award
27 reasonable attorney's fees. The following factors are to be examined in determining whether the
28 fees sought are reasonable:

(1) the qualities of the advocate: his ability, his training, education, experience, professional
standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
importance, time and skill required, the responsibility imposed and the prominence and

1 character of the parties where they affect the importance of the litigation; (3) the work
2 actually performed by the lawyer: the skill, time and attention given to the work; (4) the
3 result: whether the attorney was successful and what benefits were derived.

4 *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

5 Versa served MDB with an offer of judgment for \$1,000.00 per plaintiff ("the Initial Offer")
6 on May 4, 2017. The Motion for Fees, Exhibit 1. The following day, the parties attended
7 mediation. The Motion for Fees, 6:20-21. At mediation, MDB demanded \$175,000.00 from Versa
8 and another cross-defendant, RMC LAMAR HOLDING, INC. ("Ranco"), the manufacturer of the
9 trailer. TRANSCRIPT OF PROCEEDINGS, HEARING ON MOTION FOR ATTORNEY FEES
10 AND COSTS AND MOTION TO RETAX, April 6, 2018 ("Transcript"), 10:4-10. Versa offered
11 \$100,000.00, and Ranco offered \$50,000.00 ("the Mediation Offer"). MDB rejected the Mediation
12 Offer, and indicated MDB would settle for no less than \$175,000.00 from Versa and Ranco.
13 Transcript, 10:13-15. The Motion for Fees alleges Versa telephoned MDB approximately two
14 business days later offering to settle for \$175,000.00 ("the Final Offer"). The Motion for Fees, 7:2-
15 3. At oral argument the Court queried MDB about the Final Offer. The Court took a brief recess to
16 allow counsel for MDB to call co-counsel for details on the specifics of the Final Offer. Transcript,
17 31:7-14. MDB conceded Versa made the Final Offer, and that it was made "in close proximity" to
18 the mediation. Transcript, 32:2-15. MDB contends the Final Offer was not for \$175,000.00,
19 although co-counsel could not recall the specific amount. Transcript, 32:3-8.

20 Versa is not entitled to an award of attorneys' fees pursuant to NRCP 68. MDB's claim was
21 brought in good faith. Further, the Court finds it was not unreasonable for MDB to reject the Initial
22 Offer. The Opposition to the Motion for Fees argues the Initial Offer was unreasonable because it
23 "amounted to less than one half of one percent (0.005) of the total settlement amount MDB paid to
24 plaintiffs...." The Opposition to the Motion for Fees, 7:2-3. The Court agrees. The fact Versa
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1 made an offer of \$100,000.00 one day later and was willing to meet MDB's full demand two
2 business days later clearly demonstrates the Initial Offer of \$1,000.00 per plaintiff was
3 unreasonable and not made in good faith. MDB's decision to reject the Mediation Offer and
4 especially the Final Offer were unreasonable, but those rejections cannot be the basis for awarding
5 Versa attorneys' fees. NRCP 68 applies to *written* offers. The Court has been presented with no
6 document evincing the Mediation Offer or the Final Offer were reduced to writing. An analysis of
7 the first three *Beattie* factors leads to the conclusion Versa is not entitled to fees pursuant to NRCP
8 68; therefore, a *Brunzell* analysis of the reasonableness of the fees requested is unnecessary.³

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10
11 The Motion for Fees avers Versa is entitled to attorneys' fees pursuant to NRCP 37 because
12 the December Order issued case-concluding sanctions against MDB. NRCP 37 provides:

13 (b) Failure to Comply With Order.

14 ...

15
16 (2) Sanctions--Party. If a party or an officer, director, or managing
17 agent of a party or a person designated under Rule 30(b)(6) or 31(a) to
18 testify on behalf of a party fails to obey an order to provide or permit
19 discovery, including an order made under subdivision (a) of this rule
20 or Rule 35, or if a party fails to obey an order entered under Rules 16,
21 16.1, and 16.2 the court in which the action is pending may make such
22 orders in regard to the failure as are just, and among others the
23 following:

24 ...

25 (C) An order striking out pleadings or parts thereof, or staying
26 further proceedings until the order is obeyed, or dismissing the
27 action or proceeding or any part thereof, or rendering a
28 judgment by default against the disobedient party;

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³ The Court would conclude, should it be necessary, the fees requested were reasonable and would satisfy the *Brunzell* factors.

1 In lieu of any of the foregoing orders or in addition thereto, the court shall require the
2 party failing to obey the order or the attorney advising that party or both to pay the
3 reasonable expenses, including attorney's fees, caused by the failure, unless the court
4 finds that the failure was substantially justified or that other circumstances make an
award of expenses unjust.

5 The Court finds an award of attorneys' fees would be unjust. Case-concluding sanctions
6 against MDB was a windfall for Versa. The Motion for Fees argues, "there is no substantial
7 justification for MDB's failure to preserve the evidence other than to obstruct discovery and
8 frustrate the progress of this litigation." The Motion for Fees, 8:26-28. However, the December
9 Order made clear "the Court does not find MDB intentionally disposed of the components in order
10 to harm Versa, nor were MDB's employees acting with any malevolence...." The December Order,
11 8:20-22. MDB did not intend to "obstruct discovery and frustrate the progress of this litigation" as
12 the Motion suggests. Although dismissal of MDB's claim against Versa was warranted, it was a
13 severe sanction. Further sanctions would be unjust.
14

15 The Court finds the amount of costs requested is reasonable. District Courts have "wide, but
16 not unlimited, discretion to award costs to prevailing parties." *Cadle Co. v. Woods & Erickson,*
17 *LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), *recently upheld by Golightly & Vannah,*
18 *PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be
19 reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as
20 a matter of course, recover costs from an adverse party against whom judgment is rendered in
21 certain actions. These actions include those for recovery of money or damages exceeding
22 \$2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS
23 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the
24 statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a
25 reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,
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1 unless the court finds that the witness was called without reason or necessity," *Id.* at (4);
2 "Reasonable fees of not more than five expert witnesses in an amount not more than \$1,500.00 for
3 each witness, unless the court allows a larger fee after determining the circumstances surrounding
4 the expert's testimony were of such a necessity as to require a larger fee," *Id.* at (5); "The fee of any
5 sheriff or licensed process server for the delivery of service of any summons or subpoena used in
6 the action, unless the court determines that the service was not necessary," *Id.* at (7); "Reasonable
7 costs for photocopies," *Id.* at (12); "Any other reasonable and necessary expense incurred in
8 connection with the action, including reasonable and necessary expenses for computerized services
9 for legal research," *Id.* at (17). It is within a court's sound discretion to allow a reasonable award of
10 either part or all of the prevailing party's costs, and to apportion the costs between the parties. NRS
11 18.050; *see also Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993); *Cadle Co.*, 131
12 Nev. Adv. Op. 15, 345 P.3d at 1054. However, statutes that allow recovery of costs must be strictly
13 construed. *Bergmann*, 109 Nev. at 679, 856 P.2d at 566. Accordingly, a court's discretion should
14 be "sparingly exercised" when it considers whether or not to award expenses that are "not
15 specifically allowed by statute and precedent." *Bergman*, 109 Nev. at 679, 856 P.2d at 566.

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19 In order for a court to make an award of costs, the party seeking costs must file with the
20 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
21 the memorandum of costs, the prevailing party must also provide the court with evidence, or
22 "justifying documentation," which demonstrates how the costs being sought were "reasonable,
23 necessary, and actually incurred" in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
24 1054. Accordingly, appropriate "justifying documentation must mean something more than a
25 memorandum of costs." *Id.* Without such documentation, a court may not award costs. *Id.* If the
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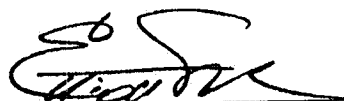
1 party against whom costs are sought wishes to dispute the costs, they must make a motion to the
2 court within three days of the memorandum's filing. NRS 18.110(4). Once in receipt of that
3 motion, the Court will be allowed to settle the costs. *Id.*

4
5 The Motion to Retax argues Versa should not be permitted to recover costs incurred
6 subsequent to Versa's offer of judgment. This argument is without merit. The Reply in Support of
7 the Motion to Retax concedes an award of costs is not limited to those incurred after an offer of
8 judgment; rather, it argues the Opposition to the Motion to Retax contradicts the Memorandum of
9 Costs and the Motion for Fees. The Reply in Support of the Motion to Retax, 5:22-26. It alleges
10 the Memorandum of Costs and the Motion for Fees indicate the only costs sought are those incurred
11 subsequent to the offer of judgment. The Court finds no such contradiction warranting the retaxing
12 of costs on this basis.

13
14 It is hereby **ORDERED** the THIRD-PARTY DEFENDANT VERSA PRODUCTS
15 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO
16 NRCP 37 AND NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request
17 for attorneys' fees is denied. MDB shall pay Versa's costs as set forth below.

18
19 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
20 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
21 INC.'S VERIFIED MEMORANDUM OF COSTS is **DENIED**. MDB is ordered to pay costs in
22 the amount of \$413.00.

23
24 DATED this 7 day of June, 2018.

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27 ELLIOTT A. SATTLER
28 District Judge

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PRODUCTS COMPANY, INC.
9

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.
19
20

Case No. CV16-00976

Dept. 10

NOTICE OF ENTRY

21 TO: ALL INTERESTED PARTIES:

22 ///

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1 PLEASE TAKE NOTICE that the Order was entered by the above-entitled Court on
2 the 7th day of June, 2018, a copy of which is attached hereto as Exhibit 1 and made a part
3 hereof.

4 AFFIRMATION

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

7 DATED this 13th day of June, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

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12

By /s/ Josh Cole Aicklen

13

JOSH COLE AICKLEN
Nevada Bar No. 007254

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Nevada Bar No. 009502

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17

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VERSA PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

Exhibit 1

Order

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2018 a true and correct copy of NOTICE OF ENTRY was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS, INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS ("the Memorandum of Costs"). Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the CROSS-CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on March 1, 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S

1 REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS
2 PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the Motion for Fees") on
3 March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.

