2-3-2017

Western Community Insurance Company v. Burks Tractor Company, Inc. Appellant's Brief Dckt. 44372

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No: 44372

Case No. CV-14-2977

WESTERN COMMUNITY INSURANCE COMPANY, Subrogee of DNJ, INC., Subrogor, and DNJ INC., an Idaho Corporation,

Plaintiffs-Appellants

BURKS TRACTOR COMPANY, INC, an Idaho Corporation, and KRONE NA, INC., a Delaware Corporation,

Defendants-Respondents

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District in and for the County of Twin Falls

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THE HONORABLE G. RICHARD BEVAN, presiding.

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Table of Contents

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

B. COURSE OF PROCEEDINGS

C. STATEMENT OF THE FACTS

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court Erred in Not Allowing Western Community to Allege Causes of Action Arising from Respondents' Violations of the Idaho Consumer Protection Act in the Proposed First Amended Complaint. 4

B. Whether the District Court Erred in Denying Appellants' Motion for New Trial.....5

C. Whether Appellant's are entitled to an award of costs and reasonable attorney fees on Appeal Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41.....5

III. ARGUMENT

A. The District Court Erred in Not Allowing Western Community to Allege Causes of Action Arising from Respondents' Violations of the Idaho Consumer Protection Act in the Proposed First Amended Complaint.....5

B. The District Court Erred in Denying Appellants' Motion New Trial.....10

1. The District Court Erred in Allowing Respondents to Assert New Factual and Legal Defenses Regarding Privity Just Prior to Trial and in Then Dismissing Burks on Directed Verdict.....11

2. The District Court Erred in Not Instructing the Jury that Krone was Responsible for Burks' Actions While Burks was Acting as Krone's Agent.....15

C. Appellants are entitled to an award of costs and reasonable attorney fees on Appeal

Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41.....18

IV. ATTORNEY FEES AND COSTS ON APPEAL

V. CONCLUSION

TABLE OF AUTHORITIES

Cases

Athay v. Stacey, 142 Idaho 360, 365, 128 P.3d 897, 902 (2005) 8
BlackCanyonRacquetball Club,Inc. v. Idaho First National Bank, N.A., 119 Idaho 171, 175, 804 P.2d 900, 904 (1991) 5, 6
Bott v. Idaho State Bldg. Auth., 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992) 10
Brooks v. Terteling, 107 Idaho 262, 265, 688 P.2d 1167, 1170 (1984) 15
Chenery v. Agri-Lines Corp., 115, Idaho 281, 766 P.2d 751 (1988) 9
Dale's Service Co., Inc. v. Jones, 96 Idaho 662, 534 P.2d 1102 (1975) 15
Halvorson v. N. Latah County Highway Dist., 151 Idaho 196, 208 254 P.3d 497. 509 (2011) 6
Hoffman v. The Board of Local Improvement Dist. No. 1101, __ Idaho __, __ P.3d __, 2016 Opinion No. 153 (December 21, 2016) citing *KGF Dev., LLC v. City of Ketchum,* 149 Idaho 524, 527, 236 P.3d 1284, 1287 (2010)(" 8
Hoopes v. Hoopes, 124 Idaho 518, 861 P.2d 88 (Idaho App. 1993) 9
Houghtelin v. Diehl, 47 Idaho 636, 639, 277 P. 699, 700 (1929) 9
International Equipment Service, Inc. v. Pocatello Industrial Park Company, 107 Idaho 1116, 1119 695 P. 2d 1255, 1258 (1985) 9
Jones v. Crawforth, 147 Idaho 1, 15, 205 P.3d 660, 664 (2009) 8
May Trucking Co. v. International Harvester Co., 97 Idaho 319, 543 P.2d 1159 (1975) 9
McBride v. Ford Motor Co., 105 Idaho 753, 760, 673 P.2d 55, 62 (1983) 17
Trinity Universal Ins. Co. of Kansas 6, 7, 9, 11
Werry v. Phillips Petroleum Co., 97 Idaho 130, 540 P.2d 792 (1975) 15

Statutes

I.C. § 12-120(3) ..... iii, 5, 18
I.C. §48-602(1) 8,9
I.C. §48-608(1) 8
Idaho Code § 48-603(5) 1, 8
Idaho Code §48-603(7) 1, 8

Rules

I.R.A 35 (a)(5), (b)(5), 40 and 41 ..... iii, 5, 18
I.R.C.P. 12(b)(6) 1, 2
I.R.C.P. 15(a) 2, 10,12

I. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

This case arises from the fire loss of a 2012 Krone X 1100 Forage Chopper ("Krone Chopper") manufactured by Respondent Krone NA, Inc, ("Krone") and purchased by DNJ from Respondent Burks Tractor Company, Inc. ("Burks"). On October 15, 2012, approximately five weeks after the Krone Chopper was purchased by DNJ, a fire ignited in the engine compartment of the Chopper. R. Vol. I., p. 21. This fire then spread to the fuel tanks of the Krone Chopper resulting in its complete loss and destruction. *Id.* Appellant Western Community provided insurance coverage to DNJ for the loss of the Krone Chopper in the amount of $440,779.00 and was subrogated to the rights of DNJ for the loss. *Id.*, pp. 22-25.

