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

RESPONDENT'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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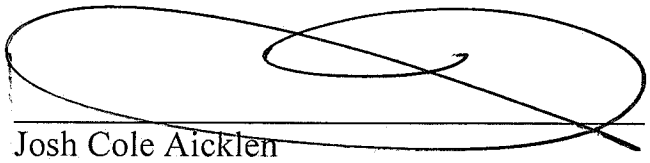
NRAP 26.1 DISCLOSURE

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

Respondent/Cross-Appellant Versa Products Company, Inc. has no parent corporations, and no publicly held company owns 10% or more of Respondent/Cross-Appellant's stock. Respondent/Cross-Appellant is represented in this appeal, and was represented in the district court proceedings, by the law firm of Lewis Brisbois Bisgaard & Smith LLP.

DATED this 5th day of March, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

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I.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A(b)(1), as this is an appeal of an order granting a motion by respondent and cross-appellant Versa Products Company, Inc. ("Versa") to strike the cross-claim by appellant MDB Trucking, LLC ("MDB") as terminating sanctions based on MDB's failure to preserve and destruction of critical evidence that was necessary for Versa to defend against MDB's cross-claim. MDB timely appealed the dismissal of its cross-claim, as well as the district court's ruling on Versa's prevailing party costs. Versa has timely cross-appealed some of the district court's rulings regarding the denial of attorneys' fees and the disallowed costs.

II.

ROUTING STATEMENT

This is a standard error-review appeal. The district court's order granting Versa's motion to strike MDB's cross-claim based on MDB's spoliation of critical evidence is governed by well-established principles of Nevada law. Accordingly, it should be presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5).

In its Opening Brief, MDB argues that this appeal is presumptively retained by this Court because it concerns "a question of first impression and an issue upon which there is otherwise an inconsistency in the published decisions." (Opening Brief at 2).[1]

[1] In its Routing Statement, MDB cites to NRCP 17(a)(10) (cases involving termination of parental rights) and (11) (matters raising as a principal issue a question of first impression).

Specifically, MDB asserts that this Court "has not addressed by way of published decision a district court's proper exercise of discretion when considering sanctions for spoliation of evidence pursuant to NRCP 37." (*Id.*) This assertion is simply false. *See Stubli v. Big D International Trucks*, 107 Nev. 309, 313-314, 810 P.2d 785 (1991) (articulating standards for district court discretion and affirming case terminating remedy of dismissal due to plaintiff's disposal of critical evidence prior to litigation); *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911 (1987) (articulating standards and excluding plaintiff's expert witness as a remedy for evidence spoliation, resulting in summary judgment).

Notably, in the entirety of its Opening Brief, ***MDB fails to cite***, let alone discuss, either *Stubli* or *Zenith*.

III.

STATEMENT OF ISSUES

A. Whether the district court abused its discretion by granting Versa's motion to strike MDB's cross-claim after an evidentiary hearing, which revealed that MDB made no efforts to retain critical electrical components of the subject truck and trailer, that these electrical components were relevant and central to Versa's cross-claim defenses and MDB's spoliation of evidence prevented Versa from meaningfully defending against MDB's cross-claim.

B. Whether the district court abused its discretion by awarding Versa expert costs in excess of the $1,500 statutory limit when the extensive investigation and inspections required of the expert were necessary to Versa's defenses.

C. Whether the district court erred by awarding costs to Versa when, by virtue of the district court's dismissal of MDB's cross-claim, Versa was the prevailing party as a matter of law.

D. Whether the district court erred by denying Versa attorney's fees pursuant to NRCP 37 when MDB provided no substantial justification its failure to retain and loss of critical evidence.

E. Whether the district court erred by denying some of Versa's costs that were reasonably incurred and supported by documentation.

IV.

STATEMENT OF THE CASE

This is an appeal from an order granting Versa's motion to strike MDB's cross-claim due to MDB's spoliation of critical evidence. (Joint Appendix [hereafter "App."] Vol. 3 at 393). Following extensive briefing and oral argument on Versa's motion to strike, the district court issued an order requesting an evidentiary hearing in order to fully evaluate if the MDB's spoliation of evidence warranted case terminating sanctions. (App. Vol. 10 at 1661-1666). After the evidentiary hearing, the district court issued its order granting Versa's motion and dismissing MDB's cross-claim. (App. Vol. 12 at 1970-1983).[2] MDB appeals this order dismissing its cross-claim.

Following these orders, Versa filed a motion for attorney's fees and costs in the consolidated cases. (App. Vol. 13 at 2003-2203; App. Vol. 15 at 2524-2625; App.

[2] The district court applied the same order to the other two cases that are consolidated with this appeal. (App. Vol. 14 at 2426-2444; App. Vol. 15 at 2445-2463).

Vol. 16 at 2626-2709). MDB filed a motion to retax. (App. Vol. 14 at 2407-2425; App. Vol. 16 at 2754-2770). Following briefing and a hearing, the district court granted in part and denied in part Versa's motion for fees and costs. MDB has appealed the order permitting Versa's cost recovery. To the extent the district court denied Versa's request for attorneys' fees and denied various cost items, Versa cross-appeals.

V.

STATEMENT OF FACTS

A. Factual and Procedural Background

On July 7, 2014, the belly of one of the trailers which was part of an MDB 18-wheel truck opened on the freeway, spilling gravel and causing multiple automobile accidents and alleged injuries to the underlying plaintiffs. (App. Vol. 3 at 397). (The underlying plaintiffs are not parties to this appeal).

On November 11, 2014, MDB's attorneys retained an expert to investigate the cause of the opening of the belly trailer. (App. Vol. 8 at 1229). MDB's expert performed two site inspections of the subject truck and trailer prior to MDB filing suit against Versa. (App. Vol. 8 at 1255, 1267). On September 16, 2015, approximately one year after the accident, the first plaintiff, Olivia John, served MDB with a lawsuit for her alleged injuries. (App. Vol. 11 at 1723-1724). Within that year, eight additional plaintiffs who allegedly suffered injuries in the accident filed suit. (App. Vol. 3 at 397).

