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

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

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

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

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

Docket 76397 Document 2018-30092

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

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

I. *Willfulness*

The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984), the Nevada Supreme Court found the term willful, "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." Willfulness may be found when a party fails to provide discovery and such failure is not due to an inability on the offending party's part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980). The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to establish willfulness.

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

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

II. The possibility of a lesser sanction

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

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

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[5] At oral argument counsel for MDB stated:

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

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

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

"The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme situations; if less drastic sanctions are available, they should be utilized." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (*citing Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that granting the Motion effectively ends the case. The Court does not take this action lightly. The *only* issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway. The Court finds 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. 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 is the position taken by MDB at the evidentiary hearing. Versa is left with no way of verifying its theory of the case.

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

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

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

A: I have seen that, yes.

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

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

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

IV. Whether evidence is irreparably lost

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

V. The feasibility and fairness of a less severe sanctions

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

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

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

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

VI. The policy favoring adjudication on the merits; and

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

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

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

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

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

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

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

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

DATED this 8 day of December, 2017.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

JOSH AICKLEN, ESQ.
MATTHEW ADDISON, ESQ.
KATHERINE PARKS, ESQ.
BRIAN BROWN, ESQ.
THIERRY BARKLEY, ESQ.
SARAH QUIGLEY, ESQ.
JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
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Sheila Mansfield
Judicial Assistant

FILED
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2018-02-08 01:13:47 PM
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Attorneys for Third-Party Defendant VERSA PRODUCTS COMPANY, INC.

DISTRICT COURT

WASHOE COUNTY, NEVADA

GENEVA M. REMMERDE, Plaintiff, vs. DANIEL ANTHONY KOSKI; MDB TRUCKING, LLC; DOES I-X and ROE I-V, Defendants. AND ALL RELATED CASES.	Case No. CV16-00976 Dept. 10 NOTICE OF ENTRY

TO: ALL INTERESTED PARTIES:

/ / /

/ / /

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

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 8th day of February, 2018

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

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

LIST OF EXHIBITS

Exhibit 1	Order

CERTIFICATE OF SERVICE

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

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

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

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

FILED
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2018-02-08 01:13:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6522570

EXHIBIT 1

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2018-01-22 04:15:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6492566

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

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

Defendants.

/

ORDER

Presently before the Court is THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.[1] *See* WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

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

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

Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and JAMES BIBLE v. MDB TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant action was filed on May 2, 2016. The Bible Action was filed September 20, 2016. It is alleged in all three actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents. In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT ("the MDB Cross-Claim") June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa: Implied Indemnification and Contribution.[2] MDB alleges it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 4:6-8. Therefore, MDB brought the Cross-Claim against the manufacturers of the trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by the trailer." The MDB Cross-Claim, 4:9-11. MDB also claims there were safer alternatives available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:15-22.

The Motion is the same as the motion practice in the Fitzsimmons Action and the Bible Action. The issues are identical, as are the relevant parties. The Court issued an ORDER ("the December Order") on December 8, 2017, in the Fitzsimmons Action. The December Order conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCP 37. The Court found in the December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of

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[2] 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. The only remaining cause of action alleged by MDB against Versa is for Contribution.

critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the Motion.[3]

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

DATED this 22 day of January, 2018.

ELLIOTT A. SATTLER
District Judge

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

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 January, 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 22 day of January, 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:

MATTHEW ADDISON, ESQ.
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JESSICA WOELFEL, ESQ.
JACOB BUNDICK, ESQ.
NICHOLAS M. WIECZOREK, ESQ.

Sheila Mansfield
Judicial Assistant

EXHIBIT "A"

FILED
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2017-12-08 02:59:29 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6431279

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

/

ORDER

Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.[1] Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOLIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. <u>*Willfulness*</u>

The first *Young* factor is willfulness. In *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984), the Nevada Supreme Court found the term willful, "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." Willfulness may be found when a party fails to provide discovery and such failure is not due to an inability on the offending party's part. *Havas v Bank of Nevada*, 96 Nev. 567, 570, 613 P.2d 706, 708 (1980). The Nevada Supreme Court has not opined that it is necessary to establish wrongful intent to establish willfulness.

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

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

II. The possibility of a lesser sanction

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

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

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[5] At oral argument counsel for MDB stated:

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

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

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

"The dismissal of a case, based upon a discovery abuse . . . should be used only in extreme situations; if less drastic sanctions are available, they should be utilized." *GNLV*, 111 Nev. at 870, 900 P.2d at 325 (*citing Young*, 106 Nev. at 92, 787 P.2d at 779-80). The Court is keenly aware that granting the Motion effectively ends the case. The Court does not take this action lightly. The *only* issue in this case is why the door to the trailer opened causing the gravel to dump into the roadway. The Court finds 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. 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 is the position taken by MDB at the evidentiary hearing. Versa is left with no way of verifying its theory of the case.

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

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

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

A: I have seen that, yes.

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

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

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

IV. Whether evidence is irreparably lost

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

V. The feasibility and fairness of a less severe sanctions

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

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

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

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

VI. The policy favoring adjudication on the merits; and

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

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

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

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

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

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

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

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

DATED this 8 day of December, 2017.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

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

CERTIFICATE OF ELECTRONIC SERVICE

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

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

Sheila Mansfield
Judicial Assistant

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CV16-00976
2018-06-07 04:35:09 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6719088

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

_____/

ORDER

Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS, INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY 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 NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on March 1, 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S

REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the Motion for Fees") on March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.

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

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

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

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

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[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.

[2] The Court incorporated by reference the ORDER entered December 22, 2017 ("the December Order"), on identical issues in the Fitzsimmons Action.

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

> (a) The Offer. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
>
> ...
>
> (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,
>
> > (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
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> > (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer....

An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of 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 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.

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

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.

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

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

Versa is not entitled to an award of attorneys' fees pursuant to NRCP 68. MDB's claim was brought in good faith. Further, the Court finds it was not unreasonable for MDB to reject the Initial Offer. The Opposition to the Motion for Fees argues the Initial Offer was unreasonable because it "amounted to less than one half of one percent (0.005) of the total settlement amount MDB paid to plaintiffs...." The Opposition to the Motion for Fees, 7:2-3. The Court agrees. The fact Versa

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

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

> (b) Failure to Comply With Order.
>
> ...
>
> (2) Sanctions--Party. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule 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:
>
> ...
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> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a 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.

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

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

The Court finds the amount of costs requested is reasonable. District Courts have "wide, but not unlimited, discretion to award costs to prevailing parties." *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, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as a matter of course, recover costs from an adverse party against whom judgment is rendered in certain actions. These actions include those for recovery of money or damages exceeding $2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,

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

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

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

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

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

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

DATED this 7 day of June, 2018.

ELLIOTT A. SATTLER
District Judge

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

FILED
Electronically
CV16-00976
2018-06-13 09:03:55 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6725968

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702.893.3383
FAX: 702.893.3789
Attorneys for Third-Party Defendant VERSA PRODUCTS COMPANY, INC.

DISTRICT COURT

WASHOE COUNTY, NEVADA

GENEVA M. REMMERDE, Plaintiff, vs. DANIEL ANTHONY KOSKI; MDB TRUCKING, LLC; DOES I-X and ROE I-V, Defendants. AND ALL RELATED CASES.	Case No. CV16-00976 Dept. 10 NOTICE OF ENTRY

TO: ALL INTERESTED PARTIES:

///

///

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

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 June, 2018

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Josh Cole Aicklen

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

LIST OF EXHIBITS

Exhibit 1	Order

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

FILED
Electronically
CV16-00976
2018-06-13 09:03:55 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6725968

EXHIBIT 1

FILED
Electronically
CV16-00976
2018-06-07 04:35:09 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6719088

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

_____/

ORDER

Presently before the Court is the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Motion for Fees") filed by Third-Party Defendant VERSA PRODUCTS, INC. ("Versa") on February 9, 2018. Versa contemporaneously filed the THIRD-PARTY 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 NRCP 37 AND NRCP 68 ("the Opposition to the Motion for Fees") on March 1, 2018. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S

REPLY TO MDB'S OPPOSITION TO ITS MOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRCP 37 AND NRCP 68 ("the Reply in Support of the Motion for Fees") on March 12, 2018, and contemporaneously submitted the matter for the Court's consideration.

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

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

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

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

---

[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.

[2] The Court incorporated by reference the ORDER entered December 22, 2017 ("the December Order"), on identical issues in the Fitzsimmons Action.

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

> (a) The Offer. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
>
> ...
>
> (f) Penalties for Rejection of Offer. If the offeree rejects an offer and fails to obtain a more favorable judgment,
>
> > (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and
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An award of attorney's fees and costs pursuant to NRCP 68 requires an evaluation of 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 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.

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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.