B. COURSE OF PROCEEDINGS.

Appellants' Complaint and Demand for Jury Trial ("Complaint") was filed on July 22, 2014. R. Vol. I., pp. 18-26. In their Complaint, Appellants alleged four causes of action: 1) A claim for Breach of Express Warranties based on breach of the Manufacturer's and Extended Warranties against Krone; 2) A claim for the Breach of the Obligation of Good Faith based on breach of the Manufacturer's and Extended Warranties against Krone; 3) A claim for violation of the Idaho Consumer Protection Act ("ICPA") pursuant to Idaho Code § 48-603(5) against Krone and Burks, and; 4) A claim for violation of the ICPA pursuant to Idaho Code §48-603(7) against Krone and Burks. *Id.* pp. 21-25.

On October 4, 2014, Krone filed a Motion to Dismiss pursuant to I.R.C.P. 12(b)(6) asserting that Appellants' ICPA claims against Krone should be dismissed for failure to state a claim upon which relief can be granted. R. Vol. I., p. 3. On October 22, 2014, Burks filed its

Answer to Complaint and Crossclaim for Indemnity against Krone. R. Vol. I., pp.27-36. On October 27, 2014, Burks filed its Motion to Dismiss pursuant to I.R.C.P. 12(b)(6) asserting that Appellants' claims for violation of the ICPA against Burks should be dismissed for failure to state a claim upon which relief can be granted. R. Vol. I., p. 3.

The district court issued its Memorandum and Order Re: Motions to Dismiss ("Memorandum Order") on December 18, 2014. R. Vol. I., pp. 4, 58-59. In its Memorandum Order, the district court dismissed Appellants' ICPA claims against both Krone and Burks on the grounds that "a subrogee may not sue under the ICPA absent an express agreement, transferring the insured's statutory rights under the ICPA to the subrogee." *Id.*, p. 58.

Appellants filed their Motion to Amend the Complaint and Demand for Jury Trial ("Motion to Amend") and supporting Memorandum on January 21, 2015 seeking to file their First Amended Complaint ("FAC") amending the allegations to more specifically support Western Community's right as subrogee of DNJ to assert DNJ's claims under the ICPA. R. Vol. I., pp. 5, 52. In response to Appellants' Motion to Amend, the district court issued its Memorandum and Order Re: Motion to Amend the Complaint on May 5, 2015 denying Western Community's Motion to Amend seeking to assert DNJ's ICPA claims. R. Vol. I., pp. 51-62.

Appellants' Third Amended Complaint ("TAC") was filed on December 17, 2015. R. Vol. I., pp. 9, 115-135. Neither Krone or Burks filed an Answer to the TAC within the ten (10) day time limitation contained in I.R.C.P. 15(a). On March 24, 2016, the district court held hearing on Respondents' Motions in Limine. Tr. Vol. 1, pp. 5-75. At this hearing, Respondents represented to the Appellants and the district court that they had just discovered that Krone was the owner of the Krone Chopper at the time it was sold to DNJ, not Burks. Tr. Vol. 1, p 12, L. 15-p. 13. L. 3; p. 18,

LL. 5-25. Krone, of course, had the documents relating to the two machines in its corporate possession at all times. Based on this representation, Burks sought "clarification" from the district court regarding whether it should be dismissed from the law suit asserting that this newly discovered evidence showed that Krone and not Burks was the party that was actually in privity of contract with Appellant DNJ under the terms of the Warranties. Tr. Vol. 1, p 19, LL. 11-24. The district court denied Burks' request for "clarification," described by the district court as a "verbal motion essentially for summary judgment," at the conclusion of the March 24, 2016 hearing. Tr. Vol. 1, p 70, LL. 14-19.

On March 29, 2016, Burks filed it Answer to the TAC. R. Vol. I., pp. 136-148. In its Answer, Burks asserted several new affirmative defenses alleging that it was not in privity of contract with DNJ on the basis of the newly discovered evidence that Krone was the owner of the Chopper at the time its sale to DNJ. R. Vol. I., p. 141. In response to Burks' March 29, 2016 Answer, Appellants filed a Motion Strike Burks' Answers and Affirmative Defenses asserting, *inter alia*, that Burks had waived its right to assert these new affirmative defenses by failing to file an Answer within ten days of the filing and service of the TAC. R. Vol. I., p. 13. The district court denied Appellants' Motion to Strike Burks' Answers and Affirmative Defenses on April 5, 2016, the first day of trial. Tr. Vol. 1, p. 82, L. 10-p.92, L. 25.