4 Also before the Court is the CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION
5 TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
6 VERIFIED MEMORANDUM OF COSTS ("the Motion to Retax") filed by MDB on February 20,
7 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
8 OPPOSITION TO THIRD-PARTY PLAINTIFF MDB TRUCKING LLC'S MOTION TO
9 RETAX COSTS ("the Opposition to the Motion to Retax") on March 8, 2018. MDB filed the
10 REPLY TO OPPOSITION TO MOTION TO RETAX COSTS ("the Reply in Support of the
11 Motion to Retax") on March 19, 2018, and contemporaneously submitted the matter for the
12 Court's consideration. The Court heard oral argument on the Motion for Fees and the Motion to
13 Retax on April 6, 2018, at which time the Court took the matters under advisement.

14 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
15 by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the
16 Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case
17 number CV15-02349. Numerous other plaintiffs were joined into the Fitzsimmons Action. Two
18 additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and
19 JAMES BIBLE V. MDB TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant
20 action was filed on May 2, 2016. The Bible Action was filed September 20, 2016. It is alleged in
21 all three actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a
22 truck for MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the
23 driving plaintiffs to lose control of their vehicles and numerous accidents occurred. The plaintiffs

1 sustained physical and emotional injuries as a result of the accidents. In response to the Complaint,
2 MDB filed a THIRD-PARTY COMPLAINT (“the MDB Cross-Claim”) June 22, 2016. The MDB
3 Cross-Claim had two causes of action relative to Versa: Implied Indemnification and
4 Contribution.¹ MDB alleges it was not Koski’s negligence that caused the gravel to spill; rather, the
5 spill was caused by the “unreasonably dangerous and defective” design and manufacture of the
6 trailer that held the gravel. The MDB Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-
7 Claim against the manufacturers of the trailer and its components, including Versa. MDB avers
8 Versa produced a solenoid valve which would, “activate inadvertently allowing the gates to open
9 and release the load [of gravel] carried by the trailer.” The MDB Cross-Claim, 3:10-11. MDB also
10 claims there were safer alternatives available to Versa; the solenoid valve was unreasonably
11 dangerous and defective; and Versa failed to provide appropriate safety mechanisms regarding the
12 solenoid valve. The MDB Cross-Claim, 3:12-18.

15 The Court entered an ORDER (“the January Order”) on January 22, 2018, granting the
16 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.’S MOTION TO STRIKE
17 DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC’S THIRD-PARTY
18 COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE
19 JURY INSTRUCTION (“the Motion to Strike”).² The Court found MDB’s disposal of the
20 electrical systems that control the solenoid which operated the Versa valve crippled Versa’s ability
21 to present its case. As a result, the Court dismissed MDB’s sole remaining claim against Versa.
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26 ¹ Versa filed THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
27 THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) (“the MTD”) on July 19, 2016. The Court granted the MTD on October 19, 2016.

28 ² The Court incorporated by reference the ORDER entered December 22, 2017 (“the December Order”), on identical
issues in the Fitzsimmons Action.

1 The Court finds Versa is not entitled to an award of attorneys' fees. In general, a district
2 court may not award "attorney fees... unless authorized to do so by a statute, rule or contract."
3 *U.S. Design & Constr. v. I.B.W.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). NRCP
4 68 provides:

5
6 (a) The Offer. At any time more than 10 days before trial, any party may serve an
7 offer in writing to allow judgment to be taken in accordance with its terms and
8 conditions.

9 ...

10 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a
11 more favorable judgment,

12 (1) the offeree cannot recover any costs or attorney's fees and shall not recover
13 interest for the period after the service of the offer and before the judgment;
14 and

15 (2) the offeree shall pay the offeror's post-offer costs, applicable interest on
16 the judgment from the time of the offer to the time of entry of the judgment
17 and reasonable attorney's fees, if any be allowed, actually incurred by the
18 offeror from the time of the offer....

19 An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of the
20 following factors:

21 (1) whether the plaintiff's claim was brought in good faith; (2) whether the
22 defendants' offer of judgment was reasonable and in good faith in both its timing and
23 amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was
24 grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror
25 are reasonable and justified in amount.

26 *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). A court may only award
27 reasonable attorney's fees. The following factors are to be examined in determining whether the
28 fees sought are reasonable:

(1) the qualities of the advocate: his ability, his training, education, experience, professional
standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
importance, time and skill required, the responsibility imposed and the prominence and

1 character of the parties where they affect the importance of the litigation; (3) the work
2 actually performed by the lawyer: the skill, time and attention given to the work; (4) the
3 result: whether the attorney was successful and what benefits were derived.

4 *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

5 Versa served MDB with an offer of judgment for \$1,000.00 per plaintiff (“the Initial Offer”)
6 on May 4, 2017. The Motion for Fees, Exhibit 1. The following day, the parties attended
7 mediation. The Motion for Fees, 6:20-21. At mediation, MDB demanded \$175,000.00 from Versa
8 and another cross-defendant, RMC LAMAR HOLDING, INC. (“Ranco”), the manufacturer of the
9 trailer. TRANSCRIPT OF PROCEEDINGS, HEARING ON MOTION FOR ATTORNEY FEES
10 AND COSTS AND MOTION TO RETAX, April 6, 2018 (“Transcript”), 10:4-10. Versa offered
11 \$100,000.00, and Ranco offered \$50,000.00 (“the Mediation Offer”). MDB rejected the Mediation
12 Offer, and indicated MDB would settle for no less than \$175,000.00 from Versa and Ranco.
13 Transcript, 10:13-15. The Motion for Fees alleges Versa telephoned MDB approximately two
14 business days later offering to settle for \$175,000.00 (“the Final Offer”). The Motion for Fees, 7:2-
15 3. At oral argument the Court queried MDB about the Final Offer. The Court took a brief recess to
16 allow counsel for MDB to call co-counsel for details on the specifics of the Final Offer. Transcript,
17 31:7-14. MDB conceded Versa made the Final Offer, and that it was made “in close proximity” to
18 the mediation. Transcript, 32:2-15. MDB contends the Final Offer was not for \$175,000.00,
19 although co-counsel could not recall the specific amount. Transcript, 32:3-8.

20 Versa is not entitled to an award of attorneys’ fees pursuant to NRCP 68. MDB’s claim was
21 brought in good faith. Further, the Court finds it was not unreasonable for MDB to reject the Initial
22 Offer. The Opposition to the Motion for Fees argues the Initial Offer was unreasonable because it
23 “amounted to less than one half of one percent (0.005) of the total settlement amount MDB paid to
24 plaintiffs....” The Opposition to the Motion for Fees, 7:2-3. The Court agrees. The fact Versa
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1 made an offer of \$100,000.00 one day later and was willing to meet MDB's full demand two
2 business days later clearly demonstrates the Initial Offer of \$1,000.00 per plaintiff was
3 unreasonable and not made in good faith. MDB's decision to reject the Mediation Offer and
4 especially the Final Offer were unreasonable, but those rejections cannot be the basis for awarding
5 Versa attorneys' fees. NRCP 68 applies to *written* offers. The Court has been presented with no
6 document evincing the Mediation Offer or the Final Offer were reduced to writing. An analysis of
7 the first three *Beattie* factors leads to the conclusion Versa is not entitled to fees pursuant to NRCP
8 68; therefore, a *Brunzell* analysis of the reasonableness of the fees requested is unnecessary.³

11 The Motion for Fees avers Versa is entitled to attorneys' fees pursuant to NRCP 37 because
12 the December Order issued case-concluding sanctions against MDB. NRCP 37 provides:

13 (b) Failure to Comply With Order.

14 ...

15
16 (2) Sanctions--Party. If a party or an officer, director, or managing
17 agent of a party or a person designated under Rule 30(b)(6) or 31(a) to
18 testify on behalf of a party fails to obey an order to provide or permit
19 discovery, including an order made under subdivision (a) of this rule
20 or Rule 35, or if a party fails to obey an order entered under Rules 16,
21 16.1, and 16.2 the court in which the action is pending may make such
22 orders in regard to the failure as are just, and among others the
23 following:

24 ...

25 (C) An order striking out pleadings or parts thereof, or staying
26 further proceedings until the order is obeyed, or dismissing the
27 action or proceeding or any part thereof, or rendering a
28 judgment by default against the disobedient party;

...

³ The Court would conclude, should it be necessary, the fees requested were reasonable and would satisfy the *Brunzell* factors.

1 In lieu of any of the foregoing orders or in addition thereto, the court shall require the
2 party failing to obey the order or the attorney advising that party or both to pay the
3 reasonable expenses, including attorney's fees, caused by the failure, unless the court
4 finds that the failure was substantially justified or that other circumstances make an
award of expenses unjust.

5 The Court finds an award of attorneys' fees would be unjust. Case-concluding sanctions
6 against MDB was a windfall for Versa. The Motion for Fees argues, "there is no substantial
7 justification for MDB's failure to preserve the evidence other than to obstruct discovery and
8 frustrate the progress of this litigation." The Motion for Fees, 8:26-28. However, the December
9 Order made clear "the Court does not find MDB intentionally disposed of the components in order
10 to harm Versa, nor were MDB's employees acting with any malevolence...." The December Order,
11 8:20-22. MDB did not intend to "obstruct discovery and frustrate the progress of this litigation" as
12 the Motion suggests. Although dismissal of MDB's claim against Versa was warranted, it was a
13 severe sanction. Further sanctions would be unjust.
14

15 The Court finds the amount of costs requested is reasonable. District Courts have "wide, but
16 not unlimited, discretion to award costs to prevailing parties." *Cadle Co. v. Woods & Erickson,*
17 *LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), *recently upheld by Golightly & Vannah,*
18 *PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be
19 reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as
20 a matter of course, recover costs from an adverse party against whom judgment is rendered in
21 certain actions. These actions include those for recovery of money or damages exceeding
22 \$2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS
23 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the
24 statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a
25 reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,
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1 unless the court finds that the witness was called without reason or necessity,” *Id.* at (4);
2 “Reasonable fees of not more than five expert witnesses in an amount not more than \$1,500.00 for
3 each witness, unless the court allows a larger fee after determining the circumstances surrounding
4 the expert’s testimony were of such a necessity as to require a larger fee,” *Id.* at (5); “The fee of any
5 sheriff or licensed process server for the delivery of service of any summons or subpoena used in
6 the action, unless the court determines that the service was not necessary,” *Id.* at (7); “Reasonable
7 costs for photocopies,” *Id.* at (12); “Any other reasonable and necessary expense incurred in
8 connection with the action, including reasonable and necessary expenses for computerized services
9 for legal research.” *Id.* at (17). It is within a court’s sound discretion to allow a reasonable award of
10 either part or all of the prevailing party’s costs, and to apportion the costs between the parties. NRS
11 18.050; *see also Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993); *Cadle Co.*, 131
12 Nev. Adv. Op. 15, 345 P.3d at 1054. However, statutes that allow recovery of costs must be strictly
13 construed. *Bergmann*, 109 Nev. at 679, 856 P.2d at 566. Accordingly, a court’s discretion should
14 be “sparingly exercised” when it considers whether or not to award expenses that are “not
15 specifically allowed by statute and precedent.” *Bergman*, 109 Nev. at 679, 856 P.2d at 566.