On June 15, 2016, almost two years after the accident, MDB, *for the first time*, put Versa on notice of its intention to seek contribution by filing its cross-claim. (App. Vol. 1 at 1). In its cross-claim, MDB alleges that there was a malfunction with the Versa valve, which allegedly caused the belly dump to unexpectedly open. (App. Vol. 1 at 3).

Versa deposed MDB pursuant to NRCP 30(b)(6). During this deposition, MDB's witness confirmed that MDB threw out electrical components in the circuit that activate the Versa valve. Versa subsequently filed its motion to strike MDB's cross-claim (the "Motion"). (App. Vol. 3 at 393-416).

B. Evidentiary Hearing on Versa's Motion

On August 29, 2017, the district court held a hearing on Versa's Motion and took the Motion under advisement. (App. Vol. 9 at 1439-1557). On September 22, 2017, the district court issued its order requesting an evidentiary hearing. (App. Vol. 10 at 1661-1666).

The evidentiary hearing took place on October 13, 2017 (from approximately 9:00 a.m. to just before 4:00 p.m.). (App. Vol. 11 at 1691, Vol. 11-12 at 1686-1934 and Vol. 12 at 1933). During the hearing, the district court heard from five different witnesses – MDB mechanic and designated witness pursuant to NRCP 30(b)(6), Scott Palmer ("Palmer"); MDB mechanic Patrick Bigby ("Bigby"); Versa's expert, Garrick Mitchell ("Mitchell"); MDB's expert, David Bosch ("Bosch"); and MDB's expert, Erik Anderson ("Anderson"). (App. Vol. 11 at 1689). The witness testimony revealed the following:

- On August 5, 2014, MDB replaced a damaged 4-way socket on trailer #6773, which was part of the electrical circuit that controls the subject Versa valve on the subject trailer. (App. Vol. 11 at 1727; 1738). MDB did not take a picture of the damaged 4-way socket and threw the 4-way socket in the trash. (App. Vol. 11 at 1727; 1793). Further, MDB cannot testify as to the condition of the 4-way socket when they replaced it. (App. Vol. 11 at 1728).
- On December 18, 2014, after MDB retained counsel and an expert regarding the subject incident, MDB replaced a damaged 4-way socket on trailer #6773, which was part of the electrical circuit that controls the subject Versa valve on the subject trailer. (App. Vol. 11 at 1728; 1738). Additionally, MDB tightened the screws on the 4-way plug on the subject tractor (#5694), which was part of the electrical circuit that controls the subject Versa valve on the subject trailer. (App. Vol. 11 at 1708; 1710-1711). MDB did not take a picture of the damaged 4-way socket and threw the 4-way socket in the trash. (App. Vol. 11 at 1730; 1793). Further, MDB cannot testify as to the condition of the 4-way socket when they replaced it. (App. Vol. 11 at 1709-1710).
- On February 5, 2015, MDB replaced a damaged 4-way cord on the subject tractor (#5694), which was part of the electrical circuit that controls the subject Versa valve on the subject trailer. (App. Vol. 11 at 1712;1716). Additionally, MDB replaced a damaged 7-way cord on the subject tractor (#5694) which contains a live wire with electricity which

runs concurrent with the 4-way cord. (App. Vol. 11 at 1712). MDB did not take a picture of the damaged 4-way and 7-way cord and threw them both in the trash. (App. Vol. 11 at 1717-1718; 1793). Further, MDB cannot testify as to the condition of the 4-way and the 7-way cord when they replaced them. (App. Vol. 11 at 1717-1718).

- On December 2, 2015, MDB replaced a damaged 4-way plug on the subject tractor (#5694), which was part of the electrical circuit that controls the subject Versa valve on the subject trailer. (App. Vol. 11 at 1720). MDB did not take a picture of the damaged 4-way plug and threw the 4-way plug in the trash. (App. Vol. 11 at 1721;1793). Further, MDB cannot testify as to the condition of the 4-way cord when they replaced it. (App. Vol. 11 at 1721).
- These various electrical components that were replaced and discarded could have been cut, abraded and/or cracked. (App. Vol. 12 at 1840). Such cut, abrasion and/or crack could have caused the Versa valve to activate. (App. Vol. 11 at 1717;1810-1811; App. Vol. 12 at 1847).
- Versa is unable to support its defense and test its theory that an electrical malfunction occurred because MDB discarded some of the components that comprise of the electrical circuit that activates the Versa valve. (App. Vol. 11 at 1775; 1791).
- Further, when the subject Versa valve was tested, *the experts found no defect, and that it worked as intended.* (App. Vol. 11 at 1773-1774).

Following the evidentiary hearing, on December 8 2017, the district court issued a thorough and detailed Order (the "Order") granting Versa's Motion and dismissing MDB's cross-claim. (App. Vol. 12 at 1970-1983). As demonstrated by the district court's thorough and detailed Order, the district court meticulously addressed and weighed each and every factor under this Court's landmark decision in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) and reasoned, based on the severe prejudice that Versa has now permanently and irreparably suffered due to MDB's willful evidence spoliation of the electrical components that Versa needed to defend against the MDB's cross-claim, no lesser sanction short of dismissal would be fair or just under the circumstances. (App. Vol. 12 at 1978).

VI.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by granting Versa's Motion and issuing case terminating sanctions by dismissing MDB's cross-claim. This ruling was supported by substantial evidence presented through the parties' extensive briefing and the testimony and documents presented during the evidentiary hearing. In its Opening Brief, MDB provides no evidentiary or legal grounds showing any abuse of discretion. To the contrary, in granting Versa's Motion, the district court properly adhered to the requisite standards and reasonably determined that Versa was severely prejudiced by MDB's failure to preserve and dispose of *the only physical evidence* Versa could rely on to defend against MDB's cross-claim. Under these circumstances, the only fair sanction was striking MDB's cross-claim.

