

**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.  
Electronically Filed  
Jan 18 2019 08:46 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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

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**JOINT APPENDIX VOLUME 10 OF 18**

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

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MDB Trucking, LLC

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9 PRODUCTS COMPANY, INC.

10  
11 DISTRICT COURT

12 WASHOE COUNTY, NEVADA

13 ERNEST BRUCE FITZIMMONS and  
14 CAROL FITZSIMMONS, Husband and  
Wife,

15 Plaintiffs,

16 vs.

17 MDB TRUCKING, LLC, et. al.

18 Defendants.

19 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY, INC.'S  
MOTION FOR SUMMARY JUDGMENT  
AGAINST DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT MDB  
TRUCKING, LLC'S CROSS-CLAIM

20  
21  
22 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS  
23 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David  
24 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS  
25 BISGAARD & SMITH, LLP, and moves this Court for an Order granting Summary  
26 Judgment in its favor as to MDB TRUCKING, LLC's Cross-Claims.

27 This Motion is based upon NRCP 56; the Memorandum of Points and Authorities;  
28 the affidavit of Josh Cole Aicklen, Esq.; the exhibits attached hereto; and any other

1 evidence the Court may entertain at the Hearing on this Motion.

2 DATED this 1<sup>st</sup> day of September, 2017

3 Respectfully submitted,

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5  
6  
7 By /s/ Josh Cole Aicklen

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17 Claimant/Cross-Defendant VERSA

18 PRODUCTS COMPANY, INC.

1 AFFIDAVIT OF JOSH COLE AICKLEN, ESQ. IN SUPPORT OF DEFENDANT/CROSS-  
2 CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION  
3 FOR SUMMARY JUDGMENT AGAINST DEFENDANT/CROSS-CLAIMANT/CROSS-  
4 DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM

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 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 Defendant/Cross-Claimant/Cross-  
13 Defendant VERSA PRODUCTS COMPANY, INC. in the subject lawsuit currently pending  
14 in Department 10 of the Second Judicial District Court for the State of Nevada, Case  
15 Number CV15-02349.

16 4. Attached hereto as Exhibit 1 is a true and correct copy of MDB's Third  
17 Supplemental NRCP 16.1 Disclosure of Documents and Witnesses, Served on July 14,  
18 2017.

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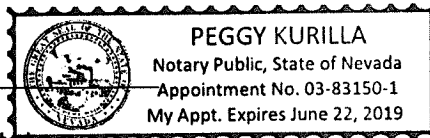
5. Attached hereto as **Exhibit 2** is a true and correct copy of MDB TRUCKING, LLC's Cross-Claim.

FURTHER AFFIANT SAYETH NAUGHT.

JOSH COLE AICKLEN, ESQ.

SUBSCRIBED AND SWORN to before me  
this 15<sup>th</sup> day of September, 2017.

NOTARY PUBLIC  
In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant/Cross-Claimant, MDB TRUCKING, LLC ("hereinafter referred to as  
4 "MDB"), has brought Cross-Claims<sup>1</sup> against VERSA PRODUCTS COMPANY, INC.  
5 (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 Cross-Claim against VERSA, a true and correct copy attached  
12 hereto as Exhibit 1. Plaintiffs were driving westbound on IR80 when a semi-trailer driven  
13 by Daniel Koski and owned by Cross-Claimant MDB spilled gravel on the freeway,  
14 causing multiple automobile accidents and the injuries alleged by the Plaintiffs. MDB's  
15 contribution claim is based on its allegation that the inadvertent gravel dump was due to  
16 an alleged "defect" with the VERSA valve on the subject trailer.

17 MDB settled the underlying personal injury lawsuits against it and is now seeking  
18 contribution from VERSA. However, in violation of NRCP 16.1(a)(1)(C) and NRCP 26,  
19 MDB never disclosed *any* damages computations, *any* documents and/or evidence to  
20 support those damages computations, nor *any* witnesses that are designated to testify as  
21

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

27 In all nine of the above mentioned lawsuits, MDB filed cross-claims/third-party action against VERSA  
28 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 leaving MDB with a cross-claim for contribution only  
against VERSA.

Plaintiffs in all of the above lawsuits have settled their claims.

1 to those damages. With discovery now closed, VERSA still does not know the amount of  
2 damages MDB is seeking and the evidentiary basis for that amount. Because MDB has  
3 violated NRCP 16.1(a)(1)(C) and NRCP 26, VERSA is entitled to Summary Judgment as  
4 a matter of law.

5 **II. STATEMENT OF UNDISPUTED FACTS**

6 VERSA provides the following material facts not in dispute in accordance with  
7 NRCP 56(c).

- 8 1. MDB is seeking contribution from VERSA based on personal injury  
9 settlements it made with all of the Plaintiffs and based on any attorney's  
10 fees and costs it may have incurred. See, Exhibit 2.
- 11 2. MDB did not produce any damages computation pursuant to NRCP  
12 16.1(a)(1)(C). See, Exhibit 1.
- 13 3. MDB did not list any witnesses who are designated to testify to damages  
14 MDB allegedly incurred.
- 15 4. MDB did not produce any documents in support of any alleged damages it  
16 suffered. Id.
- 17 5. Discovery closes today, September 1, 2017, and MDB has failed to provide  
18 any evidentiary basis for any damages it will seek at the trial of this matter.

19 **III. LEGAL ARGUMENT**

20 **A. Legal Standard of Review for Summary Judgment**

21 NRCP 56 provides:

22 **Rule 56. Summary Judgment.**

23 . . .

24 (a) For Claimant. A party seeking to recover upon a claim,  
25 counterclaim, or cross-claim or to obtain a declaratory  
26 judgment may, at any time after the expiration of 20 days from  
27 the commencement of the action or after service of a motion  
for summary judgment by the adverse party, move with or  
without supporting affidavits for a summary judgment in the  
party's favor upon all or any part thereof.

28 . . .

1  
2 (c) Motion and proceedings thereon. . . .The judgment sought  
3 shall be rendered forthwith if the pleadings, depositions,  
4 answers to interrogatories, and admissions on file, together  
5 with the affidavits, if any, show that there is no genuine issue  
6 as to any material fact and the moving party is entitled to  
7 judgment as a matter of law...[.]

8 . . .

9 See, NRCP 56(a) and (c).

10 When a motion for summary judgment is made and supported by the facts  
11 appearing in the record, a party “may not rest upon the mere allegations of his pleading,  
12 but must, by affidavit or otherwise, set forth facts demonstrating the existence of a  
13 genuine issue for trial.” Garvey v. Clark County, 91 Nev. 127, 130, 532 P.2d 269, 271  
14 (1975). The United States Supreme Court, through its interpretation of the identical  
15 federal rule for summary judgment, has held that entry of summary judgment is required  
16 when the opposing party fails to identify facts supporting the elements of his claim for  
17 relief. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986).

18 The Nevada Supreme Court has made it clear that summary judgment cannot be  
19 regarded as a disfavored procedural device, and must be granted when the  
20 circumstances warrant. See, Wood v. Safeway, Inc., 121 Nev. Adv. Op. No. 73, 121 P.3d  
21 1026, 1031 (2005). In Wood, the Nevada Supreme Court stated:

22 While the pleadings and other proof must be construed in a  
23 light most favorable to the nonmoving party, that party bears  
24 the burden to “do more than simply show that there is some  
25 metaphysical doubt” as to the operative facts in order to avoid  
26 summary judgment being entered in the moving party’s favor.  
27 The nonmoving party “must, by affidavit or otherwise, set forth  
28 specific facts demonstrating the existence of a genuine issue  
for trial or have summary judgment entered against him.” The  
nonmoving party “is not entitled to build a case on the  
gossamer threads of whimsy, speculation and conjecture.”

See, Wood v. Safeway, Inc., 121 Nev. Adv. Op. No. 73, 121 P.3d 1026, 1031 (2005)  
(internal citations omitted).

1 The Nevada Supreme Court has eliminated the “slightest doubt” standard and held  
2 that the party opposing a motion for summary judgment must show facts sufficient to  
3 demonstrate that a reasonable jury could find that the party has sufficient evidence to  
4 prove each element of his claim. Id. After adequate time for discovery, if the plaintiff fails  
5 to make a showing sufficient to establish the existence of an element essential to their  
6 case, then the court must summarily enter judgment against them. See, Celotex Corp. v.  
7 Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548 (1986); see also, NGA #2 Ltd. Liab. Co. v.  
8 Rains, 113 Nev. 1151, 946 P.2d 163 (1997).

9 **B. MDB Has the Burden of Proof Regarding it's Alleged Damages**

10 The burden of proof production and persuasion in this matter is on the Plaintiff.  
11 See, Doud v. Las Vegas Hilton Corp., 864 P.2d 796 (Nev. 1993). Plaintiff cannot rely on  
12 supposition, conjecture, or surmise. See, Murphy v. S. Pac. Co., 101 P. 322 (Nev. 1909).  
13 It is the Plaintiff and not Defendants, upon whom the duty rests to use diligence at every  
14 stage of the proceeding to expedite his case to a final determination. See, Thran v. First  
15 Judicial Dist. Court, 380 P.2d 297 (Nev. 1963). “The general rule is that an attorney’s  
16 neglect will be imputed to his client and he is held responsible for it.” Valente v. First W.  
17 Sav. & Loan, 528 P.2d 699 (1974), relying upon Link v. Wabash R.R. Co., 370 U.S. 626,  
18 634 (1962); Spring v. Texas Butadiene & Chem. Corp., 434 F.2d 677 (3d Cir. 1970), cert  
19 denied, 404 U.S. 854 (1971).

20 **1. MDB Was Required to Timely Disclose All Damages Documents and**  
21 **Witnesses During Discovery**

22 The scope of discoverable material is defined by NRCP 26(b)(1):

23 Parties may obtain discovery regarding any matter, not  
24 privileged, which is relevant to the subject matter involved in  
25 the pending action, whether it relates to the claim or defense  
26 of the party seeking discovery or to the claim or defense of  
27 any other party, including the existence, description, nature,  
28 custody, condition and location of any books, documents, or  
other tangible things and the identity and location of persons  
having knowledge of any discoverable matter. It is not ground  
for objection that the information sought will be inadmissible at  
the trial if the information sought appears reasonably  
calculated to lead to the discovery of admissible evidence. All  
discovery is subject to the limitations imposed by Rule

1 26(b)(2)(I), (ii), and (iii).

2 See, NRCP 26(b)(1).

3 NRCP 16.1 further refines parties' disclosure obligations:

4 (a) Required Disclosures

5 (1) Initial Disclosures. Except in proceedings exempted or to the extent  
6 otherwise stipulated or directed by order, a party must, without  
awaiting a discovery request, provide to other parties:

7 (A) The name and, if known, the address and telephone number of each  
8 individual likely to have information discoverable under Rule 26(b ),  
including for impeachment or rebuttal, identifying the subjects of the  
9 information;

10 (B) A copy of, or a description by category and location of, all documents, data  
compilations and tangible things that are in the possession, custody, or  
11 control of the party and which are discoverable under Rule 26(b);

12 (C) A computation of any category of damages claimed by the disclosing party,  
13 making available for inspection and copying as under Rule 34 the  
documents or other evidentiary matter, not privileged or protected from  
14 disclosure, on which such computation is based, including materials bearing  
on the nature and extent of injuries suffered

15 See, NRCP 16.1 (emphasis added).

16 Finally, NRCP 26(e) obliges parties to supplement their disclosures:

17 (e) Supplementation of disclosures and responses. A party who has made a  
18 disclosure under Rule 16.1 or responded to a request for discovery with a  
disclosure or response is under a duty to supplement or correct the  
19 disclosure or response to include information thereafter acquired, if ordered  
by the court or in the following circumstances:

20 (1) A party is under a duty to supplement at appropriate intervals its  
21 disclosures under Rule 16.1(a) if the party learns that in some  
material respect the information disclosed is incomplete or incorrect  
22 and if the additional or corrective information has not otherwise been  
made known to the other parties during the discovery process or in  
23 writing.

24 See, NRCP 26(e).

25 The Nevada Supreme Court recently further clarified that NRCP 16.1(a)(1)(C)  
26 requires *full computations of all damages* that Plaintiff intends to present to a jury to be  
27 disclosed during discovery. See, Pizarro-Ortega v. Cervantes-Lopez, 396 p.3d 783, 133  
28 Nev. Adv. App. 37 (2017). In Pizzaro-Ortega, the Court reasoned that:

1 NRCP 16.1(a)(1)(C) requires a party to produce, "without  
2 awaiting a discovery request . . . [a] computation of any  
3 category of damages claimed." In this appeal, we clarify that  
4 future medical expenses are a category of damages to which  
5 NRCP 16.1(a)(1)(C)'s computation requirement applies and  
6 that a plaintiff is not absolved of complying with NRCP  
7 16.1(a)(1)(C) simply because the plaintiff's treating physician  
8 has indicated in medical records that future medical care is  
9 necessary.

