

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 08:48 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

JOINT APPENDIX VOLUME 15 OF 18

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JAMES BIBLE,

Plaintiff,

Case No. CV16-01914

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 COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

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

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

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and GENEVA M. REMMERDE
3 v. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde Action”). The instant action was
4 filed on September 20, 2016. The Remmerde Action was filed May 2, 2016. It is alleged in all three
5 actions that on July 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for
6 MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving
7 plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three
8 separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents.
9 In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT
10 (“the MDB Cross-Claim”) September 20, 2016. The MDB Cross-Claim had two causes of action
11 relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not Koski’s
12 negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
13 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
14 Cross-Claim, 4:3-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the
15 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
16 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
17 the trailer.” The MDB Cross-Claim, 4:6-8. MDB also claims there were safer alternatives available
18 to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide
19 appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:12-15.

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

26 ² Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS CROSS-
27 CLAIMANT MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO
28 NRCP 12(B)(5) (“the MTD”) on September 21, 2016. A Stipulation was filed on November 23, 2016, agreeing to
dismiss MDB’s Cross-Claim for Implied Indemnity. The only remaining cause of action alleged by MDB against Versa
is for Contribution.

1 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of
2 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
3 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
4 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
5 Motion.³

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

11 DATED this 22 day of January, 2018.

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14 ELLIOTT A. SATTLER
District Judge

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

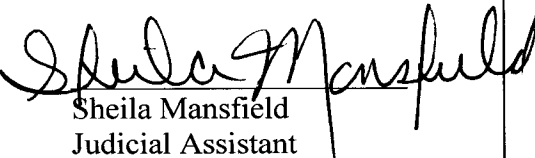
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4 **CERTIFICATE OF MAILING**

5 Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court
6 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
7 the County mailing system for postage and mailing with the United States Postal Service in Reno,
8 Nevada, a true copy of the attached document addressed to:
9
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12

13 **CERTIFICATE OF ELECTRONIC SERVICE**

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
17 of electronic filing to the following:
18

19 MATTHEW ADDISON, ESQ.
20 JOSH AICKLEN, ESQ.
21 KATHERINE PARKS, ESQ.
22 BRIAN BROWN, ESQ.
23 THIERRY BARKLEY, ESQ.
24 SARAH QUIGLEY, ESQ.
25 JESSICA WOELFEL, ESQ.
26 JACOB BUNDICK, ESQ.
27 NICHOLAS M. WIECZOREK, ESQ.
28


Sheila Mansfield
Judicial Assistant

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EXHIBIT “A”

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 *I. Willfulness*

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

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

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

24 *II. The possibility of a lesser sanction*

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

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

17
18 ⁵ At oral argument counsel for MDB stated:

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

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

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

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

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

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

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

27 A: I have seen that, yes.

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

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

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

13 IV. Whether evidence is irreparably lost

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

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

17 The Court discussed the possibility of less severe sanctions in section II. The same analysis
18 applies here. There does not appear to be any sanction short of case concluding sanctions which
19 would be appropriate under the circumstances of this case. The Court also acknowledges that
20 progressive sanctions are not always necessary. The circumstances presented in the Motion are
21 unique and the most severe sanction is appropriate.
22
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25 ⁷Q: Is there any scenario under which current from the seven-prong cord having contact with the four-prong cord could
26 open the versa valve?

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

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

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

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

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

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

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

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

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

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

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

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
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16 Attorneys for Cross-Claimant
17 MDB Trucking, LLC

12 **SECOND JUDICIAL DISTRICT COURT**

13 **WASHOE COUNTY, NEVADA**

14 ERNEST BRUCE FITZSIMMONS and
15 CAROL FITZSIMMONS, Husband and
16 Wife,

17 Plaintiffs,

18 vs.

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

21 Defendants.
22
23
24

25 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
ATTORNEYS' FEES AND COSTS
PURSUANT TO NRCP 37 AND NRCP 68**

25 Cross-Claimant MDB Trucking, LLC ("MDB"), by and through its counsel of record
26 Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and Colleen E. McCarty, Esq. of the
27 law firm of Clark Hill PLLC, hereby files this Opposition to Cross-Defendant Versa Products
28

1 Company, Inc.'s Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68
2 ("Opposition" and "Motion" respectively).

3 This Opposition is made and based on the following Memorandum of Points and
4 Authorities; the pleadings and papers on file herein; and any oral argument the Court may
5 permit at the hearing of this matter.
6

7 Dated this 25th day of January, 2018.

8 CLARK HILL PLLC

9
10 By: Colleen E. McCarty

11 NICHOLAS M. WIECZOREK

12 Nevada Bar No. 6170

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20 Attorneys for Cross-Claimant

21 MDB Trucking, LLC

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I.**

24 **INTRODUCTION**

25 As set forth in greater detail in the Argument, below, further sanctions beyond those set
26 forth in the Court's Order dated December 8, 2017 ("Order"), specifically Versa's request for
27 attorneys' fees and costs, should not be awarded under NRCP 37 because the Court did not find
28 MDB's actions to be intentional. *See GNLV Corp. v. Service Control Corp.*, 111 Nev. 866,
869, 900 P.2d 323, 325 (1995) (further sanctions only appropriate where the court finds willful
noncompliance). Further, no award of attorneys' fees and costs is appropriate under NRCP 68,
where such an award is discretionary and all factors the Court must consider weigh in favor of

1 MDB. *See Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (awarding fees
2 and costs without consideration of four factors is an abuse of discretion).

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

6 **II.**

7 **ARGUMENT**

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

10 Further sanctions against MDB are not warranted pursuant to NRCP 37, where, as here,
11 its failure to retain certain electrical components was in no way willful or intended to harm
12 Versa. This Court already imposed the most severe sanction available to it, case ending
13 sanctions against MDB, based upon its analysis of the factors set forth in *Young v. Johnny*
14 *Ribeiro Building Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). To impose additional punishment in
15 the form of an award of nearly \$300,000.00 in attorneys' fees and costs to Versa, based upon
16 the specific facts and circumstances surrounding MDB's failure to preserve evidence, would be
17 patently unjust. As stated in its Order: "The Court does not find MDB intentionally disposed of
18 the components in order to harm Versa, nor were MDB's employees acting with any
19 malevolence; however, the Court does find MDB is complicit of benign neglect and
20 indifference to the needs of Versa regarding discovery in this action." Order at 8:20-23.
21 "Benign neglect" and "indifference" to Versa's needs, while regrettable, is not the measure of
22 willful noncompliance generally required for the magnitude of further sanctions requested by
23 Versa under NRCP 37. *See e.g. GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900
24 P.2d 323, 325 (1995).

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

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

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

11 Further, the cases Versa cites in support of its Motion are either wholly inapposite or in
12 no way reflective of the facts and circumstances at issue here, where the failure to preserve
13 evidence was in no way an effort to hamper the litigation. For example, in *Skeen v. Valley*
14 *Bank*, 89 Nev. 301, 304, 511 P.2d 1053 (1973), attorney's fees were awarded pursuant to a
15 contractual provision, not as a sanction under NRCP 37. And, in *Skeen, Schatz v. Devitte*, 75
16 Nev. 124, 335 P.2d 783 (1959), and *Foster v. Dingwall*, 227 P.3d 1042, 227 P.3d 1042 (2010),
17 the misconduct sanctioned by the court was intentional, willful and specifically intended to
18 hinder the litigation. As this Court correctly concluded, the MDB employees who disposed of
19 certain electrical components did so in the course of the routine maintenance, and not with any
20 malicious purpose. Accordingly, Versa's request for further sanctions under NRCP 37 should
21 be denied.
22
23

24 **B. Versa May Not Be Awarded Attorneys' Fees and Costs Pursuant to Its Offer of**
25 **Judgment Under NRCP 68.**

26 When an offeree fails to obtain a more favorable judgment than an amount offered
27 pursuant to NRCP 68, an award of attorneys' fees and costs to the offeror is not automatic and
28 is soundly within the discretion of the trial court. See, e.g. *Trustees of Carpenters v. Better*
Bldg. Co., 101 Nev. 742, 746, 710 P.2d 1379, 1382 (1985) (quoting *Beattie v. Thomas*, 99 Nev.

1 579, 668 P.2d 268 (1983), holding that the purpose of NRCP 68 “is not to force plaintiffs
2 unfairly to forego legitimate claims”). Indeed, when considering whether an award of
3 attorneys’ fees and costs should be granted in such instances, Nevada courts must carefully
4 evaluate the four-factor test set forth by the Nevada Supreme Court in *Beattie v. Thomas*, to
5 wit:

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

11 99 Nev. at 588-89, 668 P.2d at 274; *see also Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev.
12 318, 323, 890 P.2d 785, 789 (1995).

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

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

25 117 Nev. at 13-14, 16 P.3d at 429. Utilizing the *Beattie* factors in conjunction with the facts
26 and circumstances here, this Court should deny Versa’s Motion in its entirety.

27 ///

28 ///

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

2 Versa argues, wholly without basis, that the cross-claim for Contribution brought by
3 MDB had no factual or legal support. Motion at 10:19-20. As Versa is well aware, however,
4 this Court reached a different conclusion. After hearing the testimony of five key witnesses at
5 the evidentiary hearing, the Court expressed in its Order: "The Court's decision regarding the
6 issue presented in the Motion is not predicated on who has the "stronger case" or the "better
7 expert" at the evidentiary hearing. If this were the analysis the Court would agree with MDB:
8 Dr. Bosch is a very credible witness and it is likely MDB has the more compelling argument to
9 present to the jury." Order at 11:3-6.
10

11
12 Far from a frivolous suit, as Versa speciously asserts, MDB's cross-claim based on a
13 theory of strict products liability appropriately sought contribution for the defect in the Versa
14 valve which caused the subject truck and trailer to dump its load on the highway. The
15 uncommanded activation of the Versa valve caused the traffic accidents that prompted the
16 underlying personal injury claims, which MDB alone resolved. The testimony of MDB's
17 experts, Dr. David Bosch and Erik Anderson, clearly set forth the only theory for consideration
18 by the trier of fact, i.e. that the Versa valve inadvertently activated when exposed to external
19 electromagnetic fields ("EMF"). Versa's expert, Garrick Mitchell, offered no opinion as to the
20 cause of the subject incident. Transcript at 110:3-5. There simply can be no dispute that MDB
21 brought the cross-claim in good faith and Versa has offered no legitimate argument to the
22 contrary. Accordingly, the first *Beattie* factor weighs solidly in MDB's favor.
23
24

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

27 Versa inexplicably trumpets its service of seven (7) one thousand dollar (\$1,000.00)
28 Offers of Judgment, a total of seven thousand dollars (\$7,000.00), as the basis upon which this
 Court should award it nearly three hundred thousand dollars (\$300,000.00) in attorneys' fees

1 and costs. Motion at 11:12-13. What Versa fails to advise this Court, however, and of which it
2 is well aware, is that its Offers of Judgment amounted to less than one half of one percent
3 (0.005) of the total settlement amount MDB paid to plaintiffs to settle nine,¹ not seven as Versa
4 contends, personal injury matters. And, MDB settled the underlying personal injury cases for
5 significantly less than the total amount of plaintiffs' claims. To argue that Offers of Judgment
6 totaling \$7,000 were reasonable to resolve claims totaling multi-millions of dollars is frankly
7 startling. The \$7,000 total offer could not even compensate MDB for the deposition costs
8 associated with the case, let alone begin to address the personal injury claims of sixteen (16)
9 individuals engaged in nine (9) separate lawsuits.

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

23 Finally, Versa argues that its grossly unreasonable Offers of Judgment were somehow
24 justified because: (1) both Versa's and MDB's experts found no defect in the Versa valve
25 during destructive testing; and (2) MDB destroyed crucial evidence Versa needed to defend its
26 claims. Motion at 11:5-9. Notwithstanding that neither argument addresses the reasonableness
27

28

¹ In addition to the seven cases consolidated in the instant matter, MDB settled *James Bible v. MDB Trucking, LLC et al.*, Case No. CV 16-0914 and *Geneva M. Remmerde v. MDB Trucking, LLC et al.*, Case No. CV16-00976.

1 of the amount or timing of the Offers of Judgment, Versa again provides a wholly self-serving
2 and largely inaccurate account of the facts and circumstances at issue.

3 While it is correct that no mechanical defect was identified during destructive testing,
4 Versa was well aware that MDB's experts identified the defect in the Versa valve as its
5 susceptibility to inadvertent activation when exposed to external EMF. And, while the Court
6 never considered MDB's Emergency Motion to Strike Answer, Enter Judgment on Claim for
7 Contribution, and Award Attorneys' Fees and Costs, filed October 4, 2017, MDB discovered
8 shortly before the evidentiary hearing that Versa willfully suppressed critical evidence and
9 falsely represented the fact that Versa had concerns regarding EMF and tested for it long before
10 MDB's experts offered their opinions. By contrast, this Court concluded that MDB's failure to
11 preserve evidence was the result of routine maintenance of its vehicles and equipment and was
12 not "intended to harm Versa." Order at 9:14.

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

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

18 MDB's rejection of the Offers of Judgment was neither grossly unreasonable nor in bad
19 faith, not only for the reasons stated above, but also based upon MDB's reasonable assessment
20 of the strengths and weaknesses of its case. As this Court recognized, "... Dr. Bosch is a very
21 credible witness and it is likely MDB has the more compelling argument to present to the jury."
22 Order at 11:3-6. Indeed, MDB invested significant resources to identify what caused not one,
23 but two inadvertent activations of the Versa valve with different MDB drivers only minutes
24 apart, on the same day, in the same location, and under the same circumstances. Dr. Bosch and
25 Mr. Anderson, based on significant investigation and testing, opined that the only logical

1 explanation for these inadvertent activations was a defect in the design of the Versa valve
2 which rendered it susceptible to EMF. And, Versa's expert offered no scientific explanation
3 for the failures of the Versa valve. Contrary to Versa's assertions, MDB had ample evidence to
4 support its cross-claim, while Versa provided little by way of defense.
5

6 Given this context, as Versa's combined offers of judgment for \$7,000 amounted to less
7 than one half of one percent (0.005) of the total amount committed by MDB to settle the
8 underlying personal injury claims, MDB not only rejected them, but considered them made in
9 bad faith. Accordingly, MDB's decision to reject Versa's Offers of Judgment was reasonable
10 and the third *Beattie* factor weighs in MDB's favor.
11

12 **4. Versa's Purported Attorneys' Fees and Costs are Grossly Unreasonable and**
13 **Not Justified.**

14 Versa seeks attorneys' fees in the amount of \$228,550.50 and costs in the amount of
15 \$58,773.06, which it claims to have incurred following the service of the combined \$7,000.00
16 Offers of Judgment on May 4, 2017. Motion at 13:13-15. Notwithstanding the grossly
17 unreasonable claim for costs already rebutted in Cross-Claimant MDB Trucking LLC's Motion
18 to Retax and Settle Cross-Defendant Versa Products Company Inc.'s Verified Memorandum of
19 Costs, incorporated herein by reference, Versa's purported attorneys' fees are also
20 unreasonable and not justified.
21

22 MDB does not dispute the significant amount of work performed by Versa's counsel in
23 the instant matter, indeed its counsel expended virtually identical effort. It is, however, because
24 MDB knows the monetary cost of that effort that it challenges the amount requested herein.
25 During the time period at issue, MDB incurred significantly less in attorney fees, more than
26 sixty percent (60%) less than the amount claimed by Versa. And it did so while charging
27 nearly identical rates for its attorneys. Absent some clear explanation as to why Versa incurred
28 so much more in attorneys' fees than MDB for essentially the same services at the same rates,

1 the amounts claimed should be rejected as unreasonable and not justified. Further, even a
2 cursory review of the attorney billing statements provided reveals that Versa improperly
3 attempts to recover fees for legal work which in no way relates to defense of the cross-claim.
4 Motion at Exhibit 3. Accordingly, the fourth and final *Beattie* factor also weighs in MDB's
5 favor and against any award of attorneys' fees and costs to Versa pursuant to NRCP 68.
6

7 **III.**

8 **CONCLUSION**

9 Based upon the above analysis, MDB respectfully requests that the Court deny Versa's
10 Motion and deny costs based upon its separate request to retax costs.
11

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

13 The undersigned does hereby affirm that this document does not contain the social
14 security number of any person.
15

16 Dated this 25th day of January 2018.

17 **CLARK HILL PLLC**

18
19 By: 

20 NICHOLAS M. WIECZOREK

21 Nevada Bar No. 6170

22 JEREMY J. THOMPSON

23 Nevada Bar No. 12503

24 COLLEEN E. MCCARTY

25 Nevada Bar No. 13186

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27 Las Vegas, Nevada 89169

28 Telephone: (702) 862-8300

Attorneys for Cross-Claimant

MDB Trucking, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Clark Hill PLLC, and that on
3 this 25th day of January, 2018, I served a true and correct copy of **CROSS-CLAIMANT**
4 **MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA**
5 **PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS**
6 **PURSUANT TO NRCP 37 AND NRCP 68** via electronic means, by operation of the Court's
7 electronic filing system upon each party in this case who is registered as an electronic case
8 filing user with the Clerk, or by U.S. Mail, postage prepaid thereon, to:
9

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

16 

17 An employee of Clark Hill PLLC
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1 **\$2515**

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16 *Attorneys for Cross-Claimant*

17 *MDB Trucking, LLC*

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

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

22 Plaintiffs,

23 vs.