MDB's appeal of Versa's cost award are similarly flawed. As with its arguments regarding the Motion, MDB fails to provide any evidentiary or legal grounds showing that the district court erred in granting Versa's costs.

For its cross-appeal, Versa maintains that the district court erred by not granting all of Versa's costs, as they were reasonable, justified and supported by appropriate documents. The district court also erred by failing to award Versa's its attorney's fees pursuant to NRCP 37, when it had already found that MDB's evidence spoliation was so serious that terminating sanctions were warranted, and when MDB had no reasonable justification for its failure to preserve critical evidence.

Accordingly, the Order dismissing MDB's cross-claim should be affirmed. The district court's order regarding costs, to the extent it permitted Versa's prevailing party cost recovery, should also be affirmed. To the extent Versa's costs and attorney's fees were denied, the Court should reverse the district court's order on these issues and remand for the awarding of attorneys' fees and additional costs.

VII.

ARGUMENT

A. The district court did not abuse its discretion by granting Versa's Motion and dismissing MDB's Cross-Claim.

It is well-established under Nevada law that district courts have the power and authority to dismiss actions based on both NRCP 37 and their "inherent equitable powers." *See Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 92, 787 P.2d 777 (1990). This power extends to evidence that is destroyed or lost *prior to* the initiation of formal litigation. *See Stubli v. Big D International Trucks*, 107 Nev. 309, 313-314,

810 P.2d 785 (1991) (affirming remedy of dismissal for evidence lost prior to litigation); *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911 (1987) ("[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.").

A district court's selection of the most appropriate sanction for evidence spoliation based on any given set of facts is subject to an abuse of discretion standard of review. *See, e.g., Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592 (2010) ("In reviewing sanctions, we do not consider whether we, as an original matter, would have imposed the sanctions. Our standard of review is whether the district court abused its discretion in doing so."); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042 (2010) ("This court generally reviews a district court's imposition of a discovery sanction for abuse of discretion."); *Stubli,* supra, 107 Nev. at 312 ("Selection of a particular sanction for discovery abuses under NRCP 37 is generally a matter committed to the sound discretion of the district court."); *Young, supra*, 106 Nev. at 92 (in reviewing case terminating sanctions, this Court will not substitute its judgment for that of the district court).

Though a "somewhat heightened" standard of review applies to case terminating sanctions, this standard still requires deference to the district court's findings that are just, related to the claims at issue and supported by the *Young* factors. *See Stubli, supra*, 107 Nev. at 312-313 (citing *Young*, 106 Nev. at 92-93). Any order providing for case dismissal as a sanction must "be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors."

Young, supra, 106 Nev. at 93. These "*Young* factors" include (but are not necessarily limited to) "the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses." *Young, supra*, 106 Nev. at 93.

Additionally, given the factually-intensive nature of spoliation issues, the district court has discretion in deciding which of these factors should apply, and the weight to be given to the factors, on a case-by-case basis. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 610, 245 P.3d 1182 (2010). As such, a district court's determination as to the appropriate remedy for alleged evidence spoliation will be affirmed on appeal if the district court "examined the relevant facts, applied a proper standard of law, and, utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach." *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103 (2006).

Here, the district court's Order complies with the foregoing standards established by this Court for the imposition of terminating sanctions for lost evidence. First, with respect to purely factual findings, the district court found, based on

substantial evidence presented through the underlying motion proceedings and evidentiary hearing, that:

- MDB does not dispute the electrical components were not preserved in anticipation of the trial or potential testing. (Order, App. Vol. 12 at 1976).
- MDB took no steps to warn its employees to keep any components in the electrical system should they need to be replaced. (*Id.*)
- There are no pictures taken of the electrical system or the components. (*Id.*)
- MDB's employees cannot testify to the condition of the components when they were replaced. (*Id.*)

Next, the district court specifically and meticulously addressed the *Young* factors in its Order (App. Vol. 12 at 1970) as follows[3]:

1. Willfulness

The first *Young* factor is the degree of willfulness of the offending party. *See Young, supra*, 106 Nev. at 93. Based on the totality of circumstances, the district court concluded that MDB's destruction of the truck's electrical systems was willful. (Order, App. Vol. 12 at 1976). The district court explained that MDB should have anticipated extensive litigation after the subject incident, which resulted in numerous

[3] MDB's Opening Brief does not allege the district court did not properly weigh the Young factors. However, Versa felt it was appropriate to address each factor in the Answering Brief to illustrate to the Court that the district court did not abuse its discretion in its Order.

accidents and injuries. (*Id.* at 1977). Yet, "[the district court] heard no testimony that MDB took *any* steps to preserve the truck or trailer in *any way*." (*Id.* [emphasis added].) Furthermore, "[t]here was no testimony indicating memorialization of the condition of the vehicle was ever contemplated by anyone at MDB. On the contrary, the truck and trailer continued to be in use after the events of July 7, 2014," and "[i]t was subject to 'routine' maintenance." (*Id.*)

The district court further explained that, had MDB just taken the simple step of at least taking photographs of the truck, trailer and electrical parts, then Versa may have an alternative way to defend against MDB's product liability claim. (*Id.*) However, because of MDB's failure to even consider retention of critical evidence, Versa's expert could not possibly confirm or refute MDB's position that the electrical system was working properly. (*Id.*) Though the district court did not find that MDB intended to harm Versa, MDB's neglect and indifference caused the loss of the only evidence that Versa could use to defend MDB's claims. (*Id.*) Under these circumstances, MDB's failure to preserve the evidence that was within its exclusive control was willful. (*Id.* at 1976-77 [citing *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984) (willfulness "implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.")]

Accordingly, this first *Young* factor militates in favor of dismissal of MDB's cross-claim.

