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IN THE SUPREME COURT OF THE STATE OF IDAHO

	Supreme Court Docket No: 44372
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	Case No. CV-14-2977

RESPONDENT KRONE NA, INC.'S BRIEF

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

THE HONORABLE G. RICHARD BEVAN, Presiding

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II. Statement of the Case.

A. Nature of the Case

Plaintiff-Appellant DNJ, Inc. ("DNJ") purchased a Big X 1100 Forage Chopper (the "Krone Chopper," sometimes known to farmers and contractors as a "chop harvester") at Defendant-Respondent Burks Tractor Company, Inc. ("Burks"). The Krone Chopper was manufactured by Defendant-Respondent Krone NA, Inc. ("Krone"). As part of DNJ's purchase, the Krone Chopper was covered by a New Equipment Warranty. DNJ also purchased an Extended Warranty.

After a fire that led to a complete loss of the Krone Chopper, DNJ's claims on both warranties were denied. DNJ's insurer, Plaintiff-Appellant Western Community Insurance Company ("Western Community"), paid DNJ for the loss and brought suit against Krone and Burks for breach of express warranty, breach of the implied obligation of good faith, and breach of the Idaho Consumer Protection Act (ICPA).

Though the consumer protection claims were dismissed early on, the breach of warranty and breach of good faith claims proceeded to a jury trial. During trial, Burks' motion for directed verdict was granted because Western Community had not shown privity of contract between Burks and DNJ. Rather, because Krone owned the Krone Chopper at the time of the sale, DNJ was only in privity with Krone. The jury found in favor of Krone on both the warranty and good faith claims.

B. Course of Proceedings

Krone substantially agrees with Western Community's recitation of the course of proceedings, but offers this clarification. Western Community's Third Amended Complaint[1] alleged three times that Krone owned the Krone Chopper at the time it was sold to DNJ: (1) "the Krone Chopper was manufactured and owned by Krone NA" (R. Vol. 1, p. 116); (2) "At the time of its purchase of the Krone Chopper from Krone NA . . ." (R. Vol. 1, p. 117); (3) "Krone NA as the manufacturer/owner of the Krone Chopper . . ." (*Id.*).

Since the filing of the original Complaint, and through the filing of the Third Amended Complaint, Krone asserted it was not in privity of contract with DNJ because the Krone Chopper was owned by Burks at the time of the sale. *See*, *e.g.*, R. Vol. 1, pp. 59-60. Unbeknownst to Krone, and despite its reasonable investigation into the facts surrounding the Krone Chopper's sale, this assertion turned out to be incorrect. Customarily, the dealer owns the equipment at the time of the sale—not Krone. This inaccuracy was not discovered until Burks' attorney was preparing for trial. Tr. Vol. 1, p. 12:15-25.

Upon learning this transaction was not the usual one involving Krone selling equipment to a dealer and the dealer selling it to a customer, Krone and Burks promptly informed the trial

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[1] In their brief, Western Community and DNJ repeatedly contend that Krone did not timely file an answer to the Third Amended Complaint, which was filed on December 17, 2015. *See*, *e.g.*, *Appellants' Brief*, p. 2. Any question about timeliness is irrelevant for the Court's determination of the issues as they relate to Krone, in that Western Community does not claim any error from the trial court's denial of its Motion to Strike Krone's Answer and Affirmative Defenses to the Third Amended Complaint. If the Court wishes to inquire further about the circumstances surrounding the Third Amended Complaint (including the Motion to Strike the Third Amended Complaint filed by Krone on February 2, 2016), Krone is prepared to address them at oral argument.

court and Western Community's attorneys that their previous assertions were incorrect. Tr. Vol. 1, p. 12:15-25; Tr. Vol. 1, p. 18:11-17. Krone's attorney clarified on the record that the Krone Chopper was purchased directly from Krone, thereby establishing one of the elements pled in the Third Amended Complaint. Tr. Vol. 1, p. 12:23-24.