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

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

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

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

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The Court finds the amount of costs requested is reasonable. District Courts have "wide, but not unlimited, discretion to award costs to prevailing parties." *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, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Costs awarded "must be reasonable, necessary, and actually incurred." *Id.* NRS 18.020 explains a prevailing party may, as a matter of course, recover costs from an adverse party against whom judgment is rendered in certain actions. These actions include those for recovery of money or damages exceeding $2,500.00, and those that involve the title or boundaries of real estate. NRS 18.020(3); NRS 18.020(5). The specific costs that may be recovered by a prevailing party are enumerated in the statute. In pertinent part, costs allowed are as follows: "Reporters' fees for depositions, including a reporter's fee for one copy of each deposition," NRS 18.005(2); "Fees for... deposing witnesses,

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

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

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

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

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

DATED this 7 day of June, 2018.

ELLIOTT A. SATTLER
District Judge

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

EXHIBITS FOR

QUESTION 27

Docket 76397 Document 2018-30092

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$1425
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kathleen@sigurdsonlaw.com
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE,

Plaintiff,

vs.

Case No. _____

DANIEL ANTHONY KOSKI;
MDB TRUCKING, LLC.,
DOES I – X and ROE I-V corporations,

Dept. No. _____

Defendants.

_____/

COMPLAINT

Plaintiff, GENEVA M. REMMERDE, by and through her attorney, KATHLEEN A. SIGURDSON, ESQ., hereby alleges as follows:

PARTIES

1. At all times referred to herein, Plaintiff was and is now a resident of Washoe County, Nevada.

2. Plaintiff is informed and believes, and therefore alleges that at all times referred to herein, Defendant DANIEL ANTHONY KOSKI was, and is, a resident of Washoe County, Nevada.

3. Plaintiff is informed and believes and therefore alleges, that at all times referred to herein, Defendant MDB TRUCKING, LLC has been, and is now a corporation organized and existing under the laws of the State of Nevada, and is doing business in the State of Nevada.

4. The true names or capacities, whether individual, corporate, associates, co-partnership, or otherwise of Defendants DOES I-X and ROE CORPORATIONS I-V are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the Defendants designated as DOES I-X and ROE CORPORATIONS I-V are responsible in some manner for the offense and happenings referred to in this action, and proximately caused the damages to Plaintiff described herein.

5. Plaintiff requests leave of this Court to amend the Complaint to insert the true names and capacities of the DOE and ROE Defendants when they are ascertained, to join such Defendants in this action and assert the appropriate charging allegations.

6. At all times pertinent hereto, the Defendants, and each of them, were acting as the authorized employee, agent and/or representative of each and every other Defendant, and were acting within the course and scope of their capacity. The conduct of each and every Defendant was ratified and adopted by each and every other Defendant.

FIRST CLAIM FOR RELIEF

7. Plaintiff realleges each and every allegation of paragraphs 1 through 6 of her Complaint, as if fully set forth herein.

8. On or about July 7, 2014, Plaintiff was traveling in her 2005 Saturn Ion west on IR80 near mile marker 39, Washoe County, Nevada.

9. Defendant was traveling ahead of Plaintiff's vehicle in a 2003 Peterbilt Truck Tractor.

10. At some point during Defendant's travel in the area, Defendant spilled a load of gravel onto travel lanes 1 and 2, ahead of Plaintiff's traveling path.

11. Plaintiff came upon the gravel covered roadway at highway speed and in a curve.

12. Plaintiff lost control of her vehicle and rotated counter clockwise and struck the left guardrail face with the left front of her vehicle.

13. As a direct and proximate result of Defendant's failure to properly secure his truck load, Plaintiff has suffered, and will continue to suffer in the future, severe physical and emotional injuries, all to her general damage in an amount in excess of TEN THOUSAND AND 00/100

DOLLARS ($10,000.00).

14. As a further direct and proximate result of Defendant's failure to properly secure his truck load, Plaintiff has incurred, and will continue to incur in the future, expenses for medical care and treatment, in an amount not yet ascertained. Plaintiff requests leave to amend this Complaint to insert this amount when it becomes known to Plaintiff.

SECOND CLAIM FOR RELIEF

15. Plaintiff realleges each and every allegation listed above, as if fully set forth herein

16. Plaintiff is informed and believes, and therefore alleges, that at the time Defendant DANIEL ANTHONY KOSKI operated the Peterbilt Truck Tractor owned by Defendant MDB TRUCKING, LLC, Defendant KOSKI was employed by Defendant MDB TRUCKING LLC and was acting within the scope and course of his employment. Defendant MDB TRUCKING LLC is therefore liable to Plaintiff under the doctrine of respondeat superior.

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

1. For general damages in an amount in excess of TEN THOUSAND DOLLARS AND 00/100 ($10,000.00);
2. For special damages according to proof at the time of trial;
3. For costs of suit, including reasonable attorney's fees; and
4. For such other and further relief as this Court deems just and proper.

AFFIRMATION Pursuant to NRS 239B.030: The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 2d day of May, 2016.

KATHLEEN A. SIGURDSON, ESQ.
State Bar No. 06823
1440 Haskell St.
Reno, NV 89509
Attorney for Plaintiff

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4180
Katherine F. Parks, Esq., State Bar No. 6227
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Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE, Plaintiff, vs. DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC, DOES 1-X and ROE I-V Defendants.	Case No. CV16-00976 Dept. No. 10
MDB TRUCKING, LLC, a Nevada limited liability company, Third-Party Plaintiff, vs. RMC LAMAR HOLDINGS, INC. a Colorado Corporation; VERSA PRODUCTS COMPANY, INC., a New Jersey Corporation THE MODERN GROUP GP-SUB, INC., a Texas corporation and general partnership; DRAGON ESP, LTD., a Texas limited partnership; and DOES 1-10 and BLACK AND WHITE COMPANIES, Third-Party Defendants.	

THIRD-PARTY COMPLAINT

COMES NOW the Defendant/Third-Party Plaintiff, MDB Trucking, LLC (hereinafter "MDB") by and through its counsel of record Thorndal Armstrong Delk Balkenbush & Eisinger, and hereby brings this Third-Party Complaint against Third-Party Defendants RMC Lamar

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Holdings, Inc, Versa Products Company, Inc., and the Modern Group GP-Sub, Inc. and Dragon ESP, Ltd. and hereby alleges as follows.

FIRST CLAIM FOR RELIEF

(General Allegations)

1. Third-Party Plaintiff incorporates herein that Plaintiff's Complaint solely for the purposes of establishing that a Complaint has been filed against MDB Trucking, LLC, but without admitting the truth of any allegation therein except for such allegations which may have been admitted in Third-Party Plaintiff's Answer. Third-Party Plaintiff is informed and believes and therefore alleges that the matters referred to in Third-Party Plaintiff's Complaint were proximately caused by the acts and omissions of Third-Party Defendants.

2. Third-Party Plaintiff MDB Trucking, LLC was at all relevant times a Nevada limited liability company authorized to conduct business within the State of Nevada.

3. Third-Party Defendants DOES 1-10 and BLACK AND WHITE COMPANIES are sued herein under fictitious names and the true names and capacities of said Third-Party Defendants are not known by Third-Party Plaintiff who asked leave of court to amend this Third-Party Complaint to set forth same as it becomes known or ascertained.

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

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

6. Third-Party Defendant the Modern Group GP-Sub, Inc. was at all relevant times hereto a Texas corporation and the general partner of Dragon ESP, Ltd., a Texas limited partnership.

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THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
9[illegible] S. McCarran, Suite B
[illegible], Nevada 89509
(775) 786-2882

7. Third Party Defendant Dragon ESP, Ltd. was at all relevant times a Texas limited partnership.

8. A Complaint was filed on May 2, 2016 in the Second Judicial District Court, Case No. CV16-00976, Department 10 in which the Plaintiff Geneva M. Remmerde prayed for damages against Defendant MDB Trucking, LLC alleging negligence in regards to an accident which occurred on July 7, 2014 where a trailer owned by MDB Trucking, LLC spilled a load of gravel causing an accident and injury which are claims presented by Plaintiff.

9. Upon information and belief, the Ranco trailer was activated inadvertently causing the gates of the trailer to release a subject load of gravel on the highway and was defective in whole or in part as designed by the Defendant RMC Lamar Holdings, Inc. (fka Ranch Manufacturing Company) (also known by the trade name and trademark Ranco).

10. Third Party Defendant RMC Lamar Holdings, Inc. manufactured the subject Ranco trailer in 2002 under the vehicle brand Ranco with VIN No. 1R9BP45082L008431 Idaho Plate No. TE3528.

11. Third-Party Defendants the Modern Group and Dragon ESP acquired Ranch Manufacturing on or about August 1, 2007 through an Asset Purchase Agreement.

12. Upon information and belief, Third-Party Defendant Dragon, ESP has continued to sell Ranco trailers and semi-trailers with the same components within the same general market and to same customers.

13. Third-Party Defendant Dragon ESP has maintained its manufacturing and assembly locations in the same venue of Lamar, Colorado after its acquisition of Ranch Manufacturing Company.

