

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDB TRUCKING, LLC,
Appellant/Cross-Respondent,
vs.
VERSA PRODUCTS COMPANY, INC.,
Respondent/Cross-Appellant.

No. 75022

Consolidated with Case Nos. 75319,
75321, 76395, 76396, 76397

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RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF
ON CROSS-APPEAL

Josh Cole Aicklen
Nevada Bar No. 7254
Josh.Aicklen@lewisbrisbois.com
Jeffrey D. Olster
Nevada Bar No. 8864
Jeff.Olster@lewisbrisbois.com
David B. Avakian
Nevada Bar No. 9502
David.Avakian@lewisbrisbois.com
Paige S. Shreve
Nevada Bar No. 13773
Paige.Shreve@lewisbrisbois.com
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel: 702-893-3383
Fax: 702-893-3789
Attorneys for Respondent/Cross-Appellant
VERSA PRODUCTS COMPANY, INC.

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I.

ARGUMENT

A. **The District Court Abused its Discretion by Failing to Award Versa its Attorneys' Fees Pursuant to NRCP 68**

The district court abused its discretion when it denied Versa all of its attorneys' fees pursuant to NRCP 68 because its analysis of the *Beattie* factors is not supported by substantial evidence. In awarding attorneys' fees pursuant to NRCP 68, the district court must analyze the following factors:

(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 time 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.

Beattie v. Thomas, 99 Nev. 579, 588-89, 688 P.2d 268, 274 (1983). However, no single *Beattie* factor is determinative, and a review of the factors shows the district court should have awarded Versa at least some, if not all of its attorneys' fees. *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Nev. App. 2015). While the district court's order need not go into detail regarding each and every *Beattie* factor,

the district court's finding must be supported by substantial evidence. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). The district court abuses its discretion if the *Beattie* factors are not supported by substantial evidence. *Id.*

Further, attorneys' fees are warranted even with a finding that two of the *Beattie* factors weigh in favor of the moving party. *See Lafrieda v. Gilbert*, 435 P.3d 665 (Nev. 2019) (upholding district court's award of attorneys' fees when it found the offer of judgment was reasonable in both time and amount and the fees were necessary and reasonably incurred.)

1. *MDB's Action Was Not Maintained in Good Faith*

While MDB may have originally brought its claim in good faith, such good faith was not maintained. MDB's 30(b)(6) witnesses, as well as MDB's experts, all indicated that they did not find a defect with the Versa valve. (App. Vol. 17 at 2972-2973). Once MDB knew that it had no viable theory of liability as to Versa, the continuing maintenance of the lawsuit against Versa, especially given the destruction of evidence (as detailed in Versa's Answering Brief), lacked good faith.

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

The district court abused its discretion by finding Versa's offers of judgment were not reasonable in both time and amount, as the district court failed to consider the substantial evidence that indicated otherwise.

a. *Versa's Offer of Judgment Was Reasonable in Time*

The district court did not address the timing of Versa's offers of judgment. In its Answering Brief, MDB argues that the timing of Versa's offer of judgment were unreasonable because it was served the day before mediation¹. However, substantial evidence shows the timing of the OOJ was reasonable and in good faith.

Versa completed the depositions of MDB's 30(b)(6) witnesses and its employees on March 6-8, 2017 and April 10-11, 2017. (App. Vol. 2 at 246; 274; 309; 342). During the depositions, MDB's 30(b)(6) witnesses testified that they disposed

¹ MDB suggests in its Answering Brief that Versa "refused to negotiate or to contribute to the resulting settlement." (AAB at P. 24-25). This is patently incorrect, and MDB even concedes Versa did participate and was willing to settle at or shortly after the mediation. (App. Vol. 13 at 2008-2009; App. Vol. 17 at 2927-2929, 2948-2950).

of the electrical wiring and that they did not find a defect with the Versa valve. (App. Vol. 2 at 226-229; App. Vol. 3 at 398-401). Further, all testing by experts, including destructive testing, had occurred, and all experts found the Versa valve worked as intended. (App. Vol. 8 at 1202; 1205).