C. Statement of Additional Facts

DNJ's purchase of the Krone Chopper included a standard one-year New Equipment Warranty. This warranty provided for repair or replacement of the Krone Chopper in the event there was a defect in its material or workmanship. R. Vol. 1, p. 129. DNJ also separately purchased an Extended Warranty, which provided for repair or replacement of any covered parts in the event of a mechanical breakdown or failure. R. Vol. 1, p. 133.

After the fire that led to a complete loss of the Krone Chopper, when DNJ inquired about coverage under either warranty, Krone determined there was no coverage because there was no defect in materials or workmanship. Tr. Vol. 1, p. 725:16-21. After trial, the jury was asked via special interrogatory if Krone breached either the New Equipment or Extended Warranty. The jury answered in the negative.

III. Additional Issue Presented on Appeal

Whether Krone is entitled to an award of reasonable attorneys' fees and costs incurred on this appeal.

IV. Attorney Fees on Appeal

Pursuant to I.C. § 12-120(3), I.R.A. 40, and I.R.A. 41, Krone requests an award of reasonable attorneys' fees and costs incurred on this appeal.

V. Argument

A. The trial court acted within its discretion to deny Western Community's Motion to Amend its Complaint because the proposed Idaho Consumer Protection Act Claims cannot, as a matter of law, be asserted by a subrogee as if it were the actual purchaser.

The precise issue before this Court is the trial court's denial of Western Community's motion to amend its Complaint—not the trial court's granting of Krone's motion to dismiss. As opposed to a motion to dismiss, "this Court will review a denial of a motion to amend for an abuse of discretion." *Atwood v. Smith*, 143 Idaho 110, 115, 138 P.3d 310, 315 (2006). "If the amended pleading does not set out a valid claim . . . it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). Because Western Community cannot, as a matter of law, assert claims under the ICPA, the district court did not abuse its discretion in denying Western Community's motion.

1. As subrogee of DNJ, Western Community is not a "person" within the meaning of the ICPA and therefore cannot bring claims under it.

The ICPA allows claims to be brought by "any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property . . . as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter." I.C. § 48-608. For the purposes of the ICPA, "'person' means natural persons, corporations . . . *although not a legal entity or any agent, assignee, heir, employee, representative or servant thereof.*" I.C. § 48-602(1) (emphasis added).

By allowing ICPA claims from actual purchasers but expressly prohibiting them from "a legal entity" such as (by way of example only, as given in the statute) an assignee, § 48-608 does not allow suits by any entity other than the actual purchaser. Though § 48-602(1) does not make explicit reference to subrogees, they fall within its broad language limiting standing only to the actual purchaser. Here, Western Community as subrogee constitutes "a legal entity" of the actual purchaser and therefore cannot bring suit under the ICPA.

Texas's Deceptive Trade Practices Act (DTPA) presents a useful comparison. It allows consumers to bring claims, but specifically excludes a "business consumer that has assets of $25 million or more" from the definition of "consumer." Tex. Bus. & Comm. Code § 17.45 (4). In *Trimble v. Itz* (898 S.W.2d, 370 (Tex. App. 1995)), the Texas Court of Appeals specifically rejected the argument that an insurance company with more than $25 million in assets—and therefore outside the statutory defintion—could assume its insured's status as a consumer via subrogation. *Id.* at 372. The court squarely held "the legislature specifically defined which individuals and entities have standing to assert private claims for violations of the DTPA. State Farm does not qualify. The legislature made no exceptions for subrogees." *Id.*

Like the Texas legislature with the DTPA, the Idaho legislature with the ICPA promulgated specific limitations regarding who has standing to bring claims. This specific language of limitation does not (and cannot) give way to general principles of subrogation. Though other states have allowed insurers to subrogate their insureds' consumer protection claims, Idaho has not (neither has Texas, for example); moreover, those other states' statutes do not contain the limiting language found in the ICPA and DTPA. *Compare, e.g.*, Mich. Comp.