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19 In order for a court to make an award of costs, the party seeking costs must file with the
20 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
21 the memorandum of costs, the prevailing party must also provide the court with evidence, or
22 “justifying documentation,” which demonstrates how the costs being sought were “reasonable,
23 necessary, and actually incurred” in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
24 1054. Accordingly, appropriate “justifying documentation must mean something more than a
25 memorandum of costs.” *Id.* Without such documentation, a court may not award costs. *Id.* If the
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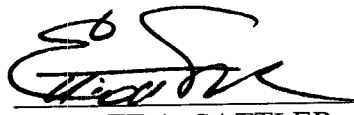
1 party against whom costs are sought wishes to dispute the costs, they must make a motion to the
2 court within three days of the memorandum's filing. NRS 18.110(4). Once in receipt of that
3 motion, the Court will be allowed to settle the costs. *Id.*

4
5 The Motion to Retax argues Versa should not be permitted to recover costs incurred
6 subsequent to Versa's offer of judgment. This argument is without merit. The Reply in Support of
7 the Motion to Retax concedes an award of costs is not limited to those incurred after an offer of
8 judgment; rather, it argues the Opposition to the Motion to Retax contradicts the Memorandum of
9 Costs and the Motion for Fees. The Reply in Support of the Motion to Retax, 5:22-26. It alleges
10 the Memorandum of Costs and the Motion for Fees indicate the only costs sought are those incurred
11 subsequent to the offer of judgment. The Court finds no such contradiction warranting the retaxing
12 of costs on this basis.

13
14 It is hereby **ORDERED** the THIRD-PARTY DEFENDANT VERSA PRODUCTS
15 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO
16 NRCP 37 AND NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request
17 for attorneys' fees is denied. MDB shall pay Versa's costs as set forth below.

18
19 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
20 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
21 INC.'S VERIFIED MEMORANDUM OF COSTS is **DENIED**. MDB is ordered to pay costs in
22 the amount of \$413.00.

23
24 DATED this 7 day of June, 2018.

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27 ELLIOTT A. SATTLER
28 District Judge

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MDB Trucking, LLC

SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

GENEVA M. REMMERDE

Plaintiff,

vs.

MDB TRUCKING, LLC, et al

Defendants.

AND ALL RELATED CASES.

Case No.: CV16-00976

Dept. No.: 10

**REPLY TO OPPOSITION TO
MOTION TO RETAX COSTS**

Third-Party Plaintiff MDB Trucking, LLC ("MDB"), by and through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby replies to Third- Party Defendant Versa Products Company, Inc.'s Opposition to Third-Party Plaintiff MDB trucking LLC's Motion to Retax and Settle Costs ("Opposition" and "Motion," respectively).

1 This Reply is made and based on the following Memorandum of Points and Authorities,
2 the pleadings and papers on file in this case, and any oral argument the Court may permit at a
3 hearing of this matter.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I.**

7 **ARGUMENT**

8 **A. Versa's Costs, By Its Own Admission, Must be Limited To Only Those**
9 **Incurred After Its May 4, 2017 Offer of Judgment.**

10 In its Opposition, Versa again completely ignores the argument advanced by MDB and
11 attempts instead to misdirect the Court by making arguments completely contrary to its own
12 costs memorandum and sworn testimony. Specifically, Versa clearly and unequivocally stated
13 that "[t]his Memorandum of Costs and Disbursements is based upon VERSA's Offer of
14 Judgment under NRCP 68," and related documents. See Verified Memorandum of Costs at
15 1:25-26. And, the previously filed sworn statement of Versa's lead counsel, Josh Cole Aicklen,
16 squarely placed all of the costs being sought in the time period after it served MDB with an
17 Offer of Judgment on May 4, 2017. See Versa's Motion for Attorneys' Fees and Costs Pursuant
18 to NRCP 37 and NRCP 68 at 4:13-14.
19
20

21 MDB does not attempt to argue that the costs statute is only applicable after service of
22 an offer of judgment, as claimed by Versa. See Opposition at 5:18-20. MDB's argument is
23 simply that Versa should not be allowed to ignore its own prior filings, completely contradict
24 itself now in opposition to MDB's Motion to Retax Costs, and make yet another new argument,
25 this time for the application of NRS 18.020. Versa's Offer of Judgment is the stated basis for its
26 entitlement to costs, and, as such, MDB's Motion to Retax Costs should be granted as the
27 entirety of the requested costs predated the Offer of Judgment.
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III.

CONCLUSION

For the reasons set forth above, Cross-Claimant MDB respectfully requests that this Court retax and settle the costs claimed by Cross-Defendant Versa by denying the improperly applied for costs in Versa's Verified Memorandum of Costs in their entirety.

DATED this 19th day of March, 2018.

CLARK HILL PLLC

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DATED this 19th day of March, 2018.

By: Colleen E. Mulart
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Page 5 of 5

EXHIBIT 1

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9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.
19

Case No. CV16-00976

Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S
VERIFIED MEMORANDUM OF COSTS

20 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
21 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
22 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and submits the
23 following Verified Memorandum of Costs to be recovered against Third-Party Plaintiff
24 MDB TRUCKING, LLC pursuant to NRS 18.005; NRS 18.020; and NRS 18.110.

25 This Memorandum of Costs and Disbursements is based upon VERSA's Offer of
26 Judgment under NRCP 68, NRS 18.005, NRS 18.020, and NRS 18.110, the pleadings
27 and papers on file herein, the verification of attorneys' fees and costs by defense counsel,
28 and any evidence to be considered by this Court.

1 VERSA submits its verified Memorandum of Costs within five (5) days of entry of
2 Judgment pursuant to NRS 18.110(1).

3 The undersigned hereby verifies, under penalty of perjury, that the following costs
4 were incurred by Defendant in the defense of this matter:

5 COSTS FROM LEWIS BRISBOIS BISGAARD & SMITH, LLP (LBBS)

6 1. Court Filing Fees \$ 413.00

7 LEGAL COSTS: \$413.00

8 AFFIRMATION

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

11 DATED this 9th day of February, 2018

12 Respectfully Submitted,

13 LEWIS BRISBOIS BISGAARD & SMITH LLP

14
15
16 By /s/ Josh Cole Aicklen

17 JOSH COLE AICKLEN

18 Nevada Bar No. 007254

19 DAVID B. AVAKIAN

20 Nevada Bar No. 009502

21 PAIGE S. SHREVE

22 Nevada Bar No. 013773

23 6385 S. Rainbow Boulevard, Suite 600

24 Las Vegas, Nevada 89118

25 Attorneys for Third-Party Defendant VERSA
26 PRODUCTS COMPANY, INC.

1 AFFIDAVIT OF JOSH COLE AICKLEN IN SUPPORT OF THIRD-PARTY DEFENDANT
2 VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS

3 STATE OF NEVADA }
4 COUNTY OF CLARK } SS.

5 I, JOSH COLE AICKLEN, ESQ., do declare and state as follows:

6 1. I am an Owner of Lewis Brisbois Bisgaard & Smith LLP, and am duly
7 licensed to practice law in the State of Nevada. I am competent to testify to the matters
8 set forth in this Affidavit, and will do so if called upon. I am the attorney of record
9 representing Third-Party Defendant VERSA PRODUCTS COMPANY, INC. in the subject
10 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
11 State of Nevada, Case Number CV16-00976.

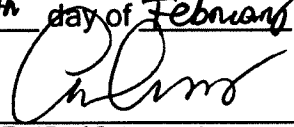
12 2. I participated in the entirety of the litigation, which culminated in an
13 evidentiary hearing on October 13, 2017 in the FITZSIMMONS and REMMERDE matter
14 with the Court finding in favor of Defendant and striking MDB's Third-Party Complaints.

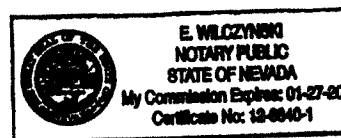
15 3. The total costs in the case were \$413.00.

16 4. The entirety of the costs in this case were reasonable and customary for
17 Washoe County.

18 By 
19 JOSH COLE AICKLEN, ESQ.

20 SUBSCRIBED AND SWORN to before
me this 9th day of February, 2018.

21 
22 NOTARY PUBLIC in and
23 for said COUNTY and STATE



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LIST OF EXHIBITS

Exhibit 1 Disbursement Diary and Supporting Documentation for Costs

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2018 a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

FILED
Electronically
CV16-00976
2018-02-09 09:40:37 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6524406 : swilliam

EXHIBIT 1

DBDRYP02

Disbursement Diary

2/2/2018 10:36:52 AM britnie.gonzalez

Page 1

From 0/00/00 Through 0/00/00

*Public/fadc-sqln01#acc/LDBData

Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc

Selections: Client-Matter: 27350-1555 to 27350-1555 *Include Write-Offs*

Date	DsbCd	Description	Check No.	Units	Rate	Amount	Stat/Source	Invoice No.
8/08/16	5	Court filing fee: Wells Fargo Commercial Card Services Inv#:073116STMT-SBOWERS Trans Date: 07/19/2016 Washoe Co 2nd Dist Genera, Filing fee of IAFD first appeal with motion to dismiss						
6/14/17	5	Court filing fee: Comerica Commercial Card Services Inv#:063017STMT-SBOWERS Trans Date: 05/03/2017 Washoe Co 2nd Dist Gen, Filing fee for motion for summary judgment.				213.00	P A/P-P	1740980
						200.00	P A/P-P	1909234
						413.00		
						413.00		

Matter Total**Disbursements by Type:**

5 Court filing fee

27350-1555
Hartford Insurance Company
Remmerde, Geneva v Vera Products Company, Inc
Date: 8/08/16
WIP Seq#: 513,682,140
Amount: 213.00