10 Id. at Page 785 (emphasis added). Also, citing to Calvert v. Ellis, No. 2:13-cv-00464-  
11 APG-NJK, 2015 U.S. Dist. LEXIS 18216, 2015 WL 631284, at \*1-2 (D. Nev. Feb. 12,  
12 [\*787] 2015); Smith v. Wal-Mart Stores, Inc., No. 2:13- cv-1597-MMD-VCF, 2014 U.S.  
13 Dist. LEXIS 97175, 2014 WL 3548206, at \*1-2 (D. Nev. July 16, 2014); Patton v. Wal-Mart  
14 Stores, Inc., No. 2:12-cv-02142-GMN-VCF, 2013 U.S. Dist. LEXIS 165617, 2013 WL  
15 6158461, at \*1-3 (D. Nev. Nov. 20, 2013); Baltodano v. Wal-Mart Stores, Inc., No. 2:10-  
16 cv-2062-JCM-RJJ, 2011 U.S. Dist. LEXIS 98306, 2011 WL 3859724, at \*1-3 (D. Nev.  
17 Aug. 31, 2011).

18 The Pizzaro-Ortega Court reasoned that a party is required to provide a  
19 computation of damages based on the information available is because "[a] party has an  
20 ongoing duty to supplement its initial disclosures"); Olaya v. Wal-Mart Stores, Inc., No.  
21 2:11-cv-997-KJD-CWH, 2012 U.S. Dist. LEXIS 111079, 2012 WL 3262875, at \*2-3 (D.  
22 Nev. Aug. 7, 2012) (same); cf. Calvert, No. 2:13-cv-00464-APG-NJK, 2015 U.S. Dist.  
23 LEXIS 18216, 2015 WL 631284, at \*2 (observing that the purpose of providing a  
24 computation of damages is not necessarily to pinpoint an exact dollar figure but to  
25 "enable the defendants to understand the contours of their potential exposure and make  
26 informed decisions regarding settlement and discovery." Id. at Page 786 (emphasis  
27 added).

28 C. MDB Has Failed to Timely Disclose the Required Damages Documents and  
VERSA is Entitled to Summary Judgment as a Matter of Law

As clearly illustrated by statutory authority and the case law cited above, MDB is  
under a continuing obligation to seasonably supplement its document disclosures and  
computations of damages pursuant to NRCP 16.1. MDB's last NRCP 16.1 Disclosure

1 was served on July 14, 2017. It did not include any computations of any damages or the  
2 required damages disclosures. See, MDB's Third Supplement to NRCP 16.1 Disclosures  
3 of Witnesses and Documents, attached hereto as **Exhibit 1**. Further, none of the  
4 supplements identified any documents, exhibits, witnesses or evidence to support any  
5 computation of damages. Id. MDB produced a total of 2,120 pages during the lengthy  
6 discovery process. None of these documents, however, support any damages that MDB  
7 is alleging against VERSA.

8 Discovery closes today on September 1, 2017, and MDB has never identified how  
9 much money it will seek from the jury in this trial or any documents/witnesses that MDB  
10 intends to rely on in support of that amount.

11 MDB identified only six (6) witnesses in it's disclosures. Id. Witnesses 5 and 6 are  
12 Nevada Highway Patrol officers, who have no basis to testify about any monetary  
13 damages that MDB allegedly suffered. Witnesses 1 and 2 are two of the Plaintiffs in the  
14 underlying case, who have no basis to discuss damages sustained by MDB and how  
15 those damages would be attributable to VERSA. Witnesses 3 and 4 are employees of  
16 MDB, but their designations read as follows:

17 3. Scott Palmer, General Manager  
18 MDB Trucking, LLC  
19 c/o Thorndal Armstrong Delk Balkenbush & Eisinger  
20 6590 S. McCarran Blvd., Suite B  
21 Reno, NV 89509  
22 Tel: (775) 786-2882

23 Scott Palmer is expected to testify regarding the facts and  
24 circumstances surrounding the incident as well as a prior  
25 maintenance and/or modifications to the subject Ranco semi-  
26 trailer.

27 4. Patrick Bigby  
28 MDB Trucking, LLC.  
c/o Thorndal Armstrong Delk Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
Reno, NV 89509  
Tel: (775) 786-2882

Patrick Bigby is expected to testify regarding the maintenance  
on the subject Ranco semi-trailer as well as modifications.

Id. at Pages 3 and 4.

1 NRS 17.225(2) states in pertinent part:

2 2. The right of contribution exists only in favor of a tortfeasor  
3 who has paid more than his equitable share of the common  
4 liability, and his total recovery is limited to the amount paid by  
5 him in excess of his equitable share.

6 (Emphasis added.)

7 None of the witnesses are disclosed to testify about monetary damages allegedly  
8 sustained by MDB. In essence, without any damages computations, any settlement  
9 documents, release agreements, invoices, paid checks or testimony from any witness,  
10 MDB is unable to prove any damages against VERSA at the trial of this matter. This is  
11 true because they cannot prove the amount paid pursuant to NRS 17.225(2). As such,  
12 VERSA is entitled to Summary Judgment as a matter of law.

13 MDB cannot meet the burden of proof to prove that it suffered any damages as to  
14 its claim for contribution against VERSA. As MDB is unable to prove any damages at  
15 trial, VERSA is entitled to summary judgment as to all claims as a matter of law.

16 IV. CONCLUSION

17 Based on the foregoing, VERSA respectfully requests that the Court grant  
18 summary judgment in favor of VERSA and against MDB as to all causes of action in the  
19 Cross-claim as a matter of law.  
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DATED this 1<sup>st</sup> day of September, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

**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  
Las Vegas, Nevada 89118  
Attorneys for Defendant/Cross-  
Claimant/Cross-Defendant **VERSA**  
**PRODUCTS COMPANY, INC.**

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LIST OF EXHIBITS

- Exhibit 1                    MDB's Third Supplemental NRCP 16.1 Disclosure of Documents  
and Witnesses, Served on July 12, 2017.
- Exhibit 2                    MDB Trucking, LLC's Cross-Claim Against RMC Lamar Holdings,  
Inc. (fka Ranch Manufacturing Company) and Versa Products  
Company, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2017, a true and correct copy of DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIMS was served via U.S. Mail addressed as follows:

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/ Rosa Rosales  
\_\_\_\_\_  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

# Exhibit 1

1 NICHOLAS M. WIECZOREK  
2 Nevada Bar No. 6170  
3 JEREMY J. THOMPSON  
4 Nevada Bar No. 12503  
5 COLLEEN E. MCCARTY  
6 Nevada Bar No. 13186  
7 **MORRIS POLICH & PURDY LLP**  
8 3800 Howard Hughes Parkway, Suite 500  
9 Las Vegas, Nevada 89169  
10 Telephone: (702) 862-8300  
11 Facsimile: (702) 862-8400  
12 Email: [NWieczorek@mpplaw.com](mailto:NWieczorek@mpplaw.com)  
13 [JThompson@mpplaw.com](mailto:JThompson@mpplaw.com)  
14 [CMcCarty@mpplaw.com](mailto:CMcCarty@mpplaw.com)

10 Katherine F. Parks, Esq., Bar No. 6227  
11 Brian M. Brown, Esq., Bar No. 5233  
12 Thierry V. Barkley, Esq., Bar No. 724  
13 Thorndal Armstrong Delk Balkenbush & Eisinger  
14 6590 S. McCarran Boulevard, Suite B  
15 Reno, Nevada 89509  
16 (775) 786-2882  
17 *Attorneys for Defendant/Cross-Claimant*  
18 *MDB Trucking, LLC*

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

18 ERNEST BRUCE FITZSIMMONS and  
19 CAROL FITZSIMMONS, Husband and Wife,

20 Plaintiffs,

21 vs.

22 MDB TRUCKING, LLC, et al.,

23 Defendants.

24 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**DEFENDANT/CROSS-CLAIMANT  
MDB TRUCKING LLC'S THIRD  
SUPPLEMENTAL NRCP 16.1  
DISCLOSURE OF DOCUMENTS AND  
WITNESSES**

26 Defendant/Cross-Claimant MDB Trucking, LLC ("MDB"), by and through its attorneys,  
27 Morris Polich & Purdy LLP, hereby produce the following supplemental list of documents and  
28 witnesses (**additions in bold**):

**A. DOCUMENTS PRODUCED**

No.	Document	Bates Range
1.	State of Nevada Traffic Accident Report July 29, 2014	MDB-000001 - MDB-000013
2.	State of Nevada Highway Patrol citation no. X01158521 July 7, 2014 (Wadsworth Justice Court)	MDB-000014 - MDB-000015
3.	MDB Trucking, SMSM safety measurement system reports	MDB-000016 - MDB-000018
4.	SMSM System Measure System detailed inspection report for prior incident on July 30, 2013	MDB-000019
5.	Record of annual inspection on Ranco semi-trailer dated April 2013	MDB-000020
6.	Driver vehicle examination report on subject Peterbilt truck and Ranco semi-trailer inspection date July 7, 2014	MDB-000021
7.	MDB work orders performed by Scott Palmer on July 7, 2014	MDB-000022 - MDB-000023
8.	MDB work order performed by Patrick Bigby dated August 1, 2013 and completed August 2, 2013	MDB-000024
9.	Photograph of interior of Peterbilt truck	MDB-000025
10.	Photographs of Ranco semi-trailer involved in incident	MDB-000026 - MDB-000027
11.	Photographs showing post-MDB accident modification [pin lock system]	MDB-000028 - MDB-000029
12.	Photograph for Versa Valve Solenoid component	MDB-000030
13.	Photographs of accident scene	MDB-000031 - MDB-000034
14.	Plaintiffs' Demand Package	MDB-000035 - MDB-000264
15.	Financial Pacific Insurance Company (Commercial Auto Lines) (effective August 20, 2013 to August 20, 2014)	MDBINS-000001 - MDBINS-000263
16.	Associated International Insurance Company (excess policy no. CUBW465613) (effective /August 20, 2013 – August 20, 2014) (premium redacted)	MDBINS-000264 - MDBINS-000309
17.	Medical records, bills and imaging studies obtained through Subpoena Duces Tecum to Renown Health regarding Carol Fitzsimmons	MDB-000265 - MDB-001504
18.	July 30, 2013 citation	MDB-001505
19.	July 25, 2013	MDB-001506
20.	Drive/Vehicle Examination Report	MDB-001507
21	<b>Curriculum Vitae of Erik S. Anderson Registered Professional Engineer</b>	<b>MDBEXPERT000001- MDBEXPERT000006</b>
22	<b>Anderson Engineering 2017 Fee Schedule</b>	<b>MDBEXPERT000007- MDBEXPERT000011</b>
23	<b>Anderson Engineering Forensic Engineering Report</b>	<b>MDBEXPERT000012- MDBEXPERT000029</b>
24	<b>Photograph Description</b>	<b>MDBEXPERT000030- MDBEXPERT0000527</b>
25	<b>Curriculum Vitae of David R. Bosch, Ph.D.</b>	<b>MDBEXPERT000528- MDBEXPERT000533</b>

No.	Document	Bates Range
26	David R. Bosch, Ph.D. Deposition/Trial Case Record	MDBEXPERT000534
27	2017 Retainer Fee Applied to General Fees/Research	MDBEXPERT000535
28	Forensic Engineering Inc. Investigation Report	MDBEXPERT000536- MDBEXPERT000598
29	Forensic Engineering Rebuttal Report	MDBEXPERT000599- MDBEXPERT000602
30	MDB Trucking Rebuttal Report Forensic Engineering Inc.	MDBEXPERT000603- MDBEXPERT000613

Defendant/Cross-Claimant MDB Trucking, LLC incorporates herein by reference all documents identified by other parties. Further supplements to this disclosure will be made as warranted.

**B. LIST OF WITNESSES**

1. Ernest Bruce Fitzsimmons and Carol Fitzsimmons  
c/o Joseph S. Bradley, Esq.  
Bradley, Drendel & Jeanney  
P.O. Box 1987  
Reno, NV 89505  
Tel: (775) 335-9999

Ernest Bruce Fitzsimmons and Carol Fitzsimmons are the Plaintiffs in this matter and are expected to testify regarding the facts and circumstances surrounding the incident.

2. Daniel Anthony Koski  
c/o Thorndal Armstrong Delk Balkenbush & Eisinger  
Bradley, Drendel & Jeanney  
6590 S. McCarran Blvd., Suite B  
Reno, NV 89509  
Tel: (775) 786-2882

Daniel Anthony Koski is a Defendant in this matter and is expected to testify regarding the facts and circumstances surrounding the incident.

3. Scott Palmer, General Manager  
MDB Trucking, LLC  
c/o Thorndal Armstrong Delk Balkenbush & Eisinger  
Bradley, Drendel & Jeanney  
6590 S. McCarran Blvd., Suite B  
Reno, NV 89509  
Tel: (775) 786-2882

1 Scott Palmer is expected to testify regarding the facts and circumstances surrounding the  
2 incident as well as a prior maintenance and/or modifications to the subject Ranco semi-trailer.

3 4. Patrick Bigby  
4 MDB Trucking, LLC.  
5 c/o Thorndal Armstrong Delk Balkenbush & Eisinger  
6 Bradley, Drendel & Jeanney  
7 6590 S. McCarran Blvd., Suite B  
8 Reno, NV 89509  
9 Tel: (775) 786-2882

10 Patrick Bigby is expected to testify regarding the maintenance on the subject Ranco semi-  
11 trailer as well as modifications.

