

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 08:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

JOINT APPENDIX VOLUME 18 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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1
2 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
3 IN AND FOR THE COUNTY OF WASHOE

4 ***

5 ERNEST BRUCE FITZSIMMONS, et al.,

6 Plaintiffs,

Case No. CV15-02349

7 Dept. No. 10

8 vs.

9 MDB TRUCKING, LLC; et al.,

10 Defendants.

11 _____ /
12 **ORDER**

13 Presently before the Court is the DEFENDANT/CROSS-DEFENDANT VERSA
14 PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
15 PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Defendant/Cross-
16 Defendant VERSA PRODUCTS, INC. ("Versa") on January 5, 2018. Versa contemporaneously
17 filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
18 VERIFIED MEMORANDUM OF COSTS ("the Memorandum of Costs"). Versa filed the
19 ERRATA TO DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
20 MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68
21 ("the Errata") on January 10, 2018. The Errata changes the total amount of fees from \$213,988.00
22 to \$228,500.50.¹ Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the CROSS-
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27 _____
28 ¹ The Motion for Fees lists attorneys' fees in the amount of \$228,500.50. The Motion for Fees, 13:14, 16:15. The incorrect figure of \$213,988.00 appears in the AFFIDAVIT OF JOSH COLE AICKLEN, ESQ. IN SUPPORT OF DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS'

1 CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA
2 PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
3 PURSUANT TO NRCPC 37 AND NRCPC 68 ("the Opposition to the Motion for Fees") on January
4 25, 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS
5 COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS'
6 FEES AND COSTS PURSUANT TO NRCPC 37 AND NRCPC 68 ("the Reply in Support of the
7 Motion for Fees") on February 5, 2018, and contemporaneously submitted the matter for the
8 Court's consideration.
9

10
11 Also before the Court is the CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION
12 TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
13 VERIFIED MEMORANDUM OF COSTS ("the Motion to Retax") filed by MDB on January 16,
14 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
15 INC.'S OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION TO
16 RETAX COSTS ("the Opposition to the Motion to Retax") on February 2, 2018. MDB filed the
17 CROSS-CLAIMANT MDB TRUCKING LLC'S REPLY IN SUPPORT OF MOTION TO
18 RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
19 VERIFIED MEMORANDUM OF COSTS ("the Reply in Support of the Motion to Retax") on
20 February 12, 2018, and contemporaneously submitted the matter for the Court's consideration.
21
22 The Court heard oral argument on the Motion for Fees and the Motion to Retax on April 6, 2018,
23 at which time the Court took the matters under advisement.
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28 FEES AND COSTS PURSUANT TO NRCPC 37 AND NRCPC 68. The Errata does not provide a reason for the
discrepancy.

1 This case arises from a personal injury action. A COMPLAINT (“the Complaint”) was filed
2 by the Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015.
3 Numerous other plaintiffs were joined into the Fitzsimmons case. It is alleged on July 7, 2014, the
4 Defendant Daniel Anthony Koski (“Koski”), while driving a truck for MDB, negligently spilled a
5 load of gravel into the roadway. The spilled gravel caused the driving Plaintiffs to lose control of
6 their vehicles and numerous accidents occurred. The Plaintiffs sustained physical and emotional
7 injuries as a result of the accidents. In response to the Complaint, MDB filed a THIRD-PARTY
8 COMPLAINT (“the MDB Cross-Claim”) June 15, 2016. The MDB Cross-Claim had two causes
9 of action relative to Versa: Implied Indemnification and Contribution.² MDB alleges it was not
10 Koski’s negligence that caused the gravel to spill; rather, the spill was caused by the “unreasonably
11 dangerous and defective” design and manufacture of the trailer that held the gravel. The MDB
12 Cross-Claim, 3:5-7. Therefore, MDB brought the Cross-Claim against the manufacturers of the
13 trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which
14 would, “activate inadvertently allowing the gates to open and release the load [of gravel] carried by
15 the trailer.” The MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives
16 available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed
17 to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim,
18 3:12-18.

19 The Court entered an ORDER (“the December Order”) on December, 8, 2017, granting the
20 DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
21 INC.’S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB
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27 ² 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.

1 TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE,
2 FOR AN ADVERSE JURY INSTRUCTION ("the Motion to Strike"). The Court found MDB's
3 disposal of the electrical systems that control the solenoid which operated the Versa valve crippled
4 Versa's ability to present its case. The December Order, 13:11-12. As a result, the Court dismissed
5 MDB's sole remaining cross-claim against Versa.
6

7 The Court finds Versa is not entitled to an award of attorneys' fees. In general, a district
8 court may not award "attorney fees... unless authorized to do so by a statute, rule or contract."
9 *U.S. Design & Constr. v. I.B.W.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). NRCP
10 68 provides:
11

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

14 ...

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

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

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

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

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

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

4
5 (1) the qualities of the advocate: his ability, his training, education, experience, professional
6 standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
7 importance, time and skill required, the responsibility imposed and the prominence and
8 character of the parties where they affect the importance of the litigation; (3) the work
actually performed by the lawyer: the skill, time and attention given to the work; (4) the
result: whether the attorney was successful and what benefits were derived.

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

10 Versa served MDB with an offer of judgment for \$1,000.00 per plaintiff (“the Initial Offer”)
11 on May 4, 2017. The Motion for Fees, Exhibit 1. The following day, the parties attended
12 mediation. The Motion for Fees, 6:20-21. At mediation, MDB demanded \$175,000.00 from Versa
13 and another cross-defendant, RMC LAMAR HOLDING, INC. (“Ranco”), the manufacturer of the
14 trailer. TRANSCRIPT OF PROCEEDINGS, HEARING ON MOTION FOR ATTORNEY FEES
15 AND COSTS AND MOTION TO RETAX, April 6, 2018 (“Transcript”), 10:4-10. Versa offered
16 \$100,000.00, and Ranco offered \$50,000.00 (“the Mediation Offer”). MDB rejected the Mediation
17 Offer, and indicated MDB would settle for no less than \$175,000.00 from Versa and Ranco.
18 Transcript, 10:13-15. The Motion for Fees alleges Versa telephoned MDB approximately two
19 business days later offering to settle for \$175,000.00 (“the Final Offer”). The Motion for Fees, 7:2-
20 3. At oral argument the Court queried MDB about the Final Offer. The Court took a brief recess to
21 allow counsel for MDB to call co-counsel for details on the specifics of the Final Offer. Transcript,
22 31:7-14. MDB conceded Versa made the Final Offer, and that it was made “in close proximity” to
23 the mediation. Transcript, 32:2-15. MDB contends the Final Offer was not for \$175,000.00,
24 although co-counsel could not recall the specific amount. Transcript, 32:3-8.
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1 Versa is not entitled to an award of attorneys' fees pursuant to NRCP 68. MDB's claim was
2 brought in good faith. Further, the Court finds it was not unreasonable for MDB to reject the Initial
3 Offer. The Opposition to the Motion for Fees argues the Initial Offer was unreasonable because it
4 "amounted to less than one half of one percent (0.005) of the total settlement amount MDB paid to
5 plaintiffs...." The Opposition to the Motion for Fees, 7:2-3. The Court agrees. The fact Versa
6 made an offer of \$100,000.00 one day later and was willing to meet MDB's full demand two
7 business days later clearly demonstrates the Initial Offer of \$1,000.00 per plaintiff was
8 unreasonable and not made in good faith. MDB's decision to reject the Mediation Offer and
9 especially the Final Offer were unreasonable, but those rejections cannot be the basis for awarding
10 Versa attorneys' fees. NRCP 68 applies to *written* offers. The Court has been presented with no
11 document evincing the Mediation Offer or the Final Offer were reduced to writing. An analysis of
12 the first three *Beattie* factors leads to the conclusion Versa is not entitled to fees pursuant to NRCP
13 68; therefore, a *Brunzell* analysis of the reasonableness of the fees requested is unnecessary.³

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

19 (b) Failure to Comply With Order.

20 ...
21 (2) Sanctions--Party. If a party or an officer, director, or managing
22 agent of a party or a person designated under Rule 30(b)(6) or 31(a) to
23 testify on behalf of a party fails to obey an order to provide or permit
24 discovery, including an order made under subdivision (a) of this rule
25 or Rule 35, or if a party fails to obey an order entered under Rules 16,
26 16.1, and 16.2 the court in which the action is pending may make such
27 orders in regard to the failure as are just, and among others the
28 following:
29 ...