Date / Time 7/19/2016 8:28:33 AM

Cashier WashoeAPI

Transaction ID 30992413

\$213.00 Amount

Court Fees Court Filing Fee
Submission ID 5614156

Payment Summary: Visa payment for \$213.00.
Payment Acct Last4: *****6392
Billing Name: Stacy Bowers
Billing Address: 6385 South Rainbow Boulevard
Las Vegas, NV 89118
Phone Number: 7028933383
Email Address: stacy.bowers@lewisbrlebois.com

27350-
1555

IAFD /
1st Appeal
M / Dismiss

Signature

Description: Filing fee of/for

Vendor: 82739 Wells Fargo Commercial Card Services
Voucher: 2035444 Distribution 4789353 Distribution Level
Doc ID: 0001NGCW Page 259

27350-1555

Date / Time 5/3/2017 1:30:30 PM Cashier WashoeAPI
Transaction ID 47998777 \$200.00 Amount
Court Fees CourtFilingFee
Submission ID 6082213
Payment Summary : Mastercard payment for \$200.00.
Payment Acct Last4 : *****0164
Billing Name : Stacy Bowers
Billing Address : 633 W. 5th St., Ste. 4000
Los Angeles, CA 90071
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbrisbois.com

Signature Motion for Summary Judgment

27350-1555
Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc
Date: 6/14/17
WIP Seq#: 546,027,920
Amount: 200.00

Vendor: 94005 Comerica Commercial Card Services
Voucher: 2146974 Distribution 5098731 Distribution Level
Doc ID: 0001TUFN Page 184

Stat: blank-WIP Open, W-WIP Written-off, B-Billed & Unpaid, P-Paid, SN-Sent to client for direct payment, PW-partially paid/partially written-off.
Source: A/P-Accounts Payable Vendor Not Paid, A/P-P-Accounts Payable-Vendor Paid, DSB-Disb entry, APWFL-A/P Workflow

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
DAVID B. AVAKIAN
3 Nevada Bar No. 009502
David.avakian@lewisbrisbois.com
4 PAIGE S. SHREVE
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5 Paige.shreve@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,
13 Plaintiff,
14
15 vs.
16 MDB TRUCKING, LLC, et. al.
17 Defendants.
18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S
OPPOSITION TO THIRD-PARTY
PLAINTIFF MDB TRUCKING LLC'S
MOTION TO RETAX AND SETTLE
COSTS

20
21
22 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
23 and through it's attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
24 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby
25 opposes MDB TRUCKING, LLC's MDB TRUCKING LLC'S Motion to Retax and Settle
26 Costs.

1 This Opposition is made and based on the pleadings and papers filed herein, the
2 Memorandum of Points and Authorities; NRS 18.020; NRS 18.110; NRS 18.005; the
3 entire records in this case, the attached Affidavit of Paige S. Shreve, Esq.; and any other
4 evidence the Court may entertain at the Hearing on this Motion.

5 DATED this 8th day of March, 2018.

6 Respectfully Submitted,

7 LEWIS BRISBOIS BISGAARD & SMITH LLP
8
9

10 By /s/ Josh Cole Aicklen

11 JOSH COLE AICKLEN
12 Nevada Bar No. 007254
13 DAVID B. AVAKIAN
14 Nevada Bar No. 009502
15 PAIGE S. SHREVE
16 Nevada Bar No. 013773
17 6385 S. Rainbow Boulevard, Suite 600
18 Las Vegas, Nevada 89118
19 Attorneys for Cross-Defendant VERSA
20 PRODUCTS COMPANY, INC.
21
22
23
24
25
26
27
28

1 AFFIDAVIT OF PAIGE S. SHREVE, ESQ. IN SUPPORT OF
2 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S OPPOSITION TO
3 THIRD-PARTY PLAINTIFF MDB TRUCKING LLC'S MOTION TO RETAX AND SETTLE
4 COSTS

3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.

6 PAIGE S. SHREVE, ESQ., being first duly sworn, deposes and states as follows:

7 1. I am an Associate at LEWIS BRISBOIS BISGAARD & SMITH LLP, and I am
8 duly licensed to practice law in the State of Nevada.

9 2. I am competent to testify to the matters set forth in this Affidavit, and will do
10 so if called upon.

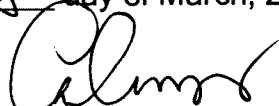
11 3. I am an attorney of record representing Defendant/Cross-Defendant VERSA
12 PRODUCTS COMPANY, INC. in the subject lawsuit currently pending in Department 10
13 of the Second Judicial District Court for the State of Nevada, Case Number CV16-00976.

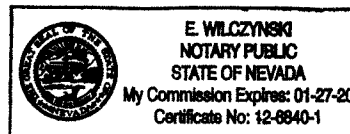
14 4. Attached hereto as Exhibit 1 is a true and correct copy of VERSA timely
15 filed its Verified Memorandum of Costs and Disbursements.

16 FURTHER AFFIANT SAYETH NAUGHT.

17 
18 PAIGE S. SHREVE, ESQ.

19
20 SUBSCRIBED AND SWORN to before me
21 this 8 day of March, 2018.

22 
23 NOTARY PUBLIC
24 In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On February 8, 2018, VERSA filed the Notice of Entry of Judgment in this matter.
4 On February 9, 2018, VERSA timely filed its Verified Memorandum of Costs and
5 Disbursements, a true and correct copy of which is attached hereto as Exhibit 1.
6 Thereafter, MDB filed the instant Motion, disputing some of VERSA's costs. MDB
7 mistakenly argues that the Court must reject all \$413.00 of VERSA's costs because they
8 were incurred after the Offer of Judgement. However, MDB's arguments are wholly
9 unsupported as VERSA is entitled to all costs as the prevailing party pursuant to NRS
10 18.020 and NRS 18.005 as well as NRCP 37.

11 As such, VERSA is entitled to all of the requested costs as they were reasonable
12 and necessarily incurred in defending MDB's cross-claims. See, Exhibit 1. As such,
13 VERSA respectfully requests an Order, granting Defendant its costs in the amount of
14 \$413.00.

15 II. LEGAL ARGUMENT

16 A. VERSA is Entitled to All Costs as the Prevailing Party Pursuant to NRS 18.020
17 and NRS 18.005

18 MDB mistakenly argues that the Court must reject \$413.00 in costs because the
19 documentation clearly demonstrates the costs were incurred prior to the Offer of
20 Judgment. However, this argument is irrelevant as VERSA is entitled to an award of its
21 costs pursuant to NRS 18.020 as the prevailing party¹. NRS 18.020 states in relevant
22 part as follows:

23 Costs must be allowed of course to the prevailing party against any adverse party
24 against whom judgment is rendered, in the following cases:

- 25 3. In an action for the recovery of money or damages, where the
26 plaintiff seeks to recover more than \$2,500.

27 ¹ This is also indicated on VERSA's Verified Memorandum of Costs. See, Exhibit 1 at P. 1:23-28.
28

1 See, NRS 18.020 (emphasis added).

2 A prevailing party is allowed to recover a number of costs under NRS 18.005
3 including:

4 2. Reporters' fees for depositions, including a reporter's fee for one
5 copy of each deposition.

6 * * *

7 5. Reasonable fees of not more than five expert witnesses in an
8 amount of not more than \$1,500 for each witness, unless the court
allows a larger fee after determining that the circumstances
surrounding the expert's testimony were of such necessity as to
require the larger fee.

9 * * *

10 15. Reasonable costs for travel and lodging incurred taking
11 depositions and conducting discovery.

12 See, NRS 18.005(5) (emphasis added).

13 MDB's alleges it suffered damages in excess of \$10,000.00. Thus, the underlying
14 motion fails pursuant NRS 18.020(3). The use of the word "must" in NRS 18.020 makes
15 an award of VERSA's costs as outlined in NRS 18.050 (as the prevailing party)
16 mandatory, rather than discretionary.

17 VERSA prevailed against MDB on its Motion to Strike MDB's Cross-Claim, thus
18 requiring MDB to pay VERSA's costs. The statute makes no mention that the costs in
19 which the prevailing party is allowed is only applicable after an Offer of Judgement is
20 served. VERSA's costs are itemized (with supporting documentation) in the Verified
21 Memorandum of Costs. See, Exhibit1. As such, these costs are awardable following
22 judgment in this action.

1 **III. CONCLUSION**

2 Based on the foregoing, VERSA respectfully requests that this Court deny MDB's
3 Motion to Retax and Settle Costs it's entirety. Further, VERSA respectfully requests that
4 the Court award the full amount of costs in this matter.

5 **AFFIRMATION**

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

8 DATED this 8th of March, 2018.

9 Respectfully Submitted,

10 LEWIS BRISBOIS BISGAARD & SMITH LLP

11
12
13 By /s/Josh Cole Aicklen

14 JOSH COLE AICKLEN
15 Nevada Bar No. 007254
16 DAVID B. AVAKIAN
17 Nevada Bar No. 009502
18 PAIGE S. SHREVE
19 Nevada Bar No. 013773
20 6385 S. Rainbow Boulevard, Suite 600
21 Las Vegas, Nevada 89118
22 Attorneys for Cross-Defendant VERSA
23 PRODUCTS COMPANY, INC.
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LIST OF EXHIBITS

Exhibit 1 VERSA timely filed its Verified Memorandum of Costs and Disbursements.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th of March, 2018, a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S OPPOSITION TO THIRD-PARTY PLAINTIFF MDB TRUCKING LLC'S MOTION TO RETAX AND SETTLE COSTS was served electronically via the Court's e-filing system addressed as follows:

Matthew C. Addison, Esq.
Jessica L. Woelfel, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC
and DANIEL ANTHONY KOSKI

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

1 **2430**

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3 NWieczorek@clarkhill.com

JEREMY J. THOMPSON

4 Nevada Bar No. 12503

5 JThompson@clarkhill.com

COLLEEN E. MCCARTY

6 Nevada Bar No. 13186

7 CMcCarty@clarkhill.com

CLARK HILL PLLC

3800 Howard Hughes Parkway, Suite 500

8 Las Vegas, Nevada 89169

9 Telephone: (702) 862-8300

10 Facsimile: (702) 862-8400

Attorneys for Cross-Claimant

11 *MDB Trucking, LLC*

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

14 GENEVA M. REMMERDE

15 Plaintiff,

16 vs.