12 5. Nevada Highway Patrol  
13 Officer Christopher Meeks.  
14 357 Hamill Lane  
15 Reno, NV 89511  
16 Tel: (775) 688-2500

17 Officer Meeks is believed to be an employee of the Nevada Highway Patrol who will  
18 testify as to his subsequent investigation as to the circumstances of this accident.

19 6. Nevada Highway Patrol  
20 Officer Jonathan Lindley  
21 357 Hamill Lane  
22 Reno, NV 89511  
23 Tel: (775) 688-2500

24 It is believed Mr. Jonathan Lindley was an employee of the Nevada Highway Patrol and  
25 completed the final review of the traffic accident report issued on or about July 29, 2014.

26 7. All witnesses identified by other parties in this matter.

27 Defendant/Cross-Claimant MDB Trucking LLC reserves the right to call and cross -  
28 examine any witnesses named by other counsel and reserves the right to amend this list as  
discovery is ongoing and more information

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1 becomes available.

2 DATED this 14<sup>th</sup> day of July, 2017.

3 MORRIS POLICH & PURDY LLP

4  
5 By: Colleen E. McCarty  
6 NICHOLAS M. WIECZOREK  
7 Nevada Bar No. 6170  
8 JEREMY J. THOMPSON  
9 Nevada Bar No. 12503  
10 COLLEEN E. MCCARTY, ESQ  
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14 Attorneys for Defendant/Cross-Claimant  
15 MDB Trucking, LLC  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Morris Polich and Purdy LLP and that on the 14<sup>th</sup> of July, 2017 a true and correct copy of the foregoing **MDB TRUCKING LLC'S THIRD SUPPLEMENTAL NRCP 16.1 DISCLOSURE OF DOCUMENTS AND WITNESSES** 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 U.S. mail at Las Vegas, Nevada, fully addressed as follows:

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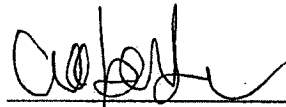
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CORTHELL

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100 W. Liberty Street, Tenth Floor  
Reno, Nv 89501  
Attorneys For Defendant  
RMC LAMAR HOLDINGS, INC.

DATED this 14<sup>th</sup> day of July, 2017.



An employee of Morris Polich & Purdy LLP

## **Exhibit 2**

1 **3860**  
Katherine F. Parks, Esq., State Bar No. 6227  
2 Brian M. Brown, Esq., State Bar No. 5233  
Thierry V. Barkley, Esq., State Bar No. 724  
3 Thorndal Armstrong Delk Balkenbush & Eisinger  
6590 S. McCarran Blvd., Suite B  
4 Reno, Nevada 89509  
(775) 786-2882  
5 Attorneys for Defendant/Third-Party Plaintiff  
MDB TRUCKING, LLC

6  
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
8 IN AND FOR THE COUNTY OF WASHOE

9 ERNEST BRUCE FITZSIMMONS and  
10 CAROL FITZSIMMONS, Husband and  
Wife,

Case No. CV15-02349

Dept. No. 15

11 Plaintiffs,

12 vs.

13 MDB TRUCKING, LLC; RMC LAMAR  
14 HOLDINGS, INC.; VERSA PRODUCTS  
COMPANY, INC.; DANIEL ANTHONY  
15 KOSKI; ABC Corporations I-X, Black and  
White Companies, and DOES I-XX,  
16 inclusive,

17 Defendants.

18 AND RELATED CROSS-CLAIM AND  
19 THIRD PARTY COMPLAINT.

20  
21 **MDB TRUCKING, LLC'S CROSS-CLAIM AGAINST RMC**  
22 **LAMAR HOLDINGS, INC. (fka RANCH MANUFACTURING COMPANY)**  
**AND VERSA PRODUCTS COMPANY, INC.**

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

THORNDAL ARMSTRONG  
DELK BALKENBUSH  
& EISINGER  
6590 S. McCarran, Suite B  
Reno, Nevada 89509  
(775) 786-2882

27 ///

28 ///

1 **FIRST CLAIM FOR RELIEF**

2 **(General Allegations)**

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

5 2. That Cross-Defendants DOES 1-10 and BLACK AND WHITE COMPANIES are  
6 sued herein under fictitious names and capacities of said Defendants are not known by Cross-  
7 Claimant, who ask leave of this court to amend this Cross-Claim to set forth same as they  
8 become known or ascertained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **FIRST CLAIM FOR RELIEF**

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

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

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

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

23 **SECOND CLAIM FOR RELIEF**

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

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

27 ///

28 ///

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

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

6                               **THIRD CLAIM FOR RELIEF**

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

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

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

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

15                               **FOURTH CLAIM FOR RELIEF**

16                               **(Contribution as to VERSA)**

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

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

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

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

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

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

4       DATED this 15<sup>th</sup> day of June, 2016.

5                   THORNDAL ARMSTRONG  
6                   DELK BALKENBUSH & EISINGER

7       By: 

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

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

DATED this 15 day of June, 2016.

THORNDAL ARMSTRONG  
DELK BALKENBUSH & EISINGER

By: 

Katherine E. Parks, Esq., State Bar No. 6227  
Brian M. Brown, Esq., State Bar No. 5233  
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1 **CERTIFICATE OF SERVICE**

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

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

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

10 \_\_\_\_\_ hand delivery

11 \_\_\_\_\_ electronic means (fax, electronic mail, etc.)

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

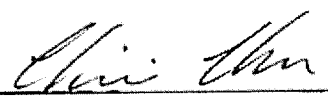
13  
14 **Joseph S. Bradley, Esq.**  
15 **Bradley, Drendel & Jeanney**  
16 **P.O. Box 1987**  
**Reno, NV 89505**  
***Attorney for Plaintiffs***

17  
18 **Matthew C. Addison, Esq.**  
19 **Jessica L. Woelfel, Esq.**  
20 **McDonald Carano Wilson LLP**  
**100 W. Liberty Street, Tenth Floor**  
**Reno, NV 89501**  
***Defendant RMC Lamar Holdings***

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

25 DATED this 15 day of June, 2016.

26  
27 **THORNDAL ARMSTRONG**  
**DELK BALKENBUSH**  
**& EISINGER**  
6590 S. McCarran, Suite B  
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28  
  
An employee of Thorndal Armstrong  
Delk Balkenbush & Eisinger

1 **2645**

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13 Las Vegas, Nevada 89169

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16 Attorneys for Cross-Claimant

17 MDB Trucking, LLC

18 **SECOND JUDICIAL DISTRICT COURT**

19 **WASHOE COUNTY, NEVADA**

20 ERNEST BRUCE FITZSIMMONS and  
21 CAROL FITZSIMMONS, Husband and  
22 Wife,

23 **Plaintiffs,**

24 vs.

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

27 **Defendants.**

28 **AND ALL RELATED CASES.**

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**CROSS-CLAIMANT MDB TRUCKING  
LLC'S OPPOSITION TO CROSS-  
DEFENDANT VERSA PRODUCTS  
COMPANY INC.'S MOTION FOR  
SUMMARY JUDGMENT [RE:  
DAMAGES] AND REQUEST FOR  
JUDICIAL NOTICE**

Cross-Claimant, 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 submits this Opposition to Cross-Defendant Versa

1 Products Company, Inc.'s Motion for Summary Judgment [Re: Damages] and Request for  
2 Judicial Notice ("Opposition" and "Motion for Summary Judgment," respectively).

3 This Opposition is made and based on the following Memorandum of Points and  
4 Authorities; the Declaration of Nicholas M. Wieczorek, Esq. attached hereto as **Exhibit A**, the  
5 Declaration of Colleen E. McCarty, Esq., attached hereto as **Exhibit B** and the exhibits thereto;  
6 the pleadings and papers on file herein; and any oral argument the Court may permit at the  
7 hearing of this matter.  
8

9 Dated this 21st day of September, 2017.

10 CLARK HILL PLLC

11  
12 By: 

13 NICHOLAS M. WIECZOREK

14 Nevada Bar No. 6170

15 JEREMY J. THOMPSON

16 Nevada Bar No. 12503

17 COLLEEN E. MCCARTY

18 Nevada Bar No. 13186

19 3800 Howard Hughes Parkway, Suite 500

20 Las Vegas, Nevada 89169

21 Telephone: (702) 862-8300

22 Attorneys for Cross-Claimant

23 MDB Trucking, LLC

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I.**

26 **INTRODUCTION**

27 As the Court is well aware, the sole cause of action remaining to be tried in the instant  
28 case is MDB's cross-claim for Contribution against Versa Products Company, Inc. ("Versa").  
As Versa points out in its newly filed Motion for Summary Judgment, nine (9) lawsuits arising  
from the underlying multi-vehicle accident that took place on July 7, 2014 involving an MDB  
trailer containing a Versa valve, have settled. Versa correctly includes in its Motion for

1 Summary Judgment the undisputed fact that MDB paid to settle all of the Plaintiffs' claims.  
2 But Versa strategically—and disingenuously—omits the additional undisputed fact that it  
3 attended the mediation which resulted in the settlements and knows exactly what contribution  
4 damages MDB is seeking. MDB and Versa came into possession of the amount of and  
5 evidence to support MDB's contribution damages at the same time and in the same manner, and  
6 MDB respectfully asserts, as argued more fully below, that it had no obligation under NRC  
7 16.1 to make any redundant disclosures of evidence already in the possession and control of  
8 Versa.  
9

10 To the extent the Court determines MDB was required to submit such disclosures,<sup>1</sup> any  
11 failure in this regard is harmless and in no way prejudicial to Versa where the information upon  
12 which MDB's damages, if any, will be calculated is and has been in Versa's possession since  
13 settlement was reached at mediation in May, 2017. More importantly, as Versa has brought the  
14 matter to the Court as a Motion for Summary Judgment, and not as a Motion in Limine to  
15 exclude evidence, Versa's request for judgment must fail where the Court may take judicial  
16 notice of the settlements already on file with the Court, which leaves the genuine issue of  
17 material fact for trial whether MDB and Versa are jointly or severally liable in tort for the  
18 injuries to the settled parties.<sup>2</sup> See NRS 47.150 (court shall take judicial notice if requested by a  
19 party and supplied the necessary information).  
20  
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22

23 For all of these reasons, and more fully set forth herein, MDB respectfully requests the  
24 Court deny Versa's Motion for Summary Judgment in its entirety.

25 ///  
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28 <sup>1</sup> In compliance with NRC 26(e)(1) and NRC 16.1(a)(3), which require supplementation of disclosures at least 30 days before trial, MDB will supplement its initial disclosures as necessary.

<sup>2</sup> In addition to the settlements filed in the instant consolidated action, MDB requests the Court take judicial notice of the settlements filed in two other cases, consolidated for discovery purposes, *James Bible v. MDB Trucking, LLC et al.*, Case No. CV16-0914 and *Geneva M. Remmerde v. MDB Trucking, LLC et al.*, Case No. CV16-00976.

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II.

STATEMENT OF MATERIAL FACTS

Versa's Statement of Undisputed Facts omits several material facts necessary for the disposition of the instant Motion for Summary Judgment. The following facts, albeit also undisputed, are subject to judicial notice and create a genuine issue of material fact as to what, if any, contribution MDB is entitled to from Versa:

1. On May 5, 2017 counsel for MDB, Nicholas M. Wieczorek, Esq., attended mediation in the matter styled *Fitzsimmons et al. v. MDB Trucking, LLC et al.*, Second Judicial District Court Case No. CV15-02349. Also present at the mediation were counsel for Versa Products Company, Inc. ("Versa"), RMC Lamar Holdings, Inc., and counsel for 13 plaintiffs who sustained injuries as a result of the subject incident. *See Exhibit A* at ¶ 4.

2. Robert F. Enzenberger, Esq. served as mediator and kept the parties, inclusive of Versa, apprised of the negotiations throughout the entirety of the eight hour mediation. *See Exhibit A* at ¶ 5.

3. The mediation resulted in resolution of all of the personal injury claims. At the conclusion of the mediation, memoranda were drafted and circulated which memorialized the specific terms of the settlement agreements, including the payment amounts. The plaintiffs assigned all claims they had as against Versa to MDB as part of the settlement consideration. *See Exhibit A* at ¶ 6.

4. The resulting Settlement Agreement and Release contained a Strict Confidentiality/Non-Disclosure provision which precludes disclosure of the payment terms except pursuant to lawful legal process or court directive. *See Exhibit A* at ¶ 7.

5. MDB filed motions for good faith settlement to secure approval of the aforementioned agreements. Versa received service of all nine motions. *See Exhibit A* at ¶ 8.

6. Between June 30, 2017 and July 20, 2017, this Court granted the motions for good faith settlement resolving the personal injury claims of (1) Olivia John individually and as guardian ad litem for Nakyla John; (2) Beverly Patrick and Ryan Crossland; (3) Sonya Corthell; (4) James Bible; (5) Angela Wilt; (6) Benjamin, Natalie and Cassandra Robles; (7) Geneva Remmerde; (8) Julie Kins, as parent and legal guardian of Kandise Baird; and (9) Ernest and Carol Fitzsimmons. *See Exhibit A at ¶ 9.*

7. Counsel for Versa was served with notice of entry of the orders granting each of the above-referenced good faith settlement motions. *See Exhibit B-1.*

8. The underlying personal injury claims, inclusive of those against Versa, were subsequently dismissed by stipulation and order. *See* Exhibit A at ¶ 10.