14. William Carder the former President and owner of Ranch Manufacturing, Inc. became an officer with Dragon ESP, Ltd. and maintained his position as Vice-President for Ranco through all relevant times up to and including 2015.

15. Upon information and belief, Dragon ESP, Ltd. is a *de facto* successor to Ranch Manufacturing, Inc. and has engaged in substantial continuation of Ranco's business.

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16. Dragon ESP, Ltd. is liable to Third-Party Plaintiff to the same extent as RMC Lamar Holdings, Inc. (fka Ranch Manufacturing Company).

17. Third-Party Plaintiff MDB Trucking, LLC in 2012 was the last purchaser and end user of the subject Ranco trailer and the direct purchaser of the subject Versa Valve unit in 2013.

18. On or before July 7, 2014, the Ranco trailer that left Ranch Manufacturing's control as designed, assembled, and manufactured by Ranco was unreasonably dangerous and defective in one or more of the following respects:

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

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

19. Ranch Manufacturing knew that Versa Products Company, Inc. had a safer design available in the stream of commerce on or about 2002 which employed a manual lock safety design; and, that same should have been provided to its end use customers in lieu of the Versa Valve model incorporated in the subject Ranco trailer.

20. Upon information and belief, Versa Products Company also knew both in 2002 and 2014 that they had an alternate safer design available in the stream of commerce which employed a manual lock safer design; and, that same should have been provided to its end user customers MDB Trucking in lieu of the model incorporated in the subject Ranco trailer.

21. To the extent Plaintiff was injured as a proximate result of the unreasonably dangerous conditions and defects at the time of manufacturing or negligent design, such as a direct and proximate result of the negligence of Third-Party Defendants; and any negligence that exists as alleged by the Plaintiffs is expressly denied. Third-Party Defendants were actively and solely negligent and Third-Party Plaintiff was passively negligent or without fault.

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22. Third-Party Defendants' breach of duty of care owed to the Third-Party Plaintiff and Third-Party Defendants are required to indemnify and hold Third-Party Plaintiff harmless with respect to all allegations and liabilities as set forth in the Complaint filed in this matter.

23. Third-Party Plaintiff has placed Third-Party Defendants on notice of claims pending in this matter.

24. Third–Party Plaintiff is required to expend costs and attorneys' fees in defending the negligence claims in the Complaint on file herein and for prosecuting the instant Third-Party Complaint.

FIRST CLAIM FOR RELIEF

(Implied Indemnification as to Third-Party Defendants RMC LAMAR HOLDINGS & THE MODERN GROUP and DRAGON ESP)

25. Third-Party Plaintiff realleges each and every allegation contained in paragraphs 1-24 as more fully set forth herein.

26. Third-Party Plaintiff is therefore entitled to complete indemnification against Third-Party Defendants with respect to all allegations or liabilities set forth in the Complaint on file in this matter.

27. Third-Party Plaintiff is entitled to all costs and fees expended in the defense of claims of negligence in this matter as well as prosecution of this Third-Party Complaint.

SECOND CLAIM FOR RELIEF

(Contribution as to Third-Party Defendants RMC LAMAR HOLDINGS & THE MODERN GROUP and DRAGON ESP)

28. Third-Party Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-27 above as if more fully set forth herein.

29. Third-Party Plaintiff is entitled to contribution from Third-Party Defendants with respect to any settlement, judgment, awards or any other type of resolution or claims brought forward by the Plaintiff in her Complaint on file herein.

30. Third-Party Plaintiff is entitled to all costs and fees expended in defense of claims of negligence in this matter as well as prosecution of the Third-Party Complaint.

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THIRD CLAIM FOR RELIEF

(Implied Indemnification as to VERSA)

31. The Third-Party Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-30 above as if more fully set forth herein.

32. The Third-Party Plaintiff is entitled to complete indemnity against VERSA PRODUCTS COMPANY, INC. with respect to all allegations or liabilities set forth in the First amended Complaint.

33. The Third-Party Plaintiff is therefore entitled to all costs and fees expended in the defense of the claims of negligence in this matter as well as prosecution of the Third-Party Complaint.

FOURTH CLAIM FOR RELIEF

(Contribution as to VERSA)

34. The Third-Party Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-33 above as if more fully set forth herein.

35. The Third-Party Plaintiff is entitled to contribution from the Third-Party Defendant VERSA PRODUCTS COMPANY, INC., with respect to any settlement, judgment, awards, or any other type of resolution of the claims brought forward by the Plaintiffs in her Complaint on file herein.

36. The Third-Party Plaintiff is entitled to all costs and fees expended in the defense of the claims for negligence in this matter as well as prosecution of the Third-Party Complaint.

WHEREFORE, Third-Party Plaintiff demands judgment against Third-Party Defendants as follows:

1. For implied indemnification with respect to all negligence claims brought against Third-Party Plaintiff in this matter;

2. For contribution with respect to all negligence claims brought against Third-Party Plaintiff in this matter;

3. For attorneys' fees and costs expended in this matter; and

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4. For such other and further relief as this Court deems just and proper in the premises.

DATED this 22nd day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: _____

Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
Thierry V. Barkley, Esq., State Bar No. 724
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MDB TRUCKING, LLC

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AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 2nd day of June, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: _____

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **THIRD-PARTY COMPLAINT** to be served on all parties to this action by:

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

__✓__ Second Judicial District Court Eflex ECF (Electronic Case Filing)

_____ hand delivery

_____ electronic means (fax, electronic mail, etc.)

_____ Federal Express/UPS or other overnight delivery fully addressed to

Kathleen A. Sigurdson, Esq.
1440 Haskell Street
Reno, Nevada 89509
Attorneys for Plaintiff

Matthew C. Addison, Esq.
Jessica L. Woelfel, Esq.
McDonald Carano Wilson LLP
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Reno, NV 89501
Third-Party Defendant RMC Lamar Holdings

Josh Cole Aicklen
David B. Avakian
Lewis Brisbois Bisgaard & Smith, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Third-Party Defendant Versa Products Co., Inc.

DATED this 22 day of June, 2016.

An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

THORNDAL ARMSTRONG
DELK BALKENBUSH
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Transaction # 5719768

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

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

Defendants.

_____/

ORDER

Presently before the Court is 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 Motion"). The Motion was filed by Third-Party Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on July 19, 2016. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the OPPOSITION TO THIRD-PARTY DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS [sic] TO DISMISS ("the Opposition") on July 29, 2016. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC'S REPLY IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S

THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) ("the Reply") on August 8, 2016. The Motion was submitted for the Court's consideration on August 10, 2016.

FACTUAL BACKGROUND

This case arises from a personal injury action. The COMPLAINT ("the Complaint") was filed on May 2, 2016. The Complaint alleges two causes of action, negligence and *respondeat superior*. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The Complaint, 2:21-22. Plaintiff Geneva Remmerde ("the Plaintiff") was driving on the same roadway. The spilled gravel caused her to lose control of her vehicle and hit a guardrail. The Complaint, 2:24-25. The Plaintiff sustained "severe physical and emotional injuries" as a result of the accident. The Complaint, 2:26-28. In response to the Complaint, MDB filed the THIRD-PARTY COMPLAINT ("the 3P Complaint") on June 22, 2016. The 3P Complaint alleged it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The 3P Complaint, 3:8-10; 4:7-8. Therefore, MDB brought the 3P Complaint against the manufacturers of the trailer and its components, including Versa. The 3P Complaint, 2:21-23. Included in the 3P Complaint were four claims for relief. The third claim for relief, and the subject of the Motion, is MDB's claim for Implied Indemnification as to Versa. The 3P Complaint, 6:1-10. Versa has moved to dismiss this cause of action.

LEGAL STANDARD FOR MOTION TO DISMISS

NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which relief can be granted. A court must liberally construe the pleadings and accept all asserted allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,

672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v. Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew,* 124 Nev. at 228, 181 P.3d at 672.

Despite a court's liberal construction of the allegations in the pleading, a pleading party must set forth sufficient facts to establish all necessary elements of a claim against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

ANALYSIS

The Motion argues MDB's cause of action for implied indemnity fails as a matter of law because, 1) MDB was "actively negligent" in failing to secure the truck load, and 2) there was no pre-existing legal relationship between Versa and MDB.

Implied indemnity is "an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors" when the negligence of those tortfeasors is the primary cause of the "injured party's harm." *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 581, 216 P.3d 793, 796 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a "complete shifting of responsibility" to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a

finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity "cannot be used to allow one innocent party to recover its defense costs from another innocent party." *Id.* Accordingly, "[a]t the heart of the doctrine is the premise that the person seeking to assert implied indemnity...has been required to pay damages caused by a third party," even though they have not committed any "independent wrong." *Id.* (citing *Harvest Capital v. WV Dept. of Energy,* 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore, implied indemnity is available as a cause of action "after the defendant has extinguished its own liability through settlement or by paying a judgment." *Id.* (citing *The Doctors*, 120 Nev. at 651, 98 P.3d at 686).