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

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

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

10 The Court finds an award of attorneys' fees would be unjust. Case-concluding sanctions
11 against MDB was a windfall for Versa. The Motion for Fees argues, "there is no substantial
12 justification for MDB's failure to preserve the evidence other than to obstruct discovery and
13 frustrate the progress of this litigation." The Motion for Fees, 8:23-25. However, the December
14 Order made clear "the Court does not find MDB intentionally disposed of the components in order
15 to harm Versa, nor were MDB's employees acting with any malevolence...." The December Order,
16 8:20-22. MDB did not intend to "obstruct discovery and frustrate the progress of this litigation" as
17 the Motion suggests. Although dismissal of MDB's claim against Versa was warranted, it was a
18 severe sanction. Further sanctions would be unjust.

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

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25 In order for a court to make an award of costs, the party seeking costs must file with the
26 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
27 the memorandum of costs, the prevailing party must also provide the court with evidence, or
28

1 “justifying documentation,” which demonstrates how the costs being sought were “reasonable,
2 necessary, and actually incurred” in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
3 1054. Accordingly, appropriate “justifying documentation must mean something more than a
4 memorandum of costs.” *Id.* Without such documentation, a court may not award costs. *Id.*

5
6 If the party against whom costs are sought wishes to dispute the costs, they must make a motion to
7 the court within three days of the memorandum’s filing. NRS 18.110(4). Once in receipt of that
8 motion, the Court will be allowed to settle the costs. *Id.*

9
10 The Motion for Fees requests expert witness fees in the amount of \$13,706.49. The Motion
11 for Fees, 15:13-17. The Motion to Retax argues the amount of expert fees requested is
12 unreasonable for the following reasons: the expert, Garrick Mitchell, M.S., P.E. (“Mitchell”), had
13 no useful opinions; Mitchell’s testimony would not aid the trier of fact, and was merely repetitive
14 of other experts; Mitchell conducted no independent testing; and Mitchell is a mechanical engineer
15 who does not possess the requisite level of expertise to make determinations better suited for an
16 electrical engineer. The Motion to Retax, 9:3-26.

17
18 This action involved millions of dollars in claimed damages. Versa’s defense rested entirely
19 upon disproving MDB’s theory that the valve manufactured by Versa malfunctioned. The only way
20 Versa could accomplish this was through the use of an expert witness. The Motion to Retax argues
21 Mitchell did not offer a viable opinion about the cause of the spill, but this does not discredit
22 Mitchell’s value as an expert because Versa did not necessarily have to prove what was responsible
23 for the incident. Given Versa’s potential exposure, it was not unreasonable for Versa to retain
24 Mitchell to perform extensive analysis and evaluation, which required two site inspections. The
25 Court finds the amount of expert fees requested is reasonable and necessary.
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1 The Motion to Retax points out the Memorandum of Costs is devoid of evidence or
2 justifying documentation pertaining to certain costs. The Motion to Retax, 3:4-5. The failure to
3 support a memorandum of costs leaves the court and the party against whom costs are sought with
4 nothing upon which a determination of reasonableness can be made. It may be that the party
5 against whom costs are sought assesses a memorandum of costs and determines the costs are
6 reasonable and a motion to retax would be unnecessary. If the party against whom costs are sought
7 does not file a motion to retax, the court still cannot award costs without evidence or justifying
8 documentation. *Cadle Co.* places the burden upon the party seeking costs to affirmatively
9 demonstrate the costs are reasonable, necessary, and actually incurred *when the motion is filed*. The
10 failure to provide justifying documentation at the outset results in additional work for the Court as
11 well as the parties. At oral argument counsel for Versa informed the Court it is their common
12 practice to attach a self-created “disbursement diary” to the memorandum of costs, and to only “dig
13 up” documentation if there is a controversy. Transcript, 26:22-24. While this may be counsel’s
14 common practice, it does not comport with the requirements set forth by the Supreme Court of
15 Nevada. The Motion to Retax argues \$16,774.78 in costs are unsupported in the Memorandum of
16 Costs and should therefore be denied. The Motion to Retax, 6:3-4. The Court agrees. The
17 remainder of the costs are supported with the requisite justifying documentation.

18 The Motion to Retax argues for a reduction in the costs award on several other grounds:
19 costs related to the Plaintiffs’ claims⁴; costs incurred subsequent to Versa’s offer of judgment;
20 expert witness costs exceeding \$1,500.00; and costs not specifically provided for in NRS 18.005.
21 The Court finds these arguments are without merit. First, Versa had a right to defend against the

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28 ⁴ The Plaintiffs asserted negligence claims against MDB and strict liability claims against Ranco and Versa. FIRST AMENDED COMPLAINT FOR DAMAGES filed August 23, 2016.

1 Plaintiffs' claims underlying MDB's claim for contribution. Second, Versa is entitled to recover
2 costs incurred prior to the offer of judgment. The Reply in Support of the Motion to Retax
3 concedes an award of costs is not limited to those incurred after an offer of judgment; rather, it
4 argues the Opposition to the Motion to Retax contradicts the Memorandum of Costs and the Motion
5 for Fees. The Reply in Support of the Motion to Retax, 5:22-26. It alleges the Memorandum of
6 Costs and the Motion for Fees indicate the only costs sought are those incurred subsequent to the
7 offer of judgment. The Court finds no such contradiction warranting the retaxing of costs on this
8 basis. Third, as discussed *supra*, Versa is entitled to recover their expert witness costs. Finally, the
9 courier fees for delivery of depositions, the compact disc fees, and exhibit fees are reasonable and
10 necessary expenses in the litigation, and are therefore recoverable pursuant to NRS 18.005(17).
11

12
13 It is hereby **ORDERED** the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS
14 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO
15 NRCP 37 AND NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request
16 for attorneys' fees is denied. MDB shall pay Versa's costs as set forth below.
17

18 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
19 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
20 INC.'S VERIFIED MEMORANDUM OF COSTS is **GRANTED IN PART AND DENIED IN**
21 **PART**. The amount of costs requested in the DEFENDANT/CROSS-DEFENDANT VERSA
22 PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS is reduced by
23 \$16,774.78. MDB is ordered to pay costs in the amount of \$41,998.28.
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25 DATED this 7 day of June, 2018.

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28 ELLIOTT A. SATTLER
District Judge

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CERTIFICATE OF MAILING

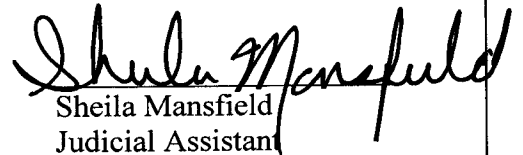
Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of June, 2018, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy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

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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 7 day of June, 2018, 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.

NICHOLAS M. WIECZOREK, ESQ.
COLLEEN E. McCARTY, ESQ.

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Sheila Mansfield
Judicial Assistant

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

5 ***

6 GENEVA M. REMMERDE,

7 Plaintiff,

Case No. CV16-00976

8 Dept. No. 10

9 vs.

10 MDB TRUCKING, LLC; et al.,

11 Defendants.

12 _____ /
13 **ORDER**

14 Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS
15 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRC
16 P 37 AND NRC P 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS,
17 INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY
18 DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF
19 COSTS ("the Memorandum of Costs"). Cross-Claimant MDB TRUCKING, LLC ("MDB") filed
20 the CROSS-CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT
21 VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
22 PURSUANT TO NRC P 37 AND NRC P 68 ("the Opposition to the Motion for Fees") on March 1,
23 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
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1 REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS
2 PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the Motion for Fees") on
3 March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.

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

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

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

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

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

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

9 ...

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

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

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

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

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

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

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

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

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

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

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

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

13 (b) Failure to Comply With Order.

14 ...

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

21 ...

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

25 ...

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

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

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

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

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

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

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

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

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24 DATED this 7 day of June, 2018.