### III.

## LEGAL ARGUMENT

### A. Legal Standard.

In granting summary judgment, the district court must take great care. *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984); *see also Montgomery v. Ponderosa Constr., Inc.*, 101 Nev. 416, 705 P.2d 652 (1985). Under Rule 56 of the Nevada Rules of Civil Procedure, summary judgment is appropriate only if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. NRCP 56(e); *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). A genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993); *see also Delgado v. American Family Ins. Group*, 125 Nev. 564, 571, 217 P.3d 563, 568 (2009). As such, “if there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for

1 the court.” *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.* 127 Nev. Adv.  
2 Op. 26, 255 P.3d 268, 275 (2011).

3 The party moving for summary judgment has the initial burden of production; that is  
4 demonstrating to the Court that there is no genuine issue of any material fact to be decided. *See*,  
5 *e.g.*, *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134  
6 (2007). This burden is not easily satisfied as the evidence and all reasonable inferences drawn  
7 from the evidence must be viewed in the light most favorable to the non-moving party. *See*  
8 *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009). If the party moving  
9 for summary judgment fails to meet its initial burden of production, the opposing party is under  
10 no obligation to produce anything, even if it ultimately has the burden of persuasion at trial. *See*  
11 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

14 Indeed, “[a] successful summary judgment motion requires the moving party to  
15 demonstrate both the absence of genuinely contested material facts as well as a prima facie  
16 entitlement to judgment as a matter of law based upon undisputed evidence that would be  
17 admissible at trial (or upon a lack of evidence if the nonmoving party bears the burden of  
18 persuasion at trial). Only after both showings have been made does the burden shift to the  
19 opposing party to prove the existence of genuinely disputed material facts. [Citations omitted.]  
20 Summary judgment cannot be granted unless and until all of these requirements are satisfied.”  
21 *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 2015 Nev. App. LEXIS 4, at\*23-24 (Nev.  
22 Ct. App. 2015).

25 **B. It Would Be Improper To Grant Summary Judgment Where Versa Has Had**  
26 **Full Possession of MDB’s Damages Evidence At All Times.**

27 NRCP 26(e) requires parties to periodically supplement the disclosures made pursuant to  
28 Rule 16.1(a) under certain circumstances. NRCP 26(e)(1) states in pertinent part:

1 (1) A party is under a duty to supplement at appropriate intervals its disclosures  
2 under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the  
3 information disclosed is incomplete or incorrect and if the additional or  
4 corrective information has not otherwise been made known to the other parties  
5 during the discovery process or in writing.

6 NRCP 26(e)(1) (Emphasis added).

7 Tellingly, Versa does not assert that it is unaware of the damages paid by MDB to settle  
8 the underlying personal injury claims. Indeed, Versa was present at the May, 2017 mediation  
9 which spanned some eight hours and during which Versa was apprised of the back and forth  
10 negotiations and resulting settlement agreements. Versa received service of the filing of each  
11 motion for good faith settlement and the subsequent orders approving them. By virtue of its  
12 participation in the mediation, Versa is fully informed of the amount at issue in MDB's  
13 contribution claim and as such, MDB had no duty under the Rules to provide a redundant  
14 calculation of damages.

15 Versa further argues that MDB has failed to disclose documents/witnesses that it  
16 intends to rely upon in support of the settlement amounts. As a threshold matter, Versa  
17 acknowledges the disclosure of MDB's Rule 30(b)(6) designee, Scott Palmer, who would testify  
18 to all relevant business matters, inclusive of the facts and circumstances surrounding the  
19 resolution of the underlying personal injury lawsuits. And, as previously indicated, MDB is  
20 aware of and will comply with supplemental disclosure requirements of NRCP 26(e)(1) and  
21 NRCP 16.1(a)(3). Finally, it should be noted that the Settlement Agreement and Release  
22 between MDB and the personal injury plaintiffs contains a Strict Confidentiality/Non-  
23 Disclosure provision which prohibits MDB from disclosing the terms of payment to the  
24 plaintiffs without lawful legal process or court directive. Accordingly, until such time as this  
25 Court directs the method and manner upon which this disclosure will be made, in light of  
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1 MDB's remaining cross-claim being one of contribution, MDB is precluded from the interim  
2 disclosure of specific payment information and/or records.

3 Even if the Court considered that MDB's disclosures were late, the law is well-settled  
4 that late disclosed damage computations are not prejudicial where the lateness of the disclosure  
5 is harmless. This is because courts generally hold that late damages disclosures are harmless  
6 and not prejudicial to the opposing party under circumstances such as these where Versa was  
7 made aware of the settlement amounts contemporaneously with MDB.  
8

9 Specifically, in *Maharaj v. California Bank & Trust*, 228 F.R.D. 458, 463 (E.D. Cal.  
10 2013), the court held that the plaintiff's total failure to disclose her analysis supporting her  
11 damage computation was harmless "since the information on which these damages are  
12 calculated is already in Defendant's possession." Similarly, in *Woodworker's Supply, Inc. v.*  
13 *Principal Mutual Life Insurance Co.*, 170 F.3d 985, 993 (10th Cir. 1999), the Tenth Circuit  
14 Court of Appeals held that a party's total failure to disclose his damages was harmless and not  
15 prejudicial because the opposing insurer-party "knew the numbers on which [Plaintiff] based his  
16 calculation; indeed it provided the calculation for the amount it paid in premiums."  
17

18 Further, the case upon which Versa relies in its Opposition, *Pizarro-Ortega v.*  
19 *Cervantes-Lopez*, 133 Nev. Adv. App. 37, 396 P.3d 783 (2017), for the proposition that MDB  
20 was required to supplement a damage calculation pursuant to Rule 26 is easily distinguished. In  
21 *Pizarro-Ortega*, the Nevada Supreme Court held that future medical expenses are among the  
22 class of damages that must be provided and supplemented in a damages calculation, not  
23 necessarily to pinpoint an exact dollar amount, but to enable defendants to understand their  
24 potential exposure. *Id.* at 786. *Pizarro-Ortega* does not apply here, however, where future  
25 medical expenses are not at issue, and more importantly, where Versa is fully advised of the  
26 amount of the contribution claim against it.  
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1                   **C. MDB's Contribution Claim Must Be Determined By the Trier of Fact.**

2           A right to contribution in Nevada exists "where two or more persons become jointly or  
3 severally liable in tort for the same injury to [a] person...even though judgment has not yet been  
4 recovered against all or any of them." NRS 17.225(1). Further, "[n]o tortfeasor is compelled to  
5 make contribution beyond his or her own equitable share of the entire liability." NRS  
6 17.225(2). It is undisputed that MDB paid the entire liability to the plaintiffs in all of the  
7 underlying cases and that this payment extinguished the liability of both MDB and Versa, which  
8 is what allows MDB to seek to recover contribution from Versa. NRS 17.225(3). The question  
9 remaining for the trier of fact, however, is not what amount was paid by MDB to these  
10 plaintiffs, as Versa would have the Court believe, but what portion of the amount paid by MDB  
11 is beyond its equitable share of liability, if any. NRS 17.225(2).

12           MDB's claim of contribution, then, although a separate cause of action, necessarily  
13 relies on a showing of Versa's liability for its product's defect. Versa is well aware of the  
14 conflicting expert testimony regarding the operation of its valve, and, in the end, the credibility  
15 of circumstantial evidence linking a Versa valve defect to the underlying accident at issue is a  
16 determination to be left to the jury. *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443,  
17 452, 686 P.2d 925, 930 (1984).

18           In Nevada, strict liability in tort extends to all products. *Ginnis v. Mapes Hotel Corp.*,  
19 86 Nev. 408, 470 P.2d 135, 138 (Nev.1970). A claimant need not, however, produce direct  
20 evidence of a specific product defect or negate any alternative causes of the accident.  
21 *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925, 927 (1984). An "unexpected,  
22 dangerous malfunction" suffices. *Id.* at 448.

23           Here, Versa hopes to avoid scrutiny by the trier of fact by a perfunctory analysis of the  
24 initial damages disclosure requirement of NRCP 16.1(a)(1)(C) because it knows that, to  
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1 establish a defect in the Versa valve and a corresponding entitlement to contribution, MDB need  
2 only show evidence of an unexpected, dangerous, malfunction. *Stackiewicz*, 100 Nev. at 449.  
3 And this burden is easily satisfied by the testimony of MDB's retained experts. Both Dr. Bosch  
4 and Mr. Anderson opined, in their respective expert reports, that the Versa valve is defective in  
5 design. Indeed, it is clear that the Versa valve had an unexpected and dangerous malfunction  
6 which caused the trailer to release its load, resulting in the multiple vehicle accidents and  
7 injuries at issue in the underlying action. As such, MDB need not pinpoint the exact cause of  
8 the malfunction to prevail on a strict liability claim.  
9

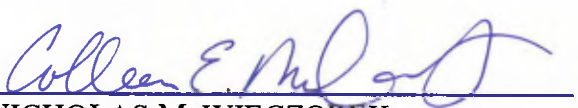
10  
11 Accordingly, Versa has failed to meet its burden to show either the absence of contested  
12 material facts, or a prima facie entitlement to judgment, as required to defeat MDB's  
13 contribution claim as a matter of law.

14 IV.

15 CONCLUSION

16  
17 For the foregoing reasons, MDB respectfully requests that this Court deny Versa's  
18 Motion for Summary Judgment in its entirety.

19 CLARK HILL PLLC

20  
21 By:   
22 NICHOLAS M. WIECZOREK  
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MDB Trucking, LLC

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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 21st day of September, 2017.

**CLARK HILL PLLC**

By: Colleen E. McCarty  
NICHOLAS M. WIECZOREK  
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JEREMY J. THOMPSON  
Nevada Bar No. 12503  
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Attorneys for Cross-Claimant  
MDB Trucking, LLC

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 21<sup>st</sup> day of September, 2017, I served a true and correct copy of the **CROSS-CLAIMANT MDB TRUCKING, LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT [RE: DAMAGES] AND REQUEST FOR JUDICIAL NOTICE** via electronic means, by operation of the Court's electronic filing system upon each party in this case who is registered as an electronic case filing user with the Clerk, or by U.S. Mail, postage prepaid thereon, to:

JACOB D. BUNDICK, ESQ.  
LISA J. ZASTROW, ESQ.  
GREENBERG TRAURIG, LLP  
3773 Howard Hughes Parkway, Ste 400 N  
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AND DRAGON ESP, LTD.

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100 W. Liberty Street, Tenth Floor  
Reno, NV 89501  
Attorneys For Defendant  
RMC LAMAR HOLDINGS, INC.



\_\_\_\_\_  
An employee of Clark Hill PLLC

**LIST OF EXHIBITS**

**Exhibit A:** Declaration of Nicholas Wieczorek in Support of Opposition to Versa's  
Motion for Summary Judgment

**Exhibit B:** Declaration of Colleen E. McCarty, Esq in Support of Opposition to Versa's  
Motion for Summary Judgment

**Exhibit B-1:** Notices of Entry of Orders Granting Daniel Koiski's Motion for Good Faith  
Settlement

# EXHIBIT A

FILED  
Electronically  
CV15-02349  
2017-09-21 05:37:46 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6312543 : csulezic

# EXHIBIT A

AA001603

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7. The resulting Settlement Agreement and Release contained a Strict Confidentiality/Non-Disclosure provision which precludes disclosure of the payment terms except pursuant to lawful legal process or court directive.

8. MDB filed motions for good faith settlement to secure approval of the aforementioned agreements. Versa received service of all nine motions.

9. Thereafter, between June 30, 2017 and July 20, 2017, the Court approved all of the good faith settlements and Versa received notice of the entry of said orders.

10. The underlying personal injury claims, inclusive of those against Versa, were subsequently dismissed by stipulation and order.

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

Executed this 21 day of September, 2017.

NICHOLAS M. WIECZOREK

**NRS 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.

# EXHIBIT B

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2017-09-21 05:37:46 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6312543 : csulezic

# EXHIBIT B

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

3 Executed this 21st day of September, 2017.

4   
5 COLLEEN E. MCCARTY  
6

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27 <sup>1</sup>NRS 53.045 Use of unsworn declaration in lieu of affidavit or other sworn declaration. Any matter whose existence  
28 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.

# EXHIBIT B-1

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CV15-02349  
2017-09-21 05:37:46 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 6312543 : csulezic

# EXHIBIT B-1

AA001609

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20 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

21 **SECOND JUDICIAL DISTRICT COURT**

22 **WASHOE COUNTY, NEVADA**

23 ERNEST BRUCE FITZSIMMONS and  
24 CAROL FITZSIMMONS, Husband and  
25 Wife,

26 Plaintiffs,

27 vs.

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

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
OLIVIA JOHN INDIVIDUALLY AND AS  
GUARDIAN AD LITEM FOR NAKYLA  
JOHN [CASE NO. CV15-01337]**

1 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

2  
3 PLEASE TAKE NOTICE that an Order was entered and filed on the 27<sup>th</sup> day of June,  
4 2017, a copy of which is attached hereto as Exhibit A.