After Appellants rested their case in chief on April 7, 2016, the district court granted Burks' Motion for Directed Verdict on the grounds that Burks was not in privity of contract with DNJ under the terms of the New Equipment or Extended Warranties. Tr. Vol. 1, p. 779, L. 7-p. 802, L. 8. On April 8, 2016, the district court denied Appellants' request for an agency jury instruction charging and instructing the jurors that Krone was responsible for Burks' actions while

it was acting as Krone's agent in extending the protections of the New Equipment and Limited Warranties to DNJ. Tr. Vol. 1, p. 817. LL. 4-25; p. 982, L. 18-p. 987, L. 3; p. 988, L.5-p. 989, L. 18. The jury then found against Appellants on each of their claims under the New Equipment and Extended Warranties. Tr. Vol. 1, p. 1094. LL. 10-p. 1099, L. 2.

Appellants filed their Motion for Reconsideration and for New Trial on May 2, 2016. R. Vol. I., p. 15. On June 24, 2016, the district court issued its Memorandum Decision Re: Plaintiff's Motion for Reconsideration and for New Trial denying Appellants' Motion for New Trial. R. Vol. I., pp. 177-195.

C. STATEMENT OF THE FACTS.

DNJ purchased the Krone Chopper from Burks on September 12, 2012. At the time of the purchase from Burks, the Krone Chopper was covered by Krone Manufacturer's Warranty identified as the New Equipment Limited Warranty ("New Equipment Warranty"). At the time of its purchase of the Krone Chopper, DNJ also purchased an "Extended Warranty" from Burks, specifically identified as the "Krone North American Crown Guarantee" for the additional sum of $20,447.00. After the Krone Chopper was destroyed by fire on October 15, 2012, Respondents Burks and Krone refused to allow DNJ to submit a claim under either the New Equipment Warranty or the Extended Warranty. Based on Respondents' failure to accept submission of DNJ's claims under these Warranties, Appellant Western Community provided insurance coverage to DNJ for the loss of the Krone Chopper in the amount of $440,779.00.

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court Erred in Not Allowing Western Community to Allege Causes of Action Arising from Respondents' Violations of the Idaho Consumer Protection Act in the Proposed First Amended Complaint.

B. Whether the District Court Erred in Denying Appellants' Motion for New Trial.

C. Whether Appellant's are entitled to an award of costs and reasonable attorney fees on Appeal Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41.

III. ARGUMENT

A. The District Court Erred in Not Allowing Western Community to Allege Causes of Action Arising from Respondents' Violations of the Idaho Consumer Protection Act in the Proposed First Amended Complaint.

Appellants filed their Motion to Amend the Complaint and Demand for Jury Trial and supporting Memorandum on January 21, 2015 seeking to file their First Amended Complaint ("FAC") amending the allegations to more specifically support Western Community's right to bring claims under the ICPA as the subrogee of DNJ. R. Vol. I., pp. 5, 52. As alleged in proposed FAC, Western Community was the Subrogee of DNJ's right to recover for the loss of the Krone Chopper against Krone under the subrogation provision of its insurance policy with DNJ:

> Insurance Policy No. 08-829801-01 was in effect from May 9, 2012 to May 8, 2013 and constituted an express contractual agreement between Plaintiff Western Community and Plaintiff DNJ. Under the contractual provisions and terms of Insurance Policy No. 08-829801-01, Plaintiff DNJ has been compensated in the amount of $440,779.00 for its October 15, 2012 loss of the Krone Chopper by Plaintiff Western Community. Pursuant to the following terms of Insurance Policy No. 08-829801-01, Plaintiff Western Community is the Subrogee of DNJ's rights to recover for this loss against Defendants:
>
> COMMERCIAL INLAND MARINE CONDITIONS: Provision J-Transfer of Rights of Recovery Against Others to Us. If any person or organization to or for whom we make payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment.

