

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDB TRUCKING, LLC,

Appellant/Cross-Respondent,

vs.

VERSA PRODUCTS COMPANY,
INC.,

Respondent/Cross-Appellant.

Supreme Court Case No. 75022

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

**APPELLANT/CROSS-RESPONDENT MDB TRUCKING, LLC'S
OPENING BRIEF**

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

NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
Nevada Bar No. 13186
CLARK HILL PLLC
3800 Howard Hughes Pkwy., Ste. 500
Las Vegas, Nevada 89169
Telephone: (702) 862-8300
Attorneys for Appellant/Cross-Respondent
MDB Trucking, LLC

NRAP 26.1 DISCLOSURE

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

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

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

Dated this 17th day of January, 2019.

CLARK HILL PLLC

By: Colleen E. McCarty
NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
Nevada Bar No. 13186
3800 Howard Hughes Pkwy., Ste. 500
Las Vegas, Nevada 89169
Telephone: (702) 862-8300
Attorneys for Appellant/Cross Respondent
MDB Trucking, LLC

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I.

JURISDICTIONAL STATEMENT

The Second Judicial District Court in Case No. CV15-02349 imposed terminating sanctions on MDB Trucking, LLC (hereinafter “MDB”) for spoliation of evidence pursuant to NRCP 37 and dismissed MDB’s cross-claim for contribution against Versa Products Company, Inc. (“Versa”). At the time, MDB’s cross-claim against Versa was the only matter remaining to be litigated in three related consolidated cases resulting from a 2014 multi-car traffic accident. The accident involved an MDB tractor/trailer combination with three trailers filled with gravel, the last of which dumped its load on the interstate following the uncommanded activation of the Versa valve that controlled the dumping mechanism.

Following the dismissal of MDB’s cross-claim, Versa moved for an award of attorneys’ fees and costs and MDB moved to retax and settle costs. The district court thereafter denied Versa’s request for attorneys’ fees and retaxed Versa’s costs. MDB is appealing the terminating sanctions and award of costs. Versa is cross-appealing the denial of attorneys’ fees and retaxing of costs. The district court orders constitute final orders in the district court cases and provide this Court with appellate jurisdiction pursuant to NRAP 3A(b)(1).

...

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II.

ROUTING STATEMENT

This consolidated appeal is presumptively retained by the Supreme Court, pursuant to NRAP 17(a)(10) and (11), as it concerns a question of first impression and an issue upon which there is otherwise an inconsistency in the published decisions. Specifically, the Supreme Court has not addressed by way of published decision a district court's proper exercise of discretion when considering sanctions for spoliation of evidence pursuant to NRCP 37.

This Court previously clarified its spoliation jurisprudence in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). This Court also previously established factors to consider in imposing sanctions, including terminating sanctions, pursuant to NRCP 37 in *Young v. Johnny Ribeiro Building Inc.*, *Bahena v. Goodyear Tire & Rubber Co.*, 106 Nev. 88, 787 P.2d 777 (1990). And, while this Court has previously found that NRCP 37 may be applied to discovery abuses, and that terminating sanctions are generally permitted under NRCP 37(b)(2), the Court has not yet articulated the requirement for considering spoliation of evidence jurisprudence when imposing such sanctions.

Underlying this matter specifically is the district court's determination that MDB spoliated certain components of the tractor and trailers involved in the subject accident giving rise to its cross-claim for contribution. And, although the district court found MDB did not intentionally dispose of the components in order

to harm Versa's defense and was at most "complicit of benign neglect and indifferent to the needs of Versa regarding discovery," it nevertheless imposed terminating sanctions pursuant to NRCP 37. Without published guidance on how to reconcile the Court's two lines of authority impacting its decision, 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*, warranting this Court's retention and review, as well as ultimate reversal and remand.

III.

ISSUES PRESENTED FOR REVIEW

This consolidated appeal presents the following issues for the Court's determination:

1) Whether the district court abused its discretion by imposing terminating sanctions for spoliation of evidence pursuant to NRCP 37, where the district court failed to consider the Supreme Court's long-standing spoliation of evidence case law, including limitations on the degree of sanctions to be imposed for negligent spoliation of evidence under *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006) and subsequent cases. Resolution of this issue in favor of MDB will likely moot the remaining issues presented.

2) Whether the district court abused its discretion by awarding expert costs to Versa in excess of the \$1,500.00 statutory limit set forth in NRS 18.005(5), without consideration of the factors set forth in *Frazier v. Drake*, 131 Nev. Adv.

Op. 64, 357 P.3d 365, 377-378 (2015).

3) Whether the district court erred by awarding costs to Versa, which costs pertained exclusively to Versa's defense of the underlying plaintiffs' personal injury actions wherein Versa was not the prevailing party.