Laws. Ann. § 445.902 (d) (defining "person" as "a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, or other legal entity"),[2] Va. Code Ann. § 59.1-198 (defining "person" as "any natural person, corporation, trust, partnership, association and any other legal entity"),[3] Conn. Gen. Stat. Ann. § 42-110a(3) (defining "person" as "a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and any other legal entity"),[4] Mass. Gen. Laws Ann. ch. 93A, § 1(a) (defining "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity").[5]

2. *Like other provisions under Idaho law, the ICPA imposes a limit on an insurer's right of subrogation.*

Western Community makes the broad statement that "subrogation encompasses the *complete* substitution of the subrogor's rights in the subrogee." *Appellant's Brief*, p. 9. But as this Court has explained, the doctrine of subrogation does not allow an unlimited transfer of rights; in certain instances the transfer is limited by statutory or decisional law. The ICPA's definition of "person" constitutes such a limitation.

First, in *Stonewall Surplus Lines Insurance Co. v. Farmers Insurance Co. of Idaho* (132 Idaho 318, 971 P.2d 1142 (1998)), a third party was not allowed to bring a direct claim against

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[2] Subrogation allowed in *Safeco Ins. Co. of Am. v. CPI Plastics Grp., Ltd.*, 625 F.Supp.2d 508 (E.D. Mich. 2008).

[3] Subrogation allowed in *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592 (4th Cir. 1985).

[4] Subrogated claim allowed, though standing was not raised, in *Trucker v. American Int'l Grp., Inc.*, 179 F.Supp.3d 224 (D. Conn. 2016).

[5] Subrogated claim allowed, though standing was not raised, in *Avolizi v. Bradford White Corp.*, 2003 Mass. App. Div. 93 (Dist. Ct. 2003).

an insurer, even though the third party was subrogated to the rights of the insured. In that case a delivery driver (Jerry Oldham) employed by Confluence Pizza, Inc. struck a pedestrian with his vehicle while making a delivery. *Id.* at 1143. The vehicle was owned by Penny MacDonald, the employee's mother. *Id.* Confluence had insurance policies through Progressive Casualty Insurance Company and Stonewall Surplus Lines Insurance Company, while Oldham and MacDonald were insured by Famers Insurance Company of Idaho. After Progressive and Stonewall reached a settlement with the pedestrian and released all parties from liability, Oldham, MacDonald, Progressive, and Stonewall sued Farmers for breach of contract. *Id.*

Though Idaho law prohibits a third party like Progressive and Stonewall from suing an insurance company for breach of contract, Progressive and Stonewall argued that "they may bring a direct action because they stand in the shoes of Penny MacDonald [the first-party insured] by way of equitable subrogation." *Id.* at 1146. This Court disagreed. Even though MacDonald (as a first-party insured in privity of contract with Farmers) would be able to sustain an action against Farmers, the prohibition against direct actions by third parties operated as an exception to general subrogation law, in that Progressive and Stonewall were not able to assume MacDonald's status as a first-party insured. *Id.*

Stonewall demonstrates that subrogation is not an absolute, unqualified transfer of the insured's rights to the insurer. Just as Idaho's prohibition on direct actions against an insurer by a third party prevented Progressive and Stonewall from assuming MacDonald's status as a first-party insured through subrogation, § 48-601's definition of "person" prevents Western Community from assuming DNJ's status as the actual purchaser.

A second case is also instructive. In *Davis v. Idaho Dept. of Health and Welfare* (130 Idaho 469, 943 P.2d 59 (Idaho Ct. App. 1997)), Davis was injured in an airplane crash and later sued for damages. *Id.* at 60. After the accident, he qualified for Medicaid benefits through the Idaho Department of Health and Welfare (DHW), which made payments on his medical bills. *Id.* Davis eventually obtained a jury verdict for his injuries resulting from the accident, but it was reduced by 35 percent due to his comparative fault. *Id.* After the jury rendered its verdict but before a final judgment was entered, Davis settled with the defendant. *Id.*