24 MDB TRUCKING, LLC, et al.,

25 Defendants.

26 AND ALL RELATED CASES.

Case No.: CV15-02349

Dept. No.: 10

[Consolidated Proceeding]

NOTICE OF APPEAL

27 **NOTICE IS HEREBY GIVEN** that Cross-Claimant MDB Trucking, LLC ("MDB"), by
28 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 appeals to the Supreme
Court of Nevada from the Order granting 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

1 Instruction, entered in this action on the 28th day of December, 2017.

2 DATED this 29 day of January, 2018

3
4
5 **CLARK HILL PLLC**

6
7 By: 

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15 Las Vegas, Nevada 89169

16 *Attorneys for Defendant/Cross-Claimant*

17 *MDB Trucking, LLC*

18 **AFFIRMATION**

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

21 DATED this 29 day of January, 2018.

22
23 **CLARK HILL PLLC**

24 By: 

25 NICHOLAS M. WIECZOREK

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Chick

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9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

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

14 Plaintiffs,

15 vs.

16 MDB TRUCKING, LLC, et. al.

17 Defendants.

18 AND ALL RELATED CASES.
19

Case No. CV15-02349

Dept. 10

DEFENDANT/CROSS-DEFENDANT
VERSA PRODUCTS COMPANY, INC.'S
OPPOSITION TO CROSS-CLAIMANT
MDB TRUCKING LLC'S MOTION TO
RETAX COSTS

20
21 COMES NOW, Defendant/Cross-Defendant VERSA PRODUCTS COMPANY,
22 INC., by and through it's attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian,
23 Esq. and Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and
24 hereby opposes MDB TRUCKING, LLC's MDB TRUCKING LLC'S Motion to Retax and
25 Settle Costs.
26
27
28

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

5 DATED this 2nd day of February, 2018

6
7 Respectfully Submitted,

8 LEWIS BRISBOIS BISGAARD & SMITH LLP

9
10
11 By /s/ Josh Cole Aicklen
12 JOSH COLE AICKLEN
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21 VERSA PRODUCTS COMPANY, INC.
22
23
24
25
26
27
28

AFFIDAVIT OF PAIGE S. SHREVE, ESQ. IN SUPPORT OF
DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION TO RETAX
COSTS

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

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

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

3. I am an attorney of record representing Defendant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. in the subject lawsuit currently pending in Department 10 of the Second Judicial District Court for the State of Nevada, Case Number CV15-02349.

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

5. Attached hereto as Exhibit 2 is a true and correct copy of vendor bills and/or credit card statements.

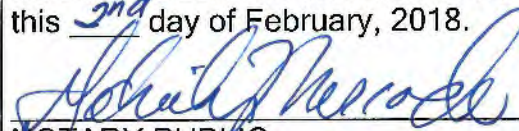
6. Attached hereto as Exhibit 3 is a true and correct copy of MDB's Cross-Claim.

FURTHER AFFIANT SAYETH NAUGHT.

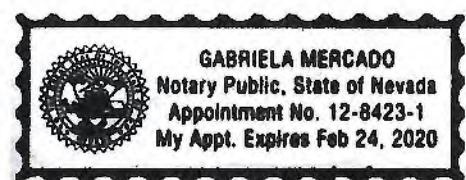


PAIGE S. SHREVE, ESQ.

SUBSCRIBED AND SWORN to before me
this 2nd day of February, 2018.



NOTARY PUBLIC
In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On December 28, 2017, VERSA filed the Notice of Entry of Judgment in this
4 matter. On January 5, 2018, VERSA timely filed its Verified Memorandum of Costs and
5 Disbursements, a true and correct copy of which is attached hereto as Exhibit 1.
6 Thereafter, MDB filed the instant Motion, disputing some of VERSA's costs. MDB
7 mistakenly argues that the Court must reject \$44,565.17 of the \$58,773.06 of VERSA's
8 costs for one of the following reasons: 1) VERSA failed to provide "justifying
9 documentation;" 2) Costs are unrelated to MDB's Cross-claim for contribution; 3) Costs
10 were incurred after the Offer of Judgement; and 4) Costs exceed the amounts permitted
11 by NRS 18.005 and/or are not Taxable Costs. However, MDB's arguments are wholly
12 unsupported. There is simply no requirement, pursuant to NRS 18.110, that VERSA
13 provide justifying documentation, *i.e.*, a disbursement diary and vendor bills, at that time.
14 However, VERSA properly itemized its costs into the various categories, provided a
15 disbursement diary which totals the itemization on the memorandum of costs and
16 provided numerous vendor bills. Id.

17 VERSA had no reason to believe that MDB would oppose the requested costs as
18 they are clearly reasonable and were necessarily incurred in defending MDB's cross-
19 claim. Id. Additionally, VERSA had no reason to believe that a disbursement diary which
20 shows the court fees paid, etc. would not be a sufficient "justifying document" for MDB
21 and that it would require VERSA to provide actual credit card receipts for the same. If
22 MDB did not oppose the costs, VERSA would still be entitled to an award of costs without
23 going through the costly effort of gathering each and every credit card receipt/vendor bills,
24 even for items which are justified in the disbursement diary.

25 However, at MDB's request, VERSA has provided a copy of the vendor bills and/or
26 credit card statements (when available), which mirror each and every entry on the
27 disbursement diary, of which are attached hereto as Exhibit 2. If the Court feels these
28

1 numerous documents are insufficient to establish “justifying documentation,” VERSA will
2 provide gladly provide any additional documentation the Court believes it needs in
3 addition to what was already provided.

4 As such, VERSA is entitled to all of the requested costs as they were reasonable
5 and necessarily incurred in defending MDB’s cross-claims. See, Exhibit 1. As such,
6 VERSA respectfully requests an Order, granting Defendant its costs in the amount of
7 \$58,773.06.

8 II. LEGAL ARGUMENT

9 A. VERSA Provided “Specific Itemization” and “Justifying Documents”
10 Pursuant to NRS 18.110

11 MDB claims that \$16,774.78 of the \$58,773.06 in costs was not specifically
12 itemized or no “justifying documentation” was provided. However, VERSA attached a
13 disbursement diary and additional “justifying documentation,” rendering MDB’s argument
14 moot. None of the case law cited by MDB explicitly requires the justifying documentation
15 to be attached to the Memorandum of Costs and Disbursements. Such a requirement
16 would conflict with NRS 18.110, which only requires that the pleading be verified and
17 state that “the items are correct, and that the costs have been necessarily incurred in the
18 action or proceeding.” See, NRS 18.110. In any event, VERSA has now provided the
19 Court a detailed disbursement diary (Exhibit 1) and each and every vendor bills/credit
20 card receipt (Exhibit 1 & 2), which allows this Court to adjudicate the reasonableness of
21 VERSA’s costs. Therefore, MDB’s argument is without any merit.

22 B. All of VERSA’s Costs Were Related to MDB’s Cross-Claim for Contribution

23 MDB argues that \$2,018.68 of VERSA’s costs were unrelated to MDB’s cross-
24 claim. However, the depositions and medical records MDB cited in its Motion are clearly
25 relevant to MDB’s cross-claim against VERSA. MDB’s cross-claim sought contribution
26 “with respect to any settlement, judgement, awards, or any other type of resolution of
27 claims brought forward by the Plaintiffs in their First Amended Complain. See, MDB’s
28

1 Cross-Claim, a true and correct copy of which is attached hereto as Exhibit 3 at P.5:19-
2 21. As such, any depositions, medical records, etc. that involve the Plaintiffs directly
3 relate to MDB's cross-claim as it sought contribution from VERSA for all of Plaintiff
4 claimed damages and any amount paid in settlement. Additionally, VERSA's attendance
5 at such depositions directly relate to MDB's cross-claims as VERSA had every right to
6 question the Plaintiffs' regarding how the subject incident occurred to see if they had
7 knowledge of anything regarding the truck and trailer that could have assisted in in
8 VERSA's defense. Therefore, all of these costs are clearly awardable.

9 C. VERSA is Entitled to All Costs as the Prevailing Party Pursuant to NRS
10 18.020 and NRS 18.005

11 MDB mistakenly argues that the Court must reject \$10,541.36 in costs because
12 the documentation clearly demonstrates the costs were incurred after the Offer of
13 Judgment. However, this argument is irrelevant as VERSA is entitled to an award of its
14 costs pursuant to NRS 18.020 as the prevailing party¹. NRS 18.020 states in relevant
15 part as follows:

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

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

20 See, NRS 18.020 (emphasis added).

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

- 23 2. Reporters' fees for depositions, including a reporter's fee for one
24 copy of each deposition.

25 * * *

- 26 5. Reasonable fees of not more than five expert witnesses in an
27 amount of not more than \$1,500 for each witness, unless the court

28 ¹ This is also indicated on VERSA's Verified Memorandum of Costs. See, Exhibit 1 at P. 1:25.

allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

* * *

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

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

MDB's alleges it suffered damages in excess of \$10,000.00. Thus, its action falls under NRS 18.020(3). The use of the word "must" in NRS 18.020 makes an award of VERSA's costs as outlined in NRS 18.050 (as the prevailing party) mandatory, rather than discretionary.

VERSA prevailed against MDB on its Motion to Strike MDB's Cross-Claim, thus requiring MDB to pay VERSA's costs. The statute makes no mention that the costs in which the prevailing party is allowed is only applicable after an Offer of Judgement is served. VERSA's costs are itemized (with supporting documentation) in the Verified Memorandum of Costs. See, Exhibits 1 and 2. As such, these costs are awardable following judgment in this action.

D. VERSA's Expert Fees are Reasonable and Have Met the Requirements Under the Frazier Decision

MDB claims that VERSA's expert witness costs are excessive. Inexplicably, MDB does not argue each of the Frazier v. Drake, 131 Nev. Adv. Op. 64, 357 P.3d 365, 377-78 (Nev. App. 2015) but does argue five of them².

The amount of a cost award and which costs are awarded to a prevailing party is left to the sound discretion of the District Court. See, Bergman adv. Boyce, 109 Nev. 670, 679 (1993) ("The determination of which expenses are allowable as costs is within the sound discretion of the trial court."). A prevailing party is entitled to recover the cost of expert witnesses up to \$1,500 for each of five expert witnesses. See, NRS 18.005(5)

² VERSA will only argue the five Frazier factors MDB discusses in its Motions since those are the only factors MDB raises in its Motion.

1 ("Reasonable fees of not more than five expert witnesses in an amount of not more than
2 \$1,500 for each witness."). The District Court, however, has the discretion to award
3 expert costs in excess of \$1,500 per expert witness if the circumstances of the particular
4 case necessitated more expert costs. NRS 18.005(5) ("...unless the court allows a larger
5 fee after determining that the circumstances surrounding the expert's testimony were of
6 such necessity as to require the larger fee."); Arnold v. Mt. Wheeler Power Company, 101
7 Nev. 612, 615 (1985) ("The amount of expert witness fees in each case is a matter within
8 the sound discretion of the trial judge . . ."). The District Court should analyze the
9 reasonableness and necessity of the requested excess expert fees when exercising its
10 discretion. See, Arnold, 101 Nev. at 615 ("The record reveals that the district court heard
11 argument on the reasonableness and necessity of the expert testimony and considered
12 these factors in ruling on the motion for excess fees. The Court, in its decision, found Mr.
13 Arnold's argument lacked sufficient support and denied the motion. This was not an
14 abuse of the court's discretion."). A Court should also consider the particular
15 circumstances of the case in which the alleged excess expert costs are requested. See,
16 Gilman v. Nevada State Board of Veterinary Medical Examiners, 120 Nev. 263, 272-73
17 (2004) ("NRS 18.005(5) limits the recovery of costs for expert witnesses to \$1,500 unless
18 the district court determines that the circumstances warrant a larger fee."). It is proper for
19 the Court to analyze whether the necessity of the expert justified the claimed costs of that
20 expert. Id. at 273 ("supported by a determination that the necessity of the expert's
21 testimony justified the fee.").

22 VERSA is requesting the following reasonable and necessary expert costs, as
23 detailed in its cost itemization attached to its Verified Memorandum of Costs. VERSA
24 seeks to recover its expert witness costs reasonably and actually incurred as follows:

25	a) Garrick Mitchell, M.S., P.E.	\$13,706.49
26	TOTAL	<u>\$13,706.49</u>

1 1. Mr. Mitchell's Importance to the Case

2 MDB first argues that Mr. Mitchell's report and evidentiary hearing testimony was
3 not useful because he was unable to determine the cause of the subject incident. Mr.
4 Mitchell prepared for and successfully testified at the evidentiary hearing in support of
5 VERSA's Motion to Strike MDB's Cross-Claim due to MDB's spoliation of critical
6 evidence. Mr. Mitchell's services were necessary given the complexity of the valve and
7 truck components. Indeed, Mr. Mitchell's services were crucial to the case, as the only
8 issues in the cross-claim were whether the VERSA valve was defective, and what the
9 cause of the dump was. Critically, Mr. Mitchell determined that the VERSA valve was not
10 defective. It simply was not VERSA's burden to prove what exactly caused the subject
11 incident that was MDB's burden. Mr. Mitchell was tasked with determining whether the
12 VERSA valve was defective and after numerous inspections and testing on the evidence
13 that was not spoliated, he opined that there was no mechanical or design defect with the
14 VERSA valve. Additionally, the Court clearly disagreed with MDB's argument that Mr.
15 Mitchell's evidentiary hearing testimony was not useful because the Court relied on his
16 testimony, in part, for its decision to strike MDB's Cross-Claim for spoliation of critical
17 evidence.

18 2. Mr. Mitchell's Expert's Opinion Aided the Trier of Fact in Deciding the Case and
19 Did Not Parrot the Testimony of MDB's Expert.

20 MDB mistakenly argues that Mr. Mitchell's expert opinions do not aid the trier of
21 fact because he offered no scientific explanation for the subject incident. However, as
22 discussed above, VERSA does not have the burden of proof to explain the subject
23 incident. Mr. Mitchell's task was to determine if there was a mechanical or design defect
24 with the VERSA valve. After numerous inspections and testing, Mr. Mitchell determined
25 there was no defect with the VERSA valve. While MDB argues that Mr. Mitchell's
26 opinions parrot the testimony of MDB's expert, (Dr. Bosch), VERSA is entitled to its own
27 expert. The fact that both experts determined that there was no defect with the subject
28

1 valve is not Mr. Mitchell parroting Dr. Bosch. Rather, this is evidence that MDB's own
2 expert disagreed with their position in the case and cross-claim against VERSA.

3 3. Mr. Mitchell Did Conduct Independent Investigations and Testing of the VERSA
4 Valve

5 VERSA is perplexed by MDB's argument that Mr. Mitchell conducted no
6 independent testing the VERSA valve, and merely observed the testing performed by
7 MDB's expert as MDB's expert and its counsel were present at all the inspections. They
8 observed Mr. Mitchell, as well as every other expert present, conduct their own
9 independent testing. In addition, Mr. Mitchell attended two site inspections in Reno,
10 Nevada prior to the testing in Arizona. The inspections included activating the VERSA
11 valve, taking electrical resistance readings and taking digital photographs. He also
12 personally inspected, photographed and took measurements of the actual VERSA valve
13 during the destructive testing in Arizona and authored multiple expert reports (all
14 concluding that the subject incident was not caused by the VERSA valve). All of Mr.
15 Mitchell's testing and investigation is also outlined in his expert reports. As such, Mr.
16 Mitchell satisfies this Frazier factor, justifying all of his expert costs in the amount
17 \$13,706.49.