4) Whether the district court erred by awarding costs to Versa, which costs predate its offers of judgment, and Versa specifically moved only for costs incurred after service of its offers of judgment.

5) Whether the district court erred by awarding costs to Versa, which costs are not specifically taxable pursuant to NRS 18.005.

IV.

STATEMENT OF THE CASE

All consolidated appeals at issue arise from the district court's determination to impose terminating sanctions against MDB, pursuant to NRCP 37, for the purported spoliation of evidence, specifically certain electrical components of MDB's tractor/trailer combination involved in the underlying accident, and to subsequently deny attorney's fees and award reduced costs to Versa. At the time the terminating sanctions were imposed, the only claim remaining to be litigated as a result of the 2014 multi-car traffic accident involving the MDB tractor/trailer combination, which released its load of gravel on Interstate 80 West of Reno, was MDB's cross-claim for contribution against Versa. Versa manufactured the solenoid valve that experienced an uncommanded activation and caused the gravel

load to release.

As the result of a mediation related to the underlying personal injury cases, which took place on May 5, 2017, MDB paid in excess of \$1.7 million to resolve all personal injury claims in the three underlying district court cases, and the plaintiffs assigned all claims against Versa to MDB as part of the settlement. Ten days later, on May 15, 2017, Versa filed its motion to strike MDB's cross-claim for contribution in the three remaining consolidated district court cases, wherein it sought sanctions for alleged spoliation of evidence pursuant to NRCP 37. Specifically, Versa sought to strike MDB's complaint or, in the alternative, to receive an adverse jury instruction for MDB's alleged replacement of and failure to preserve certain component parts of the wiring system of the subject tractor and trailers.

Following briefing and oral argument on August 29, 2017, the district court issued an interim order dated September 22, 2017 in which it found "there would be some sanctions levied on MDB for their discovery abuse: the actual sanction was not determined." The district court's interim order set the matter for evidentiary hearing on October 13, 2018, less than three weeks prior to the trial date and further stated "[e]ach party will be familiar with *Young, supra, Nevada Power, supra*, and their progeny and present witnesses in support of their respective positions." At the time the district court entered its September order, it

had taken nineteen (19) pre-trial motions under submission and trial was a month away.

The district court held the evidentiary hearing on October 13, 2017 and, at the conclusion of the hearing, informed the parties it would be granting Versa's motion to strike and entering terminating sanctions against MDB. The district court vacated the pending October 30, 2017 trial date in the lowest-numbered of the three remaining consolidated cases and advised the parties it would enter a written decision. The district court subsequently entered its written order on December 8, 2017. The district court stated therein that it "does not find MDB intentionally disposed of the components in order to harm Versa," but it "does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery," and entered the terminating sanction which is now the subject of this appeal.

The district court applied the same analysis and entered identical orders in the remaining two cases on January 22, 2018. Finally, the district court entered written orders regarding Versa's subsequent requests for attorney's fees and costs on June 7, 2018. MDB's and Versa's respective appeals and cross-appeals from these subsequent orders were later consolidated into each initial appeal, and all appeals were consolidated for all appellate purposes by order of the Court dated October 1, 2018.

V.

STATEMENT OF RELEVANT FACTS

A. Pre-Accident Truck Modifications.

MDB is a commercial trucking company based in Sparks, Nevada. (AA Vol. 8 PG 1260). At all times relevant to the instant appeal, its drivers transported rock, gravel and other materials using 18 wheel tractors with three bottom dump trailers attached. (AA Vol. 11 PG 1703). The trailers, manufactured by Ranco, incorporated a valve that controlled the air pressure utilized to open and close the gates of the dumping system. (AA Vol. 8 PG 1198). The dumping gate valve on the Ranco trailers was manufactured by Versa, model number VGK-5423-20C-D012. (*Id.*).

Roughly one year before the subject accident, on July 25, 2013 and again on July 30, 2013, a tractor/trailer combination¹ owned by MDB and routinely driven by Daniel Koski (“Koski”) experienced an uncommanded activation of the Versa valve which resulted in the dumping of the load contained in the third or last trailer. (AA Vol. 8 PG 1200). Following these uncommanded activations, which occurred in the same tractor/trailer combination, MDB took steps to prevent further uncommanded dumps. (AA Vol. 11 PGS 1849). Specifically, MDB mechanics: (1) replaced the existing Versa valve; (2) rewired the control circuit for the dump

¹ The subject MDB tractor was identified by MDB with equipment number 5694 and the subject trailers were identified by equipment numbers 6773 for the first trailer, 6774 for the middle trailer, and 6775 for the third or dumping trailer. (AA Vol. 11 PGS 1703 – 1704).

gate system; and (3) added a master switch in the cab of the truck which isolated the entire circuit of the dump controls from any other electrical system on the truck. (AA Vol. 11 PGS 1849 – 1850). Unbeknownst to MDB at the time, beginning in 2002, Versa manufactured a safer, alternative valve design which included a manual locking system. (AA Vol. 8 PG 1238).