It perhaps could have been unreasonable if Versa had served an offer of judgment prior to the depositions of MDB's 30(b)(6) witnesses as well as the other employees that were working at MDB at the time of the subject incident, which is why Versa waited until the completion of those depositions to properly analyze the case and assess a reasonable amount to offer. Additionally, Versa needed to have the deposition transcripts back in order to prepare its Motion for Summary Judgment and Motion to Strike MDB's Cross-Claim pursuant to NRCP 37. (App. Vol. 2 at 219-392; App. Vol. 3 at 393-516; App. Vol. 4 at 517-640). Once Versa received all of the deposition transcripts back, it diligently began working on the Motion for Summary Judgment and Motion to Strike MDB's Cross-Claim pursuant to NRCP 37. Versa wanted to ensure both dispositive Motions would be pending during the time the offer of judgment and mediation were pending so that MDB would be aware of all the flaws

of its case, and why its continuing maintenance of the action against Versa was not in good faith.

Versa's Motion for Summary Judgment was filed on May 1, 2017. (App. Vol. 2 at 219-392). Versa hoped to file the Motion to Strike MDB's Cross-Claim pursuant to NRCP 37 prior to mediation as well, however, given the length and complexity of such Motion, it took longer than anticipated. As such, Versa served its offer of judgment on MDB on May 4, 2017. (App. Vol. 13 at 2026-2045). Versa's Motion to Strike MDB's Cross-Claim pursuant to NRCP 37 was filed on May 15, 2017, seven (7) days before the offer of judgment would lapse. (App. Vol. 3 at 393-516)(App. Vol. 4 at 517-640). Therefore, substantial evidence shows that the timing of Versa's offers of judgment was reasonable.

b. Versa's Offers of Judgment were Reasonable in Amount

The district court abused its discretion when it found the amount of Versa's offers of judgment were unreasonable, as substantial evidence shows that the \$1,000

per case (total of nine cases²) and the waiver of attorneys' fees and costs is a significant amount and not nominal as the district court suggested. MDB's argument in its Answering Brief, that Versa's offers of judgment were unreasonable because they amounted to less than one-half of one percent (0.5%) of the total settlement, fails for three reasons.

First, the district court abused its discretion when it agreed with MDB that Versa's offers of judgment were unreasonable because they amounted to less than one-half of one percent (0.5%) of the total settlement. This was an abuse of discretion because this argument was not supported by substantial evidence, as the district court was never provided with the total amount in which MDB settled Plaintiffs' claims. (App. Vol. 18 at 3006). While even Versa does not know the total in which MDB settled Plaintiffs' claims, it does know that the total claimed medical damages between all nine (9) cases was \$521,510.43³ making Versa's offers of judgment almost 2% of the claimed medical damages, not including the waiver of attorneys'

² Since the *Bible* and *Remmerde* cases are combined in this appeal, we will include all nine and not just the seven cases that were combined in the lower court.

³ This total is assuming all claimed medical damages are legitimate which deposition testimony said otherwise for many of the Plaintiffs.

fees and costs. This is important because, at the time Versa made the offers of judgment, the Plaintiffs' claims had not been settled and MDB had cross-claims against manufacturers other than Versa.

Second, the district court abused its discretion when it disregarded substantial evidence showing the significant amount of attorneys' fees and costs that would have been effectively waived by Versa. This Court recently affirmed a district court's order that an offer of judgment containing only a mutual waiver of attorneys fees and costs in exchange for a dismissal of a lawsuit is not nominal, and may constitute a reasonable offer made in good faith. *See Busick v. Trainor*, 2019 Nev. Unpub. LEXIS 378 at *6-8 (No. 72966 March 28, 2019). In *Busick*, the plaintiffs alleged \$1-3 million dollars in damages in a medical malpractice claim. In preparing for trial, the defendant served an offer of judgment on the plaintiffs for a mutual waiver of attorneys' fees and costs. *Id.* At the time the offer of judgment was made, the defendant had incurred approximately \$95,000 in costs. Since an award of costs is mandated under NRS 18.020, the district court found the waiver of such is a

meaningful sum to be included in the offer of judgment, and awarded defendant its costs and attorneys' fees pursuant to NRCP 68.