2. Possibility of Lesser Sanction

The second *Young* factor is the extent to which the non-offending party would be prejudiced by a lesser sanction. *See Young, supra*, 106 Nev. at 93. The district court carefully considered, but rejected, the imposition of alternative lesser sanctions, including jury instructions (for either a rebuttable presumption or adverse inference) and the striking of MDB's expert. (Order, App. Vol. 12 at 1977-78). With respect to presumption or inference instructions pursuant to *Bass-Davis*, the district court reasoned that these remedies were insufficient because "[t]he actions of [MDB] had the effect of reserving to itself all expert testimony based upon examination of the [electronic components]. Any adverse presumption which the court might have ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the expert witness." (*Id.* [quoting *Zenith, supra*, 103 Nev. at 652].) Striking MDB's expert (the remedy used in *Zenith, supra*, 103 Nev. 648) would leave MDB's cross-claim subject to summary judgment, and would result in "a patent waste of limited judicial resources and of the jury's time." (*Id.* at 1978).

In other words, after reviewing extensive briefing, hearing oral argument and conducting an evidentiary hearing with multiple live witnesses, the district court could "conceive of no other sanction [short of dismissal] which would be appropriate under these circumstances." (*Id.*) Accordingly, this second *Young* factor militates in favor of dismissal of MDB's cross-claim.

3. Severity of the Sanction of Dismissal relative to the Severity of the Discovery Abuse

The third *Young* factor is the severity of the sanction of dismissal relative to the severity of the discovery abuse. *See Young, supra*, 106 Nev. at 93. In assessing this factor, the district court expressly recognized this Court's pronouncement that dismissal "should only be used in extreme situations." (Order, App. Vol. 12 at 1979 [quoting *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323 (1995)]). Nevertheless, in explaining why this case presents precisely this type of extreme situation, the district correctly noted that "[t]he *only* issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway." (*Id.* at 1979 [emphasis in original].) As such, "MDB's disposal of the electronic components without memorializing them in any way *effectively halted the adversarial process*. It left all of the 'cards' in MDB's hands and left Versa with nothing other than a theory it could neither prove nor disprove." (*Id.* at 1979 [emphasis added].) The district further explained that "MDB could simply rely on its expert during trial and argue Versa had no proof of its theory and the theory itself was preposterous. This [was] the position taken by MDB at the evidentiary hearing." (*Id.* at 1979) In other words, "*Versa is left with no way of verifying its theory of the case*" because "the adversarial process was stymied by MDB regarding *the most critical pieces of evidence*." (*Id.* at 1979-1980 [emphasis added]). This conclusion was notably buttressed by the evidence presented at the evidentiary hearing, which demonstrated that the belly dump failure could have occurred as Versa's expert opined (i.e., due an electrical failure). (*Id.* at 1979-1980).

Accordingly, this third *Young* factor militates in favor of dismissal of MDB's cross-claim.

4. Whether Evidence is Irreparably Lost

The fourth *Young* factor is whether the evidence at issue has been irreparably lost. *See Young, supra*, 106 Nev. at 93. Because MDB employees testified at the evidentiary hearing that the salient electronic components had been thrown away, the critical evidence is, undisputedly, irreparably lost. (Order, App. Vol. 12 at 1980). Accordingly, this fourth *Young* factor militates in favor of dismissal of MDB's cross-claim.

5. The Feasibility and Fairness of Alternative Sanctions

The fifth *Young* factor involves an assessment of the feasibility and fairness of alternative, less-severe sanctions. *See Young, supra*, 106 Nev. at 93. Again, the district court carefully considered and rejected the imposition of alternative lesser sanctions, including jury instructions and the striking of MDB's expert. (Order, App. Vol. 12 at 1977-78, 1980). The district court reasoned that alternative remedies were insufficient because, while MDB's experts purported to rule out any electrical cause of the belly dump failure, MDB's undisputed destruction/loss of the electronic system components totally deprived Versa of its ability to defend against MDB's cross-claim. (*Id.*) Accordingly, "[t]he circumstances presented in the Motion are unique and the most severe sanction is appropriate." (*Id.* at 1980).

Accordingly, this fifth *Young* factor militates in favor of dismissal of MDB's cross-claim.

6. The Policy Favoring Adjudication on the Merits

The sixth *Young* factor involves an assessment of the policy favoring adjudication on the merits. *See Young, supra*, 106 Nev. at 93. The district court expressly acknowledged and reaffirmed Nevada's strong public policy that cases should be adjudicated on their merits. (Order, App. Vol. 12 at 1981). The district concluded that dismissing the cross-claim would further this policy, as allowing the cross-claim to proceed "would be the antithesis of allowing it to proceed 'on the merits'" because "[t]he merits of Versa's case would not be able to be evaluated by the jury because Versa could not test its theory on the actual components." (*Id.*) Rather, "[t]he jury would be left to guess about what may have occurred rather than weigh the competing theories presented. *MDB would have an overwhelmingly unfair advantage given its action.*" (*Id.* [emphasis added].)

Accordingly, this sixth *Young* factor militates in favor of dismissal of MDB's cross-claim.

7. Whether the Sanctions Unfairly Penalize a Party for the Conduct of Counsel

The seventh *Young* factor involves an assessment of whether sanctions unfairly operate to penalize a party for the misconduct of its attorney. *See Young, supra*, 106 Nev. at 93. The district court correctly found that this factor is inapplicable, as there is no evidence to show that MDB's counsel was in any way responsible for the loss of the evidence. (Order, App. Vol. 12 at 1982). Accordingly, this seventh *Young* factor effectively militates in favor of dismissal of MDB's cross-claim.