The modifications made by MDB in 2013 eliminated the possibility of a mechanical ground fault in the wiring system to the rear trailer. (AA Vol. 12 PG 1846). In short, the Versa valve received no electric current unless the driver of the truck affirmatively activated both the master switch and the individual trailer switch in the cab of the truck (both of which were shielded by plastic safety covers) and flipped both switches to the “on” position. (AA Vol. 11 PG 1810, AA Vol. 12 PG 1847). This isolated circuit prevented the Versa valve from being activated by any short circuit, exposed wire, or other electrical malfunction within the truck or trailers. (AA Vol. 12 PGS 1859 – 1862).

B. The Subject Accident.

On July 7, 2014, Koski, while driving the modified tractor/trailer combination, experienced an uncommanded activation of the Versa valve which resulted in the loss of the gravel load from the third trailer. (AA Vol. 11 PG 1705). The incident occurred on Interstate 80 near mile marker 39 outside of Reno, Nevada and Koski was initially unaware that the third trailer had released its load.

(AA Vol. 8 PG 1196). Further, Koski took no affirmative action to cause the trailer to open. (AA Vol. 11 PG 1737). Following the uncommanded release of gravel onto the Interstate, multiple vehicles collided and were damaged, and in some instances, their occupants sustained injuries. (AA Vol. 11 PG 1705).

Also on July 7, 2014, a different MDB-owned tractor/trailer combination driven by MDB employee Scott Palmer (“Palmer”) experienced an uncommanded activation of its Versa valve on Interstate 80 near mile marker 42. (AA Vol. 11 PG 1741). As a result of the uncommanded activation, which occurred approximately ten minutes prior to that experienced by Koski, the third trailer released a load of sand on the Interstate. (AA Vol. 8 PG 1200). Like Koski, Palmer took no affirmative action to cause the trailer to open. (AA Vol. 11 PGS 1741 – 1742). There were no accidents associated with this spill. (*Id.*). Following the July 7, 2014 incidents, MDB removed all of its bottom dump trailers from the road and its maintenance team manufactured and installed a pin lock system to prevent uncommanded activation of the Versa valves before re-deploying the trailers. (AA Vol. 11 PG 1742).

Following the subject incident in 2014, MDB’s mechanics also attempted, albeit unsuccessfully, to isolate the cause of the dumps. (AA Vol. 8 PG 1216). As a result, in November of 2014 MDB retained two forensic engineering experts, David Bosch, Ph.D. and Erik Anderson, P.E., C.F.E.I., to provide an independent

forensic engineering investigation of the accident at issue in the underlying litigation. (AA Vol. 8 PGS 1224 – 1286, 1195 – 1212). Among Dr. Bosch's conclusions: (1) there were no vehicle issues that could have caused the Versa valve to activate uncommanded and dump loads; (2) there was no evidence the drivers caused the unintended dumps; and (3) the only logical explanation for the numerous unintended dumps was that the Versa valve design is defective. (AA Vol. 8 PGS 1284 – 1286). Similarly, Mr. Anderson concluded: (1) the accident was not caused by any action or inaction of MDB or its employees; (2) the Versa valve was susceptible to uncommanded activation and external electromagnetic fields can cause uncommanded operation; and (3) the Versa valve is defective in its design because it was susceptible to uncommanded activation when exposed to external electromagnetic fields. (AA Vol. 8 PGS 1211 – 1212).

C. MDB's Resolution of the Underlying Personal Injury Cases.

The subject multi-vehicle accident on July 7, 2014 gave rise to multiple personal injury lawsuits against MDB and Versa, the first of which was filed more than one year after the accident on July 9, 2015.² The majority of the personal injury cases were later consolidated for discovery and trial purposes into *Fitzsimmons v. MDB Trucking, LLC, et al.*, District Court Case No. CV15-02349. (AA Vol. 10 PG 1562). *Bible v. MDB Trucking, LLC, et al.*, District Court Case

² See *Olivia John, et al. v. MDB Trucking, LLC et al.*, Second Judicial District Court Case No. CV15-01337.

No. CV 16-01913 and *Remmerde v. MDB Trucking, LLC, et al.*, District Court Case No. CV16-00976 were consolidated for discovery purposes only. (*Id.*).