5 DATED this 30 day of June, 2017.

6 MORRIS POLICH & PURDY LLP

7  
8 By: 

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

DATED this 30 day of June, 2017.

MORRIS POLICH & PURDY LLP

By: 

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EXHIBIT LIST

EXHIBIT A

ORDER

2 PAGES

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Morris Polich & Purdy LLP, and that on this 30 day of June, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING OLIVIA JOHN INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR NAKYLA JOHN** via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk or by U.S. Mail:

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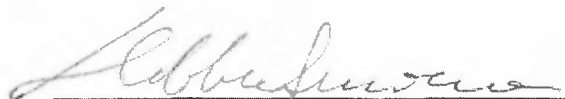
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Trucking, LLC and DANIEL ANTHONY KOSKI



An Employee of MORRIS POLICH & PURDY LLP

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20 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

21 **SECOND JUDICIAL DISTRICT COURT**

22 **WASHOE COUNTY, NEVADA**

23 ERNEST BRUCE FITZSIMMONS and  
24 CAROL FITZSIMMONS, Husband and  
25 Wife,

26 Plaintiffs,

27 vs.

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

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
BEVERLY, PATRICK AND RYAN  
CROSSLAND [CASE NO. CV16-00626]**

1 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

2  
3 PLEASE TAKE NOTICE that an Order was entered and filed on the 27<sup>th</sup> day of June,  
4 2017, a copy of which is attached hereto as Exhibit A.

5 DATED this 30 day of June, 2017.

6 MORRIS POLICH & PURDY LLP

7  
8 By. 

9 NICHOLAS M. WIECZOREK

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27 Attorney for MDB TRUCKING, LLC and

28 DANIEL KOSKI

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

DATED this 30 day of June, 2017.

MORRIS POLICH & PURDY LLP

By: 

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EXHIBIT LIST

**EXHIBIT A**

**ORDER**

**2 PAGES**

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Morris Polich & Purdy LLP, and that on this 30 day of June, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING BEVERLY, PATRICK AND RYAN CROSSLAND [CASE NO. CV16-00626]** via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk or by U.S. Mail:

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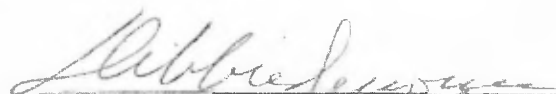
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An Employee of MORRIS POLICH & PURDY LLP

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20 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

21 **SECOND JUDICIAL DISTRICT COURT**

22 **WASHOE COUNTY, NEVADA**

23 ERNEST BRUCE FITZSIMMONS and  
24 CAROL FITZSIMMONS, Husband and  
25 Wife,

26 Plaintiffs,

27 vs.

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

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
SONYA CORTHELL  
[CASE NO. CV16-01335]**

1 **TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:**

2  
3 PLEASE TAKE NOTICE that an Order was entered and filed on the 27<sup>th</sup> day of June,  
4 2017, a copy of which is attached hereto as Exhibit A.

5 DATED this 29 day of June, 2017.

6 MORRIS POLICH & PURDY LLP

7  
8 By. 

9 NICHOLAS M. WIECZOREK

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27 *Attorney for MDB TRUCKING, LLC and*

28 *DANIEL KOSKI*

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EXHIBIT LIST

EXHIBIT A                      ORDER    2 PAGES

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Morris Polich & Purdy LLP, and that on this 30 day of June, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING SONYA CORTHELL [CASE NO. CV16-01335]** via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk or by U.S. Mail:

Joseph S. Bradley, Esq.  
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Robles, Kins, Remmerde and Bible

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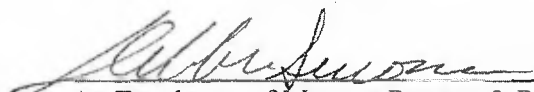
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Trucking, LLC and DANIEL ANTHONY KOSKI

  
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*Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

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

ERNEST BRUCE FITZSIMMONS and  
CAROL FITZSIMMONS, Husband and  
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC, et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
JAMES BIBLE**

**PLEASE TAKE NOTICE** that an Order was entered on the 17<sup>th</sup> day of July 2017, in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

DATED this 20 day of July, 2017.

CLARK HILL PLLC

By:

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

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*Attorneys for MDB Trucking, LLC*

**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 21 day of July, 2017.

CLARK HILL PLLC

By:

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*Attorneys for MDB Trucking, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC,, and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING JAMES BIBLE was served via the U. S. mail, postage prepaid upon the following:

Joseph S. Bradley, Esq.  
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P.O. Box 1987  
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Attorneys for Plaintiffs Beverly, Patrick and Ryan Crossland

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Attorneys for USAA [subrogated insurer]

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Attorneys for Plaintiffs Christy, Shawn and Sonya Corthell

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Brian M. Brown, Esq.  
Thierry V. Barkley, Esq.  
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Reno, Nevada 89509  
Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI

  
An employee of Morris Polich & Purdy LLP

# **EXHIBIT 1**

# **EXHIBIT 1**

**AA001628**

1 3060  
2 NICHOLAS M. WIECZOREK  
3 Nevada Bar No. 6170  
4 JEREMY J. THOMPSON  
5 Nevada Bar No. 12503  
6 COLLEEN E. McCARTY  
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16 (775) 786-2882

15 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

17 SECOND JUDICIAL DISTRICT COURT  
18 WASHOE COUNTY, NEVADA

19 ERNEST BRUCE FITZSIMMONS and  
20 CAROL FITZSIMMONS, Husband and  
21 Wife,

22 Plaintiffs,

23 vs.

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

26 Defendants.  
27  
28

AND ALL RELATED CASES.

Case No.: CV15-02349  
Dept. No.: 10

[Consolidated Proceeding]

ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING JAMES BIBLE

1           Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff James Bible and GOOD CAUSE APPEARING,  
3 THEREFORE:

4           IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6           DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By: 

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. McCARTY

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(775) 786-2882

26 Attorney for MDB TRUCKING, LLC and

27 DANIEL KOSKI

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2 NICHOLAS M. WIECZOREK

3 Nevada Bar No. 6170

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5 Nevada Bar No. 12503

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23 *Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

24  
25 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
26 IN AND FOR THE COUNTY OF WASHOE

27 ERNEST BRUCE FITZSIMMONS and  
28 CAROL FITZSIMMONS, Husband and  
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC, et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
ANGELA WILT

1 PLEASE TAKE NOTICE that an Order was entered on the 17<sup>th</sup> day of July 2017,  
2 in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

3 DATED this 12 day of July, 2017.

4  
5 CLARK HILL PLLC

6  
7 By: 

8 NICHOLAS M. WIECZOREK

9 Nevada Bar No. 6170

10 JEREMY J. THOMPSON

11 Nevada Bar No. 12503

12 COLLEEN E. MCCARTY

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16 Las Vegas, Nevada 89169

17 Telephone: (702) 862-830

18 Attorneys for MDB Trucking, LLC

19 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

22 DATED this 20 day of July, 2017.

23  
24 CLARK HILL PLLC

25 By: 

26 NICHOLAS M. WIECZOREK

27 Nevada Bar No. 6170

28 JEREMY J. THOMPSON

Nevada Bar No. 12503

COLLEEN E. MCCARTY

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Attorneys for MDB Trucking, LLC

# EXHIBIT 1

# EXHIBIT 1

1 3060  
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22 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

23 **SECOND JUDICIAL DISTRICT COURT**

24 **WASHOE COUNTY, NEVADA**

25 ERNEST BRUCE FITZSIMMONS and  
26 CAROL FITZSIMMONS, Husband and  
27 Wife,

28 Plaintiffs,

vs.

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

Defendants.

Case No.: CV15-02349  
Dept. No.: 10

[Consolidated Proceeding]

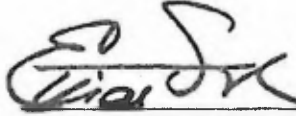
**ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING ANGELA WILT**

AND ALL RELATED CASES.

1           Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff Angela Wilt and GOOD CAUSE APPEARING,  
3 THEREFORE:

4           IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6           DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By:

  
~~NICHOLAS M. WIECZOREK~~

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Attorney for MDB TRUCKING, LLC and  
DANIEL KOSKI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC,, and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING ANGELA WILT was served via the U. S. mail, postage prepaid upon the following:

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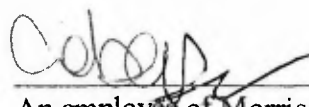
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Attorneys for USAA [subrogated insurer]

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Attorneys for Plaintiffs Christy, Shawn and Sonya Corthell

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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI



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AA001636

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15 *Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

16  
17 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
18 **IN AND FOR THE COUNTY OF WASHOE**

19 ERNEST BRUCE FITZSIMMONS and  
CAROL FITZSIMMONS, Husband and  
20 Wife,

21 Plaintiffs,

22 vs.

23 MDB TRUCKING, LLC, et al.,

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
BENJAMIN, NATALIE AND  
CASSANDRA ROBLES



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC., and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING BENJAMIN, NATALIE AND CASSANDRA ROBLES was served via the U. S. mail, postage prepaid upon the following:

Joseph S. Bradley, Esq.  
Sarah M. Quigley, Esq.  
P.O. Box 1987  
Reno, Nevada 89505  
Attorneys for Plaintiffs Ernest and Carol Fitzsimmons and Angela Wilt

Jacob D. Bundick, Esq.  
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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI



An employee of Morris Polich & Purdy LLP

# **EXHIBIT 1**

# **EXHIBIT 1**

1 **3060**

2 NICHOLAS M. WIECZOREK

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4 JEREMY J. THOMPSON

5 Nevada Bar No. 12503

6 COLLEEN E. McCARTY

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21 (775) 786-2882

22 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

23 **SECOND JUDICIAL DISTRICT COURT**

24 **WASHOE COUNTY, NEVADA**

25 ERNEST BRUCE FITZSIMMONS and  
26 CAROL FITZSIMMONS, Husband and  
27 Wife,

28 Plaintiffs,

vs.

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

Defendants.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING ROSA, BENJAMIN,  
NATALIE AND CASSANDRA ROBLES**

AND ALL RELATED CASES.

1       Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff Rosa, Benjamin, Natalie and Cassandra Robles and  
3 GOOD CAUSE APPEARING, THEREFORE:

4       IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6       DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By: 

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27 DANIEL KOSKI  
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*Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

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

ERNEST BRUCE FITZSIMMONS and  
CAROL FITZSIMMONS, Husband and  
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC, et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
GENEVA REMMERDE

PLEASE TAKE NOTICE that an Order was entered on the 17<sup>th</sup> day of July 2017,  
in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

DATED this 23<sup>rd</sup> day of July, 2017.

CLARK HILL PLLC

By:

NICHOLAS M. WIECZOREK

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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 2 day of July, 2017.

CLARK HILL PLLC

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*Attorneys for MDB Trucking, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC,, and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING GENEVA REMMERDE was served via the U. S. mail, postage prepaid upon the following:

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# EXHIBIT 1

# EXHIBIT 1

AA001646

1 3060

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22 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

23 **SECOND JUDICIAL DISTRICT COURT**

24 **WASHOE COUNTY, NEVADA**

25 ERNEST BRUCE FITZSIMMONS and  
26 CAROL FITZSIMMONS, Husband and  
27 Wife,

28 Plaintiffs,

vs.

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

Defendants.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING GENEVA REMMERDE**

AND ALL RELATED CASES.

1       Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff Geneva Remmerde and GOOD CAUSE  
3 APPEARING, THEREFORE:

4       IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6       DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By: 

NICHOLAS M. WIECZOREK

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26 Attorney for MDB TRUCKING, LLC and  
27 DANIEL KOSKI  
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*Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

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

ERNEST BRUCE FITZSIMMONS and  
CAROL FITZSIMMONS, Husband and  
Wife,

Plaintiffs,

vs.

MDB TRUCKING, LLC, et al.,

Defendants.

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
JULIE KINS, AS PARENT AND LEGAL  
GUARDIAN OF KANDISE BAIRD**

**PLEASE TAKE NOTICE** that an Order was entered on the 17<sup>th</sup> day of July 2017, in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

DATED this 20 day of July, 2017.

CLARK HILL PLLC

By:

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

JEREMY J. THOMPSON

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*Attorneys for MDB Trucking, LLC*

**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 30 day of July, 2017.

CLARK HILL PLLC

By: \_\_\_\_\_

NICHOLAS M. WIECZOREK

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JEREMY J. THOMPSON

Nevada Bar No. 12503

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*Attorneys for MDB Trucking, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC,, and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING JULIE KINS, AS PARENT AND LEGAL GUARDIAN OF KANDISE BAIRD was served via the U. S. mail, postage prepaid upon the following:

Joseph S. Bradley, Esq.  
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P.O. Box 1987  
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Attorneys for Plaintiffs Beverly, Patrick and Ryan Crossland

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Attorneys for Defendants/Third-Party Plaintiff, MDB Trucking, LLC and DANIEL ANTHONY KOSKI



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# EXHIBIT 1

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15 *Attorneys for MDB TRUCKING, LLC and DANIEL KOSKI*

16  
17 **SECOND JUDICIAL DISTRICT COURT**  
18 **WASHOE COUNTY, NEVADA**

19  
20 ERNEST BRUCE FITZSIMMONS and  
21 CAROL FITZSIMMONS, Husband and  
Wife,

22 Plaintiffs,

23 vs.