18 4. Mr. Mitchell has the Knowledge and Expertise to Qualify a Mechanical Expert

19 Garrick Mitchell, M.S., P.E. was retained to offer testimony including, but not
20 limited to, his evaluation of the subject valve, inspection and testing of the subject valve,
21 mechanical analysis, maintenance and any other areas within his expertise. Mr. Mitchell
22 was also retained to offer rebuttal testimony as to the expert reports authored by Erik
23 Anderson, PE, CFEI and David Bosch, Ph.D. Mr. Mitchell has both Bachelors and
24 Masters Degrees in Mechanical Engineering, and is a Registered Professional Engineer
25 in Nevada (as well as Arizona, California, Colorado, Idaho, Montana, Nebraska, New
26 Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and Wyoming).

1 While MDB mistakenly argues that Mr. Mitchell does not have the expertise of an
2 electrical engineer, VERSA and Mr. Mitchell never held him out to be an electrical
3 engineer. Further, Mr. Mitchell being a mechanical engineer and not an electrical
4 engineer is completely irrelevant regarding Mr. Mitchell's expertise as a mechanical
5 engineer and his expert opinions in this case.

6 Mr. Mitchell's fees were very reasonable given the time this matter necessitated,
7 his area of expertise and professional qualifications and the multi-million dollar exposure.
8 Simply put, VERSA has satisfied the Frazier factor with regards to Mr. Mitchell's expert
9 fees. Consequently, this Court should award Mr. Mitchell's fees in their entirety.

10 E. All of VERSA's Costs Are Taxable Pursuant to NRS 18.005

11 1. Reporter's Fees for Depositions including Courier Fees and
12 Exhibits

13 Delivery of the deposition, disc fees and exhibit fess are part of the reporter's fee.
14 MDB's arguments are the same when it comes to the collection of reporter's fees
15 pursuant to NRS 18.005(2). The Legislature did not place the same restrictions on
16 specific type of recovery of reporter's fees as MDB suggests. There is nothing about the
17 amount of the fees that is unreasonable and MDB does not argue as much. Reporter
18 costs, which include the delivery and the exhibits which are attached to such depositions
19 are a necessary aspect of litigation and are a reasonable cost to be recovered.
20 Moreover, VERSA was free to litigate the case at trial with the strategy that counsel felt
21 was best. Part of that strategy was using a certified court reporter to transcribe deposition
22 testimony. There is nothing in NRS 18.005(2) that would prohibit the recovery of such a
23 cost. Therefore, all of the requested Reporter's Fees in the amount of \$2,000 are
24 awardable pursuant to NRS 18.005.

25 2. Duplications and Other Miscellaneous Costs

26 Contrary to MDB's argument that there were duplications in invoices, this is
27 incorrect. If MDB reviewed the invoices attached, they would clarify what the charges are
28

1 for. For the alleged duplicate travel of Paige Shreve to New York on May 7, 2017- May
2 11, 2017, the invoice of \$869.40 was for airfare. The other charge for the same trip of
3 \$513.48 is the Hilton Hotel bill. While they both relate to travel to New York for
4 deposition, they are not duplicative, as one is for airfare only and one is for the hotel only.
5 As for the other alleged duplication regarding CAROL AND ERNEST FITZSIMMONS'
6 deposition transcript of \$510.00, there is no duplication. If MDB reviewed the bottom of
7 the invoice, they would notice that the alleged duplication is in fact the same invoice as
8 indicated on page 1 of 2 and 2 of 2. Additionally, MDB can look to the Disbursement
9 Diary which provides a detailed description, it would notice that \$510.00 was only
10 charged once. Finally, if MDB is to add up all of the costs, it would notice that \$510.00
11 was only charged once.

12 Lastly, regarding the American Legal Services invoice, the invoice indicated that it
13 was an advance fee paid to Anderson Engineering. The \$1,689.38 is the witness fee
14 required by MDB's experts, Mr. Anderson and Dr. Bosch, for their respective depositions.
15 Consequently, these fees are recoverable pursuant to NRS 18.005(4).

16 III. CONCLUSION

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

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

DATED this 2nd day of February, 2018

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

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Las Vegas, Nevada 89118

Attorneys for Defendant/Cross-Defendant

VERSA PRODUCTS COMPANY, INC.

Exhibit List

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Exhibit 1 Verified Memorandum of Costs and Disbursements
Exhibit 2 Vendor bills and/or credit card statements
Exhibit 3 MDB's Cross-Claim

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 20178, a true and correct copy of DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION TO RETAX COSTS was served via the Court's electronic e-filing system as follows:

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DANIEL ANTHONY KOSKI

/s/ Susan Kingsbury

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9

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA
12

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

14 Plaintiffs,

15 vs.

16 MDB TRUCKING, LLC, et. al.

17 Defendants.
18

19 AND ALL RELATED CASES.

Case No. CV15-02349
Dept. 10

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

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

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

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. LEGAL ARGUMENT

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

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

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

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

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

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

1 order to defend the case to the best of its ability.

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

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

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

12 The intent of VERSA's underlying Motion is not to argue the "what if" scenario that
13 could have occurred if MDB had not spoliated critical evidence. Although MDB wishes it
14 could go back in time and change the spoliation, they cannot. As such, this factor is
15 simple - MDB knew prior to adding VERSA as a party in the action that it had destroyed
16 crucial evidence that VERSA needed to prove its defense to the cross-claims (as well as
17 evidence MDB needed to prove its claims). Knowing that it had "left all of the 'cards' in
18 MDB's hands and left VERSA with nothing other than a theory it could neither prove nor
19 disprove," MDB filed a suit against VERSA. See, December 8, 2017, Order granting
20 VERSA's Motion to Strike MDB's Cross-Claim at P. 10:9-10. There is ample evidence
21 that MDB's cross-claims were not brought and maintained in good faith. As such, this
22 factor weighs heavily toward awarding VERSA's attorneys' fees and costs incurred after
23 May 4, 2017, for rejecting VERSA's seven (7) good faith Offers of Judgment.

1 2. VERSA's Offers of Judgment Were Reasonable in Both Time and
2 Amount and Made in Good Faith

3 VERSA served its Offers of Judgment on seven¹ (7) Plaintiffs' cases prior to MDB
4 settling the Plaintiffs' claims and after MDB's PMK's testified that it had destroyed critical
5 evidence that VERSA would need to defend MDB's claims. At the time of the offers of
6 judgment, VERSA was aware that MDB and VERSA's expert found no mechanical or
7 design defect with the subject valve and that MDB's actions prohibited VERSA's ability to
8 adequately defend itself in the subject litigation. As such, VERSA believed (and still
9 believes) that it should not need to offer MDB any money nonetheless the amount it
10 offered. However, VERSA wanted to "buy its peace" to avoid costly litigation and
11 negative publicity. MDB clearly had a different agenda.

12 Lastly, contrary to MDB's opposition, VERSA did meaningfully participate in
13 mediation. In fact, two business days after mediation, VERSA and RMC LAMAR were
14 actually able to get the authority to settle the case that MDB demanded from them during
15 mediation. However, MDB reneged and refused to even discuss settlement.

16 3. MDB's Rejection of VERSA's Reasonable Offers of Judgment was
17 Grossly Unreasonable

18 MDB again attempts to bring up the strengths and weakness of the cases in
19 support of its reasoning for rejecting the offers of judgment. However, MDB's arguments
20 are completely irrelevant, because all of the arguments are based on a "what if" case. It
21 is easy to argue the strengths of any given case in hindsight, when your client spoliated
22 highly relevant evidence. The Court already ruled that MDB's actions prohibited a jury
23 from being able to evaluate VERSA's case because it could not test the actual
24 components on the subject truck and trailer at the time of the subject incident giving MDB

25 _____
26 ¹ Contrary to MDB's Opposition, only seven Plaintiffs' cases are discussed in this motion as those are the
27 only cases that have been consolidated into the Fitzsimmons matter. The other two cases MDB references
28 (Remmerde and Bible) VERSA will file Motions for Attorney's Fees and Costs as they are separate cases
and will not be discussed in this reply.

1 an unfair advantage in the litigation. As such, MDB's rejection was grossly unreasonable
2 because it was aware prior to filing suit against VERSA that its actions would have
3 consequences, including getting its cross-claim stricken. Consequently, this factor
4 strongly favors awarding VERSA all of its requested attorney's fees and costs.

5 4. VERSA's Attorney's Fees and Costs Following the Offers of Judgment
6 are Reasonable and Justified in Amount

7 However much time MDB decided to spend litigating their case is completely their
8 choice, but that does not mean VERSA's fees are unreasonable². MDB's attorney's fees
9 are not at issue before the Court and are irrelevant to the instant motion. As the Court is
10 well aware from the numerous Motions that have been filed, VERSA's defense team
11 spent hundreds of hours litigating this high exposure case. The factual and legal issues
12 in this matter were intricate, including: analyzing MDB's maintenance records; the scope
13 of admissibility of MDB's many experts; the destruction of crucial evidence; and the
14 evaluation of legal authority and documents to refute MDB's product liability claims
15 against VERSA.

16 The amount of VERSA's attorney's fees and costs are reasonable given MDB's
17 questionable legal position and destruction of critical evidence. VERSA is entitled to an
18 award of its attorney's fees and costs after May 4, 2017 through the present (and costs
19 from the case inception to the present as the prevailing party). Consequently, Defendant
20 seeks an award of \$228,500.50 in attorney's fees and \$58,773.06 in costs, totaling
21 \$287,273.56. See, Exhibits 1, 2, 3 and 4.

22 II. CONCLUSION

23 For the foregoing reasons, VERSA requests an award of its reasonable attorney's
24 fees and costs totaling \$287,273.56 (\$228,500.50 in attorney's fees and \$58,773.06 in
25

26 ² It is likely MDB did not include the attorney's fees incurred by its previous counsel when it alleges that it
27 spend (60%) less than the amount claimed by VERSA. Additionally, if MDB wants to produce its attorney's
28 bills, VERSA will gladly explain the difference between the bills. In any event, MDB's attorney's fees and
costs are not relevant to the underlying motion.

1 costs) pursuant to NRCP 37 and NRCP 68. Furthermore, VERSA requests that this
2 Court award the attorney's fees and costs incurred in bringing the instant Motion. VERSA
3 will supplement the briefing with an affidavit regarding these additional fees and
4 expenses.

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 5th day of February, 2018

9 Respectfully Submitted,

10 LEWIS BRISBOIS BISGAARD & SMITH LLP
11
12

13 By /s/ Josh Cole Aicklen

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9 PRODUCTS COMPANY, INC.

10
11 DISTRICT COURT
12 WASHOE COUNTY, NEVADA

13 JAMES BIBLE,
14 Plaintiff,
15 vs.
16 MDB TRUCKING, LLC, et. al.
17 Defendants.
18 AND ALL RELATED CASES.

Case No. CV16-01914
Dept. 10
NOTICE OF ENTRY

21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

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

4 **AFFIRMATION**

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

7 DATED this 8th day of February, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP
10
11

12 By /s/ Josh Cole Aicklen

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

Exhibit 1 Order

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CERTIFICATE OF SERVICE

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

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DANIEL ANTHONY KOSKI

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

EXHIBIT 1

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

JAMES BIBLE,

Plaintiff,

Case No. CV16-01914

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 COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

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

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

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and GENEVA M. REMMERDE
3 v. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde Action”). The instant action was
4 filed on September 20, 2016. The Remmerde Action was filed May 2, 2016. It is alleged in all three
5 actions that on July 7, 2014, Defendant Daniel Anthony Koski (“Koski”), while driving a truck for
6 MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving
7 plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three
8 separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents.
9 In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT
10 (“the MDB Cross-Claim”) September 20, 2016. The MDB Cross-Claim had two causes of action
11 relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not Koski’s
12 negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
13 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
14 Cross-Claim, 4:3-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the
15 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
16 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
17 the trailer.” The MDB Cross-Claim, 4:6-8. MDB also claims there were safer alternatives available
18 to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide
19 appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:12-15.

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

25
26 ² Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS CROSS-
27 CLAIMANT MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO
28 NRCP 12(B)(5) (“the MTD”) on September 21, 2016. A Stipulation was filed on November 23, 2016, agreeing to
dismiss MDB’s Cross-Claim for Implied Indemnity. The only remaining cause of action alleged by MDB against Versa
is for Contribution.

1 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of
2 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
3 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
4 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
5 Motion.³

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

11 DATED this 22 day of January, 2018.

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

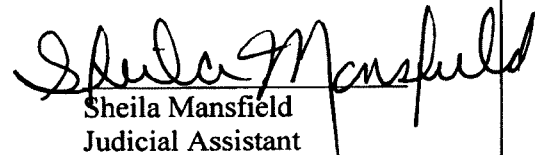
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4 **CERTIFICATE OF MAILING**

5 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
6 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
7 the County mailing system for postage and mailing with the United States Postal Service in Reno,
8 Nevada, a true copy of the attached document addressed to:
9
10
11
12

13 **CERTIFICATE OF ELECTRONIC SERVICE**

14 I hereby certify that I am an employee of the Second Judicial District Court of the State of
15 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
16 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
17 of electronic filing to the following:
18

19 MATTHEW ADDISON, ESQ.
20 JOSH AICKLEN, ESQ.
21 KATHERINE PARKS, ESQ.
22 BRIAN BROWN, ESQ.
23 THIERRY BARKLEY, ESQ.
24 SARAH QUIGLEY, ESQ.
25 JESSICA WOELFEL, ESQ.
26 JACOB BUNDICK, ESQ.
27 NICHOLAS M. WIECZOREK, ESQ.
28


Sheila Mansfield
Judicial Assistant

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EXHIBIT "A"

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 *I. Willfulness*

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

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

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

24 II. The possibility of a lesser sanction

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

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

17
18 ⁵ At oral argument counsel for MDB stated:

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

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

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

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

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

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

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

27 A: I have seen that, yes.

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

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

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

13 IV. Whether evidence is irreparably lost

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

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

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

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

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

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

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VI. The policy favoring adjudication on the merits; and

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

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

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

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

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

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

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

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

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS WIECZOREK, ESQ.


Sheila Mansfield
Judicial Assistant

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4 PAIGE S. SHREVE
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LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

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

Case No. CV16-01914

Dept. 10

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

19
20
21 COMES NOW, Cross-Defendant VERSA PRODUCTS COMPANY, INC., by and
22 through its attorneys of record, Josh Cole Aicklen, Esq., David B. Avakian, Esq. and
23 Paige S. Shreve, Esq., of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby
24 submits its Motion for Attorneys' Fees and Costs Pursuant to NRCP 37 and NRCP 68.

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

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

3 DATED this 9th day of February, 2018.

4 Respectfully Submitted,

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6
7

8 By /s/ Josh Cole Aicklen
9 JOSH COLE AICKLEN
10 Nevada Bar No. 007254
11 DAVID B. AVAKIAN
12 Nevada Bar No. 009502
13 PAIGE S. SHREVE
14 Nevada Bar No. 013773
15 6385 S. Rainbow Boulevard, Suite 600
16 Las Vegas, Nevada 89118
17 Attorneys for Cross-Defendant VERSA
18 PRODUCTS COMPANY, INC.
19
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1 AFFIDAVIT OF JOSH COLE AICKLEN, ESQ. IN SUPPORT OF
2 CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
3 MOTION FOR ATTORNEYS' FEES, COSTS AND INTEREST PURSUANT TO NRCP 37
4 AND NRCP 68

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

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

8 1. I am an Owner of LEWIS BRISBOIS BISGAARD & SMITH LLP, and am
9 duly licensed to practice law in the State of Nevada. I am competent to testify to the
10 matters set forth in this Affidavit, and will do so if called upon. I am the attorney of record
11 representing Cross-Defendant VERSA PRODUCTS COMPANY, INC. in the subject
12 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
13 State of Nevada, Case Number CV16-01914.

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

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

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

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

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

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

13 5. From May 4, 2017 to the present, VERSA incurred a total of \$724.50 in
14 attorneys' fees and \$1,274.74 in costs defending against MDB's claims. See, Verified
15 Memorandum of Attorneys' Fees and Costs, attached as Exhibit 2; see also, Redacted
16 copies of attorneys' fees and invoices, true and correct copies of which are attached
17 hereto as Exhibit 3.

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

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

24 9. Attached hereto as Exhibit 4 is a true and correct copy of VERSA's Motion
25 to Strike MDB's Cross-Claim pursuant to NRCP 37 (pleading only).