R. Vol. I., pp.58-59.

In its Memorandum and Order Re: Motion to Amend the Complaint, the district court relied upon the cases of *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank, N.A.,*

119 Idaho 171, 175, 804 P.2d 900, 904 (1991) and *Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 208 254 P.3d 497. 509 (2011) and refused to allow Appellants to amend the complaint to include the ICPA claims on the grounds that the amended ICPA claims were not valid claims. R. Vol. I., pp. 53, 58-59. Specifically, the district court found:

> Claims Ill and IV of the original complaint alleged ICPA violations against both Burks and Krone. This court dismissed those claims on 12/18/14, holding that "a subrogee may not sue under the ICPA absent an express agreement, transferring the insured's statutory rights under the ICPA to the subrogee." *Memorandum and Order Re Motions to Dismiss,* December 18, 2014, p.11.
> ....
>
> The court's holding, quoted above, was that absent an express agreement whereby the insured transferred his or her statutory right to bring an ICPA claim to the insurer, subrogation will not apply. This requires more than a boilerplate subrogation clause. It requires the express transfer or assignment of statutory ICPA rights from the insured to the insurer. Such an agreement is not before the court. Western has added the following language to its proposed First Amended Complaint: This is exactly the type of generic boilerplate subrogation clause that the Washington Court of Appeals found insufficient in *Trinity Universal Ins. Co. of Kansas v. Ohio Ins. Co.,* 176 Wash.App. 185, 312 P.3d 976 (Wash. Ct. App. 2013). Nowhere does it purport to assign DNJ's statutory right to sue for violations of the ICPA to Western. Therefore, because the court finds that this agreement remains insufficient to grant Western, as DNJ's subrogee, the right to sue the defendants under the ICPA, Western's ICPA claims may not be re-pled in the First Amended Complaint.) (R. p, 58-59)

R. Vol. I., pp. 58-59.

Appellant submits that the district court erred in relying upon the holding of *Trinity Universal Ins. Co. of Kansas v. Ohio Ins. Co.*, 312 P.3d 976 (Wash.App. Div. 1 2013) for its finding that that Appellants' ICPA allegations failed to state valid claims because Idaho law requires express insurance policy language specifically transferring a subrogor's statutory causes of action under the ICPA to the insurance company subrogee. This finding is not supported by the specific statutory language of the ICPA or Idaho case law governing the transfer

of rights under the doctrine of subrogation.

The *Trinity Universal Ins. Co. of Kansas* case relied upon by the district court arose from an insurance subrogation claim between two insurance companies after settlement of an underlying personal injury claim. *Id.*, 312 P.3d at 980. In the *Trinity Universal Ins. Co. of Kansas case,* the Trinity Universal Insurance Company of Kansas ("Trinity") had settled a personal injury claim involving Ohio Casualty Insurance Company's ("Ohio Casualty") insured, Millenium Building Company Inc. ("Millenium"). *Id.*, 312 P.3d at 980-981.

In *Trinity Universal Ins. Co. of Kansas,* Ohio Casualty asserted that Trinity lacked standing to bring statutory claims under the Washington Consumer Protection Act ("CPA"). *Id.*, 312 P.3d at 984. The basis of the Washington Appellate Court's decision that Trinity did not have standing to pursue its CPA claims against Ohio Casualty was that Trinity had made payments on behalf of its insured only for the insured's liability under its liability coverage and not for the bad faith claims asserted by Trinity against Ohio Casualty under the CPA. *Id.*, 312 P.3d at 986-987. In the absence of actual payments to the insured for the bad faith claims asserted, Trinity had sustained no losses to recover for its CPA claims under either conventional (contractual) or equitable subrogation. As stated by the Washington Appellate Court in the *Trinity Universal Ins. Co. of Kansas case,* Trinity had already obtained a judgment and payment from Ohio Casualty for the losses it had paid on behalf of its insured and had no right to collect additional payments from Ohio Casualty based its CPA claims for bad faith. *Id.*, 312 P.3d at 986-987

The *Trinity Universal Ins. Co. of Kansas* case was decided under Washington law and is both legally and factually inapposite to the case at bar. In this case, Western Community's proposed claims under the ICPA were pled as alternative theories of recovery of the $440,779.00

Western Community had actually paid to DNJ for the loss of the Krone Chopper after Respondents refused to accept DNJ's warranty claims. R. Vol. I., pp.18-26. This amount represented the actual loss paid to DNJ by Western Community under the language of the subrogation provision providing that "if any person or organization to or for whom we make payment under this coverage part has rights to recover damages from another, those rights are transferred to us to the extent of our payment." R. Vol. I., pp.18-26, 58-59.

Idaho Code §48-602(1) provides:

> "Person" means natural persons, corporations both foreign and domestic, trusts, partnerships both limited and general, incorporated or unincorporated associations, companies, trusts, business entities, and any other legal entity, or any other group associated in fact although not a legal entity or any agent, assignee, heir, employee, representative or servant thereof.