The second requirement is "a legal relationship or duty," which "supports the claim of indemnity." *Black & Decker (U.S.), Inc. v. Essex group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698, 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citation omitted) (holding the court requires "some nexus or relationship between the indemnitee and indemnitor" to allow a claim for implied indemnity); *see also Pack v. LaTourette,* 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there "must be a preexisting legal relation" between the two parties, "or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor"). Accordingly, implied indemnification is not "a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation." *Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citing *Piedmont Equip. Co. Inc. v. Eberhard Mfg. Co.*, 99 Nev. 523, 528, 665 P.2d 256, 259 (1983)). Because the Nevada Supreme Court has held implied indemnity "should not be construed as permission to open a floodgate for cross-claims" when there is no legal relationship between the parties, the standard for what

qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citing *Piedmont,* 99 Nev. at 527–28, 665 P.2d at 259).

A. Finding of Liability

The Motion argues a cause of action for implied indemnity should be precluded because MDB was negligent when it failed to properly secure the truck's load. The Motion, 7:15-16. The Motion therefore argues that because *the Complaint* alleges MDB's "active negligence" MDB cannot be eligible for indemnification until it is found liable for that negligence. The Motion, 7:17-21. The Opposition argues the Court need not rely on the Plaintiff's allegations of MDB's negligence. The Opposition, 2:14-15. The Opposition also argues the issue of whether MDB was actively or passively (primarily or secondarily) negligent, should be decided by the trier of fact. The Opposition, 4:11-12.

The Court finds the 3P Complaint pleads sufficient facts to place Versa on notice of their potential liability.[1] By suggesting a finding of liability must occur before a party may *plead a claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot expect a party to admit or assert its own liability in order to plead a claim for relief unless the party is pleading in the alternative, as allowed by NRCP 8(e)(2).[2]

It is important to make the distinction between *pleading a claim* for implied indemnity and indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible

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[1] The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss, the Opposition, 2:13. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), The Motion, 5:14-19; however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The 3P Complaint pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

[2] NRCP 8(e)(2) states, in relevant part, "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both."

or proper without a finding of liability or a requirement that the pleading party pay damages. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. However, the 3P Complaint does not request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint need only assert a possibility that if MDB is found liable, it is entitled to indemnification from Versa, thereby obviating the need for additional proceedings to establish Versa's financial responsibility to MDB.

The 3P Complaint asserts MDB is entitled to indemnity by Versa "with respect to all allegations or liabilities set forth" in the Complaint. The 3P Complaint, 6:5-7. Accordingly, the 3P Complaint effectively places Versa on notice that *if* it is found at fault for the "allegations or liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of that exact negligence.

B. Legal Relationship

The Motion argues the 3P Complaint fails to allege the legal relationship or pre-existing duty between MDB and Versa required for a claim for implied indemnity to survive. The Motion, 8:11-13. The Opposition argues the 3P Complaint pleads sufficient facts to evidence the legal relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco trailer and the direct purchaser of the subject Versa unit in 2013." The 3P Complaint, 4:3-5. Therefore, the Opposition argues a legal relationship was created when MDB purchased the trailer component from Versa.

As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of a legal relationship as it applies to implied indemnity. The Court has found a legal relationship

exists in very limited circumstances. *See Black & Decker,* 105 Nev. at 346, 775 P.2d at 699 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997) (citing *Piedmont*, 99 Nev. at 527-28, 665 P2d at 259) (holding a legal relationship exists between a contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870, 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an express indemnity contract is in place); *Outboard Motor Corp. v, Shupbach*, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee when the employer holds a separate and independent duty to the employee); *Mills v. Continental Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as between a bailor and a bailee "where the parking lot attendant collects a fee, has possession of the keys, assumes control of the car and issues a ticket to identify the car for redelivery"); *Troxel v. Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship and constitutional protection exists between a parent and a child).

The Court finds the 3P Complaint does not plead sufficient facts to indicate the establishment of a legal relationship between MDB and Versa. Although the Opposition avers a legal relationship was formed between MDB and Versa when MDB purchased a trailer that included a Versa component, that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction could create a legal relationship if it involved an implied warranty or merchantability, *Black & Decker,* 105 Nev. at 346, 775 P.2d at 699; however, the 3P Complaint does not mention an implied warranty of merchantability. Were the Court to follow the 3P Complaint's argument to its logical conclusion, every sale of goods would create the legal relationship necessary for an implied indemnity claim. This is too broad an application of the

Nevada Supreme Court's holdings, discussed *supra*, which limit the formation of a legal relationship to very particular circumstances. Further, the 3P Complaint does not plead facts that indicate the formation of a legal relationship via any preexisting duty of Versa to MDB. Therefore, because the 3P Complaint has not pled sufficient facts to evidence a legal relationship between MDB and Versa, its third cause of action for implied indemnification against Versa cannot be sustained.

While the Motion may have pled the facts necessary to satisfy the requirement of liability on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a preexisting legal relationship between the party seeking indemnity, MDB, and the party who would indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the claim.

IT IS ORDERED Versa's 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) is hereby GRANTED.

DATED this 21 day of September, 2016.

ELLIOTT A. SATTLER
District Judge

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 21st day of September, 2016, 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 21st day of September, 2016, 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:

BRIAN BROWN, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
KATHLEEN SIGURDSON, ESQ. for GENEVA M REMMERDE
KATHERINE PARKS, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
THIERRY BARKLEY, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
MATTHEW ADDISON, ESQ. for RMC LAMAR HOLDINGS, INC.
JESSICA WOELFEL, ESQ. for RMC LAMAR HOLDINGS, INC.

Nikki White for

Sheila Mansfield
Administrative Assistant

FILED
Electronically
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2016-09-23 11:05:58 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5722889

2545
Katherine F. Parks, Esq., State Bar No. 6227
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Attorneys for Defendant/Third-Party Plaintiff
MDB TRUCKING, LLC

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE, Plaintiff, vs. DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC, DOES 1-X and ROE I-V Defendants.	Case No. CV16-00976 Dept. No. 10
MDB TRUCKING, LLC, a Nevada limited liability company, Third-Party Plaintiff, vs. RMC LAMAR HOLDINGS, INC. a Colorado Corporation; VERSA PRODUCTS COMPANY, INC., a New Jersey Corporation THE MODERN GROUP GP-SUB, INC., a Texas corporation and general partnership; DRAGON ESP, LTD., a Texas limited partnership; and DOES 1-10 and BLACK AND WHITE COMPANIES, Third-Party Defendants.	

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NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 21st day of September 2016, the Court entered an Order and a true and correct copy of said Order is attached hereto as Exhibit 1.

DATED this 23rd day of September, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

By: _____

Katherine F. Parks, Esq., State Bar No. 6227
Brian M. Brown, Esq., State Bar No. 5233
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MDB TRUCKING, LLC

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6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-2882

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be served on all parties to this action by:

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

__✓__ Second Judicial District Court Eflex ECF (Electronic Case Filing)

_____ hand delivery

_____ electronic means (fax, electronic mail, etc.)

_____ Federal Express/UPS or other overnight delivery fully addressed as follows:

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The Modern Group GP-SUB, Inc. and Dragon ESP, Ltd.

DATED this 23rd day of September, 2016.

/s/ Chiai Chon
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
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INDEX OF EXHIBIT(S)

Exhibit No.	Exhibit Description	No. of Pages
1	Order	9

THORNDAL ARMSTRONG
DELK BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

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

Defendants.

_____/

ORDER

Presently before the Court is 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 Motion"). The Motion was filed by Third-Party Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on July 19, 2016. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the OPPOSITION TO THIRD-PARTY DEFENDANT'S [VERSA PRODUCTS COMPANY, INC.] MOTIONS [sic] TO DISMISS ("the Opposition") on July 29, 2016. Versa filed the THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC'S REPLY IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC'S

THIRD CAUSE OF ACTION FOR IMPLIED INDEMNITY PURSUANT TO NRCP 12(B)(5) ("the Reply") on August 8, 2016. The Motion was submitted for the Court's consideration on August 10, 2016.

FACTUAL BACKGROUND

This case arises from a personal injury action. The COMPLAINT ("the Complaint") was filed on May 2, 2016. The Complaint alleges two causes of action, negligence and *respondeat superior*. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The Complaint, 2:21-22. Plaintiff Geneva Remmerde ("the Plaintiff") was driving on the same roadway. The spilled gravel caused her to lose control of her vehicle and hit a guardrail. The Complaint, 2:24-25. The Plaintiff sustained "severe physical and emotional injuries" as a result of the accident. The Complaint, 2:26-28. In response to the Complaint, MDB filed the THIRD-PARTY COMPLAINT ("the 3P Complaint") on June 22, 2016. The 3P Complaint alleged it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The 3P Complaint, 3:8-10; 4:7-8. Therefore, MDB brought the 3P Complaint against the manufacturers of the trailer and its components, including Versa. The 3P Complaint, 2:21-23. Included in the 3P Complaint were four claims for relief. The third claim for relief, and the subject of the Motion, is MDB's claim for Implied Indemnification as to Versa. The 3P Complaint, 6:1-10. Versa has moved to dismiss this cause of action.