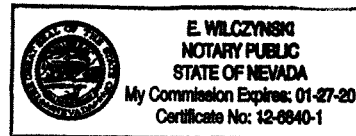
10. Attached hereto as **Exhibit 5** is a true and correct copy of the Notice of Entry of Order Granting VERSA's Motion to Strike MDB's Cross-Claim pursuant to NRCP 37.

FURTHER AFFIANT SAYETH NAUGHT.


JOSH COLE AICKLEN, ESQ.

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

NOTARY PUBLIC
In and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

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

16 II. PROCEDURAL HISTORY

17 MDB first served VERSA with a Cross-Claim on July 7, 2016. Plaintiffs',
18 Defendants' and Third-Party Defendants' conducted discovery over the next several
19 months. On May 4, 2017, VERSA served an Offer of Judgment to MDB for the amount of
20 \$1,000.00. See, Exhibit 1. On May 5, 2017, the parties attended mediation in an attempt
21 to resolve this matter. All the claims were settled with the Plaintiffs. Unfortunately, MDB
22

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

26 In all nine of the above mentioned lawsuits, MDB filed cross-claims/third-party action against VERSA
27 for Indemnity and Contribution. VERSA filed a Motion to Dismiss MDB's Indemnity claim against VERSA in
all nine cases. The Court granted VERSA's Motions to Dismiss the indemnity claims, leaving MDB with a
cross-claim for contribution only against VERSA. All Plaintiffs have settled their personal injury claims.
28

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

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

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

26 III. LEGAL ARGUMENT

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

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

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

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

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

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

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

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

NRCP 68 states, in relevant part:

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

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

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

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

See, NRCP 68 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 25 (1) the qualities of the advocate: his [counsel's] ability, his
26 training, education, experience, professional standing and
27 skill; (2) the character of the work to be done: its difficulty, its
28 intricacy, its importance, time and skill required, the
responsibility imposed and the prominence and character of
the parties where they affect the importance of the litigation;
(3) the work actually performed by the lawyer: the skill, time

1 and attention given to the work; (4) the result: whether the
2 attorney was successful and what benefits were derived.

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

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

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

16 The amount of VERSA's attorneys' fees and costs are reasonable given MDB's
17 questionable legal position and destruction of critical evidence. VERSA is entitled to an
18 award of its attorneys' fees and costs after May 4, 2017, to the present. Consequently,
19 Defendant seeks an award of \$724.50 in attorneys' fees and \$1,274.74 in costs, totaling
20 \$1,999.24 See, Exhibits 1, 2 and 3.

21 III. CONCLUSION

22 For the foregoing reasons, VERSA requests an award of its attorneys' fees and
23 costs totaling \$1,999.24 (\$724.50 in attorneys' fees and \$1,274.74 in costs) pursuant to
24 NRCP 37 and NRCP 68. Furthermore, VERSA requests that this Court award the
25 attorneys' fees and costs incurred in bringing the instant Motion. VERSA will supplement
26 its Reply with an affidavit regarding these additional fees and expenses.

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AFFIRMATION

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

DATED this 9th of February, 2018.

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/Josh Cole Aicklen
JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
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6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

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

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CERTIFICATE OF SERVICE

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

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

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

EXHIBIT 1

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
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LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Defendant/Cross-
Claimant/Cross-Defendant
9 VERSA PRODUCTS COMPANY, INC.

10 DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 JAMES BIBLE,

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC, a Nevada Limited
Liability Company; RMC LAMAR
16 HOLDINGS, INC., a Colorado
Corporation; VERSA PRODUCTS
17 COMPANY, INC. a New Jersey
Corporation; DANIEL ANTHONY KOSKI;
18 ABC CORPORATIONS I-X; BLACK AND
WHITE COMPANIES; XYZ
19 PARTNERSHIPS; and DOES I-X,
inclusive,

20 Defendants.

21 VERSA PRODUCTS COMPANY, INC.,

22 Cross-Claimant,

23 vs.

24 MDB TRUCKING, LLC; DANIEL
25 ANTHONY KOSKI; and DOES I-X,
inclusive,

26 Cross-Defendants.
27
28

Case No. CV16-01914
Dept. 10

DEFENDANT/CROSS-
CLAIMANT/CROSS-DEFENDANT
VERSA PRODUCTS COMPANY, INC.'S
OFFER OF JUDGMENT TO
DEFENDANT/CROSS-
CLAIMANT/CROSS-DEFENDANT MDB
TRUCKING, LLC

1 MDB TRUCKING, LLC,
2 Third-Party Plaintiff,
3 vs.
4 THE MODERN GROUP GP-SUB, INC., a
5 Texas corporation and general
6 partnership; DRAGON ESP, LTD. A Texas
7 limited partnership; and DOES 1-10 and
8 BLACK AND WHITE COMPANIES, 1-10,
9 Third-Party Defendants.
10
11 MDB TRUCKING, LLC, a Nevada limited
12 liability company,
13 Cross-Claimant,
14 vs.
15 RMC LAMAR HOLDINGS, INC., a
16 Colorado corporation; VERSA
17 PRODUCTS, INC. a New Jersey
18 corporation and DOES 1-10 and BLACK
19 AND WHITE COMPANIES, 1-10,
20 Cross-Defendants.

21 **DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS**
22 **COMPANY, INC.'S OFFER OF JUDGMENT TO DEFENDANT/CROSS-**
23 **CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC**

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

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

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

8 This Offer of Judgment is made solely for the purposes intended by N.R.C.P. 68
9 and is not to be construed as an admission in any form, shape or manner that VERSA
10 PRODUCTS COMPANY, INC. is liable for any of the allegations made by Plaintiffs and/or
11 MDB TRUCKING, LLC in the Complaints and Cross-Claims. Nor is it an admission that
12 Plaintiffs and/or MDB TRUCKING, LLC is entitled to any relief, including, but not limited
13 to, an award of damages, attorney's fees, costs or interest. By virtue of this Offer, VERSA
14 PRODUCTS COMPANY, INC. waives no defenses asserted in its Answer to Plaintiffs'
15 Complaints and MDB TRUCKING, LLC Cross-Claims.

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AFFIRMATION

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

DATED this 4th day of May, 2017

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ David B. Avakian

JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant/Cross-
Claimant/Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

EXHIBIT 3

Date	Description	Hours	Amount	Invoice #
5/04/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel for Dragon	.10	21.50 B	1909232
	Day Total:	.10	21.50 B	
5/11/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Discovery Motions: Draft/Revise: Finalize motion for protective order	.50	107.50 B	1909232
	Day Total:	.50	107.50 B	
5/15/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Dispositive Motions: Draft/Revise: Finalize Motion for spoliation sanctions against MDB	.50	107.50 B	1909232
	Day Total:	.50	107.50 B	
	MONTH TOTAL:	1.10	236.50 B	
		.00	.00 N	
		1.10	236.50 T	
6/06/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission re motion for summary judgment	.20	43.00 B	1909232
	Day Total:	.20	43.00 B	
6/22/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Written Motions and Submissions: Review/Analyze: Detailed legal analysis of Plaintiffs motion for determination of good faith settlement	.30	64.50 B	1909232
	Day Total:	.30	64.50 B	
6/28/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of non-opposition to motion for good faith settlement	.10	21.50 B	1909232
	Day Total:	.40	86.00 B	
	MONTH TOTAL:	.10	21.50 B	
		.10	21.50 B	
		.70	150.50 B	
		.00	.00 N	
		.70	150.50 T	
7/07/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the notice of association of counsel	.10	21.50 B	1964174

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

Date	Description	Hours	Amount	Invoice #
7/10/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Dispositive Motions: Review/Analyze: Detailed legal analysis of Plaintiff's Opposition to motion for summary judgment	.10 Day Total:	21.50 B	
		.30	64.50 B	1964174
	Day Total:	.30	64.50 B	
	MONTH TOTAL:	.40	86.00 B	
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		.40	86.00 T	
8/01/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order scheduling hearing on various motions	.10 Day Total:	21.50 B	1964174
8/03/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission re motion for protective order	.10 Day Total:	21.50 B	
8/07/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of MDIB's objection to request for submission on motion for protective order	.20 Day Total:	43.00 B	1964174
		.20	43.00 B	
8/09/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order setting hearing on motion for protective order	.10 Day Total:	21.50 B	1964174
8/17/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of Modern and Dragon's offer of judgment for \$1,000	.10 Day Total:	21.50 B	1964174
		.10	21.50 B	
	MONTH TOTAL:	.60	129.00 B	
		.00	.00 N	
		.60	129.00 T	
12/07/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the return of jury fees	.10 Day Total:	21.50 B	2021409
		.10	21.50 B	

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

Date	Description	Hours	Amount	Invoice #
12/12/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Draft/Revise: Prepare request for submission on motion to strike	.20	43.00 B	2021409
	Day Total:	.20	43.00 B	
	MONTH TOTAL:	.30	64.50 B	
		.00	.00 N	
		.30	64.50 T	
1/22/18	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Prepare correspondence to adjuster K. Decker re status of order striking MDB's cross-claim	.10	21.50	
	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Fact Investigation/Development: Review/Analyze: Initial receipt, review and legal analysis of the order dismissing MDB's cross-claim	.10	21.50	
	Day Total:	.20	43.00	
	MONTH TOTAL:	.20	43.00 B	
		.00	.00 N	
		.20	43.00 T	
	TIMEKEEPER TOTAL:	3.30	709.50 B	
		.00	.00 N	
		3.30	709.50 T	

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

Date	Description	Hours	Amount	Invoice #
5/05/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Analysis/Strategy: Review/Analyze: Review and analyze prescription history of Plaintiff Bible from the Nevada State Board of Pharmacy	.10	7.50 B	1909232
	Day Total:	.10	7.50 B	
5/23/17	27350-1553 Hartford Insurance Company Bible, James v Versa Products Company, Inc Analysis/Strategy: Review/Analyze: Review and analyze Third Party Rejection Notice from the Internal Revenue Service	.10	7.50 B	1909232
	Day Total:	.10	7.50 B	
	MONTH TOTAL:	.20	15.00 B	
		.00	.00 N	
		.20	15.00 T	
	TIMEKEEPER TOTAL:	.20	15.00 B	
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Blank = Billable/Unbilled * = From Time Entry E=From Error File B = Billed N = Non-billable T = Total W = Written Off

Date	Description	Hours	Amount	Invoice #
FINAL TOTAL:		3.50	724.50	B
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		3.50	724.50	T

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

EXHIBIT 5

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
DAVID B. AVAKIAN
3 Nevada Bar No. 009502
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4 PAIGE S. SHREVE
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LEWIS BRISBOIS BISGAARD & SMITH LLP
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Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Defendant/Cross-
Claimant/Cross-Defendant VERSA
9 PRODUCTS COMPANY, INC.

10
11 DISTRICT COURT
12 WASHOE COUNTY, NEVADA

13 JAMES BIBLE,

14 Plaintiff,

15 vs.

16 MDB TRUCKING, LLC, et. al.

17 Defendants.

18 AND ALL RELATED CASES.
19
20

Case No. CV16-01914

Dept. 10

NOTICE OF ENTRY

21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

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

4 **AFFIRMATION**

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

7 DATED this 8th day of February, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

10
11
12 By /s/ Josh Cole Aicklen

13 JOSH COLE AICKLEN

Nevada Bar No. 007254

14 DAVID B. AVAKIAN

Nevada Bar No. 009502

15 PAIGE S. SHREVE

Nevada Bar No. 013773

16 6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

17 Attorneys for Defendant/Cross-Defendant

18 VERSA PRODUCTS COMPANY, INC.

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LIST OF EXHIBITS

Exhibit 1 Order

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CERTIFICATE OF SERVICE

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

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

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

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

FILED
Electronically
CV16-01914
2018-02-08 01:14:40 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6522573

EXHIBIT 1

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

JAMES BIBLE,

Plaintiff,

Case No. CV16-01914

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 NRCPC 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.¹ See WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

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

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

1 Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed
2 and prosecuted outside of the Fitzsimmons Action: the instant case and GENEVA M. REMMERDE
3 v. MDB TRUCKING, LLC et al., CV16-00976 ("the Remmerde Action"). The instant action was
4 filed on September 20, 2016. The Remmerde Action was filed May 2, 2016. It is alleged in all three
5 actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a truck for
6 MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving
7 plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three
8 separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents.
9 In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT
10 ("the MDB Cross-Claim") September 20, 2016. The MDB Cross-Claim had two causes of action
11 relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not Koski's
12 negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably
13 dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB
14 Cross-Claim, 4:3-5. Therefore, MDB brought the Cross-Claim against the manufacturers of the
15 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
16 would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by
17 the trailer." The MDB Cross-Claim, 4:6-8. MDB also claims there were safer alternatives available
18 to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide
19 appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:12-15.

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

25
26 ² Versa filed CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S MOTION TO DISMISS CROSS-
27 CLAIMANT MDB TRUCKING, LLC'S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO
28 NRCP 12(B)(5) ("the MTD") on September 21, 2016. A Stipulation was filed on November 23, 2016, agreeing to
dismiss MDB's Cross-Claim for Implied Indemnity. The only remaining cause of action alleged by MDB against Versa
is for Contribution.

1 December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of
2 critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant
3 action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as
4 EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the
5 Motion.³

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

11 DATED this 22 day of January, 2018.

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


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2
3
4 **CERTIFICATE OF MAILING**

5 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
6 of the State of Nevada, County of Washoe; that on this ____ day of January, 2018, I deposited in
7 the County mailing system for postage and mailing with the United States Postal Service in Reno,
8 Nevada, a true copy of the attached document addressed to:
9
10
11

12 **CERTIFICATE OF ELECTRONIC SERVICE**

13 I hereby certify that I am an employee of the Second Judicial District Court of the State of
14 Nevada, in and for the County of Washoe; that on the 22 day of January, 2018, I electronically
15 filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice
16 of electronic filing to the following:
17

18 MATTHEW ADDISON, ESQ.
19 JOSH AICKLEN, ESQ.
20 KATHERINE PARKS, ESQ.
21 BRIAN BROWN, ESQ.
22 THIERRY BARKLEY, ESQ.
23 SARAH QUIGLEY, ESQ.
24 JESSICA WOELFEL, ESQ.
25 JACOB BUNDICK, ESQ.
26 NICHOLAS M. WIECZOREK, ESQ.
27
28


Sheila Mansfield
Judicial Assistant

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EXHIBIT "A"

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

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

ORDER

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

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

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

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

23 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
24 by Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015. Numerous
25 other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, Defendant
26 Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of
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28 ² There were numerous other pre-trial motions scheduled for oral argument on the same date.

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

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

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

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

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

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

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

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

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

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

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

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

22 The *Stubli* Court upheld case concluding sanctions when the appellant or its agents failed to
23 preserve evidence related to the cause of a trucking accident. The respondent provided expert
24 affidavits which posited the cause of the accident could have been something other than the
25 respondent's work on the truck. "The experts further asserted that appellant's failure to preserve the
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28 ⁴ The trial court actually struck the appellant's expert witness from the trial. The appellant indicated it had insufficient
evidence to proceed without its expert and the trial court granted summary judgment in favor of the respondent. *Zenith*,
103 Nev. at 651, 747 P.2d at 913.

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

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

18 *I. Willfulness*

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20 The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598,
21 599 (1984), the Nevada Supreme Court found the term willful, “implies simply a purpose or
22 willingness to commit the act or to make the omission in question. The word does not require in its
23 meaning any intent to violate law, or to injure another, or to acquire any advantage.” Willfulness
24 may be found when a party fails to provide discovery and such failure is not due to an inability on
25 the offending party’s part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980).
26 The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to
27 establish willfulness.
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1 Clearly MDB should have anticipated extensive litigation as a result of the incident that
2 occurred on July 7, 2014. This was not a mere "slip and fall" where the putative plaintiff initially
3 claims he/she is not injured only later to come back and sue. There were numerous accidents and
4 injuries as a result of collisions occurring on a highway. MDB, or its counsel, had to know there
5 would be litigation as a result of these events. The Court heard no testimony that MDB took any
6 steps to preserve the truck or trailer in any way. There was no testimony indicating memorialization
7 of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck
8 and trailer continued to be in use after the events of July 7, 2014. It was subject to "routine"
9 maintenance. The Court may have condoned the continued use of the truck, and even the trailer, had
10 there been *any* steps taken to preserve the appearance of these items as they existed at the time of the
11 event, or prior to the "routine" maintenance. The memorialization did not occur.