Here, the district court rejected Versa's argument that there should have been some consideration regarding attorneys' fees and costs when analyzing the reasonableness of Versa's offers of judgment. (App. Vol. 18 at 2935, 2938). Substantial evidence shows that Versa incurred a total of \$27,698.55 in costs for all nine cases prior to the service of the offers of judgment. (App. Vol. 14 at 2320-2406; App. Vol. 16 at 2701-2744). It would have been reasonable for MDB to assume the costs would have been significant given the numerous depositions and expert testing conducted. Further, MDB should have recognized that significant costs would be incurred if it rejected the offers of judgment, given the strong likelihood that an evidentiary hearing would be ordered on Versa's pending NRCP 37 motions. Accordingly, just adding the costs to the offers of judgment, and providing no consideration regarding attorneys fees, Versa's offers of judgment essentially amounted to almost 8% of the Plaintiffs' combined claimed damages. Therefore, an offer of judgment for almost 8% of the Plaintiffs' claimed medical damages is more

than reasonable because: (1) Versa was not the only party that MDB was seeking contribution from, and (2) substantial evidence shows that Versa's two pending dispositive motions proved that Versa had no liability.

Third, the district court abused its discretion when it relied on Versa's \$100,000 offer at mediation as the basis for the offers of judgment being unreasonable. (App. Vol. 18 at 3006). The fact that Versa was willing to participate in mediation and attempt to resolve the matter in good faith does not somehow prove that its offers of judgment were made in bad faith. In fact, the offers of judgment, which included a waiver of attorneys' fees and costs amounted to almost \$100,000.

Lastly, assuming *arguendo* this Court agrees with the district court that the amount offered was nominal, the district court abused its discretion when it did not take into consideration that even the \$1,000 alone was a significant amount because four of the nine underlying cases had damages of approximately \$10,000 or less, with the lowest one being the Robles case, with \$2,749 total in alleged damages.⁴

⁴ An offer of judgment was served in each of the nine cases. These offers were each separate and distinct. (App. Vol. 13 at 2026-2045).

As such, the district court abused its discretion because substantial evidence shows that Versa's offers of judgment were reasonable in both time and amount.

3. *MDB's Rejection of Versa's Reasonable Offers of Judgment was Grossly Unreasonable*

MDB argues in its Answering Brief that the district court properly determined that MDB's decision to reject Versa's offers of judgment was reasonable because MDB had "ample evidence to support its cross-claim." Due to the then-pending offers of judgment, MDB was required to "balance the uncertainty of receiving a more favorable judgment against the risk of receiving a less favorable judgment and being forced to pay the offeror's costs and attorney's fees." *Bergmann v. Boyce*, 109 Nev. 670, 678, 856 P.2d 560, 565 (1993) (superseded by statute in part regarding NRS 18.005). When balancing the uncertainty of receiving a less favorable judgment and being forced to pay Versa's costs and attorneys' fees, substantial evidence establishes that MDB's rejection of Versa's offers of judgment was unreasonable.

Again, contrary to MDB's assertion, MDB's experts found no defect with the Versa valve, and had no explanation as to the cause of the inadvertent activation.

(App. Vol. 17 at 2972-2973). In addition, at the time the offers of judgment were pending, Versa's two pending motions (including the Motion to Strike that is the subject of this appeal) showed that MDB had a difficult, if not insurmountable, burden to overcome to prove liability. Lastly, MDB should have anticipated the fees and costs to be substantial based on all the expert inspections, the evidentiary hearing and potentially the consolidated jury trial. MDB should have reasonably expected attorneys' fees and costs to be at least \$350,000 should the case actually go through trial. This does not include the additional expenses MDB would have to pay in attorneys' fees and costs from the time of the offers of judgment through trial.