DHW argued that exercising its subrogation rights would entitle it to full reimbursement for the amount in paid on Davis's behalf, while Davis argued that DHW's subrogated interest in the settlement should reflect the comparative fault reduction. *Id.* The *Davis* court recognized that "[u]nder general subrogation principles, if DHW had sued the manufacturers directly for reimbursement of Medicaid payments, its recovery would have been reduced by the 35% negligence attributable to Davis." *Id.* at 61. This point is true under the general doctrine of subrogation, because the subrogee is entitled to remedies no greater than those available to the subrogor, thus imputing the subrogor's comparative fault reduction onto the subrogee. But because the applicable statute entitled DHW to "an amount equal to the expenditure for medical assistance benefits paid by the department,"[6] rather than whatever amount was actually

[6] At the time, I.C. § 56-209b(3) provided that "[i]n all cases where the department of health and welfare through the medical assistance program has or will be required to pay medical expenses for a recipient and that recipient is entitled to recover any or all such medical expenses from any third party, the department of health and welfare will be *subrogated* to the rights of the recipient to the extent of the amount of medical assistance benefits paid by the department as the result of the occurrence giving rise to the claim against the third party" (emphasis added). The court

recovered by Davis, the court found that the statutory language modified the general principles of subrogation.

The *Davis* court's holding emphasized that "equitable principles cannot supersede the positive enactments of the legislature." *Id.* Thus, the statute at issue operated as an exception to the general rules of subrogation. Like DHW, Western Community here would ordinarily be entitled to the same rights and claims as DNJ. Nevertheless, § 48-602(1)'s list of exclusions from the definition of "person" is a positive legislative enactment that cannot be superseded through subrogation.

3. Allowing subrogation of ICPA claims would subvert its legislative purpose.

When construing a statute, this Court "is to derive legislative intent." *Robinson v. Bateman-Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). "Because 'the best guide to legislative intent is the words of the statute itself,' the interpretation of a statute must begin with the literal words of the statute." *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). This Court may also consider the "public policy behind the statute and the statute's legislative history." *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cty.*, 159 Idaho 84, 87, 356 P.3d 377, 380 (2015).

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looked at the next subsection, I.C. § 56-209b(4), which stated that "[i]f a settlement or judgment is received by the recipient without delineating what portion of the settlement or judgment is in payment of medical expenses, it will be presumed that the settlement or judgment applies first to the medical expenses incurred by the recipient *in an amount equal to the expenditure for medical assistance benefits paid by the department* as a result of the occurrence giving rise to the payment or payments to the recipient" (emphasis added).

Section 48-602(1)'s current language came from a 1993 amendment. Before then, the statute defined "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity or any agent or servant thereof." 1993 Idaho Sess. Laws Ch. 102 (H.B. 109). Among other changes, the amendment limited that definition by inserting the qualifying phrase "although not" at the end and adding the current list of exceptions. *Id.*

Before 1993, the ICPA appears to have allowed claims brought under it to be transferred to others, in that there was no language prohibiting such transfers. By inserting the new language, however, the legislature expressly ended any such transferability. "When the legislature amends a statute it is deemed, absent an express indication to the contrary, to be indicative of changed legislative intent." *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987).[7]

The current form of § 48-602(1) shows a legislative intent that ICPA claims remain with the actual purchaser—and with the actual purchaser alone. In fact, the legislature went to great lengths to include a near-exhaustive list of entities that do not constitute persons entitled to bring ICPA claims: "a legal entity or any agent, assignee, heir, employee, representative or servant" of the actual purchaser. I.C. § 48-602(1). Given this extensive list, there is no room for a subrogee like Western Community to step in and subvert the clear legislative purpose.

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[7] The 1993 amendment contains no express indication to the contrary. The legislature's statement of purpose as to the amendments to § 48-602(1) merely indicates it was meant "to clarify existing definitions, as well as add new definitions." 1993 Idaho Sess. Laws Ch. 102 (H.B. 109).