Under I.C. §48-602(1) the definition of "Person" in the ICPA includes corporations, companies, business entities and any other legal entities. Clearly, DNJ as an Idaho corporation had the right to bring a cause of action under I.C. §48-608(1) for violations of Idaho Code §§ 48-603(5) and (7). The standard of review for this Court regarding statutory interpretation is one of free review. The standard of review in a case of statutory interpretation is free review. *Hoffman v. The Board of Local Improvement Dist. No. 1101,* __ Idaho __, __ P.3d __, 2016 Opinion No. 153 (December 21, 2016) citing *KGF Dev., LLC v. City of Ketchum,* 149 Idaho 524, 527, 236 P.3d 1284, 1287 (2010)("We exercise free review over matters of statutory interpretation."). "When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole." *Athay v. Stacey,* 142 Idaho 360, 365, 128 P.3d 897, 902 (2005), cited in *Jones v. Crawforth,* 147 Idaho 1, 15, 205 P.3d 660, 664 (2009).

Western Community's proposed claims under the ICPA were pled as alternative theories

of recovery to the warranty claims seeking recovery of the actual loss paid to DNJ under the language of the subrogation provision. Based on the subrogation provision of its insurance policy with DNJ, Western Community occupied the same legal position as DNJ under the Idaho common law governing contractual subrogation and, therefore, had the same rights to recover against Krone and Burks as did DNJ. *May Trucking Co. v. International Harvester Co.*, 97 Idaho 319, 543 P.2d 1159 (1975); *Chenery v. Agri-Lines Corp.*, 115, Idaho 281, 766 P.2d 751 (1988); *Hoopes v. Hoopes*, 124 Idaho 518, 861 P.2d 88 (Idaho App. 1993). Under Idaho law, the doctrine of subrogation encompasses the complete substitution of the subrogor's rights in the subrogee. *International Equipment Service, Inc. v. Pocatello Industrial Park Company,* 107 Idaho 1116, 1119 695 P. 2d 1255, 1258 (1985). "Subrogation, in its broadest sense, is the substitution of one person for another, so that he may succeed to the rights of the creditor in relation to the debt or claim and its rights, remedies and securities." *Id. citing Houghtelin v. Diehl,* 47 Idaho 636, 639, 277 P. 699, 700 (1929).

As pled, the proposed allegations of the FAC identifying the language of the subrogation provision of the insurance agreement between DNJ and Western Community was unambiguous and was clearly broad enough to transfer DNJ's right to pursue ICPA claims against Respondents to Western Community. As the transferee and subrogee of DNJ, Western Community had the same rights to recover against Defendant under Idaho statutory and common law as did DNJ. These subrogation rights included DNJ's right to bring claims against Respondents under the ICPA for the recovery of those payments actually made to DNJ. The district court's reliance on the *Trinity Universal Ins. Co. of Kansas* case to find that that Appellants' ICPA allegations failed to state a valid claim because Idaho law requires express policy language specifically transferring

a subrogor's statutory causes of action under the ICPA to its subrogee was error and should be reversed here on appeal. This case should be remanded for new trial so that Appellants can have the opportunity to present these ICPA claims to a jury.

B. The District Court Erred in Denying Appellants' Motion New Trial.

Appellants filed their Motion for Reconsideration and for New Trial on May 2, 2016. R. Vol. I., p. 15. On June 24, 2016, the district court issued its Memorandum Decision Re: Plaintiff's Motion for Reconsideration and for New Trial denying Appellants' Motion for New Trial. R. Vol. I., pp. 177-195. A Motion for New Trial is governed by Idaho Rule of Civil Procedure 15(a) which provides in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
>
> 1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
>
> 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
>
> 7. Error in law, occurring at the trial.

When considering an appeal from a trial court's ruling on a motion for new trial, this Court applies the abuse of discretion standard. *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992).

As alleged in the Complaint filed on July 22, 2014, DNJ purchased the Krone Chopper from Burks on September 12, 2012. R. Vol. I., p. 19, ¶ 8. At the time of the purchase from Burks, Appellants alleged that the Krone Chopper was covered by the New Equipment Warranty. *Id.* p, 20, ¶ XII. In addition, Appellants alleged that DNJ purchased the Extended Warranty for the

additional sum of $20,447.00. *Id.*, ¶ XIII. The allegation that Burks was the owner of the Krone Chopper at the time of the sale was not disputed by Respondents between July 22, 2014 and March 24, 2016.

1. The District Court Erred in Allowing Respondents to Assert New Factual and Legal Defenses Regarding Privity Just Prior to Trial and in Then Dismissing Burks on Directed Verdict.

