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### Western Community Insurance Company v. Burks Tractor Company, Inc. Clerk's Record Dckt. 44372

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs/Appellants )

vs )

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

Defendants/Respondents )

SUPREME COURT NO. 44372  
CASE NO. CV 2014-2977

CLERK'S RECORD ON APPEAL

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

HONORABLE RANDY J. STOKER  
District Judge

RODNEY SAETRUM  
DAVID LLOYD  
SAETRUM LAW OFFICES  
P. O. Box 7425  
Boise, ID 83707

MICHAEL BRADY  
BRADY LAW CHARTERED  
2537 W. State Street, Suite 200  
Boise, ID 83702

ATTORNEYS FOR APPELLANTS

ATTORNEY FOR RESPONDENT  
BURKS TRACTOR

BEN CLUFF  
DAVID COLEMAN  
COLEMAN, RITCHIE & CLUFF  
P. O. Box 525  
Twin Falls, ID 83303-0525

ATTORNEY FOR RESPONDENT KRONE NA, INC.

TWIN FALLS COUNTY DISTRICT COURT

**CASE SUMMARY**

**CASE NO. CV-2014-2977**

Western Community Insurance Company  
 vs.  
 Burks Tractor Company, Inc., An Idaho Corporation,  
 Krone NA, Inc., A Delaware Corporation

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Location: Twin Falls County District Court  
 Judicial Officer: Bevan, G. Richard  
 Filed on: 07/22/2014

CASE INFORMATION

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

DATE

CASE ASSIGNMENT

Current Case Assignment	
Case Number	CV-2014-2977
Court	Twin Falls County District Court
Date Assigned	07/22/2014
Judicial Officer	Bevan, G. Richard

PARTY INFORMATION

Party	Name	Lead Attorneys
Plaintiff	Western Community Insurance Company	Saetrum, Rodney R. <i>Retained</i> 208-336-0484(W)
Defendant	Burks Tractor Company, Inc., An Idaho Corporation	Brady, Michael George <i>Retained</i> 208-345-8400(W)
	Krone NA, Inc., A Delaware Corporation	Cluff, Benjamin John <i>Retained</i> 208-734-1224(W)
Cross Claimant	Burks Tractor Company, Inc., An Idaho Corporation	Brady, Michael George <i>Retained</i> 208-345-8400(W)
Cross Defendant	Krone NA, Inc., A Delaware Corporation	Cluff, Benjamin John <i>Retained</i> 208-734-1224(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX

07/22/2014	New Case Filed Other Claims <i>New Case Filed-Other Claims</i>	
07/22/2014	Notice of Appearance <i>Plaintiff: Western Community Insurance Company Appearance Rodney R. Saetrum</i>	
07/22/2014	Miscellaneous <i>Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Saetrum Law Offices Receipt number: 1418698 Dated: 7/22/2014 Amount: \$221.00 (Check) For: Western Community Insurance Company (plaintiff)</i>	
07/22/2014	Complaint Filed <i>Complaint And Demand for Jury Trial</i>	
07/22/2014	Summons Issued and Retained <i>Summons Issued And Retained x2</i>	

**CASE SUMMARY****CASE No. CV-2014-2977**

07/29/2014	Miscellaneous <i>Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Worst Fitzgerald &amp; Stover Receipt number: 1419351 Dated: 7/29/2014 Amount: \$9.00 (Cash)</i>
09/23/2014	Miscellaneous <i>Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Brady Law Receipt number: 1423917 Dated: 9/23/2014 Amount: \$136.00 (Check) For: Burks Tractor Company, Inc., An Idaho Corporation (defendant)</i>
09/23/2014	Notice of Appearance <i>Notice Of Appearance</i>
09/24/2014	Notice of Appearance <i>Defendant: Burks Tractor Company, Inc., An Idaho Corporation Appearance Michael G. Brady</i>
09/29/2014	Motion <i>Motion for Pro Hac Vice Admission</i>
09/30/2014	Order <i>Order Granting Motion for Pro Hac Vice Admission</i>
10/03/2014	Hearing Scheduled <i>Hearing Scheduled (Motion to Dismiss 11/03/2014 09:30 AM) claims against Krone</i>
10/03/2014	Miscellaneous <i>Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: COleman, Ritchie &amp; Coleman Receipt number: 1424844 Dated: 10/3/2014 Amount: \$136.00 (Check) For: Krone NA, Inc., A Delaware Corporation (defendant)</i>
10/03/2014	Notice of Appearance <i>Defendant: Krone NA, Inc., A Delaware Corporation Appearance Benjamin John Cluff</i>
10/04/2014	Notice of Hearing <i>Notice Of Hearing</i>
10/04/2014	Motion to Dismiss Case <i>Motion To Dismiss</i>
10/04/2014	Brief Filed <i>Defendant Krone NA, Inc's Brief In Support of Motion to Dismiss</i>
10/08/2014	Continued (Judicial Officer: Bevan, G. Richard ) <i>Continued (Motion to Dismiss 11/10/2014 09:30 AM) claims against Krone</i>
10/09/2014	Continued (Judicial Officer: Bevan, G. Richard ) <i>Continued (Motion to Dismiss 11/17/2014 09:30 AM) claims against Krone</i>
10/09/2014	Notice of Hearing <i>Amended Notice Of Hearing</i>
10/23/2014	Answer <i>Answer to Complaint, Cross-Claim, and Demand for Jury Trial</i>
10/27/2014	Notice of Hearing <i>Notice Of Hearing Re: Burks Tractor Company, Inc.'s Motion to Dismiss</i>
10/27/2014	Motion to Dismiss Case <i>Burks Tractor Company, Inc.'s Motion To Dismiss</i>

**CASE SUMMARY**

**CASE NO. CV-2014-2977**

10/27/2014 Memorandum  
*Memorandum in Support of Burks Tractor Company, Inc.'s Motion to Dismiss*

11/04/2014 Answer  
*Defendant Krone's Answer to Defendant Burks's Cross-Claim*

11/10/2014 Miscellaneous  
*Plaintiffs' Opposition to Defendants' Motion to Dismiss*

11/17/2014 DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Motion to Dismiss scheduled on 11/17/2014 09:30 AM: District Court Hearing Held*  
*Court Reporter: Virginia Bailey*  
*Number of Transcript Pages for this hearing estimated: claims against Krone*

11/17/2014 Court Minutes  
*Court Minutes*

11/17/2014 **Motion to Dismiss (9:30 AM)** (Judicial Officer: Bevan, G. Richard)  
*claims against Krone Hearing result for Motion to Dismiss scheduled on 11/17/2014 09:30 AM: District Court Hearing Held*  
*Court Reporter: Virginia Bailey*  
*Number of Transcript Pages for this hearing estimated:*

11/26/2014 Memorandum  
*Supplemental Memorandum in Support of Burks Tractor Company, Inc.'s Motion to Dismiss*

11/26/2014 Brief Filed  
*Plaintiffs' Supplemental Briefing in Support of Opposition to Defendants' Motion to Dismiss*

11/26/2014 Brief Filed  
*Defendant Krone's Supplemental Brief in Support of its Motion to Dismiss*

12/17/2014 Hearing Scheduled  
*Hearing Scheduled (Scheduling Conference 01/05/2015 09:30 AM)*

12/17/2014 Order  
*Order for Scheduling Conference and Order Re: Motion Practice*

12/18/2014 Memorandum  
*Memorandum and Order Re Motions to Dismiss*

12/29/2014 Judgment  
*Judgment Dismissing Defendant Burks Tractor Company, Inc.*

12/29/2014 Civil Disposition Entered  
*Civil Disposition/Judgment entered: entered for: Burks Tractor Company, Inc., An Idaho Corporation, Defendant; Western Community Insurance Company, Plaintiff. Filing date: 12/29/2014*

12/29/2014 Notice  
*Plaintiff's Notice of Objection to Proposed Judgment Dismissing Defendant Burkes Tractor Company, Inc. with Prejudice*

12/30/2014 Continued (Judicial Officer: Bevan, G. Richard )  
*Continued (Scheduling Conference 01/05/2015 09:00 AM) By telephone - Mr. Lloyd (Saetrum's Office) is to initiate the call to counsel and the Court*

12/30/2014 Notice of Hearing  
*Notice Of Hearing*

**CASE SUMMARY**

CASE NO. CV-2014-2977

12/31/2014	Partial Judgment Or Opinion Filed <i>Partial Judgment</i>
01/05/2015	DC Hearing Held: Court Reporter: # of Pages: <i>Hearing result for Scheduling Conference scheduled on 01/05/2015 09:00 AM: District Court Hearing Held</i> <i>Court Reporter: Virginia Bailey</i> <i>Number of Transcript Pages for this hearing estimated: By telephone - Mr. Lloyd (Saetrum's Office) is to initiate the call to counsel and the Court</i>
01/05/2015	Court Minutes <i>Court Minutes</i>
01/05/2015	Hearing Scheduled <i>Hearing Scheduled (Motion 02/04/2015 09:30 AM)</i>
01/05/2015	<b>Scheduling Conference (9:00 AM)</b> (Judicial Officer: Bevan, G. Richard) <i>By telephone - Mr. Lloyd (Saetrum's Office) is to initiate the call to counsel and the Court Hearing result for Scheduling Conference scheduled on 01/05/2015 09:00 AM: District Court Hearing Held</i> <i>Court Reporter: Virginia Bailey</i> <i>Number of Transcript Pages for this hearing estimated:</i>
01/12/2015	Stipulation <i>Stipulation for Scheduling and Planning</i>
01/12/2015	Notice of Hearing <i>Notice Of Hearing</i>
01/12/2015	Motion for Reconsideration <i>Plaintiff's Motion for Reconsideration Re: Judgment Dismissing Defendant Burks Tractor, Inc. Dated December 29, 2014</i>
01/21/2015	Notice of Hearing <i>Notice Of Hearing</i>
01/21/2015	Motion <i>Plaintiff's Motion to Amend Complaint and Demand for Jury Trial</i>
01/21/2015	Memorandum <i>Plaintiff's Memorandum in Support of Plaintiff's Motion to Amend complaint and Demand for Jury Trial</i>
01/26/2015	Memorandum <i>Defendant Burks' Memorandum Brief in Opposition to Plaintiff's Motion for Reconsideration Re: Judgment Dismissing Defendant Burks Tractor, Inc.</i>
01/26/2015	Memorandum <i>Defendant' Burks' Memorandum Brief in Opposition to Plaintiff's Motion to Amend Complaint and Demand for Jury Trial</i>
01/30/2015	Hearing Scheduled <i>Hearing Scheduled (Jury Trial 04/05/2016 09:00 AM) 5 days</i>
01/30/2015	Hearing Scheduled <i>Hearing Scheduled (Civil Pretrial Conference 03/07/2016 09:30 AM)</i>
01/30/2015	Hearing Scheduled <i>Hearing Scheduled (Status/ADR 02/08/2016 09:30 AM)</i>
01/30/2015	Continued (Judicial Officer: Bevan, G. Richard ) <i>Continued (Motion 03/16/2015 09:30 AM)</i>

**CASE SUMMARY**

**CASE NO. CV-2014-2977**

01/30/2015 Miscellaneous  
*\*\*\*RE-SET\*\*\* Notice Of Hearing*

01/30/2015 Notice  
*Notice of Jury Trial Setting, Pretrial Conference and Order Governing Further Proceedings*

01/30/2015 Stipulation  
*Stipulation for Filing First Amended Complaint and Demand for Jury Trial*

02/02/2015 Order  
*Order Re: First Amended Complaint and Demand for Jury Trial*

02/25/2015 Notice of Hearing  
*Notice Of Hearing*

02/25/2015 Motion  
*Defendant Krone NA, Inc.'s Motion to Strike*

02/25/2015 Brief Filed  
*Defendant Krone NA, Inc.'s Brief in Support of Motion to Strike*

02/25/2015 Affidavit  
*Affidavit of Benjamin J. Cluff in Support of Defendant Krone, NA, Inc.'s Motion to Strike*

02/25/2015 Motion to Dismiss Case  
*Defendant Krone NA, Inc.'s Motion to Dismiss First Amended Complaint*

02/25/2015 Brief Filed  
*Defendant Krone NA, Inc.'s Brief in Support of Motion to Dismiss First Amended Complaint*

03/03/2015 Continued (Judicial Officer: Bevan, G. Richard )  
*Continued (Motion 03/16/2015 09:15 AM) also Motion to Strike and Motion to Dismiss Amended Complaint - by telephone*

03/03/2015 Notice of Hearing  
*Amended Notice of Hearing (telephonic)*

03/09/2015 Miscellaneous  
*Plaintiffs' Opposition to Defendant Krone NA's Motion to Dismiss First Amended Complaint and Motion to Strike*

03/09/2015 Hearing Vacated  
*Hearing result for Motion scheduled on 03/16/2015 09:15 AM: Hearing Vacated also Motion to Strike and Motion to Dismiss Amended Complaint - by telephone (to be re-set)*

03/12/2015 Hearing Scheduled  
*Hearing Scheduled (Motion 04/13/2015 10:00 AM)*

03/13/2015 Notice of Hearing  
*Second Amended Notice Of Hearing (telephonic)*

03/16/2015 **Motion Hearing (9:15 AM)** (Judicial Officer: Bevan, G. Richard)  
*also Motion to Strike and Motion to Dismiss Amended Complaint - by telephone Hearing result for Motion scheduled on 03/16/2015 09:15 AM: Hearing Vacated*

03/17/2015 Notice of Hearing  
*Amended Notice Of Hearing*

**CASE SUMMARY**

**CASE NO. CV-2014-2977**

04/08/2015 Notice of Service  
*Notice Of Service of Defendant Krone NA's First Interrogatories and Requests for Production to Plaintiff Western Community Insurance*

04/08/2015 Notice of Service  
*Notice Of Service of Defendant Krone NA's First Interrogatories and Requests for Production to Plaintiff Burks Tractor Company*

04/08/2015 Notice of Service  
*Notice Of Service of Defendant Krone NA's First Interrogatories and Requests for Production to Plaintiff DNJ, Inc.*

04/13/2015 DC Hearing Held: Court Reporter: # of Pages:  
*Hearing result for Motion scheduled on 04/13/2015 10:00 AM: District Court Hearing Held Court Reporter: Virginia Bailey Number of Transcript Pages for this hearing estimated: VARIOUS MOTIONS*

04/13/2015 Court Minutes  
*Court Minutes*

04/13/2015 **Motion Hearing** (10:00 AM) (Judicial Officer: Bevan, G. Richard)  
*VARIOUS MOTIONS Hearing result for Motion scheduled on 04/13/2015 10:00 AM: District Court Hearing Held Court Reporter: Virginia Bailey Number of Transcript Pages for this hearing estimated:*

04/21/2015 Memorandum  
*Memorandum and Order Re Motion for Reconsideration*


05/05/2015 Order  
*Memorandum and Order RE Motion to Amend Complaint*


05/11/2015 Judgment  
*Amended Judgment Dismissing Defendant Burks Tractor Company, Inc. Without Prejudice*


05/11/2015 Civil Disposition Entered  
*Civil Disposition/Judgment entered: entered for: Burks Tractor Company, Inc., An Idaho Corporation, Defendant; Western Community Insurance Company, Plaintiff. Filing date: 5/11/2015*


05/20/2015 Complaint Filed  
*Second Amended Complaint and Demand for Jury Trial*

06/08/2015 Answer  
*Defendant Burks Tractor Company, Inc.'s Answer to Second Amended Complaint, Cross-Claim, and Demand for Jury Trial*

07/20/2015  Answer  
*Answer to Plaintiffs' Second Amended Complaint and Answer to Defendant Burks Tractor Company, Inc.'s Cross-Claim Against Krone NA, Inc.*


















07/21/2015  Notice of Service  
*of Discovery Responses*

07/23/2015  Motion for Summary Judgment  
*Defendants' Joint Motion for Summary Judgment*

07/23/2015  Statement  
*Statement of Uncontroverted Material Facts in Support of Defendant's Joint Motion for Summary Judgment*





















**CASE SUMMARY**  
**CASE NO. CV-2014-2977**

- 07/23/2015  Memorandum  
*Memorandum in Support of Defendants' Joint Motion for Summary Judgment*
- 07/23/2015  Certificate of Service  
*Certificate of Service of Affidavit of Ken Stratton in Support of Defendants' Joint Motion for Summary Judgment*
- 07/23/2015  Affidavit  
*Affidavit of Ken Stratton*
- 07/24/2015  Notice of Hearing
- 08/20/2015  Notice of Taking Deposition
- 08/20/2015  Notice of Hearing
- 08/26/2015 Scanned  
*Bulk*
- 08/31/2015  Motion  
*Plaintiffs' Motion to Strike the Affidavit Testimony of Ken Stratton*
- 08/31/2015  Miscellaneous  
*Plaintiffs' Opposition to Defendants' Joint Motion for Summary Judgment*
- 08/31/2015  Affidavit  
*Affidavit of Dell Jaynes in Support of Plaintiffs' Opposition to Defendants' Joint Motion for Summary Judgment*
- 09/08/2015  Notice of Taking Deposition  
*Notice of Deposition of Leslie Preston*
- 09/09/2015  Stipulation  
*Stipulation to Withdraw Defendants' Joint Motion for Summary Judgment*
- 09/14/2015  **CANCELED Motion for Summary Judgment (9:30 AM) (Judicial Officer: Bevan, G. Richard)**  
*Vacated*
- 09/16/2015  Order  
*Withdrawing Defendants' Joint Motion for Summary Judgment*
- 09/23/2015  Notice of Taking Deposition
- 09/23/2015  Notice of Taking Deposition
- 09/23/2015  Notice of Taking Deposition
- 09/23/2015  Notice of Service

# CASE SUMMARY















CASE NO. CV-2014-2977

09/23/2015	 Notice of Service
09/24/2015	 Notice of Taking Deposition <i>Ken Stratton</i>
09/24/2015	 Notice of Taking Deposition <i>Leslie Preston</i>
09/29/2015	 Notice of Taking Deposition <i>Ken Stratton - Amended</i>
10/05/2015	 Notice of Taking Deposition <i>of Shane Ruffing</i>
10/13/2015	 Affidavit of Service <i>Shane Ruffing, 10/07/2015</i>
10/16/2015	 Stipulation <i>Stipulation to Extend Pre Trial Deadlines</i>
10/20/2015	 Order <i>Re: Stipulation to Extend Pre Trial Deadlines</i>
10/30/2015	 Notice of Taking Deposition <i>Amended Notice of Deposition of Leslie Preston</i>
11/02/2015	 Notice <i>Notice of Preparation of Transcript and Filing</i>
11/04/2015	 Notice of Taking Deposition <i>Second Amended Notice of Deposition of Leslie Preston</i>
11/06/2015	 Stipulation <i>Amended Stipulation to Extend Pre Trial Deadlines</i>
11/09/2015	 Order <i>Re: Amended Stipulation to Extend Pre Trial Deadlines</i>
11/30/2015	 Notice <i>of Change of Address and Phone Number</i>
12/17/2015	 Witness List <i>Plaintiffs' Expert Witness Disclosure</i>
12/17/2015	 Complaint Filed <i>Third Amended Complaint and Demand for Jury Trial</i>
01/04/2016	 Stipulation <i>Second Amended Stipulation to Extend Pre- Trial Deadlines</i>
01/05/2016	 Order

# CASE SUMMARY

CASE NO. CV-2014-2977
















*Re: Second Amended Stipulation to Extend Pre-Trial Deadlines*

- 01/11/2016  Notice of Taking Deposition  
*Notice of Video-Taped Deposition of Slade Rowland*
- 01/26/2016 Scanned  
*Final*
- 02/01/2016  Notice of Taking Deposition Duces Tecum  
*of Scott Kimbrough*
- 02/02/2016  Motion  
*Motion to Strike Third Amended Complaint*
- 02/08/2016 **Status Conference (9:15 AM)** (Judicial Officer: Bevan, G. Richard)  
*Mr. Brady to appear by telephone, calling into the Court at 735-4372*
- 02/08/2016  Amended  
*Amended Notice of Deposition Duces Tecum of Scott Kimbrough*
- 02/11/2016  Notice of Hearing
- 02/12/2016  Affidavit in Support of Motion  
*Supplemental Suggestions In Support of Defendant Krone, Inc.'s Motion to Strike Third Amended Complaint*
- 02/16/2016  Miscellaneous  
*Plaintiffs' Opposition to Defendant Krone NA's Motion to Strike Plaintiffs' Third Amended Complaint*
- 02/16/2016  Affidavit  
*of David W. Lloyd in Support of Plaintiffs' Opposition to Defendant Krone NA's Motion to Strike Plaintiffs' Third Amended Complaint*
- 02/17/2016  Witness Disclosure  
*Disclosure of Defendant/Cross-Claimant Burks Tractor Company, Inc.'s Lay Witnesses*
- 02/22/2016  **Motion Hearing - Civil (9:00 AM)** (Judicial Officer: Bevan, G. Richard)  
*Mr. Dupont via telephone to the Court at 735-4372*
- 02/22/2016 DC Hearing Held: Court Reporter: # of Pages:  
*Virginia Bailey*
- 02/22/2016  Court Minutes
- 02/25/2016  Motion  
*Defendant Krone's Motion in Limine to Exclude Scott Kimbrough's Opinions*
- 02/26/2016  Miscellaneous  
*Second Supplemental Suggestions in Support of Defendant Krone's Motion to Strike Third Amended Complaint*
- 02/26/2016  Supplemental Brief Filed

# CASE SUMMARY















CASE NO. CV-2014-2977

*Plaintiffs' Supplemental Briefing in Opposition to Defendant Krone NA's Motion to Strike Plaintiffs' Third Amended Complaint*

- 02/29/2016  **Witness Disclosure**  
*Disclosure of Defendant Krone NA, Inc.'s Lay and Expert Witnesses*
  
- 02/29/2016  **Witness Disclosure**  
*Disclosure of Plaintiffs' Lay Witnesses*
  
- 02/29/2016  **Notice of Service**  
*of Disclosure of Defendant/Cross-Claimant Burks Tractor Company, Inc.'s Expert Witnesses*
  
- 03/01/2016  **Reply**  
*Krone's Sur-Reply to Plaintiffs' Supplemental Briefing in opposition to Krone's Motion to Strike Third Amended Complaint*
  
- 03/01/2016  **Order**  
*Re Motion to Strike*
  
- 03/03/2016  **Notice of Hearing**
  
- 03/04/2016  **Miscellaneous**  
*Plaintiffs' Opposition to the March 3, 2016 Notice of Hearing on Defendant Krone's Motion in Limine to Exclude Scott Kimbrough's Opinions*
  
- 03/07/2016  **Pre-trial - Civil (9:30 AM)** (Judicial Officer: Bevan, G. Richard)  
*Also Motion in Limine*
  
- 03/07/2016 DC Hearing Held: Court Reporter: # of Pages:  
*Virginia Bailey*
  
- 03/07/2016  **Court Minutes**
  
- 03/09/2016  **Motion for Reconsideration**  
*Krone NA's Motion for Reconsideration of Order Denying Krone's Motion to Strike Plaintiffs' Third Amended Complaint*
  
- 03/09/2016  **Motion**  
*Defendants/Cross-Claimant Burks Tractor Company, Inc.'s Joinder of Defendant Krone's Motion in Limine to Exclude Scott Kimbrough's Opinions*
  
- 03/11/2016  **Motion**  
*Krone NA's Motions in Limine*
  
- 03/11/2016  **Notice of Hearing**
  
- 03/11/2016  **Miscellaneous**  
*Burks Tractor Company Inc.'s Joinder of Defendant Krone's Motions in Limine with Regard to Issues 2, 3, 4, 5, 6, and 7*
  
- 03/14/2016  **Miscellaneous**  
*Krone NA's Withdrawal Of Its Motion to Reconsider*