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27 ELLIOTT A. SATTLER
28 District Judge

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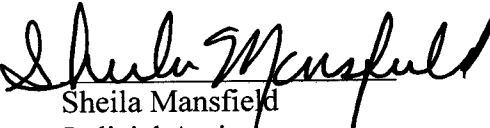
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Sheila Mansfield
Judicial Assistant

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

1 COSTS PURSUANT TO NRCP 37 AND NRCP 68 (“the Reply in Support of the Motion for
2 Fees”) on March 12, 2018, and contemporaneously submitted the matter for the Court’s
3 consideration.
4

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

17 This case arises from a personal injury action. A COMPLAINT (“the Complaint”) was filed
18 by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 (“the
19 Fitzsimmons Action”). The Fitzsimmons Action was assigned Second Judicial District Court case
20 number CV15-02349. Numerous other plaintiffs were joined into the Fitzsimmons Action. Two
21 additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and
22 GENEVA M. REMMERDE V. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde
23 Action”). The instant action was filed September 20, 2016. The Remmerde Action was filed May
24 2, 2016. It is alleged in all three actions that on July 7, 2014, Defendant Daniel Anthony Koski
25 (“Koski”), while driving a truck for MDB, negligently spilled a load of gravel into the roadway.
26 The spilled gravel caused the driving plaintiffs to lose control of their vehicles and numerous
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28

1 accidents occurred. The plaintiffs sustained physical and emotional injuries as a result of the
2 accidents. In response to the Complaint, MDB filed a THIRD-PARTY COMPLAINT (“the MDB
3 Cross-Claim”) June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa:
4 Implied Indemnification and Contribution.¹ MDB alleges it was not Koski’s negligence that caused
5 the gravel to spill; rather, the spill was caused by the “unreasonably dangerous and defective”
6 design and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 3:5-7.
7 Therefore, MDB brought the Cross-Claim against the manufacturers of the trailer and its
8 components, including Versa. MDB avers Versa produced a solenoid valve which would, “activate
9 inadvertently allowing the gates to open and release the load [of gravel] carried by the trailer.” The
10 MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives available to Versa; the
11 solenoid valve was unreasonably dangerous and defective; and Versa failed to provide appropriate
12 safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 3:12-18.
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15
16 The Court entered an ORDER (“the January Order”) on January 22, 2018, granting the
17 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.’S MOTION TO STRIKE
18 DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC’S THIRD-PARTY
19 COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE
20 JURY INSTRUCTION (“the Motion to Strike”).² The Court found MDB’s disposal of the
21 electrical systems that control the solenoid which operated the Versa valve crippled Versa’s ability
22 to present its case. As a result, the Court dismissed MDB’s sole remaining claim against Versa.
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25
26 ¹ Versa filed THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
27 THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) (“the MTD”) on July 19, 2016. The Court granted the MTD on October 19, 2016.

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

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

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

9 ...

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

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

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

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

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

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

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

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

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

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

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

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

13 (b) Failure to Comply With Order.

14 ...

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

24 ...

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

29 ...

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

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

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

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

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

4
5 First, the Motion to Retax argues \$198.00 of the claimed costs should not be awarded
6 because they are unsupported with the required justifying documentation. For the reasons set forth
7 on the same issue in the ORDER entered contemporaneously herewith in the Fitzsimmons action,
8 the Court agrees. The costs award will be reduced by \$198.00.

9 The Motion to Retax argues for a reduction in the costs award on several other grounds:
10 costs related to the plaintiffs' claims underlying the MDB Cross-Claim against Versa; costs
11 incurred subsequent to Versa's offer of judgment; and costs not specifically provided for in NRS
12 18.005. The Court finds these arguments are without merit. First, Versa had a right to defend
13 against the claims underlying MDB's claim for contribution. Second, Versa is entitled to recover
14 costs incurred prior to the offer of judgment. The Reply in Support of the Motion to Retax
15 concedes an award of costs is not limited to those incurred after an offer of judgment; rather, it
16 argues the Opposition to the Motion to Retax contradicts the Memorandum of Costs and the Motion
17 for Fees. The Reply in Support of the Motion to Retax, 4:21-25. It alleges the Memorandum of
18 Costs and the Motion for Fees indicate the only costs sought are those incurred subsequent to the
19 offer of judgment. The Court finds no such contradiction warranting the retaxing of costs on this
20 basis. Finally, the authorization and shipping fees for medical and tax records are reasonable and
21 necessary expenses in the litigation, and are therefore recoverable pursuant to NRS 18.005(17).
22

23 //

24 //

1 It is hereby **ORDERED** the CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
2 INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND
3 NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request for attorneys'
4 fees is denied. MDB shall pay Versa's costs as set forth below.

6 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
7 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
8 INC.'S VERIFIED MEMORANDUM OF COSTS is **GRANTED IN PART AND DENIED IN**
9 **PART**. The amount of costs requested in the CROSS-DEFENDANT VERSA PRODUCTS
10 COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS is reduced by \$198.00. MDB is
11 ordered to pay costs in the amount of \$1,076.74.

13 DATED this 7 day of June, 2018.

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16 ELLIOTT A. SATTLER
17 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 June, 2018, 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 7 day of June, 2018, 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.
- NICHOLAS M. WIECZOREK, ESQ.
- COLLEEN E. McCARTY, ESQ.


Sheila Mansfield
Judicial Assistant

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 Defendant/Cross-Claimant
VERSA PRODUCTS COMPANY, INC.

9
10 IN THE SECOND JUDICIAL DISTRICT COURT
11 WASHOE COUNTY, NEVADA

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

13 Plaintiffs,

14 vs.

15 MDB TRUCKING, LLC, et. al.

16 Defendants.

17 AND ALL RELATED CASES.
18

Case No. CV15-02349

Dept. 10

NOTICE OF ENTRY

19
20
21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

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

4 AFFIRMATION

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

7 DATED this 13th day of June, 2018

8 Respectfully Submitted,

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

10
11
12 By /s/ Josh Cole Aicklen
13 JOSH COLE AICKLEN
14 Nevada Bar No. 007254
15 DAVID B. AVAKIAN
16 Nevada Bar No. 009502
17 PAIGE S. SHREVE
18 Nevada Bar No. 013773
19 6385 S. Rainbow Boulevard, Suite 600
20 Las Vegas, Nevada 89118
21 Attorneys for Defendant/Cross-Claimant
22 VERSA PRODUCTS COMPANY, INC.
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25
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LIST OF EXHIBITS

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Exhibit 1 Order

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this 13th day of June, 2018, I did cause a true copy of the foregoing NOTICE OF ENTRY to be served via the electronic filing system with the Court and addressed as follows:

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

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

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

EXHIBIT 1

4845-3057-6394.1

AA003038

1
2 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

3 IN AND FOR THE COUNTY OF WASHOE

4 ***

5 ERNEST BRUCE FITZSIMMONS, et al.,

6 Plaintiffs,

Case No. CV15-02349

7
8 vs.

Dept. No. 10

9 MDB TRUCKING, LLC; et al.,

10 Defendants.

11 _____ /
12 **ORDER**

13 Presently before the Court is the DEFENDANT/CROSS-DEFENDANT VERSA
14 PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
15 PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Defendant/Cross-
16 Defendant VERSA PRODUCTS, INC. ("Versa") on January 5, 2018. Versa contemporaneously
17 filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
18 VERIFIED MEMORANDUM OF COSTS ("the Memorandum of Costs"). Versa filed the
19 ERRATA TO DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
20 MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68
21 ("the Errata") on January 10, 2018. The Errata changes the total amount of fees from \$213,988.00
22 to \$228,500.50.¹ Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the CROSS-
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27 _____
28 ¹ The Motion for Fees lists attorneys' fees in the amount of \$228,500.50. The Motion for Fees, 13:14, 16:15. The incorrect figure of \$213,988.00 appears in the AFFIDAVIT OF JOSH COLE AICKLEN, ESQ. IN SUPPORT OF DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS'

1 CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA
2 PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
3 PURSUANT TO NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on January
4 25, 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS
5 COMPANY, INC.'S REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS'
6 FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the
7 Motion for Fees") on February 5, 2018, and contemporaneously submitted the matter for the
8 Court's consideration.
9

10
11 Also before the Court is the CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION
12 TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
13 VERIFIED MEMORANDUM OF COSTS ("the Motion to Retax") filed by MDB on January 16,
14 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
15 INC.'S OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC'S MOTION TO
16 RETAX COSTS ("the Opposition to the Motion to Retax") on February 2, 2018. MDB filed the
17 CROSS-CLAIMANT MDB TRUCKING LLC'S REPLY IN SUPPORT OF MOTION TO
18 RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.'S
19 VERIFIED MEMORANDUM OF COSTS ("the Reply in Support of the Motion to Retax") on
20 February 12, 2018, and contemporaneously submitted the matter for the Court's consideration.
21 The Court heard oral argument on the Motion for Fees and the Motion to Retax on April 6, 2018,
22 at which time the Court took the matters under advisement.
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28 FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68. The Errata does not provide a reason for the
discrepancy.

1 This case arises from a personal injury action. A COMPLAINT (“the Complaint”) was filed
2 by the Plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015.

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

19 The Court entered an ORDER (“the December Order”) on December, 8, 2017, granting the
20 DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
21 INC.’S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB
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27 ² 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 NRC P 12(B)(5) (“the MTD”) on June 27, 2016. The Court granted the MTD on October 19, 2016.