Further, based on the analysis above, the district court abused its discretion in finding MDB's rejection of the offers of judgment was reasonable. Specifically, the district court found that MDB's decision to reject the \$100,000 at mediation was unreasonable. (App. Vol. 18 at 3006). As discussed in more detail above, Versa's offers of judgment, which included a mutual waiver of attorneys' fees and costs, was almost equivalent to \$100,000. Therefore, had the district court properly applied the

reasoning in *Busick*, it would have concluded that substantial evidence supported a finding that the rejection of the offers of judgment was unreasonable.

4. *Versa's Attorneys' Fees and Costs Following the Offers of Judgment Were Reasonable and Justified in Amount*

Contrary to MDB's contentions in its Answering Brief, the district court did not abuse its discretion when it found that Versa's attorneys' fees were reasonable and necessary. MDB bases its argument on the fact that it incurred more than 60% less attorneys' fees than Versa. However, MDB fails to provide any case law which supports the argument that incurring less fees makes the opposing party's fees unreasonable and unnecessary. While this section does not necessarily need to be briefed in full due to MDB's failure to provide any case law to support its argument, Versa will still briefly address MDB's arguments.

Because MDB does not provide evidence of its attorneys' fees, there is no basis in the record for accepting MDB's factual assertion. In any event, even assuming that MDB's contention is correct, there are likely multiple reasons why MDB may have incurred less attorneys' fees. First and foremost, MDB's current counsel did not

substitute in as attorneys until two months after the offers of judgment were served. Prior to that, MDB was represented by the Thorndal firm. This was also after the briefing on the Motion to Strike MDB's Cross-Claim, which took a significant amount of time given the complexity of the issues, the deposition transcripts and the numerous pages of maintenance records. Second, Versa filed 60% more motions than MDB from the time of serving the offers of judgment through its motion for attorneys' fees. This aggressive defense obviously paid off for Versa. As such, the district court did not abuse its discretion when it found Versa's attorneys' fees to be reasonable and necessary.

The district court abused its discretion when it denied all of Versa's attorneys fees pursuant to Versa's offers of judgment because substantial evidence proves that the *Beattie* factors weigh in favor of Versa, especially in light of the newly decided *Busick* case.

B. The District Court Abused its Discretion by Failing to Award Versa its Attorneys' Fees Pursuant to NRCP 37

The district court abused its discretion when it denied all of Versa's attorneys' fees. As this Court has explained, "[u]nder NRCP 37(b)(2), a court *must* award a party attorney fees incurred as a result of the other party's discovery violations." *Agwara v. Agwara*, 433 P.3d 1253 (2019) (affirming district court's award of attorneys' fees pursuant to NRCP 37(b)(2) because all of the fees incurred were due to a direct result of discovery violations.) In accordance with *Agwara*, the district court was required to award Versa the attorneys' fees it incurred as a result of MDB's discovery violations, which led to case terminating sanctions. (App. Vol. 12 at 1970-1983). The district court's failure to do so constitutes an abuse of discretion. This Court therefore should reverse the district court's denial of all of Versa's attorneys' fees.

C. MDB Does Not Argue The District Court Did Not Abuse its Discretion by Disallowing \$16,774.78 in Costs

In its Answering Brief, MDB fails to address Versa's argument that the district court abused its discretion by disallowing \$16,774.78 in requested costs. Since MDB does not dispute this order, this Court should reverse the district court's order.

Further, as discussed in the Answering Brief, Versa filed its Memorandum of Costs on January 5, 2018 (App. Vol. 14 at 2320), which included an Affidavit of Josh Cole Aicklen, lead attorney for Versa. This affidavit complied with NRS 18.010. Additionally, the Memorandum included a Disbursement Diary and Supporting Documentation for Costs, which specifically denoted the costs incurred by Versa due to the underlying claims by MDB. (App. Vol. 14 at 2323-2398). Further, Versa supplied additional supporting documentation in its Opposition to MDB's Motion to Retax due to MDB's argument that it did not believe \$16,774.78 of the costs had sufficient documentation. (App. Vol. 15 at 2478-2492) (Respondent/Cross-