17 MDB TRUCKING, LLC, et al

18 Defendants.

19

AND ALL RELATED CASES.

Case No.: CV16-00976

Dept. No.: 10

**CROSS-CLAIMANT MDB TRUCKING
LLC'S MOTION TO RETAX AND
SETTLE CROSS-DEFENDANT VERSA
PRODUCTS COMPANY INC.'S
VERIFIED MEMORANDUM OF COSTS**

21
22 Pursuant to NRS 18.110(4), Cross-Claimant MDB Trucking, LLC ("MDB"), by and
23 through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and
24 Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby moves this Court to retax
25 and settle the costs contained in Cross-Defendant Versa Products Company, Inc.'s Verified
26 Memorandum of Costs ("Memorandum"), which was filed on February 9, 2018.¹ As set forth
27
28

¹ MDB's argument in opposition to Versa's Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68, which if granted would result in the disallowance of all costs, is incorporated by reference herein. The remainder of MDB's Motion will address why the majority of Versa's specific claimed costs should be retaxed and settled in the event the Court determines it is appropriate to consider them at all.

1 below, Versa's Memorandum seeks costs that are not timely because they pre-date Versa's
2 Offer of Judgment.

3 This Motion to Retax and Settle Costs ("Motion") is made and based on the following
4 Memorandum of Points and Authorities, the exhibits thereto, the pleadings and papers on file in
5 this case, and any oral argument permitted by the Court.

6 Dated this 20 day of February, 2018.

7 **CLARK HILL PLLC**

8 By: 

9 NICHOLAS M. WIECZOREK

10 Nevada Bar No. 6170

11 JEREMY J. THOMPSON

12 Nevada Bar No. 12503

13 COLLEEN E. MCCARTY

14 Nevada Bar No. 13186

15 3800 Howard Hughes Parkway, Suite 500

16 Las Vegas, Nevada 89169

17 Telephone: (702) 862-8300

18 Attorneys for Cross-Claimant

19 MDB Trucking, LLC

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I.**

22 **INTRODUCTION**

23 The Memorandum filed by Cross-Defendant Versa Products Company, Inc. ("Versa")
24 seeks \$413.00 in costs which it claims it incurred (1) in defense of the cross-claim for
25 Contribution brought against it by MDB Trucking LLC ("MDB"), and (2) after it served MDB
26 with an Offer of Judgment on May 4, 2017. *See* Versa's Motion for Attorneys' Fees and Costs
27 Pursuant to NRCP 37 and NRCP 68 ("Motion for Attorneys' Fees and Costs") at 4:13-14
28 [Affidavit of Josh Cole Aicklen] already on file herein. Even a cursory review of the
Memorandum, however, reveals that all of the purported costs were incurred prior to Versa's
May 4, 2017 Offer of Judgment, despite Versa's counsel's claim to the contrary. Accordingly,
MDB respectfully requests this Court deny the improper costs request contained in Versa's
Memorandum.

1 II.

2 ARGUMENT

3 VERSA IMPROPERLY SEEKS \$413.00 IN COSTS INCURRED PRIOR TO VERSA'S
4 MAY 4, 2017 OFFER OF JUDGMENT.

5 Versa seeks \$413.00 in filing fees paid to the Second Judicial District Court. While its
6 internal and self-serving "Disbursement Diary" indicates the costs were incurred on August 8,
7 2016 and June 14, 2017, the receipts from the Second Judicial District Court reflect the actual
8 dates on which the costs were incurred. According to the receipts, which were provided by
9 Versa, the claimed costs in the amount of \$213.00 and \$200.00 were incurred on July 19, 2016
10 and May 3, 2017, respectively. (See Exhibit 1 to the Memorandum). And both payments were
11 made prior to the Offers of Judgment served by Versa on May 4, 2017. Where Versa based its
12 entitlement to costs on NRCP 68 (see Memorandum at 1:26) and falsely claimed that all costs
13 were subsequently incurred (see Motion for Attorneys' Fees and Costs at 4:13-14), the claimed
14 costs in the amount of \$413.00 dated prior to the service of the Offers of Judgment must be
15 denied.
16
17

18 III.

19 CONCLUSION

20 For the reasons set forth above, Cross-Claimant MDB respectfully requests that this
21 Court retax and settle the costs claimed by Cross-Defendant Versa by denying the improperly
22 applied for costs in Versa's Verified Memorandum of Costs in their entirety.
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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

Dated this 20 day of February, 2018.

CLARK HILL PLLC

By: _____

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. MCCARTY

Nevada Bar No, 13186

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

Telephone: (702) 862-8300

Attorneys for Cross-Claimant

MDB Trucking, LLC

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


An employee of Clark Hill PLLC

EXHIBIT 1

4845-3057-6394.1

DBDRYP02

Disbursement Diary

2/2/2018 10:36:52 AM brittnie.gonzalez

Page 1

From 0/00/00 Through 0/00/00

*Public/ladc-sqln01#acct/LDBData
Selections: Client-Matter: 27350-1555 to 27350-1555 *Include Write-Offs*Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc

Date	DsbCd	Description	Check No.	Units	Rate	Amount	Stat/Source	Invoice No.
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Disbursements by Type:						413.00		
5		Court filing fee						
Matter Total						413.00		

27350-1555
Hartford Insurance Company
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Cashier WashoeAPI

Transaction ID 30992413

\$213.00 Amount

Court Fees Court Filing Fee
Submission ID 5614156

Payment Summary : Visa payment for \$213.00.
Payment Acct Last4 : *****6392
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Billing Address : 6385 South Rainbow Boulevard
Las Vegas, NV 89118
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbrisbois.com

27350-
1555

IAFD /
1st Appeal
M / Dismiss

Signature

Description: Filing fee of/for

Vendor: 82739 Wells Fargo Commercial Card Services
Voucher: 2035444 Distribution
Doc ID: 0001NGCW Page 259 4789353 Distribution Level

27350-1555

27350-1555
Hartford Insurance Company
Remmerde, Geneva v Versa Products Company, Inc
Date: 6/14/17
WIP Seq#: 546,027,920
Amount: 200.00

Date / Time 5/3/2017 1:30:30 PM Cashier WashoeAPI
Transaction ID 47998777 \$200.00 Amount
Court Fees CourtFilingFee
Submission ID 6082213
Payment Summary : Mastercard payment for \$200.00.
Payment Acct Last4 : *****0164
Billing Name : Stacy Bowers
Billing Address : 633 W. 5th St., Ste. 4000
Los Angeles, CA 90071
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbrisbois.com

Signature Motion for Summary Judgment

Vendor: 94005 Comerica Commercial Card Services
Voucher: 2146974 Distribution 5098731 Distribution Level
Doc ID: 0001TUFN Page 184

Stat: blank-WIP Open, W-WIP Written-off, B-Billed & Unpaid, P-Paid, SN-Sent to client for direct payment, PW-partially paid/partially written-off.
Source: A/P-Accounts Payable Vendor Not Paid; A/P-P-Accounts Payable-Vendor Paid; DSB-Disb entry; APWFL-A/P Workflow

46

1 JOSH COLE AICKLEN
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DAVID B. AVAKIAN
3 Nevada Bar No. 009502
David.avakian@lewisbrisbois.com
4 PAIGE S. SHREVE
Nevada Bar No. 013773
5 Paige.shreve@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

**THIRD-PARTY DEFENDANT VERSA
PRODUCTS COMPANY, INC.'S
VERIFIED MEMORANDUM OF COSTS**

19
20 COMES NOW, Third-Party Defendant VERSA PRODUCTS COMPANY, INC., by
21 and through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
22 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and submits the
23 following Verified Memorandum of Costs to be recovered against Third-Party Plaintiff
24 MDB TRUCKING, LLC pursuant to NRS 18.005; NRS 18.020; and NRS 18.110.

25 This Memorandum of Costs and Disbursements is based upon VERSA's Offer of
26 Judgment under NRCP 68, NRS 18.005, NRS 18.020, and NRS 18.110, the pleadings
27 and papers on file herein, the verification of attorneys' fees and costs by defense counsel,
28 and any evidence to be considered by this Court.

1 VERSA submits its verified Memorandum of Costs within five (5) days of entry of
2 Judgment pursuant to NRS 18.110(1).

3 The undersigned hereby verifies, under penalty of perjury, that the following costs
4 were incurred by Defendant in the defense of this matter:

5 COSTS FROM LEWIS BRISBOIS BISGAARD & SMITH, LLP (LBBS)

6 1. Court Filing Fees \$ 413.00

7 LEGAL COSTS: \$413.00

8 AFFIRMATION

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

11 DATED this 9th day of February, 2018

12 Respectfully Submitted,

13 LEWIS BRISBOIS BISGAARD & SMITH LLP

14
15
16 By /s/ Josh Cole Aicklen

17 JOSH COLE AICKLEN
18 Nevada Bar No. 007254
19 DAVID B. AVAKIAN
20 Nevada Bar No. 009502
21 PAIGE S. SHREVE
22 Nevada Bar No. 013773
23 6385 S. Rainbow Boulevard, Suite 600
24 Las Vegas, Nevada 89118
25 Attorneys for Third-Party Defendant VERSA
26 PRODUCTS COMPANY, INC.
27
28

1 AFFIDAVIT OF JOSH COLE AICKLEN IN SUPPORT OF THIRD-PARTY DEFENDANT
2 VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS

3 STATE OF NEVADA }
4 COUNTY OF CLARK } SS.

5 I, JOSH COLE AICKLEN, ESQ., do declare and state as follows:

6 1. I am an Owner of Lewis Brisbois Bisgaard & Smith LLP, and am duly
7 licensed to practice law in the State of Nevada. I am competent to testify to the matters
8 set forth in this Affidavit, and will do so if called upon. I am the attorney of record
9 representing Third-Party Defendant VERSA PRODUCTS COMPANY, INC. in the subject
10 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
11 State of Nevada, Case Number CV16-00976.

12 2. I participated in the entirety of the litigation, which culminated in an
13 evidentiary hearing on October 13, 2017 in the FITZSIMMONS and REMMERDE matter
14 with the Court finding in favor of Defendant and striking MDB's Third-Party Complaints.