# CASE SUMMARY

CASE NO. CV-2014-2977

- 03/16/2016  Motion  
*Krone NA's Supplemental Motion in Limine*
- 03/16/2016  Amended  
*Amended Notice of Hearing*
- 03/17/2016  Affidavit  
*Deposition Designation for Slade Rowland*
- 03/18/2016  Miscellaneous  
*Plaintiffs' Opposition to Defendants' Motion in Limine to Exclude Dr. Scott Kimbrough's Opinions*
- 03/18/2016  Affidavit  
*of Dr. Scott Kimbrough in Support of Plaintiffs' Opposition to Motion in Limine to Exclude Scott Kimbrough's Opinions*
- 03/18/2016  Affidavit  
*of David W. Lloyd in Support of Plaintiffs' Opposition to Motion in Limine to Exclude Dr. Scott Kimbrough's Opinions*
- 03/18/2016  Response  
*Plaintiffs' Response and Opposition to Krone NA's Motions in Limine*
- 03/18/2016  Miscellaneous  
*Plaintiffs' Rebuttal Expert Witness Disclosure*
- 03/21/2016  Jury Instructions Filed  
*Plaintiffs' Proposed Non-Standard Jury Instructions*
- 03/21/2016  Exhibit List  
*Defendant/Cross-Claimant Burks Tractor Compnay, Inc.'s List of Trial Exhibits*
- 03/21/2016  Jury Instructions Filed  
*Burks Tractor's Requested Jury Instructions and Special Verdict*
- 03/21/2016  Requested Jury Instructions  
*Krone's Proposed Jury Instructions*
- 03/23/2016  Response  
*Krone NA's Reply to Plaintiffs' Opposition to Krone's Motions in Limine*
- 03/23/2016  Response  
*Krone NA's Reply to Plaintiffs' Opposition to Krone's Motion in Limine to Exclude Scott Kimbrough's Opinions*
- 03/24/2016 **Motion Hearing - Civil (10:00 AM) (Judicial Officer: Bevan, G. Richard)**
- 03/24/2016 DC Hearing Held: Court Reporter: # of Pages:  
*Virginia Bailey*
- 03/24/2016  Court Minutes














**CASE SUMMARY**

**CASE NO. CV-2014-2977**


















- 03/25/2016  Order  
*on Motions in Limine*
  
- 03/29/2016  Answer  
*Defendant Burks Tractor Company, Inc.'s Answer to Third Amended Complaint, Cross-Claim, and Demand for Jury Trial*
  
- 03/30/2016  Motion  
*to Strike Defendant Burks' Answers and Affirmative Defenses to Third Amended Complaint*
  
- 03/30/2016  Affidavit  
*of David W. Lloyd in Support of Plaintiffs' Motion to Strike Defendant Burks Answer to the Third Amended Complaint*
  
- 03/30/2016  Memorandum  
*Plaintiffs' Trial Memorandum Regarding Unconscionable Provisions*
  
- 03/31/2016  Memorandum  
*Opinion and Order on Motion in Limine*
  
- 03/31/2016  Memorandum  
*Defendant Burks' Brief in Opposition to Plaintiffs' Motion to Strike Defendant Burks' Answers and Affirmative Defenses to Third Amended Complaint*
  
- 03/31/2016  Memorandum  
*Defendant Burks' Memorandum Brief in Opposition to Plaintiffs' Trial Memorandum Regarding Unconscionable Provisions*
  
- 03/31/2016  Answer  
*to Plaintiffs' Third Amended Complaint - Krone NA's*
  
- 03/31/2016  Memorandum  
*Krone NA's Trial Memorandum in Opposition to Plaintiffs' Trial Memorandum Regarding Unconscionable Provisions*
  
- 03/31/2016  Exhibit List  
*Plaintiffs'*
  
- 03/31/2016  Motion  
*for Shortening Time - Pl's*
  
- 04/01/2016  Amended  
*Amended Notice of Hearing*
  
- 04/01/2016  Motion  
*to Strike Defendant Krone NA's Answers and Affirmative Defenses to Third Amended Complaint*
  
- 04/01/2016  Affidavit in Support of Motion  
*Affidavit of David W. Lloyd in Support of Plaintiffs' Motion to Strike Defendant Krone NA's Answer to The Third Amended Complaint*
  
- 04/01/2016  Notice of Hearing

# CASE SUMMARY

CASE NO. CV-2014-2977

04/01/2016	 Plaintiff's Requested Jury Instructions <i>Plaintiffs' Supplemental</i>
04/04/2016	 Order <i>Shortening Time</i>
04/05/2016	<b>Jury Trial (8:30 AM)</b> (Judicial Officer: Bevan, G. Richard) <b>04/05/2016-04/08/2016</b>
04/05/2016	DC Hearing Held: Court Reporter: # of Pages: <i>Virginia Bailey</i>
04/05/2016	 Court Minutes
04/05/2016	 Jury Packet <i>Jury Trial Work Product Documentation- Misc Documents</i>
04/05/2016	 Preliminary Jury Instructions
04/06/2016	DC Hearing Held: Court Reporter: # of Pages: <i>Virginia Bailey</i>
04/06/2016	 Court Minutes
04/07/2016	DC Hearing Held: Court Reporter: # of Pages: <i>Virginia Bailey</i>
04/07/2016	 Court Minutes
04/08/2016	DC Hearing Held: Court Reporter: # of Pages: <i>Virginia Bailey</i>
04/08/2016	 Court Minutes
04/08/2016	 Final Jury Instructions
04/08/2016	 Verdict form
04/18/2016	 Judgment
04/18/2016	 Judgment
04/18/2016	 Order <i>Granting Motion for Directed Verdict</i>
04/18/2016	<b>Dismissed With Prejudice</b> (Judicial Officer: Bevan, G. Richard) Party (Burks Tractor Company, Inc., An Idaho Corporation)
04/18/2016	<b>Dismissed With Prejudice</b> (Judicial Officer: Bevan, G. Richard) Party (Krone NA, Inc., A Delaware Corporation)
04/18/2016	Civil Disposition Entered

**CASE SUMMARY**  
**CASE NO. CV-2014-2977**

















- 04/20/2016  Memorandum of Costs & Attorney Fees  
*Defendant Burks*
- 04/20/2016  Affidavit  
*of Michael G. Brady in Support of Defendant Burks' Memorandum of Costs*
- 04/20/2016  Affidavit  
*of Michael G. Brady in Support of Defendant Burks' Award of Attorney Fees*
- 04/20/2016  Affidavit  
*of Timothy J. Stover in Support of Defendant Burks' Award of Attorney Fees*
- 04/20/2016  Memorandum  
*Defendant Burks' Memorandum in Support of an Award of Attorney Fees*
- 04/28/2016  Motion  
*Defendant Krone's Motion for Costs and Attorney's Fees Claimed*
- 04/28/2016  Memorandum  
*in Support of Defendant Krone's Motion for Costs and Attorney's Fees Claimed*
- 04/28/2016  Affidavit  
*of Benjamin J. Cluff in Support of Defendant Krone's Motion for Costs and Attorney's Fees Claimed*
- 04/28/2016  Affidavit  
*of Philip R. Dupont in Support of Defendant Krone's Motion for Costs and Attorney's Fees Claimed*
- 05/02/2016  Notice of Hearing
- 05/02/2016  Motion  
*Plaintiffs' Motion for Reconsideration and for New Trial*
- 05/02/2016  Memorandum In Support of Motion  
*for Reconsideration and for New Trial - Plaintiffs'*
- 05/09/2016  Amended  
*Amended Notice of Hearing*
- 05/09/2016  Notice of Hearing
- 05/09/2016  Motion  
*Plaintiffs' Motion to Disallow Some or All of the Costs and Opposition to Defendant Krone's Motion for Costs and Attorney Fees Claimed*
- 05/12/2016  Memorandum In Support of Motion  
*to Disallow Some or All of the Costs and Opposition to Defendant Krone's Motion for Costs and Attorney Fees Claimed*
- 05/13/2016  Memorandum



# CASE SUMMARY

CASE NO. CV-2014-2977

*Burks' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration and for New Trial*

- 05/16/2016  Response  
*Defendant Krone NA's Response to Plaintiffs' Motion for New Trial*
  
- 05/26/2016  Response  
*Defendant Krone NA'S Reply in Support of its Motion for Attorneys' Fees and Costs*
  
- 05/26/2016  Affidavit  
*of Stephen C. Smith in Support of Defendant Krone NA'S Motion for Attorneys' Fees and Costs*
  
- 05/31/2016  **Motion for Reconsideration** (8:45 AM) (Judicial Officer: Bevan, G. Richard)  
*45 minutes - Various Motions - Mr. Saetrum to intiate the call.*
  
- 05/31/2016 DC Hearing Held: Court Reporter: # of Pages:  
*Virginia Bailey*
  
- 05/31/2016  Court Minutes
  
- 06/08/2016  Notice of Hearing  
*on Defendant Krone's Motion for Costs and Attorney's Fees Claimed*
  
- 06/13/2016  Order  
*Denying Plaintiffs' Motion for Reconsider and for New Trial*
  
- 06/14/2016 **Motion Hearing** (10:30 AM) (Judicial Officer: Bevan, G. Richard)
  
- 06/24/2016  Decision or Opinion  
*Memorandum Decision Re: Plaintiffs' Motion for Reconsideration and for New Trial*
  
- 07/07/2016  Decision or Opinion  
*Memorandum Decision Re: Burks Tractor Company's Request for Costs and Attorney Fees*
  
- 07/08/2016  Notice of Appeal
  
- 07/08/2016 Appeal Filed in Supreme Court
  
- 07/12/2016  Judgment  
*Amended*
  
- 07/28/2016  Clerk's Certificate of Appeal
  
- 07/29/2016  Decision or Opinion  
*Memorandum Decision Re: Krone NA, Inc.'s Motion for Attorney's Fees*
  
- 07/29/2016  Motion  
*to Stay Execution of Amended Judgment*
  
- 07/29/2016  Memorandum  
*in Support of Motion to Stay Execution of Amended Judgment*
  
- 08/03/2016  Judgment

**CASE SUMMARY**

**CASE NO. CV-2014-2977**

*Amended*

08/22/2016



Supreme Court Document Filed-Misc

*Notice of Appeal - Transcripts Requested \*\*Set Due Date - Transcripts (Reporter's Lodging date is 10-11-16) and Clerk's Record Due 11-15-16\*\**

DATE

FINANCIAL INFORMATION

<b>Defendant</b> Krone NA, Inc., A Delaware Corporation	
Total Charges	136.00
Total Payments and Credits	136.00
<b>Balance Due as of 10/3/2016</b>	<b>0.00</b>
<b>Cross Claimant</b> Burks Tractor Company, Inc., An Idaho Corporation	
Total Charges	136.00
Total Payments and Credits	136.00
<b>Balance Due as of 10/3/2016</b>	<b>0.00</b>
<b>Other Party</b> Unknown Payor	
Total Charges	9.00
Total Payments and Credits	9.00
<b>Balance Due as of 10/3/2016</b>	<b>0.00</b>
<b>Plaintiff</b> Western Community Insurance Company	
Total Charges	353.00
Total Payments and Credits	353.00
<b>Balance Due as of 10/3/2016</b>	<b>0.00</b>

DISTRICT COURT  
TWIN FALLS CO., IDAHO  
FILED

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BY \_\_\_\_\_ CLERK  
          ps          DEPUTY

Rodney R. Saetrum, ISBN: 2921  
David W. Lloyd, ISBN: 5501  
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs,

v.

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

Defendants.

Case No. CV-14-2977

**COMPLAINT AND  
DEMAND FOR JURY  
TRIAL**

Plaintiff, Western Community Insurance Company, as Subrogee of DNJ, Inc., Subrogor, have and for a cause of action against Defendants, Burks Tractor Company, Inc. and Krone NA, Inc., hereby Complain and allege as follows:

**PARTIES, JURISDICTION AND VENUE**

I.

At all times relevant hereto, Plaintiff Western Community Insurance Company ("Plaintiff Western Community") was and is an insurance company licensed to do business in the State of Idaho. Plaintiff Western Community is the Subrogee of rights to recover against Defendant Burks Tractor Company, Inc. ("Burks Tractor Company"), and Defendant Krone NA, Inc. ("Krone NA") under the provisions of its Insurance Policy Number 08-829801-01 with Subrogor, DNJ, Inc. ("DNJ").

**COMPLAINT AND DEMAND FOR JURY TRIAL - 1**

II.

At all times relevant hereto, DNJ was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State's Office with its principle place of business in Buhl, Idaho.

III.

At all times relevant hereto, Defendant Burks Tractor Company, was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State's Office with its principle place of business in Twin Falls, Idaho.

IV.

At all times relevant hereto, Defendant Krone NA, was a corporation established within the laws of the State of Delaware with its principle place of business in Memphis, Tennessee and was acting under a Certificate of Authority to transact business in Idaho issued by the Idaho Secretary of State's Office.

V.

Jurisdiction is proper in this Court as the amount sought by Plaintiff exceeds \$10,000.00.

VI.

Venue is proper in this County in that Defendant, Burks Tractor Company has its principle place of business in this County and the cause of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

VII.

Venue is proper in this County in that Defendant Krone NA was transacting business in this County and Plaintiff's causes of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

**GENERAL ALLEGATIONS**

VIII.

On September 12, 2012, DNJ executed a Purchaser's Order for Equipment ("Purchase Order") which included the purchase of a 2012 Krone X 1100 Forage Chopper ("Krone Chopper") from Defendant Burks Tractor Company. The Purchase Order was a contract for the sale of goods and identified the Krone Chopper by its Vin Number 841659. Under the terms of the Purchase Order, the purchase price of the Krone Chopper was \$457,529.00.

**COMPLAINT AND DEMAND FOR JURY TRIAL - 2**

IX.

Prior to the purchase of the Krone Chopper, DNJ, had previously purchased a similar Krone forage chopper from Defendant Burks Tractor Company. As part of its regular use of the previously purchased Krone forage chopper, DNJ had been forced to install a metal shield over the fuel tanks to prevent heated chaff and debris from burning through the fuel tanks.

X.

During discussions with Defendant Burks Tractor Company representative, Les Preston, prior to the purchase of the Krone Chopper, DNJ representative, Dell Jaynes, advised Mr. Preston that he had been the forced to install a metal shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris from burning through the fuel tanks. Mr. Preston was familiar with the type of business run by DNJ, including the fact that the DNJ used its Krone choppers as part of its custom farming business, as well as the operating conditions that the Krone Chopper would be used under.

XI.

After being advised by Mr. Jaynes that he had been the forced to install a metal shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris from burning through the fuel tanks and based on his knowledge of the operating conditions that the Krone Chopper would be used under, Mr. Preston recommended that DNJ purchase the Krone Chopper.

XII.

The Krone Chopper was covered by a manufacturer's New Equipment Limited Warranty ("New Equipment Warranty") warranting that the Krone Chopper was free from defects in both material and workmanship. By its express terms, the New Equipment Warranty provided warranty coverage for one (1) year or one season after the date of delivery.

XIII.

At the time it purchased the Krone Chopper, DNJ also purchased a manufacturer's Krone North America Crown Guarantee ("Extended Warranty") for the price of \$20,447.00. By its express terms, the Extended Warranty provided coverage for the entire Krone Chopper for a period of two (2) years from the date of purchase, and covering the drive train of the Krone Chopper for an additional one (1) year.

XIV.

On or about October 15, 2012, the defective fuel tanks of the Krone Chopper caused a fire (“October 15, 2012 fire”) to ignite just below the engine compartment of the Krone Chopper. The October 15, 2012 fire spread from the fuel tanks and ultimately engulfed the entire Krone Chopper. The October 15, 2012 fire resulted in the complete loss and destruction of the Krone Chopper.

XV.

At the time of the October 15, 2012 fire, the value of the Krone Chopper was approximately \$440,779.00.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION-BREACH OF EXPRESS WARRANTIES**

**(Against Defendant Krone NA)**

XVI.

Plaintiff Western Community repleads and realleges paragraphs I-XV, as if fully set forth herein.

XVII.

Under the terms of the New Equipment Warranty, Defendant Krone NA agreed and warranted that it would repair or replace any part of the Krone Chopper that showed evidence of defect or improper workmanship.

XVIII.

Under the terms of the Extended Warranty, Defendant Krone NA agreed and warranted that it would repair or replace any covered parts of the Krone Chopper that were determined to have failed due to a mechanical breakdown or other failure and restore the Krone Chopper to its pre-loss condition.

XIX.

The October 15, 2012 fire was due to a defect in the material and workmanship and/or a mechanical breakdown or failure of the fuel tanks of the Krone Chopper.

XX.

Defendant Krone, NA breached its duties and obligations under the terms of the New Equipment and Extended Service Warranties by failing to replace the damaged parts of the Krone Chopper and by failing to repair and restore the Krone Chopper to its pre-loss condition.

**COMPLAINT AND DEMAND FOR JURY TRIAL - 4**

XXI.

Plaintiff Western Community provided insurance coverage to Subrogor DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, Subrogor DNJ, has been compensated in the amount of \$440,779.00 for its October 15, 2012 loss of the Krone Chopper. Plaintiff Western Community is subrogated and entitled to collect these sums from Defendant Krone, NA based on Defendant Krone NA's breach of its duties and obligations under the terms of the New Equipment and Extended Service Warranties.

**SECOND CAUSE OF ACTION: BREACH OF OBLIGATION OF GOOD FAITH  
(Against Defendant Krone NA)**

XXII.

Plaintiff Western Community repleads and realleges paragraphs I-XXI, as if fully set forth herein.

XXIII.

Pursuant to Idaho Code § 28-1-304 the New Equipment and Extended Warranties were contracts and contained the respective duties and obligations of the parties to these contractual agreements. Both the New Equipment and Extended Warranties, therefore, imposed an obligation of good faith in the performance and enforcement of the warranty provisions on Defendant Krone, NA.

XXIV.

In addition to its failure to replace the damaged parts of the Krone Chopper and to repair and restore the Krone Chopper to its pre-loss condition as required by the New Equipment and Extended Warranties, Defendant Krone NA breached its obligation of good faith to DNJ by instructing Defendant Burks Tractor Company not to file or otherwise submit a warranty claim on behalf of DNJ as a result of its loss of the Krone Chopper.

XXV.

By refusing to allow Defendant Burks Tractor Company to submit, or to otherwise consider a warranty claim under the New Equipment and Extended Warranties for the replacement, repair and restoration of the Krone Chopper, Defendant Krone NA breached its obligation of good faith in its performance and enforcement of the New Equipment and Extended

**COMPLAINT AND DEMAND FOR JURY TRIAL - 5**

Warranties.

XXVI.

Plaintiff Western Community provided insurance coverage to Subrogor DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, Subrogor DNJ has been compensated in the amount of \$440,779.00 for its October 15, 2012 loss of the Krone Chopper. Plaintiff Western Community is subrogated and entitled to collect these sums from Defendant Krone, NA based on Defendant Krone NA's breach of its obligation of good faith in the performance and enforcement of the New Equipment and Extended Service Warranties.

**THIRD CAUSE OF ACTION: VIOLATION OF IDAHO CONSUMER PROTECTION  
ACT § 48-603(5)**

**(Against Defendants Krone NA and Burks Tractor Company)**

XXVII.

Plaintiff Western Community repleads and realleges paragraphs I-XXVI, as if fully set forth herein.

XXVIII.

Idaho Code § 48-603(5) prohibits the use of unfair or deceptive acts or practices in the conduct of any trade or commerce when the person knows, or in the exercise of due care should know, that they are representing goods as having characteristics, uses or benefits that they do not have.

XXIX.

Defendants Krone NA and Burks Tractor Company represented 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. 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 they knew, or in the exercise of due care, should have known that they would not, Defendants Krone NA and Burks Tractor Company violated Idaho Code §48-603(5) by using unfair methods and practices during the sale of the Krone Chopper to DNJ.

**COMPLAINT AND DEMAND FOR JURY TRIAL - 6**



XXX.

Despite being advised by Mr. Jaynes that he had been the forced to install a metal shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris from burning through the fuel tanks and his own knowledge of the operating conditions that the Krone Chopper would be used under, Mr. Preston, on behalf of Defendant Burks Tractor Company, recommended that DNJ purchase the Krone Chopper. By doing so, Defendant Burks Tractor Company violated Idaho Code § 48-603(5) by representing the Krone Chopper as having characteristics, uses or benefits sufficient for DNJ's intended use of the Krone Chopper when it did not.

XXXI

Pursuant to Idaho Code §48-608, Plaintiff DNJ suffered an ascertainable loss of money as a result of the use and employment by Defendants Krone NA and Burks Tractor Company of the above referenced methods, acts, or practices and its entitled to bring this action to recover actual damages in the amount of \$440,779.00

XXXII.

Plaintiff Western Community Insurance Company provided insurance coverage to Subrogor DNJ under Policy No. 08-829801-01 in the amount of \$440,779.00 for the value of the Krone Chopper at the time of its loss. Under the terms of this Policy, Plaintiff Western Community is subrogated and entitled to collect these sums from Defendants based on Defendants' violations of the Idaho Consumer Protection Act.

**FOURTH CAUSE OF ACTION: VIOLATION OF IDAHO CONSUMER PROTECTION  
ACT § 48-603(7)**

**(Against Defendants Krone NA and Burks Tractor Company.)**

XXXIII.

Plaintiff Western Community repleads and realleges paragraphs I-XXXII, as if fully set forth herein.

XXXIV.

Idaho Code §48-603(7) prohibits representing goods are of a particular standard, quality or grade if they are another.

**COMPLAINT AND DEMAND FOR JURY TRIAL - 7**

XXXV.

By representing that the Krone Chopper would be free from defects in the material and workmanship and 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 they would not, Defendants violated Idaho Code §48-603(7) by representing the Krone Chopper and Warranties were of a particular standard, quality or grade when they were not.

XXXVI.

Despite being advised by Mr. Jaynes he had been the forced to install a metal shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris from burning through the fuel tanks and his own knowledge of the operating conditions that the Krone Chopper would be used under, Mr. Preston, on behalf of Defendant Burks Tractor Company, recommended that DNJ purchase the Krone Chopper. By doing so, Defendant Burks Tractor Company violated Idaho Code §48-603(7) by representing that the Krone Chopper was of a particular standard, quality or grade sufficient for DNJ's intended use of the Krone Chopper when it was not.

XXXVII.

Pursuant to Idaho Code §48-608, Plaintiff DNJ suffered an ascertainable loss of money as a result of the use and employment by Defendants Krone NA and Burks Tractor Company of the above referenced method, acts, or practices and its entitled to bring this action to recover actual damages in the amount of \$440,779.00

XXXVIII.

Plaintiff Western Community Insurance Company provided insurance coverage to Subrogor DNJ under Policy No. 08-829801-01 in the amount of \$440,779.00 for the value of the Krone Chopper at the time of its loss. Under the terms of this Policy, Plaintiff Western Community is subrogated and entitled to collect these sums from Defendants based on Defendants' violations of the Idaho Consumer Protection Act.

**ATTORNEY'S FEES**

Plaintiff Western Community Insurance Company has been required to retain the services of Saetrum Law Offices in order to prosecute this action and is entitled to an award of its

reasonable attorney's fees and costs of suit pursuant to Idaho Code §§ 12-121, 12-120(3), and/or 48-608(5) and I.R.C.P. 54(d) and (e).

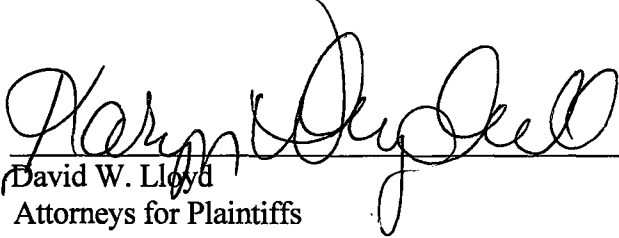
**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff Western Community prays for judgment against Defendants Krone NA and Burks Tractor Company as follows:

1. For damages in the amount of \$440,779.00 as paid by Plaintiff Western Community Insurance Company under DNJ, Inc.'s Insurance Policy with Plaintiff ;
2. For interest on said amount from October 15, 2012; and
3. For reasonable attorneys fees in the amount of \$15,000.00 if this matter is taken by default or in such greater amount as established by the evidence if this matter is contested; and
4. For such other and further relief as this court deems just and proper in the premises.