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

26 Defendants.  
27  
28

AND ALL RELATED CASES.

Case No.: CV15-02349  
Dept. No.: 10

[Consolidated Proceeding]

**ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING JULIE KINS, AS PARENT  
AND LEGAL GUARDIAN OF KANDISE  
BAIRD**

1 Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff Julie Kins, as Parent and Legal Guardian of  
3 Kandisc Baird and GOOD CAUSE APPEARING, THEREFORE:

4 IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6 DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By:

  
14 NICHOLAS M. WIECZOREK

15 Nevada Bar No. 6170

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26 Attorney for MDB TRUCKING, LLC and  
27 DANIEL KOSKI

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15 *Attorneys for Defendant/Cross-Claimant MDB Trucking, LLC*

16  
17 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
18 **IN AND FOR THE COUNTY OF WASHOE**

19 ERNEST BRUCE FITZSIMMONS and  
CAROL FITZSIMMONS, Husband and  
20 Wife,

21 Plaintiffs,

22 vs.

23 MDB TRUCKING, LLC, et al.,

24 Defendants.

25 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

NOTICE OF ENTRY OF ORDER  
GRANTING MDB TRUCKING AND  
DANIEL ANTHONY KOSKI'S MOTION  
FOR DETERMINATION OF GOOD  
FAITH SETTLEMENT REGARDING  
ERNEST AND CAROL FITZSIMMONS

**PLEASE TAKE NOTICE** that an Order was entered on the 17<sup>th</sup> day of July 2017, in the above-entitled matter, a copy of which is attached hereto as Exhibit 1.

DATED this 22 day of July, 2017.

CLARK HILL PLLC

By:

NICHOLAS M. WIECZOREK

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*Attorneys for MDB Trucking, LLC*

## 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 July, 2017.

CLARK HILL PLLC

NICHOLAS M. WIECZOREK

Nevada Bar No. 6170

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Nevada Bar No. 12503

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC,, and on this 20<sup>th</sup> day of July 2017, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MDB TRUCKING AND DANIEL ANTHONY KOSKI'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT REGARDING ERNEST AND CAROL FITZSIMMONS** was served via the U. S. mail, postage prepaid upon the following:

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AA001657

# EXHIBIT 1

EXHIBIT 1.

1 3060

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17 **SECOND JUDICIAL DISTRICT COURT**

18 **WASHOE COUNTY, NEVADA**

19 ERNEST BRUCE FITZSIMMONS and  
20 CAROL FITZSIMMONS, Husband and  
21 Wife,

22 Plaintiffs,

23 vs.

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

26 Defendants.

27  
28 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**ORDER GRANTING MDB TRUCKING  
AND DANIEL ANTHONY KOSKI'S  
MOTION FOR DETERMINATION OF  
GOOD FAITH SETTLEMENT  
REGARDING ERNEST AND CAROL  
FITZSIMMONS**

1           Upon review of the Motion for Determination of Good Faith Settlement as well as the  
2 non-opposition filed by counsel for Plaintiff Ernest and Carol Fitzsimmons and GOOD CAUSE  
3 APPEARING, THEREFORE:


4           IT IS HEREBY ORDERED that this Motion for Determination of Good Faith  
5 Settlement is granted.

6           DATED this 17 day of July, 2017.

7  
8   
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS POLICH & PURDY LLP

12  
13 By:   
14 NICHOLAS M. WIECZOREK

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Attorney for MDB TRUCKING, LLC and  
DANIEL KOSKI

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.<sup>1</sup> 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 PRODUCTS COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO VERSA PRODUCTS

<sup>1</sup> 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 COMPANY, INC.'S MOTION TO STRIKE MDB TRUCKING, LLC'S CROSS-CLAIM  
2 PURSUANT TO NRCP 37; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY  
3 INSTRUCTION ("the Reply") on June 12, 2017, and contemporaneously submitted the matter for  
4 the Court's consideration. The Court entered an ORDER on August 1, 2017, setting the Motion  
5 for oral argument.<sup>2</sup> The parties contacted the Court on August 10, 2017, and set the matter for oral  
6 argument on August 29, 2017. The Court heard the arguments of counsel on August 29, and took  
7 the matter under submission.

8 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was  
9 filed by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015.  
10 Numerous other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014,  
11 Defendant Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a  
12 load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of  
13 their vehicles and numerous accidents occurred. The plaintiffs sustained physical and emotional  
14 injuries as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY  
15 COMPLAINT ("the MDB Cross-Claim") June 15, 2016. The MDB Cross-Claim had two causes  
16 of action relative to Versa: Implied Indemnification and Contribution.<sup>3</sup> MDB alleges it was not  
17 Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably  
18 dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB  
19 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the  
20 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which  
21 would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried  
22 by the trailer." The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives  
23 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed  
24

25  
26 <sup>2</sup> There were numerous other pre-trial motions scheduled for oral argument on the same date.

27 <sup>3</sup> 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 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,  
2 3:12-18.

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

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

23       The Motion avers MDB had a duty to preserve the discarded electrical systems in  
24 anticipation of the underlying action. In *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648,  
25 651, 747 P.2d 911, 914 (1987), the Nevada Supreme Court held, "[E]ven where an action has not  
26 been commenced and there is only a potential for litigation, the litigant is under a duty to preserve  
27 the evidence which it knows or reasonably should know is relevant to the action." The Motion  
28 concludes the appropriate sanction for the failure to preserve this crucial evidence should be

1 dismissal of the entire action. *See generally Young v. Johnny Ribeiro Building Inc.*, 106 Nev. 88,  
2 787 P.2d 777 (1990) and NRCP 37.

3       Discovery sanctions are within the discretion of the trial court. *See Stubli v. Big D Int'l*  
4 *Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991), and *Kelly Broadcasting v. Sovereign*  
5 *Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). Dismissal of an entire action with  
6 prejudice is a dramatic punishment for a discovery abuse. The Nevada Supreme Court cautions  
7 district courts the use of such a Draconian sanction should be approached with caution. "The  
8 dismissal of a case, based upon a discovery abuse such as the destruction or loss of evidence,  
9 'should be used only in extreme situations; if less drastic sanctions are available, they should be  
10 utilized.'" *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 326 (1995)  
11 (citation omitted). The *Young* Court adopted an eight factor analysis district courts must go through  
12 if they feel a discovery abuse is so severe it warrants dismissal. The *Young* Court held, "We will  
13 further require that every order of dismissal with prejudice as a discovery sanction be supported by  
14 an express, careful and preferably written explanation of the court's analysis of the pertinent  
15 factors." *Id.* 106 Nev. at 93, 787 P.2d at 780. Additionally, in *Nevada Power v. Fluor Illinois*, 108  
16 Nev. 638, 837 P.2d 1354 (1992), the Nevada Supreme Court held it was an abuse of discretion for a  
17 district court to grant case concluding sanctions without an evidentiary hearing. The *Nevada Power*  
18 Court held the party facing a case terminating sanction needs an "opportunity to present witnesses  
19 or to cross-examine [the movant] or their experts with regard to [the discovery violations]."  
20 *Nevada Power*, 108 Nev. at 646, 837 P.2d at 1360. *Cf. Bahena v. Goodyear Tire & Rubber Co.*,  
21 126 Nev. 606, 612, 245 P.3d 1182, 1186 (2010).

22       The Court conducted oral argument on the Motion. Oral argument is not an evidentiary  
23 hearing. It was not anticipated by the parties there was a need to have witnesses, including experts,  
24 available for direct and cross-examination. The pernicious effect of the spoliation of the electrical  
25 evidence was discussed by counsel for Versa; however, counsel is not an expert nor was he subject  
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1 to cross-examination by counsel for MDB.<sup>4</sup> Counsel were able to discuss with the Court some, but  
2 not all, of the *Young* factors. The Court informed the parties there would be some sanction levied on  
3 MDB for their discovery abuse: the actual sanction was not determined. The Court needed an  
4 opportunity to review the relevant cases discussed, *supra*. Having reviewed these cases, the Court  
5 concludes granting the Motion *may* be an appropriate sanction. The Court cannot fully evaluate this  
6 issue without the benefit of an evidentiary hearing.

7 **IT IS ORDERED** that the parties contact the Judicial Assistant for Department 10 within  
8 ten (10) days from the date of this filed Order to set an evidentiary hearing on the Motion. Such  
9 setting may be made by telephone, with the parties first conference calling each other before calling  
10 the Court. Each party will be familiar with *Young, supra, Nevada Power, supra*, and their progeny  
11 and present witnesses in support of their respective positions. Counsel will exchange the names of  
12 anticipated witnesses no fewer than ten (10) days prior to the evidentiary hearing. Should a party  
13 propose to offer expert testimony, and the opposing party has a good faith belief the proffered expert  
14 witness does not meet the requirements to offer such testimony, the opposing party will immediately  
15 notify the Court and proffering counsel.<sup>5</sup> This ORDER *does not* modify the requirements of NRC  
16 16.1(a)(2).

17 DATED this 22 day of September, 2017.

18   
19 ELLIOTT A. SATTLER  
20 District Judge  
21  
22  
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24

25 <sup>4</sup> Counsel for Versa did inform the Court he was an electrician for many years and has some experience in electrical  
26 matters. Further, counsel for Versa drew what was admittedly a crude drawing on the chalkboard in the courtroom to  
27 assist in his explanation of an issue regarding the electrical system. The drawing was not preserved for review.

28 <sup>5</sup> See generally, *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), *Higgs v. State*, 126 Nev. 1, 222 P.3d 648  
(2010); *Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203 (2016), and NRS 50.275.

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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 September, 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 22 day of September, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

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9 PRODUCTS COMPANY, INC.

10  
11 DISTRICT COURT  
12 WASHOE COUNTY, NEVADA

13 ERNEST BRUCE FITZIMMONS and  
14 CAROL FITZSIMMONS, Husband and  
Wife,

15 Plaintiffs,

16 vs.

17 MDB TRUCKING, LLC, et. al.

18 Defendants.

19 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

**DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY, INC.'S  
REPLY TO MDB TRUCKING, LLC'S  
OPPOSITION TO ITS MOTION FOR  
SUMMARY JUDGMENT AND  
OPPOSITION TO REQUEST FOR  
JUDICIAL NOTICE**

20  
21  
22 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS  
23 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David  
24 B. Avakian, Esq. and Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH,  
25 LLP, and Replies to MDB TRUCKING, LLC's Opposition to its Motion for Summary  
26 Judgment as to MDB TRUCKING, LLC's Cross-Claims and Opposition to MDB  
27 TRUCKING, LLC's Request for Judicial Notice.

1 This Reply is based upon NRCP 56; the Memorandum of Points and Authorities;  
2 the exhibits attached hereto; and any other evidence the Court may entertain at the  
3 Hearing on this Motion.

4 DATED this 28<sup>th</sup> day of September, 2017

5 Respectfully Submitted,

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

7  
8  
9 By /s/ Josh Cole Aicklen

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20 PRODUCTS COMPANY, INC.  
21  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant/Cross-Claimant, MDB TRUCKING, LLC (“hereinafter referred to as  
4 “MDB”), has brought Cross-Claims<sup>1</sup> against VERSA PRODUCTS COMPANY, INC.  
5 (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 Cross-Claim against VERSA, a true and correct copy is  
12 attached to the Motion as **Exhibit 1**. Plaintiffs were driving westbound on IR80 when a  
13 semi-trailer driven by Daniel Koski and owned by Cross-Claimant MDB spilled gravel on  
14 the freeway, causing multiple automobile accidents and the injuries alleged by the  
15 Plaintiffs. MDB’s contribution claim is based on its allegation that the inadvertent gravel  
16 dump was due to an alleged “defect” with the VERSA valve on the subject trailer.

17 MDB settled the underlying personal injury lawsuits and is now seeking  
18 contribution from VERSA. However, in violation of NRCP 16.1(a)(1)(C) and NRCP 26,  
19 MDB never disclosed *any* damages computations, *any* documents and/or evidence to  
20 support those damages computations, nor *any* witnesses that are designated to testify as  
21

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22 <sup>1</sup> There are a total of nine different lawsuits filed by the Plaintiffs. All except for two of the above mentioned  
23 lawsuits have been consolidated for discovery and trial purposes. The remaining two cases, James Bible  
24 (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.

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

28 Plaintiffs in all of the above lawsuits have settled their claims.

1 to those damages. With discovery now closed, VERSA still does not know the amount of  
2 damages MDB is seeking and the evidentiary basis for that amount. Because MDB has  
3 violated NRCP 16.1(a)(1)(C) and NRCP 26, VERSA is entitled to summary judgment as a  
4 matter of law.

5 In its Opposition, MDB argues that it did not have the duty to provide its  
6 computations of damages in support of their claimed damages or designated witnesses to  
7 testify regarding its claimed damages. MDB basis this argument on the fact that,  
8 generally, VERSA was aware of the amount of the settlement reached between MDB and  
9 Plaintiffs because they also attended the mediation. However, this argument flies in the  
10 face of the disclosure requirements pursuant to NRCP 16.1, as well as the Nevada  
11 Supreme Court binding decision in Pizarro-Ortega.