Appellants' TAC was served on Defendants on December 15, 2015 and filed with the Court on December 17, 2015. R. Vol. I., pp. 115-135. Facts alleging privity of contract between DNJ and Krone as well as Burks' role as Krone's authorized seller/distributor under both the New Equipment and the Extended Warranties were clearly alleged in the TAC:

> IX.
>
> At the time of its purchase of the Krone Chopper from Krone NA, Krone NA as the manufacturer/owner of the Krone Chopper and Burks as Krone NA's authorized seller/distributor, warranted to DNJ that the Krone Chopper was free from defects in material and workmanship under the terms of a New Equipment Limited Warranty ("Krone NA New Equipment Warranty"). Exhibit 2.
>
> X.
>
> The Krone NA New Equipment Warranty constituted an express warranty and/or contractual agreement between Krone NA as the warrantor, Burks as Krone NA's authorized seller/distributor and DNJ as the "original purchaser-user" of the Krone Chopper. Exhibit 2, p. 1. In the Krone NA New Equipment Warranty, Krone NA warranted and agreed that the Krone Chopper was free from defects in material and workmanship and that Krone NA was obligated to DNJ to repair or replace any part of the Krone Chopper that showed evidence of defect or improper workmanship free of charge to DNJ while the Krone NA New Equipment Warranty was in effect. Exhibit 2, p.1.
>
> XI.
>
> Krone NA warranted and agreed that it would provide DNJ with warranty coverage under the Krone NA New Equipment Warranty for one (1) year or one season after the date of delivery. The Krone NA New Equipment Warranty was in effect on the date of the October 15, 2012 fire. Exhibit 2, p.1.

R. Vol. I., p. 117.

In the TAC, Appellants made the following factual and legal allegations regarding the Extended Warranty:

> XII.
>
> At the time it of its purchase of the Krone Chopper, DNJ also purchased what was identified in the Purchase Order as a "Krone Warranty 2yrs. Full" and was titled a Krone North America Crown Guarantee ("Krone NA Extended Warranty") for the price of $20,447.00. Exhibit 3. The Krone NA Extended Warranty constituted an express warranty and/or agreement between Krone NA as guarantor, Burks as the "Provider" issuing the contract and DNJ as the "owner" of the Krone Chopper. Exhibit 3, p.1.
>
> XIII.
>
> In the Krone NA Extended Warranty, Krone NA and Burks warranted and agreed to repair or replace covered parts of the Krone Chopper which failed due to mechanical breakdown or other failure and to restore the Krone Chopper to its operating condition just prior to the failure while the Krone NA Extended Warranty remained in effect. Exhibit 3, pp. 1, 2. By its express terms, the Krone NA Extended Warranty provided warranty coverage for the Krone Chopper for a period of two (2) years from the date that the Krone NA New Equipment Warranty started and was in effect on the date of the October 15, 2012 fire. Exhibit 3, p.1.

R. Vol. I., pp. 117-118.

Neither Defendant filed an Answer to the TAC within ten (10) days as required by I.R.C.P. 15(a). R. Vol. I., pp. 9-10. It was not until the March 24, 2016 hearing on the Respondents' Motions in Limine that Respondents advised Appellants and the district court that they had just discovered that Krone and not Burks was the owner of the Krone Chopper at the time of its sale to DNJ. This new fundamental factual assertion was first raised by Defendants only twelve days before trial commenced on April 5, 2016.

Prior to the March 24, 2016 hearing, Respondents had asserted throughout the discovery and pre-trial proceedings that Burks and not Krone was the owner of the Krone Chopper at the time it was sold to DNJ and, therefore, it was Burks and not Krone that was in privity of contract with DNJ under the Warranties. R. Vol. I., p. 179. In the Statement of Uncontroverted Facts

submitted by Respondents in support of their Joint Motion for Summary Judgment on July 23, 2015, Respondents expressly represented that the Krone Chopper was owned by Burks at the time of the sale. R. Vol. I., p. 179. This representation, rather misrepresentation, was based on the sworn Affidavit of Ken Stratton, the Regional Business Manager for the Western Region of Krone North America. R. Vol. I., p. 179; Tr. Vol. 1, p. 647, L. 16-p.648, L. 6.

On March 29, 2016, the Wednesday of the week preceding the start of trial on Tuesday, April 5, 2016, Burks filed it Answer to the TAC. Vol. I., pp. 136-145. In its Answer to the TAC, Burks asserted the following new additional Affirmative Defenses based on the newly discovered evidence of ownership that it first advised the Appellants and district court of on March 24, 2016:

XVIII DEFENSE

> Krone was the owner of the Krone Chopper and privity of the contract existed between Krone and DNJ with regard to the direct sale of the Krone Chopper by Krone to DNJ.

XIX DEFENSE

> Privity of contract existed between Krone and DNJ for the New Equipment Warranty and the Extended Warranty.

XX DEFENSE

> No privity of contract existed between Burks and DNJ for the New Equipment Warranty or the Extended Warranty.