1 TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE,
2 FOR AN ADVERSE JURY INSTRUCTION ("the Motion to Strike"). The Court found MDB's
3 disposal of the electrical systems that control the solenoid which operated the Versa valve crippled
4 Versa's ability to present its case. The December Order, 13:11-12. As a result, the Court dismissed
5 MDB's sole remaining cross-claim against Versa.
6

7 The Court finds Versa is not entitled to an award of attorneys' fees. In general, a district
8 court may not award "attorney fees... unless authorized to do so by a statute, rule or contract."
9 *U.S. Design & Constr. v. I.B.W.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). NRCP
10 68 provides:
11

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

15 ...
16 (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a
17 more favorable judgment,

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

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

25 An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of the
26 following factors:
27

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

1 *Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983). A court may only award
2 reasonable attorney’s fees. The following factors are to be examined in determining whether the
3 fees sought are reasonable:
4

- 5 (1) the qualities of the advocate: his ability, his training, education, experience, professional
6 standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
7 importance, time and skill required, the responsibility imposed and the prominence and
8 character of the parties where they affect the importance of the litigation; (3) the work
actually performed by the lawyer: the skill, time and attention given to the work; (4) the
result: whether the attorney was successful and what benefits were derived.

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

10 Versa served MDB with an offer of judgment for \$1,000.00 per plaintiff (“the Initial Offer”)
11 on May 4, 2017. The Motion for Fees, Exhibit 1. The following day, the parties attended
12 mediation. The Motion for Fees, 6:20-21. At mediation, MDB demanded \$175,000.00 from Versa
13 and another cross-defendant, RMC LAMAR HOLDING, INC. (“Ranco”), the manufacturer of the
14 trailer. TRANSCRIPT OF PROCEEDINGS, HEARING ON MOTION FOR ATTORNEY FEES
15 AND COSTS AND MOTION TO RETAX, April 6, 2018 (“Transcript”), 10:4-10. Versa offered
16 \$100,000.00, and Ranco offered \$50,000.00 (“the Mediation Offer”). MDB rejected the Mediation
17 Offer, and indicated MDB would settle for no less than \$175,000.00 from Versa and Ranco.
18 Transcript, 10:13-15. The Motion for Fees alleges Versa telephoned MDB approximately two
19 business days later offering to settle for \$175,000.00 (“the Final Offer”). The Motion for Fees, 7:2-
20 3. At oral argument the Court queried MDB about the Final Offer. The Court took a brief recess to
21 allow counsel for MDB to call co-counsel for details on the specifics of the Final Offer. Transcript,
22 31:7-14. MDB conceded Versa made the Final Offer, and that it was made “in close proximity” to
23 the mediation. Transcript, 32:2-15. MDB contends the Final Offer was not for \$175,000.00,
24 although co-counsel could not recall the specific amount. Transcript, 32:3-8.
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1 Versa is not entitled to an award of attorneys' fees pursuant to NRCP 68. MDB's claim was
2 brought in good faith. Further, the Court finds it was not unreasonable for MDB to reject the Initial
3 Offer. The Opposition to the Motion for Fees argues the Initial Offer was unreasonable because it
4 "amounted to less than one half of one percent (0.005) of the total settlement amount MDB paid to
5 plaintiffs...." The Opposition to the Motion for Fees, 7:2-3. The Court agrees. The fact Versa
6 made an offer of \$100,000.00 one day later and was willing to meet MDB's full demand two
7 business days later clearly demonstrates the Initial Offer of \$1,000.00 per plaintiff was
8 unreasonable and not made in good faith. MDB's decision to reject the Mediation Offer and
9 especially the Final Offer were unreasonable, but those rejections cannot be the basis for awarding
10 Versa attorneys' fees. NRCP 68 applies to *written* offers. The Court has been presented with no
11 document evincing the Mediation Offer or the Final Offer were reduced to writing. An analysis of
12 the first three *Beattie* factors leads to the conclusion Versa is not entitled to fees pursuant to NRCP
13 68; therefore, a *Brunzell* analysis of the reasonableness of the fees requested is unnecessary.³
14
15

16
17 The Motion for Fees avers Versa is entitled to attorneys' fees pursuant to NRCP 37 because
18 the December Order issued case-concluding sanctions against MDB. NRCP 37 provides:

19 (b) Failure to Comply With Order.

20 ...
21 (2) Sanctions--Party. If a party or an officer, director, or managing
22 agent of a party or a person designated under Rule 30(b)(6) or 31(a) to
23 testify on behalf of a party fails to obey an order to provide or permit
24 discovery, including an order made under subdivision (a) of this rule
25 or Rule 35, or if a party fails to obey an order entered under Rules 16,
26 16.1, and 16.2 the court in which the action is pending may make such
27 orders in regard to the failure as are just, and among others the
28 following:
 ...

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

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

5 ...

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

11 The Court finds an award of attorneys' fees would be unjust. Case-concluding sanctions
12 against MDB was a windfall for Versa. The Motion for Fees argues, "there is no substantial
13 justification for MDB's failure to preserve the evidence other than to obstruct discovery and
14 frustrate the progress of this litigation." The Motion for Fees, 8:23-25. However, the December
15 Order made clear "the Court does not find MDB intentionally disposed of the components in order
16 to harm Versa, nor were MDB's employees acting with any malevolence...." The December Order,
17 8:20-22. MDB did not intend to "obstruct discovery and frustrate the progress of this litigation" as
18 the Motion suggests. Although dismissal of MDB's claim against Versa was warranted, it was a
19 severe sanction. Further sanctions would be unjust.

20 The Court now turns to the issue of costs. The Court finds the costs supported by justifying
21 documentation to be reasonable; however, the costs award is reduced because some of the claimed
22 costs are not properly supported in the Memorandum of Costs. District Courts have "wide, but not
23 unlimited, discretion to award costs to prevailing parties." *Cadle Co. v. Woods & Erickson, LLP*,
24 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), *recently upheld by Golightly & Vannah, PLLC*
25 *v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be
26 reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as
27 a matter of course, recover costs from an adverse party against whom judgment is rendered in
28 certain actions. These actions include those for recovery of money or damages exceeding

1 \$2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS
2 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the
3 statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a
4 reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,
5 unless the court finds that the witness was called without reason or necessity," *Id.* at (4);
6 "Reasonable fees of not more than five expert witnesses in an amount not more than \$1,500.00 for
7 each witness, unless the court allows a larger fee after determining the circumstances surrounding
8 the expert's testimony were of such a necessity as to require a larger fee," *Id.* at (5); "The fee of any
9 sheriff or licensed process server for the delivery of service of any summons or subpoena used in
10 the action, unless the court determines that the service was not necessary," *Id.* at (7); "Reasonable
11 costs for photocopies," *Id.* at (12); "Any other reasonable and necessary expense incurred in
12 connection with the action, including reasonable and necessary expenses for computerized services
13 for legal research." *Id.* at (17). It is within a court's sound discretion to allow a reasonable award
14 of either part or all of the prevailing party's costs, and to apportion the costs between the parties.
15 NRS 18.050; *see also Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993); *Cadle*
16 *Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at 1054. However, statutes that allow recovery of costs must
17 be strictly construed. *Bergmann*, 109 Nev. at 679, 856 P.2d at 566. Accordingly, a court's
18 discretion should be "sparingly exercised" when it considers whether or not to award expenses that
19 are "not specifically allowed by statute and precedent." *Bergman*, 109 Nev. at 679, 856 P.2d at
20 566.
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25 In order for a court to make an award of costs, the party seeking costs must file with the
26 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
27 the memorandum of costs, the prevailing party must also provide the court with evidence, or
28

1 “justifying documentation,” which demonstrates how the costs being sought were “reasonable,
2 necessary, and actually incurred” in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
3 1054. Accordingly, appropriate “justifying documentation must mean something more than a
4 memorandum of costs.” *Id.* Without such documentation, a court may not award costs. *Id.*
5
6 If the party against whom costs are sought wishes to dispute the costs, they must make a motion to
7 the court within three days of the memorandum’s filing. NRS 18.110(4). Once in receipt of that
8 motion, the Court will be allowed to settle the costs. *Id.*

9
10 The Motion for Fees requests expert witness fees in the amount of \$13,706.49. The Motion
11 for Fees, 15:13-17. The Motion to Retax argues the amount of expert fees requested is
12 unreasonable for the following reasons: the expert, Garrick Mitchell, M.S., P.E. (“Mitchell”), had
13 no useful opinions; Mitchell’s testimony would not aid the trier of fact, and was merely repetitive
14 of other experts; Mitchell conducted no independent testing; and Mitchell is a mechanical engineer
15 who does not possess the requisite level of expertise to make determinations better suited for an
16 electrical engineer. The Motion to Retax, 9:3-26.