On May 5, 2017 the parties, including counsel for the 13 plaintiffs purportedly injured as a result of the subject accident, attended mediation. (AA Vol. 10 PG 1604). The mediation resulted in the resolution of all of the personal injury claims. (*Id.*). At the conclusion of the mediation, memoranda were drafted and circulated which memorialized the specific terms of the settlement agreements, including the payment amounts. (*Id.*). The plaintiffs assigned all claims they had as against Versa to MDB as part of the settlement consideration. (*Id.*).

Thereafter, MDB filed motions for good faith settlement to secure approval of the aforementioned agreements. (AA Vol. 10 PG 1605). Between June 30, 2017 and July 20, 2017, the district court granted the motions for good faith settlement resolving the personal injury claims of all underlying plaintiffs. (*Id.*). The underlying personal injury claims, inclusive of those against Versa, were subsequently dismissed by stipulation and order. (*Id.*). As of July 20, 2017, the only remaining matter to be decided in the district court was the cross-claim for contribution asserted by MDB against Versa, wherein MDB alleged that the unreasonably dangerous and defective design of the Versa valve caused the release of the gravel load, resulting in the subject accident. (AA Vol. 1 PGS 1 – 8).

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D. Versa's Spoliation Motion.

On May 15, 2017, ten days after the mediation in which MDB agreed to settle all of the underlying personal injury cases, Versa brought a motion to strike MDB's cross-claim or, in the alternative, for an adverse jury instruction based on alleged spoliation of evidence. (AA Vol. 3 PGS 393 – 640). Versa argued MDB disposed of evidence critical to its defense to the cross-claim for contribution, specifically replacing certain component parts of the electrical system that controlled the Versa valve. (*Id.*). MDB argued in opposition that there was no relevant evidence negligently lost or destroyed that had any prejudicial effect on Versa's defenses to MDB's cross-claim. (AA Vol. 8 PGS 1122 – 1155, AA Vol. 10 PGS 1677 – 1685). Indeed, the components at issue did not effect the Versa valve because the modifications to the wiring system of the subject truck and trailers, made in 2013 prior to the subject accident in 2014, eliminated any chance the truck's electrical system could energize the Versa valve. (AA Vol. 8 PG 1165).

After full briefing, the district court heard oral argument on the motion to strike on August 29, 2017. (AA Vol. 9 PGS 1439 – 1557). At that time, the Court stated, “[t]here will be a sanction for the loss of the evidence.” (AA Vol. 9 PGS 1535 – 1536). A written order entered September 22, 2017 set the matter for evidentiary hearing. (AA Vol. 10 PG 1665). Evidence presented during the evidentiary hearing specifically focused on the routine maintenance performed

during the more than two years from the date of the subject accident, July 7, 2014, to the date of the expert inspection, October 13, 2016, as follows:

DATE	EQUIPMENT	PART
August 5, 2014	Trailer - #6773 (not the subject trailer)	Replaced 4-way socket
December 18, 2014	Trailer – #6773 (not the subject trailer)	Replaced 4-way socket
December 18, 2014	Tractor – #5694	Tightened screws on 4-way plug
February 5, 2015	Tractor - #5694	Replaced damaged 4-way cord and 7-way cord
December 2, 2015	Tractor – #5694	Replaced 4-way plug

(AA Vol. 12 PGS 1947, 1950, 1953, 1956 and 1962). Notably, no routine maintenance was performed on the subject trailer, equipment #6775 after the subject incident. (AA Vol. 12 PGS 1947 – 1962). MDB further acknowledged that during the course of this routine maintenance, it failed to preserve the parts it replaced, which consisted of two sockets, two cords and one plug. (AA Vol. 11 PG 1721).

E. The District Court’s Sanction Orders.

Immediately following the evidentiary hearing on October 13, 2017, the district court informed the parties it would be granting Versa’s motion to strike and entering terminating sanctions against MDB. (AA Vol. 12 PGS 1927 – 1928). The district court issued its first written order thereafter on December 8, 2018. (AA Vol. 12 PGS 1970 – 1983). The order sets forth the district court’s sole

consideration of the factors set forth in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), with only two passing references to, and no actual factual analysis under, *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). (*Id.*).

With regard to MDB's actions, the district court concluded that it "does not find MDB intentionally disposed of the components in order to harm Versa," but it "does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery." (AA Vol. 12 PG 1977). With regard to the possibility of a lesser sanction, the district court stated in issuing terminating sanctions that it "can conceive of no other sanction which would be appropriate under these circumstances." (AA Vol. 12 PG 1978). The district court disposed of the remaining underlying cases by way of identical orders issued on January 22, 2018. (AA Vols. 14 and 15 PGS 2426 – 2463).