8. The Need for Deterrence

The eighth *Young* factor involves an assessment of the need to deter both the parties and future litigants from similar abuses. *See Young, supra*, 106 Nev. at 93. The district, based on this Court's *Zenith* opinion and the evidence presented in connection the Motion and evidentiary hearing, concluded that allowing MDB's cross-claim to proceed when if failed to preserve the only evidence that could support Versa's defense "would set a dangerous precedent to similarly situated parties in the future. It would also be antithetical to a potential litigant's obligation to preserve the very evidence it may have to produce during discovery." (Order, App. Vol. 12 at 1981). Accordingly, this eighth *Young* factor also militates in favor of dismissal of MDB's cross-claim.

In other words, the district court, after carefully considering each of the *Young* factors, decided that all of these factors mandated dismissal of the cross-claim because MDB's evidence spoliation "crippled [Versa's] ability to present its case." (Order, App. Vol. 12 at 1982).

B. MDB does not identify any abuse of discretion in its Opening Brief.

The arguments asserted by MDB in its Opening Brief were properly rejected by the district court, and MDB identifies no law or evidence establishing the district court abused its discretion.

1. MDB merely re-argues facts by asserting that it was not required to preserve the electrical components for the truck.

MDB argues on appeal that it had no obligation to preserve the truck's electrical components. (Opening Brief at 19-20). Specifically, MDB argues that the modification of the dump gate system prior to the subject accident removed any chance that the wiring could affect the operation of the Versa valve, that routine maintenance would have no impact on the subject Versa valve and that Versa produced no evidence to support is claim to the contrary. (*Id.* at 20-21).

The district court did not abuse its discretion by rejecting these factual contentions in the proceedings below. Rather, the district court properly recognized that MDB's failure to preserve the electrical components from the subject truck *completely precluded Versa from testing MDB's* ***argument*** that the electrical system could not have caused the belly dump to open. (Order, App. Vol. 12 at 1976-1982). Similarly, Versa's failure to "produce evidence" regarding any possible electrical component failure was solely a function of the MDB's failure to preserve the evidence. (*Id.*) In other words, consistent with this Court's opinions in *Zenith* and *Stubli*, the district court merely recognized that 'trust us' arguments are not permissible when a party has disposed of the evidence needed to assess that trust. *See Mishler v. State Bd. of Medical Examiners*, 109 Nev. 287, 294, 849 P.2d 291 (1993) (recognizing "the obligation of a party who intends to rely on certain evidence to marshal and preserve it for the benefit of the opposing party," and that, "[w]here a

party fails to do so, that party must suffer the prejudice from the absence of the evidence.")

The district court's ruling was based not only on a detailed assessment of the *Young* factors (as detailed above), but also on substantial factual evidence presented in the Motion proceedings. In its cross-claim, MDB alleges that the Versa valve was defective because it would activate inadvertently. (App. Vol. 1 at 3). The Versa valve is activated when the valve receives electricity, but the valve can only receive electricity through the electrical wiring (within the four-way cords) from the truck and through the trailers. (App. Vol. 11 at 1714-15, 1726-27 and 1817). The electrical writing is connected through four-way sockets and plugs. (*Id.*) Additionally, the seven-way cords are tied together with the four-way cords. (App. Vol. 11 at 1802).

The evidence presented below showed that MDB's own mechanics were well aware that the four-way connectors and plugs supply the electricity to the Versa valve. For example, MDB mechanic Patrick Bigby testified that the four-way connectors that were removed and replaced are the connectors for the wiring that controls the subject Versa valve. (App. Vol. 11 at 1701:20-23). MDB employees also acknowledged that issues could have existed with the electrical cords that were thrown away, and MDB's expert acknowledged that electrical issues could have caused the Versa valve to open. (App. Vol. 11 at 1717; App. Vol. 12 at 1847). As such, the district court did not abuse its discretion when it found that the discarded components that were involved in the electrical activation of the Versa valve, i.e. the four-way plug and connector, are relevant and should have been preserved, or, at the very least, photographed. (Order, App. Vol. 12 at 1976-1982).

The district court also heard testimony that, due to the close nature of the seven-way and four-way cords, it is possible that the cords could have been stripped and the bare cords could have touched. (App. Vol. 11 at 1717;1810-1811; App. Vol. 12 at 1847). Such touching would send electricity to the Versa valve. (*Id.*) Therefore, the district court did not abuse its discretion when it determined that the seven-way plug and cords were relevant and should have been preserved, or at the very least photographed. (Order, App. Vol. 12 at 1976-1982). There is no dispute that MDB took none of these steps to preserve evidence that it knew, or should have known, would be relevant to its cross-claim against Versa.

There is also no dispute that MDB threw the electrical components away after they were on notice of a potential legal claim. This is evident by the fact that MDB had an attorney and hired an expert for the subject incident on November 11, 2014, which was prior to a majority of the "routine maintenance" that was performed on the subject truck and trailers. (App. Vol. 8 at 1229). Moreover, as the district court properly recognized, MDB knew, on the date of the accident (July 7, 2014), that MDB had to know that there would be litigation arising out of the subject accident based on the numerous accidents and collisions. (App. Vol. 12 at 1977). The district court accordingly did not abuse its discretion when it concluded that MDB was on notice of the potential litigation and had a duty to preserve the evidence, including the electrical components which in any way could have potentially caused the Versa valve to activate.

Finally, MDB suggests that it obligation to preserve critical evidence was somehow affected by Versa's conduct. Specifically, MDB asserts that "Versa

displayed no sense of urgency to inspect the subject semi-truck and trailers." (Opening Brief at 20). In addition to being legally irrelevant, this assertion is simply false. MDB filed its cross-claim against Versa on June 15, 2016. (App. Vol. 1 at 1). The first inspection that involved Versa took place just a few months later, on October 13, 2016. (App. Vol. 8 at 1269).

In sum, MDB's re-argument of select facts, and mischaracterizations of other facts, do not demonstrate any abuse of discretion by the district court. The district court's factual findings, which are subject to a substantial evidence review, were rationally based on the evidence presented.