4. Trinity Universal Ins. Co. of Kansas *applies.*

The trial court here relied on *Trinity Universal Ins. Co. of Kansas*, 312 P.3d 976 (Wash. App. Div. 1 2013), to hold that in the absence of express language in the insurance policy allowing subrogation of an insured's statutory consumer protection act claims, there was no right to subrogate such claims.[8]

In the most basic sense, Western Community's contention that *Trinity* does not state the law of Idaho is correct: *Trinity* is a decision from the State of Washington; moreover, Idaho courts have never addressed the transferability of ICPA claims via subrogation. But a basic principle from *Trinity* has relevance here. As the court noted there, "Trinity [the co-primary insurer] remains a third party, without standing to assert [the excess insurer's] ... claims against [the other co-primary insurer]." *Trinity*, 176 Wash. App. at 205. Thus, an insurer was not able to subrogate its way into first-party status with respect to bad faith claims. This holding is consistent with this Court's holding in *Stonewall* (discussed above). And the situation is analogous to an insurer (like Western Community here) trying to "subrogate its way" into actual-purchaser status to bring ICPA claims. Nonetheless, in the face of the limiting language of I.C. 48-602(1), a subrogee is prohibited from bringing its subrogor's ICPA claims.

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[8] In so ruling, the trial court left open the possibility that ICPA claims could be subrogated if the proper language were present. Krone submits that, given the limiting language contained in ICPA's definition of "person," claims under it can *never* be subrogated. Nonetheless, an affirmance of the trial court's decision is still appropriate. "Where the final judgment of the district court is entered upon a different theory, it will be upheld on the correct theory." *Lemmon v. Hardy*, 95 Idaho 778, 781, 519 P.2d 1168, 1171 n.3 (1974).

5. *Even if ICPA claims may be subrogated, the jury verdict in favor of Krone renders dismissal of those claims harmless error.*

Western Community attempted to bring two claims under the ICPA. First, it claimed Krone violated I.C. § 48-603(5) "by representing that the New Equipment and Extended Warranties would provide for the replacement of the damaged parts and the repair and restoration of the Krone Chopper to its pre-loss condition when [Krone] knew, or in the exercise of due care, should have known [it] would not." R. Vol. 1, p. 23 ¶ XXIX. Second, it claimed Krone violated I.C. § 48-603(7) "by representing the Krone Chopper and Warranties were of a particular standard, quality or grade when they were not." R. Vol. 1, p. 25 ¶ XXXV.

Western Community's ICPA claims provide for liability only if Krone represented that the New Equipment or Extended Warranty had "characteristics . . . uses, [or] benefits . . . *that they do not have*" (I.C. § 48-603(5) (emphasis added)) or if Krone represented they "are of a particular standard, quality or grade . . . *if they are of another*." I.C. § 48-603(7) (emphasis added).

Importantly, on the remaining claims tried, the jury declined to find a breach of either the New Equipment Warranty or the Extended Warranty. As a result, any representation that Krone would repair or replace the Krone Chopper under the New Equipment or Extended Warranty *necessarily* (by virtue of the jury's verdict) was not false, misleading, or deceptive—because the conditions precedent to trigger either warranty never occurred. Western Community therefore cannot show that either of the warranties possessed characteristics or qualities other than those

they were represented to possess. As such, any posited error arising from the trial court's dismissal of the ICPA claims was harmless.

B. The trial court properly exercised its discretion to deny Appellants' Motion for New Trial.

This Court "reviews a trial court's determinations regarding motions for new trial ... for abuse of discretion." *Carillo v. Boise Tire Co.*, 152 Idaho 741, 748, 274 P.3d 1256, 1263 (2012). A motion's denial "will not be disturbed absent a showing of manifest abuse." *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 30, 105 P.3d 676, 690 (2005). Appellate review evaluates "whether the trial court perceived the issue as one of discretion, acted within the outer boundaries of its discretion and consistent with legal standards, and made the decision with an exercise of reason." *Id.*

1. The supposed "new factual and legal defenses" were properly allowed.

Western Community attempts to argue the trial court wrongly allowed Krone and Burks to clarify earlier inaccuracies regarding ownership of the Krone Chopper at the time of purchase.[9] In particular, a clarification was allowed that Krone, not Burks, owned it when purchased by DNJ. This argument is unpersuasive, however, because the Third Amended Complaint alleged Krone's ownership; as such, the correction had the effect of relieving Appellants of proving an essential element of their claim against Krone: privity of contract. In other words, the clarification made Western Community's job easier—hence, no prejudice.