R. Vol. I., p. 89; p. 141.

In response to Burks' March 29, 2016 Answer containing these new affirmative defenses, Appellants filed a Motion Strike Burks' Answers and Affirmative Defenses asserting, *inter alia*, that Burks had waived its right to assert these new affirmative defenses by failing to file an Answer within ten days of the filing and service of the TAC. R. Vol. I., p. 13. This Motion was denied by the district court on April 5, 2016, the first day of trial. Tr. Vol. 1, p. 82, L. 10-p.92, L. 25.

The new factual assertion of ownership of the Krone Chopper at the time of the sale, and the resulting change in Respondents' legal position that it was Krone and not Burks that was in privity of contract with DNJ, took place only twelve days before trial commenced on April 5, 2016. Burks' new Affirmative Defenses based on of lack of privity were not pled until March 29, 2016, just over three business days prior to trial. The district court's Order allowing Respondents to submit new factual assertions and resulting legal defenses was made on the first day of trial. In allowing Respondents to assert the alleged "newly discovered" factual allegation that Krone and not Burks was the owner of Chopper at the time of the sale, the district court condoned Respondents' efforts to manipulate the evidence to their advantage thereby unfairly prejudicing Appellants' right to a fair trial. In short, for well over a year, discovery, motions, and affidavits forced Appellants to focus its trial efforts on Burk's as the owner and issuer of the warranties. The Court allowing the Respondents to completely reverse legal and factual possessions days before and at the first day of trial was extremely prejudice and in error.

In addition to allowing Respondents to controvert their previous factual assertions supporting privity on the eve of trial, the district court erred in dismissing Burks on directed verdict on the grounds that Burks was not party to the Extended Warranty. The Key Terms and Definitions provisions of the Extended Warranty expressly provided:

> CONTRACT: Means this EQUIPMENT SERVICE CONTRACT. It is a CONTRACT between YOU and US.
>
> WE, US, OUR, DEALER, MANUFACTURER means the Provider issuing this CONTRACT.

R. Vol. I., p. 133.

This provision of the Extended Warranty expressly identified Burks as the dealer as one of the parties to the Extended Warranty. Appellants had pled that the Extended Warranty constituted an express warranty and/or agreement between Krone as guarantor, Burks as the "Provider" issuing the contract and DNJ as the "owner" of the Krone Chopper in the TAC. R. Vol. I., p. 117. During its ruling on Burks' Motion for Directed Verdict, however, the district court indicated that this was only "loose language" insufficient to establish that Burks was a party to the Extended Warranty. Tr. Vol. 1, p. 791, LL. 7-24. This ruling was error. To the extent that any ambiguity arises from the use of the words in a contract, such ambiguity must be construed most strongly against the party who prepared and provided that language. *Brooks v. Terteling*, 107 Idaho 262, 265, 688 P.2d 1167, 1170 (1984) (citing *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 540 P.2d 792 (1975); *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662, 534 P.2d 1102 (1975)).

Appellants assert that the language identifying the parties in the Extended Warranty was not ambiguous and clearly identified Burks as a party to the agreement. It was not disputed that the Extended Warranty was drafted by Krone and sold and implemented on their behalf by Burks. Instead of granting Burks' Motion for Directed Verdict on the Extended Warranty claim, the district court should have submitted this issue to the jury. The district court should have instructed the jurors under IDJI 6.08.2 and 6.08.3 that this language must be construed against the Defendants and to resolve all doubts regarding whether Burks was a party to the Extended Warranty in favor of Appellants. The district court's decision to grant Burks' Motion for Directed Verdict on the Extended Warranty claim on the grounds that Burks was not a party to the agreement was an error of law resulting in an unfair trial.

2. The District Court Erred in Not Instructing the Jury that Krone was Responsible for Burks' Actions While Burks was Acting as Krone's Agent.

In the TAC, Appellants clearly alleged that Burks was Krone's authorized seller/distributor for purposes of New Equipment Warranty. In the TAC, Plaintiffs had expressly pled that the Extended Warranty constituted an express warranty and/or agreement between Krone as guarantor, Burks as the "Provider" issuing the contract and DNJ as the "owner" of the Krone Chopper. At trial, Appellants then presented evidence of the agency relationship between Krone and Burks through the testimony of Mr. Burks, President of Burks. During Mr. Burks testimony, Appellants introduced the Dealership Agreement between Krone and Burks which expressly provided in paragraph 4(d) that Burks was required as Krone's agent to:

> Extend Krone NA, Inc.'s applicable Product Warranty to Dealers customers by using Krone, NA, Inc. standard printed warranty for the Products in effect at the time of sale to Dealers customer.

Tr. Vol. 1, p. 608, L. 1-p. 609, L. 13; p. 609, L. 3-p. 615, L. 11. During his trial testimony, Defendant Burks' President, Douglas Burks, confirmed the authenticity and accuracy of the Dealership Agreement containing this express provision as establishing the agency relationship between Krone and Burks. *Id.* p. 609, L. 3-p. 615, L. 11.