2. This Court's Bass-Davis opinion does not require a lesser sanction.

MDB next argues that this Court's *Bass-Davis* opinion permits only an adverse inference jury instruction, not dismissal of the cross-claim. (Opening Brief at 22-24). As support for this argument, MDB points to the district court's conclusion that the MDB employees who failed to preserve the critical evidence did not act with intent to harm Versa's case.

MDB's argument, essentially, is that *Bass-Davis* implicitly overruled this Court's longstanding and well-established jurisprudence regarding case-terminating evidentiary sanctions, including *Young*, *Stubli* and *Zenith*. Again, in *Stubli*, this Court affirmed the dismissal of plaintiff's complaint because plaintiff's counsel and expert witness failed to preserve critical evidence relating to a truck accident. *See Stubli, supra*, 107 Nev. at 313-14. Similarly, in *Zenith*, this Court affirmed the exclusion of plaintiff's expert witness (which effectively amounted to a dismissal) due to plaintiff's

disposal of critical evidence. *See Zenith, supra*, 103 Nev. at 651-52. If this Court had intended to overrule *Stubli* and *Zenith* in *Bass-Davis*, it certainly would have done so in clear and unambiguous language, especially given the importance of the issue and this Court's longstanding affirmation of case-terminating sanctions that are properly considered by district courts.

Not only did this Court in *Bass-Davis* not overrule these authorities that permitted case terminating sanctions, it also did not eliminate the possibility that case-terminating sanctions could be an appropriate remedy when the evidence destroyed is central to the claim at issue. In *Bass-Davis*, this Court did not cite to *Stubli*. This Court did cite to *Zenith*, but only to re-state the proposition that a party has a pre-litigation duty to preserve evidence. *Bass-Davis,* 122 Nev. at 450 n. 19. If this Court had intended to somehow limit the universe of remedies for highly-prejudicial evidence spoliation, it would certainly have cited the two prior cases (*Stubli* and *Zenith*) in which case terminating sanctions due to evidence spoliation were affirmed in well-reasoned published opinions.

Indeed, this Court even recognized in *Bass-Davis* that, in addition to adverse inference or rebuttable presumption jury instructions, district courts have the discretion "to impose other appropriate sanctions" for a loss of evidence. *Bass-Davis,* 122 Nev. at 455. As such, if this Court had decided that a jury instruction was the exclusive remedy for evidence spoliation, as MDB suggests, this Court would not have provided the district court with this authority to "impose other appropriate sanctions" for lost evidence. *Id.*

Finally, the distinction between the jury instruction remedies contemplated in *Bass-Davis*, and the case terminating remedies issued and affirmed by this Court in *Stubli* and *Zenith*, is desirable and consistent with Nevada law and policy. It is well established that a dismissal, though it should only be imposed after thoughtful consideration of all factors, need not be preceded by other less severe sanctions. *See Young*, supra, 106 Nev. at 92. District courts also must consider whether a non-offending party would be prejudiced by a lesser sanction. *See Stubli, supra,* 107 Nev. at 313 (citing *Young,*, 106 Nev. at 92-93).

It is also well-established that Nevada favors the adjudication of disputes on their merits. In *Bass-Davis*, the lost evidence was a videotape of the alleged slip-and-fall incident. Notably, however, the absence of the videotape did not preclude the plaintiff from establishing his claim based on other evidence (e.g., plaintiff's testimony as to the condition of the property, sweep sheets, etc.) In stark contrast, in *Stubli* and *Zenith*, the lost evidence ***was the primary evidence necessary to prove that the defendant's product was defective*** (in *Stubli*, the parts of the truck necessary to defend the plaintiff's product liability claim; in *Zenith*, the television set that was allegedly defective). When the evidence lost is necessary to defend against a claim that is based significantly on that evidence, the dismissal of that claim is the only fair remedy when the defendant cannot meaningfully defend the claim without the evidence.[4]

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[4] This principle has also been recognized by the Nevada federal court, which has found that jury instruction sanctions are inadequate when a product liability defendant "has been denied its primary and best means of defending against Plaintiff's
(footnote continued)

This case is, quite obviously, more closely aligned factually with *Stubli* and *Zenith* than it is with *Bass-Davis*. As the district concluded in its meticulous analysis of the *Young* factors, MDB's loss of "the most critical" piece of evidence "effectively halted the adversarial process . . . and left Versa with nothing other than a theory it could neither prove nor disprove." (Order, App. Vol. 12 at 1979-80). Under these circumstances, the district court properly considered, and rejected, the viability of lesser sanctions, including the jury instruction remedies discussed in *Bass-Davis*. (Order, App. Vol. 12 at 1977-78). With any sanction short of dismissal, Versa simply cannot meaningfully and fairly defend against MDB's cross-claim.

C. The district court properly awarded expert fees and costs to Versa.

This Court's review of a district court's award of expert fees and costs to the prevailing party is reviewed for an abuse of discretion. *See, e.g., Capanna v. Orth*, 134 Nev. Adv. Op. 108, 2018 Nev. LEXIS 119 at *14 (Dec. 27, 2018); *In re Estate of Miller*, 125 Nev. Adv. Op. 42, 216 P.3d 239, 241 (2009); *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994).

1. Expert Fees

Under NRS 18.005(5), a district court may award expert fees in excess of $1,500 when it determines "[t]hat the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." Here, the district court awarded Versa $13,706.49 in expert fees. (App. Vol. 18 at 3009). MDB appeals this

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claims." *Azad v. Goodyear Tire & Rubber Co.*, 2013 U.S. Dist. Lexis 20944 at *12-*13 (D. Nev. February 14, 2013) (citing *Fire, supra*, 103 Nev. 648).

award, arguing that the district court erred because it did not consider the factors identified in *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (Nev. App. 2015). (Opening Brief at 24-26). This argument is incorrect, as the district court did consider these *Frazier* factors. Additionally, Versa's expert's testimony constituted most of Versa's evidence.