F. The District Court's Attorneys' Fees and Costs Orders.

In the underlying case on appeal in Case No. 76395, Versa filed a post-judgment motion for attorneys' fees and costs, and a verified memorandum of costs, wherein it sought from MDB attorneys' fees in the amount of \$228,500.50 and costs in the amount of \$58,773.06 from MDB. (AA Vol. 13 PGS 2003-2019). MDB filed a motion to retax and settle costs and opposed Versa's motion for attorneys' fees and costs. (AA Vol. 14 PGS 2407 – 2425 and AA Vol. 15 PGS

2464 – 2474). After full briefing, the district court heard oral argument on the pending motions on April 6, 2018, at which time it took the matters under advisement. In a final written order issued on June 7, 2018, and noticed on June 13, 2018, the district court granted in part and denied in part the pending motions. (AA Vol. 17 PGS 2942 – 2953). Specifically, the district court denied Versa’s request for attorneys’ fees in its entirety and reduced its allowable costs to \$41,998.28. (*Id.*).

In the underlying case on appeal in Case No. 76396, Versa filed a post-judgment motion for attorneys’ fees and costs and a verified memorandum of costs, wherein it sought from MDB attorneys’ fees in the amount of \$724.50 and costs in the amount of \$1,274.74. (AA Vol. 15 PGS 2524 – 2537). Thereafter, MDB filed a motion to retax and settle costs and opposed Versa’s motion for attorneys’ fees and costs. (AA Vol. 16 PGS 2754 – 2765 and 2771 - 2789). After full briefing, the district court heard oral argument on their motions, also on April 6, 2018, at which time it took the matters under advisement. (AA Vol. 17 PGS 2859 – 2941). In a final written order issued on June 7, 2018, and noticed on June 13, 2018, the district court granted in part and denied in part the pending motions. (AA Vol. 18 PGS 3007 - 3022). Specifically, the district court denied Versa’s request for attorneys’ fees and reduced its allowable costs to \$1,076.74. (AA Vol. 18 PG 3021).

Finally, in the underlying case on appeal in Case No. 76397, Versa filed a post-judgment motion for attorneys' fees and costs and a verified memorandum of costs, wherein it sought from MDB attorneys' fees in the amount of \$731.00 and costs in the amount of \$413.00. (AA Vol. 16 PGS 2626 – 2718). Thereafter, MDB filed a motion to retax and settle costs and opposed the motion for attorneys' fees. (AA Vol. 16 PGS 2766 – 2770 and 2790 – 2808). After full briefing, the district court heard oral argument on their motions also on April 6, 2018, at which time it took the matters under advisement. (AA Vol. 17 PGS 2918 – 3000). In a final written order issued on June 7, 2018, and noticed on June 13, 2018, the district court granted in part and denied in part the pending motions. (AA Vol. 18 PGS 3013 – 3022). Specifically, the district court denied Versa's request for attorneys' fees and granted its request for costs in the amount of \$413.00 without reduction, and denied MDB's request to retax costs. (*Id.*).

VI.

SUMMARY OF ARGUMENT

Judicial adherence and respect for this Court's precedents is fundamental to the equal and efficient administration of justice. The failure to follow precedential guidance damages the notions of equal justice which are fundamental, especially where procedural orders nullify the right to trial by jury. This Court should reverse the district court's order granting Versa's motion to strike MDB's cross claim for

contribution and remand the matter to the district court for further proceedings consistent with a determination that the district court erred by not considering the Court's spoliation of evidence precedents when imposing sanctions under NRCP 37(b)(2) for that reason. This reversal and remand will result in the reversal and remand of all subsequent orders of the district court pertaining to attorneys' fees and costs.

The terminating sanctions imposed by the district court are not appropriate where the district court first determined in its interim order dated September 22, 2017 that MDB would be sanctioned pursuant to NRCP 37 without making any specific findings as to the alleged spoliation committed by MDB. When the district court did conduct an evidentiary hearing on October 13, 2017, it concluded that it "does not find MDB intentionally disposed of the components in order to harm Versa," but it "does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery." Imposing terminating sanctions thereafter, on findings that at most constituted negligent spoliation, if any, on the part of MDB, is not consistent with *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).

The district court's failure to consider this Court's long standing spoliation of evidence authority, including the limitations on the degree of sanctions to be imposed for negligent spoliation of evidence under *Bass-Davis*, warrants reversal

and remand. Pursuant to *Bass-Davis*, the most severe sanction the district court could have imposed, based on its actual finding that the evidence at issue was destroyed as a result of “benign neglect,” was an adverse inference jury instruction. Even if the district court had concluded (which it did not) that the evidence was intentionally destroyed, the most severe sanction could have been no more than a rebuttable presumption jury instruction. The district court’s discretion to impose sanctions pursuant to NRCPC 37(b)(2) must be tempered by the rule’s requirement that the imposition of such sanctions be “just.” Terminating sanctions are simply not allowed by Nevada law under the circumstances of the instant appeal.