LEGAL STANDARD FOR MOTION TO DISMISS

NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which relief can be granted. A court must liberally construe the pleadings and accept all asserted allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,

672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v. Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Despite a court's liberal construction of the allegations in the pleading, a pleading party must set forth sufficient facts to establish all necessary elements of a claim against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

ANALYSIS

The Motion argues MDB's cause of action for implied indemnity fails as a matter of law because, 1) MDB was "actively negligent" in failing to secure the truck load, and 2) there was no pre-existing legal relationship between Versa and MDB.

Implied indemnity is "an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors" when the negligence of those tortfeasors is the primary cause of the "injured party's harm." *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 581, 216 P.3d 793, 796 (2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a "complete shifting of responsibility" to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a

finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity "cannot be used to allow one innocent party to recover its defense costs from another innocent party." *Id.* Accordingly, "[a]t the heart of the doctrine is the premise that the person seeking to assert implied indemnity...has been required to pay damages caused by a third party," even though they have not committed any "independent wrong." *Id.* (citing *Harvest Capital v. WV Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore, implied indemnity is available as a cause of action "after the defendant has extinguished its own liability through settlement or by paying a judgment." *Id.* (citing *The Doctors*, 120 Nev. at 651, 98 P.3d at 686).

The second requirement is "a legal relationship or duty," which "supports the claim of indemnity." *Black & Decker (U.S.), Inc. v. Essex group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698, 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citation omitted) (holding the court requires "some nexus or relationship between the indemnitee and indemnitor" to allow a claim for implied indemnity); *see also Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there "must be a preexisting legal relation" between the two parties, "or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor"). Accordingly, implied indemnification is not "a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation." *Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citing *Piedmont Equip. Co. Inc. v. Eberhard Mfg. Co.*, 99 Nev. 523, 528, 665 P.2d 256, 259 (1983)). Because the Nevada Supreme Court has held implied indemnity "should not be construed as permission to open a floodgate for cross-claims" when there is no legal relationship between the parties, the standard for what

qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796 (citing *Piedmont*, 99 Nev. at 527–28, 665 P.2d at 259).

A. Finding of Liability

The Motion argues a cause of action for implied indemnity should be precluded because MDB was negligent when it failed to properly secure the truck's load. The Motion, 7:15-16. The Motion therefore argues that because *the Complaint* alleges MDB's "active negligence" MDB cannot be eligible for indemnification until it is found liable for that negligence. The Motion, 7:17-21. The Opposition argues the Court need not rely on the Plaintiff's allegations of MDB's negligence. The Opposition, 2:14-15. The Opposition also argues the issue of whether MDB was actively or passively (primarily or secondarily) negligent, should be decided by the trier of fact. The Opposition, 4:11-12.

The Court finds the 3P Complaint pleads sufficient facts to place Versa on notice of their potential liability.[1] By suggesting a finding of liability must occur before a party may *plead a claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot expect a party to admit or assert its own liability in order to plead a claim for relief unless the party is pleading in the alternative, as allowed by NRCP 8(e)(2).[2]

It is important to make the distinction between *pleading a claim* for implied indemnity and indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible

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[1] The Opposition correctly states the Motion includes an improper standard for a 12(b)(5) motion to dismiss, the Opposition, 2:13. The Motion applies the higher pleading standard articulated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937 (2009), The Motion, 5:14-19; however, the Nevada Supreme Court has specifically stated that it declines to adopt this higher standard. The 3P Complaint pleads sufficient facts under the proper notice pleading standard followed by Nevada courts.

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or proper without a finding of liability or a requirement that the pleading party pay damages. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. However, the 3P Complaint does not request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint need only assert a possibility that if MDB is found liable, it is entitled to indemnification from Versa, thereby obviating the need for additional proceedings to establish Versa's financial responsibility to MDB.

The 3P Complaint asserts MDB is entitled to indemnity by Versa "with respect to all allegations or liabilities set forth" in the Complaint. The 3P Complaint, 6:5-7. Accordingly, the 3P Complaint effectively places Versa on notice that *if* it is found at fault for the "allegations or liabilities" in the Complaint, it is entitled to indemnification. Further, as stated *supra*, the Motion argues indemnity is improper considering MDB's "active negligence;" the Court fails to recognize how facts asserting MDB's negligence preclude maintenance of a claim that requires a finding of that exact negligence.

B. Legal Relationship

The Motion argues the 3P Complaint fails to allege the legal relationship or pre-existing duty between MDB and Versa required for a claim for implied indemnity to survive. The Motion, 8:11-13. The Opposition argues the 3P Complaint pleads sufficient facts to evidence the legal relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco trailer and the direct purchaser of the subject Versa unit in 2013." The 3P Complaint, 4:3-5. Therefore, the Opposition argues a legal relationship was created when MDB purchased the trailer component from Versa.

As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of a legal relationship as it applies to implied indemnity. The Court has found a legal relationship

exists in very limited circumstances. *See Black & Decker,* 105 Nev. at 346, 775 P.2d at 699 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997) (citing *Piedmont*, 99 Nev. at 527-28, 665 P2d at 259) (holding a legal relationship exists between a contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870, 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an express indemnity contract is in place); *Outboard Motor Corp. v, Shupbach*, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee when the employer holds a separate and independent duty to the employee); *Mills v. Continental Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as between a bailor and a bailee "where the parking lot attendant collects a fee, has possession of the keys, assumes control of the car and issues a ticket to identify the car for redelivery"); *Troxel v. Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship and constitutional protection exists between a parent and a child).

The Court finds the 3P Complaint does not plead sufficient facts to indicate the establishment of a legal relationship between MDB and Versa. Although the Opposition avers a legal relationship was formed between MDB and Versa when MDB purchased a trailer that included a Versa component, that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction could create a legal relationship if it involved an implied warranty or merchantability, *Black & Decker,* 105 Nev. at 346, 775 P.2d at 699; however, the 3P Complaint does not mention an implied warranty of merchantability. Were the Court to follow the 3P Complaint's argument to its logical conclusion, every sale of goods would create the legal relationship necessary for an implied indemnity claim. This is too broad an application of the

Nevada Supreme Court's holdings, discussed *supra*, which limit the formation of a legal relationship to very particular circumstances. Further, the 3P Complaint does not plead facts that indicate the formation of a legal relationship via any preexisting duty of Versa to MDB. Therefore, because the 3P Complaint has not pled sufficient facts to evidence a legal relationship between MDB and Versa, its third cause of action for implied indemnification against Versa cannot be sustained.

While the Motion may have pled the facts necessary to satisfy the requirement of liability on the part of Versa, the Motion does not plead the facts necessary to satisfy the requirement of a preexisting legal relationship between the party seeking indemnity, MDB, and the party who would indemnify, Versa. Proper pleading of the liability requirement alone cannot sustain the claim.

IT IS ORDERED Versa's 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) is hereby GRANTED.

DATED this 21 day of September, 2016.

ELLIOTT A. SATTLER
District Judge

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 21st day of September, 2016, 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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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 21st day of September, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

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THIERRY BARKLEY, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
MATTHEW ADDISON, ESQ. for RMC LAMAR HOLDINGS, INC.
JESSICA WOELFEL, ESQ. for RMC LAMAR HOLDINGS, INC.

Nikki White for

Sheila Mansfield
Administrative Assistant

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

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

Defendants.

_____/

ORDER

Presently before the Court is THIRD PARTY DEFENDANT THE MODERN GROUP GP-SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT ("the Motion"). The Motion was filed by Third-Party Defendants THE MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. (collectively "Modern") on August 1, 2016. Third-Party Plaintiff MDB TRUCKING, LLC ("MDB") filed the THIRD PARTY PLAINTIFF'S OPPOSITION TO THIRD-PARTY DEFENDANT'S [THE MODERN GROUP AND DRAGON ESP, LTD'S] MOTION TO DISMISS THIRD-PARTY COMPLAINT ("the Opposition") on August 18, 2016. Modern filed the REPLY IN SUPPORT OF THIRD-PARTY DEFENDANTS THE MODERN GROUP GP-SUB, INC'S AND DRAGON ESP LTD.'S MOTION TO DISMISS THIRD-PARTY

COMPLAINT ("the Reply") on August 29, 2016. The Motion was submitted for the Court's consideration on September 7, 2016.