DATED this 21<sup>st</sup> day of July, 2014.

SAETRUM LAW OFFICES

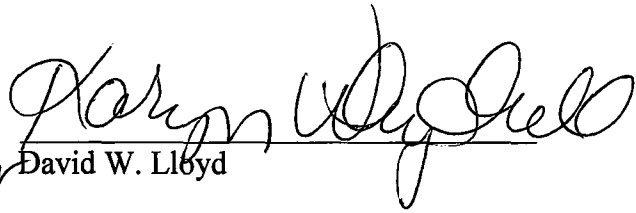
By   
for David W. Lloyd  
Attorneys for Plaintiffs

**DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiffs above-named, and hereby demand a jury trial pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this 21<sup>st</sup> day of July 2014.

SAETRUM LAW OFFICES

By   
for David W. Lloyd

DISTRICT COURT  
TWIN FALLS CO., IDAHO  
FILED

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BY bb CLERK  
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**BRADY LAW, CHARTERED**  
**Michael G. Brady, ISB #1293**  
**St. Mary's Crossing**  
**2537 W. State Street, Suite 200**  
**Boise, ID 83702**

**TELEPHONE: (208) 345-8400**  
**FACSIMILE: (208) 322-4486**

**Attorneys for Defendant/Cross-Claimant**  
**Burks Tractor Company, Inc.**

**ORIGINAL**

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE  
COMPANY, as Subrogee of DNJ, INC.,  
Subrogor, an Idaho corporation,

Plaintiff,

v.

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

Defendants.

BURKS TRACTOR COMPANY, INC., an  
Idaho corporation,

Cross-Claimant,

v.

KRONE NA, INC., a Delaware corporation,

Cross-Defendant.

Case No. CV-14-2977

Judge G. Richard Bevan

**ANSWER TO COMPLAINT, CROSS-  
CLAIM, AND DEMAND FOR JURY  
TRIAL**

**ANSWER**

DEFENDANT BURKS TRACTOR COMPANY, INC. (“Burks”), by and through its attorneys of record, Brady Law, Chartered, as and for an Answer to Plaintiff’s Complaint, pleads and alleges as follows:

**First Defense**

1. Burks denies each and every allegation contained in Plaintiff’s Complaint, unless expressly and specifically hereinafter admitted.

**Parties, Jurisdiction and Venue**

1. With regard to Paragraph I of Plaintiff’s Complaint, Burks admits that Plaintiff Western Community Insurance Company (“Western Community”) was an is an insurance company licensed to do business in the state of Idaho, but is without knowledge or information sufficient to form a belief as to the remaining allegations contained therein, and therefore denies the same.

2. With regard to Paragraphs II, III and IV of Plaintiff’s Complaint, Burks admits each and every allegation contained therein.

3. With regard to Paragraph V of Plaintiff’s Complaint, Burks admits that jurisdiction is proper in this Court.

4. With regard to Paragraphs VI and VII of Plaintiff’s Complaint, Burks admits that venue is proper in Twin Falls County, Idaho.

**General Allegations**

1. With regard to Paragraph VIII of Plaintiff’s Complaint, Burks admits each and every allegation contained therein.

2. With regard to Paragraph IX of Plaintiff’s Complaint, Burks admits that DNJ had previously purchased a Krone Chopper from Burks, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein, and therefore denies the same.

3. With regard to Paragraphs X and XI of Plaintiff’s Complaint, Burks denies each and every allegation contained therein.

4. With regard to Paragraph XII of Plaintiff’s Complaint, Burks admits that the

Krone Chopper was covered by a Krone New Equipment Limited Warranty (“New Equipment Warranty”), which Krone New Equipment Warranty provided warranty coverage as stated therein, and denies each and every other allegation contained therein.

5. With regard to Paragraph XIII of Plaintiff’s Complaint, Burks admits that the Krone Chopper was covered by a Krone North America Crown Guarantee (“Extended Warranty”) which provided warranty coverage as provided therein, and denies each and every other allegation contained therein.

6. With regard to Paragraph XIV of Plaintiff’s Complaint, Burks admits that on or about October 15, 2012, the Krone Chopper was damaged by a fire, and denies each and every other allegation contained therein.

7. With regard to Paragraph XV of Plaintiff’s Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

**First Cause of Action – Breach of Express Warranties**  
**(Against Defendant Krone)**

8. With regard to Paragraph XVI of Plaintiff’s Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiff’s Complaint as if fully set forth herein.

9. With regard to Paragraph XVII, XVIII, XIX, and XX of Plaintiff’s Complaint, only allegations against Defendant Krone are alleged therein, which do not require an answer by Burks; however, to the extent that factual allegations are contained therein against Burks, all such allegations are denied.

10. With regard to Paragraph XXI of Plaintiff’s Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

**Second Cause of Action – Breach of Obligation of Good Faith**  
**(Against Defendant Krone)**

11. With regard to Paragraph XXII of Plaintiff’s Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiff’s Complaint as if fully set forth herein.

12. With regard to Paragraphs XXIII, XXIV, and XXV of Plaintiff’s Complaint, only

allegations against Defendant Krone are alleged therein, which do not require an answer by Burks; however, to the extent that factual allegations are contained therein against Burks, all such allegations are denied.

13. With regard to Paragraph XXVI of Plaintiff's Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

**Third Cause of Action – Violation of Idaho Consumer Protection Act § 48-603(5)**  
**(Against Defendants Krone and Burks)**

14. With regard to Paragraph XXVII of Plaintiff's Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiff's Complaint as if fully set forth herein.

15. With regard to Paragraph XXVIII of Plaintiff's Complaint, only legal conclusions are set forth therein, which do not require an answer by Burks; however, to the extent that factual allegations are contained therein against Burks, denies the same.

16. With regard to Paragraph XXIX of Plaintiff's Complaint, Burks alleges that the Krone New Equipment Warranty and the Krone Extended Warranty were issued by, and the sole responsibility of Krone, which warranties speak for themselves, and Burks denies each and every other allegation contained therein.

17. With regard to Paragraph XXX of Plaintiff's Complaint, Burks denies each and every allegation contained therein.

18. With regard to Paragraph XXXI of Plaintiff's Complaint, Burks denies each and every allegation contained therein.

19. With regard to Paragraph XXXII of Plaintiff's Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore, denies the same.

**Fourth Cause of Action – Violation of Idaho Consumer Protection Act § 48-603(7)**  
**(Against Defendants Krone and Burks)**

20. With regard to Paragraph XXXIII of Plaintiff's Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiff's Complaint as if fully set forth herein.

1. With regard to Paragraph XXXIV of Plaintiff's Complaint, only legal conclusions

are set forth therein, which do not require an answer by Burks; however, to the extent that factual allegations are contained therein against Burks, denies the same.

2. With regard to Paragraphs XXXV, XXXVI, and XXXVII of Plaintiff's Complaint, Burks denies each and every allegation contained therein.

21. With regard to Paragraph XXXVIII, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

**Second Defense**

Western Community, as the subrogee of DNJ, is subject to all the admissions, denials and defenses pled in this Answer.

**Third Defense**

Plaintiff's damages, if any, were caused by the negligence, fault or responsibility of DNJ.

**Fourth Defense**

Plaintiff's damages, if any, were caused by accident, misuse, and/or negligence of DNJ.

**Fifth Defense**

Plaintiff's damages, if any, were caused by changes, alterations or modifications of the Krone Chopper by DNJ not authorized by Krone or Burks.

**Sixth Defense**

Plaintiff's damages, if any, were caused by the abuse, misuse, or lack of maintenance of the Krone Chopper by DNJ.

**Seventh Defense**

Burks made no representations or warranties, express or implied, to DNJ, including the implied warranties of merchantability or fitness regarding the Krone Chopper.

**Eighth Defense**

Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would, or should, in the exercise of reasonable care, reveal the existence of the defective condition alleged in the Complaint.

**Ninth Defense**

Burks did not have knowledge or reason to know of the defective condition of the Krone Chopper alleged in the Complaint.



**Tenth Defense**

Prior to the sale of the Krone Chopper to DNJ, Burks did not alter, modify or install any part or component of the Krone Chopper alleged to be defective in the Complaint.

**Eleventh Defense**

Burks did not provide any plans or specifications to Krone for the manufacture of the Krone Chopper.

**Twelfth Defense**

Plaintiff's claims are barred in whole, or in part, by the economic loss rule.

**Thirteenth Defense**

Western Community, as the subrogee of DNJ, is not entitled to bring claims under the Idaho Consumer Protection Act, *Idaho Code* Title 48, Chapter 6, because it has no standing, is not a purchaser, and is not a legal entity entitled to bring an Idaho Consumer Protection Act claim against Burks.

**Fourteenth Defense**

A mere breach of contract claim is not unfair or deceptive, absent substantial aggravating circumstances. Egregious or aggravating circumstances must be alleged in the Complaint before the provisions of the Idaho Consumer Protect Act may take effect.

**Fifteenth Defense**

Plaintiff's claims are barred by the Idaho Product Liability Reform Act, *Idaho Code* Title 6, Chapter 14.

**Sixteenth Defense**

All representations made by Burks to DNJ regarding the sale of the Krone Chopper were included in a written contract that became the entire agreement between the parties.

**Seventeenth Defense**

DNJ did not rely on any representations made by Burks regarding the Krone Chopper that were not included in the written contract between Burks and DNJ.

**Prayer For Relief**

WHEREFORE, Burks prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff take nothing thereunder.

2. That Burks be awarded attorney fees pursuant to Idaho Code §§ 12-120(3), 12-121, and 48-608(5).

3. That Burks be awarded costs and disbursements necessarily incurred in defending this action pursuant to *Idaho Rules of Civil Procedure*, Rule 54.

4. For such other and further relief as the Court may deem just and proper.

### **CROSS-CLAIM**

Defendant/Cross-Claimant Burks Tractor Company, Inc. (“Burks”), as and for a cross-claim against Defendant/Cross-Defendant Krone NA, Inc. (“Krone”), pleads and alleges as follows:

### **Parties**

1. Burks was and is an Idaho corporation, organized and existing under the laws of the state of Idaho, with its principal place of business in Twin Falls, Idaho.

2. Krone NA, Inc., was and is a Delaware corporation, organized and existing under the laws of the state of Delaware, with its principal place of business in Memphis, Tennessee, and licensed to transact business in the state of Idaho.

### **Jurisdiction and Venue**

1. Jurisdiction and venue are proper in this Court.

### **General Allegations**

1. Krone manufactured a 2012 Krone X 1100 Forage Chopper (“Krone Chopper”), serial number 841659.

2. Burks is an authorized Krone dealer in the state of Idaho.

3. On September 12, 2012, DNJ, Inc. (“DNJ”) executed a Purchaser’s Order and Addendum to purchase the Krone Chopper from Burks.

4. The Krone Chopper was covered by a Krone New Equipment Limited Warranty (“New Equipment Warranty”) and a Krone North America Crown Guarantee (“Extended Warranty”) issued by Krone for delivery by Burks to DNJ.

5. Incident to the sale of the Krone Chopper by Burks to DNJ, Burks made no representations or warranties, express or implied, to DNJ, including the implied warranties of merchantability or fitness regarding the Krone Chopper.

6. On or about October 15, 2012, the Krone Chopper was damaged in a fire.

7. On July 22, 2014, Plaintiff filed a Complaint against Burks and Krone, alleging that the October 15, 2012 fire was due to a defect in the materials and workmanship and/or a mechanical breakdown or failure of the fuel tanks of the Krone Chopper.

**First Cause of Action**

**(Indemnity)**

1. Burks repeats and realleges each and every allegation set forth in paragraphs 1 through 7, as if fully set forth herein.

2. Pursuant to *Idaho Code* § 6-1407(2), the defense and indemnity of Burks in this action was tendered to Krone.

3. *Idaho Code* § 6-1407(1) provides that product sellers (Burks) other than manufacturers (Krone) shall not be subject to liability in circumstances where Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would or should, in the exercise of reasonable care, reveal the existence of the alleged defective condition.

4. Burks made no express or implied warranties to DNJ concerning the design or manufacture of the Krone Chopper; an inspection of the Krone Chopper by Burks would not have revealed or discovered the alleged defect; Burks had no reason to know of the alleged defect; and Burks did not alter, modify or install the fuel tanks on the Krone Chopper alleged to be defective in the Complaint.

5. Krone has failed to accept the tender of defense from Burks and agree to indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the action and/or to indemnify Burks for any judgment rendered against Krone, for which Burks may be legally liable.

6. Pursuant to *Idaho Code* § 6-1407(1) and (2), Burks is entitled to a defense from Krone, and indemnity for reasonable attorney fees and costs incurred by Burks in defending this action, and indemnity for any judgment rendered against Krone for which Burks may be held liable.

**Prayer**

WHEREFORE, Burks prays for judgment against Krone as follows:

1. To indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the Complaint and prosecuting this Cross-Claim.

2. To indemnify Burks for any judgment rendered against Krone for which Burks may be held liable.

3. For attorney fees incurred in defending the Complaint and prosecuting this Cross-Claim pursuant to *Idaho Code* §§ 12-120(3) and 6-1407(2).

4. For costs and disbursements incurred in defending the Complaint and prosecuting this Cross-Claim pursuant to *Idaho Rules of Civil Procedure*, Rule 54 and *Idaho Code* § 6-1407(2).

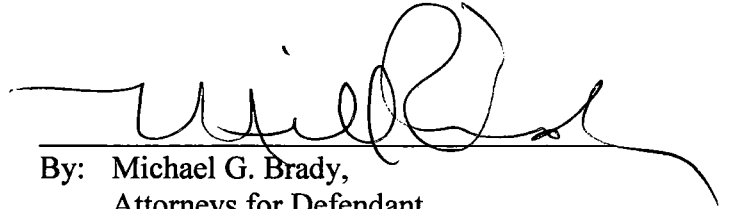
5. For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Burks hereby demands a jury trial pursuant to *Idaho Rules of Civil Procedure*, Rule 38(b).

DATED this 22 day of October, 2014.

BRADY LAW, CHARTERED



By: Michael G. Brady,  
Attorneys for Defendant  
Burks Tractor Company, Inc.

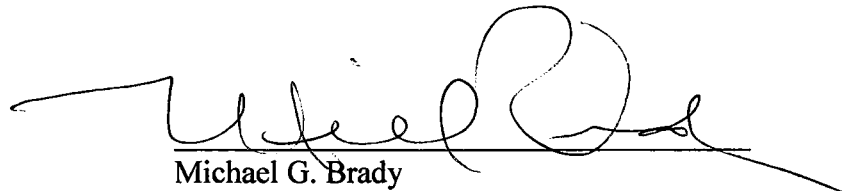
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22 day of October, 2014, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Rodney R. Saetrum [x] U.S. Mail, Postage Prepaid  
David W. Lloyd [ ] Express Mail  
SAETRUM LAW OFFICES [ ] Hand Delivery  
P.O. Box 7425 [ ] Facsimile Transmission  
Boise, ID 83707 [ ] Federal Express  
FAX (208) 336-0448 [x] Electronic Mail  
general@saetrumlaw.com  
*Attorneys for Plaintiff*

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Benjamin J. Cluff [ ] Express Mail  
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*Attorneys for Defendant Krone NA, Inc.*

Philip R. Dupont [x] U.S. Mail, Postage Prepaid  
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7450 West 130<sup>th</sup> St., Ste 140 [ ] Hand Delivery  
Overland Park, KS 66213 [ ] Facsimile Transmission  
pdupont@sandbergphoenix.com [ ] Federal Express  
*Attorneys for Defendant Krone NA, Inc.* [x] Electronic Mail

  
Michael G. Brady

DISTRICT COURT  
TWIN FALLS CO., IDAHO  
FILED

2014 NOV -4 PM 3:51

BY \_\_\_\_\_  
CLERK  
DEPUTY

Benjamin Cluff (#6197)  
David A. Coleman (#5742)  
COLEMAN, RITCHIE & CLUFF  
P.O. Box 525  
Twin Falls, ID 83303  
Telephone: 208-734-1224  
Fax: 208-734-3983

Philip R. DuPont  
(Pro Hac Vice Admission Pending)  
SANDBERG PHOENIX & VON GONTARD P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

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

Plaintiff, )

v. )

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

Defendants. )

Case No. CV-14-2977

**DEFENDANT KRONE'S ANSWER  
TO DEFENDANT BURKS'S  
CROSS-CLAIM**

**Parties**

1. Defendant Krone admits the allegations in Paragraph 1 of Defendant Burks's cross-claim.
2. Defendant Krone admits the allegations in Paragraph 2 of Defendant Burks's cross-claim.

**Jurisdiction and Venue**

1. Defendant Krone admits the allegations in Paragraph 1 of Defendant Burks's cross-claim.

**General Allegations**

1. Defendant Krone denies the allegations in Paragraph 1 of Defendant Burks's cross-claim.
2. Defendant Krone admits the allegations in Paragraph 2 of Defendant Burks's cross-claim.
3. Defendant Krone admits the allegations in Paragraph 3 of Defendant Burks's cross-claim.
4. Defendant Krone admits the allegations in Paragraph 4 of Defendant Burks's cross-claim.
5. Defendant Krone is without sufficient information to answer the allegations in paragraph 5 of Defendant Burks's cross-claim and therefore denies the same.
6. Defendant Krone admits the allegations in Paragraph 6 of Defendant Burks's cross-claim.
7. Defendant Krone admits the allegations in Paragraph 7 of Defendant Burks's cross-claim, but only to the extent that such allegations were made by Plaintiff. Defendant Krone denies the veracity of those same allegations made by Plaintiff.

**First Cause of Action (Indemnity)**

1. Defendant Krone repeats and realleges each and every admission and denial set forth in General Allegations Paragraphs 1 through 7, as if fully set forth herein.
2. Defendant Krone admits the allegations in Paragraph 2 of Defendant Burks's cross-claim.
3. Paragraph 3 of Defendant Burks's cross-claim consists of a legal conclusion, which Defendant Krone is not required to answer.
4. Defendant Krone denies that Defendant Burks made no express or implied warranties. Defendant Krone admits that an inspection would not have revealed or discovered the alleged defect. Defendant Krone denies that Defendant Burks had no reason to know of the alleged

defect. Defendant Krone is without sufficient information to admit or deny that Defendant Burks did not alter, modify or install the fuel tanks, and therefore denies the same.

5. Defendant Krone admits the allegations in Paragraph 5 of Defendant Burks's cross-claim.

6. Paragraph 6 of Defendant Burks's cross-claim consists solely of a legal conclusion, which Defendant Krone is not required to answer.

### **Affirmative Defenses**

Defendant Krone states the following affirmative defenses to Defendant Burks's cross-claim:

1. Defendant Burks had knowledge or reason to know of the alleged defect in the Krone Chopper.

2. Should the Court determine that Defendant Burks is entitled to indemnity, Defendant Krone is only obligated to indemnify Defendant Burks for costs and attorney's fees incurred in the defense of claims directed solely at Defendant Krone.

3. Should the Court determine that Defendant Burks is entitled to indemnity, Defendant Krone is only obligated to indemnify Defendant Burks for any judgment awarded for claims directed solely at Defendant Krone.


4. The sale of the Krone Chopper to Plaintiff was completed based on the representations made by Burks—which had knowledge or reason to know of the alleged defect in the Krone Chopper. Therefore, the doctrine of indemnity is not available since Defendant Burks should not be permitted to base a cause of action on its own wrong.

WHEREFORE, having fully answered, Defendant Krone denies that Defendant Burks is entitled to the requested relief and moves this Court to dismiss Defendant Burks's cross claim



with prejudice, at Defendant Burks's cost, for attorney's fees and costs pursuant to Idaho Code §12-120(3), and for such other and further relief as this Court deems just and proper.

DATED this 4 day of November, 2014.

  
BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
P.O. Box 525  
Twin Falls, Idaho 83303-0525

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 4 day of November, 2014, he caused a true and correct copy of the foregoing **DEFENDANT KRONE'S ANSWER TO DEFENDANT BURKS'S CROSS-CLAIM** to be served upon the following persons in the following manner:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_ ✓  
Facsimile \_\_\_\_\_

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_ ✓  
Facsimile \_\_\_\_\_

  
BENJAMIN J. CLUFF

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2014 DEC 29 AM 10:14

BY \_\_\_\_\_  
CLERK

                     DEPUTY

BRADY LAW, CHARTERED  
Michael G. Brady, ISB #1293  
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2537 W. State Street, Suite 200  
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bradylaw@bradylawoffice.com  
mike@bradylawoffice.com

TELEPHONE: (208) 345-8400  
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Attorneys for Defendant, Burks Tractor Company, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE  
COMPANY, as Subrogee of DNJ, INC.,  
Subrogor, an Idaho corporation,

Plaintiff,

v.

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

Defendants.

Case No. CV-14-2977

Judge G. Richard Bevan

**JUDGMENT DISMISSING DEFENDANT  
BURKS TRACTOR COMPANY, INC.**

JUDGMENT IS ENTERED AS FOLLOWS:

1. Plaintiff's Complaint against Defendant Burks Tractor Company, Inc. is dismissed with prejudice and Plaintiff shall take nothing thereunder against Defendant Burks Tractor Company, Inc.; and

**JUDGMENT DISMISSING DEFENDANT BURKS TRACTOR COMPANY, INC. – P. 1**  
0161.0019

ORIGINAL

2. As the prevailing party, costs may be awarded to Defendant Burks Tractor Company, Inc. as determined by the Court.

DATED this 29 day of December, 2014.



G. RICHARD BEVAN, District Judge

**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed, postage prepaid, to the following parties on this 29 day of December, 2014:

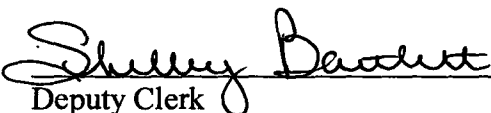
Rodney R. Saetrum  
David W. Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, ID 83707

Benjamin Cluff  
Coleman, Ritchie & Cluff  
P.O. Box 525  
Twin Falls, ID 83303-0525

Philip R. Dupont  
Sandberg, Phoenix & Von Gontard, P.C.  
7450 West 130<sup>th</sup> St., Suite 140  
Overland Park, KS 66213

Michael G. Brady  
Brady Law, Chartered  
St. Mary's Crossing  
2537 W. State St., Ste. 200  
Boise, ID 83702

CLERK OF THE DISTRICT COURT

By:   
Deputy Clerk

David A. Coleman (ISB #5742)  
 Benjamin J. Cluff (ISB #6197)  
 COLEMAN, RITCHIE & CLUFF  
 P.O. Box 525  
 Twin Falls, ID 83303-0525  
 Telephone: 208-734-1224  
 Fax: 208-734-3983

DISTRICT COURT  
 TWIN FALLS CO. IDAHO  
 FILED

2014 DEC 31 AM 10:11

BY \_\_\_\_\_ CLERK  
 \_\_\_\_\_ DEPUTY

Philip R. Dupont  
 (Pro Hac Vice)  
 SANDBERG PHOENIX & VON GONTARD P.C.  
 7450 West 130<sup>th</sup> Street, Suite 140  
 Overland Park, KS 66213-2659  
 Telephone: 913-953-3467  
 Fax: 913-851-3737

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

WESTERN COMMUNITY INSURANCE )  
 COMPANY, As Subrogee of DNJ, INC. )  
 Subrogor, an Idaho Corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BURKS TRACTOR COMPANY, INC., an )  
 Idaho Corporation, and KRONE NA, INC., a )  
 Delaware Corporation )  
 )  
 Defendants.

Case No. CV-14-2977

**PARTIAL JUDGMENT**

PARTIAL JUDGMENT IS ENTERED AS FOLLOWS:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's claim for breach of the New Equipment Warranty and breach of duty of good faith based on the New Equipment Warranty, both asserted against Defendant Krone NA, Inc. are dismissed and Plaintiff's two Idaho Consumer Protection Act claims asserted against Krone NA, Inc. are dismissed.