VII.

ARGUMENT

A. Standard of Review.

In reviewing sanctions pursuant to NRCPC 37, the standard of review is whether the district court abused its discretion. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). When a district court imposes terminating discovery sanctions, this Court applies a “somewhat heightened standard of review.” *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). Under this heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated. *Id.*

...

In the event this Court undertakes a review of the district court orders regarding attorneys' fees and costs issued subsequent to its granting of the motion to strike, the following standards apply. When an attorneys' fees matter implicates a question of law, the proper review is de novo. *In re estate and Trust of Rose Miller, GNLV Corp. v. Service Control Corp* 125 Nev. 550, 553, 216 P.3d 239, 241 (2009). Statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law. *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). Standards regarding specific cost awards are provided in the respective argument sections, below.

B. The District Court Abused Its Discretion When It Imposed Case-Ending Sanctions Against MDB for Spoliation of Evidence.

1. MDB Was Not Required to Preserve Collateral Electrical Component Parts Following Its Routine Maintenance.

“[W]hen presented with a spoliation allegation, the threshold question should be whether the alleged spoliator was under any obligation to preserve the missing or destroyed evidence.” *Bass-Davis v. Davis*, 122 Nev. at 450, 134 P.3d at 108. The Court in *Bass-Davis* held that, pre-litigation, the duty to preserve evidence arises once a party is on notice of a potential legal claim. *Id.* The Court explained “notice” as follows:

Even where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.

GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) (emphasis added). Here, there was no evidence lost or destroyed which MDB knew, or reasonably should have known, was in any way relevant to the instant products liability claim, as established at the evidentiary hearing.

At the hearing, Versa argued to the district court that MDB should have known that it had a duty to preserve the component electrical parts of the subject truck and trailers, from the date of the subject accident on July 7, 2014, until the date on which Versa actually inspected the subject semi-truck and trailers more than two years later on October 13, 2016. Versa, however, provided the district court with no authority for the proposition that a commercial trucking company may not engage in routine maintenance of the very commodities upon which it relies for revenue or risk a spoliation finding. Indeed, Versa displayed no sense of urgency to inspect the subject semi-truck and trailers because it knew their continued operation had no material impact on relevant evidence regarding the actual issue before the trial Court, i.e. the inadvertent activation of the Versa valve (which was not altered or modified before Versa's inspection).

Versa specifically contended that MDB "actively destroyed evidence by removing and trashing components involved with how the subject valve operates." (AA Vol. 3 PG 407). The evidence adduced at the October 13, 2017 evidentiary hearing showed this to be patently false, as the dump gate system had been

modified in 2013, a full year before the subject accident, to remove any chance that the wiring could affect the valve's operation. And, Versa produced no evidence in support of its claim to the contrary.

MDB did not dispute, and never had disputed, that it performed routine maintenance on the subject truck and trailers as part of its normal business operations after the subject accident on July 7, 2014. The actual maintenance Versa alleged constituted spoliation consisted of the replacement of two, four-way sockets on trailer #6773, which was not the subject trailer, the tightening of screws on the four-way plug and replacement of the four-way plug on the tractor, and the replacement of the four-way cord and seven-way cord on the subject tractor. (AA Vol. 12 PGS 1947, 1950, 1953, 1956 and 1962). That was the extent of the purported spoliation. None of the components were tied to the activation of the Versa valve due to the modifications installed by MDB before the incident.

The uncontroverted testimony of MDB's experts at the evidentiary hearing was, in fact, that any routine maintenance would have no impact whatsoever on the subject Versa valve. This was because the configuration of the wiring and switching created after the errant dumps in July 2013, the year prior to the subject accident, eliminated any chance that the electrical system on the subject truck could inadvertently activate the Versa valve. Versa, in turn, provided no evidence to the contrary. As no relevant evidence was lost or destroyed, which MDB should

have known was in any way relevant to the underlying strict product liability claim involving the Versa valve, the district court's examination of the evidence should have concluded with a finding that no spoliation occurred and that no sanction was warranted.

2. The District Court's Ruling Was Inappropriate Even With a Finding That MDB Was Obligated to Preserve the Electrical Component Parts in Question.

Even if this Court chooses not to disturb the district court's factual finding that MDB's routine maintenance of the subject tractor and trailers constituted a violation of the duty to preserve evidence, the district court's decision to impose terminating sanctions where it found the failure to preserve the plug, two sockets, and two cords in question was merely negligent is not consistent with this Court holding in *Bass-Davis*.