FACTUAL BACKGROUND

This case arises from a personal injury action. The COMPLAINT ("the Complaint") was filed on May 2, 2016. The Complaint alleges two causes of action, negligence and *respondeat superior*. It is alleged Defendant Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The Complaint, 2:21-22. Plaintiff Geneva Remmerde ("the Plaintiff") was driving on the same roadway. The spilled gravel caused her to lose control of her vehicle and hit a guardrail. The Complaint, 2:24-25. The Plaintiff sustained "severe physical and emotional injuries" as a result of the accident. The Complaint, 2:26-28. In response to the Complaint, MDB filed the THIRD-PARTY COMPLAINT ("the 3P Complaint") on June 22, 2016. The 3P Complaint alleged it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The 3P Complaint, 3:8-10; 4:7-8. Therefore, MDB brought the 3P Complaint against the manufacturers of the trailer and its components, including Modern. The 3P Complaint, 3:12-22. The 3P Complaint includes four claims for relief. The first claim for Relief is MDB's claim for Implied Indemnification as to, *inter alia*, Modern. The 3P Complaint, 5:9-11. The second claim for Relief is MDB's claim for Contribution as to, *inter alia*, Modern. The Motion moves to dismiss the first and second causes of action as to Modern.

LEGAL STANDARD FOR MOTION TO DISMISS

NRCP 12(b)(5) states a claim may be dismissed for failure to state a claim upon which relief can be granted. A court must liberally construe the pleadings and accept all asserted allegations as true. *Buzz Stew, LLC. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670,

672 (2008). Dismissal is appropriate if the allegations fail to state a cognizable claim of relief when taken at "face value," and construed favorably on behalf of the counterclaimant. *Morris v. Bank of Am.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (quoting *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)); *see also Stockmeier v. Nevada Dep't of Corrections*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (holding dismissal is proper where factual allegations "are insufficient to establish the elements of a claim for relief"). Accordingly, the claim should only be dismissed if it "appears beyond a doubt" the non-moving party could "prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew,* 124 Nev. at 228, 181 P.3d at 672.

Despite a court's liberal construction of the allegations in the pleading, a pleading party must set forth sufficient facts to establish all necessary elements of a claim against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)). These facts are necessary to provide the opposing party with fair notice. *See Hay*, 100 Nev. at 198, 678 P.2d at 673.

ANALYSIS

The Motion argues MDB's causes of action for implied indemnity and contribution fail as a matter of law because they are "not yet ripe for adjudication." The Motion, 2:14-15. The Motion avers "such claims do not arise until a resolution or judgment is obtained in the underlying matter." The Motion, 4:26-27.

A. First Cause of Action for Implied Indemnity

Implied indemnity is "an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors" when the negligence of those tortfeasors is the primary cause of the "injured party's harm." *Rodriguez v. Primadonna, Co., LLC*, 125 Nev. 578, 589, 216 P.3d 793, 801

(2009) (citing *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004)). Implied indemnity allows a "complete shifting of responsibility" to a third party. *The Doctors*, 120 Nev. at 651, 98 P.3d at 686. There are two requirements for an implied indemnity claim. The first is a finding the third-party defendant is liable for damages to the plaintiff on the underlying claim. *Primadonna*, 125 Nev. at 581, 216 P.3d at 796. This is because implied indemnity "cannot be used to allow one innocent party to recover its defense costs from another innocent party." *Id.* Accordingly, "[a]t the heart of the doctrine is the premise that the person seeking to assert implied indemnity...has been required to pay damages caused by a third party," even though they have not committed any "independent wrong." *Primadonna*, 125 Nev. at 589, 216 P.3d at 801 (citing *Harvest Capital v. WV Dept. of Energy,* 211 W.Va. 34, 560 S.E.2d 509, 513 (2002)). Therefore, implied indemnity is available as a cause of action "after the defendant has extinguished its own liability through settlement or by paying a judgment." *Id.* (citing *The Doctors*, 120 Nev. at 651, 98 P.3d at 686).

The second requirement is "a legal relationship or duty," which "supports the claim of indemnity." *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 105 Nev. 344, 346, 775 P.2d 698, 699 (1989) (citation omitted); *see also Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citation omitted) (holding the court requires "some nexus or relationship between the indemnitee and indemnitor" to allow a claim for implied indemnity); *see also Pack v. LaTourette,* 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1249 (2012) (citation omitted) (holding there "must be a preexisting legal relation" between the two parties, "or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor"). Accordingly, implied indemnification is not "a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation." *Primadonna*, 125 Nev. at 591, 216 P.3d at 802 (citing *Piedmont Equip. Co. Inc. v.*

Eberhard Mfg. Co., 99 Nev. 523, 527-28, 665 P.2d 256, 259 (1983)). Because the Nevada Supreme Court has held implied indemnity "should not be construed as permission to open a floodgate for cross-claims" when there is no legal relationship between the parties, the standard for what qualifies as a legal relationship is high. *Primadonna*, 125 Nev. at 590, 216 P.3d at 802 (citing *Piedmont,* 99 Nev. at 527–28, 665 P.2d at 259).

1. Finding of Liability

The Motion contends MDB's claim for Implied Indemnity is yet unripe because "a cause of action for implied indemnity does not run until the target defendant pays the actual loss by way of settlement or judgment." The Motion, 6:5-6. According to the Motion, it would be "entirely prejudicial" to join Modern in an action that is "still pending and is being heavily litigated." The Motion, 6:8; 7. The Motion therefore argues MDB is not eligible for indemnification until there has been a finding of liability in a "settlement or judgment." The Opposition posits NRCP 14(a) specifically "allows a Third-Party Plaintiff to implead a Third-Party Defendant 'who is or may be liable to the Third-Party Plaintiff for all or part of the Plaintiff's claim.'" The Opposition, 4:21-23.

The Court finds the 3P Complaint pleads sufficient facts to place Modern on notice of their potential liability. By suggesting a finding of liability must occur before a party may *plead a claim* of implied indemnity, the Motion suggests a pleading party would be required to plead an admission of, or facts asserting, its own liability to sustain its claim. However, a court cannot expect a party to admit or assert its own liability in order to plead a claim for relief unless the party is pleading in the alternative, as allowed by NRCP 8(e)(2).[1]

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[1] NRCP 8(e)(2) states, in relevant part, "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both."

It is important to make the distinction between *pleading a claim* for implied indemnity and indemnification itself. The cases discussed, *supra*, clearly indicate indemnification is not possible or proper without a finding of liability or a requirement that the pleading party pay damages. *Primadonna*, 125 Nev. at 581; 589, 216 P.3d at 796; 801. However, the 3P Complaint does not request indemnification, but rather pleads it as a cause of action. In other words, the 3P Complaint need only assert a possibility that if MDB is found liable, it is entitled to indemnification from Modern, thereby obviating the need for additional proceedings to establish Modern's financial responsibility to MDB.

Pursuant to NRCP 14(a), a defendant has the ability to bring an indemnity claim as they would any other claim—at any time. In fact, The Nevada Supreme Court has explained NRCP 14(a) is "based upon the theory of indemnity," in which "a defendant is permitted to defend the case and at the same time assert his right of indemnity against the party ultimately responsible for the damage." *Reid v. Royal Insurance Co., Ltd.*, 80 Nev. 137, 140-41, 390 P.2d 45, 46-47 (1964).

The 3P Complaint asserts MDB is entitled to indemnity by Modern "with respect to all allegations or liabilities set forth" in the Complaint. The 3P Complaint, 6:5-7. Accordingly, the 3P Complaint effectively places Modern on notice that *if* it is found at fault for the "allegations or liabilities" in the Complaint, it is entitled to indemnification.

2. Legal Relationship

The Motion argues the 3P Complaint fails to allege the legal relationship or pre-existing duty between MDB and Modern required for a claim for implied indemnity to survive. The Motion, 6:20-24. The Opposition argues the 3P Complaint pleads sufficient facts to evidence the legal relationship because it indicates MDB was "the last purchaser and end user of the subject Ranco trailer," as designed and manufactured by "Defendant RMC Lamar Holdings, Inc. (fka

Ranch Manufacturing Company)." The 3P Complaint, 4:3-5; 3:9-11. "Third-Party Defendants the Modern Group and Dragon ESP acquired Ranch Manufacturing on or about August 1, 2007." The 3P Complaint, 3:15-16. Therefore, the Opposition argues a legal relationship was created when MDB purchased a trailer designed and manufactured by Ranch Manufacturing ("Ranch"), which had been acquired by Modern.

As explained, *supra*, the Nevada Supreme Court has set a high standard for establishment of a legal relationship as it applies to implied indemnity. The Court has found a legal relationship exists in very limited circumstances. *See Black & Decker,* 105 Nev. at 346, 775 P.2d at 700 (holding a legal relationship exists in cases of implied warranties of merchantability); *see also Medallion Development, Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997) (citing *Piedmont*, 99 Nev. at 527-28, 665 P.2d at 259) (holding a legal relationship exists between a contractor and subcontractor); *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 360, 989 P.2d 870, 874-75 (1999) (holding a legal relationship can exist between an employer and employee where an express indemnity contract is in place); *Outboard Motor Corp. v, Shupbach*, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977) (holding a legal relationship can exist between an employer and employee when the employer holds a separate and independent duty to the employee); *Mills v. Continental Parking Corp.*, 86 Nev. 724, 725, 475 P.2d 673, 674 (1970) (holding a legal relationship exists as between a bailor and a bailee "where the parking lot attendant collects a fee, has possession of the keys, assumes control of the car and issues a ticket to identify the car for redelivery"); *Troxel v. Granville*, 530 U.S. 57, 58, 120 S.Ct. 2054, 2056 (2000) (holding a fundamental legal relationship and constitutional protection exists between a parent and a child).