DATED this 31 day of Dec, 2014.

[Signature]  
DISTRICT JUDGE

**NOTICE OF FILING AND MAILING ORDER**

NOTICE IS HEREBY GIVEN by the Clerk of the above-entitled Court, pursuant to Rule 77(d) of *Idaho Rules of Civil Procedure*, that the foregoing **PARTIAL JUDGMENT** was filed on the 31 day of Dec, 2014, and was served to the following parties on the 31 day of Dec, 2014:

Philip R. Dupont MO 35454  
(Pro Hac Vice)  
SANDBERG, PHOENIX  
& von GONTARD, P.C.  
7450 W. 130<sup>th</sup> Street, Suite 140  
Overland Park, KS 66213

Hand Delivery \_\_\_\_\_  
U.S. Mail ✓  
Court Folder \_\_\_\_\_  
(Twin Falls Only)

David A. Coleman (ISB #5742)  
Benjamin J. Cluff (ISB #6197)  
COLEMAN, RITCHIE & CLUFF  
P.O. Box 525  
Twin Falls, ID 83303-0525

Hand Delivery \_\_\_\_\_  
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(Twin Falls Only)

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Hand Delivery \_\_\_\_\_  
U.S. Mail ✓  
Court Folder \_\_\_\_\_  
(Twin Falls Only)

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702


Hand Delivery \_\_\_\_\_  
U.S. Mail ✓  
Court Folder \_\_\_\_\_  
(Twin Falls Only)

CLERK OF THE DISTRICT COURT

By [Signature]  
Deputy Clerk

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2015 APR 21 PM 3:12

BY \_\_\_\_\_ CLERK  
 DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE )  
COMPANY, as Subrogee of DNJ, INC., )  
Subrogor, an Idaho Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BURKS TRACTOR COMPANY, INC., an )  
Idaho Corporation, and KRONE NA, INC., )  
a Delaware Corporation, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

Case No. CV 2014-2977

**MEMORANDUM AND  
ORDER RE MOTION FOR  
RECONSIDERATION**

This matter is before the court on the plaintiff's Motion for Reconsideration, filed on 01/12/15. A hearing on the motion was held on 04/13/15. At the hearing, Dave Lloyd represented the plaintiff; the defendant Krone was represented by Philip Dupont and Brett Simon. Burks Tractor was represented by Mike Brady. Counsel for all parties appeared telephonically. After reviewing the briefs, hearing oral arguments, and researching the applicable law, the motion is GRANTED.

## I. Background

Western Community Insurance Company (“Western”) filed suit against Burks Tractor Company (“Burks”) and Krone NA, Inc. (“Krone”) on 07/22/14, alleging breach of warranty, breach of the obligation of good faith and fair dealing, and violations of the Idaho Consumer Protection Act (“ICPA”). On 10/03/14, Krone filed a motion to dismiss. Burks followed suit and filed its own motion to dismiss on 10/27/14. A hearing on these motions was held on 11/17/14, after which the court issued a Memorandum and Order Re Motions to Dismiss on 12/18/14. This order dismissed all of Western’s claims against Burks and four of Western’s claims against Krone. A judgment was signed by the court on 12/29/14, dismissing Western’s complaint against Burks in its entirety, with prejudice.<sup>1</sup>

Western filed a Motion for Reconsideration on 01/12/15, asking the court to reconsider the wording of its 12/29/14 Judgment, dismissing Western’s complaint against Burks “with prejudice.” Western seeks such reconsideration so that it can amend its complaint against Burks, addressing any deficiencies that resulted in the court’s 12/18/14 dismissal. Burks filed a memorandum in opposition on 01/26/15 and a telephonic hearing was held on 04/13/15. At that hearing the court listened to oral arguments and took the matter under advisement.

---

<sup>1</sup> This judgment was submitted to the court by Burks and was signed the same day before the court was aware that Western had filed a notice of objection to Burks’ proposed judgment.

## II. Analysis

### **A. As it was not a Final Judgment, the Court May Reconsider its 12/29/14 Judgment Dismissing Western's Complaint Against Burks With Prejudice.**

I.R.C.P. 11(a)(2)(B) provides that a "motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment..." A judgment is final if it has been certified as final pursuant to I.R.C.P. 54(b)(1) or if "judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action." I.R.C.P. 54(a).

On 12/18/14, the court issued a Memorandum and Order Re Motions to Dismiss, dismissing the entirety of Western's complaint against Burks and all but two of Western's claims against Krone. The court signed a Judgment Dismissing Defendant Burks Tractor Company, Inc. on 12/29/14, dismissing Western's complaint against Burks with prejudice. This judgment did not include a Rule 54(b) certificate. It also failed to resolve "all claims for relief...asserted by or against all parties in the action," as two of Western's claims against Krone remained. Therefore, the 12/29/14 judgment was interlocutory in nature.

Because the 12/29/14 judgment dismissing Western's claims against Burks with prejudice was not final, Western's motion for reconsideration under I.R.C.P. 11(a)(2)(B) is timely and proper. District courts must entertain motions to reconsider brought properly under I.R.C.P. 11(a)(2)(B). *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Therefore, this court must entertain Western's motion.



**B. The Court's 12/29/14 Judgment Dismissing Western's Complaint Against Burks With Prejudice is Reconsidered.**

When deciding a motion to reconsider, a district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. *Id.* If the original order was within the trial court's discretion, then so is the decision to grant or deny the motion to reconsider. *Id.* When a district court's discretionary decision is reviewed on appeal, appellate courts conduct a multi-tiered inquiry to determine: "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the court reached its decision by an exercise of reason." *Antim v. Fred Meyer stores, Inc.*, 150 Idaho 774, 782, 251 P.3d 602, 610 (Ct. App. 2011).

When considering a motion under I.R.C.P. 11(a)(2)(B), the court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. *International Real Estate Solutions, Inc. v. Arave*, 157 Idaho 816, 340, 343, P.3d 465, 468 (2014). While the presentation of new evidence is not required, a party moving for reconsideration must provide the court with some basis on which to reconsider its original decision. *Johnson v. Lambros*, 143 Idaho 468, 472-73, 147 P.3d 100, 104-05 (Ct. App. 2006).

Here, Burks submitted the judgment in question on 12/29/14. Western filed an objection to that judgment the same day, requesting the court to dismiss Western's  
MEMORANDUM AND ORDER RE MOTION FOR RECONSIDERATION- 4

claims against Burks *without* prejudice, to allow Western to amend its pleadings in accordance with the court's Memorandum and Order Re Motions to Dismiss. When the court signed Burk's judgment, it was unaware of Western's objection.<sup>2</sup> Had the court been aware of Western's objection, it would not have signed the judgment as proffered, and would instead have dismissed the claims against Burks without prejudice.

Therefore, in consideration of Western's timely objection to Burks' proposed judgment, and recognizing this matter as one of discretion, the court will grant Western's motion to reconsider its decision dismissing Burks with prejudice.

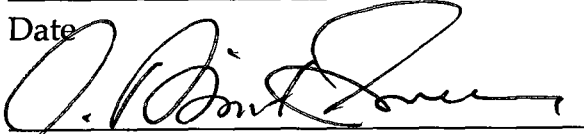
#### **IV. Conclusion**

Based on the foregoing, Western's Motion for Reconsideration is GRANTED and Western's complaint against Burks is hereby dismissed without prejudice. Burks is directed to tender to the court, within seven (7) days, a proposed judgment to that effect.

IT IS SO ORDERED.

04.21.15

Date



G. RICHARD BEVAN

District Judge

---

<sup>2</sup> The Judgment submitted by Burks and signed by the court was file stamped at 10:14 AM on 12/29/14. Western's objection to the proposed judgment was file stamped at 3:42 PM the same day.

CERTIFICATE OF SERVICE

I, Shelley Bartlett, do hereby certify that a true and correct copy of the foregoing document was sent to the following parties on this 21st day of April, 2015 by the service indicated:

Benjamin J. Cluff  
COLEMAN RITCHIE & CLUFF  
PO Box 525  
Twin Falls, ID 83303-0525

First Class Mail, Postage Paid  
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 Hand Delivered

Philip R. Dupont  
Sanberg Phoenix & von Gontard P.C.  
7450 West 130<sup>th</sup> Street, Suite 140  
Overland Park, Kansas 66213-2659

First Class Mail, Postage Paid  
 Courthouse Box  
 Hand Delivered

Rodney R. Saetrum  
SAETRUM LAW OFFICES  
PO Box 7425  
Boise, ID 83707

First Class Mail, Postage Paid  
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Michael G. Brady  
BRADY LAW CHARTERED  
2537 W State St, Ste 200  
Boise, ID 83702

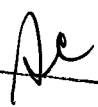
First Class Mail, Postage Paid  
 Courthouse Box  
 Hand Delivered

Kristina Glascock  
Clerk of the District Court

  
Shelley Bartlett  
Deputy Clerk

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2015 MAY -5 PM 2:48

BY \_\_\_\_\_ CLERK  
 \_\_\_\_\_ DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE )  
COMPANY, as Subrogee of DNJ, INC., )  
Subrogor, an Idaho Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BURKS TRACTOR COMPANY, INC., an )  
Idaho Corporation, and KRONE NA, INC., )  
a Delaware Corporation, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

Case No. CV 2014-2977

**MEMORANDUM AND  
ORDER RE MOTION TO  
AMEND COMPLAINT**

This matter is before the court on Plaintiff's Motion to Amend Complaint and Demand for Jury Trial, filed on 01/21/15. A hearing on the motion was held on 04/13/15. At the hearing, Dave Lloyd represented the plaintiff; the defendant Krone was represented by Philip DuPont and Brett Simon. Burks Tractor was represented by Mike Brady. Counsel for all parties appeared telephonically. After reviewing the briefs, hearing oral arguments, and researching the applicable law, the motion is GRANTED in part and DENIED in part.

## I. BACKGROUND

Western Community Insurance Company (“Western”) filed suit against Burks Tractor Company (“Burks”) and Krone NA, Inc. (“Krone”) on 07/22/14, alleging breach of warranty, breach of the obligation of good faith and fair dealing, and violations of the Idaho Consumer Protection Act (“ICPA”).<sup>1</sup> On 10/03/14, Krone filed a motion to dismiss. Burks followed suit and filed its own motion to dismiss on 10/27/14. A hearing on these motions was held on 11/17/14, after which the court issued a Memorandum and Order Re Motions to Dismiss on 12/18/14. This order dismissed all of Western’s claims against Burks and four of Western’s claims against Krone.

Western filed a motion to amend its complaint on 01/21/15, attempting to revive these dismissed claims. The proposed First Amended Complaint seeks to (1) add DNJ, Inc. as plaintiff on all four claims,<sup>2</sup> (2) add Burks as defendant on two of the four claims,<sup>3</sup> and (3) cure any pleading deficiencies that resulted in the aforementioned dismissals. On 01/26/15, Burks filed a memorandum in opposition to Western’s motion to amend. Krone filed a motion to dismiss Western’s proposed First Amended Complaint on 02/25/15, as well as a brief in support. A telephonic hearing on the matter was held on 04/13/15, after which the matter was taken under advisement.

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<sup>1</sup> The suit itself revolves around the purchase and subsequent destruction by fire of a “chopper,” a piece of heavy farm equipment.

<sup>2</sup> Suit had originally been brought only by Western, as DNJ’s subrogee.

<sup>3</sup> Burks was originally named a defendant only on claims III and IV, for violations of the ICPA. Claims I and II, which were based on breach of warranty and breach of the obligation of good faith and fair dealing, had originally only been asserted against Krone.

## II. LEGAL STANDARD

I.R.C.P. 15(a), which governs amendments generally, allows a party to amend its pleadings

once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

Although leave to amend should be freely given, the decision to grant or deny permission to amend is left to the sound discretion of the trial court. *Jones v. Watson*, 98 Idaho 606, 610, 570 P.2d 284, 288 (1977).

When making such a determination, a court may consider whether the new claims being asserted state a valid claim for relief. *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). If the amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense such as a statute of limitations, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. *Id.*; see also *Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 208, 254 P.3d 497, 509 (2011) (holding that leave to amend under I.R.C.P. 15(a) was properly denied where the added claims lacked merit).

### III. ANALYSIS

#### **A. DNJ May Be Joined as a Plaintiff with Regards to Claims I and II, but not Claims III and IV.**

Western, as DNJ's subrogee, was the sole plaintiff in the original complaint. The proposed First Amended Complaint seeks to add DNJ as a co-plaintiff on all four claims for relief.

As to the first two causes of action—breach of express warranty and breach of the obligation of good faith and fair dealing—the addition of DNJ presents no problem. A claim alleging breach of an express warranty sounds in contract. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975). The same is true for breach of the obligation of good faith and fair dealing. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991). The limitations period for an action on a written contract is five years. I.C. § 5-216. The limitations period for an oral contract is four years. I.C. § 5-217.

DNJ bought the equipment on which the alleged warranties are based on 09/12/12. The defendants' alleged failure to honor these warranties occurred in October of 2012. Therefore, as less than three years have passed, the limitations periods under either I.C. § 5-216 or I.C. § 5-217 have yet to run. Consequently, the court sees no reason, in its discretion, not to allow the addition of DNJ as plaintiff on these claims.

Claims III and IV merit closer scrutiny. ICPA claims are subject to a two-year limitations period. I.C. § 48-619.<sup>4</sup> DNJ purchased the chopper in September of 2012. The chopper was destroyed in October of 2012. Therefore, any alleged unfair or deceptive acts surrounding the sale of the chopper would have occurred in September/October of 2012, more than two years before the filing of the Motion to Amend Complaint.<sup>5</sup> As such, the limitations period for ICPA claims bars Western's untimely attempt to join DNJ as co-plaintiff on these claims.

Western argues that I.R.C.P 15(c) and 17(a) allow for DNJ's untimely joinder because the First Amended Complaint should "relate back" to the filing of the original complaint. This argument is flawed for the following reasons.

I.R.C.P. 17(a), which provides for the substitution or joinder of plaintiffs, states in part that

[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Idaho case-law interpreting this rule is sparse, but the rule does allow for the relation back of amendments adding a plaintiff, even after the statute of limitations for the plaintiff to be added has run. *See American Pension Services, Inc. v. Cornerstone Home*

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<sup>4</sup> "[N]o private action may be brought under this act more than two (2) years after the cause of action accrues." I.C. § 48-619.

<sup>5</sup> As mentioned above, the Motion to Amend the Complaint was filed on 01/21/15.



*Builders, LLC*, 147 Idaho 638, 213 P.3d 1038 (2009). However, cases interpreting I.R.C.P. 17(a) have read into the rule the same requirement of good faith/lack of mistake found in I.R.C.P. 15(c).<sup>6</sup> See *Conda Partnership, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 903, 771 P.2d 920, 921 (Ct. App. 1989) (“Rule 17(a) is designed to prevent forfeiture when determination of the proper party is difficult or when an understandable mistake has been made in selecting the party plaintiff.”); *Tingley v. Harrison*, 125 Idaho 86, 91-92, 867 P.2d 960, 965-66 (1994) (holding that “Rule 17(a) affords a ‘reasonable’ amount of time to correct an inadvertent error in naming the party plaintiff” and “only allows retroactive ratification where there was a mistake in naming the original party”).

In *Tingley* the Court denied an attempt to add a plaintiff for whom the statute of limitations had already run because the original plaintiff in the case had “failed to show that he was mistakenly named a party in lieu of the [real party in interest], or that he [was] invoking the application of rule 17(a) for any other reason than to escape the...limitation period.” *Id.* The Court went on to express that Rule 17(a) “is not a provision to be distorted by parties to circumvent the limitations period.” *Id.*; accord *U.S. for Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070, (9th Cir. 1989).

Here, where DNJ was the aggrieved party, its position as the real party in interest was not difficult to determine. Neither was Western’s decision to bring this suit alone, on DNJ’s behalf, an inadvertent error or an understandable mistake. Western

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<sup>6</sup> I.R.C.P. 15(c) provides for the joinder of defendants after the statute of limitations has run.

was placed on notice as early as October 3, 2014, when Krone challenged Western's ability to maintain an ICPA claim as DNJ's subrogee, that DNJ was the proper party for such a claim. This was before the ICPA limitations period ran with regard to DNJ. However, instead of seeking to add DNJ then, Western made the tactical decision not to add DNJ and to proceed solely in its position as subrogee. Now, with the benefit of hindsight and the court's dismissal of its ICPA claims, and after the limitations period has run, Western seeks to use Rule 17(a) to unwind that decision. Under case-law interpreting I.R.C.P. 17(a), such use of the rule is not permitted. Therefore, as the ICPA limitations period has run, DNJ may not be joined as a co-plaintiff on these claims.

**B. Burks May Be Joined as a Defendant with Regards to Claims I and II.**

The original complaint named Krone as the sole defendant on the first two claims for relief.<sup>7</sup> The proposed First Amended Complaint seeks to join Burks as a defendant on these claims as well.

As mentioned above, these claims sound in contract. Because the limitations period for a contractual cause of action has not yet run, and because the court finds little if any prejudice to Burks, as they have been named a defendant from the outset and are aware of all of the allegations set forth in these claims, the court will exercise its discretion under Rules 15(a) and 15(c) and allow the joinder of Burks as a defendant on these claims.

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<sup>7</sup> These claims are for breach of express warranty and breach of the obligation of good faith and fair dealing.

**C. The ICPA Claims May Not Be Re-pled for Failure to State a Valid Claim.**

Claims III 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.

Western argues that it has alleged additional facts in its proposed First Amended Complaint that establish the existence of just such an agreement. After carefully reading the document, the court disagrees.

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:

Insurance Policy No. 08-829801-01 was in effect from May 9, 2012 and 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 was 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 payment 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.

*First Amended Complaint*, p. 5, ¶ XIII. 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.

**D. The New Equipment Warranty, the Breach of Warranty and Breach of Good Faith and Fair Dealing Claims May Not Be Re-pled.**

Claims I and II of the original complaint alleged breach of the Krone NA New Equipment Warranty, as well as breach of the obligation of good faith and fair dealing with regard to that warranty. These claims were dismissed because Western failed to plead privity of contract between DNJ and Krone, a prerequisite to such claims.

The proposed First Amended Complaint re-pleads these claims, stating that "as part of the consideration for its purchase of the Krone Chopper, DNJ was provided and received a Krone North America New Equipment Limited Warranty...." *First Amended*

*Complaint*, p. 3, ¶ IX. Later in the same paragraph, the document states that “[t]he Krone NA New Equipment Warranty constituted an express warranty and/or agreement between Krone NA and DNJ...” *Id.*

The court finds these statements conclusory and insufficient to establish a relationship of privity between DNJ and Krone as to the New Equipment Warranty. DNJ purchased the chopper from Burks, not Krone. The language added in the First Amended Complaint simply states that DNJ, as part of this purchase, “was provided” and “received” the warranty, but makes no mention of anything being provided by Krone. Despite the addition of this language, nothing has been presented in the First Amended Complaint or any supporting exhibits or affidavits that supports the existence of any agreement or relationship whatsoever with regard to this warranty between DNJ and Krone. Without such an agreement or relationship, privity is absent, and absent such privity, these allegations fail to state a valid claim.

#### **IV. Conclusion**

Based on the foregoing, Western’s Motion to Amend Complaint is GRANTED in part as follows:

- (1) DNJ may be joined as a co-plaintiff as to claims I and II.
- (2) Burks may be joined as a co-defendant on claims I and II.

Additionally, Western’s motion is partially DENIED as follows:

(1) DNJ may not be joined as a co-plaintiff as to claims III and VI, which have been dismissed.

(2) The proposed reintroduction of the portions of claims I and II related to Krone's alleged breach of the New Equipment Warranty and breach of the obligation of good faith and fair dealing with regard to that warranty, previously dismissed, will not be allowed. The same applies to claims III and IV in their entirety.

Western is directed to file an Amended Complaint consistent with this Order within ten (10) calendar days.

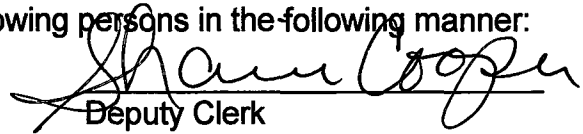
IT IS SO ORDERED.

May 5, 2015  
Date

G. Richard Bevan  
G. RICHARD BEVAN  
District Judge

CERTIFICATE OF MAILING

The undersigned certifies that on the 6th day of May, 2015, she caused a true and correct copy of the foregoing **MEMORANDUM AND ORDER RE MOTION TO AMEND COMPLAINT** to be served upon the following persons in the following manner:

  
Deputy Clerk

**Plaintiff's Counsel:**

Rodney R. Saetrum  
PO Box 7425  
Boise ID 83707

Mailed  Hand Delivered \_\_\_\_\_ Faxed \_\_\_\_\_

**Defendant's Counsel:**

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Benjamin John Cluff  
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DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2015 MAY 11 AM 11:59

BY \_\_\_\_\_ CLERK  
*SB* DEPUTY

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Attorneys for Defendant, Burks Tractor Company, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE  
COMPANY, as Subrogee of DNJ, INC.,  
Subrogor, an Idaho corporation,

Plaintiff,

v.

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

Defendants.

Case No. CV-14-2977

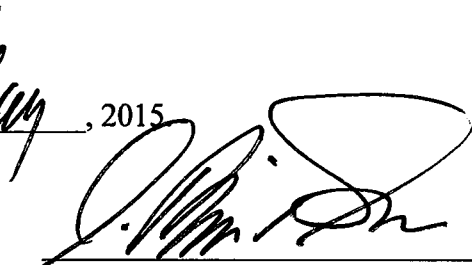
Judge G. Richard Bevan

**AMENDED JUDGMENT DISMISSING  
DEFENDANT BURKS TRACTOR  
COMPANY, INC. WITHOUT  
PREJUDICE**

JUDGMENT IS ENTERED AS FOLLOWS:

1. Plaintiff's Complaint against Defendant Burks Tractor Company, Inc. is  
dismissed without prejudice.

DATED this 11 day of May, 2015

  
\_\_\_\_\_  
G. RICHARD BEVAN, District Judge

**AMENDED JUDGMENT DISMISSING DEFENDANT BURKS TRACTOR COMPANY,  
INC. WITHOUT PREJUDICE – P. 1**



**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed, postage prepaid, to the following parties on this 12 day of May, 2015:

Rodney R. Saetrum  
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Boise, ID 83707

Benjamin Cluff  
Coleman, Ritchie & Cluff  
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2537 W. State St., Ste. 200  
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CLERK OF THE DISTRICT COURT

By: Shelley Bantitt  
Deputy Clerk

Rodney R. Saetrum, ISBN: 2921  
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DISTRICT COURT  
Fifth Judicial District  
County of Twin Falls - State of Idaho

MAY 20 2015 1:17 pm

By \_\_\_\_\_ Clerk  
Deputy Clerk

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs,

v.

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

Defendants.

Case No. CV-14-2977

**SECOND AMENDED  
COMPLAINT AND  
DEMAND FOR JURY  
TRIAL**

Plaintiffs, Western Community Insurance Company, as Subrogee of DNJ, Inc., Subrogor, and DNJ, Inc, have and for their causes of action against Defendants, Burks Tractor Company, Inc. and Krone NA, Inc., hereby complain and allege as follows:

**PARTIES, JURISDICTION AND VENUE**

I.

At all times relevant hereto, Plaintiff Western Community Insurance Company (“Plaintiff Western Community”) was and is an insurance company licensed to do business in the State of Idaho. Plaintiff Western Community is the Subrogee of DNJ, Inc’s rights to recover against Defendant Burks Tractor Company, Inc. (“Burks”), and Defendant Krone NA, Inc. (“Krone NA”) pursuant to and under the provisions of its Insurance Policy Number 08-829801-01 with Plaintiff

**SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 1**

DNJ, Inc. (“Plaintiff DNJ”).

II.

At all times relevant hereto, Plaintiff DNJ was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State’s Office with its principle place of business in Buhl, Idaho.