17
18 This action involved millions of dollars in claimed damages. Versa’s defense rested entirely
19 upon disproving MDB’s theory that the valve manufactured by Versa malfunctioned. The only way
20 Versa could accomplish this was through the use of an expert witness. The Motion to Retax argues
21 Mitchell did not offer a viable opinion about the cause of the spill, but this does not discredit
22 Mitchell’s value as an expert because Versa did not necessarily have to prove what was responsible
23 for the incident. Given Versa’s potential exposure, it was not unreasonable for Versa to retain
24 Mitchell to perform extensive analysis and evaluation, which required two site inspections. The
25 Court finds the amount of expert fees requested is reasonable and necessary.
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1 The Motion to Retax points out the Memorandum of Costs is devoid of evidence or
2 justifying documentation pertaining to certain costs. The Motion to Retax, 3:4-5. The failure to
3 support a memorandum of costs leaves the court and the party against whom costs are sought with
4 nothing upon which a determination of reasonableness can be made. It may be that the party
5 against whom costs are sought assesses a memorandum of costs and determines the costs are
6 reasonable and a motion to retax would be unnecessary. If the party against whom costs are sought
7 does not file a motion to retax, the court still cannot award costs without evidence or justifying
8 documentation. *Cadle Co.* places the burden upon the party seeking costs to affirmatively
9 demonstrate the costs are reasonable, necessary, and actually incurred *when the motion is filed*. The
10 failure to provide justifying documentation at the outset results in additional work for the Court as
11 well as the parties. At oral argument counsel for Versa informed the Court it is their common
12 practice to attach a self-created “disbursement diary” to the memorandum of costs, and to only “dig
13 up” documentation if there is a controversy. Transcript, 26:22-24. While this may be counsel’s
14 common practice, it does not comport with the requirements set forth by the Supreme Court of
15 Nevada. The Motion to Retax argues \$16,774.78 in costs are unsupported in the Memorandum of
16 Costs and should therefore be denied. The Motion to Retax, 6:3-4. The Court agrees. The
17 remainder of the costs are supported with the requisite justifying documentation.

22 The Motion to Retax argues for a reduction in the costs award on several other grounds:
23 costs related to the Plaintiffs’ claims⁴; costs incurred subsequent to Versa’s offer of judgment;
24 expert witness costs exceeding \$1,500.00; and costs not specifically provided for in NRS 18.005.
25 The Court finds these arguments are without merit. First, Versa had a right to defend against the
26

27
28 ⁴ The Plaintiffs asserted negligence claims against MDB and strict liability claims against Ranco and Versa. FIRST AMENDED COMPLAINT FOR DAMAGES filed August 23, 2016.

1 Plaintiffs' claims underlying MDB's claim for contribution. Second, Versa is entitled to recover
2 costs incurred prior to the offer of judgment. The Reply in Support of the Motion to Retax
3 concedes an award of costs is not limited to those incurred after an offer of judgment; rather, it
4 argues the Opposition to the Motion to Retax contradicts the Memorandum of Costs and the Motion
5 for Fees. The Reply in Support of the Motion to Retax, 5:22-26. It alleges the Memorandum of
6 Costs and the Motion for Fees indicate the only costs sought are those incurred subsequent to the
7 offer of judgment. The Court finds no such contradiction warranting the retaxing of costs on this
8 basis. Third, as discussed *supra*, Versa is entitled to recover their expert witness costs. Finally, the
9 courier fees for delivery of depositions, the compact disc fees, and exhibit fees are reasonable and
10 necessary expenses in the litigation, and are therefore recoverable pursuant to NRS 18.005(17).
11

12
13 It is hereby **ORDERED** the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS
14 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO
15 NRCP 37 AND NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request
16 for attorneys' fees is denied. MDB shall pay Versa's costs as set forth below.
17

18 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
19 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
20 INC.'S VERIFIED MEMORANDUM OF COSTS is **GRANTED IN PART AND DENIED IN**
21 **PART**. The amount of costs requested in the DEFENDANT/CROSS-DEFENDANT VERSA
22 PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS is reduced by
23 \$16,774.78. MDB is ordered to pay costs in the amount of \$41,998.28.
24

25 DATED this 7 day of June, 2018.

26
27 
28 ELLIOTT A. SATTLER
District Judge

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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LEWIS BRISBOIS BISGAARD & SMITH LLP
6 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
7 702.893.3383
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8 Attorneys for Third-Party Defendant VERSA
PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

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

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

NOTICE OF ENTRY

19
20
21 TO: ALL INTERESTED PARTIES:

22 ///

23 ///

LIST OF EXHIBITS

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Exhibit 1

Order

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CERTIFICATE OF SERVICE

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

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

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

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

EXHIBIT 1

4845-3057-6394.1

AA003055

1
2
3 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR THE COUNTY OF WASHOE

5 ***

6 GENEVA M. REMMERDE,

7 Plaintiff,

Case No. CV16-00976

8 Dept. No. 10

9 vs.

10 MDB TRUCKING, LLC; et al.,

11 Defendants.
12 _____/

13 **ORDER**

14 Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS
15 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP
16 37 AND NRCP 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS,
17 INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY
18 DEFENDANT VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF
19 COSTS ("the Memorandum of Costs"). Cross-Claimant MDB TRUCKING, LLC ("MDB") filed
20 the CROSS-CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT
21 VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
22 PURSUANT TO NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on March 1,
23 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S
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1 REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS
2 PURSUANT TO NRCF 37 AND NRCF 68 ("the Reply in Support of the Motion for Fees") on
3 March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.
4

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

17 This case arises from a personal injury action. A COMPLAINT ("the Complaint") was filed
18 by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 ("the
19 Fitzsimmons Action"). The Fitzsimmons Action was assigned Second Judicial District Court case
20 number CV15-02349. Numerous other plaintiffs were joined into the Fitzsimmons Action. Two
21 additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and
22 JAMES BIBLE V. MDB TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant
23 action was filed on May 2, 2016. The Bible Action was filed September 20, 2016. It is alleged in
24 all three actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a
25 truck for MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the
26 driving plaintiffs to lose control of their vehicles and numerous accidents occurred. The plaintiffs
27
28

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

15 The Court entered an ORDER (“the January Order”) on January 22, 2018, granting the
16 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.’S MOTION TO STRIKE
17 DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC’S THIRD-PARTY
18 COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE
19 JURY INSTRUCTION (“the Motion to Strike”).² The Court found MDB’s disposal of the
20 electrical systems that control the solenoid which operated the Versa valve crippled Versa’s ability
21 to present its case. As a result, the Court dismissed MDB’s sole remaining claim against Versa.
22
23
24

25
26 ¹ Versa filed THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
27 THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) (“the MTD”) on July 19, 2016. The Court granted the MTD on October 19, 2016.

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

1 The Court finds Versa is not entitled to an award of attorneys' fees. In general, a district
2 court may not award "attorney fees... unless authorized to do so by a statute, rule or contract."
3 *U.S. Design & Constr. v. I.B.W.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). NRCP
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6 (a) The Offer. At any time more than 10 days before trial, any party may serve an
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11 more favorable judgment,

12 (1) the offeree cannot recover any costs or attorney's fees and shall not recover
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15 (2) the offeree shall pay the offeror's post-offer costs, applicable interest on
16 the judgment from the time of the offer to the time of entry of the judgment
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18 offeror from the time of the offer....

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

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22 defendants' offer of judgment was reasonable and in good faith in both its timing and
23 amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was
24 grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror
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(1) the qualities of the advocate: his ability, his training, education, experience, professional
standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its
importance, time and skill required, the responsibility imposed and the prominence and

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

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

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17 31:7-14. MDB conceded Versa made the Final Offer, and that it was made “in close proximity” to
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1 made an offer of \$100,000.00 one day later and was willing to meet MDB's full demand two
2 business days later clearly demonstrates the Initial Offer of \$1,000.00 per plaintiff was
3 unreasonable and not made in good faith. MDB's decision to reject the Mediation Offer and
4 especially the Final Offer were unreasonable, but those rejections cannot be the basis for awarding
5 Versa attorneys' fees. NRCP 68 applies to *written* offers. The Court has been presented with no
6 document evincing the Mediation Offer or the Final Offer were reduced to writing. An analysis of
7 the first three *Beattie* factors leads to the conclusion Versa is not entitled to fees pursuant to NRCP
8 68; therefore, a *Brunzell* analysis of the reasonableness of the fees requested is unnecessary.³

9
10
11 The Motion for Fees avers Versa is entitled to attorneys' fees pursuant to NRCP 37 because
12 the December Order issued case-concluding sanctions against MDB. NRCP 37 provides:

13 (b) Failure to Comply With Order.