The district court granted Burks' Motion for Directed Verdict on April 7, 2016 after the Appellants rested their case in chief on the grounds that Burks was not in privity of contract with DNJ under the terms of the New Equipment or Extended Warranties. Tr. Vol. 1, p. 779, L. 7-p. 802, L. 8. On April 8, 2016, the district court denied Appellants' request for an agency jury instruction charging and instructing the jurors that Krone was responsible for Burks' actions while it was acting as Krone's agent in extending the protections of the New Equipment and Limited Warranties to DNJ on April 8, 2016. Tr. Vol. 1, p. 817, LL. 4-25; p. 982, L. 18-p. 987. L. 3; p. 988, L.5-p. 989. L. 18. The district court denied Appellants' request for an agency instruction despite its

own determination "that Burks was in all respects acting as an agent for Krone" during its ruling on Burks' Motion for Directed Verdict. Tr. Vol. 1, p. 801, LL. 18-25.

The district court's ruling denying Appellants' request for a jury instruction charging and instructing the jurors that Krone, as the principal, was responsible for Burks' actions when acting as Krone's agent in extending the protections of the Warranties to DNJ further prevented Appellants from having a fair trial and was an error in law. The court's instructions, considered as a whole, must fairly and adequately present the issues and state the applicable law. *McBride v. Ford Motor Co.*, 105 Idaho 753, 760, 673 P.2d 55, 62 (1983)(*citations omitted*).

IDJI 6.40.1. Agency defined provides:

> The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the agent's scope of authority.

IDJI 6.41.1. Agent's act binds principal - agency admitted provides:

> There is no dispute in this case that (agent's name) was the agent of the principal, (principal's name), at the time of the transaction described by the evidence. Therefore, (principal's name), the principal, is responsible for any act of (agent's name), the agent, within the scope of the agent's authority.

After dismissing Burks by directed verdict on April 7, 2016, the district court denied Appellants' request for the IDJI agency instruction so that the jurors were left to simply speculate about Burks' dismissal. After allowing Burks to make new factual assertions and legal defenses just before trial, the district court must have instructed the jurors consistent with the trial evidence showing that Burks was acting as Krone' agent. The jurors were never advised whether they should hold Krone liable for Burks' actions if they found these actions were done in violation of Burks' duties to extend the warranty to protections to purchasers of Krone equipment. Instead, the jurors were simply instructed that the district court had "made a legal ruling yesterday afternoon,

late evening, that the defendant Burks Tractor had been dismissed from the case; and so they are no longer a party to the lawsuit" on the morning of the final day of trial. Tr. Vol. 1, p. 819, LL. 12-18.

Based on Appellants' request, the pleadings and evidence at trial and the district court's duty to charge the juror with instructions that fairly and adequately present the issues and state the applicable law, the district court should have instructed the jurors with both IDJI 6.40.1 and 6.41.1. The district court's failure to do so was an error in law and further allowed Respondents to manipulate the proceedings resulting in an unfair trial.

C. Appellants are entitled to an award of costs and reasonable attorney fees on Appeal Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41.

Appellants submit that the claims between the parties based on the sale of the Krone Chopper and the Warranties arose from a commercial transaction as defined by I.C. § 12-120(3). The district court awarded attorney fees to Respondents on the basis that the claims constituted commercial transactions subject to I.C. § 12-120(3). Appellants are, therefore, entitled to an award of attorney fees here on appeal.

IV. ATTORNEY FEES AND COSTS

Pursuant to I.C. § 12-120(3) and I.R.A 35 (a)(5), (b)(5), 40 and 41, requests an award of its costs and reasonable attorney fees on Appeal.

V. CONCLUSION

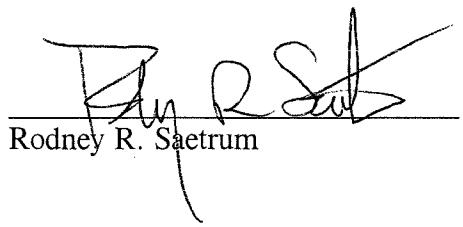
By misrepresenting ownership, Respondent Krone created a series of Court errors in this matter along with wasted time, expense, and effort.

Allowing Respondents to violate pleading requirements allowing new defenses days before trial for which discovery become impossible to obtain, dismissing Respondent Burk from the case, and failing to give an agency instruction created surprise and an unfair trial.

Based on the foregoing, Appellants respectfully request that this Court remand this case to the district court for new trial and award Appellants their attorney fees incurred in bringing this Appeal.

Respectfully submitted this 3rd day of February, 2017.

SAETRUM LAW OFFICES

By 

Rodney R. Saetrum