Appellant's Appendix Vol. 1 at 3100 to Vol. 2 at 3541⁵). Between the documentation provided in the Memorandum of Costs and Versa's Opposition to MDB's Motion to Retax, the district court had detailed supporting documentation for every cost in which Versa sought, including the \$16,774.78 alleged in MDB's Motion to Retax.⁶

The district court's denial of the \$16,774.78 of supported costs was based on the district court finding that "*Cadle Co.* places the burden upon the party seeking costs to affirmatively demonstrate the costs are reasonable, necessary, and actually incurred *when the motion is filed.*" (App. Vol. 18 at 3010) (emphasis added). However, this is not the holding in *Cadle Co. v. Woods & Erickson, Ltd. Liab. P'ship*, 345 P.3d 1049, 1054 (2015). While Versa does concede that *Cadle Co.* requires the party to supply justifying documentation if a party is unsatisfied by the itemized memorandum, such documentation does not need to be supplied "when the motion is filed" as the court suggested in its order. (App. Vol. 18 at 3010). *Cadle Co.* simply

⁵ Versa provides an appendix only to provide the Court with the exhibits that were attached to Versa's Opposition to MDB's Motion to Retax that was inadvertently excluded in the Joint Appendix.

⁶ In its Reply in Support of Motion to Retax, MDB even acknowledged that Versa provided supplemental justifying documentation for the \$16,774.78 of costs in dispute. (App. Vol. 16 at 2747-2748).

requires that the district court have evidence that costs were reasonable and necessary at the time the district court makes its determination. *Cadle Co.*, 345 P.3d at 1054. The district court had such documentation at the time of the hearing and upon its order. As such, the district court abused its discretion in its denial of \$16,774.78 in costs that were supported by proper justifying documentation, which enabled the district court to determine whether the costs were reasonable and necessary.

II.

CONCLUSION

The district court's order denying Versa's motion for attorneys' fees, and the order disallowing certain costs, should be reversed. MDB unreasonably rejected Versa's offers of judgment, which were both reasonable in timing and amount. As such, the district court should have awarded fees to Versa pursuant to NRCP 68.

Additionally, MDB forced Versa to incur substantial attorneys' fees, even though it knew that it had thrown away critical evidence that was needed to prove its cross-claim. Under these circumstances, the district court should have also awarded fees to Versa pursuant to NRCP 37.

DATED this 3rd day of May, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

Josh Cole Aicklen

Nevada Bar No. 7254

Jeffrey D. Olster

Nevada Bar No. 8864

David B. Avakian

Nevada Bar No. 9502

Paige S. Shreve

Nevada Bar No. 13773

Lewis Brisbois Bisgaard & Smith LLP

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Respondent/Cross-Appellant

VERSA PRODUCTS COMPANY, INC.

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **4,182 words** (including tables and certifications).

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

relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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DATED this 3rd day of May, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

Josh Cole Aicklen

Nevada Bar No. 7254

Jeffrey D. Olster

Nevada Bar No. 8864

David B. Avakian

Nevada Bar No. 9502

Paige S. Shreve

Nevada Bar No. 13773

Lewis Brisbois Bisgaard & Smith LLP

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Respondent/Cross-Appellant

VERSA PRODUCTS COMPANY, INC.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d) I certify that I am an employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP, and that on this 3rd day of May, 2019, I did cause a true
copy of the foregoing **RESPONDENT/ CROSS-APPELLANT’S REPLY BRIEF**
ON CROSS-APPEAL and RESPONDENT/CROSS-APPELLANT’S APPENDIX
to be served via the Court’s electronic filing and service system (“E-Flex”) to all
parties on the current service list:

Nicholas M. Wiczorek, Esq.
Jeremy J. Thompson, Esq.
Colleen E. McCarty, Esq.
CLARK HILL PLLC
3800 Howard Hughes Pkwy, Ste. 500
Las Vegas, NV 89169
*Attorneys for Appellant/
Cross-Respondent*

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