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

24 *II. The possibility of a lesser sanction*

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

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18 ⁵ At oral argument counsel for MDB stated:

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

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

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

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

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

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

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

26 A: I have seen that, yes.

27 TRANSCRIPT OF PROCEEDINGS, EVIDENTIARY HEARING (testimony of Patrick Bigby), 154:1-6.
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1 2. Dr. Bosch had to acknowledge, though grudgingly and with great circumspection, that it
2 was possible though highly unlikely the electrical system could have caused the valve in
3 question to open.⁷

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

13 IV. Whether evidence is irreparably lost

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

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

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

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

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

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

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

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

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

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

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

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

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

20 DATED this 8 day of December, 2017.

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23 ELLIOTT A. SATTLER
24 District Judge
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CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS WIECZOREK, ESQ.


Sheila Mansfield
Judicial Assistant

FILED
Electronically
CV16-01914
2018-02-09 12:15:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6525131 : csulezic

EXHIBIT 2

1 JOSH COLE AICKLEN
Nevada Bar No. 007254
2 Josh.aicklen@lewisbrisbois.com
DAVID B. AVAKIAN
3 Nevada Bar No. 009502
David.avakian@lewisbrisbois.com
4 PAIGE S. SHREVE
Nevada Bar No. 013773
5 Paige.shreve@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Cross-Defendant VERSA
PRODUCTS COMPANY, INC.

10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 JAMES BIBLE,

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC, et. al.

16 Defendants.

17 AND ALL RELATED CASES.
18

Case No. CV16-01914

Dept. 10

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

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

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

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

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

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

1.	Court Filing Fees	\$	398.00
2.	Mail	\$	43.74
3.	Records Reproduction	\$	834.00

LEGAL COSTS: **\$1,274.74**

AFFIRMATION

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

DATED this 9th day of February, 2018.

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
PAIGE S. SHREVE
Nevada Bar No. 013773
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Cross-Defendant
VERSA PRODUCTS COMPANY, INC.

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

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

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

6 1. I am an Owner of Lewis Brisbois Bisgaard & Smith LLP, and am duly
7 licensed to practice law in the State of Nevada. I am competent to testify to the matters
8 set forth in this Affidavit, and will do so if called upon. I am the attorney of record
9 representing Cross-Defendant VERSA PRODUCTS COMPANY, INC. in the subject
10 lawsuit currently pending in Department 10 of the Second Judicial District Court for the
11 State of Nevada, Case Number CV16-01914.

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

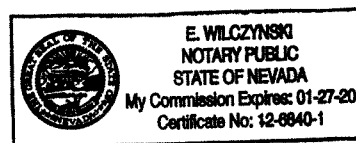
15 3. The total costs in the case were \$ 1,275.74.

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

18 By 
19 JOSH COLE AICKLEN, ESQ.

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

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



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LIST OF EXHIBITS

Exhibit 1

Disbursement Diary and Supporting Documentation for Costs

1
2
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CERTIFICATE OF SERVICE

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

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

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

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

EXHIBIT 1

DBDRYP02

Disbursement Diary

2/2/2018 10:37:31 AM brittanie.gonzalez

Page 1

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

Hartford Insurance Company
 Bible, James v Versa Products Company, Inc

Public/ladc-sqln01#acct/LDBData
 Include Write-Offs

Selections: Client-Matter: 27350-1553 to 27350-1553

Date	DsbCd	Description	Check No.	Units	Rate	Amount	Stat/Source	Invoice No.
7/29/16	5	Court filing fee: Tenth Judicial District Court Inv#: LV-05022 Filing for Cr regarding Bible v. Versa Products	11783			198.00	P A/P-P	1740978
7/29/16	5	Court filing fee: Tenth Judicial District Court Inv#: LV-05023 Fee to file D Jury Trial regarding Bible v. Versa Products	11784			320.00	P A/P-P	1740978
8/05/16	F	Federal Express Mail: Federal Express Inv#: 5-504-03131 07/29/16 Recipient: Judicial District Court Sender: Josh Cole Aicklen 776880733313	165792			21.87	W A/P-P	
9/16/16	F	Federal Express Mail: Federal Express Inv#: 5-547-56483 09/07/16 Recipient: Churchill County Sender: David B. Avakian 777173407850	168900			21.87	W A/P-P	
5/09/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759911 Records of Bible, James from Department of Health and Human Services on 04/25/17.	189865			81.00	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759981 Records of Bible, James from Remsa Ambulance Service on 04/25/17.	189865			81.00	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759952 Records of Bible, James from YRC Freight on 04/25/17.	189865			81.00	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759937 Records of Bible, James from Nevada Prescription Monitoring Progra on 04/25/17.	189865			81.00	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759919 Records of Bible, James from Raivs Team on 04/25/17.	189865			261.50	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759989 Records of Bible, James from Reno Radiological Associates CHTD on 04/25/17.	189865			86.50	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759984 Records of Bible, James from Renown Regional Medical Center on 04/25/17.	189865			81.00	P A/P-P	1909232
5/10/17	RR	Records Reproduction: Compex Legal Services, Inc. Attn: Accts Receivable In 22759982 Records of Bible, James from Renown Regional Medical Records Processing Center on 04/25/17.	189865			81.00	P A/P-P	1909232
6/14/17	5	Court filing fee: Comerica Commercial Card Services Inv# 063017STMT-SBOWERS Trans Date: 05/03/2017 Washoe Co 2nd Dist Gen, Filing fee for motio for summary judgment.				200.00	P A/P-P	1909232
12/18/17	5	Court filing fee: SECOND JUDICIAL DISTRICT COURT- COURT FILING FEE.				320.00-	C/R	

Disbursements by Type:

5 Court filing fee
 F Federal Express Mail
 RR Records Reproduction

Matter Total**1,275.74**

AA002583

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
WIP Seq#: 508,648,060
Check#: 11783
Amount: 198.00

Lewis Brisbois Bisgaard & Smith LLP

Cost Advance Ticket Check Request

LV-05022

1. Check — Date Needed: 7/28/16
2. Type of Expense:

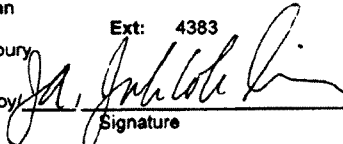
**Finance Committee approval required

<input checked="" type="checkbox"/>	Filing Fee	5	<input type="checkbox"/>	Court Reporter Fee	CR
<input type="checkbox"/>	Witness Fee	7	<input type="checkbox"/>	Mediation / Arbitration Fee**	AM
<input type="checkbox"/>	Prof. Consulting / Service Fee	S	<input type="checkbox"/>	COD Transcription (Invoice Needed)**	G
<input type="checkbox"/>	Expert Witness Fee**	J	<input type="checkbox"/>	Reproduction / Copies	R
<input type="checkbox"/>	Jury Fees	JF	<input type="checkbox"/>	Reproduction / Medical Records	RR
<input type="checkbox"/>	Deposition	H			

Any client-related requests over \$500.00 require Lane Ashley's approval. All educational expenses/seminars require Karl Loureiro's approval.

3. Client and File Name: Bible v. Versa Products
4. Client and Matter No.: 27350-1553
5. Amount: \$198.00
6. Payee / Vendor: Tenth Judicial District Court
7. Mailing Address: 73 N. Maine St., Ste. B
Fallon, NV 89406
775-423-8088
8. Payee's Telephone No.:
9. Payee's Tax I.D. No.:
10. Explanation for billing purposes: Filing for Cross-Claim

Attorney: David B. Ext: 1720
Avakian
Secretary: Susan Ext: 4383
Kingsbury

Auth. by  Date 7/28/16
Signature

Return to:
Floor:

Remember to have Attorney Sign and Attach all Supporting Backup

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021758 Distribution 4752915
Doc ID: 0001MHYZ Page 1 Distribution Level

AA002584

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
WIP Seq#: 508,648,060
Check#: 11783
Amount: 198.00

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021758 Distribution
Doc ID: 0001MHYZ Page 2
4752915 Distribution Level

TENTH JUDICIAL DISTRICT COURT CHURCHILL OFFICIAL FEE SCHEDULE Effective July 1, 2015 - Updated Changes Highlighted in Red Please be advised that all payments that relate to filing fees fines, administrative assessments, restitution, etc. must be submitted in the form of a cashier's check or money order. The Court will continue to accept payment by check from legal counsel and from businesses who have received Court approval of this method of payment. Any exceptions to this policy may only be approved by the Court Administrator. Cash will continue to be accepted for copies and certification of documents as long as the amount does not exceed \$28.00.		
Adoptions	When filing a new Adoption proceeding..... NRS 19.013 (\$56), 19.020 (\$3), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$213.00
	When filing a new Adoption proceeding for a special needs child pursuant to NRS 19.034.....	\$1.00
Answer or Appearance	When a defendant answers a complaint, to be paid upon the filing of the first paper in the action for Civil cases and Domestic cases not contained in NRS 125..... NRS 19.013 (\$44), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$198.00
	For each additional defendant named in a civil answer or first appearance..... NRS 19.0335 (\$30)	\$30.00
	When a defendant answers an action for constructional defect or any other action defined as complex..... NRS 19.013 (\$44), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$349), CC 4.090.060 (\$20)	\$448.00
	Divorce, Annulment, Separate Maintenance answer or first appearance..... NRS 19.013 (\$44), 19.031 (\$14), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$187.00
	Child Custody answer or first appearance..... NRS 19.013 (\$44), 19.031 (\$14), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$187.00
Appeal from a Justice or Municipal Court	When filing an appeal from a Justice Court or Municipal Court..... NRS 19.013 (\$42), 19.020 (\$5), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10.00), CC 4.090.060 (\$20)	\$134.00
Appeal/Supreme Court	When filing a Notice of Appeal..... NRS 19.013 (\$24)	\$24.00
	Bonds for Costs on Appeal - Cash or surety deposited by the appellant in the district court with the Notice of Appeal..... NRS 2.250, N.R.A.P. 7	\$500.00
	Supreme Court Appeal filing fee (payable to the Clerk of the Supreme Court).....	\$250.00
Complaints		
Annulment or Separate Maintenance	When filing a Complaint for Annulment or a Complaint for Separate Maintenance..... NRS 19.013 (\$68), 19.020 (\$3), 19.030 (\$32), 19.031 (\$14), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$274.00
Child Custody	When filing a Complaint for Child Custody..... NRS 19.013 (\$58), 19.020 (\$3), 19.030 (\$32), 19.031 (\$14), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$234.00
Civil	When filing a new Civil action or proceeding..... NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
	For each additional plaintiff named in a civil complaint or amended civil complaint..... NRS 19.0335 (\$30)	\$30.00
	When filing an action for constructional defect or other action defined as complex..... NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$349), CC 4.090.060 (\$20)	\$495.00
	When filing a third party complaint..... 19.0302 (\$135)	\$135.00
Divorce	When filing for a Divorce..... NRS 19.013 (\$58), 19.020 (\$3), 19.030 (\$32), 19.031 (\$14), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$274.00
Domestic Not Specified Above	When filing a domestic case not specified above..... NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Confession of Judgment	For filing a Confession of Judgment..... NRS 17.110 (\$28)	\$28.00
Contest/Objection (Probate/Guardianship)	When filing a petition to contest any will or codicil, or on the filing of an objection or cross-petition to the appointment of an executor, administrator or guardian or an objection to the settlement of account or any answer in an estate or guardianship matter..... NRS 19.013 (\$44), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$198.00

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
WIP Seq#: 508,648,060
Check#: 11783
Amount: 198.00

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021758 Distribution 4752915
Doc ID: 0001MHYZ Page 3 Distribution Level

Copies	For each page copied from any file stamped document(s); unless such fee is waived by Clerk of Court NRS 19.013 (\$3.00)	\$0.50
	For each page copied that is not a file stamped document	\$0.25
	For each CD/DVD Requested of Court Hearings or Documents	\$25.00
Certify/Exemplify	To certify copies of any document(s) prepared by the clerk NRS 19.013 (\$3)	\$3.00
	(Copy fees of \$.50 per page also apply)	
	To exemplify any document(s) prepared by the clerk NRS 19.013 (\$6)	\$6.00
	To examine and certify a copy of any document(s) prepared by another NRS 19.013 (\$5)	\$5.00
Declaration of Domicile	To examine and exemplify a copy of any document(s) prepared by another NRS 19.013 (\$5)	\$9.00
	Filing of Declaration of Domicile NRS 41.195	\$5.00
Demand for Jury Trial	When filing a Demand for Jury Trial NRCP Rule 38 (d)	\$320.00
Domestic Case-Reopen	When filing a motion or other paper that seeks to modify or adjust a final order issued pursuant to NRS 125, 125B and 125C and on filing any answer or response to such a motion or other paper, excluding those exceptions noted in NRS 19.0312, (effective 1/10/02)	\$25.00
Foreign Judgment or Order	Filing and registration of Foreign Judgment or Order NRS 17.350 - NRS 19.013 (\$50), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Foreign Support Order or Decrees (UIFSA)	Filing Foreign Support Orders or Decrees NRS 130.601	NO FEE
Guardian Ad Litem	Petition for appointment of Guardian Ad Litem (Civil fee paid upon filing of complaint)	NO FEE
Guardianship/Probate	Where value of Estate is \$2,500 or less NRS 19.013	NO FEE
	Where value of Estate is \$100,000 or less or Unknown NRS 19.013 (\$72), 19.020 (\$1.50), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), CC 4.090.060 (\$20)	\$160.50
	Where value of Estate is between \$100,000 and \$200,000 NRS 19.013 (\$72), 19.020 (\$1.50), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$259.50
	Where value of Estate is more than \$200,000 NRS 19.013 (\$72), 19.020 (\$1.50), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$352), CC 4.090.060 (\$20)	\$512.50
Liens, Frivolous or Excessive	When filing an application regarding frivolous or excessive liens NRS 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 109.2276 (\$98)	\$155.00
Minor's Compromise	When filing a Petition to Compromise a Minor's Claim NRS 41.200	NO FEE
Miscellaneous Filings	To file other papers to be kept by the clerk, except for papers filed in court or filed by public officers in their official capacity, and not otherwise provided for NRS 19.013 (\$5), 19.03135 (\$10)	\$15.00
	For issuing any certificate under seal, not otherwise provided for NRS 19.013 (\$6)	\$5.00
Motions	For filing a motion for summary judgment or joinder 19.0302 (\$200)	\$200.00
	For filing a motion to certify/decertify class 19.0302 (\$349)	\$349.00
Joint Petition Divorces Only	1st Time Filing Motion to Modify, Adjust or Enforce Decree of Divorce 68381 - New Section to NRS 19	\$129.00

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 7/29/16
 WIP Seq#: 508,648,060
 Check#: 11783
 Amount: 198.00

Joint Petition Divorces Only	1st Time Opposing Motion Modify, Adjust, Enforce Decree of Divorce 85388 - New Section to NRS 19	\$57.00
Name Change	Filing a petition for a name change NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Packets of Forms	Initiating Case Packets All other Multi document packets Waiver of Fees and Costs	\$10.00 \$5.00 No Fee
Peremptory Challenge	Peremptory challenge of a Judge (payable to the Clerk of the Supreme Court).....	\$450.00
Petition to Seal Records	When filing a new Petition to Seal Records NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Power of Attorney	For filing a certified copy of a Bondsman's Appointment by Power of Attorney..... NRS 697.276 - 19.013 (\$15)	\$15.00
Searches	For performing a search of the records per year, per name; unless such fee is waived by Clerk of Court NRS 19.013 (\$5.50)	\$0.50
Termination of Parental Rights	Petition for Termination of Parental Rights..... NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Transfer from another District Court or County	To transfer an action or proceeding from another District Court or County..... NRS 19.013 (\$56), 19.020 (\$3), 19.030 (\$32), 19.031 (\$25), 19.03135 (\$10), 19.0302 (\$99), CC 4.090.060 (\$20)	\$245.00
Transfer from a Justice or Municipal Court	When transferring a case from a Justice Court or Municipal Court..... NRS 19.013 (\$42), 19.020 (\$3), 19.030 (\$32), 19.0302 (\$99), 19.031 (\$25), 19.03135 (\$10), CC 4.090.060 (\$20)	\$231.00
Will	When filing an original Will (no petition included)..... NRS 19.013 (\$5), 19.03135 (\$10)	\$15.00
Writs	For the issuance of any writ of attachment, writ of garnishment, writ of execution or any other writ designed to enforce any judgment of the court..... 19.0302 (\$10)	\$10.00
Writ of Habeas Corpus	Filing a petition for Writ of Habeas Corpus..... NRS 19.013(5)	NO FEE

Vendor: 93565 Tenth Judicial District Court
 Voucher: 2021758 Distribution
 Doc ID: 0001MHYZ Page 4
 4752915 Distribution Level

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 7/29/16
 W/P Seq#: 508,648,070
 Check#: 11784
 Amount: 320.00

Lewis Brisbois Bisgaard & Smith LLP

Cost Advance Ticket Check Request

LV-05023

1. Check — Date Needed: 7/28/16
2. Type of Expense:

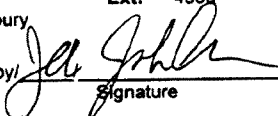
**Finance Committee approval required

<input type="checkbox"/>	Filing Fee	5	<input type="checkbox"/>	Court Reporter Fee	CR
<input type="checkbox"/>	Witness Fee	7	<input type="checkbox"/>	Mediation / Arbitration Fee**	AM
<input type="checkbox"/>	Prof. Consulting / Service Fee	S	<input type="checkbox"/>	COD Transcription (Invoice Needed)**	G
<input type="checkbox"/>	Expert Witness Fee**	J	<input type="checkbox"/>	Reproduction / Copies	R
<input checked="" type="checkbox"/>	Jury Fees	JF	<input type="checkbox"/>	Reproduction / Medical Records	RR
<input type="checkbox"/>	Deposition	H			

Any client-related requests over \$500.00 require Lane Ashley's approval. All educational expenses/seminars require Karl Loureiro's approval.