If an expert's testimony constitutes most of a party's evidence, then a district court may award expert fees in excess of $1,500. *See Frazier, supra*, 357 P.3d at 374; *Gilman v. Nevada State Bd. of Veterinary Med. Examiners*, 120 Nev. 263, 272-73, 89 P.3d 1000 (2004) (disapproved on other grounds in *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014)). As this Court observed in *Frazier*, "[i]n *Gilman*, the Nevada Supreme Court affirmed an award of $7,145 in expert witness fees on the basis that the expert's testimony constituted most of the parties['] evidence in the underlying case." *Frazier*, 357 P.3d at 374.

Here, Versa's expert witness testimony comprised most of Versa's evidence. (App. Vol. 18 at 3009). Indeed, Versa's defense "[r]ested entirely upon disproving MDB's theory that the valve manufactured by Versa malfunctioned." *Id.* The district court determined that "[t]he only way Versa could accomplish this was through the use of an expert witness." *Id.* Because Versa's expert's testimony was "[t]he only way[]" that Versa could disprove MDB's theory, such testimony *a fortiori* constituted most of Versa's evidence. *Id.* (These findings further underscore the critical nature of the electrical component evidence that MDB failed to retain).

MDB suggestion that the district court did not address any of the *Frazier* factors is false. In in its order on Versa's motion for attorneys' fees and costs (entered on

June 7, 2018), the district court addressed the following *Frazier* factors: (1) the importance of expert testimony to Versa's case, (2) the extent and nature of the work performed by Versa's expert, (3) whether Versa's expert had to conduct testing and (4) the education of Versa's expert. (App. Vol. 18 at 3009).[5] Specifically, the district court found that "Versa's defense rested entirely upon disproving MDB's theory that the valve manufactured by Versa malfunctioned. The only way Versa could accomplish this was through the use of an expert witness." (*Id.*) In other words, the district court considered and properly concluded that Versa's expert witness costs were necessary. The district then concluded: "Given Versa's potential exposure, it was not unreasonable for Versa to retain [its expert] to perform extensive analysis and evaluation, which required two site inspections. The court finds the amount of expert fees requested is reasonable and necessary." (*Id.*)

Accordingly, the district court did not abuse its discretion in awarding expert fees in excess of $1,500.

2. Costs

"Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases: . . . In an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." NRS 18.020(3). This Court has explained that "prevailing party" means a party who has won on least one of its claims. *See Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). An order "[d]ismissing

[5] The district court was not required to address all of the *Frazier* TA \s "131 Nev. Adv.

a complaint is sufficient to find a prevailing party." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1292 (2016). The district court also has discretion to determine the amount of costs awarded. *See Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560 (1993); *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015); *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016).

Here, because MDB's cross-claim was dismissed due to MDB's evidence spoliation, Versa is the prevailing party as a matter of law. Accordingly, Versa sought prevailing party costs pursuant to its verified memorandum of costs. (App. Vol. 14 at 2320). This memorandum was supported by the affidavit of Versa's lead trial counsel, Josh Cole Aicklen, along with a disbursement diary and supporting documentation, which specifically denoted the costs incurred by Versa in defending the claims. (App. Vol. 14 at 2323-2398). Versa included almost 100 pages of supporting documents to ensure that it properly complied with NRS 18.010. The district court therefore properly awarded Versa's costs. (App. Vol. 18 at 3011).

MBD seems to argue that, because Versa was a defendant to the underlying personal injury action, it cannot be construed as a prevailing party. However, as provided and discussed *supra*, MBD's argument is contrary to binding authority from the Nevada Supreme Court. Versa prevailed on its Motion for Attorney's Fees and Costs (in part) and its Motion to strike the cross-claim, and thus, under the liberally construed manner by which a "prevailing party" is to be interpreted, Versa assuredly comes within the domain of what constitutes a prevailing party. Versa's Motion to Strike was granted and MDB's causes of action, stricken. *See MB Am. v. Alaska Pac.,*

supra, 367 P.3d at 1292 (reaffirming that an order "[d]ismissing a complaint is sufficient to find a prevailing party.").

Further, MDB's argument that the costs for the depositions for the underlying plaintiffs and the acquisition of medical records should not be recoverable is misplaced. (Opening Brief at 27). MDB had a contribution claim against Versa. (App. Vol. 1 at 1-8). As such, Versa potentially could have been responsible for all damages that could have been awarded against MDB for the underlying injury claims. Versa was therefore required to defend the contribution claim by preparing to defend against the underlying plaintiffs' alleged damages. Further, the plaintiffs' testimony regarding how the incident occurred and what the plaintiffs saw were relevant as to whether the Versa valve malfunctioned as MDB alleged. The district court properly considered and decided these factors. (App. Vol. 17 at 2966; App. Vol. 18 at 3010-3011). Because Versa was the prevailing party as a matter of law, it is entitled to all costs incurred for the entire case.

MDB's contention that Versa was not entitled to costs prior to its offer of judgment is also misplaced. As discussed above, Versa is entitled to costs as the prevailing party. *See* NRS 18.020. Further, MDB conceded that the costs statute is not only applicable after an offer of judgment has been served, which the district court partly based its decision on to award Versa pre-offer of judgment costs and fees. (App. Vol. 16 at 2749; App. Vol. 18 at 3011). MDB's basis for its argument is that the verified memorandum of costs was based only on Versa's offer of judgment. (Opening Brief at 27). This argument, however, misstates the record, as noted by Versa in its opposition to MDB's motion to retax. (App. Vol. 15 at 2483). Versa's

verified memorandum of costs provides that "the following verified Memorandum of Costs to be recovered against Cross-Claimant MDB TRUCKING, LLC pursuant to NRS 18.005; NRS 18.020; and NRS 18.110." (App. Vol. 15 at 2320). As such, the district court's order granting costs prior to the offer of judgment is consistent with Nevada case law and the record.