## 12 II. LEGAL ARGUMENT

### 13 A. MDB Still Has the Burden of Proof Regarding its Alleged Damages

14 The burden of proof production and persuasion in this matter is on the Plaintiff.  
15 See, Doud v. Las Vegas Hilton Corp., 864 P.2d 796 (Nev. 1993). Plaintiff cannot rely on  
16 supposition, conjecture, or surmise. See, Murphy v. S. Pac. Co., 101 P. 322 (Nev. 1909).  
17 It is the Plaintiff and not Defendants, upon whom the duty rests to use diligence at every  
18 stage of the proceeding to expedite his case to a final determination. See, Thran v. First  
19 Judicial Dist. Court, 380 P.2d 297 (Nev. 1963). “The general rule is that an attorney’s  
20 neglect will be imputed to his client and he is held responsible for it.” Valente v. First W.  
21 Sav. & Loan, 528 P.2d 699 (1974), relying upon Link v. Wabash R.R. Co., 370 U.S. 626,  
22 634 (1962); Spring v. Texas Butadiene & Chem. Corp., 434 F.2d 677 (3d Cir. 1970), cert  
23 denied, 404 U.S. 854 (1971).

#### 24 1. MDB Had a Duty To Timely Disclose Any Damages Documents 25 and/or Witnesses Pursuant to NRCP 16.1 and NRCP 26(b)(1)

26 In its Opposition, MDB argues that the Court should ignore all of the well-reasoned  
27 discovery requirements pursuant to NRCP 26(b)(1) and NRCP 16.1, because “VERSA  
28 has had full possession of MDB’s damages evidence at all times.” See, MDB’s

1 Opposition, Page 6, Lines 25-26. At the same time, MDB is arguing that it could not  
2 disclose its settlement agreement and material settlement and payment terms because of  
3 the “Confidentiality/Non-Disclosure” provisions in the settlement. Id. at Page 4, Lines 24-  
4 25. Further, MDB argues that Scott Palmer was designated to talk about damages it  
5 suffered. Each of these arguments is meritless. MDB had a duty to timely provide three  
6 areas of damages documents:

- 7 1. Computations of it’s damages (which includes the amount of settlement(s)  
8 paid, any attorneys fees and costs, interest and/or any other monetary  
9 damages) it will seek to recover at trial;
- 10 2. Foundational documents to support these alleged damages computations  
11 (invoices, settlement documents, settlement check(s), redacted attorneys  
12 billing sheets, etc.); and
- 13 3. Foundational witnesses to discuss these damages.

14 MDB failed to provide *any* of the above and it offers no reasonable excuse as to  
15 why. MDB does not assert that its failures were as a result of an inadvertent mistake.  
16 Instead, it simply “doubles-down” by mistakenly arguing that it never had a duty to  
17 produce any of it’s damages documents, witnesses or evidence. This is simply not true.

18 i. **MDB Had a Duty to Produce Its Complete Damages Computations**

19 In support of it’s Opposition, MDB cites a non-binding California case, Maharaj v.  
20 California Bank & Trust, 228 F.R.D. 458 (E.D. Cal. 2013) for the premise that if the  
21 damages information is generally known, the parties do not have to produce the  
22 computations. This, of course, is absolutely inapplicable in Nevada, which has specific  
23 rules of civil procedure, codified pursuant to NRCP 26 and NRCP 16.1 that absolutely  
24 requires these disclosures.

25 The Maharaj case involved a Plaintiff who was seeking the value of his hourly  
26 wages and benefits from the Defendant, *while he was still employed* by that Defendant. In  
27 essence, Defendant, California Bank & Trust, would have had all of the exhibits,  
28 witnesses and documents to support Plaintiff’s claims and therefore the Court did not find

1 any prejudice to the Defendant. However, this is clearly not the case here. VERSA does  
2 not have any documents to support MDB's damages; has never deposed anyone at MDB  
3 regarding any damages; does not have access to MDB's attorney's fees and costs and  
4 any other damages it intends to seek at trial.

5 In fact, the Court does not have out-of-state direction on how to approach  
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11 NRCP 16.1(a)(1)(C) requires a party to produce, "without  
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13 **category of damages claimed.**" In this appeal, we clarify that  
14 future medical expenses are a category of damages to which  
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16 3. Scott Palmer's Designation Does Not Include or Even References  
17 Damages

18 MDB argues that it designated a witness to discuss the damages, its manager  
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24 (1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise  
25 stipulated or directed by order, a party must, without awaiting a discovery request,  
provide to other parties:

26 (A) The name and, if known, the address and telephone number of each individual  
27 likely to have information discoverable under Rule 26(b), including for  
impeachment or rebuttal, identifying the subjects of the information;

28 See, 16.1(a)(1)(A) (emphasis added).

1 MDB designated Mr. Palmer in its last supplement, to testify as follows:

2 Scott Palmer is expected to testify regarding the facts and  
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5 See, MDB's Third Supplement to NRCP 16.1, Previously attached as Exhibit 1 to  
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12 Finally, the Parties deposed Mr. Palmer and he did not testify related to any  
13 settlement, damages or any other financial issues during his testimony.

14 **B. MDB's "Request For Judicial Notice" Is Missing From The Motion**

15 MDB's Opposition title lists a "Request for Judicial Notice", but does not specify  
16 what MDB requests the Court will take judicial notice of. Outside of the title, nowhere in  
17 the body of the Opposition does MDB argue about "Judicial Notice" or what specifically  
18 the Court to recognize. Thus, VERSA cannot address this portion of MDB's brief and  
19 accordingly, requests that the Court deny MDB's request for judicial notice as there are  
20 no points and authorities to support the request.

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1 **III. CONCLUSION**

2 Based on the foregoing, VERSA respectfully requests that the Court grants  
3 summary judgment in favor of VERSA and against MDB as to all causes of action in the  
4 Cross-claim as a matter of law and deny MDB's Request for Judicial Notice.

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 28<sup>th</sup> day of September, 2017

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  
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CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of September, 2017, a true and correct copy of DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S REPLY TO MDB TRUCKING, LLC'S OPPOSITION TO ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO REQUEST FOR JUDICIAL NOTICE was served via U.S. Mail addressed as follows:

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

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8 Attorneys for Defendant/Cross-  
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9 PRODUCTS COMPANY, INC.

10  
11 DISTRICT COURT

12 WASHOE COUNTY, NEVADA

13 ERNEST BRUCE FITZIMMONS and  
14 CAROL FITZSIMMONS, Husband and  
Wife,

15 Plaintiffs,

16 vs.

17 MDB TRUCKING, LLC, et. al.

18 Defendants.

19 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

**DEFENDANT/CROSS-  
CLAIMANT/CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY, INC.'S  
REPLY TO MDB TRUCKING, LLC'S  
OPPOSITION TO ITS MOTION FOR  
SUMMARY JUDGMENT AND  
OPPOSITION TO REQUEST FOR  
JUDICIAL NOTICE**

20  
21  
22 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS  
23 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David  
24 B. Avakian, Esq. and Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH,  
25 LLP, and Replies to MDB TRUCKING, LLC's Opposition to its Motion for Summary  
26 Judgment as to MDB TRUCKING, LLC's Cross-Claims and Opposition to MDB  
27 TRUCKING, LLC's Request for Judicial Notice.

1 This Reply is based upon NRCP 56; the Memorandum of Points and Authorities;  
2 the exhibits attached hereto; and any other evidence the Court may entertain at the  
3 Hearing on this Motion.

4 DATED this 28<sup>th</sup> day of September, 2017

5 Respectfully Submitted,

6 LEWIS BRISBOIS BISGAARD & SMITH LLP  
7  
8

9 By /s/ Josh Cole Aicklen

10 JOSH COLE AICKLEN  
11 Nevada Bar No. 007254  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant/Cross-Claimant, MDB TRUCKING, LLC (“hereinafter referred to as  
4 “MDB”), has brought Cross-Claims<sup>1</sup> against VERSA PRODUCTS COMPANY, INC.  
5 (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 Cross-Claim against VERSA, a true and correct copy is  
12 attached to the Motion as **Exhibit 1**. Plaintiffs were driving westbound on IR80 when a  
13 semi-trailer driven by Daniel Koski and owned by Cross-Claimant MDB spilled gravel on  
14 the freeway, causing multiple automobile accidents and the injuries alleged by the  
15 Plaintiffs. MDB’s contribution claim is based on its allegation that the inadvertent gravel  
16 dump was due to an alleged “defect” with the VERSA valve on the subject trailer.

17 MDB settled the underlying personal injury lawsuits and is now seeking  
18 contribution from VERSA. However, in violation of NRCP 16.1(a)(1)(C) and NRCP 26,  
19 MDB never disclosed *any* damages computations, *any* documents and/or evidence to  
20 support those damages computations, nor *any* witnesses that are designated to testify as  
21

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22 <sup>1</sup> There are a total of nine different lawsuits filed by the Plaintiffs. All except for two of the above mentioned  
23 lawsuits have been consolidated for discovery and trial purposes. The remaining two cases, James Bible  
24 (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.

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

28 Plaintiffs in all of the above lawsuits have settled their claims.

1 to those damages. With discovery now closed, VERSA still does not know the amount of  
2 damages MDB is seeking and the evidentiary basis for that amount. Because MDB has  
3 violated NRCP 16.1(a)(1)(C) and NRCP 26, VERSA is entitled to summary judgment as a  
4 matter of law.

5 In its Opposition, MDB argues that it did not have the duty to provide its  
6 computations of damages in support of their claimed damages or designated witnesses to  
7 testify regarding its claimed damages. MDB basis this argument on the fact that,  
8 generally, VERSA was aware of the amount of the settlement reached between MDB and  
9 Plaintiffs because they also attended the mediation. However, this argument flies in the  
10 face of the disclosure requirements pursuant to NRCP 16.1, as well as the Nevada  
11 Supreme Court binding decision in Pizarro-Ortega.

## 12 II. LEGAL ARGUMENT

### 13 A. MDB Still Has the Burden of Proof Regarding its Alleged Damages

14 The burden of proof production and persuasion in this matter is on the Plaintiff.  
15 See, Doud v. Las Vegas Hilton Corp., 864 P.2d 796 (Nev. 1993). Plaintiff cannot rely on  
16 supposition, conjecture, or surmise. See, Murphy v. S. Pac. Co., 101 P. 322 (Nev. 1909).  
17 It is the Plaintiff and not Defendants, upon whom the duty rests to use diligence at every  
18 stage of the proceeding to expedite his case to a final determination. See, Thran v. First  
19 Judicial Dist. Court, 380 P.2d 297 (Nev. 1963). “The general rule is that an attorney’s  
20 neglect will be imputed to his client and he is held responsible for it.” Valente v. First W.  
21 Sav. & Loan, 528 P.2d 699 (1974), relying upon Link v. Wabash R.R. Co., 370 U.S. 626,  
22 634 (1962); Spring v. Texas Butadiene & Chem. Corp., 434 F.2d 677 (3d Cir. 1970), cert  
23 denied, 404 U.S. 854 (1971).

#### 24 1. MDB Had a Duty To Timely Disclose Any Damages Documents 25 and/or Witnesses Pursuant to NRCP 16.1 and NRCP 26(b)(1)

26 In its Opposition, MDB argues that the Court should ignore all of the well-reasoned  
27 discovery requirements pursuant to NRCP 26(b)(1) and NRCP 16.1, because “VERSA  
28 has had full possession of MDB’s damages evidence at all times.” See, MDB’s

1 Opposition, Page 6, Lines 25-26. At the same time, MDB is arguing that it could not  
2 disclose its settlement agreement and material settlement and payment terms because of  
3 the “Confidentiality/Non-Disclosure” provisions in the settlement. Id. at Page 4, Lines 24-  
4 25. Further, MDB argues that Scott Palmer was designated to talk about damages it  
5 suffered. Each of these arguments is meritless. MDB had a duty to timely provide three  
6 areas of damages documents:

- 7 1. Computations of it’s damages (which includes the amount of settlement(s)  
8 paid, any attorneys fees and costs, interest and/or any other monetary  
9 damages) it will seek to recover at trial;
- 10 2. Foundational documents to support these alleged damages computations  
11 (invoices, settlement documents, settlement check(s), redacted attorneys  
12 billing sheets, etc.); and
- 13 3. Foundational witnesses to discuss these damages.

14 MDB failed to provide *any* of the above and it offers no reasonable excuse as to  
15 why. MDB does not assert that its failures were as a result of an inadvertent mistake.  
16 Instead, it simply “doubles-down” by mistakenly arguing that it never had a duty to  
17 produce any of it’s damages documents, witnesses or evidence. This is simply not true.

18 i. **MDB Had a Duty to Produce Its Complete Damages Computations**

19 In support of it’s Opposition, MDB cites a non-binding California case, Maharaj v.  
20 California Bank & Trust, 228 F.R.D. 458 (E.D. Cal. 2013) for the premise that if the  
21 damages information is generally known, the parties do not have to produce the  
22 computations. This, of course, is absolutely inapplicable in Nevada, which has specific  
23 rules of civil procedure, codified pursuant to NRCP 26 and NRCP 16.1 that absolutely  
24 requires these disclosures.