14 ...

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

24 ...

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

...

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

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

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

17 The Court finds the amount of costs requested is reasonable. District Courts have "wide, but
18 not unlimited, discretion to award costs to prevailing parties." *Cadle Co. v. Woods & Erickson,*
19 *LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), *recently upheld by Golightly & Vannah,*
20 *PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be
21 reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as
22 a matter of course, recover costs from an adverse party against whom judgment is rendered in
23 certain actions. These actions include those for recovery of money or damages exceeding
24 \$2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS
25 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the
26 statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a
27 reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,
28

1 unless the court finds that the witness was called without reason or necessity,” *Id.* at (4);
2 “Reasonable fees of not more than five expert witnesses in an amount not more than \$1,500.00 for
3 each witness, unless the court allows a larger fee after determining the circumstances surrounding
4 the expert’s testimony were of such a necessity as to require a larger fee,” *Id.* at (5); “The fee of any
5 sheriff or licensed process server for the delivery of service of any summons or subpoena used in
6 the action, unless the court determines that the service was not necessary,” *Id.* at (7); “Reasonable
7 costs for photocopies,” *Id.* at (12); “Any other reasonable and necessary expense incurred in
8 connection with the action, including reasonable and necessary expenses for computerized services
9 for legal research.” *Id.* at (17). It is within a court’s sound discretion to allow a reasonable award of
10 either part or all of the prevailing party’s costs, and to apportion the costs between the parties. NRS
11 18.050; *see also Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993); *Cadle Co.*, 131
12 Nev. Adv. Op. 15, 345 P.3d at 1054. However, statutes that allow recovery of costs must be strictly
13 construed. *Bergmann*, 109 Nev. at 679, 856 P.2d at 566. Accordingly, a court’s discretion should
14 be “sparingly exercised” when it considers whether or not to award expenses that are “not
15 specifically allowed by statute and precedent.” *Bergman*, 109 Nev. at 679, 856 P.2d at 566.

16
17
18
19 In order for a court to make an award of costs, the party seeking costs must file with the
20 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
21 the memorandum of costs, the prevailing party must also provide the court with evidence, or
22 “justifying documentation,” which demonstrates how the costs being sought were “reasonable,
23 necessary, and actually incurred” in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
24 1054. Accordingly, appropriate “justifying documentation must mean something more than a
25 memorandum of costs.” *Id.* Without such documentation, a court may not award costs. *Id.* If the
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28


1 party against whom costs are sought wishes to dispute the costs, they must make a motion to the
2 court within three days of the memorandum's filing. NRS 18.110(4). Once in receipt of that
3 motion, the Court will be allowed to settle the costs. *Id.*

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

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

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

23
24 DATED this 7 day of June, 2018.

25
26 
27 ELLIOTT A. SATTLER
28 District Judge

1 JOSH COLE AICKLEN
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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.

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

21 TO: ALL INTERESTED PARTIES:

22 ///

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LIST OF EXHIBITS

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Exhibit 1

Order

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CERTIFICATE OF SERVICE

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

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

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

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

EXHIBIT 1

1
2
3 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR THE COUNTY OF WASHOE

5 ***

6 JAMES BIBLE,

7 Plaintiff,

Case No. CV16-01914

8 Dept. No. 10

9 vs.

10 MDB TRUCKING, LLC; et al.,

11 Defendants.

12 _____ /
13 **ORDER**

14 Presently before the Court is the CROSS-DEFENDANT VERSA PRODUCTS
15 COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRC
16 P 37 AND NRC P 68 ("the Motion for Fees") filed by Cross-Defendant VERSA PRODUCTS, INC.
17 ("Versa") on February 9, 2018. Versa contemporaneously filed the CROSS-DEFENDANT
18 VERSA PRODUCTS COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS ("the
19 Memorandum of Costs"). Cross-Claimant MDB TRUCKING, LLC ("MDB") filed the CROSS-
20 CLAIMANT MDB TRUCKING LLC'S OPPOSITION TO CROSS-DEFENDANT VERSA
21 PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS
22 PURSUANT TO NRC P 37 AND NRC P 68 ("the Opposition to the Motion for Fees") on March 1,
23 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
24 INC.'S REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND
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1 COSTS PURSUANT TO NRCPC 37 AND NRCPC 68 (“the Reply in Support of the Motion for
2 Fees”) on March 12, 2018, and contemporaneously submitted the matter for the Court’s
3 consideration.
4

5 Also before the Court is the CROSS-CLAIMANT MDB TRUCKING LLC’S MOTION
6 TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY INC.’S
7 VERIFIED MEMORANDUM OF COSTS (“the Motion to Retax”) filed by MDB on February 20,
8 2018. Versa filed the DEFENDANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
9 INC.’S OPPOSITION TO CROSS-CLAIMANT MDB TRUCKING LLC’S MOTION TO
10 RETAX COSTS (“the Opposition to the Motion to Retax”) on March 8, 2018. MDB filed the
11 REPLY TO OPPOSITION TO MOTION TO RETAX COSTS (“the Reply in Support of the
12 Motion to Retax”) on March 19, 2018, and contemporaneously submitted the matter for the
13 Court’s consideration. The Court heard oral argument on the Motion for Fees and the Motion to
14 Retax on April 6, 2018, at which time the Court took the matters under advisement.
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17 This case arises from a personal injury action. A COMPLAINT (“the Complaint”) was filed
18 by plaintiffs Ernest Bruce Fitzsimmons and Carol Fitzsimmons, on December 4, 2015 (“the
19 Fitzsimmons Action”). The Fitzsimmons Action was assigned Second Judicial District Court case
20 number CV15-02349. Numerous other plaintiffs were joined into the Fitzsimmons Action. Two
21 additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and
22 GENEVA M. REMMERDE V. MDB TRUCKING, LLC et al., CV16-00976 (“the Remmerde
23 Action”). The instant action was filed September 20, 2016. The Remmerde Action was filed May
24 2, 2016. It is alleged in all three actions that on July 7, 2014, Defendant Daniel Anthony Koski
25 (“Koski”), while driving a truck for MDB, negligently spilled a load of gravel into the roadway.
26 The spilled gravel caused the driving plaintiffs to lose control of their vehicles and numerous
27
28

1 accidents occurred. The plaintiffs sustained physical and emotional injuries as a result of the
2 accidents. In response to the Complaint, MDB filed a THIRD-PARTY COMPLAINT (“the MDB
3 Cross-Claim”) June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa:
4 Implied Indemnification and Contribution.¹ MDB alleges it was not Koski’s negligence that caused
5 the gravel to spill; rather, the spill was caused by the “unreasonably dangerous and defective”
6 design and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 3:5-7.
7 Therefore, MDB brought the Cross-Claim against the manufacturers of the trailer and its
8 components, including Versa. MDB avers Versa produced a solenoid valve which would, “activate
9 inadvertently allowing the gates to open and release the load [of gravel] carried by the trailer.” The
10 MDB Cross-Claim, 3:10-11. MDB also claims there were safer alternatives available to Versa; the
11 solenoid valve was unreasonably dangerous and defective; and Versa failed to provide appropriate
12 safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 3:12-18.
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14

15
16 The Court entered an ORDER (“the January Order”) on January 22, 2018, granting the
17 THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.’S MOTION TO STRIKE
18 DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC’S THIRD-PARTY
19 COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE
20 JURY INSTRUCTION (“the Motion to Strike”).² The Court found MDB’s disposal of the
21 electrical systems that control the solenoid which operated the Versa valve crippled Versa’s ability
22 to present its case. As a result, the Court dismissed MDB’s sole remaining claim against Versa.
23
24

25
26 _____
27 ¹ Versa filed THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY INC.’S MOTION TO DISMISS
THIRD-PARTY PLAINTIFF, MDB TRUCKING, LLC’S THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY
PURSUANT TO NRCP 12(B)(5) (“the MTD”) on July 19, 2016. The Court granted the MTD on October 19, 2016.

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

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

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

9 ...

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

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

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

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

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

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

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

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

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

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

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

9
10
11 The Motion for Fees avers Versa is entitled to attorneys' fees pursuant to NRCP 37 because
12 the December Order issued case-concluding sanctions against MDB. NRCP 37 provides:

13 (b) Failure to Comply With Order.

14 ...

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

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

...