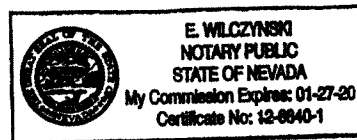
15 3. The total costs in the case were \$413.00.

16 4. The entirety of the costs in this case were reasonable and customary for
17 Washoe County.

18
19
20 SUBSCRIBED AND SWORN to before
me this 9th day of February, 2018.

21
22 NOTARY PUBLIC in and
23 for said COUNTY and STATE

By *Josh Cole Aicklen*
JOSH COLE AICKLEN, ESQ.



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LIST OF EXHIBITS

Exhibit 1

Disbursement Diary and Supporting Documentation for Costs

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2018 a true and correct copy of THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

EXHIBIT 1

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

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

DANIEL ANTHONY KOSKI; MDB TRUCKING,
LLC; et al.,

Defendants.

ORDER

Presently before the Court is THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

This case arises from a personal injury action. A COMPLAINT was filed by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case number CV15-02349.

¹ The issues presented in the Motion were fully briefed in FITZSIMMONS, et al. v. MDB TRUCKING, LLC, et al., CV15-02349.

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and JAMES BIBLE v. MDB
3 TRUCKING, LLC et al., CV16-01914 (“the Bible Action”). The instant action was filed on May 2,
4 2016. The Bible Action was filed September 20, 2016. It is alleged in all three actions that on July
5 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for MDB, negligently
6 spilled a load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose
7 control of their vehicles and numerous accidents occurred resulting in the three separate cases. The
8 plaintiffs sustained physical and emotional injuries as a result of the accidents. In response to the
9 complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT (“the MDB Cross-
10 Claim”) June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa: Implied
11 Indemnification and Contribution.² MDB alleges it was not Koski’s negligence that caused the
12 gravel to spill; rather, the spill was caused by the “unreasonably dangerous and defective” design
13 and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 4:6-8. Therefore, MDB
14 brought the Cross-Claim against the manufacturers of the trailer and its components, including
15 Versa. MDB avers Versa produced a solenoid valve which would, “activate inadvertently allowing
16 the gates to open and release the load [of gravel] carried by the trailer.” The MDB Cross-Claim, 4:9-
17 11. MDB also claims there were safer alternatives available to Versa; the solenoid valve was
18 unreasonably dangerous and defective; and Versa failed to provide appropriate safety mechanisms
19 regarding the solenoid valve. The MDB Cross-Claim, 4:15-22.

20 The Motion is the same as the motion practice in the Fitzsimmons Action and the Bible
21 Action. The issues are identical, as are the relevant parties. The Court issued an ORDER (“the
22 December Order”) on December 8, 2017, in the Fitzsimmons Action. The December Order
23 conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny*
24 *Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCp 37. The Court found in the
25 December Order case concluding sanctions were an appropriate sanction for MDB’s spoliation of

26
27 ² Versa filed THIRD PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
28 THIRD PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCp 12(B)(5) (“the MTD”) on July 19, 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 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
2 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
3 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
4 Motion.³

5 It is hereby **ORDERED** THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY,
6 INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING,
7 LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE,
8 FOR AN ADVERSE JURY INSTRUCTION is **GRANTED**. MDB TRUCKING, LLC'S CROSS-
9 CLAIM is **DISMISSED**.

10 DATED this 22 day of January, 2018.

11 
12 ELLIOTT A. SATTLER
13 District Judge
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27 ³ The Court notes D.C.R. 13(3) states, "[f]ailure of the opposing party to serve and file his written opposition may be
28 construed as an admission that the motion is meritorious and a consent to granting the same." Versa has not moved to
have the Motion granted under this standard.

1
2
3 **CERTIFICATE OF MAILING**

4 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
5 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
6 the County mailing system for postage and mailing with the United States Postal Service in Reno,
7 Nevada, a true copy of the attached document addressed to:

8
9
10
11 **CERTIFICATE OF ELECTRONIC SERVICE**

12 I hereby certify that I am an employee of the Second Judicial District Court of the State of
13 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
14 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
15 of electronic filing to the following:
16

17 MATTHEW ADDISON, ESQ.
18 JOSH AICKLEN, ESQ.
19 KATHERINE PARKS, ESQ.
20 BRIAN BROWN, ESQ.
21 THIERRY BARKLEY, ESQ.
22 SARAH QUIGLEY, ESQ.
23 JESSICA WOELFEL, ESQ.
24 JACOB BUNDICK, ESQ.
25 NICHOLAS M. WIECZOREK, ESQ.

26
27
28

Sheila Mansfield
Judicial Assistant

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EXHIBIT “A”

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

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

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

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

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

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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
26

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

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

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

18 I. Willfulness

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

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

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

24 *II. The possibility of a lesser sanction*

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

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

17
18 ⁵ At oral argument counsel for MDB stated:

19
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
26 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
27 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
28 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
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[ied] the petition as moot" on February 13, 2008. In short, the "case" MDB relies upon does not even
exist.

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

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

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

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

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

27 A: I have seen that, yes.

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

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

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

13 IV. Whether evidence is irreparably lost

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
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6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

15 DANIEL ANTHONY KOSKI; MDB
16 TRUCKING, LLC; DOES I-X and ROE I-V,

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

NOTICE OF ENTRY

19
20
21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

1 PLEASE TAKE NOTICE that the Order was entered by the above-entitled Court on
2 the 22nd day of January, 2018, a copy of which is attached hereto as **Exhibit 1** and made
3 a part hereof.

4 **AFFIRMATION**

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

7 DATED this 8th day of February, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP
10
11

12 By /s/ Josh Cole Aicklen

13 JOSH COLE AICKLEN

14 Nevada Bar No. 007254

15 DAVID B. AVAKIAN

16 Nevada Bar No. 009502

17 PAIGE S. SHREVE

18 Nevada Bar No. 013773

19 6385 S. Rainbow Boulevard, Suite 600

20 Las Vegas, Nevada 89118

21 Attorneys for Defendant/Cross-Defendant
22 VERSA PRODUCTS COMPANY, INC.
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LIST OF EXHIBITS

Exhibit 1 Order

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018 a true and correct copy of NOTICE OF ENTRY was served via the Court's electronic e-filing system addressed as follows:

Matthew C. Addison, Esq.
McDONALD CARANO WILSON LLP
100 W. Liberty St., 10th Floor
Reno, NV 89501
RMC LAMAR HOLDINGS, INC.

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
Attorneys for MDB TRUCKING, LLC and
DANIEL ANTHONY KOSKI

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

DANIEL ANTHONY KOSKI; MDB TRUCKING,
LLC; et al.,

Defendants.

ORDER

Presently before the Court is THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

This case arises from a personal injury action. A COMPLAINT was filed by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case number CV15-02349.

¹ The issues presented in the Motion were fully briefed in FITZSIMMONS, et al. v. MDB TRUCKING, LLC, et al., CV15-02349.

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and JAMES BIBLE v. MDB
3 TRUCKING, LLC et al., CV16-01914 (“the Bible Action”). The instant action was filed on May 2,
4 2016. The Bible Action was filed September 20, 2016. It is alleged in all three actions that on July
5 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for MDB, negligently
6 spilled a load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose
7 control of their vehicles and numerous accidents occurred resulting in the three separate cases. The
8 plaintiffs sustained physical and emotional injuries as a result of the accidents. In response to the
9 complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT (“the MDB Cross-
10 Claim”) June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa: Implied
11 Indemnification and Contribution.² MDB alleges it was not Koski’s negligence that caused the
12 gravel to spill; rather, the spill was caused by the “unreasonably dangerous and defective” design
13 and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 4:6-8. Therefore, MDB
14 brought the Cross-Claim against the manufacturers of the trailer and its components, including
15 Versa. MDB avers Versa produced a solenoid valve which would, “activate inadvertently allowing
16 the gates to open and release the load [of gravel] carried by the trailer.” The MDB Cross-Claim, 4:9-
17 11. MDB also claims there were safer alternatives available to Versa; the solenoid valve was
18 unreasonably dangerous and defective; and Versa failed to provide appropriate safety mechanisms
19 regarding the solenoid valve. The MDB Cross-Claim, 4:15-22.

20 The Motion is the same as the motion practice in the Fitzsimmons Action and the Bible
21 Action. The issues are identical, as are the relevant parties. The Court issued an ORDER (“the
22 December Order”) on December 8, 2017, in the Fitzsimmons Action. The December Order
23 conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny*
24 *Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCp 37. The Court found in the
25 December Order case concluding sanctions were an appropriate sanction for MDB’s spoliation of

26
27 ² Versa filed THIRD PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
28 THIRD PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCp 12(B)(5) (“the MTD”) on July 19, 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 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
2 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
3 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
4 Motion.³

5 It is hereby **ORDERED** THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY,
6 INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING,
7 LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE,
8 FOR AN ADVERSE JURY INSTRUCTION is **GRANTED**. MDB TRUCKING, LLC'S CROSS-
9 CLAIM is **DISMISSED**.

10 DATED this 22 day of January, 2018.

11 
12 ELLIOTT A. SATTLER
13 District Judge
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28 ³ The Court notes D.C.R. 13(3) states, "[f]ailure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same." Versa has not moved to have the Motion granted under this standard.

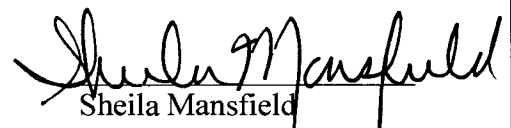
1
2
3 **CERTIFICATE OF MAILING**

4 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
5 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
6 the County mailing system for postage and mailing with the United States Postal Service in Reno,
7 Nevada, a true copy of the attached document addressed to:
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10

11 **CERTIFICATE OF ELECTRONIC SERVICE**

12 I hereby certify that I am an employee of the Second Judicial District Court of the State of
13 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
14 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
15 of electronic filing to the following:
16

17 MATTHEW ADDISON, ESQ.
18 JOSH AICKLEN, ESQ.
19 KATHERINE PARKS, ESQ.
20 BRIAN BROWN, ESQ.
21 THIERRY BARKLEY, ESQ.
22 SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS M. WIECZOREK, ESQ.

23
24 
25 Sheila Mansfield
26 Judicial Assistant
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EXHIBIT "A"

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

vs.

Dept. No. 10

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

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

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

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

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

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

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

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

18 *I. Willfulness*

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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.
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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*

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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.