As this Court clarified regarding the issue of lost evidence in *Bass-Davis*:

In considering the issue of lost evidence, we necessarily revisit our 1997 decision in *Reingold v. Wet 'n Wild Nevada, Inc.* (Footnote omitted). In that case, we determined that the district court should have given a jury instruction allowing an adverse inference for lost evidence, as relevant evidence was spoliated when Wet 'n Wild followed its policy of routinely destroying records each season. We further concluded that Wet 'n Wild's evidence destruction was "willful" as defined by NRS 47.250(3), thus creating a rebuttable presumption that the evidence "would be adverse if produced." (Footnote omitted).

Given that *Reingold* seemingly embraced both an inference created by evidence not produced and a rebuttable presumption for evidence willfully suppressed, we take this opportunity to clarify that decision and conclude that a permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed. The NRS 47.250(3) presumption, on the other hand, applies only in cases involving willful suppression of evidence, in which the party destroying evidence intends to harm another party, i.e., to obtain a competitive advantage in the matter. In this case, involving negligent loss of evidence, the district court abused its discretion by refusing to issue an adverse inference instruction or to consider other appropriate sanctions. We therefore reverse the judgment and order of the district court and remand for a new trial consistent with this opinion.

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

Under any fair reading of *Bass-Davis*, therefore, the only appropriate sanction, if any, for MDB's failure to preserve the plug, two sockets and two cords in question would be an adverse inference jury instruction. At no time did Versa proffer to the district court any evidence linking the routine maintenance actions of MDB's employees with any intent to harm Versa's case. Indeed, no such evidence existed. On the contrary, the evidence already in the record, as well as that elicited at the evidentiary hearing, clearly showed that MDB's failure to preserve the few electrical component parts in question offered no basis to conclude that the actions of MDB's employees were undertaken in a deliberate attempt to harm Versa's case. And, the district court said exactly this when it concluded it "does not find

MDB intentionally disposed of the components in order to harm Versa,” but it “does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery.” (AA Vol. 12 PG 1977).

As this Court has previously limited the nature of sanctions to be imposed for negligent or willful spoliation of evidence under *Bass-Davis*, and the evidence here at most points to the mere negligence of MDB, any sanction with a greater consequence than an adverse inference warrants reversal. Certainly the district court’s issuance of terminating sanctions pursuant to NRC 37(b)(2), based solely on its assessment of the factors set forth in *Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88, 787 P.2d 777 (1980), constitutes an abuse of discretion. The trial court engaged in the incorrect analysis. This Court may take the opportunity to clarify the scope of its prior decisions and establish firm guidance for evidentiary spoliation motions.

C. The District Court Abused Its Discretion By Awarding Expert Costs to Versa in Excess of the Statutory Limit.

Under NRS 18.005, expert witness fees are limited to \$1,500.00 per expert witness, unless “the circumstances surrounding the expert’s testimony were of such necessity as to require the larger fee.” *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365, 377-78 (Nev. App. 2015). “The resolution of such requests will necessarily require a case-by-case examination of the appropriate factors.” *Frazier*, 357 P.3d at 378 (citations omitted) (emphasis added). Specifically, a

district court's decision to award more than \$1,500 in expert witness fees is reviewed for an abuse of discretion. *Id.*, citing *Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006-07 (2004), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490-91 (2014).

Here the district court provided only limited justification for its decision to award expert witness fees in excess of NRS 18.005(5)'s per-expert presumptive maximum and offered no explanation for how it arrived at the amount of expert witness fees awarded. The district court simply awarded Versa the full amount of requested expert witness fees and failed to address any of the *Frazier* factors, which include the importance of the expert's testimony to a party's case; the degree to which the expert's opinion aided the trier of fact; whether the expert's reports or testimony were repetitive of other expert witnesses; the extent and nature of the work performed by the expert; whether the expert had to conduct independent investigations or testing; and other factors concerning the expert's education and the fees actually charged in relation to other comparable experts. *Frazier*, 357 P.3d at 378-79.

As MDB argued to the district court in its motion to retax costs, none of the applicable *Frazier* factors justify an award of costs in excess of \$1,500.00 for Versa's use of Garrick Mitchell's services. (AA Vol. 14 PGS 2414 – 2416). Both

Mitchell's report and testimony at the evidentiary hearing made clear Mitchell had no useful and/or admissible opinions to provide to the trier of fact. Mitchell's testimony did not aid the Court in any meaningful way, and Versa did not dispute that the testimony tracked closely with MDB's expert, Dr. Bosch. Further, Mitchell did not report having conducted any independent testing, and, ultimately, as a mechanical engineer, he simply did not possess the requisite knowledge, education or training in the relevant areas of electrical engineering and electricity to warrant any additional award beyond the statutory minimum.

Accordingly, the district court abused its discretion by not considering the *Frazier* factors and reducing Versa's allowable expert witness to the \$1,500.00 presumed statutory cap.