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

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

5 The Court finds an award of attorneys' fees would be unjust. Case-concluding sanctions
6 against MDB was a windfall for Versa. The Motion for Fees argues, "there is no substantial
7 justification for MDB's failure to preserve the evidence other than to obstruct discovery and
8 frustrate the progress of this litigation." The Motion for Fees, 8:26-28. However, the December
9 Order made clear "the Court does not find MDB intentionally disposed of the components in order
10 to harm Versa, nor were MDB's employees acting with any malevolence...." The December Order,
11 8:20-22. MDB did not intend to "obstruct discovery and frustrate the progress of this litigation" as
12 the Motion suggests. Although dismissal of MDB's claim against Versa was warranted, it was a
13 severe sanction. Further sanctions would be unjust.
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15 The Court finds the amount of costs requested is reasonable. District Courts have "wide, but
16 not unlimited, discretion to award costs to prevailing parties." *Cadle Co. v. Woods & Erickson,*
17 *LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), *recently upheld by Golightly & Vannah,*
18 *PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be
19 reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as
20 a matter of course, recover costs from an adverse party against whom judgment is rendered in
21 certain actions. These actions include those for recovery of money or damages exceeding
22 \$2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS
23 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the
24 statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a
25 reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,
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1 unless the court finds that the witness was called without reason or necessity,” *Id.* at (4);
2 “Reasonable fees of not more than five expert witnesses in an amount not more than \$1,500.00 for
3 each witness, unless the court allows a larger fee after determining the circumstances surrounding
4 the expert’s testimony were of such a necessity as to require a larger fee,” *Id.* at (5); “The fee of any
5 sheriff or licensed process server for the delivery of service of any summons or subpoena used in
6 the action, unless the court determines that the service was not necessary,” *Id.* at (7); “Reasonable
7 costs for photocopies,” *Id.* at (12); “Any other reasonable and necessary expense incurred in
8 connection with the action, including reasonable and necessary expenses for computerized services
9 for legal research.” *Id.* at (17). It is within a court’s sound discretion to allow a reasonable award of
10 either part or all of the prevailing party’s costs, and to apportion the costs between the parties. NRS
11 18.050; *see also Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993); *Cadle Co.*, 131
12 Nev. Adv. Op. 15, 345 P.3d at 1054. However, statutes that allow recovery of costs must be strictly
13 construed. *Bergmann*, 109 Nev. at 679, 856 P.2d at 566. Accordingly, a court’s discretion should
14 be “sparingly exercised” when it considers whether or not to award expenses that are “not
15 specifically allowed by statute and precedent.” *Bergman*, 109 Nev. at 679, 856 P.2d at 566.

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18
19 In order for a court to make an award of costs, the party seeking costs must file with the
20 clerk and serve upon the adverse party a verified memorandum of costs. NRS 18.110(1). Beyond
21 the memorandum of costs, the prevailing party must also provide the court with evidence, or
22 “justifying documentation,” which demonstrates how the costs being sought were “reasonable,
23 necessary, and actually incurred” in the action. *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at
24 1054. Accordingly, appropriate “justifying documentation must mean something more than a
25 memorandum of costs.” *Id.* Without such documentation, a court may not award costs. *Id.* If the
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1 party against whom costs are sought wishes to dispute the costs, they must make a motion to the
2 court within three days of the memorandum's filing. NRS 18.110(4). Once in receipt of that
3 motion, the Court will be allowed to settle the costs. *Id.*

4
5 First, the Motion to Retax argues \$198.00 of the claimed costs should not be awarded
6 because they are unsupported with the required justifying documentation. For the reasons set forth
7 on the same issue in the ORDER entered contemporaneously herewith in the Fitzsimmons action,
8 the Court agrees. The costs award will be reduced by \$198.00.

9 The Motion to Retax argues for a reduction in the costs award on several other grounds:
10 costs related to the plaintiffs' claims underlying the MDB Cross-Claim against Versa; costs
11 incurred subsequent to Versa's offer of judgment; and costs not specifically provided for in NRS
12 18.005. The Court finds these arguments are without merit. First, Versa had a right to defend
13 against the claims underlying MDB's claim for contribution. Second, Versa is entitled to recover
14 costs incurred prior to the offer of judgment. The Reply in Support of the Motion to Retax
15 concedes an award of costs is not limited to those incurred after an offer of judgment; rather, it
16 argues the Opposition to the Motion to Retax contradicts the Memorandum of Costs and the Motion
17 for Fees. The Reply in Support of the Motion to Retax, 4:21-25. It alleges the Memorandum of
18 Costs and the Motion for Fees indicate the only costs sought are those incurred subsequent to the
19 offer of judgment. The Court finds no such contradiction warranting the retaxing of costs on this
20 basis. Finally, the authorization and shipping fees for medical and tax records are reasonable and
21 necessary expenses in the litigation, and are therefore recoverable pursuant to NRS 18.005(17).

22 //

23 //

1 It is hereby **ORDERED** the CROSS-DEFENDANT VERSA PRODUCTS COMPANY,
2 INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND
3 NRCP 68 is **GRANTED IN PART AND DENIED IN PART**. Versa's request for attorneys'
4 fees is denied. MDB shall pay Versa's costs as set forth below.

6 It is **FURTHER ORDERED** the CROSS-CLAIMANT MDB TRUCKING LLC'S
7 MOTION TO RETAX AND SETTLE CROSS-DEFENDANT VERSA PRODUCTS COMPANY
8 INC.'S VERIFIED MEMORANDUM OF COSTS is **GRANTED IN PART AND DENIED IN**
9 **PART**. The amount of costs requested in the CROSS-DEFENDANT VERSA PRODUCTS
10 COMPANY, INC.'S VERIFIED MEMORANDUM OF COSTS is reduced by \$198.00. MDB is
11 ordered to pay costs in the amount of \$1,076.74.

13 DATED this 7 day of June, 2018.

14
15 
16 ELLIOTT A. SATTLER
17 District Judge
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1 CERTIFICATE OF MAILING

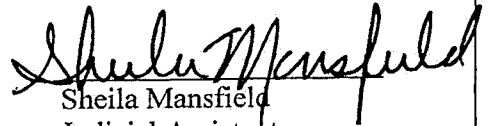
2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this ____ day of June, 2018, I deposited in the
4 County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a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

7 CERTIFICATE OF ELECTRONIC SERVICE

8 I hereby certify that I am an employee of the Second Judicial District Court of the State of
9 Nevada, in and for the County of Washoe; that on the 7 day of June, 2018, I electronically filed
10 the foregoing with the Clerk of the Court by using the ECF system which will send a notice of
11 electronic filing to the following:

12 JOSH AICKLEN, ESQ.

13 NICHOLAS M. WIECZOREK, ESQ.
14 COLLEEN E. McCARTY, ESQ.

15 
16 Sheila Mansfield
17 Judicial Assistant
18
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1 **\$2515**
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5 JEREMY J. THOMPSON
6 Nevada Bar No. 12503
7 JThompson@clarkhill.com
8 COLLEEN E. MCCARTY
9 Nevada Bar No. 13186
10 CMcCarty@clarkhill.com
11 **CLARK HILL PLLC**
12 3800 Howard Hughes Parkway, Suite 500
13 Las Vegas, Nevada 89169
14 Telephone: (702) 862-8300
15 Facsimile: (702) 862-8400
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 Wife,
16
17 Plaintiffs,
18
19 vs.
20 MDB TRUCKING, LLC, et al.,
21
22 Defendants.
23
24 AND ALL RELATED CASES.

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

[Consolidated Proceeding]

NOTICE OF APPEAL

22 **NOTICE IS HEREBY GIVEN** that Cross-Claimant MDB Trucking, LLC (“MDB”), by
23 and through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and
24 Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby appeals to the Supreme
25 Court of Nevada from the Order Granting in Part and Denying in Part of Cross-Claimant MDB
26 Trucking LLC's Motion To Retax And Settle Cross-Defendant Versa Products Company Inc.'s
27

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1 Verified Memorandum of Costs entered in this action on the 13th day of June, 2018.

2 DATED this 13th day of July, 2018.

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CLARK HILL PLLC

By: Colleen E. McCarty

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3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
*Attorneys for Defendant/Cross-Claimant
MDB Trucking, LLC*

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 13th day of July, 2018.

CLARK HILL PLLC

By: Colleen E. McCarty

NICHOLAS M. WIECZOREK
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JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
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MDB Trucking, LLC*

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9 Nevada Bar No. 13186

10 CMcCarty@clarkhill.com

11 **CLARK HILL PLLC**

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13 Las Vegas, Nevada 89169

14 Telephone: (702) 862-8300

15 Facsimile: (702) 862-8400

16 *Attorneys for Cross-Claimant*

17 *MDB Trucking, LLC*

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**SECOND JUDICIAL DISTRICT COURT
WASHOE COUNTY, NEVADA**

GENEVA M. REMMERDE

Plaintiff,

vs.