III.

At all times relevant hereto, Defendant Burks was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State’s Office with its principle place of business in Twin Falls, Idaho.

IV.

At all times relevant hereto, Defendant Krone NA, was a corporation established within the laws of the State of Delaware with its principle place of business in Memphis, Tennessee and was acting under a Certificate of Authority to transact business in Idaho issued by the Idaho Secretary of State’s Office.

V.

Jurisdiction is proper in this Court as the amount sought by Plaintiff exceeds \$10,000.00.

VI.

Venue is proper in this County in that Defendant, Burks has its principle place of business in this County and the cause of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

VII.

Venue is proper in this County in that Defendant Krone NA was transacting business in this County and Plaintiff’s causes of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

**GENERAL ALLEGATIONS**

VIII.

On September 12, 2012, DNJ executed a Purchaser’s Order for Equipment (“Purchase Order”) for the purchase of a 2012 Krone X 1100 Forage Chopper (“Krone Chopper”) from Defendant Burks. Exhibit 1. The Purchase Order was a contract for the sale of goods and identified the Krone Chopper by its Vin Number 841659. Exhibit 1. Under the terms of the Purchase Order,

the purchase price of the Krone Chopper was \$457,529.00. Exhibit 1.

IX.

At the time of its purchase of the Krone Chopper, and as part of the consideration for its purchase of the Krone Chopper, DNJ was provided and received a Krone North America New Equipment Limited Warranty (“Krone NA New Equipment Warranty”). Exhibit 2. In the Krone NA New Equipment Warranty, Defendants expressly warranted to the “original purchaser user” that the Krone Chopper was free from defects in material and workmanship. The Krone NA New Equipment Warranty constituted an express warranty and/or agreement between Defendants and DNJ as the “original purchaser-user” of the Krone Chopper. Exhibit 2, p.1.

X.

In the Krone NA New Equipment Warranty, Defendants expressly warranted and agreed that the Krone Chopper was free from defects in both material and workmanship and that “any part” of the Krone chopper that showed “evidence of defect or improper workmanship” would be repaired or replaced “free of charge” to DNJ while the New Equipment Warranty was in effect. Exhibit 2, p.1. By its express terms, the Krone NA New Equipment Warranty provided DNJ with warranty coverage for one (1) year or one season after the date of delivery and was in effect on the date of the October 15, 2012 fire. Exhibit 2, p.1.

XI.

At the time it of its purchase of the Krone Chopper, DNJ also agreed to purchase 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.

XII.

In the Krone NA Extended Warranty, Defendants 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 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.

XIII.

Prior to the purchase of the Krone Chopper, Plaintiff DNJ had previously purchased a similar Krone forage chopper from Burks. As part of its regular use of the previously purchased Krone forage chopper, DNJ had been forced to install a metal shield over the fuel tanks of the forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks.

XIV.

During discussions with Burks' representative, Les Preston, prior to the purchase of the Krone Chopper, DNJ representative Dell Jaynes advised Mr. Preston that DNJ had been the forced to install a metal shield over the plastic fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks. Mr. Jaynes advised Mr. Preston that DNJ did not want to purchase another chopper with similar problems. At the time of this discussion, Mr. Preston was familiar with the type of business run by DNJ, including the fact that the DNJ used its Krone choppers as part of its custom farming business, as well as the operating conditions that the Krone Chopper would be used under.

XV.

After Mr. Jaynes advised Mr. Preston that DNJ had been the forced to install a metal shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks, and based on his knowledge of the operating conditions that the Krone Chopper would be used under, Mr. Preston recommended that DNJ purchase the Krone Chopper. Based on Mr. Preston's recommendation, DNJ agreed to purchase the Krone Chopper with the understanding that it would not have problems with heated chaff and debris falling from the engine and burning through the fuel tanks of the Krone Chopper.

XVI.

On or about October 15, 2012, the fuel tanks of the Krone Chopper failed and caused a fire ("October 15, 2012 fire") to ignite just below the engine compartment of the Krone Chopper. The October 15, 2012 fire spread from the fuel tanks and ultimately engulfed the entire Krone Chopper. The October 15, 2012 fire was a mechanical breakdown and/or failure caused by a defect in, or

Defendants' improper workmanship on, the fuel tanks of the Krone Chopper. The October 15, 2012 fire resulted in the complete loss and destruction of the Krone Chopper.

XVII.

At the time of the October 15, 2012 fire, the value of the Krone Chopper was approximately \$440,779.00.

XVIII.

Insurance Policy No. 08-829801-01 was in effect from May 9, 2012 and 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 was 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 payment 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.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION-BREACH OF EXPRESS WARRANTIES**

XIX.

Plaintiffs replead and realleges Paragraphs I-XVIII, as if fully set forth herein.

XX.

Under the terms of the Krone NA New Equipment Warranty, Defendant Burks agreed and warranted that it would repair or replace any part of the Krone Chopper that showed evidence of defect or improper workmanship.

XXI.

Under the terms of the Krone NA Extended Warranty, Defendants agreed and warranted that they would repair or replace any covered parts of the Krone Chopper that were determined to have failed due to a mechanical breakdown or other failure and restore the Krone Chopper to its operating condition just prior to the failure while the Warranty remained in effect

**SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 5**

XXII.

The October 15, 2012 fire was due to a defect in the material and workmanship and/or a mechanical breakdown or failure of the fuel tanks of the Krone Chopper.

XXIII.

As a result of the October 15, 2012 fire, Plaintiffs attempted to submit warranty claims under the Krone NA New Equipment and Extended Warranties through Burks for the repair and/or replacement of the defective parts of the Krone Chopper that were determined to have failed due to a mechanical breakdown or other failure and for restoration of the Krone Chopper to its pre-loss condition. In response to Plaintiffs' efforts to submit warranty claims under the Krone NA New Equipment and Extended Warranties, Krone NA instructed Burks not to file or otherwise submit Plaintiffs' warranty claims.

XXIV.

Defendant Burks breached its duties and obligations under the terms of the Krone NA New Equipment Warranty by failing to repair and/or replace the damaged parts of the Krone Chopper after the October 15, 2012 fire.

XXV.

Defendants breached their duties and obligations under the terms of the Krone NA Extended Warranty by failing by failing to repair and restore the Krone Chopper to its pre-loss condition as a result of the mechanical breakdown and/or other failure of the fuel tanks.

XXVI.

Plaintiff Western Community provided insurance coverage to Plaintiff DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, Subrogor DNJ, has been compensated in the amount of \$440,779.00 for its October 15, 2012 loss of the Krone Chopper. Under the terms of Policy No. 08-829801-01, Plaintiff Western Community is subrogated to the rights of Plaintiff DNJ to recover for this payment and is entitled to collect this sum from Defendant Burks based on Defendant Burks breach of its duties and obligations under the terms of the Krone NA New Equipment Warranty and against Defendants based on the breach of their duties and obligations under the terms of the Krone NA Extended Warranty.

**SECOND CAUSE OF ACTION: BREACH OF OBLIGATION OF GOOD FAITH**

**XXVII.**

Plaintiffs replead and reallege Paragraphs I-XXVI, as if fully set forth herein.

**XXVIII.**

Pursuant to Idaho Code § 28-1-304, the Krone NA New Equipment and Extended Warranties were contracts and contained the respective duties and obligations of the parties to these contracts, DNJ, Krone NA and Burks. Both the Krone NA New Equipment and Extended Warranties, therefore, imposed an obligation of good faith in the performance and enforcement of the warranty provisions on Defendants Krone NA and Burks.

**XXIX.**

In addition to its failure to repair and/or replace the damaged parts of the Krone Chopper after the October 15, 2012 fire, Defendant Krone NA instructed Defendant Burks not to file or otherwise submit a warranty claim on behalf of DNJ as a result of DNJ's complete loss of the Krone Chopper. By refusing to allow Burkes to submit, or to otherwise consider, a warranty claim under the Krone NA Extended Warranty for the replacement and/or repair of the Krone Chopper to its operating condition just prior to the failure, Defendant Krone NA breached its obligation of good faith in its performance and enforcement of the terms of the Krone NA New Equipment Warranty.

**XXX.**

In addition to their failure to repair and restore the Krone Chopper to its pre-loss condition after the October 15, 2012 fire, Defendants breached their obligation of good faith to DNJ under the terms of the Krone NA Extended Warranty by failing to submit and/or accept a warranty claim on behalf of DNJ as a result of DNJ's complete loss of the Krone Chopper.

**XXXI.**

Plaintiff Western Community provided insurance coverage to Subrogor DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, Subrogor DNJ has been compensated in the amount of \$440,779.00 for value of its October 15, 2012 loss of the Krone Chopper. Under the terms of Policy No. 08-829801-01, Plaintiff Western Community is subrogated to the rights of Plaintiff DNJ to recover for this payment and is entitled to collect this sum from Defendant Krone NA based on Defendant



Krone NA's breach of its obligation of good faith in the performance and enforcement of the terms of the Krone NA New Equipment and against Defendants based on the breach of their obligation of good faith in the performance and enforcement of the terms of the Krone NA Extended Warranty.

**ATTORNEY'S FEES**

Plaintiffs have been required to retain the services of Saetrum Law Offices in order to prosecute this action and are entitled to an award of their reasonable attorney's fees and costs of suit pursuant to Idaho Code §§ 12-121, 12-120(3) and I.R.C. P. 54(d)(1) and (e)(1).


**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for judgment against Defendants Krone NA and Burks as follows:

1. For damages in the amount of \$440,779.00 as paid by Plaintiff Western Community under its Insurance Policy with Plaintiff DNJ for the loss of the Krone Chopper;
2. For damages in the amount of \$500.00 as paid by Plaintiff DNJ under its Insurance Policy with Plaintiff Western Community for payment of Plaintiff DNJ's insurance deductible;
3. For damages in the amount of \$20,447.00 for the amount paid by Plaintiff DNJ for the Krone NA Extended Warranty;
4. For interest on said amounts from October 15, 2012;
5. For reasonable attorneys' fees in the amount of \$15,000.00 if this matter is taken by default or in such greater amount as established by the evidence if this matter is contested; and
6. For such other and further relief as this Court deems just and proper in the premises.

DATED this 19th day of May, 2015.

SAETRUM LAW OFFICES


By   
David W. Lloyd  
Attorneys for Plaintiffs

**DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiffs above-named, and hereby demand a jury trial pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this 19th day of May 2015.

SAETRUM LAW OFFICES

By   
David W. Lloyd

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19<sup>th</sup> day of May, 2015, I caused a true and correct copy of the foregoing to be sent by method indicated below:

Benjamin Cluff  
David A. Coleman  
Coleman, Ritchie & Cluff  
P.O. Box 525  
Twin Falls, ID 83303

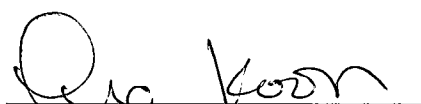
\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Hand Delivery  
\_\_\_\_\_ Overnight Mail  
 Facsimile

Philip R. DuPont  
Sandberg Phoenix & Von Gontard P.C.  
7450 West 130<sup>th</sup> Street Suite 140  
Overland Park, Kansas 66213-2659

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Hand Delivery  
\_\_\_\_\_ Overnight Mail  
 Facsimile

Michael G. Brady  
Brady Law Chartered  
St. Mary's Crossing  
2537 W. State Street, Suite 200  
Boise Idaho 83702

\_\_\_\_\_ U.S. Mail  
\_\_\_\_\_ Hand Delivery  
\_\_\_\_\_ Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Tracy Koon

***EXHIBIT "1"***

### Purchaser's Order for Equipment

**Jurks Tractor Co. Inc.** Dealer  
140 Kimberly Road, Twin Falls, Idaho 83301

Date 9/12 20 12  
Buyer

**D DNJ, Inc.**

Address 4178 North 1000 East, Buhl, Idaho 83316

Please Enter the Following Order to be Delivered on or after

Quantity		Warranty Period	Make, Model, Description	Serial No./Attach	Cash Price Each Item
New	Used	Months			
1			Krone Big X 1100 Forage Chopper	841386	\$457,529.00
1			Krone EC-903 Tri Fold Corn Header	825953	\$145,046.00
1			Krone EF-380 Pickup Header	839897	\$38,978.00
1			Krone Warranty 2 Yrs. Full & 3rd. Yr. Drivetrain or 3000 Hrs.	N/A	\$20,447.00
1			Krone Big X 1100 Forage Chopper	841659	\$457,529.00
1			Krone EC-903 Tri Fold Corn Header	826903	\$145,046.00
1			Krone EF-380 Pickup Header	839898	\$38,978.00
1			Krone Warranty 2 Yrs. Full & 3rd. Yr. Drivetrain or 3000 Hrs.	N/A	\$20,447.00

Transportation Expense

Trade in: Plus Extra Equipment (Cab, Extender, Duals, etc.)

Year	Eq.	Description			Hours	Trade Allowance
		Make	Model	Serial No.		

Upon delivery, it is agreed that Purchaser will pay all taxes and other charges and settle for the purchase price as follows:

- Total Cash Price \$ 1,324,000.00
- Less Down Payment \$
- Unpaid Cash Price \$ 1,191,405.19
- Enter % Sales Tax \$ 50.00 \$ 0.00
- Other Fees or Charges \$ 166.50
- Total Taxes and Fees (4 + 5) \$ 166.50
- Cash Due on Delivery (3 + 6) \$ 1,191,571.69

Purchaser hereby bargains, sells and conveys unto Seller the above described in Equipment and warrants and certifies it to be free and clear of liens, encumbrance, and security interests, except to the extent shown below.

Trade Allowance	\$	
Less Amount Owed	\$	
TO	\$	
Net Trade Allowance, (1 - 2)	\$	
Other (Specify)	\$	
Cash Down Payment with Order	\$	
Total Cash and Other Down Payment (4 + 5)	\$	0.00
Total Down Payment (3 + 6)	\$	

This is a cash transaction. If the Purchaser so requests prior to acceptance, the unpaid balance will be handled as a time sales transaction, subject to available financing and credit approval.

**NO DELIVERY OF ABOVE GOODS TO BE MADE UNTIL FULL SETTLEMENT IS RECEIVED.**

**SELLER AND MANUFACTURER MAKE NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED (INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) EXCEPT AS PROVIDED ON THE REVERSE SIDE.**

#### NOTICE TO PURCHASER

Read this contract before you sign it.

You are entitled to an exact and completely filled in copy of this contract when you sign it. Keep it to protect your legal rights.

Purchaser acknowledges receipt of a fully completed copy of this contract and Purchaser waives notice of the acceptance or rejection of this order by the seller.

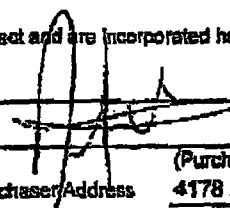
The additional terms and conditions set forth on the reverse side are a part of this contract and are incorporated herein by reference.

Understood that this is the entire agreement between the parties.

Taken by Leslie Preston

accepted This \_\_\_\_\_ Day \_\_\_\_\_ 20 \_\_\_\_\_

Dealer / Store Manager

  
 (Purchaser's Signature)  
 Purchaser Address 4178 North 1000 East  
 (Street)  
 Buhl \_\_\_\_\_  
 (Town)  
 Twin Falls Idaho 83316

***EXHIBIT "2"***

**NEW EQUIPMENT LIMITED WARRANTY  
TERMS & CONDITIONS**



KRONE NA, Inc. (hereafter called KRONE) warrants each new KRONE product to be free from defects in material and workmanship. This Limited Warranty shall extend for one year or one season's use only; whichever occurs first, from the day of delivery or warranty start date; to the original purchaser-user, in the event a dealer files a false/incorrect Start Date - Intentional or not - the machine Warranty Start Date will default automatically to the Delivery Date.

This Limited Warranty does NOT cover any merchandise or component parts which, in the opinion of KRONE, have been subjected to negligent use, misuse, alteration, or accident. Repairs made with parts other than those manufactured and obtainable from KRONE will not be considered. Under no circumstances are component parts warranted against wear that is not related to defective materials or workmanship.

KRONE does not warrant electric motors, batteries, tires, or other components supplied by manufacturers that are warranted separately by those suppliers.

KRONE's obligation under this Limited Warranty is limited to repairing or replacing free of charge to the original purchaser-user, at a location designated by KRONE; any part that in KRONE's judgment shows evidence of defect or improper workmanship. Defective parts must be returned through the selling dealer or distributor, transportation charges prepaid by Krone, if requested.

This Limited Warranty and KRONE's obligation hereunder is in lieu of all warranties, express or implied, and all other representations to the original purchaser-user and all other obligations or liabilities, including liability for loss of crops, losses caused by harvest delays or any expense of loss for labor, supplies, rental equipment and all incidental or consequential damages. The performance or replacement or repairs is the exclusive remedy under this written Warranty or any Implied Warranty.

No person is authorized to give any other warranties or to assume any other liability on KRONE's behalf.

**KRONE MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

*(This machine Warranty must be registered with KRONE within ten (10) days from the date of original purchase.)*

*KRONE NA, Inc. reserves the right to change or withdraw this program at anytime without notice.*

Krone NA, Inc. \* PO Box 18880 \* Memphis, TN 38181-0880 \* 1-800-453-2874 \* [www.krone-northamerica.com](http://www.krone-northamerica.com)

## REPAIRS OR REPLACEMENT NOT COVERED BY THE STANDARD WARRANTY

1. **OWNER RESPONSIBILITY PARTS:** Some items must be serviced and/or replaced as a normal result of machine usage. These are defined as "Owner Responsibility" items. Major examples are listed below:

**PTO Components:** The service life of a PTO clutch can vary considerably upon the local applications and conditions, such as abrasive dust, adjustment, loading, and wear due to overloading, etc. Thus, the service life of a clutch may be measured in days to years, depending on the operating conditions. Clutch repair or replacement is normally an owner responsibility and not a warrantable item.

**V-Belts:** The machine is originally equipped with premium grade V-belts, especially designed to perform the job for which they were intended on the machine. As with PTO clutches, V-belt service life varies considerably upon the local applications and conditions, such as abrasive dust, adjustment, loading, slippage, and wear due to overloading, etc. Thus, the service life of a V-belt may be measured in days to years, depending on the operating conditions. V-belt replacement is normally an owner responsibility and not a warrantable item.

**HYDRAULIC COMPONENTS:** Hydraulic component life is greatly affected by the regularity of hydraulic oil changes and the quality of the replacement oil. Failures to these components must be the result of a defect in material or workmanship to be considered warrantable.

**CHAINS AND SPROCKETS:** Chains and sprockets are subject to great variations in service life, depending on such factors as over-tension, under-tension, lubrication or (as an example) installing a new chain on old sprockets. Sprocket and chain replacement is normally an owner responsibility and not handled as a warranty item.

**GROUND ENGAGING AND CUTTING PARTS:** Ground engaging and cutting parts are subject to wear and replacement. Service life of these parts can vary from hours to years, depending on local conditions. Normally, the replacement of this category of parts is considered to be an owner expense. If an individual item broke prematurely due to defect in material or poor workmanship, it will then be warranted.

2. **FOREIGN OBJECT PROTECTIVE SYSTEMS:** Some Krone Machines are equipped with protective devices to reduce the risk of damage to the machine caused by a foreign object. These devices include but are not limited to shear bolts, clutches, metal detection and rock protection. Under no circumstances shall the protective system be altered from the manufacturer setting, doing so voids the warranty. Incidental or consequential damages to machine components due to the failure of one of these devices will not be covered by Krone Limited Warranty.
3. **FAILURES DUE TO ABUSIVE USAGE, LACK OF MAINTENANCE OR ACCIDENT:** All repairs and labor are an owner expense for failures resulting from abusive usage, lack of maintenance and/or accident.
4. **FAILURES DUE TO UNAUTHORIZED ALTERATION OF MACHINE OR INSTALLATION OF UNAUTHORIZED ATTACHMENTS:** We point out for your protection, that the installation of unauthorized attachments or the unauthorized alteration of the machine may overload certain components and result in unexpected repairs or overhaul. Any failure resulting from the above is an owner expense.
5. **LABOR REIMBURSEMENT:** Labor will be considered when it is submitted with the original request and is accompanied by a copy of the shop ticket.  
**LABOR RATE:** Labor will be paid based on Dealers published hourly labor rate established with KRONE NA. Changes to labor rate are allowed once per calendar year and must be accompanied by three retail shop tickets establishing the hourly labor rate. This labor rate must be published in a prominent place in the workshop.  
**LABOR HOURS:** Labor hours will be paid based on a flat rate manual, or the experience of KRONE personnel, or reasonable and customary time required completing the described work.

*KRONE NA, Inc. reserves the right to change or withdraw this program at anytime without notice.*

Krone NA, Inc. \* PO Box 18880 \* Memphis, TN 38181-0880 \* 1-800-453-2974 \* [www.krone-na.com](http://www.krone-na.com)



**REPAIRS OR REPLACEMENT NOT COVERED BY  
THE STANDARD WARRANTY (continued)**

6. **WARRANTY CLAIMS:** Warranty claims should be submitted in English, electronically on the KWS system. Incomplete claims will be denied. All claims must be received within 90 days of the machine failure and within 60 days of the date the defective part was repaired or replaced. Claims that will be submitted after warranty expiration date must be pre-approved with KRONE NA warranty department before the warranty expiration date has passed. Warranty Claim disputes must be submitted in writing within thirty (30) days of the decision date.
7. **DEFECTIVE PARTS:** Defective parts that have been replaced must be saved at the dealer until 45 days after the warranty credit is issued. In some cases, a part may be repaired instead of replaced. In this instance, photos of the damage must be available in lieu of the failed parts. These parts or photos must be returned to KRONE if so requested. Normal return freight charges will be compensated by Krone as outlined on the Warranty Parts Packing Slip. Parts or photos not returned to KRONE within 15 days of request will result in denial of claim and reversal of any credit issued.
8. **RENTAL OR LEASED MACHINES:** Rental or leased machines have a specified policy that can be an exception to the standard warranty. Other warranty provisions outlined remain the same. See the Rental Program or Rental Purchase Program for specific instructions. Warranty coverage will not exceed one year.
9. **SPARE-PARTS WARRANTY:** All repair parts sold to customers have a ninety (90) day warranty time period, beginning the date of purchase, with the rest of the provisions outlined remaining the same. Warranty requests must include a copy of the original dealer counter ticket. Repair parts installed by the dealer carry a ninety (90) day warranty time period that becomes effective from the date of first use after installation. First use date must be documented by the dealer and shall include an hour meter reading. Warranty requests must include a copy of the original work order listing parts used during repair and first use date.
10. **FREIGHT FOR PARTS USED ON WARRANTY REPAIRS:** Freight compensation is based on the original invoice or an estimation of ground rate. If the dealer is eligible to receive an additional percentage above dealer net on parts, this amount is to be awarded in lieu of freight and handling charges. Freight charges other than ground rate will be the responsibility of the dealer or customer.
11. **SHOP SUPPLIES:** Shop supplies, such as rags, penetrating oil, cleaner, starting fluid, etc., are not warrantable items.
12. **HAULING CHARGES / MILEAGE / TRAVEL TIME:** Charges for hauling equipment, mileage, travel time, etc. are not covered under warranty.
13. **STATE AND LOCAL FRANCHISE AGREEMENTS:** KRONE shall make every effort to conform to state and local laws where applicable.
14. **DISPUTE PROCESS:** In the event a dealer does not agree with a decision filed by the warranty administrator, a review form may be obtained from the Territory Service Manager.