The Court finds the 3P Complaint does not plead sufficient facts to indicate the establishment of a legal relationship between MDB and Modern. Although the Opposition avers a

legal relationship was formed between MDB and Modern when MDB purchased a Ranch trailer, that transaction does not, *ipso facto*, form a recognized legal relationship. The transaction could create a legal relationship if it involved an implied warranty of merchantability, *Black & Decker,* 105 Nev. at 346, 775 P.2d at 700; however, the 3P Complaint does not mention an implied warranty of merchantability. Were the Court to follow the 3P Complaint's argument to its logical conclusion, every sale of goods would create the legal relationship necessary for an implied indemnity claim. This is too broad an application of the Nevada Supreme Court's holdings, discussed *supra*, which limit the formation of a legal relationship to very particular circumstances. Further, the 3P Complaint does not plead facts indicating the formation of a legal relationship via any preexisting duty of Modern to MDB. Therefore, because the 3P Complaint has not pled sufficient facts to evidence a legal relationship between MDB and Modern, its first cause of action for implied indemnification against Modern cannot be sustained.

While the Motion may have pled the facts necessary to satisfy the requirement of liability on the part of Moden, the Motion does not plead the facts necessary to satisfy the requirement of a preexisting legal relationship between the party seeking indemnity, MDB, and the party who would indemnify, Modern. Proper pleading of the liability requirement alone cannot sustain the claim.

B. Second Cause of Action for Contribution

The Motion cites to *The Doctors* to explain MDB's Contribution claim fails because a "contribution claim only arises where judgment has been entered in an action against two or more tortfeasors." The Motion, 7:3-4. Additionally, the Motion argues "Third-Party Plaintiffs cannot seek both contribution and indemnity. There can be no contribution where indemnity exists." The Motion, 7:8-10. The Opposition contends "[n]either claims for indemnification or contribution are

premature at this stage of the proceedings," and it may therefore pursue the 3P Complaint "under both alternate theories of recovery." The Opposition, 21-23.

"A right to contribution exists 'where two or more persons become jointly or severally liable in tort for the same injury to [a] person...even though judgment has not been recovered against all or any of them.'" *LaTourette,* 128 Nev. Adv. Op. 25, 277 P.3d at 1249 (citing NRS 17.225(1)). The *LaTourette* Court explicitly clarified NRCP 14(a) "provides that a third-party plaintiff may implead a third-party defendant based on an inchoate claim for contribution," in order to "specifically provide for the possibility of joining a third-party defendant 'against whom a cause of action has not yet accrued.'" *Id.* (citing NRCP 14(a); 6 Charles Alan Wright, Arthur R. Miller &Mary Kay Kane, Federal Practice and Procedure § 1451 (2010)). The *LaTourette* Court explained the Nevada Supreme Court had "repeatedly recognized that a third-party plaintiff has the right to seek contribution prior to entry of judgment." *LaTourette,* 128 Nev. Adv. Op. 25, 277 P.3d at 1249.

The Court finds the 3P Complaint pleads sufficient facts to maintain its second cause of action for contribution. The Motion does not attack the merits of the claim; instead, the Motion contends the claim is "not yet ripe for adjudication." The Motion, 2:15. The *LaTourette* Court clearly explained a defendant may bring a claim for contribution "prior to entry of judgment;" accordingly, the Motion's claim a contribution claim can only arise "where judgment has been entered in an action," is an erroneous application of *The Doctors*. Additionally, the Court finds the issue of whether the 3P Complaint may include claims for both implied indemnity and contribution to be moot given that the Implied Indemnity claim is dismissed. Accordingly, the 3P Complaint properly pleads a ripe claim for contribution.

IT IS ORDERED Modern's THIRD PARTY DEFENDANT THE MODERN GROUP GP-SUB, INC'S MOTION TO DISMISS THIRD PARTY COMPLAINT is hereby GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED MDB's first claim for relief for Implied Indemnity as to THE MODERN GROUP GP-SUB, INC. and DRAGON ESP, LTD. is hereby DISMISSED.

DATED this 26 day of October, 2016.

ELLIOTT A. SATTLER
District Judge

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 26 day of October, 2016, 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 26 day of October, 2016, 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:

BRIAN BROWN, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
KATHLEEN SIGURDSON, ESQ. for GENEVA M REMMERDE
KATHERINE PARKS, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
THIERRY BARKLEY, ESQ. for DANIEL ANTHONY KOSKI, MDB TRUCKING, LLC
MATTHEW ADDISON, ESQ. for RMC LAMAR HOLDINGS, INC.
JESSICA WOELFEL, ESQ. for RMC LAMAR HOLDINGS, INC.
JACOB BUNDICK, ESQ.
JOSH AICKLEN, ESQ.

Sheila Mansfield
Administrative Assistant

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Transaction # 5789437

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GENEVA M. REMMERDE, Plaintiff, vs. MDB TRUCKING, LLC,; DANIEL ANTHONY KOSKI; and DOES I-X and ROE I-V corporations, Defendants. AND ALL RELATED ACTIONS	Case No. CV16-00976 Dept. No. 10

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 26th day of October 2016, the Court entered an Order and a true and correct copy of said Order is attached hereto as Exhibit 1.

DATED this 3rd day of November, 2016.

THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in District Court Case No. CV16-00976 does not contain the social security number of any person.

Thierry V. Barkley, Esq.
Attorney for Defendants
MDB TRUCKING, LLC. and
DANIEL A. KOSKI

11/7/16
Date

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Thorndal Armstrong Delk Balkenbush & Eisinger, and that on this date I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be served on all parties to this action by:

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

__✓__ Second Judicial District Court Eflex ECF (Electronic Case Filing)

_____ hand delivery

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_____ Federal Express/UPS or other overnight delivery fully addressed as follows:

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DATED this 3 day of November, 2016.

/s/ Chiai Chon
An employee of Thorndal Armstrong
Delk Balkenbush & Eisinger

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INDEX OF EXHIBIT(S)

Exhibit No.	Exhibit Description	No. of Pages
1	Order	11

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SECOND JUDICIAL DISTRICT COURT

WASHOE COUNTY, NEVADA

ERNEST BRUCE FITZSIMMONS and CAROL FITZSIMMONS, Husband and Wife.

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED CASES.

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

[Consolidated Proceeding]

STIPULATION AND ORDER FOR DISMISSAL OF GENEVA REMMERDE'S COMPLAINT AGAINST DEFENDANTS IN CASE NO. CV16-00976

.....

.....

.....

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their counsel hereto that the Complaint in Case No. CV16-00976 against all the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this _____ day of August, 2017.

CLARK HILL PLLC

By: _____
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By: _____
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Reno, NV 89501
Attorneys for RMC Lamar Holdings

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their counsel hereto that the Complaint in Case No. CV16-00976 against all the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this _____ day of August, 2017.

CLARK HILL PLLC

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By:_____
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Attorneys for RMC Lamar Holdings

ORDER

Upon review of the above Stipulation in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint in Case No. CV16-00976 against the Defendants be dismissed, with prejudice, with each party to bear their own attorney's fees and costs.

DATED this 28 day of August, 2017.

DISTRICT COURT JUDGE

Respectfully Submitted By:

CLARK HILL PLLC

By:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

GENEVA M. REMMERDE,

Plaintiff,

Case No. CV16-00976

Dept. No. 10

vs.

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

Defendants.

_____/

ORDER

Presently before the Court is THIRD-PARTY DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/THIRD-PARTY PLAINTIFF MDB TRUCKING, LLC's THIRD-PARTY COMPLAINT PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS COMPANY, INC. ("Versa") on May 15, 2017. Defendant/Cross-Claimant MDB TRUCKING, LLC ("MDB") did not file an Opposition to the Motion.[1] *See* WDCR 12(2). The Motion was submitted for the Court's consideration on December 12, 2017.