MDB TRUCKING, LLC, et al

Defendants.

AND ALL RELATED CASES.

Case No.: CV16-00976

Dept. No.: 10

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Cross-Claimant MDB Trucking, LLC (“MDB”), by and through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby appeals to the Supreme Court of Nevada from the Order Granting in Part and Denying in Part of Cross-Claimant MDB Trucking LLC's Motion To Retax And Settle Cross-Defendant Versa Products Company Inc.'s

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1 Verified Memorandum of CostS entered in this action on the 13th day of June, 2018.

2 DATED this 13th day of July, 2018.

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CLARK HILL PLLC

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

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 13th day of July, 2018.

CLARK HILL PLLC

By: Colleen E. McCarty
NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
Nevada Bar No. 13186
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
*Attorneys for Defendant/Cross-Claimant
MDB Trucking, LLC*

1 CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC, and on this 13th
3 day of July 2018, a true and correct copy of the foregoing NOTICE OF APPEAL was served
4 via electronic service upon the following:

5 JOSH COLE AICKLEN, ESQ.
6 DAVID B. AVAKIAN, ESQ.
7 PAIGE S. SHREVE, ESQ.
8 LEWIS BRISBOIS BISGAARD & SMITH LLP
9 6385 S. Rainbow Blvd., Suite 600
10 Las Vegas, Nevada 89118
11 Attorneys for Defendant
12 Versa Products Co., Inc.



13 An employee of Clark Hill PLLC
14
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1 **\$2515**
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6 Nevada Bar No. 12503
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8 COLLEEN E. MCCARTY
9 Nevada Bar No. 13186
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12 3800 Howard Hughes Parkway, Suite 500
13 Las Vegas, Nevada 89169
14 Telephone: (702) 862-8300
15 Facsimile: (702) 862-8400
16 *Attorneys for Cross-Claimant*
17 *MDB Trucking, LLC*

12 **SECOND JUDICIAL DISTRICT COURT**
13 **WASHOE COUNTY, NEVADA**

14 JAMES BIBLE

15 Plaintiff,

16 vs.

17 MDB TRUCKING, LLC, et al

18 Defendants.

19

AND ALL RELATED CASES.

Case No.: CV16-01914
Dept. No.: 10

NOTICE OF APPEAL

21 **NOTICE IS HEREBY GIVEN** that Cross-Claimant MDB Trucking, LLC (“MDB”), by
22 and through its counsel of record Nicholas M. Wieczorek, Esq., Jeremy J. Thompson, Esq. and
23 Colleen E. McCarty, Esq. of the law firm of Clark Hill PLLC, hereby appeals to the Supreme
24 Court of Nevada from the Order Granting in Part and Denying in Part of Cross-Claimant MDB
25 Trucking LLC's Motion To Retax And Settle Cross-Defendant Versa Products Company Inc.'s

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1 Verified Memorandum of Costs entered in this action on the 13th day of June, 2018.

2 DATED this 13th day of July, 2018.

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CLARK HILL PLLC

By: Colleen E. McCarty

NICHOLAS M. WIECZOREK
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COLLEEN E. MCCARTY
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3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
*Attorneys for Defendant/Cross-Claimant
MDB Trucking, LLC*

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 13th day of July, 2018.

CLARK HILL PLLC

By: Colleen E. McCarty


NICHOLAS M. WIECZOREK
Nevada Bar No. 6170
JEREMY J. THOMPSON
Nevada Bar No. 12503
COLLEEN E. MCCARTY
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Las Vegas, Nevada 89169
*Attorneys for Defendant/Cross-Claimant
MDB Trucking, LLC*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of CLARK HILL PLLC, and on this 13th day of July 2018, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served via electronic service upon the following:

JOSH COLE AICKLEN, ESQ.
DAVID B. AVAKIAN, ESQ.
PAIGE S. SHREVE, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendant
Versa Products Co., Inc.



An employee of Clark Hill PLLC

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

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 JAMES BIBLE,	Case No. CV16-01914
13 Plaintiff,	Dept. 10
14 vs.	NOTICE OF CROSS-APPEAL
15 MDB TRUCKING, LLC, et. al.	
16 Defendants.	
17 AND ALL RELATED CASES.	

18
19
20 Notice is hereby given that Cross-Appellant/Respondent VERSA PRODUCTS
21 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David
22 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS
23 BISGAARD & SMITH LLP, appeals to the Nevada Supreme Court from the following
24 orders and judgment:

25 1. Order Granting in Part and Denying in Part of Defendant/Cross-
26 Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC.'S Motion for Attorneys'
27 Fees and Costs Pursuant to NRCP 37 and NRCP 68 entered in this action on the 13th day
28 of June 2018; and

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2. Order Granting in Part and Denying in Part of Cross-Claimant MDB TRUCKING LLC'S Motion to Retax and Settle Cross-Defendant VERSA PRODUCTS COMPANY, INC.'S Verified Memorandum of Costs entered in this action on the 13th day of June 2018.

3. All other orders and rulings relating to, underlying and/or affecting the foregoing orders and judgment.

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 24th day of July, 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-Appellant/Respondent
VERSA PRODUCTS COMPANY, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2018, a true and correct copy of **NOTICE OF CROSS-APPEAL** was served via U.S. Mail addressed as follows:

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
Colleen E. McCarty, Esq.
MORRIS POLICH & PURDY LLP
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

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2 Josh.aicklen@lewisbrisbois.com
DAVID B. AVAKIAN
3 Nevada Bar No. 009502
David.avakian@lewisbrisbois.com
4 PAIGE S. SHREVE
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5 Paige.shreve@lewisbrisbois.com
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7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Cross-Appellant/Respondent
VERSA PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

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

14 Plaintiffs,

15 vs.

16 MDB TRUCKING, LLC, et. al.

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV15-02349

Dept. 10

NOTICE OF CROSS-APPEAL

19
20 Notice is hereby given that Cross-Appellant/Respondent VERSA PRODUCTS
21 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David
22 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS
23 BISGAARD & SMITH LLP, appeals to the Nevada Supreme Court from the following
24 orders and judgment:

25 1. Order Granting in Part and Denying in Part of Defendant/Cross-
26 Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC.'S Motion for Attorneys'
27 Fees and Costs Pursuant to NRCP 37 and NRCP 68 entered in this action on the 13th day
28 of June 2018; and

1 2. Order Granting in Part and Denying in Part of Cross-Claimant MDB
2 TRUCKING LLC'S Motion to Retax and Settle Cross-Defendant VERSA PRODUCTS
3 COMPANY, INC.'S Verified Memorandum of Costs entered in this action on the 13th day
4 of June 2018.

5 3. All other orders and rulings relating to, underlying and/or affecting the
6 foregoing orders and judgment.

7 **AFFIRMATION**

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

10 DATED this 24th day of July, 2018

11 Respectfully submitted,

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13

14

15

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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Las Vegas, Nevada 89118
Attorneys for Cross-Appellant/Respondent
VERSA PRODUCTS COMPANY, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2018, a true and correct copy of **NOTICE OF CROSS-APPEAL** was served via U.S. Mail addressed as follows:

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
Colleen E. McCarty, Esq.
MORRIS POLICH & PURDY LLP
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

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7 702.893.3383
FAX: 702.893.3789
8 Attorneys for Cross-Appellant/Respondent
VERSA PRODUCTS COMPANY, INC.

9
10 DISTRICT COURT
11 WASHOE COUNTY, NEVADA

12 GENEVA M. REMMERDE,

13 Plaintiff,

14 vs.

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

17 Defendants.

18 AND ALL RELATED CASES.

Case No. CV16-00976

Dept. 10

NOTICE OF CROSS-APPEAL

19
20
21 Notice is hereby given that Cross-Appellant/Respondent VERSA PRODUCTS
22 COMPANY, INC., by and through its attorneys of record, Josh Cole Aicklen, Esq., David
23 B. Avakian, Esq. and Paige S. Shreve, Esq., of the law firm LEWIS BRISBOIS
24 BISGAARD & SMITH LLP, appeals to the Nevada Supreme Court from the following
25 orders and judgment:

26 1. Order Granting in Part and Denying in Part of Third-Party Defendant
27 VERSA PRODUCTS COMPANY, INC.'S Motion for Attorneys' Fees and Costs Pursuant
28 to NRCP 37 and NRCP 68 entered in this action on the 13th day of June 2018; and

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2018, a true and correct copy of **NOTICE OF CROSS-APPEAL** was served via U.S. Mail addressed as follows:

Nicholas M. Wieczorek, Esq.
Jeremy J. Thompson, Esq.
Colleen E. McCarty, Esq.
MORRIS POLICH & PURDY LLP
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