*KRONE NA, Inc. reserves the right to change or withdraw this program at anytime without notice.*

Krone NA, Inc. • PO Box 10000 • Memphis, TN 38101-0000 • 1-800-453-2074 • [www.krone-northamerica.com](http://www.krone-northamerica.com)

***EXHIBIT "3"***

**KRONE NORTH AMERICA  
CROWN GUARANTEE  
FULL MACHINE EXTENDED SERVICE CONTRACT  
TERMS AND CONDITIONS**

**KEY TERMS AND DEFINITIONS:**

- **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
- **YOU, YOUR, CONTRACT HOLDER:** means the owner of the EQUIPMENT listed in the extended service contract certificate.
- **EQUIPMENT/MACHINE:** means the EQUIPMENT described in the extended service contract certificate.
- **ADMINISTRATOR:** means the company appointed by US to administer this CONTRACT. The ADMINISTRATOR has no liability to YOU.
- **MECHANICAL BREAKDOWN or FAILURE:** means the actual breaking or electronic failure of any covered part of the covered MACHINE while in ordinary use arising from faults attributable to manufacturing defects in workmanship or materials in such MACHINE causing sudden stoppage of the functions thereof and necessitating repair before it can resume work.
- **DEDUCTIBLE:** means the portion of the repair that is covered by this CONTRACT, which YOU must first pay for each, unrelated FAILURE. The DEDUCTIBLE amount is \$500.00.

**WHAT YOUR CONTRACT COVERS:**

The service contract coverage is limited exclusively to the repair or replacement of covered parts as they pertain to the machine (listed below in section I.) determined to have failed due to a MECHANICAL BREAKDOWN or FAILURE as defined under terms and definitions. No person has the authority to change or to waive any of its provisions. This CONTRACT is for the sole benefit of the CONTRACT HOLDER named herein and applies only to the Equipment described in the extended service contract certificate.

I. Full Machine covers all parts except those specifically identified as not being covered under the section within this contract titled "What is not covered". Please note that Full Machine coverage is not available for balers and headers.

**WHAT IS NOT COVERED:**

**MECHANICAL BREAKDOWN OR FAILURE:**

- Caused by accident, misuse, negligence or natural calamity.
- Caused by using other than the recommended manufacturer genuine parts/filters or installing attachments to equipment not authorized in writing by the manufacturer.
- Caused by changes, alterations or modifications to the equipment or any of its components/parts other than authorized by the manufacturer/dealer which in the sole judgment of the manufacturer/dealer affects the performance, stability of purpose for which it was manufactured. Additionally, accessories are not covered, if they are not installed on the unit or considered in the cost of the unit when the extended warranty is purchased.
- Caused by non-operational defects, which generally do not affect the stability or reliability of the equipment.
- Caused by service maintenance, such as engine cleaning, brake adjustment, etc., replacement of consumable parts/consumable items, such as oil, grease, fan belts, batteries, gaskets, fuses, brake or clutch linings, fuel filter, tires, cables, carbon brushes, bulbs, glass, and other similar maintenance and/or supply items and all other parts not made of metal.
- Caused by wear items but not limited to: cutting components, knives, pickup lines, scrapers, augers, belts, wear plates, ground contacting components, undercarriage components, components that contact crop during normal operation, cutterbars, PTO Shafts, slip clutches and U-joints.
- Freight or storage charges, transportation or towing charges, loading or unloading charges, rental or loaner equipment charges, loss of time, inconvenience, bodily injury and property damage. Incidental or consequential damage that results from a MECHANICAL BREAKDOWN OR FAILURE.
- Damage to a covered component that is caused by the failure of a non-covered component.
- Minor adjustments.
- A product recall or a product support program.

**CONTRACT RESPONSIBILITIES, LIMITATIONS AND EXTENSIONS**

**A. OUR RESPONSIBILITIES**

WE agree to repair or replace any of the parts covered, if required due to a MECHANICAL BREAKDOWN or FAILURE; when the MECHANICAL BREAKDOWN or FAILURE is deemed to be covered under this warranty.

**B. YOUR RESPONSIBILITIES**

To keep this CONTRACT valid, YOU must upon request show proof that YOUR EQUIPMENT has been serviced as recommended by the EQUIPMENT manufacturer, during the time period in which a claim is being considered for payment. Failure to provide proof of service may terminate the service contract and result in the denial of the claim. In the event of MECHANICAL BREAKDOWN or FAILURE, you must protect the equipment from further damage. Any further damage shall be considered YOUR failure to protect the equipment and shall not be covered. In order to keep this contract valid, the DEALER and or YOU must notify the ADMINISTRATOR of any alterations or additions to the Equipment and of any proposed departure from ordinary working conditions from which the equipment is designed to operate. The ADMINISTRATOR must approve the alterations, additions, or changes in operation of the equipment with written consent.

**C. CONTRACT PERIOD/TERRITORY**

If this is a NEW EQUIPMENT CONTRACT, the time and hour limits of the term selected start the day this EQUIPMENT Manufacturers Warranty starts and at zero (0) hours. Coverage expires when the length of time or accumulated hours (whichever occurs first) of the term selected is reached.

If this is a USED EQUIPMENT CONTRACT, the time and hour limits of the term selected start on the DATE ISSUED/EQUIPMENT DELIVERY DATE and from the hours on the service meter on that date. Coverage expires when the length of time for the term selected shown in the

Valid 2/23/09

extended service contract certificate is reached or total hours on the EQUIPMENT is equal to the sum of the selected term hours plus stated hours on the EQUIPMENT at delivery date, whichever occurs first. This CONTRACT applies only to a MECHANICAL BREAKDOWN or FAILURE occurring within the United States, Canada and Mexico.

#### D. LIMITS OF LIABILITY

Limit shall be limited to the reasonable price for repair or replacement of any covered part; compensated in accordance with the manufacturer's standard warranty policy. The repair or replacement is based upon nationally recognized flat rates and/or factory manuals. Labor reimbursement will be based on the dealer's suggested list price for shop labor and field labor as they are documented on file with KRONE North America. If a part is unobtainable, our liability shall be limited to the manufacturer's or supplier's latest suggested retail price. In no event will the liability for each MECHANICAL BREAKDOWN or FAILURE, under this CONTRACT, exceed 20% of the original EQUIPMENT transaction price. Additionally, the total of all benefits payable shall never exceed 80% of the price YOU paid for YOUR EQUIPMENT. The intent of this extended warranty is not to restore the product to a like-new condition, but rather to restore the product to its operating condition just prior to the extended warranty covered failure. All repairs must be performed by a manufacturer authorized repair facility. The repair facility that performs the repairs must warrant its work for a period no less than 3 months or 500 hours, starting from the date that the machine is put back into service, to be free of defects in material or poor workmanship.

#### E. SUBROGATION

YOU agree that WE, after honoring a claim on YOUR CONTRACT, have all rights of subrogation against those who may be responsible for YOUR MECHANICAL BREAKDOWN. All amounts recovered by YOU for which YOU were previously reimbursed under this CONTRACT shall become OUR property or the property of OUR designee and shall be forwarded to same by YOU, up to the total amount paid by US under this CONTRACT.

#### F. ARBITRATION

In the event of any dispute concerning the interpretation of the CONTRACT by Us and/or the ADMINISTRATOR, shall be resolved by arbitration in accordance with the rules of the American Arbitration Association. For claims arbitration, written demand must be made to ADMINISTRATOR or US within (60) days of the claim denial.

#### G. TRANSFER OF THIS CONTRACT

Contact US and submit the following:

1. This CONTRACT
2. Written evidence verifying all maintenance requirements have been met.
3. A copy of documentation evidencing change of ownership and service hours at date of sale.
4. Photocopies of documents sent to the manufacturer verifying transference of factory warranty, if applicable.

Conditions:

1. This CONTRACT cannot be transferred to other EQUIPMENT. It can only be transferred to a different owner.
2. The EQUIPMENT is subject to inspection.
3. Transfer must take place within fifteen (15) days of change of ownership.
4. All remaining underlying warranties must be transferred to the new owner.
5. Failure to notify the ADMINISTRATOR of the transfer will void the remaining contract period.

#### H. START / STOP WARRANTY IN EFFECT FEATURE

A dealer may stop and restart the effectiveness of the warranty for those machines that are received on a trade in and are stored at the dealership until such time that the machine is resold. The amount of time that the warranty can be stopped is a maximum of 6 months from the date the machine is brought to the dealership for a trade in. In order to keep this feature in effect the dealer must adhere to the following:

1. The DEALER must notify KRONE denoting the date in which the machine was delivered to the dealership for trade in to stop the warranty. The DEALER must provide a copy of the required documentation denoting this date.
  2. The DEALER must notify KRONE denoting the date in which the machine was resold in order to restart the warranty. The DEALER must provide a copy of the required documentation denoting this date.
  3. Upon receiving the machine the DEALER must inspect the machine denoting any pre-existing problems. This information must be provided to KRONE. Please note this is not an opportunity to perform work on the machine updating the machine to a like new condition; that work is at the DEALER'S expense.
  4. The DEALER must provide KRONE with current oil sample reports on all lubricated components denoting the current condition of the machine at the time of trade in.
  5. The DEALER must perform a new oil change on all lubricated compartments ensuring that the machine has clean oil.
  6. The DEALER must start the machine and exercise all of its functions at least once every four weeks.
- Any failure that is deemed to have occurred due to not adhering to the above described instructions or that is the result of corrosion will not be covered under this warranty.

#### I. CANCELLATION

This CONTRACT is noncancelable, except by the ADMINISTRATOR within the first sixty (60) days, should the EQUIPMENT not meet underwriting guidelines. In such a case, YOU will receive a full refund of the CONTRACT charge from US.

#### IN CASE OF MECHANICAL BREAKDOWN OR FAILURE

1. If the cost of repair is greater than one thousand (\$1000.00) dollars, the DEALER and/or YOU must, if requested, provide the ADMINISTRATOR with adequate photographic evidence of the affected parts, or preserve the parts affected, and make them available for inspection by the ADMINISTRATOR, or its representative. If the repair estimate exceeds five thousand (\$5,000.00) dollars, you can contact KRONE before proceeding with repairs in order to pre-qualify the repairs.
2. Within ninety (90) days of the date of FAILURE, and within sixty (60) days of the date of REPAIR, the repairing DEALER must provide the ADMINISTRATOR with a Repair Order detailing the FAILURE and the repairs, along with such other explanations or evidence as may be reasonably required by the ADMINISTRATOR, including a statutory declaration verifying the contents of the Repair Order, other explanations or evidence. If WE ask YOU, YOU must allow the ADMINISTRATOR to inspect YOUR EQUIPMENT to gather necessary information regarding any claim. YOU may be required to supply the ADMINISTRATOR with all maintenance records for service performed on the EQUIPMENT.

3. All repairs must be performed by a manufacturer authorized repair facility. The repair facility that performs the repairs must warrant its work for a period no less than 3 months or 500 hours, starting from the date that the machine is put back into service, to be free of defects in material or poor workmanship.

**IF YOU HAVE A MECHANICAL BREAKDOWN OR FAILURE IT IS YOUR RESPONSIBILITY TO NOTIFY YOUR REPAIRING DEALER. IT IS THEN THE RESPONSIBILITY OF THE DEALER TO NOTIFY KRONE NORTH AMERICA:**

**Notify:**  
KRONE NORTH AMERICA  
901-842-5011  
[www.krone-northamerica.com](http://www.krone-northamerica.com)

**Submit claims to:**  
KRONE NORTH AMERICA  
P.O. Box 18880  
Memphis, TN. 38181  
[www.krone-northamerica.com](http://www.krone-northamerica.com)

**Administered by:**  
KRONE NORTH AMERICA  
P.O. Box 18880  
Memphis, TN, 38181

**ORIGINAL**

DISTRICT COURT  
TWIN FALLS CO., IDAHO  
FILED

2015 JUN -8 AM 10:46

BY \_\_\_\_\_ CLERK  
\_\_\_\_\_ & \_\_\_\_\_ DEPUTY

**BRADY LAW, CHARTERED**  
**Michael G. Brady, ISB #1293**  
**Jason S. Thompson, ISB #8985**  
**St. Mary's Crossing**  
**2537 W. State Street, Suite 200**  
**Boise, ID 83702**

**TELEPHONE: (208) 345-8400**  
**FACSIMILE: (208) 322-4486**

**Attorneys for Defendant/Cross-Claimant,**  
**Burks Tractor Company, Inc.**

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

**WESTERN COMMUNITY INSURANCE  
COMPANY, as Subrogee of DNJ, INC.,  
Subrogor, an Idaho corporation,**

**Plaintiff,**

**v.**

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

**Defendants.**

**BURKS TRACTOR COMPANY, INC., an  
Idaho corporation,**

**Cross-Claimant,**

**v.**

**KRONE NA, INC., a Delaware corporation,**

**Cross-Defendant.**

Case No. CV-14-2977

Judge G. Richard Bevan

**DEFENDANT BURKS TRACTOR  
COMPANY, INC.'S ANSWER TO  
SECOND AMENDED COMPLAINT,  
CROSS-CLAIM, AND DEMAND FOR  
JURY TRIAL**

DEFENDANT BURKS TRACTOR COMPANY, INC. (“Burks”), by and through its attorneys of record, Brady Law, Chartered, as and for an Answer to Plaintiffs’ Second Amended Complaint, pleads and alleges as follows:

**FIRST DEFENSE**

Burks denies each and every allegation contained in Plaintiffs’ Second Amended Complaint, unless expressly and specifically hereinafter admitted.

**PARTIES, JURISDICTION AND VENUE**

1. With regard to Paragraph I of Plaintiffs’ Second Amended Complaint, Burks admits that Plaintiff Western Community Insurance Company (“Western Community”) was an insurance company licensed to do business in the state of Idaho, but is without knowledge or information sufficient to form a belief as to the remaining allegations contained therein, and therefore denies the same.

2. With regard to Paragraphs II, III and IV of Plaintiffs’ Second Amended Complaint, Burks admits each and every allegation contained therein.

3. With regard to Paragraph V of Plaintiffs’ Second Amended Complaint, Burks admits that jurisdiction is proper in this Court.

4. With regard to Paragraphs VI and VII of Plaintiffs’ Second Amended Complaint, Burks admits that venue is proper in Twin Falls County, Idaho.

**GENERAL ALLEGATIONS**

5. With regard to Paragraph VIII of Plaintiffs’ Second Amended Complaint, Burks admits each and every allegation contained therein.

6. With regard to Paragraphs IX and X of Plaintiffs’ Second Amended Complaint, Burks admits that the Krone Chopper was covered by a Krone New Equipment Limited Warranty (“New Equipment Warranty”), which Krone New Equipment Warranty provided warranty coverage as stated therein, and denies each and every other allegation contained therein.

7. With regard to Paragraphs XI and XII of Plaintiffs’ Second Amended Complaint, Burks admits that the Krone Chopper was covered by a Krone North America Crown Guarantee (“Extended Warranty”), which provided warranty coverage as provided therein, and denies each and every other allegation contained therein.

8. With regard to Paragraph XIII of Plaintiffs' Second Amended Complaint, Burks admits that DNJ had previously purchased a Krone Chopper from Burks, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein, and therefore denies the same.

9. With regard to Paragraphs XIV and XV of Plaintiffs' Second Amended Complaint, Burks denies each and every allegation contained therein.

10. With regard to Paragraph XVI of Plaintiffs' Second Amended Complaint, Burks admits that on or about October 15, 2012, the Krone Chopper was damaged by a fire, and denies each and every other allegation contained therein.

11. With regard to Paragraph XVII of Plaintiffs' Second Amended Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

12. With regard to Paragraph XVIII of Plaintiffs' Second Amended Complaint, there are not allegations concerning Burks contained therein. To the extent that allegations concerning Burks are contained in Paragraph XVIII, Burks denies the same.

**FIRST CAUSE OF ACTION – BREACH OF EXPRESS WARRANTIES**

13. With regard to Paragraph XIX of Plaintiffs' Second Amended Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiffs' Second Amended Complaint as if fully set forth herein.

14. With regard to Paragraph XX, XXI, and XXII of Plaintiffs' Second Amended Complaint, Burks denies each and every allegation contained therein.

15. With regard to Paragraph XXIII of Plaintiffs' Second Amended Complaint, Burks only admits that Plaintiffs submitted a warranty claim, and denies each and every remaining allegation contained therein.

16. With regard to Paragraph XXIV and XXV of Plaintiffs' Second Amended Complaint, Burks denies each and every allegation contained therein.

17. With regard to Paragraph XXVI of Plaintiffs' Second Amended Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.



**SECOND CAUSE OF ACTION – BREACH OF OBLIGATION OF GOOD FAITH**

18. With regard to Paragraph XXVII of Plaintiffs' Second Amended Complaint, Burks repeats and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiffs' Second Amended Complaint as if fully set forth herein.

19. With regard to Paragraphs XXVIII, XXIX, and XXX of Plaintiffs' Second Amended Complaint, Burks denies each and every allegation contained therein.

20. With regard to Paragraph XXXI of Plaintiffs' Second Amended Complaint, Burks is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

**ATTORNEY'S FEES**

Burks denies that Plaintiffs are entitled to attorney's fees and costs in this case.

**SECOND DEFENSE**

Western Community, as the subrogee of DNJ, is subject to all the admissions, denials and defenses pled in this Answer.

**THIRD DEFENSE**

Plaintiffs' damages, if any, were caused by the negligence, fault or responsibility of DNJ.

**FOURTH DEFENSE**

Plaintiffs' damages, if any, were caused by accident, misuse, and/or negligence of DNJ.

**FIFTH DEFENSE**

Plaintiffs' damages, if any, were caused by changes, alterations or modifications of the Krone Chopper by DNJ not authorized by Krone or Burks.

**SIXTH DEFENSE**

Plaintiffs' damages, if any, were caused by the abuse, misuse, or lack of maintenance of the Krone Chopper by DNJ.

**SEVENTH DEFENSE**

Burks made no representations or warranties, express or implied, to DNJ, including the implied warranties of merchantability or fitness regarding the Krone Chopper.

**EIGHTH DEFENSE**

Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would, or should, in the exercise of reasonable care, reveal the existence of the defective condition alleged in the Second Amended Complaint.

**NINTH DEFENSE**

Burks did not have knowledge or reason to know of the defective condition of the Krone Chopper alleged in the Second Amended Complaint.

**TENTH DEFENSE**

Prior to the sale of the Krone Chopper to DNJ, Burks did not alter, modify or install any part or component of the Krone Chopper alleged to be defective in the Second Amended Complaint.

**ELEVENTH DEFENSE**

Burks did not provide any plans or specifications to Krone for the manufacture of the Krone Chopper.

**TWELFTH DEFENSE**

Plaintiffs' claims are barred in whole, or in part, by the economic loss rule.

**THIRTEENTH DEFENSE**

Plaintiffs' claims are barred by the Idaho Product Liability Reform Act, *Idaho Code* Title 6, Chapter 14.

**FOURTEENTH DEFENSE**

All representations made by Burks to DNJ regarding the sale of the Krone Chopper were included in a written contract that became the entire agreement between the parties.

**FIFTHTEENTH DEFENSE**

DNJ did not rely on any representations made by Burks regarding the Krone Chopper that were not included in the written contract between Burks and DNJ.

**PRAYER FOR RELIEF**

WHEREFORE, Burks prays for judgment as follows:

1. That Plaintiffs' Second Amended Complaint be dismissed with prejudice and that Plaintiff take nothing thereunder.

2. That Burks be awarded attorney fees pursuant to Idaho Code §§ 12-120(3), 12-121, and 48-608(5).

3. That Burks be awarded costs and disbursements necessarily incurred in defending this action pursuant to *Idaho Rules of Civil Procedure*, Rule 54.

4. For such other and further relief as the Court may deem just and proper.

### **CROSS-CLAIM**

Defendant/Cross-Claimant Burks Tractor Company, Inc. (“Burks”), as and for a cross-claim against Defendant/Cross-Defendant Krone NA, Inc. (“Krone”), pleads and alleges as follows:

### **PARTIES**

1. Burks was and is an Idaho corporation, organized and existing under the laws of the state of Idaho, with its principal place of business in Twin Falls, Idaho.

2. Krone NA, Inc., was and is a Delaware corporation, organized and existing under the laws of the state of Delaware, with its principal place of business in Memphis, Tennessee, and licensed to transact business in the state of Idaho.

### **JURISDICTION AND VENUE**

1. Jurisdiction and venue are proper in this Court.

### **GENERAL ALLEGATIONS**

1. Krone manufactured a 2012 Krone X 1100 Forage Chopper (“Krone Chopper”), serial number 841659.

2. Burks is an authorized Krone dealer in the state of Idaho.

3. On September 12, 2012, DNJ, Inc. (“DNJ”) executed a Purchaser’s Order and Addendum to purchase the Krone Chopper from Burks.

4. The Krone Chopper was covered by a Krone New Equipment Limited Warranty (“New Equipment Warranty”) and a Krone North America Crown Guarantee (“Extended Warranty”) issued by Krone for delivery by Burks to DNJ.

5. Incident to the sale of the Krone Chopper by Burks to DNJ, Burks made no representations or warranties, express or implied, to DNJ, including the implied warranties of merchantability or fitness regarding the Krone Chopper.

6. On or about October 15, 2012, the Krone Chopper was damaged in a fire.

7. On May 19, 2015, Plaintiff filed a Second Amended Complaint against Burks and Krone, alleging that the October 15, 2012 fire was due to a defect in the materials and workmanship and/or a mechanical breakdown or failure of the fuel tanks of the Krone Chopper.

**FIRST CAUSE OF ACTION**

**(Indemnity)**

1. Burks repeats and realleges each and every allegation set forth in paragraphs 1 through 7, as if fully set forth herein.

2. Pursuant to *Idaho Code* § 6-1407(2), the defense and indemnity of Burks in this action was tendered to Krone.

3. *Idaho Code* § 6-1407(1) provides that product sellers (Burks) other than manufacturers (Krone) shall not be subject to liability in circumstances where Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would or should, in the exercise of reasonable care, reveal the existence of the alleged defective condition.

4. Burks made no express or implied warranties to DNJ concerning the design or manufacture of the Krone Chopper; an inspection of the Krone Chopper by Burks would not have revealed or discovered the alleged defect; Burks had no reason to know of the alleged defect; and Burks did not alter, modify or install the fuel tanks on the Krone Chopper alleged to be defective in the Second Amended Complaint.

5. Krone has failed to accept the tender of defense from Burks and agree to indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the action and/or to indemnify Burks for any judgment rendered against Krone, for which Burks may be legally liable.

6. Pursuant to *Idaho Code* § 6-1407(1) and (2), Burks is entitled to a defense from Krone, and indemnity for reasonable attorney fees and costs incurred by Burks in defending this action, and indemnity for any judgment rendered against Krone for which Burks may be held liable.

7. Additionally, the New Equipment Warranty and Extended Warranty were issued by Krone, for delivery by Burks to DNJ. As such, Burks is entitled to indemnity from Krone for any judgment or liability rendered against Burks relating to the Krone New Equipment Warranty and Krone Extended Warranty.

**PRAYER**

WHEREFORE, Burks prays for judgment against Krone as follows:

1. To indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the Second Amended Complaint and prosecuting this Cross-Claim.
2. To indemnify Burks for any judgment rendered against Krone for which Burks may be held liable.
3. For attorney fees incurred in defending the Second Amended Complaint and prosecuting this Cross-Claim pursuant to *Idaho Code* §§ 12-120(3) and 6-1407(2).
4. For costs and disbursements incurred in defending the Second Amended Complaint and prosecuting this Cross-Claim pursuant to *Idaho Rules of Civil Procedure*, Rule 54 and *Idaho Code* § 6-1407(2).
5. For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Burks hereby demands a jury trial pursuant to *Idaho Rules of Civil Procedure*, Rule 38(b).

DATED this 5<sup>th</sup> day of June, 2014.

BRADY LAW, CHARTERED



By: Jason S. Thompson,  
Attorneys for Defendant,  
Burks Tractor Company, Inc.