25 The Maharaj case involved a Plaintiff who was seeking the value of his hourly  
26 wages and benefits from the Defendant, *while he was still employed* by that Defendant. In  
27 essence, Defendant, California Bank & Trust, would have had all of the exhibits,  
28 witnesses and documents to support Plaintiff’s claims and therefore the Court did not find

1 any prejudice to the Defendant. However, this is clearly not the case here. VERSA does  
2 not have any documents to support MDB's damages; has never deposed anyone at MDB  
3 regarding any damages; does not have access to MDB's attorney's fees and costs and  
4 any other damages it intends to seek at trial.

5 In fact, the Court does not have out-of-state direction on how to approach  
6 damages disclosures in Nevada. The Nevada Supreme Court recently clarified that  
7 NRCP 16.1(a)(1)(C) requires *full computations of all damages* that Plaintiff intends to  
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1     **III.     CONCLUSION**

2             Based on the foregoing, VERSA respectfully requests that the Court grants  
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5                             **AFFIRMATION**

6             Pursuant to NRS 239B.030, the undersigned hereby affirms that this document  
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8             DATED this 28<sup>th</sup> day of September, 2017

9   Respectfully Submitted,

10    LEWIS BRISBOIS BISGAARD & SMITH LLP

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13                             By             /s/ Josh Cole Aicklen  
14   JOSH COLE AICKLEN  
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16 Attorneys for Cross-Claimant  
17 MDB Trucking, LLC

18 **SECOND JUDICIAL DISTRICT COURT**

19 **WASHOE COUNTY, NEVADA**

20 ERNEST BRUCE FITZSIMMONS and  
21 CAROL FITZSIMMONS, Husband and  
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23 Plaintiffs,

24 vs.

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

27 Defendants.  
28

AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

**CROSS-CLAIMANT MDB TRUCKING,  
LLC'S SUPPLEMENTAL BRIEF IN  
OPPOSITION TO CROSS-DEFENDANT  
VERSA PRODUCTS COMPANY, INC.'S  
MOTION TO STRIKE CROSS-CLAIM  
PURSUANT TO NRCP 35 [SIC]; OR IN  
THE ALTERNATIVE, FOR AN  
ADVERSE JURY INSTRUCTION**

Date of Hearing: October 13, 2017

Time of Hearing: 9:00 a.m.

Cross-Claimant, 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 submits its Supplemental Brief to its Opposition to Versa  
Products Company, Inc.'s ("Versa") Motion to Strike Cross-Claim Pursuant to NRCP 35 [sic];

1 or in the Alternative, for an Adverse Instruction (“Supplemental Brief” and “Motion for  
2 Spoliation Sanction,” respectively).

3 The original briefing for the instant matter was submitted in June, 2017. Thereafter, the  
4 Court heard oral argument from the parties on August 29, 2017 and issued an Order dated  
5 September 22, 2017 in which it found “there would be some sanction levied on MDB for their  
6 discovery abuse: the actual sanction was not determined.” See Court’s Order at 5:3. The  
7 Court’s Order further stated, “Each party will be familiar with *Young, supra, Nevada Power,*  
8 *supra*, and their progeny and present witnesses in support of their respective positions.” *Id.* at  
9 5:10. As the Court’s Order stated the foregoing findings without discussion of the Supreme  
10 Court’s holding in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), in the interest of  
11 completeness of the record, MDB respectfully submits this Supplemental Brief for the Court’s  
12 consideration in issuing its final Order.<sup>1</sup>

13  
14  
15 Dated this 12th day of October, 2017.

16  
17 **CLARK HILL PLLC**

18  
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<sup>1</sup> MDB notes, in submitting the instant Supplemental Brief, that Versa also supplemented its prior briefing earlier this week in conjunction with its Opposition to MDB’s Motion to Strike Answer, Enter Judgment on a Claim for Contribution, and Award Attorneys’ Fees and Costs, and MDB believes both arguments are ripe for consideration.

I.

**INTRODUCTION**

The Nevada Supreme Court has previously held that it is an abuse of discretion for a district court not to consider the case of *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006) when imposing sanctions under NRCP 37(b)(2) based on an allegation of spoliation.<sup>2</sup> The Court found that while a case-ending discovery sanction based on spoliation may be permitted under NRCP 37(b)(2), “the district court’s discretion is tempered by that statute’s requirement that the imposition of sanctions be ‘just.’”<sup>3</sup> The Court reasoned, “Therefore, our spoliation of evidence jurisprudence must be considered when imposing sanctions under NRCP 37(b)(2) for that reason.”<sup>4</sup> The Court ultimately entered a rare order granting a petition for writ of mandamus, concluding that the case-ending sanction recommended by the discovery commissioner and approved by the district court, which was intended to deter the offending party and similarly situated parties from similar future conduct (one of the enumerated factors from *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990)), “fails to recognize the limitations on the degree of sanctions to be imposed for negligent or willful spoliation of evidence under *Bass-Davis*.”<sup>5</sup>

In the case at bar, the evidence argued in prior briefings and expected to be presented at the evidentiary hearing unquestionably show that: (1) MDB’s routine maintenance of the

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<sup>2</sup> See *Wal-Mart Stores, Inc., et al. v. Eighth Judicial District Court, et al.*, Order Granting Petition for Writ of Mandamus, Supreme Court Case No. 48488, at \*3 (2008) (subsequently decided as moot following settlement of the real parties in interest). Effective October 1, 2017, the Nevada Supreme Court’s amendment of Rule 36 of the Nevada Rules of Appellate Procedure in ADKT No. 0504, filed September 12, 2017, allows citation to unpublished Supreme Court cases for persuasive value.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*4 (emphasis added).

1 tractor/trailer combination at issue, both before and after the subject accident on July 7, 2014,  
2 did not result in the destruction of relevant evidence, and (2) to the extent the Court finds the  
3 limited number of items replaced pursuant to MDB's routine maintenance were relevant, no  
4 conduct of MDB rises above, at the most, a mere negligent failure to preserve evidence.  
5 Applying the holding in *Bass-Davis* to the facts of the instant case, then, the only appropriate  
6 sanction MDB should face, if any, is an adverse inference jury instruction.  
7

## 8 II.

### 9 ARGUMENT

#### 10 A. MDB Was Not Obligated to Preserve the Irrelevant Tractor/Trailer Component 11 Parts at Issue Following Routine Maintenance.

12 “[W]hen presented with a spoliation allegation, the threshold question should be whether  
13 the alleged spoliator was under any obligation to preserve the missing or destroyed evidence.”<sup>6</sup>  
14 The Court in *Bass-Davis* has held that, pre-litigation, the duty to preserve evidence arises once a  
15 party is on notice of a potential legal claim.<sup>7</sup> *Id.* The Court explained “notice” as follows:  
16

17 Even where an action has not been commenced and there is only a  
18 potential for litigation, the litigant is under a duty to preserve  
19 evidence which it knows or reasonably should know is relevant to  
20 the action.<sup>8</sup>

21 MDB submits that there was no evidence lost or destroyed which it knew, or reasonably should  
22 have known was in any way relevant to the instant products liability claim.

23 Versa contends that MDB knew, or reasonably should have known, that it had a duty to  
24 preserve the entirety of the subject truck and trailers from the date of the subject incident on  
25 July 7, 2014, until the date on which Versa actually inspected the subject truck and trailers,  
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28 <sup>6</sup> *Bass-Davis*, 122 Nev. at 450, 134 P.3d at 108.

<sup>7</sup> *Id.*

<sup>8</sup> *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) (emphasis added).

1 more than two years later, October 13, 2016.<sup>9</sup> Versa, however, cites no legal authority for the  
2 proposition that a commercial trucking company must park the very commodities upon which it  
3 relies for an indeterminate amount of time or risk a finding of spoliation of evidence. Indeed,  
4 Versa displayed no sense of urgency to inspect the subject truck and trailers because it knew  
5 their continued operation had no material impact on relevant evidence regarding the actual issue  
6 before this Court, the uncommanded activation of the Versa valve.  
7

8 Versa next contends that MDB “actively destroyed evidence by removing and trashing  
9 components involved with how the subject valve operates.”<sup>10</sup> This is patently false, and Versa  
10 has produced no evidence in support of this inflammatory claim. MDB does not dispute, and  
11 never has, that it performed routine maintenance on the subject truck and trailers as part of its  
12 normal business operations after the subject incident on July 7, 2014. The maintenance Versa  
13 alleges constitutes spoliation is as follows: (1) tightened the screws on the four way plug of the  
14 tractor trailer and tested it (12/18/2014); (2) replaced the four way plug and reattached wires  
15 that were pulled out on the tractor trailer and tested it (12/2/2015); and (3) replaced a four way  
16 socket on trailer #6773 (not the subject trailer) (12/18/2014).<sup>11</sup> This is the extent of the  
17 purported spoliation. None of this routine maintenance involved the subject trailer or the Versa  
18 valve contained thereon, which is the subject of the instant litigation. And, more significantly,  
19 it has been and remains the position of MDB’s experts that any routine maintenance would have  
20 no impact on the subject Versa valve because the configuration of the wiring and switching  
21 created after the errant dumps in July, 2013, eliminated any chance that the electrical system on  
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27 <sup>9</sup> See Motion to Strike at 15:4-12.

28 <sup>10</sup> See Motion to Strike at 15:6-7.

<sup>11</sup> See Motion to Strike at 7:12-21; 8:19-22; and 9:5-21.

1 the subject truck could inadvertently activate the Versa valve. And Versa has provided no  
2 evidence to dispute this fact.

3 As no relevant evidence was lost or destroyed, which MDB knew or reasonably should  
4 have known was in any way relevant to the underlying strict product liability claim involving  
5 the Versa valve, the Court's examination of the evidence should conclude with a finding that no  
6 spoliation occurred and no sanction is warranted.

7  
8 **B. If the Court Finds MDB Was Obligated To Preserve the Few Tractor/Trailer**  
9 **Component Parts in Question, MDB's Was Merely Negligent for Not Doing So.**

10 In the event, however, that this Court finds the above-referenced routine maintenance  
11 constitutes a violation of MDB's duty to preserve evidence, the next issue for this Court's  
12 consideration is whether the failure to preserve the plug, socket, and few wires in question was  
13 willful or merely negligent. The Nevada Supreme Court explained the distinction in *Bass-Davis*  
14 as follows:  
15

16 In considering the issue of lost evidence, we necessarily revisit our  
17 1997 decision in *Reingold v. Wet 'n Wild Nevada, Inc.* (Footnote  
18 omitted). In that case, we determined that the district court should  
19 have given a jury instruction allowing an adverse inference for lost  
20 evidence, as relevant evidence was spoliated when Wet'n Wild  
21 followed its policy of routinely destroying records each season. We  
22 further concluded that Wet'n Wild's evidence destruction was  
23 "willful" as defined by NRS 47.250(3), thus creating a rebuttable  
24 presumption that the evidence "would be adverse if produced."  
25 (Footnote omitted).

26 Given that *Reingold* seemingly embraced both an inference created  
27 by evidence not produced and a rebuttable presumption for  
28 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.<sup>12</sup>

Under any fair reading, then, of the holding in *Bass-Davis*, the only appropriate sanction for MDB's failure to preserve the plug, socket and few wires in question would be an adverse inference jury instruction. At no time did Versa proffer evidence linking the routine maintenance actions of MDB's employees with any intent to harm Versa's case. No such evidence exists. On the contrary, the evidence already in the record, as well as that expected to be adduced at the evidentiary hearing, clearly shows that MDB's failure to preserve the few tractor/trailer component parts in question, while unfortunate and possibly negligent, offers no basis for the Court to conclude that the actions of MDB's employees were undertaken in a deliberate attempt to harm Versa's case.

As the degree of sanctions to be imposed for negligent or willful spoliation of evidence are limited under *Bass-Davis*, and the evidence in the instant case at most would point to the mere negligence of MDB, any sanction with a greater burden than an adverse inference and certainly any sanction based solely on one or more of the *Young v. Ribeiro* factors used to determine permissible sanctions under NRCP 37(b)(2), if entered by the Court, would be an abuse of the Court's discretion.

### III.

## CONCLUSION

For the foregoing reasons, MDB respectfully requests the Court deny Versa's request to strike MDB's cross-claim on the grounds of spoliation, and deny any alternative request for an adverse jury instruction, on the grounds that the tractor/trailer component parts MDB failed to

<sup>12</sup> 122 Nev. at 445, 134 P.3d at 105 (emphasis added).

1 preserve during routine maintenance were irrelevant. In the alternative, if the Court determines  
2 the tractor/trailer component parts MDB failed to preserve were relevant, MDB respectfully  
3 requests the Court apply the holding in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103  
4 (2006), and limit the sanction imposed to an adverse inference jury instruction.  
5

6 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

9 Dated this 12<sup>th</sup> day of October, 2017.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on this 11<sup>th</sup> day of October, 2017, I served a true and correct copy of **CROSS-CLAIMANT MDB TRUCKING, LLC'S SUPPLEMENTAL BRIEF IN OPPOSITION TO CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC'S MOTION TO STRIKE CROSS-CLAIM PURSUANT TO NRCP 35 [SIC]; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION** via electronic means, by operation of the Court's electronic filing system upon each party in this case who is registered as an electronic case filing user with the Clerk, or by U.S. Mail, postage prepaid thereon, to:

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