3. Client and File Name: Bible v. Versa Products
4. Client and Matter No.: 27350-1553
5. Amount: \$320.00
6. Payee / Vendor: Tenth Judicial District Court
7. Mailing Address: 73 N. Maine St., Ste. B
Fallon, NV 89406
775-423-6088
8. Payee's Telephone No.: 775-423-6088
9. Payee's Tax I.D. No.:
10. Explanation for billing purposes: Fee to file Demand for Jury Trial

Attorney: David Avakian Ext: 1720
 Secretary: Susan Kingsbury Ext: 4383

Auth. by:  Signature

Date: 7/28/16

Return to:
Floor:

Remember to have Attorney Sign and Attach all Supporting Backup

Vendor: 93565 Tenth Judicial District Court
 Voucher: 2021762 Distribution
 Doc ID: 0001MHZ2 Page 1
 4752916 Distribution Level

AA002588

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
W/P Seq#: 508,648,070
Check#: 11784
Amount: 320.00

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021762 Distribution 4752916
Doc ID: 0001MHZ2 Page 2 Distribution Level

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

1 CASE NO. 16-10DC-0824
2 DEPT NO. I

3
4 IN THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
5 IN AND FOR THE COUNTY OF CHURCHILL
6

7 JAMES BIBLE,
8 Plaintiff,
9 vs.

Case No. 16-10DC-0824
Dept. No. I

10 MDB TRUCKING, LLC, a Nevada Limited
11 Liability Company; RMS LAMAR
12 HOLDINGS, INC. a Colorado Corporation;
13 VERSA PRODUCTS COMPANY, INC., a
14 New Jersey Corporation; DANIEL
15 ANTHONY KOSKI; ABC
16 CORPORATIONS; BLACK AND WITH
17 COMPANIES; XYZ PARTNERSHIPS; and
18 DOES I through X, inclusive
19 Defendants.

20 VERSA PRODUCTS COMPANY, INC.,
21 Cross-Claimant,
22 vs.

23 MDB TRUCKING, LLC; DANIEL
24 ANTHONY KOSKI and DOES I - X,
25 inclusive,
26 Cross-Defendants.
27
28

DEMAND FOR JURY TRIAL

24 COMES NOW, Defendant VERSA PRODUCTS COMPANY, INC. by and through
25 its attorneys of record, Josh Cole Aicklen, Esq. and David B. Avakian, Esq. of LEWIS
26
27
28

4826-6278-7381.1

AA002589

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
W/P Seq#: 508,648,070
Check#: 11784
Amount: 320.00

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021762 Distribution
Doc ID: 0001MHZ2 Page 3
4752916 Distribution Level

1 BRISBOIS BISGAARD & SMITH LLP, and hereby demands a jury trial of all of the issues
2 in the above-captioned matter.

3 AFFIRMATION

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

6 DATED this ____ day of July, 2016

7 Respectfully submitted,

8 LEWIS BRISBOIS BISGAARD & SMITH LLP

9
10
11 By

JOSH COLE AICKLEN
Nevada Bar No. 007254
DAVID B. AVAKIAN
Nevada Bar No. 009502
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Defendant VERSA PRODUCTS
COMPANY, INC.

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**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

4826-6278-7381.1

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 7/29/16
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Amount: 320.00

Vendor: 93565 Tenth Judicial District Court
Voucher: 2021762 Distribution
Doc ID: 0001MHZ2 Page 4
4752916 Distribution Level

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of July, 2016, a true and correct copy
of DEMAND FOR JURY TRIAL was served by U.S. Mail addressed as follows:

James F. Sloan, Esq.
JAMES F. SLOAN LTLD.
977 W. Williams Ave.
Fallon, NV 894063
Attorney for Plaintiff
JAMES BIBLE

An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

4826-6278-7381.1

3

AA002591

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 8/05/16
 WIP Seq#: 511,210,870
 Check#: 165792
 Amount: 21.87

Vendor: 34224 Federal Express
 Voucher: 2027648 Distribution
 Doc ID: 0001MVT6 Page 35

4768866 Distribution Level

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Account Summary	Search/Download	My Options	Message Center																																																								
<div>Tracking ID Details</div> <div>Tracking ID Summary</div> <div> <div> <div>Billing Information</div> <table border="1"> <tr> <td>Tracking ID no.</td> <td>CPHY 77688073313 Next</td> </tr> <tr> <td>Invoice no.</td> <td>5-504-03131</td> </tr> <tr> <td>Account no.</td> <td>1732-0629-8</td> </tr> <tr> <td>Ship date</td> <td>07/29/2016</td> </tr> <tr> <td>Invoice date</td> <td>08/05/2016</td> </tr> <tr> <td>Due date</td> <td>08/20/2016</td> </tr> <tr> <td>Tracking ID Balance due</td> <td>\$21.87</td> </tr> <tr> <td>Status</td> <td>Open</td> </tr> </table> <div> View Invoice History View signature proof of delivery </div> </div> <div> <div>Messages</div> <p>FedEx has audited this shipment for correct packing Read More. Distance Based Pricing, Zone 4 The Earned Discount for this ship date has been on Read More. Fuel Surcharge - FedEx has applied a fuel surcharge Read More. The package weight exceeds the maximum for the Read More.</p> </div> </div>				Tracking ID no.	CPHY 77688073313 Next	Invoice no.	5-504-03131	Account no.	1732-0629-8	Ship date	07/29/2016	Invoice date	08/05/2016	Due date	08/20/2016	Tracking ID Balance due	\$21.87	Status	Open																																								
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<div>Transaction Details</div> <div> <div> <div>Sender Information</div> <p>JOSH COLE ACKLEN LEWIS BRISBOIS BISGAARD & SMIT 8385 SOUTH RAINBOW BLVD LAS VEGAS NV 89118 US</p> </div> <div> <div>Recipient Information</div> <p>TENTH JUDICIAL DISTRICT COURT TENTH JUDICIAL DISTRICT COURT 73 N MAIN STREET FALLON NV 89405 US</p> </div> </div> <div> <div> <div>Shipment Details</div> <table border="1"> <tr> <td>Ship date</td> <td>07/29/2016</td> </tr> <tr> <td>Payment type</td> <td>Shipper</td> </tr> <tr> <td>Service type</td> <td>FedEx Priority Overnight</td> </tr> <tr> <td>Zone</td> <td>04</td> </tr> <tr> <td>Package type</td> <td>FedEx Pak</td> </tr> <tr> <td>Weight</td> <td>1.00 lbs</td> </tr> <tr> <td>Pieces</td> <td>1</td> </tr> <tr> <td>Meter No</td> <td>104750598</td> </tr> <tr> <td>Declared value</td> <td>\$0.00</td> </tr> </table> </div> <div> <div>Charges</div> <table border="1"> <tr> <td>Transportation Charge</td> <td>47.46</td> </tr> <tr> <td>Fuel Surcharge</td> <td>0.43</td> </tr> <tr> <td>Weekday Delivery</td> <td>0.00</td> </tr> <tr> <td>Discount</td> <td>-26.10</td> </tr> <tr> <td>Earned Discount</td> <td>-2.37</td> </tr> <tr> <td>DAS Comm</td> <td>2.46</td> </tr> <tr> <td>Total charges</td> <td>\$21.87</td> </tr> </table> </div> </div> <div> <div> <div>Original Reference</div> <table border="1"> <tr> <td>Customer reference no.</td> <td>27350-1553</td> </tr> <tr> <td>Department no</td> <td></td> </tr> <tr> <td>Reference #2</td> <td></td> </tr> <tr> <td>Reference #3</td> <td></td> </tr> </table> </div> <div> <div>Updated Reference</div> <table border="1"> <tr> <td>Customer reference no.</td> <td></td> </tr> <tr> <td>Department no</td> <td></td> </tr> <tr> <td>Reference #2</td> <td></td> </tr> <tr> <td>Reference #3</td> <td></td> </tr> </table> </div> </div> <div> <div> <div>Proof of Delivery</div> <table border="1"> <tr> <td>Delivery date</td> <td>08/01/2016 12:53 PM</td> </tr> <tr> <td>Service area code</td> <td>S.HOOTEN</td> </tr> </table> </div> <div> <div>Cost Allocation Reference</div> <table border="1"> <tr> <td>Cost allocation</td> <td></td> </tr> <tr> <td>Shipment Notes</td> <td></td> </tr> </table> </div> </div> <div> <div> View signature proof of delivery </div> <div> Approve/notify user Dispute Pay </div> </div>				Ship date	07/29/2016	Payment type	Shipper	Service type	FedEx Priority Overnight	Zone	04	Package type	FedEx Pak	Weight	1.00 lbs	Pieces	1	Meter No	104750598	Declared value	\$0.00	Transportation Charge	47.46	Fuel Surcharge	0.43	Weekday Delivery	0.00	Discount	-26.10	Earned Discount	-2.37	DAS Comm	2.46	Total charges	\$21.87	Customer reference no.	27350-1553	Department no		Reference #2		Reference #3		Customer reference no.		Department no		Reference #2		Reference #3		Delivery date	08/01/2016 12:53 PM	Service area code	S.HOOTEN	Cost allocation		Shipment Notes	
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Shipment Notes																																																											



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8/15/2016

AA002592

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 9/16/16
WIP Seq#: 515,427,110
Check#: 168900
Amount: 21.87

Vendor: 34224 Federal Express
Voucher: 2042938 Distribution
Doc ID: 0001NOTY Page 12
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Tracking ID Summary			
Billing Information			
Tracking ID no: Previous 777173407850 Next			
Invoice no: 5-547-56483			
Account no: 1732-8828-8			
Ship date: 08/07/2016			
Invoice date: 08/16/2016			
Due date: 10/01/2016			
Tracking ID Balance due: \$21.87			
Status: Open			
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Transaction Details			
Sender Information			
DAVID S. AVAKIAN			
LEWIS BRISBOIS BISGAARD & SMIT			
6385 SOUTH RAINBOW BLVD			
LAS VEGAS NV 89118			
US			
Recipient Information			
CHURCHILL COUNTY			
DISTRICT COURT			
73 N. MAIN STREET			
FALLON NV 89406			
US			
Charges			
Transportation Charge 47.46			
Fuel Surcharge 0.43			
Weekday Delivery 0.00			
Discount -26.10			
Earned Discount -2.37			
DAS Comm 2.45			
Total charges \$21.87			
Enter promo code			
Original Reference			
Customer reference no: 27350-1553			
Department no:			
Reference #2			
Reference #3			
Updated Reference			
Customer reference no:			
Department no:			
Reference #2			
Reference #3			
Proof of Delivery			
Delivery date: 08/08/2016 16:05			
Service area code: PM			
Signed by: J BERNINGHAM			
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Cost Allocation Reference			
Cost allocation			
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9/27/2016

AA002593

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 5/09/17
 WIP Seq#: 544,141,160
 Check#: 189865
 Amount: 81.00

Vendor: 640 Compex Legal Services, Inc.
 Voucher: 2130236 Distribution 5055527
 Doc ID: 0001SGXO Page 1 Distribution Level

INVOICE NO.: 22759911
 ORDER DATE: 04/25/17
 INVOICE DATE/DATE OF SERVICE: 05/09/17



TERMS : NET 30 DAYS

TAX ID: 95-4443964

CASE NAME: JAMES BIBLE V MDB TRUCKING
 RECORDS OF: BIBLE, JAMES
 FILE/CLAIM NO.: 27350.1553/27350.1553

CLIENT/INSURED: MDB TRUCKING
 DATE OF LOSS:

BILLED TO:
 LEWIS BRISBOIS BISGAARD & SMITH
 P.O. BOX 86367
 LOS ANGELES, CA 90086-0367
 DAVID B. AVAKIAN

ORDERED BY:
 LEWIS BRISBOIS BISGAARD & SMITH
 6385 SOTUH RAINBOW BOULEVARD, SUITE #600
 LAS VEGAS, NV 89118
 DAVID B. AVAKIAN
 702-893-3383

PLEASE REMIT TO:
 P.O. BOX 2738
 TORRANCE, CA 90509-2738
 TEL 800.788.8831 FAX 310.781.9720

PHONE #: 702-893-3383
 ACCOUNT #: 43138

H89567- A	DEPARTMENT OF HEALTH AND HUMAN S ERVICES CLAUSE: MEDICAL/BILLS NOTES: CLOSED: CASE SETTLED	Basic Charge - Auth	1	30.00	30.00
		Phone Call/Status	1	3.50	3.50
		Authorization Prep	1	.00	.00
		Authorization Service	1	.00	.00
		Field Trip	1	14.50	14.50
		Rush	1	25.00	25.00
		Shipping and Handling	1	8.00	8.00
		SUB TOTAL			81.00
		TOTAL DUE			81.00
<div>22759911 -> PLEASE USE 8 DIGIT INVOICE NUMBER TO INSURE PROMPT CREDIT</div> <div>RECEIVED MAY 16 2017 ACCOUNTS PAYABLE-LA</div>					

DOCSMTMP000001212000

AA002594

Vendor:	640	Compx Legal Services, Inc.	
Voucher:	2129628	Distribution	5053736
Doc ID:	0001SFN7	Page	1

TAX ID: 95-4443964

ORDERED BY:
LEWIS BRISBOIS BISGAARD & SMITH
6385 SOTUH RAINBOW BOULEVARD, SUITE #600
LAS VEGAS, NV 89118
DAVID B. AVAKIAN
702-883-3383

PHONE #: 702-893-3383
ACCOUNT #: 43138

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MAY 16 2017
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ADMINISTRATIVE TELEPHONE

AA002595

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 5/10/17
 WIP Seq#: 541,390,470
 Check#: 189865
 Amount: 81.00

Vendor: 640 Compex Legal Services, Inc.
 Voucher: 2129629 Distribution
 Doc ID: 0001SFNA Page 1
 5053737 Distribution Level

INVOICE NO.: 22759952

ORDER DATE: 04/25/17

INVOICE DATE/DATE OF SERVICE: 05/10/17



COMPEX
 Legal Services, Inc.