D. The District Court Erred By Awarding Costs to Versa for Its Defense of the Underlying Personal Injury Actions When It Was Not a Prevailing Party.

Without citing to any legal authority, Versa made the blanket assertion, which was accepted by the district court, that "any depositions, medical records, etc. that involve the Plaintiffs directly relate to MDB's cross-claim." (AA Vol. 15 PG 2483). Versa conveniently neglected to remind the district court that it was also a defendant in the underlying personal injury actions and necessarily incurred the costs in its own defense. It is well-settled Nevada law that costs cannot be awarded to a party unless that party is the "prevailing party" in an action. NRS 18.020; *Nevada N. R. R. v. Ninth Judicial Dist. Court*, 51 Nev. 201, 204-05, 273 P.

177, 178 (1928) (in determining which party is the “prevailing party,” courts must primarily consider “the end attained”).

In the instant matter, MDB settled all of the Plaintiffs’ causes of action without any contribution from Versa. And, the costs for the depositions and medical records of the personal injury plaintiffs were in no way relevant to the strict products liability theory at issue in MDB’s cross-claim against Versa, i.e. the uncommanded activation of the Versa valve when exposed to external electromagnetic fields. The plaintiffs’ testimony was strictly limited to their accounts of the subject spill, their resulting injuries and their medical treatment. Indeed, any deposition of the personal injury plaintiffs and their authorizations for medical records related only to their case-specific claims and in no way related to whether the Versa valve was defective and subjected Versa to MDB’s cross-claim for Contribution.

Accordingly, the district court erred in denying MDB’s motion to retax and settle costs as to any amounts unrelated to MDB’s cross-claim for Contribution, the only claim upon which Versa prevailed.

E. The District Court Erred By Awarding Costs to Versa That Predated Its Offers of Judgment.

In its verified memorandum of costs, Versa clearly and unequivocally stated that “[t]his Memorandum of Costs and Disbursements is based upon Versa’s Offer of Judgment under NRCP 68,” and related documents. (AA Vol. 14 PG 2321).

And, the previously filed sworn statement of Versa's lead counsel squarely placed all of the costs being sought in the time period after it served MDB with an Offer of Judgment on May 4, 2017. (AA Vol. 13 PG 2006).

MDB did not attempt to argue that the costs statute is only applicable after an offer of judgment, as Versa argued. MDB's argument was simply that Versa should not be allowed to ignore its own prior filings, completely contradict itself in opposition to MDB's motion to retax and settle costs, and make an eleventh-hour argument for the application of NRS 18.020. Versa's offers of judgment were the stated bases for its entitlement to costs, and, as such, the district court erred in denying MDB's request to reduce Versa's allowable costs by any amounts incurred prior to serving its offers of judgment.

F. The District Court Erred By Awarding Costs Not Specifically Taxable Pursuant to NRS 18.005.

Versa argued to the district court that “[t]here is nothing in NRS 18.005(2) that would prohibit the recovery” of reporter's fees for depositions, including courier fees and exhibits. (AA Vol. 15 PG 2488). On the contrary, statutes permitting an award of costs must be strictly construed. *Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998). NRS 18.005(2) limits taxable costs for depositions to reporters' fees and the cost for one copy of each deposition. Accordingly, the district court erred in granting Versa's request for costs and denying MDB's motion to retax and settle costs for courier fees for the delivery of

depositions, compact disc fees, exhibit fees, and all other miscellaneous fees not provided for in the applicable statute.

VIII.
CONCLUSION

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

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

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

Dated this 17th day of January, 2019.

CLARK HILL PLLC

By: Colleen E. McCarty
NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
Nevada Bar No. 13186
3800 Howard Hughes Pkwy., Ste. 500
Las Vegas, Nevada 89169
Telephone: (702) 862-8300
Attorneys for Appellant/Cross Respondent
MDB Trucking, LLC

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,167 words.

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

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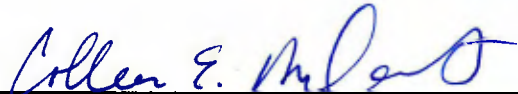
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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of January, 2019.

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 Pkwy., Ste. 500

Las Vegas, Nevada 89169

Telephone: (702) 862-8300

Attorneys for Appellant/Cross Respondent

MDB Trucking, LLC

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this 17th day of January, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANT/CROSS-RESPONDENT MDB TRUCKING, LLC'S OPENING BRIEF** by the method indicated to the counsel stated below:

- BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- BY PERSONAL DELIVERY:** by causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.
- BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Josh Cole Aicklen, Esq.
josh.aicklen@lewisbrisbois.com
David B. Avakian, ESQ.
david.avakian@lewisbrisbois.com
Paige S. Shreve, ESQ.
paige.shreve@lewisbrisbois.com
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