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18 ⁵ At oral argument counsel for MDB stated:

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

24 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING, 208:15-24. The citation to an unpublished
25 disposition of the Nevada Supreme Court issued prior to January 1, 2016, is a violation of ADKT 0504 and SCR 123
26 (the SCR was repealed by the ADKT). The Court found it difficult to believe the Nevada Supreme Court would make
27 such a sweeping change to firmly established precedent as that represented by counsel in an unpublished disposition.
28 The Court was unfamiliar with *Walmart*, so the Court endeavored to familiarize itself with the case. The Court looked
up the case number provided by counsel on the Nevada Supreme Court webpage. Troublingly, the Court was unable to
verify the veracity of the proposition proffered by MDB *because the parties agreed to dismiss their proceedings and
the Nevada Supreme Court vacated the order upon which MDB makes its argument*. The Nevada Supreme Court had
granted a Writ of Mandamus on January 31, 2008; however, it withdrew that order on a subsequent date. The Nevada
Supreme Court webpage indicates the parties contacted the Supreme Court on February 2, 2008, and indicated they had
settled their case. The Nevada Supreme Court entered an order vacating the January 31, 2008, order upon which MDB
relies and "den[ied] 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.

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

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

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

13 IV. Whether evidence is irreparably lost

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

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

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

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

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

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

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

3 VII. The need to deter parties and future litigants from similar abuse
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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.
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1 When the Court balances the sixth and eighth *Young* factor it concludes dismissal of MDB's claims
2 against Versa are appropriate.

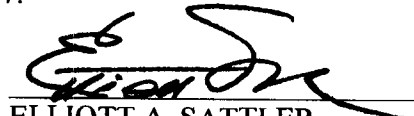
3 *VIII. Whether sanctions unfairly operate to penalize a party for the misconduct of his or her*
4 *attorney*

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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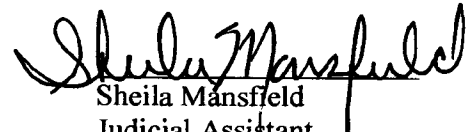
CERTIFICATE OF MAILING

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

GENEVA M. REMMERDE,
Plaintiff,

Case No. CV16-00976
Dept. No. 10

vs.

DANIEL ANTHONY KOSKI, MDB
TRUCKING, LLC, DOES 1-X and
ROE I-V

Defendants.

MDB TRUCKING, LLC, a Nevada limited
liability company,

Third-Party Plaintiff,

vs.

RMC LAMAR HOLDINGS, INC. a
Colorado Corporation; VERSA PRODUCTS
COMPANY, INC., a New Jersey Corporation
THE MODERN GROUP GP-SUB, INC., a
Texas corporation and general partnership;
DRAGON ESP, LTD., a Texas limited
partnership; and DOES 1-10 and BLACK
AND WHITE COMPANIES,

Third-Party Defendants.

THIRD-PARTY COMPLAINT

COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter
“MDB”) by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger,
and hereby brings this Third-Party Complaint against Third-Party Defendants RMC Lamar

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1 Holdings, Inc, Versa Products Company, Inc., and the Modern Group GP-Sub, Inc. and Dragon
2 ESP, Ltd. and hereby alleges as follows.

3 **FIRST CLAIM FOR RELIEF**

4 **(General Allegations)**

5 1. Third-Party Plaintiff incorporates herein that Plaintiff's Complaint solely for the
6 purposes of establishing that a Complaint has been filed against MDB Trucking, LLC, but
7 without admitting the truth of any allegation therein except for such allegations which may have
8 been admitted in Third-Party Plaintiff's Answer. Third-Party Plaintiff is informed and believes
9 and therefore alleges that the matters referred to in Third-Party Plaintiff's Complaint were
10 proximately caused by the acts and omissions of Third-Party Defendants.

11 2. Third-Party Plaintiff MDB Trucking, LLC was at all relevant times a Nevada
12 limited liability company authorized to conduct business within the State of Nevada.

13 3. Third-Party Defendants DOES 1-10 and BLACK AND WHITE COMPANIES are
14 sued herein under fictitious names and the true names and capacities of said Third-Party
15 Defendants are not known by Third-Party Plaintiff who asked leave of court to amend this Third-
16 Party Complaint to set forth same as it becomes known or ascertained.

17 4. Third Party Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing)
18 was at all relevant times hereto a Colorado corporation engaged in the business of designing and
19 manufacturing trailers and semi-trailers and placed same into the stream of commerce and was
20 doing business in the State of Nevada.

21 5. Third-Party Defendant Versa Products Company, Inc was at al relevant times
22 hereto a New Jersey Corporation engaged in the business of designing and manufacturing
23 pneumatic air solenoid valves specifically for bottom dump trailers and gate activated controls
24 and placed into the stream of commerce and was doing business in the State of Nevada.

25 6. Third-Party Defendant the Modern Group GP-Sub, Inc. was at all relevant times
26 hereto a Texas corporation and the general partner of Dragon ESP, Ltd., a Texas limited
27 partnership.

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1 7. Third Party Defendant Dragon ESP, Ltd. was at all relevant times a Texas limited
2 partnership.

3 8. A Complaint was filed on May 2, 2016 in the Second Judicial District Court,
4 Case No. CV16-00976, Department 10 in which the Plaintiff Geneva M. Remmerde prayed for
5 damages against Defendant MDB Trucking, LLC alleging negligence in regards to an accident
6 which occurred on July 7, 2014 where a trailer owned by MDB Trucking, LLC spilled a load of
7 gravel causing an accident and injury which are claims presented by Plaintiff.

8 9. Upon information and belief, the Ranco trailer was activated inadvertently causing
9 the gates of the trailer to release a subject load of gravel on the highway and was defective in
10 whole or in part as designed by the Defendant RMC Lamar Holdings, Inc. (fka Ranch
11 Manufacturing Company) (also known by the trade name and trademark Ranco).

12 10. Third Party Defendant RMC Lamar Holdings, Inc. manufactured the subject
13 Ranco trailer in 2002 under the vehicle brand Ranco with VIN No. 1R9BP45082L008431 Idaho
14 Plate No. TE3528.

15 11. Third-Party Defendants the Modern Group and Dragon ESP acquired Ranch
16 Manufacturing on or about August 1, 2007 through an Asset Purchase Agreement.

17 12. Upon information and belief, Third-Party Defendant Dragon, ESP has continued
18 to sell Ranco trailers and semi-trailers with the same components within the same general market
19 and to same customers.

20 13. Third-Party Defendant Dragon ESP has maintained its manufacturing and
21 assembly locations in the same venue of Lamar, Colorado after its acquisition of Ranch
22 Manufacturing Company.

23 14. William Carder the former President and owner of Ranch Manufacturing, Inc.
24 became an officer with Dragon ESP, Ltd. and maintained his position as Vice-President for
25 Ranco through all relevant times up to and including 2015.

26 15. Upon information and belief, Dragon ESP, Ltd. is a *de facto* successor to Ranch
27 Manufacturing, Inc. and has engaged in substantial continuation of Ranco's business.

28 ///

1 16. Dragon ESP, Ltd. is liable to Third-Party Plaintiff to the same extent as RMC
2 Lamar Holdings, Inc. (fka Ranch Manufacturing Company).

3 17. Third-Party Plaintiff MDB Trucking, LLC in 2012 was the last purchaser and end
4 user of the subject Ranco trailer and the direct purchaser of the subject Versa Valve unit
5 in 2013.

6 18. On or before July 7, 2014, the Ranco trailer that left Ranch Manufacturing's
7 control as designed, assembled, and manufactured by Ranco was unreasonably dangerous and
8 defective in one or more of the following respects:

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

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

15 19. Ranch Manufacturing knew that Versa Products Company, Inc. had a safer
16 design available in the stream of commerce on or about 2002 which employed a manual lock
17 safety design; and, that same should have been provided to its end use customers in lieu of the
18 Versa Valve model incorporated in the subject Ranco trailer.

19 20. Upon information and belief, Versa Products Company also knew both
20 in 2002 and 2014 that they had an alternate safer design available in the stream of commerce
21 which employed a manual lock safer design; and, that same should have been provided to its end
22 user customers MDB Trucking in lieu of the model incorporated in the subject Ranco trailer.

23 21. To the extent Plaintiff was injured as a proximate result of the unreasonably
24 dangerous conditions and defects at the time of manufacturing or negligent design, such as a
25 direct and proximate result of the negligence of Third-Party Defendants; and any negligence that
26 exists as alleged by the Plaintiffs is expressly denied. Third-Party Defendants were actively and
27 solely negligent and Third-Party Plaintiff was passively negligent or without fault.

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1 **THIRD CLAIM FOR RELIEF**

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

3 31. The Third-Party Plaintiff repeats and realleges each and every allegation contained
4 in paragraphs 1-30 above as if more fully set forth herein.

5 32. The Third-Party Plaintiff is entitled to complete indemnity against VERSA
6 PRODUCTS COMPANY, INC. with respect to all allegations or liabilities set forth in the First
7 amended Complaint.

8 33. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the
9 defense of the claims of negligence in this matter as well as prosecution of the Third-Party
10 Complaint.

11 **FOURTH CLAIM FOR RELIEF**

12 **(Contribution as to VERSA)**

13 34. The Third-Party Plaintiff repeats and realleges each and every allegation contained
14 in paragraphs 1-33 above as if more fully set forth herein.

15 35. The Third-Party Plaintiff is entitled to contribution from the Third-Party
16 Defendant VERSA PRODUCTS COMPANY, INC., with respect to any settlement, judgment,
17 awards, or any other type of resolution of the claims brought forward by the Plaintiffs in her
18 Complaint on file herein.

19 36. The Third-Party Plaintiff is entitled to all costs and fees expended in the defense
20 of the claims for negligence in this matter as well as prosecution of the Third-Party Complaint.

21 WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendants
22 as follows:

- 23 1. For implied indemnification with respect to all negligence claims brought against
24 Third-Party Plaintiff in this matter;
25 2. For contribution with respect to all negligence claims brought against Third-Party
26 Plaintiff in this matter;
27 3. For attorneys' fees and costs expended in this matter; and
28

///

1 4. For such other and further relief as this Court deems just and proper in the
2 premises.