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5<sup>th</sup> day of June, 2015, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Rodney R. Saetrum	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
David W. Lloyd	<input type="checkbox"/>	Express Mail
SAETRUM LAW OFFICES	<input type="checkbox"/>	Hand Delivery
P.O. Box 7425	<input checked="" type="checkbox"/>	Facsimile Transmission
Boise, ID 83707	<input type="checkbox"/>	Federal Express
Fax: (208) 336-0448	<input type="checkbox"/>	Electronic Mail
<i>Attorneys for Plaintiff</i>		

David A. Coleman	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
Benjamin J. Cluff	<input type="checkbox"/>	Express Mail
COLEMAN, RITCHIE & CLUFF	<input type="checkbox"/>	Hand Delivery
P.O. Box 525	<input checked="" type="checkbox"/>	Facsimile Transmission
Twin Falls, ID 83303	<input type="checkbox"/>	Federal Express
Fax: (208) 734-3983	<input type="checkbox"/>	Electronic Mail
<i>Attorneys for Defendant Krone NA, Inc.</i>		

Philip R. Dupont	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
Sandberg, Phoenix & Von Gontard, P.C.	<input type="checkbox"/>	Express Mail
7450 West 130th St., Ste 140	<input type="checkbox"/>	Hand Delivery
Overland Park, KS 66213	<input checked="" type="checkbox"/>	Facsimile Transmission
Fax: (913) 851-3737	<input type="checkbox"/>	Federal Express
<i>Attorneys for Defendant Krone NA, Inc.</i>	<input type="checkbox"/>	Electronic Mail

  
\_\_\_\_\_  
Jason S. Thompson

David A. Coleman (ISB #5742)  
 Benjamin J. Cluff (ISB #6197)  
 COLEMAN, RITCHIE & CLUFF  
 P.O. Box 525  
 Twin Falls, ID 83303-0525  
 Telephone: 208-734-1224  
 Fax: 208-734-3983

DISTRICT COURT  
 TWIN FALLS CO., IDAHO  
 FILED

2015 JUL 20 PM 3:59

BY \_\_\_\_\_ CLERK  
 SP DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE	)	
COMPANY, As Subrogee of DNJ, INC.	)	Case No. CV-14-2977
Subrogor, and DNJ, INC, an Idaho	)	
Corporation,	)	
	)	<b>ANSWER TO PLAINTIFFS'</b>
Plaintiff,	)	<b>SECOND AMENDED COMPLAINT</b>
	)	<b>AND ANSWER TO DEFENDANT</b>
v.	)	<b>BURKS TRACTOR COMPANY,</b>
	)	<b>INC.'S CROSS-CLAIM AGAINST</b>
BURKS TRACTOR COMPANY, INC., an	)	<b>KRONE NA, INC.</b>
Idaho Corporation, and KRONE NA, INC., a	)	
Delaware Corporation	)	
	)	
Defendants.	)	

COMES NOW defendant Krone NA, Inc. (hereinafter "Defendant Krone"), by and through its attorneys of record, Sandberg Phoenix & von Gontard and Coleman, Ritchie & Cluff, and for its response to Plaintiffs' Second Amended Complaint and Defendant Burks Tractor Company Inc.'s Cross Claim Against Defendant Krone states as follows:

**Answer to Complaint**

1. Defendant Krone admits that Plaintiff Western was an insurance company licensed to do business in the state of Idaho, but is without sufficient information to admit or deny the remaining allegations contained in paragraph I and therefore denies the same.

2. Defendant Krone admits the allegations contained in paragraph II.
3. Defendant Krone admits the allegations contained in paragraph III.
4. Defendant Krone admits the allegations contained in paragraph IV.
5. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph V and therefore denies the same.
6. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph VI and therefore denies the same.
7. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph VII and therefore denies the same.
8. Defendant Krone admits the allegations contained in paragraph VIII.
9. Defendant Krone admits that Plaintiff DNJ was provided a New Equipment Warranty, but denies each and every other allegation contained in paragraph IX.
10. Defendant Krone admits that Plaintiff DNJ was provided a New Equipment Warranty, but denies each and every other allegation contained in paragraph X.
11. Defendant Krone is without sufficient information to admit or deny the allegations of paragraph XI and therefore denies each and every allegation contained in paragraph XI.
12. Defendant Krone denies each and every allegation contained in paragraph XII.
13. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XII and therefore denies the same.
14. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XIV and therefore denies the same.



15. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XV and therefore denies the same.

16. Defendant Krone admits that on or about October 15, 2012, the Krone Chopper was damaged by a fire, and denies each and every other allegation contained in paragraph XVI.

17. Defendant Krone denies the allegations contained in paragraph XVII.

18. Defendant Krone is without sufficient information to admit or deny the allegations of paragraph XVIII and therefore Defendant Krone denies each and every allegation contained in paragraph XVIII.

**First Cause of Action**

19. By way of response to paragraph XIX, Defendant Krone incorporates by reference its responses to paragraphs I through XVIII above as fully set out herein.

20. Defendant Krone is not implicated in paragraph XX. To the extent any allegation does affect Defendant Krone, Defendant Krone denies each and every allegation.

21. Defendant Krone denies each and every allegation of paragraph XXI and states that the Court has ruled that Plaintiffs cannot make a claim against Krone on the New Equipment Warranty.

22. Defendant Krone denies each and every allegation contained in paragraph XXII.

23. Defendant Krone denies each and every allegation contained in paragraph XXIII.

24. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XXIV and therefore denies the same.

25. Defendant Krone denies each and every allegation contained in paragraph XXV.

26. Defendant Krone denies the allegations in paragraph XXVI.

### **Second Cause of Action**

27. By way of response to paragraph XXVII, Defendant Krone incorporates by reference its responses to paragraphs I through XXVI above as fully set out herein.

28. Defendant Krone denies each and every allegation contained in paragraph XXVIII.

29. Defendant Krone denies each and every allegation contained in paragraph XXIX.

30. Defendant Krone denies the allegations contained in paragraph XXXI.

31. Defendant Krone denies Plaintiffs are entitled to any of the damages contained in Plaintiffs' Prayer for Relief.

### **Attorney's Fees**

Defendant Krone denies that Plaintiffs are entitled to attorney's fees and costs in this case.

### **Affirmative Defenses**

1. Plaintiffs' damages, if any, were caused by the negligence, fault, or responsibility of DNJ.
2. Plaintiffs' damages, if any, were caused by accident, misuse, and/or negligence of DNJ.
3. Plaintiffs' damages, if any, were caused by changes, alterations, or modifications of the Krone Chopper by DNJ not authorized by Krone or Burks.
4. Plaintiffs' damages, if any, were caused by the abuse, misuse, or lack of maintenance of the Krone Chopper by DNJ.
5. Plaintiffs' claims are barred in whole, or in part, by the economic loss rule.
6. Plaintiffs have failed to mitigate their damages, if any.

**Answer to Burks' Cross-Claim Against Defendant Krone**

1. Defendant Krone admits the allegations contained in paragraph 1.
2. Defendant Krone denies the allegations contained in paragraph 1 under "General Allegations".
3. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph 2 and therefore denies the same.
4. Defendant Krone admits the allegations contained in paragraph 3 of the section "General Allegations."
5. Defendant Krone denies the allegations contained in paragraph 4 of the section "General Allegations."
6. Defendant Krone does not have sufficient knowledge to admit or deny the allegations contained in paragraph 5 of the section "General Allegations" and therefore denies the same.
7. Defendant Krone admits the allegations contained in paragraph 6 of the section "General Allegations."
8. Defendant Krone admits the allegations contained in paragraph 7 of the section "General Allegations."

**First Cause of Action**

9. By way of response to paragraph 1 of the section "First Cause of Action," Defendant Krone incorporates by reference its responses to paragraphs 1 through 7 of the section "General Allegations" as fully set forth herein.

10. In response to paragraph 2 of the section "First Cause of Action," Defendant Krone admits receiving a letter of indemnity from Burks for this action, but denies each and every other allegation contained in the paragraph.

11. In response to paragraph 3 of the section "First Cause of Action," Defendant Krone admits that *Idaho Code* § 6-1407(1) is a products liability statute that provides immunity to product sellers that meet certain criteria. Defendant Krone denies any other allegation contained in paragraph 3.

12. Defendant Krone is without sufficient information contained in paragraph 4 of the section "First Cause of Action" to admit or deny and therefore deny the same.

13. Defendant Krone admits that Burks' tender of defense has not been accepted, but denies each and every other allegation contained in paragraph 5 of the section "First Cause of Action."

14. Defendant Krone denies each and every allegation contained in paragraph 6 of the section "First Cause of Action."

15. Defendant Krone denies each and every allegation contained in paragraph 7 of the section "First Cause of Action."

16. Defendant Krone denies Burkes is entitled to any of the relief identified in Burks' prayer.

WHEREFORE, Defendant Krone requests the Court enter judgment on its behalf, for its costs herein incurred and for such other and further relief as the Court deems just.

Respectfully Submitted,

  
BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
P.O. Box 525  
Twin Falls, Idaho 83303-0525

and

PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of July, 2015, I submitted the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, via U.S. Mail to the following individuals:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

  
BENJAMIN J. CLUFF

David A. Coleman (ISB #5742)  
 Benjamin J. Cluff (ISB #6197)  
 COLEMAN, RITCHIE & CLUFF  
 P.O. Box 525  
 Twin Falls, ID 83303-0525  
 Telephone: 208-734-1224  
 Fax: 208-734-3983

DISTRICT COURT  
 TWIN FALLS CO., IDAHO  
 FILED

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BY \_\_\_\_\_  
 CLEAR  
 \_\_\_\_\_  
 DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE )  
 COMPANY, As Subrogee of DNJ, INC. )  
 Subrogor, and DNJ, INC, an Idaho )  
 Corporation, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BURKS TRACTOR COMPANY, INC., an )  
 Idaho Corporation, and KRONE NA, INC., a )  
 Delaware Corporation )  
 )  
 Defendants. )  
 )

Case No. CV-14-2977

**DEFENDANTS' JOINT MOTION  
 FOR SUMMARY JUDGMENT**

Defendants Burks Tractor Company, Inc. and Krone NA, Inc. ("Defendants") move for Summary Judgment pursuant to *Idaho Rules of Civil Procedure*, Rule 56 on Plaintiff's claims for recovery under the Extended Warranty on the grounds and for the reasons that the Extended Warranty did not commence until the one-year New Equipment Limited Warranty expired. As alleged by Plaintiffs, DNJ purchased the Krone X 1100 Forage Chopper ("the Chopper") from Burks on September 12, 2012 and delivered on September 18, 2012. It was destroyed in a fire approximately one month later on October 15, 2012. Accordingly, only the one-year New

Equipment Limited Warranty could apply to this case and the Extended Warranty, which would not have started until the beginning of DNJ's second year of ownership, never applied.

There being no genuine issue as to any material fact, Defendants jointly move this Court for an Order granting Summary Judgment, dismissing the Extended Warranty claims under both Courts I and II of Plaintiffs' Second Amended Complaint.

Respectfully Submitted,



BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
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PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659  
Attorneys for Defendant Krone NA, Inc.

and

/s/ \_\_\_\_\_  
MICHAEL G. BRADY  
JASON S. THOMPSON  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702  
Attorneys for Defendant Burks Tractor  
Company, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23 day of July, 2015, I submitted the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, via U.S. Mail to the following individuals:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707


Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

  
BENJAMIN J. CLUFF



2015 JUL 23 PM 3:54

BY \_\_\_\_\_ CLERK

 \_\_\_\_\_ DEPUTY

David A. Coleman (ISB #5742)  
Benjamin J. Cluff (ISB #6197)  
COLEMAN, RITCHIE & CLUFF  
P.O. Box 525  
Twin Falls, ID 83303-0525  
Telephone: 208-734-1224  
Fax: 208-734-3983

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiff, )

v. )

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

Defendants. )

Case No. CV-14-2977

**STATEMENT OF  
UNCONTROVERTED MATERIAL  
FACTS IN SUPPORT OF  
DEFENDANTS' JOINT MOTION  
FOR SUMMARY JUDGMENT**

Defendants Burks Tractor Company, Inc. and Krone NA, Inc. offer the following  
Statement of Uncontroverted Material Facts in Support of Defendants' Joint Motion for  
Summary Judgment:

1. On September 12, 2012, DNJ purchased a 2012 Krone Big X 1100 Forage Chopper, S/N 841659 (the "Chopper"), from Burks Tractor Company, Inc. ("Burks"). The delivery date was September 18, 2012. (*Affidavit of Ken Stratton*, ¶ 2).

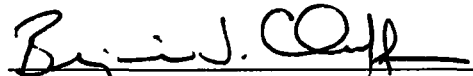
2. DNJ was provided a one-year New Equipment Limited Warranty (09/18/12-09/17/13). The New Equipment Limited Warranty was in effect on October 15, 2012 when the Chopper was destroyed by a fire. (*Aff. Stratton*, ¶ 3).

3. On September 12, 2012, DNJ purchased an Extended Warranty on the Chopper to commence on September 18, 2013, when the one-year New Equipment Limited Warranty expired. (*Aff. Stratton*, ¶ 4).

4. The Extended Warranty DNJ purchased from Burks did not commence until September 18, 2013 which is the day the one-year New Equipment Limited Warranty expired. (*Aff. Stratton*, ¶ 5).

5. The Extended Warranty was not in effect on October 15, 2012 when the Chopper was destroyed by fire. (*Aff. Stratton*, ¶6).

Respectfully Submitted,



BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
P.O. Box 525  
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PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659  
Attorneys for Defendant Krone NA, Inc.

and

/s/ \_\_\_\_\_  
MICHAEL G. BRADY  
JASON S. THOMPSON  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702  
Attorneys for Defendant Burks Tractor  
Company, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23 day of July, 2015, I submitted the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, via U.S. Mail to the following individuals:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

  
BENJAMIN J. CLUFF

David A. Coleman (ISB #5742)  
 Benjamin J. Cluff (ISB #6197)  
 COLEMAN, RITCHIE & CLUFF  
 P.O. Box 525  
 Twin Falls, ID 83303-0525  
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DISTRICT COURT  
 TWIN FALLS CO., IDAHO  
 FILED

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiff, )

v. )

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

Defendants. )

Case No. CV-14-2977

**MEMORANDUM IN SUPPORT OF  
 DEFENDANTS' JOINT MOTION  
 FOR SUMMARY JUDGMENT**

Defendants Burks Tractor Company, Inc. and Krone NA, Inc. ("Defendants") jointly move for Summary Judgment, seeking dismissal of Plaintiff's claims for recovery under the Extended Warranty on the grounds that the Extended Warranty did not commence until the one-year New Equipment Limited Warranty expired.

As alleged by Plaintiffs, DNJ purchased the Krone X 1100 Forage Chopper ("the Chopper") from Burks on September 12, 2012, and it was destroyed in a fire approximately one month later on October 15, 2012. Accordingly, only the one-year New Equipment Warranty

applies to this case, and the Extended Warranty, which would not have started until DNJ's second year of ownership, never applied.

### **I. BACKGROUND**

DNJ purchased the Chopper from Burks on September 12, 2012 (see, Affidavit of Ken Stratton, ¶ 2). A New Equipment Limited Warranty was provided to DNJ. DNJ separately purchased an Extended Warranty at the time of the sale (See, Affidavit of Ken Stratton, filed concurrently herewith, ¶ 4). After owning the Chopper for only one month, the Chopper was destroyed in a fire on October 15, 2012. Plaintiff Western insured the Chopper and allegedly paid DNJ for the value of the Chopper. Western now brings this subrogation claim, along with DNJ, to recover the value of the Chopper.

This Court has ruled on two separate Motions to Dismiss (12/18/14 and 5/5/15). Following those Court Orders, Plaintiffs filed a Second Amended Complaint and Demand for Jury Trial alleging a cause of action against Defendants for breach of express warranty under the Extended Warranty, as well as, Count II for Breach of Obligation of Good Faith under the Extended Warranty. The Second Amended Complaint and Demand for Jury Trial is designed to be in conformity with the Court's May 5, 2014 Order.

Because neither Defendant can be liable under the Extended Warranty, both Defendants jointly move for Summary Judgment on those portions of Counts I and II seeking recovery under the Extended Warranty.

### **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. On September 12, 2012, DNJ purchased a 2012 Krone Big X 1100 Forage Chopper, S/N 841659 (the "Chopper"), from Burks Tractor Company, Inc. ("Burks"). The delivery date was September 18, 2012. (*Aff. Stratton*, ¶ 2).

2. DNJ was provided a one-year New Equipment Limited Warranty (09/18/12-09/17/13). The New Equipment Limited Warranty was in effect on October 15, 2012 when the Chopper was destroyed by a fire. (*Aff. Stratton* ¶ 3).

3. On September 12, 2012, DNJ purchased an Extended Warranty on the Chopper to commence on September 18, 2013, when the one-year New Equipment Limited Warranty expired. (*Aff. Stratton* ¶ 4).

4. The Extended Warranty DNJ purchased from Burks did not commence until September 18, 2013 which is the day the one-year New Equipment Limited Warranty expired. (*Aff. Stratton* ¶ 5).

5. The Extended Warranty was not in effect on October 15, 2012 when the Chopper was destroyed by fire. (*Aff. Stratton* ¶ 6).

## **II. SUMMARY JUDGMENT STANDARD**

I.R.C.P. 56 C, which governs summary judgments, provides that the party may move for summary judgment if it demonstrates there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law.” The Idaho Supreme Court has consistently emphasized that the purpose of summary judgment is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain. Berg v. Fairman, 107 Idaho 441, 444, 690 P.2d 896, 899 (1984). When ruling on a motion for summary judgment, the court must construe the record in the light most favorable to the non-moving party, and draw all reasonable inferences in that party’s favor. Atwood v. Western Const., Inc., 129 Idaho 234, 237, 923 P.2d 479, 482 (Ct. App. 1996).

However, a party confronted with a summary judgment motion “[M]ay not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists in order to withstand summary judgment. Finholt v. Cresto, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). Furthermore, a mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. Id. at 897, 155 P.3d at 698. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the party. Id.

Furthermore, if a nonmoving party fails to provide a sufficient showing to establish each of the essential elements of his or her case, judgment shall be granted to the moving party. Foster v. Traul, 141 Idaho 890, 892, 120 P.3d 278, 280 (2005). “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” McCorkle v. Northwestern Mutual Life Insurance Company, 141 Idaho 550, 112 P.3d 838 (Ct. App. 2005) (citing Celotex Corp. V. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 273 (1986)).

“In such a situation there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. “The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id.


### **III. ARGUMENT**

As demonstrated by the separately filed Affidavit from Ken Stratton, who is employed by Krone, it cannot be disputed that the Extended Warranty would not apply until the one-year New Equipment Limited Warranty expired (see, Affidavit of Ken Stratton). DNJ purchased the Chopper on September 12, 2012, and was provided with the one-year New Equipment Limited Warranty, which would not have expired until September 11, 2013. The Extended Warranty would not have commenced until September 12, 2013 approximately 11 months after the Chopper was destroyed by a fire. There can be no recovery under the Extended Warranty because it never applied to DNJ's loss.

### **IV. CONCLUSION**

There being no genuine issue as to any material fact, Defendants jointly move this Court for an Order granting Summary Judgment, dismissing the Extended Warranty claims under both Courts I and II of Plaintiffs' Second Amended Complaint and Demand for Jury Trial.

Respectfully Submitted,

  
BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
P.O. Box 525  
Twin Falls, Idaho 83303-0525



PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659  
Attorneys for Defendant Krone NA, Inc.

and

/s/ \_\_\_\_\_  
MICHAEL G. BRADY  
JASON S. THOMPSON  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702  
Attorneys for Defendant Burks Tractor  
Company, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23 day of July, 2015, I submitted the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, via U.S. Mail to the following individuals:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

  
BENJAMIN J. CLUFF

David A. Coleman (ISB #5742)  
 Benjamin J. Cluff (ISB #6197)  
 COLEMAN, RITCHIE & CLUFF  
 P.O. Box 525  
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 Telephone: 208-734-1224  
 Fax: 208-734-3983

DISTRICT COURT  
 TWIN FALLS CO., IDAHO  
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BY \_\_\_\_\_ CLERK  
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiff, )

v. )

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


Defendants. )

Case No. CV-14-2977

**CERTIFICATE OF SERVICE OF  
 AFFIDAVIT OF KEN STRATTON  
 IN SUPPORT OF DEFENDANTS'  
 JOINT MOTION FOR SUMMARY  
 JUDGMENT**

Defendant Krone NA, Inc. and Burks Tractor Company, Inc. have filed herein an Affidavit of Ken Stratton in support to Defendants' Motion for Summary Judgment, a copy of which is attached.

Respectfully Submitted,

  
 \_\_\_\_\_  
 BENJAMIN J. CLUFF  
 DAVID A. COLEMAN  
 Coleman, Ritchie & Cluff  
 156 2<sup>nd</sup> Avenue West  
 P.O. Box 525  
 Twin Falls, Idaho 83303-0525

and

PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23 day of July, 2015, I submitted the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, via U.S. Mail to the following individuals:

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
P.O. Box 7425  
Boise, Idaho 83707

Mike Brady  
Brady Law Chartered  
2537 W. State Street  
Suite 200  
Boise, Idaho 83702

  
BENJAMIN J. CLUFF

DEC 17 2015 9:57 am

By \_\_\_\_\_  
Deputy Clerk

Rodney R. Saetrum, ISBN: 2921  
David W. Lloyd, ISBN: 5501  
SAETRUM LAW OFFICES  
P.O. Box 7425  
Boise, Idaho 83707  
Telephone: (208) 336-0484  
Fax: (208) 336-0448  
Email: general@saetrumlaw.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs,

v.

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

Defendants.

Case No. CV-14-2977

**THIRD AMENDED  
COMPLAINT AND  
DEMAND FOR JURY  
TRIAL**

Plaintiffs, Western Community Insurance Company, as Subrogee of DNJ, Inc., Subrogor, and DNJ, Inc, have and for their causes of action against Defendants, Burks Tractor Company, Inc. and Krone NA, Inc., hereby complain and allege as follows:

**PARTIES, JURISDICTION AND VENUE**

I.

At all times relevant hereto, Plaintiff Western Community Insurance Company ("Western Community") was and is an insurance company licensed to do business in the State of Idaho. Western Community is the Subrogee of DNJ, Inc's rights to recover against Defendant Burks Tractor Company, Inc. ("Burks"), and Defendant Krone NA, Inc. ("Krone NA") pursuant to and under the provisions of its Insurance Policy Number 08-829801-01 with Plaintiff DNJ, Inc.

**THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 1**

("DNJ").

II.

At all times relevant hereto, Plaintiff DNJ was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State's Office with its principle place of business in Buhl, Idaho.

III.

At all times relevant hereto, Defendant Burks was and is an Idaho corporation established within the laws of the State of Idaho and registered with the Idaho Secretary of State's Office with its principle place of business in Twin Falls, Idaho.

IV.

At all times relevant hereto, Defendant Krone NA, was a corporation established within the laws of the State of Delaware with its principle place of business in Memphis, Tennessee and was acting under a Certificate of Authority to transact business in Idaho issued by the Idaho Secretary of State's Office.

V.

Jurisdiction is proper in this Court as the amount sought by Plaintiff exceeds \$10,000.00.

VI.

Venue is proper in this County in that Defendant Burks has its principle place of business in this County and Plaintiffs' causes of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

VII.

Venue is proper in this County in that Defendant Krone NA was transacting business in this County and Plaintiffs' causes of action arose in this County. (IDAHO CODE §§ 5-404 and 48-608(3))

**GENERAL ALLEGATIONS**

VIII.

On September 12, 2012, DNJ executed a Purchaser's Order for Equipment ("Purchase Order") for the purchase of a 2012 Krone X 1100 Forage Chopper ("Krone Chopper"). The Krone Chopper was manufactured and owned by Krone NA and was sold to DNJ on its behalf by Burks. Exhibit 1. The Purchase Order was a contract for the sale of goods and identified the Krone

Chopper by its Vin Number 841659. Exhibit 1. Under the terms of the Purchase Order, the purchase price of the Krone Chopper was \$457,529.00. Exhibit 1.

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.

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.

**THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 3**

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.

XIV.

Prior to the purchase of the Krone Chopper, Plaintiff DNJ had purchased a similar Krone forage chopper from Burks. As part of its regular use of the previously purchased Krone forage chopper, DNJ had been forced to install a shield over the fuel tanks of the Krone forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks.