TERMS : NET 30 DAYS

TAX ID: 95-4443964

CASE NAME: JAMES BIBLE, V MDB TRUCKING,

RECORDS OF: BIBLE, JAMES

FILE/CLAIM NO.: 27350.1553/27350.1553

CLIENT/INSURED: MDB TUCKING

DATE OF LOSS:

BILLED TO:

LEWIS BRISBOIS BISGAARD & SMITH
 P.O. BOX 86387
 LOS ANGELES, CA 90086-0367
 DAVID B. AVAKIAN

ORDERED BY:

LEWIS BRISBOIS BISGAARD & SMITH
 6385 SOTUH RAINBOW BOULEVARD, SUITE #600
 LAS VEGAS, NV 89118
 DAVID B. AVAKIAN
 702-893-3383

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P.O. BOX 2738

TORRANCE, CA 90509-2738

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PHONE #: 702-893-3383

ACCOUNT #: 43138

H89540- A	YRC FREIGHT	Basic Charge - Auth	1	30.00	30.00
	CLAUSE: SPECIAL (OTHER)	Phone Call/Status	1	3.50	3.50
	NOTES: CLOSED: CASE SETTLED	Authorization Prep	1	.00	.00
		Authorization Service	1	.00	.00
		Field Trip	1	14.50	14.50
		Rush	1	25.00	25.00
		Shipping and Handling	1	8.00	8.00
		SUB TOTAL			81.00
		TOTAL DUE			81.00
					RECEIVED
					MAY 16 2017
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DOCUMENTARY POLICY

AA002596

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 5/10/17
WIP Seq#: 541,390,480
Check#: 189865
Amount: 81.00

Vendor: 640 Compex Legal Services, Inc.
Voucher: 2129630 Distribution
Doc ID: 0001SFNE Page 1
5053738 Distribution Level

INVOICE NO.: 22759937
ORDER DATE: 04/25/17
INVOICE DATE DATE OF SERVICE: 05/10/17



TERMS : NET 30 DAYS
TAX ID: 95-4443964

CASE NAME: JAMES BIBLE V MDB TRUCKING
RECORDS OF: BIBLE, JAMES
FILE/CLAIM NO.: 27350.1553/27350.1553

CLIENT/INSURED: MDB TRUCKING
DATE OF LOSS:

BILLED TO:
LEWIS BRISBOIS BISGAARD & SMITH
P.O. BOX 86367
LOS ANGELES, CA 90086-0367
DAVID B. AVAKIAN

ORDERED BY:
LEWIS BRISBOIS BISGAARD & SMITH
6385 SOTUH RAINBOW BOULEVARD, SUITE #600
LAS VEGAS, NV 89118
DAVID B. AVAKIAN
702-893-3383

PLEASE REMIT TO:
P.O. BOX 2738
TORRANCE, CA 90509-2738
TEL 800.788.8831 FAX 310.781.9720

PHONE #: 702-893-3383
ACCOUNT #: 43138

TEL 800.788.8831 FAX 310.781.9720

H89558- A	NEVADA PRESCRIPTION MONITORING PROGRAM ROGRAM CLAUSE: MEDICAL/BILLS NOTES: CLOSED: CASE SETTLED	Basic Charge - Auth	1	30.00	30.00
		Phone Call/Status	1	3.50	3.50
		Authorization Prep	1	.00	.00
		Authorization Service	1	.00	.00
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		Rush	1	25.00	25.00
		Shipping and Handling	1	8.00	8.00
		SUB TOTAL			81.00
		TOTAL DUE			81.00
<div>RECEIVED</div> <div>MAY 16 2017</div> <div>ACCOUNTS PAYABLE-LA</div>					
22759937 -> PLEASE USE 8 DIGIT INVOICE NUMBER TO INSURE PROMPT CREDIT					

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Voucher:	2129631	Distribution	5053739
Doc ID:	0001SFNK	Page	1

AA002598

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Voucher:	2129633	Distribution	5053741
Doc ID:	0001SFNS	Page	1



COMPEX
Legal Services, Inc.

TAX ID: 95-4443964

CLIENT/INSURED: MDB TRUCKING
DATE OF LOSS:

ORDERED BY:
LEWIS BRISBOIS BISGAARD & SMITH
6385 SOTUH RAINBOW BOULEVARD, SUITE #600
LAS VEGAS, NV 89118
DAVID B. AVAKIAN
702-883-3383

PHONE #: 702-893-3383
ACCOUNT #: 43138

TEL 800.788.8831 FAX 310.781.9720				
H89534- D	RENO RADIOLOGICAL ASSOCIATES CHT D CLAUSe: AUTH - MEDS/BILLS/FILMS NOTES: CLOSED: CASE SETTLED	Basic Charge - Auth Phone Call/Status Authorization Prep Authorization Service Out of Area Rush Shipping and Handling SUB TOTAL	1 1 1 1 1 1 1	30. 00 3. 50 . 00 . 00 20. 00 25. 00 8. 00 86. 50
		TOTAL DUE		86. 50
				RECEIVED MAY 16 2017 ACCOUNTS PAYABLE-LA
22759989	→ PLEASE USE 8 DIGIT INVOICE NUMBER TO INSURE PROMPT CREDIT			

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MAY 16 2017
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DOCUMENTID:V44AC_PCL.DOC

AA002599

27350-1553
 Hartford Insurance Company
 Bible, James v Versa Products Company, Inc
 Date: 5/10/17
 WIP Seq#: 541,390,510
 Check#: 189865
 Amount: 81.00

Vendor: 640 Compex Legal Services, Inc.
 Voucher: 2129634 Distribution
 Doc ID: 0001SFOC Page 1
 5053742 Distribution Level

INVOICE NO.: 22759984

ORDER DATE: 04/25/17

INVOICE DATE DATE OF SERVICE: 05/10/17



COMPEX
 Legal Services, Inc.

TERMS : NET 30 DAYS

TAX ID: 95-4443964

CASE NAME: JAMES BIBLE, V MDB TRUCKING,

RECORDS OF: BIBLE, JAMES

FILE/CLAIM NO.: 27350.1553/27350.1553

CLIENT/INSURED: MDB TRUCKING

DATE OF LOSS:

BILLED TO:

LEWIS BRISBOIS BISGAARD & SMITH
 P.O. BOX 86367
 LOS ANGELES, CA 90086-0367
 DAVID B. AVAKIAN

ORDERED BY:

LEWIS BRISBOIS BISGAARD & SMITH
 6385 SOTUH RAINBOW BOULEVARD, SUITE #600
 LAS VEGAS, NV 89118
 DAVID B. AVAKIAN
 702-893-3383

PLEASE REMIT TO:

P.O. BOX 2738

TORRANCE, CA 90509-2738

TEL 800.788.8831 FAX 310.781.9720

PHONE #: 702-893-3383

ACCOUNT #: 43138

H89534- C	RENOWN REGIONAL MEDICAL CENTER	Basic Charge - Auth	1	30.00	30.00
	CLAUSE: AUTH - MEDS/BILLS/FILMS	Phone Call/Status	1	3.50	3.50
	NOTES: CLOSED: CASE SETTLED	Authorization Prep	1	.00	.00
		Authorization Service	1	.00	.00
		Field Trip	1	14.50	14.50
		Rush	1	25.00	25.00
		Shipping and Handling	1	8.00	8.00
		SUB TOTAL			81.00
		TOTAL DUE			81.00
<div>RECEIVED</div> <div>MAY 16 2017</div> <div>ACCOUNTS PAYABLE-LA</div>					
22759984 → PLEASE USE 8 DIGIT INVOICE NUMBER TO INSURE PROMPT CREDIT					

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27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 5/10/17
WIP Seq#: 541,390,520
Check#: 189865
Amount: 81.00

Vendor: 640 Compex Legal Services, Inc.
Voucher: 2129635 Distribution
Doc ID: 00015FOH Page 1
5053743 Distribution Level

INVOICE NO.: 22759982
ORDER DATE: 04/25/17



TERMS : NET 30 DAYS

INVOICE DATEDATE OF SERVICE: 05/10/17

TAX ID: 95-4443964

CASE NAME: JAMES BIBLE, V MDB TRUCKING,
RECORDS OF: BIBLE, JAMES
FILE/CLAIM NO.: 27350.1553/27350.1553

CLIENT/INSURED: MDB TRUCKING
DATE OF LOSS:

BILLED TO:
LEWIS BRISBOIS BISGAARD & SMITH
P.O. BOX 86367
LOS ANGELES, CA 90086-0367
DAVID B. AVAKIAN

ORDERED BY:
LEWIS BRISBOIS BISGAARD & SMITH
6385 SOTUH RAINBOW BOULEVARD, SUITE #600
LAS VEGAS, NV 89118
DAVID B. AVAKIAN
702-893-3383

PLEASE REMIT TO:
P.O. BOX 2738
TORRANCE, CA 90509-2738
TEL 800.788.8831 FAX 310.781.9720

PHONE #: 702-893-3383
ACCOUNT #: 43138

H89534- B	RENOWN REGIONAL MEDICAL RECORDS PROCESSING CENTER CLAUSE: AUTH - MEDS/BILLS/FILMS NOTES: CLOSED: CASE SETTLED	Basic Charge - Auth	1	30.00	30.00
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		Authorization Service	1	.00	.00
		Field Trip	1	14.50	14.50
		Rush	1	25.00	25.00
		Shipping and Handling	1	8.00	8.00
		SUB TOTAL			81.00
		TOTAL DUE			81.00
22759982 -> PLEASE USE 8 DIGIT INVOICE NUMBER TO INSURE PROMPT CREDIT					

RECEIVED

MAY 16 2017

ACCOUNTS PAYABLE-LA

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27350-1553

27350-1553
Hartford Insurance Company
Bible, James v Versa Products Company, Inc
Date: 6/14/17
WIP Seq#: 546,027,930
Amount: 200.00

Date / Time 5/3/2017 1:55:34 PM Cashier WashoeAPI
Transaction ID 48000911 \$200.00 Amount
Court Fees CourtFilingFee
Submission ID 6082232
Payment Summary : Mastercard payment for \$200.00.
Payment Acct Last4 : *****0164
Billing Name : Stacy Bowers
Billing Address : 633 W. 5th St., Ste. 4000
Los Angeles, CA 90071
Phone Number : 7028933383
Email Address : stacy.bowers@lewisbrisbois.com

Signature

Motion for Summary Judgment

Vendor: 94005 Comerica Commercial Card Services
Voucher: 2146974 Distribution 5098732 Distribution Level
Doc ID: 0001TUFN Page 797

47

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

AA002602

EXHIBIT 4

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FAX: 702.893.3789
8 Attorneys for Defendant/Cross-
Claimant/Cross-Defendant
9 VERSA PRODUCTS COMPANY, INC.

10 DISTRICT COURT

11 WASHOE COUNTY, NEVADA

12 JAMES BIBLE,

13 Plaintiff,

14 vs.

15 MDB TRUCKING, LLC, a Nevada Limited
Liability Company; RMC LAMAR
16 HOLDINGS, INC., a Colorado
Corporation; VERSA PRODUCTS
17 COMPANY, INC. a New Jersey
Corporation; DANIEL ANTHONY KOSKI;
18 ABC CORPORATIONS I-X; BLACK AND
WHITE COMPANIES; XYZ
19 PARTNERSHIPS; and DOES I-X,
inclusive,

20 Defendants.

21 VERSA PRODUCTS COMPANY, INC.,

22 Cross-Claimant,

23 vs.

24 MDB TRUCKING, LLC; DANIEL
25 ANTHONY KOSKI; and DOES I-X,
inclusive,

26 Cross-Defendants.
27
28

Case No. CV16-01914
Dept. 10

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

1 MDB TRUCKING, LLC,
2 Third-Party Plaintiff,
3 vs.
4 THE MODERN GROUP GP-SUB, INC., a
5 Texas corporation and general
6 partnership; DRAGON ESP, LTD. A Texas
7 limited partnership; and DOES 1-10 and
8 BLACK AND WHITE COMPANIES, 1-10,
9 Third-Party Defendants.
10
11 MDB TRUCKING, LLC, a Nevada limited
12 liability company,
13 Cross-Claimant,
14 vs.
15 RMC LAMAR HOLDINGS, INC., a
16 Colorado corporation; VERSA
17 PRODUCTS, INC. a New Jersey
18 corporation and DOES 1-10 and BLACK
19 AND WHITE COMPANIES, 1-10,
20 Cross-Defendants.

21 DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS
22 COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-
23 DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSANT TO NRCP 35; OR IN
24 THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION

25 COMES NOW, Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS
26 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David
27 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS
28 BISGAARD & SMITH, LLP, and hereby request an Order dismissing Defendant/Cross-
Claimant/Cross-Defendant MDB TRUCKING, LLC's Cross-Claims against it, or in the
alternative issuing an adverse jury instruction.

1 This Motion is based upon the Memorandum of Points and Authorities; the Affidavit
2 of David B. Avakian, Esq. included herein; NRCP 37; NRS 47.250; the Exhibits attached
3 hereto; and any other evidence the Court may entertain at the Hearing on this Motion.

4 DATED this 15th day of May, 2017

5 Respectfully submitted,

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

7
8
9 By /s/ David B. Avakian

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

1 AFFIDAVIT OF DAVID B. AVAKIAN, ESQ. IN SUPPORT OF
2 DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS
3 COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-
4 DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSANT TO NRCP 35; OR IN
5 THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION

6
7 STATE OF NEVADA)
8 COUNTY OF CLARK) ss.
9

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

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

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

15 3. I am an attorney of record representing Defendant/Cross-Claimant/Cross-
16 Defendant VERSA PRODUCTS COMPANY, INC. in the subject lawsuit currently pending
17 in Department 10 of the Second Judicial District Court for the State of Nevada, Case
18 Number CV16-01914.

19 4. Attached hereto as Exhibit 1 is a true and correct copy of MDB's Cross-
20 Claim.

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

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

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

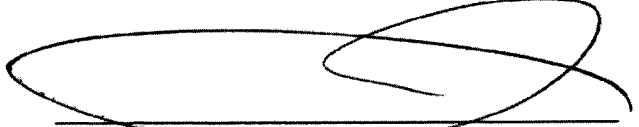
27 8. Attached hereto as Exhibit 5 is a true and correct copy of the Declaration by
28 David R. Bosch, Ph.D.

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

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

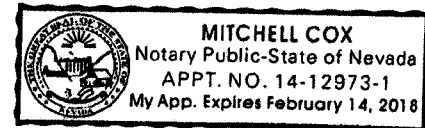
3 11. Attached hereto as Exhibit 8 is a true and correct copy of the Deposition
4 Transcript of Patrick Bigby.

5 FURTHER AFFIANT SAYETH NAUGHT.

6
7
8 
DAVID B. AVAKIAN, ESQ.

9 SUBSCRIBED AND SWORN to before me
10 this 15th day of May, 2017.

11
12 
NOTARY PUBLIC
13 In and for said County and State



14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. INTRODUCTION

16 Defendant/Cross-Claimant, MDB TRUCKING, LLC ("hereinafter referred to as
17 "MDB"), has brought Cross-Claims¹ against VERSA PRODUCTS COMPANY, INC.
18 (hereinafter referred to as "VERSA"), in which it asserts a contribution claim against
19 VERSA for a personal injury claims brought by Plaintiffs, Ernest Fitzsimmons and Carol
20 Fitzsimmons ("Fitzsimmons"); Angela Wilt ("Wilt"); Rosa, Benjamin, Cassandra and
21 Natalie Robles ("Robles"); Sonya Corthell ("Corthell"); Beverly, Patrick and Ryan
22

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

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

1 Crossland ("Crossland"); Olivia and Naykyla John ("John"); Kandise Baird ("Kins"); James
2 Bible ("Bible"); and Geneva Remmerde ("Remmerde") (collectively referred to as
3 "Plaintiffs"). See, MDB's Cross-Claim against VERSA, a true and correct copy attached
4 hereto as Exhibit 1. Plaintiffs were driving westbound on IR80 when a semi-trailer driven
5 by Daniel Koski and owned by Cross-Claimant MDB spilled gravel on the freeway,
6 causing multiple automobile accidents and the injuries alleged by the Plaintiffs. MDB's
7 contribution claim is based on its allegation that the inadvertent gravel dump was due to
8 an alleged "defect" with the VERSA valve on the subject trailer.

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

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

19 However, MDB did not take the subject truck trailers and valve out of service after
20 the subject incident and continued to keep them in service for over two years after the
21 subject incident and a year an a half after the first lawsuit was filed. The only reason
22 MDB removed the subject truck and trailers out of service was because the experts in the
23 subject litigation removed the subject valve for destructive testing. See, Exhibit 3 at P.
24 84:19-24. Further, after the subject litigation and even after the first lawsuit was filed,
25 *MDB discarded the electrical component parts that are used in activating the subject*
26 *valve.* See, Exhibit 3 at P. 169:16-22. In doing so, MDB intentionally spoliated critical
27 evidence that VERSA absolutely requires to defend against MDB's baseless cross-claim.

28

1 Therefore, and pursuant to NRCP 37, VERSA respectfully requests that the Court
2 strike MDB TRUCKING, LLC's Cross-Claims against VERSA, or in the alternative issue
3 an adverse jury instruction against MDB due to MDB's failure to preserve key evidence
4 that is crucial to VERSA's defense.

5 **II. FACTUAL BACKGROUND**

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

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

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

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

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

21 Q. Okay.

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

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

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

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

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

Q. And what was this work order for?

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

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

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

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

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

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

13 MR. PALMER: 2/5/15.

14 Q. And what is this work order for?

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

18 Q. Okay. So is this four-way cord different from the work
19 order we discussed of the four-way plug in MDBMAINT
20 129?