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[9] As a corollary to this point, Western Community asserts error as to the trial court's granting of Burks' motion for directed verdict on the basis that Burks was not in privity of contract with DNJ. As this specific argument is not direct to Krone, Krone makes no response.

Indeed, Paragraph IX of Western Community's Third Amended Complaint alleged no less than thrice that Krone NA owned the Krone Chopper at all times. See R. Vol. 1, p. 117: Paragraph VIII (alleging Krone was the "manufacturer/owner of the Krone Chopper" at the time it was purchased by DNJ and that the Krone Chopper was purchased "from Krone NA"); R. Vol. 1, p. 116 (alleging the Chopper was "owned by Krone NA and sold to DNJ on its behalf by Burks"). Western Community now claims it and DNJ were somehow prejudiced by Krone's later admission that it owned the Krone Chopper at the time of the sale—the very fact alleged in the Third Amended Complaint.

Notably, Western Community and DNJ failed to conduct any discovery on the issue of the Krone Chopper's ownership at the time of the purchase. As such, the facts surrounding ownership were not determined until shortly before trial. Once this determination was made, Krone and Burks promptly made the necessary corrections. In arguing the trial court should not have allowed Krone to admit ownership at trial, Western Community and DNJ *are essentially asking this Court to order a new trial based on facts known to be false.* In addition to being entirely unprecedented, any such order would in effect require Krone's attorneys to violate the Idaho Rules of Professional Conduct. *See* I.R.P.C. Rule 3.3 (a)(3) ("a lawyer shall not knowingly offer evidence that the lawyer knows to be false").

The bottom line here is that Krone and Burks made a mistake on an issue on which no discovery was conducted, fixed the mistake before trial, and in doing so actually made Western Community's job easier by removing an element of its claims at trial. To call the situation anything else is to accuse Krone of hiding a ball when doing so was of absolutely no benefit (or

harm, for that matter) to Krone. And if Western Community had any reason to question the incorrect assertion regarding ownership, they could and should have conducted discovery on the issue but chose not to. Finally, the trial court's decision is a matter of sound discretion; there is nothing in the record to suggest the trial judge did anything other than exercise such discretion in a rational fashion.

2. The requested agency instruction was properly refused.

a. An agency instruction was not supported by the pleadings.

"Only instructions which are pertinent to the pleadings and the evidence should be given." *Sherwood v. Carter*, 119 Idaho 246, 260, 805 P.2d 452, 466 (1991). Whether a proposed jury instruction is supported "is committed to the discretion of the trial court." *Craig Johnson Const., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 800, 134 P.3d 648, 651 (2006).

Western Community and DNJ have not identified a pleading that put agency at issue; neither Krone nor Burks consented to trying the case on the issue. In fact, the trial court even noted that the "defense was, other than inferentially here as to this dealership agreement, fairly adamant about allowing anything to go outside the scope of the pleadings." Tr. Vol. 1, p. 988:23-989:1. Because the pleadings did not put agency at issue, the trial court denied an agency instruction on the basis that "it would be manifestly unjust for the court to decide the case on theories not considered by the parties." Tr. Vol. 1, p. 988:15-17.

Having failed to show where agency was raised in the pleadings (and it was not), the trial court did not err in declining to submit an agency instruction to the jury.

b. Western Community's oral request for an agency instruction during the instruction conference did not comply with Rule 51.

To request a jury instruction, a party must "file written requests" "no later than five (5) days before the commencement of any trial by jury." I.R.C.P. 51(a)(1).[10] The rule specifically provides that "the court shall not be required to consider any requested instructions not filed and served upon the parties as required by this rule." *Id.* There is no error if instructions are refused when they were not submitted in accordance with Rule 51. *Lunders v. Estate of Snyder*, 131 Idaho 689, 697, 963 P.2d 372, 380 (1998).

Here, a written request for an agency instruction was *never* filed. The only such request was an oral one during the instruction conference. Moreover, the language of the proposed instruction was never even offered. Tr. Vol. 1, p. 983:19-25. To the extent Western Community can even be considered as having requested a jury instruction on agency, the request was properly denied for failure to comply with Rule 51.