MDB also argues that the district court erred by awarding costs that were not specifically taxable pursuant to NRS 18.005(2). MBD, however, fails to provide any reference to NRS 18.005(17). NRS 18.005(17) specifically provides that courts can award costs for "[a]ny other reasonable and necessary expense incurred in connection with the action." In fact, the district court in making its determination regarding courier fees, cited to NRS 18.005(17), and provided: "the courier fees for delivery of depositions, the compact disc fees, and exhibit fees are reasonable and necessary expenses in the litigation, and are therefore recoverable." (App. Vol. 18 at 3011).

D. The district court should have awarded Versa attorneys' fees and additional costs.

The version of NRCP 37(b) in effect at the time of the underlying proceedings provided that, when a court strikes a pleading, "[i]n lieu of any of the foregoing orders or **in addition thereto**, the court **shall** require the party ... to pay the reasonable expenses, including attorney's fees ... unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (emphasis added). The Court has broad power in terms of the sanctions that can be invoked when a party fails to participate in the discovery process. *See Temora Trading Co. v. Perry*, 98 Nev. 229, 231, 645 P.2d 436, 437, *cert. denied*, 459 U.S.

1070, 103 Sup.Ct. 489, 74 L.Ed. 2d (1982). Further, "fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue." *See Young*, 106 Nev. at 92.

Here, the district court erred in not awarding Versa attorney's fees on the grounds that Versa's successful motion to strike MDB's cross-claim was a "windfall." (App. Vol. 18 at 3007). This was error. Even though the district court found that MDB's actions were not meant to purposefully harm Versa, MDB's failure to preserve "the electrical systems that control the solenoid which operated the Versa valve crippled Versa's ability to present a case." (App. Vol. 18 at 3004). This evidence spoliation by MDB was serious enough to (properly and justifiably) warrant dismissal of MDB's cross-claim.

This conclusion by the district court ignored the fact that Versa was forced to defend against MDB's cross-claim without critical evidence. The district court also failed to take into consideration that MDB continued to engage in costly litigation, even *after* it discovered that critical evidence had been lost.

Versa's claim for attorney's fees directly relates to MDB's failure to preserve critical evidence. MDB's failure to abide by Nevada's longstanding principle to preserve evidence that it knew or should known would be relevant to the action resulted in terminating sanctions. While this terminating sanctions was entirely warranted, Versa was unfairly forced to incur substantial attorneys' fees to obtain this just result. The district court's denial of attorney's fees creates a new paradigm for potential litigants, which is that a party can bring a claim without evidence, with the only real sanction being dismissal of the claim, so long as the conduct of disposing

pertinent evidence was not done to harm the adversary. Versa was forced to hire counsel to defend against a suit based upon nothing but conjecture. As such, Versa respectfully requests that this Court reverse the district court's denial of attorney's fees.

The district court also erred by disallowing $16,774.78 in requested costs that were incurred by Versa. The Nevada Supreme Court has held that costs awarded "must be reasonable, necessary, and actually incurred." *See Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015), recently upheld by *Golightly & Vannah, PLLC v. TJ Allen, PLLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). NRS 18.010(1) requires a party to file a memorandum of costs that is verified by the oath of the party seeking costs, and such oath must state that the costs were necessarily incurred during the instant litigation. Further, along with the memorandum of costs, the party seeking costs must also provide justifying documents that convey the costs were necessarily incurred as a result of the underlying litigation. *See*, NRS 18.110; *Bobby Berosini, Ltd. V. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998).

Here, Versa's counsel filed its Memorandum of Costs on January 5, 2018. (App. Vol. 14 at 2320). Included with the Memorandum of Costs was the Affidavit of Josh Cole Aicklen, lead attorney for Versa, along with 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). Versa included almost 100 pages of "justifying documents" to ensure that it properly complied with NRS 18.010. Versa's Disbursement Diary provides a comprehensive

outline denoting all costs that Versa incurred as a result of MDB's cross-claims. Therefore, it was an abuse of discretion for the district court to not award Versa all of its requested costs as all of the costs were directly related to the claims brought by MDB. Versa respectfully requests that this Court reject the district court's denial of $16,774.78 that were incurred by Versa due to the underlying litigation.

VIII.

CONCLUSION

The district court properly found, based on substantial evidence, that MDB took no steps to preserve critical evidence relating to the electrical systems in its truck, that MDB disposed of this evidence before Versa had the opportunity to inspect it and that this evidence spoliation crippled Versa's ability to meaningfully defend against MDB's cross-claim. The district court's Order granting Versa's Motion meticulously details and applies the *Young* factors. This Order, including its numerous factual findings, which were made after an evidentiary hearing, is entitled to deference by this Court. MDB demonstrates no abuse of discretion. Rather, it largely re-argues facts that were fully and fairly decided by the district court. The district court's ruling was fair, just and based on well-established Nevada law. Accordingly, the Order granting Versa's motion to strike MDB's cross-claim should be affirmed.

MDB's contentions regarding Versa's entitlement to prevailing party costs are similarly unavailing. Accordingly, the district court's order awarding prevailing party costs to Versa should be affirmed. However, the district court's order denying Versa's motion for attorneys' fees, and the order disallowing certain costs, should be

reversed. MDB forced Versa to incur substantial attorneys' fees, even though it knew that it had failed to preserve and had disposed of critical evidence that was relevant to its cross-claim. Under these circumstances, the district court should have awarded fees to Versa pursuant to NRCP 37.

DATED this 5th day of March, 2019.

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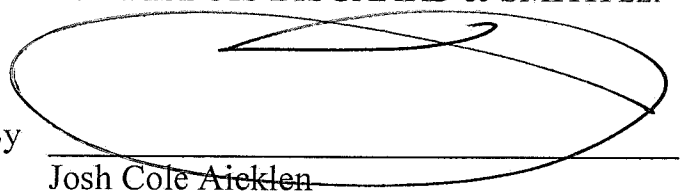
By 

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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 **9,968 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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