3 DATED this 22nd day of June, 2016.

4 THORNDAL ARMSTRONG
5 DELK BALKENBUSH & EISINGER

6 By: 

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

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **THIRD-PARTY COMPLAINT** to be served on all parties to this action by:

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

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

_____ hand delivery

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

_____ Federal Express/UPS or other overnight delivery fully addressed to

**Kathleen A. Sigurdson, Esq.
1440 Haskell Street
Reno, Nevada 89509
Attorneys for Plaintiff**

**Matthew C. Addison, Esq.
Jessica L. Woelfel, Esq.
McDonald Carano Wilson LLP
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Third-Party Defendant RMC Lamar Holdings**

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

DATED this 22 day of June, 2016.



An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDB TRUCKING, LLC,

Appellant,

vs.

VERSA PRODUCTIONS COMPANY, INC.,

Respondent.

Supreme Court No.: 76397

District Court Case No. CV16-00976
Dept. 10

Electronically Filed
Aug 06 2018 12:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**DOCKETING STATEMENT
CIVIL APPEALS**

1. Judicial District: Second Judicial District Department: 10

County: Washoe

Judge: The Honorable Elliott A. Sattler

District Ct. Case No.: CV16-00976

2. Attorney(s) filing this docketing statement:

Attorneys: Nicholas M. Wieczorek, Esq.; Jeremy J. Thompson, Esq.; and Colleen E. McCarty, Esq.

Telephone: (702) 862-8300

Firm: Clark Hill PLLC

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

Client: MDB Trucking, LLC ("MDB")

3. Attorney(s) representing Respondent(s):

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

Telephone: (702) 893-3383

Firm: Lewis Brisbois Bisgaard & Smith LLP

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

Client(s): Versa Products Company, Inc. ("Versa")

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

- | | |
|---|--|
| ☐ Judgment after bench trial | ☐ Dismissal |
| ☐ Judgment after jury verdict | ☐ Lack of jurisdiction |
| ☐ Summary judgement | ☐ Failure to state a claim |
| ☐ Default judgment | ☐ Failure to prosecute |
| ☐ Grant/Denial of NRCP 60(b) relief | ☐ Other (specify): |
| ☐ Grant/Denial of injunction | ☐ Divorce Decree: |
| ☐ Grant/Denial of declaratory relief | ☐ Original ☐ Modification |
| ☐ Review of agency determination | <u>Other disposition (specify):</u> Post-Judgment Order (1) Granting in Part and Denying in Part Versa's Motion for Attorney's Fees and Costs Pursuant to NRCP 37 and NRCP 68 and (2) Granting in Part and Denying in Part MDB's Motion to Retax and Settle Verified Memorandum of Costs |

5. Does this appeal raise issues concerning any of the following? Not applicable.

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

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

MDB Trucking, LLC v. Versa Products Co., Inc.,
Case Nos. 75022, 75319, 75321, 76395 and 76396

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

Fitzsimmons v. MDB Trucking, LLC, et al., Second Judicial District Case No. CV15-02349
Bible v. MDB Trucking, LLC, et al., Second Judicial District Case No. CV16-01914

On June 7, 2018, the Court filed its post-judgment Orders in the above-referenced cases, which were the same or substantially similar in outcome to the instant appeal. These Orders were noticed on July 13, 2018 and have also been appealed and cross-appealed.

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

The matter underlying this appeal arises from a personal injury action. On December 4, 2015, Ernest and Carol Fitzsimmons filed a complaint styled *Fitzsimmons v. MDB Trucking, LLC, et al.*, in the Second Judicial District Court, Case No. CV15-02349 (the “*Fitzsimmons* Action”). Numerous other plaintiffs’ cases were subsequently consolidated into the *Fitzsimmons* Action. Two additional cases resulting from the same accident were filed but not consolidated with the *Fitzsimmons* Action, e.g. *Remmerde v. MDB Trucking, LLC*, Case No. CV-00976, the case which is the subject of the instant appeal, and *Bible v. MDB Trucking, LLC*, Case No. CV16-01914. The personal injury claims all related to multiple traffic accidents, which occurred when a semi-trailer owned and operated by MDB inadvertently dumped a load of gravel on the freeway. MDB settled all of the underlying plaintiffs’ claims and thereafter pursued a Cross-Claim for Contribution against Versa. The *Fitzsimmons* Action was subsequently dismissed by the District Court’s Order entered on December 8, 2017 and noticed on December 29, 2017, which granted case-ending sanctions, pursuant to NRCP 37. And, based upon that decision, the District Court filed an Order dismissing MDB’s Cross-Claim in the instant underlying case, as well as in the *Bible* matter. All three cases are currently on appeal from that Order, in Supreme Court Case Nos. 75022 (*Fitzsimmons*), 75319 (*Remmerde*) and 75321 (*Bible*), respectively.

On February 9, 2018, Versa filed a post-judgment Motion for Attorneys’ Fees and Costs Pursuant to NRCP 37 and NRCP 68 (“Motion for Attorneys’ Fees”), and a Verified Memorandum of Costs (“Memorandum of Costs”), wherein it sought attorneys’ fees in the amount of \$731.00 and costs in the amount of \$413.00 from MDB. Thereafter, MDB timely filed a Motion to Retax and Settle Costs (“Motion to Retax”) and opposed the Motion for Attorneys’ Fees. After full briefing, the District Court heard oral argument on the Motion for Attorneys’ Fees and Motion to Retax on April 6, 2018, at which time it took the matters under advisement. In a final written Order on the post-judgment motions entered on June 7, 2018, and noticed on June 13, 2018, the District Court granted in part and denied in part the Motion for Attorneys’ Fees and denied the Motion to Retax. Specifically, Versa’s request for attorneys’ fees was denied, and its Verified Memorandum of Costs was not reduced. MDB was ordered to pay Versa costs in the amount of \$413.00 and is appealing said cost award in its entirety.

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

Whether the District Court abused its discretion by awarding \$413.00 to Versa for costs which predate its Offers of Judgment, in contravention of its Motion for Attorneys’ Fees, wherein Versa specifically requests costs incurred after the service of the Offers of Judgment.

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

Fitzsimmons v. MDB Trucking, LLC, et al., Case No. 75022
Bible v. MDB Trucking, LLC, et al., Case No. 76396

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

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues? Not applicable.

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

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

☐ A substantial issue of first impression

☐ An issue of public policy

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

☐ A ballot question

If so, explain:

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

MDB respectfully asserts that this matter, which is an appeal of a post-judgment Order related to the appeal of a case-ending sanctions Order in Case No. 75319, is presumptively retained by the Supreme Court, pursuant to NRAP 17(a)(10) and/or (11). The Supreme Court previously clarified its spoliation jurisprudence in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), but it remains a question of first impression and/or inconsistency in the published decisions of the Appellate Courts what impact the *Bass-Davis* decision has on a district court's exercise of discretion to impose sanctions under NRCP 37. It is MDB's position in the instant case that the District Court failed to recognize the limitations on the degree of sanctions to be imposed for negligent or willful spoliation of evidence under *Bass-Davis* and abused its discretion in entering case concluding sanctions.

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

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

Not applicable.

Was it a bench or jury trial?

Not applicable.

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

Not applicable.

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

Order filed on June 7, 2018.

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

Not applicable.

17. Date written notice of entry of judgment or order appealed from: June 13, 2018.

Was service by:

- ☐ Delivery
☒ Mail/electronic/fax

18. Date written notice of entry of Judgment or order was served: June 13, 2018

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

Not applicable.

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

- ☐ NRCP 50(b) Date of filing _____
☐ NRCP 52(b) Date of filing _____
☐ NRCP 59 Date of filing _____

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

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

Was service by:

- ☐ Delivery
☐ Mail

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20. Date notice of appeal filed: July 13, 2018.

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

Versa filed a Notice of Cross-Appeal on July 24, 2018.

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

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

SUBSTANTIVE APPEALABILITY

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

(a)

- | | |
|---|---------------------------------------|
| ☒ NRAP 3A(b)(1) | ☐ NRS 38.205 |
| ☐ NRAP 3A(b)(2) | ☐ NRS 233B.150 |
| ☐ NRAP 3A(b)(3) | ☐ NRS 703.376 |
| ☐ Other (specify) | |
-

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

N.R.A.P. 3A(b)(1) allows an appeal to be taken from the final judgment or orders of a district court. The District Court's Order resolved all issues in dispute raised by Versa's Motion for Attorneys' Fees and MDB's Motion to Retax. There is nothing remaining to be adjudicated by the parties.

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

(a) Parties:

- (1) MDB Trucking, LLC
- (2) Versa Products Company, Inc.

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

The claims of all other parties were settled in the district court.

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

Versa's Motion for Attorneys' Fees against MDB granted in part and denied in part by Order entered on June 7, 2018. MDB's Motion to Retax against Versa was denied in the same Order entered on June 7, 2018.

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

X Yes
☐ No

25. If you answered "No" to question 23, complete the following: Not applicable.

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

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

☐ Yes
☐ No

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

☐ Yes
☐ No

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

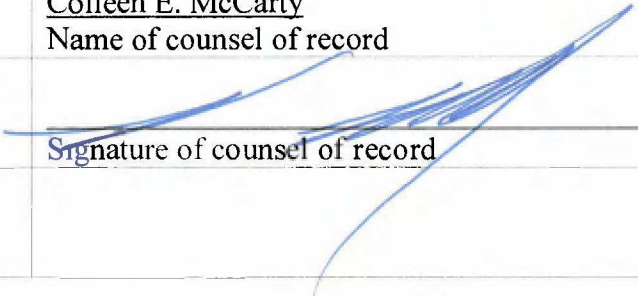
Not applicable.

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

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

VERIFICATION

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

<u>MDB Trucking, LLC</u> Name of appellant	<u>Nicholas Wiczorek, Jeremy Thompson and Colleen E. McCarty</u> Name of counsel of record
<u>8/6/18</u> Date	 Signature of counsel of record
<u>Nevada, Clark County</u> State and County where signed	

CERTIFICATE OF SERVICE

I certify that on the 6th day of August, 2018, I served a copy of this completed docketing statement upon all counsel of records:

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

Josh Cole Aicklen, ESQ.
David B. Avakian, ESQ.
Paige S. Shreve, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Respondent/Cross-Appellant
Versa Products Company, Inc.


An Employee of Clark Hill PLLC