Furthermore, though instructions *may* be requested less than five days before trial if the "requested instructions concern matters arising during the trial of the action which could not reasonably have been anticipated," (I.R.C.P. 51(a)(1)), this provision does not help Western Community. First, even the previously unanticipated instructions must be "file[d] and serve[d]." *Id.* They were not here. Second, the potential need for an agency instruction could have been reasonably anticipated more than five days before trial. On March 24, 2016 (a full 12 days before trial), when Western Community became aware that Krone was admitting it owned the Krone

[10] This rule was amended effective July 1, 2016 (after the trial of this case). But its current form retains the same substance as the previous version.

Chopper at the time of the sale, Western Community could have anticipated a potential need for an agency instruction to tie Burks to Krone, in that there was no longer any contractual privity between Burks and DNJ. At any rate, because Western Community's request for an agency instruction did not comply with Rule 51(a)(1)'s requirements, the request was properly denied.

c. Even if an agency instruction was warranted, any error from the trial court's refusal to submit one was rendered harmless by the jury's verdict.

"The burden is on the appellant to sow prejudicial error from an erroneous jury instruction, and it must be clearly shown." *Clark v. Klein*, 137 Idaho 154, 45 P.3d 810, 815 (2002). Here, the jury found there was no breach of either warranty. Whether the jury was instructed as to Burks' agency is thus irrelevant, because there is no liability to impute onto Krone. *See Finck v. Hoskins*, 94 Idaho 524, 526, 492 P.2d 936, 938 (1972) (potentially erroneous damages instruction was of no prejudicial effect due to defense verdict). Western Community therefore cannot meet its burden to show prejudicial error, even if the instruction were improperly denied (it was not).

C. Krone is entitled to its reasonable attorneys' fees and costs incurred in this appeal.

The prevailing party in a civil action arising from "any commercial transaction . . . shall be allowed a reasonable attorney's fee to be set by the court." I.C. § 12-120(3). For purposes of this statute, a commercial transaction "is defined to mean all transactions except transactions for personal or household purposes." *Id.* Because the Krone Chopper was purchased by DNJ for business use, this case involves a commercial transaction; reasonable attorneys' fees incurred at trial and on appeal shall be awarded to the prevailing party. *Med Recovery Servs., LLC v.*

Bonneville Billing & Collections, Inc., 157 Idaho 395, 402, 336 P.3d 802, 809 (2014). Krone accordingly requests its reasonable attorneys' fees incurred in this appeal.

VI. Conclusion

Western Community's Motion to Amend its Complaint to assert claims under the ICPA was properly denied. Western Community had no valid ICPA claims, because Western Community is not a "person" within the ICPA's meaning. That statute provides a limitation on an insurer's general right to subrogation. Moreover, allowing subrogation of such claims would defeat the ICPA's legislative purpose. Furthermore, even if a subrogee were allowed to assert such claims, any error resulting from the trial court's denial of Western Community's Motion to Amend was harmless here, due to the jury's verdict finding there was no breach of the New Equipment or Extended Warranty.

Additionally, the trial court properly denied Western Community's and DNJ's Motion for New Trial. Not only did Western Community fail to identify how its orally requested agency instruction was supported by the pleadings, its request for such an instruction during the instruction conference did not comply with Idaho Rule of Civil Procedure 51. This fact alone is grounds to properly deny a request for an instruction.

Furthermore, there was no error in allowing Krone and Burks to proceed to trial based on the realization that Krone (not Burks) owned the Krone Chopper at the time of sale. Western Community cannot demonstrate any prejudice from the admission; it was a fact alleged in its own Third Amended Complaint.

For these reasons, Krone respectfully requests that the Court affirm the trial court's denial of Western Community's Motion to Amend its Complaint, and its Motion for New Trial. Krone also asks for an award of reasonable attorneys' fees incurred on this appeal.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 3 day of March, 2017, I caused a true and correct copy of the foregoing **RESPONDENT KRONE NA, INC.'S BRIEF** to be served upon the following persons in the following manner:

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Certificate of Compliance

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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