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

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

Numerous other plaintiffs were joined into the Fitzsimmons Action. Two additional cases were filed and prosecuted outside of the Fitzsimmons Action: the instant case and JAMES BIBLE v. MDB TRUCKING, LLC et al., CV16-01914 ("the Bible Action"). The instant action was filed on May 2, 2016. The Bible Action was filed September 20, 2016. It is alleged in all three actions that on July 7, 2014, Defendant Daniel Anthony Koski ("Koski"), while driving a truck for MDB, negligently spilled a load of gravel into the roadway. The spilled gravel caused the driving plaintiffs to lose control of their vehicles and numerous accidents occurred resulting in the three separate cases. The plaintiffs sustained physical and emotional injuries as a result of the accidents. In response to the complaint filed in the instant action, MDB filed a THIRD-PARTY COMPLAINT ("the MDB Cross-Claim") June 22, 2016. The MDB Cross-Claim had two causes of action relative to Versa: Implied Indemnification and Contribution.[2] MDB alleges it was not Koski's negligence that caused the gravel to spill; rather, the spill was caused by the "unreasonably dangerous and defective" design and manufacture of the trailer that held the gravel. The MDB Cross-Claim, 4:6-8. Therefore, MDB brought the Cross-Claim against the manufacturers of the trailer and its components, including Versa. MDB avers Versa produced a solenoid valve which would, "activate inadvertently allowing the gates to open and release the load [of gravel] carried by the trailer." The MDB Cross-Claim, 4:9-11. MDB also claims there were safer alternatives available to Versa; the solenoid valve was unreasonably dangerous and defective; and Versa failed to provide appropriate safety mechanisms regarding the solenoid valve. The MDB Cross-Claim, 4:15-22.

The Motion is the same as the motion practice in the Fitzsimmons Action and the Bible Action. The issues are identical, as are the relevant parties. The Court issued an ORDER ("the December Order") on December 8, 2017, in the Fitzsimmons Action. The December Order conducted a thorough analysis of the issue presented in the Motion. *See generally Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and NRCP 37. The Court found in the December Order case concluding sanctions were an appropriate sanction for MDB's spoliation of

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[2] 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. The only remaining cause of action alleged by MDB against Versa is for Contribution.

critical evidence. The Court finds a restatement of the December Order is unnecessary in the instant action. Given the indistinguishable issues the Court attaches hereto and incorporates herein as EXHIBIT A the December Order which shall be considered dispositive of the issue raised in the Motion.[3]

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

DATED this 22 day of January, 2018.

ELLIOTT A. SATTLER
District Judge

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

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 January, 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 22 day of January, 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:

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

Sheila Mansfield
Judicial Assistant

EXHIBIT "A"

FILED
Electronically
CV15-02349
2017-12-08 02:59:29 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6431279

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

ERNEST BRUCE FITZSIMMONS, et al.,

Plaintiffs,

Case No. CV15-02349

Dept. No. 10

vs.

MDB TRUCKING, LLC; et al.,

Defendants.

/

ORDER

Presently before the Court is DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT MDB TRUCKING, LLC'S CROSS-CLAIM PURSUANT TO NRCP 35; OR IN THE ALTERNATIVE, FOR AN ADVERSE JURY INSTRUCTION ("the Motion"). The Motion was filed by Defendant/Cross-Claimant/Cross-Defendant VERSA PRODUCTS, INC. ("Versa") on May 15, 2017.[1] Defendant/Cross-Claimant, MDB Trucking, LLC ("MDB") filed MDB'S OPPOSITION TO VERSA PRODUCTS COMPANY, INC.'S MOTION TO STRIKE AND/OR SPOLIATION INSTRUCTIONS ("the Opposition") on June 2, 2017. Versa filed DEFENDANT/CROSS-CLAIMANT/CROSS-DEFENDANT VERSA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

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

No. 76397

Electronically Filed
Aug 06 2018 02:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Docket 76397 Document 2018-30092

1. Judicial District Second Department X

County Washoe Judge Elliott A. Sattler

District Ct. Case No. CV16-00976

2. Attorney filing this docketing statement:

Attorney Josh Cole Aicklen and David B. Avakian Telephone 702-893-3383

Firm Lewis Brisbois Bisgaard & Smith

Address 6385 South Rainbow Blvd. Ste. 600
Las Vegas, Nevada 89118

Client(s) VERSA PRODUCTS COMPANY, INC.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Nicholas M. Wiezcorek Telephone (702)862-8300

Firm Clark Hill, PLLC

Address 3800 Howard Hughes Parkway Ste. 500
Las Vegas, NV 89169

Client(s) MDB TRUCKING, LLC

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☒ Other disposition (specify): Attorney's Fees

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75022
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75319
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 75321
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76396
MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76395

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

1. Fitzsimmons v. MDB Trucking LLC et al., Second Judicial District Court, Case No. CV15-02349. On December 8, 2017, the Court filed on Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on December 29, 2017.
2. James M. Bible v. MDB Trucking LLC et al., Second Judicial District Court, Case No. CV16-01914. On January 22, 2018, the Court filed an Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on February 8, 2018.
3. Geneva M. Remmerde v. Daniel Anthony Koski; MDB Trucking, LLC et al., Second Judicial District Court, Case No. CV16-00976. On January 22, 2018, the Court filed an Order dismissing MDB's Cross-Claim. Notice of Entry of Order was filed on February 8, 2018.

8. Nature of the action. Briefly describe the nature of the action and the result below:

MDB TRUCKING, LLC brought Cross-Claims against VERSA PRODUCTS COMPANY, INC., in which it asserted a contribution claim against VERSA PRODUCTS COMPANY, INC. for personal injury claims brought by Plaintiffs. Plaintiffs were driving westbound on IR80 when a semi-trailer driven by DANIEL KOSKI and owned by MDB TRUCKING, LLC spilled gravel on the freeway, causing multiple automobile accidents and the injuries alleged by the Plaintiffs. VERSA PRODUCTS COMPANY, INC. filed a Motion to Strike MDB TRUCKING, LLC 's Cross-Claim Pursuant to NRCP 37. The District Court granted the Motion and struck MDB TRUCKING, LLC's Cross-Claim. VERSA PRODUCTS COMPANY, INC. timely filed its Motion for Attorney's Fees and Costs on February 9, 2018. Thereafter, MDB TRUCKING, LLC timely filed a Motion to Retax and Settle Costs. On June 7, 2018, the District Court granted in part and denied in part the Motion for Attorney's Fees and Costs and Motion to Retax. MDB TRUCKING, LLC appealed the order and now VERSA PRODUCTS COMPANY, INC. cross-appeals the same order to this Honorable Court as to the denial of attorneys fees and the full amount of costs.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the District Court erred in denying Cross-Appellant/Respondent's Motion for an award of Attorney's Fees and the full amount of Costs.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

1. MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76396. This involves the same issue of whether the District Court erred in denying Cross-Appellant/Respondent's Motion for Attorney's Fees and full Costs.
2. MDB Trucking LLC v. Versa Products Company, Inc., Case No. 76395. This involves the same issue of whether the District Court erred in denying Cross-Appellant/Respondent's Motion for Attorney's Fees and full Costs.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively assigned to the Court of Appeals pursuant NRAP 17(b)(8) as it is an appeal from a post-judgment order in a civil case.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from June 7, 2018

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served June 16, 2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. ***See*** **AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed July 24, 2018 (Cross-Appeal)

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

MDB TRUCKING, LLC first appealed the Motion for Attorneys' Fees and Costs and Motion to Retax on July 13, 2018. VERSA PRODUCTS COMPANY, INC. timely filed its Cross-Appeal within 14 days after the date the first notice was served (July 13, 2018).

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g., NRAP 4(a) or other*

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) provides the basis for appeal as the Court entered a final post-judgment order.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plantiff- Geneva Remmerde
Defendants- MDB TRUCKING, LLC and Daniel Koski ("Defendants")
Third-Party Defendants- VERSA PRODUCTS COMPANY, INC.; RMC Lamar Holdings, Inc.; The Modern Group GP-Sub, Inc.; and Dragon Esp, LTD ("Third-Party Defendants")

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties have been formally dismissed except for MDB TRUCKING, LLC and VERSA PRODUCTS COMPANY, INC.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

1. Plaintiff's claim for Negligence and Strict Products Liability against all Defendants. Formal disposition of claim against all Defendants on December 5, 2017.
2. MDB TRUCKING, LLC's Third-Party claim for Contribution against Third-Party Defendants. Formal disposition of claims against was filed on VERSA PRODUCTS COMPANY, INC. on February 8, 2018. Claims against the remaining Defendants and Third-Party Defendants have been dismissed, however no formal disposition has been filed.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

VERSA PRODUCTS COMPANY, INC.
Name of appellant

Josh Cole Aicklen, Esq.
Name of counsel of record

August 6, 2018
Date

Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

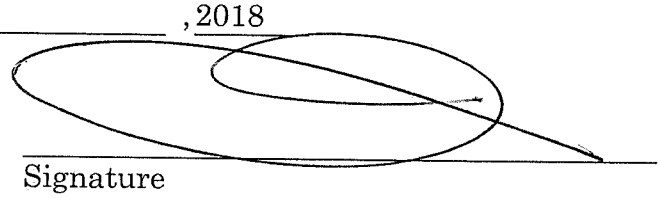
I certify that on the 6th day of August, 2018, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

X BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Dated this 6th day of August, 2018



Signature