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

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

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

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

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

Id. at P. 92:6-7.

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

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

At least, I am assuming that's what he replaced. It could be the four-way
socket on the front or the back. It doesn't distinguish between the two on
this work order. But I'm assuming it's the one on the front. That's the one

1 that gets unplugged and plugged all the time, and we replace them as soon
2 as -- any issues whatsoever, we replace them.

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

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

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

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

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

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

16 MR. PALMER: 12/2/15?

17 Q. Uh-huh.

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

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

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

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

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

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

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

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

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

9 REQUEST FOR ADMISSION NO. 13:

10
11 Admit that the Peterbuilt truck that allegedly spilled gravel on
12 the roadway in this case is not in the same exact condition as
it was at the time of the subject incident.

13 RESPONSE TO REQUEST FOR ADMISSION NO. 13:

14 Admitted.

15 REQUEST FOR ADMISSION NO. 14:

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

18 RESPONSE TO REQUEST FOR ADMISSION NO. 14:

19 Admitted.

20 REQUEST FOR ADMISSION NO. 15:

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

23 RESPONSE TO REQUEST FOR ADMISSION NO. 15:

24 Admitted.

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

26 REQUEST FOR ADMISSION NO. 24:

27 Admit that you or someone on your behalf continued to use
28 and operate the subject VERSA valve on the same subject
trailer from the time of the subject incident to the present.

1 RESPONSE TO REQUEST FOR ADMISSION NO. 24:

2 Admitted.

3 Id. at P. 6:8-12

4 REQUEST FOR ADMISSION NO. 26:

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

7 RESPONSE TO REQUEST FOR ADMISSION NO. 26:

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

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

11 III. LEGAL ARGUMENT

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

13 It is well established in Nevada that a party is entitled to have the jury instructed on
14 all of her case theories that are supported by the evidence. Bass-Davis v. Davis, 122 Nev.
15 442, 447, 134 P.3d 103, 106 (2006). Accordingly, even when an action has not been
16 commenced and there is only a potential for litigation, the litigant is under a duty to
17 preserve evidence which it knows or reasonably should know is relevant to the action.
18 Fire Ins. Exch. v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987).
19 Thus, where a party is on notice of potential litigation, the party is subject to sanctions for
20 actions taken which prejudice the opposing party's discovery efforts. Fire Ins. Exch. v.
21 Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987)

22 Here, as the Court is aware, the instant case does not involve a negligible fender
23 bender. Contrarily, this case involves a serious twenty car accident, resulting from when
24 one of MDB's trucks released a truckload of material onto a busy interstate highway. With
25 so many parties involved and due to the gravity of the event, *it is clear that MDB was on*
26 *notice that there was potential litigation on the horizon* where liability would be an issue.
27 MDB was well-aware that both police and EMT's were on scene and numerous people
28 were transported to local hospitals with serious injuries. Moreover, as MDB's truck,

1 trailers and the subject VERSA valve are the centerpiece of the resulting litigation, MDB
2 knew, or should have reasonably known, that the truck, trailers and valve were relevant to
3 the instant litigation. Thus, because MDB was on notice that the truck and trailers were
4 relevant to potential litigation, MDB had a pre-litigation duty to preserve the evidentiary
5 value contained within the truck, trailers and valve by removing such evidence from
6 service and continued use.

7 Moreover, as MDB's cross-claim against VERSA asserts that the subject valve
8 caused or contributed to the accident because it allegedly operated inadvertently, MDB
9 *was on notice and knew*, or should have reasonably known, *that any parts*, mechanical,
10 electrical, or otherwise, that are *related to the valve's operation*, (in any capacity), *are*
11 *relevant to the instant litigation*. Thus, because MDB was on notice that all parts related to
12 the subject valve were relevant to potential litigation, MDB had a pre and post litigation
13 duty to preserve the evidentiary value contained within such evidence by retaining the
14 evidence instead of conveniently discarding, and ultimately destroying, such critical
15 evidence.

16 Simply put, MDB's actions of not preserving the aforementioned evidence not only
17 goes staunchly against case law and the spirit of the discovery rules, but it also
18 *detrimentally affects VERSA's ability to defend itself* from MDB's baseless lawsuit by
19 removing crucial evidence that supports VERSA's liability theories. Accordingly, in the
20 interest of upholding the validity of Nevada's discovery rules and remedying the
21 outstanding injustice, both case law and statutory law dictate that this Court should
22 sanction MDB. Indeed, without an appropriate sanction, MDB's discovery violations
23 unfairly tip the scales of justice in MDB's favor.

24 **B. This Court Should Strike MDB's Cross-Claim Because of MDB's Discovery**
25 **Violations Pursuant to NRCP 37 and Prevailing Case Law**

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

27 Nevada allows for the dismissal of a case based upon an offending party's abuse
28 of discovery. GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 870, 900 P.2d 323, 325

1 (1995). Indeed, the Nevada Rules of Civil Procedure permit the Court to strike out
2 pleadings or dismiss an action entirely for discovery abuses. See NRCP 37(b)(2)(C).
3 Additionally, a district court has the inherent equitable power to dismiss actions as a
4 sanction for abusive litigation practices. Parkinson v. Bernstein, Nos. 59947, 61089, 2014
5 Nev. Unpub. LEXIS 2176, at *1 (Dec. 22, 2014).

6 Dismissal is a proper sanction where a plaintiff possesses the evidence at issue
7 but disposes of it before filing a complaint. CSA Serv. Ctr., LLC v. Air Design Sys., LLC,
8 No. 57674, 2013 Nev. Unpub. LEXIS 686, at *8 (May 31, 2013). Dismissal of a party's
9 complaint as a sanction does not need to be "preceded by other less severe sanctions."
10 CSA Serv. Ctr., LLC v. Air Design Sys., LLC, No. 57674, 2013 Nev. Unpub. LEXIS 686, at
11 *7 (May 31, 2013). A court's authority to impose sanctions "is rooted in a court's
12 fundamental interest in protecting its own integrity and that of the judicial process."
13 Halverson v. Hardcastle, 123 Nev. 245, 261 n.26, 163 P.3d 428, 440 (2007) (quoting
14 Cummings v. Wayne County, 210 Mich. App. 249, 533 N.W.2d 13, 14 (Mich. Ct. App.
15 1995).

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

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

25 To muddy the waters even more, MDB not only continued to operate the subject
26 truck, trailer, and valve at issue in this case, but MBD, *while on notice* to preserve
27 relevant evidence, *removed and threw away* the electrical components that control the
28

1 subject valve. See, Exhibit 3 at P. 169:16-22; Exhibit 6 at P. 4:13-22. Mr. Palmer testified
2 to the same:

3 Q. Okay. Did you save the plugs that you changed after the July 2014
4 event until the time that the forensic inspection, electrical inspection
5 had occurred?

6 MR. PALMER: No.

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

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

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

11 To state the obvious, such electrical components support VERSA's defense that
12 something other than the valve itself (such as a defect or malfunction like the electrical
13 components MDB destroyed) activated the subject valve and caused the underlying
14 accident. Accordingly, applying Parkinson, because *MDB destroyed highly relevant*
15 *evidence that VERSA requires to prove the case is meritless*, this Court should strike
16 MDB's cross-claim against VERSA to curtail any further unnecessary litigation costs and
17 free up the Court's docket for cases with actual veracity.

18 ***2. A Young Factor Analysis Supports the Court Striking MDB's Cross-Claim***

19 While dismissal need not be preceded by other less severe sanctions, it should be
20 imposed only after thoughtful consideration of all the factors involved in a particular case.

21 See, Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). The
22 factors a Court may properly consider include, but are not limited to:

- 23 1) the degree of willfulness of the offending party;
- 24 2) the extent to which the non-offending party would be prejudiced by a lesser
25 sanction;
- 26 3) the severity of the sanction of dismissal relative to the severity of the
27 discovery abuse;
- 28 4) whether any evidence has been irreparably lost;
- 5) the feasibility and fairness of alternative, less severe sanctions, such as an
order deeming facts relating to improperly withheld or destroyed evidence to
be admitted by the offending party;

- 6) the policy favoring adjudication on the merits;
- 7) Whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and
- 8) the need to deter both the parties and future litigants from similar abuses.

Id.

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

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

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

Moreover, knowing that MDB's main theory of liability against VERSA was that the subject valve was somehow "energized," MDB removed and spoliated electrical parts that activated the subject valve. See, Exhibit 5. Put simply, *MDB discarded the electrical component parts that are used in activating the subject valve*. Such conduct appears intentional or, at the very least, highly reckless considering the magnitude of the instant

1 case and the competing theories of liability. Moreover, such conduct appears intentional
2 or highly reckless when viewed in the proper context that such evidence supports
3 VERSA's defense that it's valve functioned properly. Accordingly, applying Young and N.
4 AM. Props, because MBD's intentional or reckless conduct rises to a level of willfulness,
5 MBD's destruction of evidence and it's failure to preserve the integrity of evidence weighs
6 in favor of this Court striking MDB's cross-claim against VERSA.

7 **b. A Lesser Sanction Would Adversely Harm Versa Because it Would**
8 **Needlessly Increase Litigation Costs and Severely Prejudice**
9 **VERSA's Liability Defense**

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

15 Here, a lesser sanction would prejudice VERSA for two reasons. First, a lesser
16 sanction would force VERSA to approach trial without crucial defense evidence while
17 simultaneously rewarding MDB for it's conduct. Second, a lesser sanction needlessly
18 increases VERS's litigation cots and does nothing to remedy the discovery abuses.
19 Versa is unable to test the electrical component parts to determine if there was a
20 malfunction which activated the valve. Accordingly, applying Young, because a lesser
21 sanction would not remedy MDB's spoliation of critical evidence, a lesser sanction will
22 only force VERSA to incur unnecessary and expensive litigation costs. Thus, this factor
23 strongly weighs in favor of the Court striking MDB's cross-claim.

24 **c. Dismissal of MDB's Cross-Claim Balances the Harm of MDB's**
25 **Destruction of Evidence Necessary for VERSA to Assert a Proper**
26 **Defense**

27 The third factor of the Young analysis addresses the severity of the sanction of
28 dismissal relative to the severity of the discovery abuse. See, Young, 106 Nev. at 93.
29 Courts have held that severe sanctions are warranted when the aggravating party

1 *violates both the letter and spirit* of the discovery rules. See, N. Am. Props, 2016 Nev.
2 Unpub. LEXIS 487 at *10.

3 Here, the instant discovery violations are a text book example of conduct that
4 violates both the letter and spirit of discovery: *MDB threw away key evidence that VERSA*
5 *needs to prove it's case*. See, Exhibit 3 at P. 169:16-22. Such conduct has a nullifying
6 effect on VERSA's ability to defend itself in this matter. Essentially, MDB's destruction of
7 evidence functions indirectly as an informal dismissal of VERSA's defenses. Accordingly,
8 applying Young and N. Am. Props., because MDB's actions have a similar effect as a
9 dispositive Motion, dismissal of MDB's cross-claim is proportionate to MDB's discovery
10 abuses and, therefore, this factor weighs in favor of the Court striking MDB's cross-claim.

12 d. Unquestionably, MBD Irreparably Destroyed Highly Relevant
13 Evidence

14 The fourth factor of the Young analysis addresses whether any evidence has been
15 irreparably lost. Young, 106 Nev. at 93. Although evidence may not be irreparably lost,
16 the Court may hold this factor against the aggravating party if the abusive conduct greatly
17 undermines the utility of the subject evidence by robbing the aggrieved party of the
18 opportunity to carefully review and consider the evidence before trial. See, N. Am. Props.
19 2016 Nev. Unpub. LEXIS 487 at *11.

20 Here, this is an open and closed case - *MDB irreparably lost evidence*. See,
21 Exhibit 3 at P. 169:16-22. MDB threw away the electrical components that relate to the
22 core issue of why the subject valve activated. *Id.* Additionally, through the continued
23 used of the truck, trailers, and subject valve after the accident, MDB forever destroyed
24 VERSA's ability to investigate the condition of such evidence as it existed at the time of
25 the accidents. See, Exhibit 4 at P. 84:19-24; Exhibit 6 at P. 4:8-22. Accordingly, applying
26 Young and N. Am. Props., because MDB irreparably spoliated evidence, which unduly
27

1 prejudice VERSA, this factor strongly weighs in favor of the Court striking MDB's cross-
2 claim.

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

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

12 Here, MDB's discovery violations have undermined VERSA's liability defenses by
13 destroying key evidence and, thus, such violations have created unequal footing in favor
14 of MDB as the parties approach trial. Although it is feasible to administer a lesser
15 sanction, it is both unquestionably unfair and economically unsound. The indirect
16 consequence of allowing a lesser sanction is that such action sends a message that the
17 discovery rules are only bark, with no bite. A lesser sanction will force VERSA to
18 approach trial with essential tools missing from its tool belt - the crucial evidence that
19 MDB destroyed. More importantly, as outlined above, a lesser adverse instruction
20 sanction requires additional unnecessary and costly litigation fees. Accordingly, applying
21 Young, as any other sanction would not be as fair as dismissing MDB's meritless cross-
22 claim, this factor strongly weighs in favor of the Court striking MDB's cross-claim.

23 f. Public Policy Favors Dismissing this Meritless Claim

24 The sixth factor of the Young analysis addresses the public policy favoring
25 adjudication on the merits. Young, 106 Nev. at 93. Although courts favor adjudicating
26 cases on their merits, gross discovery abuses will qualify as circumstances when case-
27 ending sanctions, or sanctions that effectively act as case-ending sanctions, are
28 appropriate. See, Foster v. Dingwall, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (not

1 hearing the case on its merits appropriate when relevant evidence been irreparably lost
2 due to the willful actions).

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

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

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

17 Here, at this point in litigation, there is no evidence in the record to suggest that
18 MDB's counsel had an part in the destruction of the subject evidence. Accordingly,
19 applying Young, because *MDB actively destroyed evidence on its own volition*, void of
20 counsel's misconduct, this factor strongly weighs in favor of the Court striking MDB's
21 cross-claim.

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

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

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

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

14 When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable
15 presumption that *the evidence would be adverse if produced*. Bass-Davis v. Davis, 122
16 Nev. 442, 448, 134 P.3d 103, 106 (2006). A rebuttable presumption is a rule of law by
17 which the finding of a basic fact gives rise to a presumed fact's existence, unless the
18 presumption is rebutted. Van Wart v. Cook, 557 P.2d 1161, 1163 (Okla. Civ. App. 1976).
19 However, the party seeking the presumption's benefit has the burden of demonstrating
20 that the evidence was destroyed with intent to harm. Bass-Davis v. Davis, 122 Nev. 442,
21 448, 134 P.3d 103, 107 (2006).

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

27 Here, as addressed in the Young analysis, MDB willfully destroyed crucial
28 evidence that is pertinent to VERSA's liability defenses. See, Exhibit 3 at P. 169:16-22;

1 Exhibit 6 at P. 4:8-22; P. 6:8-23. With MDB's continual use of the subject truck, trailers,
2 and valve after the subject accident, MDB corrupted the integrity and value of such
3 evidence. Such continued use after being on notice to preserve evidence demonstrates
4 MDB's intent to harm the integrity of the evidence and harm VERSA's defense of the
5 case. Additionally, MDB's cognizant destruction of the key electrical components, that
6 cause the valve to activate, demonstrate by a preponderance of the evidence that MDB
7 intended to harm VERSA by destroying the evidence that supports VERSA's liability
8 defenses. *Id.* MBD may try to hide behind a procedural argument that it threw away the
9 critical evidence as part of its business operations; however, such an argument would
10 constitute a red hearing because MDB should not have even operated the subject truck,
11 trailers and valve to artificially create a situation that called for replacement and repair of
12 such components. *Id.* Accordingly, applying Bass-Davis, because MDB intentionally
13 suppressed and destroyed crucial evidence, this Court should advise the jury that such
14 evidence would be adverse against MDB if MDB had properly produced such evidence.

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

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

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

9 IV. CONCLUSION

10 Based on the foregoing, VERSA respectfully requests that the Court grant
11 VERSA's Motion and strike MDB's cross-claims, or in the alternative, issue an adverse
12 instruction against MDB.

13 AFFIRMATION

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

16 DATED this 15th day of May, 2017

17 Respectfully submitted,

18 LEWIS BRISBOIS BISGAARD & SMITH LLP

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