XV.

During discussions with Burks' representative, Les Preston, prior to the purchase of the Krone Chopper, DNJ representative Dell Jaynes told Mr. Preston that DNJ had been required to install a shield over the plastic fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks. Mr. Jaynes advised Mr. Preston that DNJ did not want to purchase another chopper with similar problems. At the time of this discussion, Mr. Preston was familiar with the type of business run by DNJ, including the fact that the DNJ used its Krone choppers as part of its custom farming business, as well as the operating conditions that the Krone Chopper would be used under.

XVI.

After Mr. Jaynes advised Mr. Preston that DNJ had been the forced to install a shield over the fuel tanks of the previously purchased Krone forage chopper to prevent heated chaff and debris falling from the engine and burning through the fuel tanks, and based on his knowledge of the operating conditions that the Krone Chopper would be used under, Mr. Preston recommended that DNJ purchase the Krone Chopper. Based on Mr. Preston's recommendation, DNJ agreed to purchase the Krone Chopper with the understanding that it would not have problems with heated chaff and debris falling from the engine and igniting in the engine compartment of the Krone Chopper.

XVII.

On or about October 15, 2012, a fire ignited in the right rear corner of the engine compartment of the Krone Chopper ("October 15, 2012 fire"). The Krone Chopper had been cleaned by DNJ employees in accordance with Krone NA's recommended cleaning procedures approximately one hour before the fire ignited. Instead of debris accumulation, the fire was caused by defects in the material and/or workmanship and/or a mechanical breakdown or failure of the high capacity wires connecting the battery to the starter and alternator and/or the turbocharger turbine housings of the Krone Chopper.

XVIII.

Once ignited, the fire in the right rear corner of the engine compartment of the Krone Chopper was fueled by nearby flammable fluids and quickly spread from the right rear corner of the engine compartment and ultimately engulfed the entire Krone Chopper. The October 15, 2012 fire resulted in the complete loss and destruction of the Krone Chopper.

XIX.

At the time of the October 15, 2012 fire, the value of the Krone Chopper was approximately \$440,779.00.

XX.

Insurance Policy No. 08-829801-01 was in effect from May 9, 2012 and May 8, 2013 and constituted an express contractual agreement between Western Community and DNJ. Under the contractual provisions and terms of Insurance Policy No. 08-829801-01, DNJ was compensated in the amount of \$440,779.00 for its October 15, 2012 loss of the Krone Chopper by Western Community. Pursuant to the following terms of Insurance Policy No. 08-829801-01, Western Community is the Subrogee of DNJ's rights to recover for this payment 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.

XXI.

Sometime after the October 15, 2012 fire, Krone NA, acting without permission or request from either DNJ or Burks, transferred coverage under the Krone NA Extended Warranty from the



Krone Chopper to a replacement 2013 Krone Big X 1100 Chopper purchased by DNJ.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION-BREACH OF EXPRESS WARRANTIES**

XXII.

Plaintiffs replead and realleges Paragraphs I-XXI, asif fully set forth herein.

XXIII.

Under the terms of the Krone NA New Equipment Warranty, Krone NA as the warrantor and Burks as Defendant Krone NA's authorized seller/distributor agreed and warranted that they would repair or replace any part of the Krone Chopper that showed evidence of defect or improper workmanship.

XXIV.

Under the terms of the Krone NA Extended Warranty, Krone NA as guarantor and Burks as the "Provider" issuing the contract agreed and warranted that they would repair or replace any covered parts of the Krone Chopper that were determined to have failed due to a mechanical breakdown or other failure and restore the Krone Chopper to its operating condition just prior to the failure while the Krone NA Extended Warranty remained in effect

XXV.

The October 15, 2012 fire was due to a defect in the material and workmanship and/or a mechanical breakdown or failure of the high capacity wires connecting the battery to the starter and alternator and/or the turbocharger turbine housings of the Krone Chopper.

XXVI.

As a result of the October 15, 2012 fire, Plaintiffs attempted to submit warranty claims to Krone NA under the Krone NA New Equipment and Krone NA Extended Warranty through Defendant Burks for the repair and/or replacement of the parts of the Krone Chopper that were determined to have failed due to defect, mechanical breakdown or other failure and for restoration of the Krone Chopper to its pre-loss condition. In response to DNJ's efforts to submit warranty claims under the Krone NA New Equipment and Krone NA Extended Warranty, Krone NA instructed Burks not to file or otherwise submit DNJ's warranty claims.

XXVII.

**THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL - 6**

Defendant Krone NA breached its duties and obligations under the terms of the Krone NA New Equipment Warranty by failing to repair and/or replace the damaged parts of the Krone Chopper after the October 15, 2012 fire.

XXVIII.

Defendants Krone NA and Burks breached their duties and obligations under the terms of the Krone NA Extended Warranty by failing to repair and restore the Krone Chopper to its pre-loss condition as a result of the mechanical breakdown and/or other failure of the high capacity wires connecting the battery to the starter and alternator and/or the turbocharger turbine housings of the Krone Chopper

XXIX.

Western Community provided insurance coverage to DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, DNJ, has been compensated in the amount of \$440,779.00 for its October 15, 2012 loss of the Krone Chopper. Under the terms of Policy No. 08-829801-01, Western Community is subrogated to the rights of DNJ to recover for this payment and is entitled to collect this sum from Krone NA based on Krone NA's breach of its duties and obligations under the terms of the Krone NA New Equipment Warranty and against Defendants based on the breach of their duties and obligations under the terms of the Krone NA Extended Warranty.

**SECOND CAUSE OF ACTION: BREACH OF OBLIGATION OF GOOD FAITH**

XXX.

Plaintiffs replead and reallege Paragraphs I-XXIX, as if fully set forth herein.

XXXI.

Pursuant to Idaho Code §28-1-304, the Krone NA New Equipment and Krone NA Extended Warranty were contracts and contained the respective duties and obligations of the parties to these contracts, DNJ, Krone NA and Burks. Both the Krone NA New Equipment and Krone NA Extended Warranty, therefore, imposed an obligation of good faith in the performance and enforcement of the warranty provisions on Defendants Krone NA and Burks.

XXXII.

In addition to its failure to repair and/or replace the damaged parts of the Krone Chopper after the October 15, 2012 fire, Krone NA instructed Burks not to file or otherwise submit a

warranty claim on behalf of DNJ as a result of DNJ's complete loss of the Krone Chopper. By refusing to allow Burks to submit, or to otherwise consider, a warranty claim under the Krone NA New Equipment Warranty for the replacement and/or repair of the Krone Chopper on behalf of DNJ, Defendant Krone NA breached its obligation of good faith in its performance and enforcement of the terms of the Krone NA New Equipment Warranty.

XXXIII.

In addition to their failure to repair and restore the Krone Chopper to its pre-loss condition after the October 15, 2012 fire, Defendants breached their obligation of good faith to DNJ under the terms of the Krone NA Extended Warranty by failing to submit and/or accept a warranty claim on behalf of DNJ as a result of DNJ's complete loss of the Krone Chopper.

XXXIV.

After the October 2012 fire and after it denied DNJ's warranty claim under the Krone NA Extended Warranty, Krone NA breached its obligation of good faith to DNJ under the terms of the Krone NA Extended Warranty by transferring coverage under the Krone NA Extended Warranty from the Krone Chopper to the 2013 Krone Big X 1100 Chopper purchased by DNJ. Without the permission or request of either DNJ or Burks, Krone NA transferred the protections under the Krone NA Extended Warranty from the Krone Chopper in the effort to avoid liability for breaching its duties and obligations under the terms of the Krone NA Extended Warranty.

XXXV.

Western Community provided insurance coverage to DNJ under Policy No. 08-829801-01 for the value of the Krone Chopper at the time of its loss. Under the terms of Policy No. 08-829801-01, DNJ has been compensated in the amount of \$440,779.00 for value of its October 15, 2012 loss of the Krone Chopper. Under the terms of Policy No. 08-829801-01, Western Community is subrogated to the rights of DNJ to recover for this payment and is entitled to collect this sum from Krone NA based on Krone NA's breach of its obligation of good faith in the performance and enforcement of the terms of the Krone NA New Equipment Warranty and against Defendants based on the breach of their obligation of good faith in the performance and enforcement of the terms of the Krone NA Extended Warranty.

**ATTORNEY'S FEES**

Plaintiffs have been required to retain the services of Saetrum Law Offices in order to

prosecute this action and are entitled to an award of their reasonable attorney's fees and costs of suit pursuant to Idaho Code §§12-121,12-120(3), and/or 48-608(5) and I.R.C.P. 54(d) and (e).

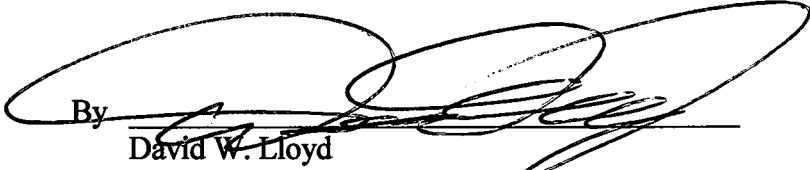
**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for judgment against Defendants Krone NA and Burks as follows:

1. For damages in the amount of \$440,779.00 as paid by Plaintiff Western Community under its Insurance Policy with Plaintiff DNJ for the loss of the Krone Chopper;
2. For damages in the amount of \$500.00 as paid by Plaintiff DNJ under its Insurance Policy with Plaintiff Western Community for payment of Plaintiff DNJ's insurance deductible;
3. For damages in the amount of \$20,447.00 for the amount paid by Plaintiff DNJ for the Krone NA Extended Warranty;
4. For interest on said amounts from October 15, 2012;
5. For reasonable attorneys' fees in the amount of \$15,000.00 if this matter is taken by default or in such greater amount as established by the evidence if this matter is contested; and
6. For such other and further relief as this Court deems just and proper in the premises.

DATED this 15<sup>th</sup> day of December, 2015.

SAETRUM LAW OFFICES

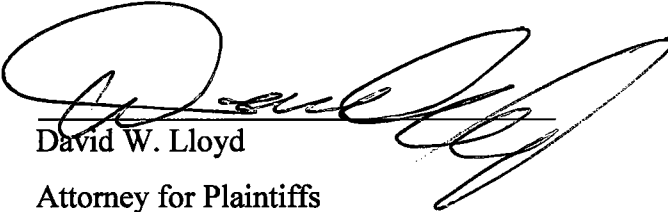
By   
David W. Lloyd  
Attorneys for Plaintiffs

**DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiffs above-named, and hereby demand a jury trial pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this 15<sup>th</sup> day of December, 2015.

SAETRUM LAW OFFICES

By   
David W. Lloyd  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of December, 2015, I caused a true and correct copy of the foregoing to be sent by method indicated below:

Benjamin Cluff  
David A. Coleman  
Coleman, Ritchie & Cluff  
P.O. Box 525  
Twin Falls, ID 83303

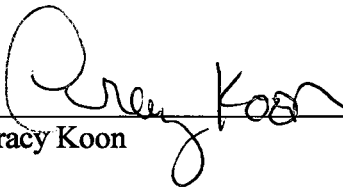
U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Philip R. DuPont  
Sandberg Phoenix & Von Gontard P.C.  
7450 West 130<sup>th</sup> Street Suite 140  
Overland Park, Kansas 66213-2659

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 Hand Delivery  
 Overnight Mail  
 Facsimile

Michael G. Brady  
Brady Law Chartered  
St. Mary's Crossing  
2537 W. State Street, Suite 200  
Boise Idaho 83702

U.S. Mail  
 Hand Delivery  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Tracy Koon

***EXHIBIT "1"***

Sat 10 12 10:55a April

### Purchaser's Order for Equipment

**Jurks Tractor Co. Inc. Dealer**  
140 Kimberly Road, Twin Falls, Idaho 83301

Date 9/12 20 12  
Buyer

DNJ, Inc.

Address 4178 North 1000 East, Buhl, Idaho 83316

Please Enter the Following Order to be Delivered on or after

Quantity		Warranty Period Months	Make, Model, Description	Serial No./Attach	Cash Price Each Item
New	Used				
1			Krone Big X 1100 Forage Chopper	841385	\$457,529.00
1			Krone EC-903 Tri Fold Corn Header	825953	\$145,046.00
1			Krone EF-380 Pickup Header	839897	\$38,978.00
1			Krone Warranty 2 Yrs. Full & 3rd. Yr. Drivetrain or 3000 Hrs.	N/A	\$20,447.00
1			Krone Big X 1100 Forage Chopper	841659	\$457,529.00
1			Krone EC-903 Tri Fold Corn Header	826903	\$145,046.00
1			Krone EF-380 Pickup Header	839898	\$38,978.00
1			Krone Warranty 2 Yrs. Full & 3rd. Yr. Drivetrain or 3000 Hrs.	N/A	\$20,447.00

Transportation Expense

Plus Extra Equipment (Cab, Excelsior, Duals, etc.)

Year	Description			Hours	Trade Allowance
Fig.	Make	Model	Serial No.		

Upon delivery, it is agreed that Purchaser will pay all taxes and other charges and settle for the purchase price as follows:

1. Total Cash Price	\$	1,324,000.00
2. Less Down Payment	\$	
3. Unpaid Cash Price	\$	1,191,405.19
4. Enter % Sales Tax \$ 50.00	\$	0.00
5. Other Fees or Charges \$ 166.50		
6. Total Taxes and Fees (4 + 5)	\$	166.50
7. Cash Due on Delivery (3 + 6)	\$	1,191,571.69

Purchaser hereby bargains, sells and conveys unto Seller the above described in Equipment and warrants and certifies it to be free and clear of liens, encumbrance, and security interests, except to the extent shown below.

Trade Allowance	\$	
Less Amount Owed		
TO	\$	
Net Trade Allowance, (1 - 2)	\$	
Other (Specify)		
Cash Down Payment with Order	\$	
Total Cash and Other Down Payment (4 + 5)	\$	0.00
Total Down Payment (3 + 6)	\$	

This is a cash transaction. If the Purchaser so requests prior to acceptance, the unpaid balance will be handled as a time sales transaction, subject to available financing and credit approval.

**NO DELIVERY OF ABOVE GOODS TO BE MADE UNTIL FULL SETTLEMENT IS RECEIVED.**

**SELLER AND MANUFACTURER MAKE NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED (INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) EXCEPT AS PROVIDED ON THE REVERSE SIDE.**

#### NOTICE TO PURCHASER:

Read this contract before you sign it.

You are entitled to an exact and completely filled in copy of this contract when you sign it. Keep it to protect your legal rights.

Purchaser acknowledges receipt of a fully completed copy of this contract and Purchaser waives notice of the acceptance or rejection of this order by the seller.

The additional terms and conditions set forth on the reverse side are a part of this contract and are incorporated herein by reference.

Understood that this is the entire agreement between the parties.

Taken by Leslie Preston

accepted This \_\_\_\_\_ Day

20 \_\_\_\_\_

Dealer / Store Manager

  
(Purchaser's Signature)  
Purchaser Address 4178 North 1000 East  
(Street)

Buhl  
(Town)

Twin Falls Idaho 83316



***EXHIBIT "2"***

**NEW EQUIPMENT LIMITED WARRANTY  
TERMS & CONDITIONS**



KRONE NA, Inc. (hereafter called KRONE) warrants each new KRONE product to be free from defects in material and workmanship. This Limited Warranty shall extend for one year or one season's use only; whichever occurs first, from the day of delivery or warranty start date; to the original purchaser-user, in the event a dealer files a false/incorrect Start Date - intentional or not - the machine Warranty Start Date will default automatically to the Delivery Date.

This Limited Warranty does NOT cover any merchandise or component parts which, in the opinion of KRONE, have been subjected to negligent use, misuse, alteration, or accident. Repairs made with parts other than those manufactured and obtainable from KRONE will not be considered. Under no circumstances are component parts warranted against wear that is not related to defective materials or workmanship.

KRONE does not warrant electric motors, batteries, tires, or other components supplied by manufacturers that are warranted separately by these suppliers.

KRONE's obligation under this Limited Warranty is limited to repairing or replacing free of charge to the original purchaser-user, at a location designated by KRONE; any part that in KRONE's judgment shows evidence of defect or improper workmanship. Defective parts must be returned through the selling dealer or distributor, transportation charges prepaid by Krone, if requested.

This Limited Warranty and KRONE's obligation hereunder is in lieu of all warranties, express or implied, and all other representations to the original purchaser-user and all other obligations or liabilities, including liability for loss of crops, losses caused by harvest delays or any expenses of loss for labor, supplies, rental equipment and all incidental or consequential damages. The performance or replacement or repairs is the exclusive remedy under this written Warranty or any implied Warranty.

No person is authorized to give any other warranties or to assume any other liability on KRONE's behalf.

**KRONE MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

*(This machine Warranty must be registered with KRONE within ten (10) days from the date of original purchase.)*

*KRONE NA, Inc. reserves the right to change or withdraw this program at anytime without notice.*

Krone NA, Inc. \* PO Box 18880 \* Memphis, TN 38181-0880 \* 1-800-453-2874 \* [www.krone-northamerica.com](http://www.krone-northamerica.com)

## REPAIRS OR REPLACEMENT NOT COVERED BY THE STANDARD WARRANTY

1. **OWNER RESPONSIBILITY PARTS:** Some items must be serviced and/or replaced as a normal result of machine usage. These are defined as "Owner Responsibility" items. Major examples are listed below:

**PTO Components:** The service life of a PTO clutch can vary considerably upon the local applications and conditions, such as abrasive dust, adjustment, loading, and wear due to overloading, etc. Thus, the service life of a clutch may be measured in days to years, depending on the operating conditions. Clutch repair or replacement is normally an owner responsibility and not a warrantable item.

**V-Belts:** The machine is originally equipped with premium grade V-belts, especially designed to perform the job for which they were intended on the machine. As with PTO clutches, V-belt service life varies considerably upon the local applications and conditions, such as abrasive dust, adjustment, loading, slippage, and wear due to overloading, etc. Thus, the service life of a V-belt may be measured in days to years, depending on the operating conditions. V-belt replacement is normally an owner responsibility and not a warrantable item.

**HYDRAULIC COMPONENTS:** Hydraulic component life is greatly affected by the regularity of hydraulic oil changes and the quality of the replacement oil. Failures to these components must be the result of a defect in material or workmanship to be considered warrantable.

**CHAINS AND SPROCKETS:** Chains and sprockets are subject to great variations in service life, depending on such factors as over-tension, under-tension, lubrication or (as an example) installing a new chain on old sprockets. Sprocket and chain replacement is normally an owner responsibility and not handled as a warranty item.

**GROUND ENGAGING AND CUTTING PARTS:** Ground engaging and cutting parts are subject to wear and replacement. Service life of these parts can vary from hours to years, depending on local conditions. Normally, the replacement of this category of parts is considered to be an owner expense. If an individual item broke prematurely due to defect in material or poor workmanship, it will then be warranted.

2. **FOREIGN OBJECT PROTECTIVE SYSTEMS:** Some Krone Machines are equipped with protective devices to reduce the risk of damage to the machine caused by a foreign object. These devices include but are not limited to shear bolts, clutches, metal detection and rock protection. Under no circumstances shall the protective system be altered from the manufacturer setting, doing so voids the warranty. Incidental or consequential damages to machine components due to the failure of one of these devices will not be covered by Krone Limited Warranty.

3. **FAILURES DUE TO ABUSIVE USAGE, LACK OF MAINTENANCE OR ACCIDENT:** All repairs and labor are an owner expense for failures resulting from abusive usage, lack of maintenance and/or accident.

4. **FAILURES DUE TO UNAUTHORIZED ALTERATION OF MACHINE OR INSTALLATION OF UNAUTHORIZED ATTACHMENTS:** We point out for your protection, that the installation of unauthorized attachments or the unauthorized alteration of the machine may overload certain components and result in unexpected repairs or overhaul. Any failure resulting from the above is an owner expense.

5. **LABOR REIMBURSEMENT:** Labor will be considered when it is submitted with the original request and is accompanied by a copy of the shop ticket.

**LABOR RATE:** Labor will be paid based on Dealers published hourly labor rate established with KRONE NA. Changes to labor rate are allowed once per calendar year and must be accompanied by three retail shop tickets establishing the hourly labor rate. This labor rate must be published in a prominent place in the workshop.

**LABOR HOURS:** Labor hours will be paid based on a flat rate manual, or the experience of KRONE personnel, or reasonable and customary time required completing the described work.

*KRONE NA, Inc. reserves the right to change or withdraw this program at anytime without notice.*

Krone NA, Inc. \* PO Box 18880 \* Memphis, TN 38118-0880 \* 1-800-453-2974 \* [www.krone-na.com](http://www.krone-na.com)

**REPAIRS OR REPLACEMENT NOT COVERED BY  
THE STANDARD WARRANTY (continued)**

8. **WARRANTY CLAIMS:** Warranty claims should be submitted in English, electronically on the KWS system. Incomplete claims will be denied. All claims must be received within 90 days of the machine failure and within 90 days of the date the defective part was repaired or replaced. Claims that will be submitted after warranty expiration date must be pre-approved with KRONE NA warranty department before the warranty expiration date has passed. Warranty Claim disputes must be submitted in writing within thirty (30) days of the decision date.
7. **DEFECTIVE PARTS:** Defective parts that have been replaced must be saved at the dealer until 45 days after the warranty credit is issued. In some cases, a part may be repaired instead of replaced. In this instance, photos of the damage must be available in lieu of the failed parts. These parts or photos must be returned to KRONE if so requested. Normal return freight charges will be compensated by Krone as outlined on the Warranty Parts Packing Slip. Parts or photos not returned to KRONE within 15 days of request will result in denial of claim and reversal of any credit issued.
8. **RENTAL OR LEASED MACHINES:** Rental or leased machines have a specified policy that can be an exception to the standard warranty. Other warranty provisions outlined remain the same. See the Rental Program or Rental Purchase Program for specific instructions. Warranty coverage will not exceed one year.
9. **SPARE-PARTS WARRANTY:** All repair parts sold to customers have a ninety (90) day warranty time period, beginning the date of purchase, with the rest of the provisions outlined remaining the same. Warranty requests must include a copy of the original dealer counter ticket. Repair parts installed by the dealer carry a ninety (90) day warranty time period that becomes effective from the date of first use after installation. First use data must be documented by the dealer and shall include an hour meter reading. Warranty requests must include a copy of the original work order listing parts used during repair and first use date.
10. **FREIGHT FOR PARTS USED ON WARRANTY REPAIRS:** Freight compensation is based on the original invoice or an estimation of ground rate. If the dealer is eligible to receive an additional percentage above dealer net on parts, this amount is to be awarded in lieu of freight and handling charges. Freight charges other than ground rate will be the responsibility of the dealer or customer.
11. **SHOP SUPPLIES:** Shop supplies, such as rags, penetrating oil, cleaner, starting fluid, etc., are not warrantable items.
12. **HAULING CHARGES / MILEAGE / TRAVEL TIME:** Charges for hauling equipment, mileage, travel time, etc. are not covered under warranty.
13. **STATE AND LOCAL FRANCHISE AGREEMENTS:** KRONE shall make every effort to conform to state and local laws where applicable.
14. **DISPUTE PROCESS:** In the event a dealer does not agree with a decision filed by the warranty administrator, a review form may be obtained from the Territory Service Manager.

*KRONE NA, Inc. reserves the right to change or withdraw this program at any time without notice.*

Krone NA, Inc. • PO Box 10000 • Memphis, TN 38181-0000 • 1-800-453-2874 • [www.krone-northamerica.com](http://www.krone-northamerica.com)

***EXHIBIT "3"***

**KRONE NORTH AMERICA  
CROWN GUARANTEE  
FULL MACHINE EXTENDED SERVICE CONTRACT  
TERMS AND CONDITIONS**

**KEY TERMS AND DEFINITIONS:**

- **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
- **YOU, YOUR, CONTRACT HOLDER:** means the owner of the EQUIPMENT listed in the extended service contract certificate.
- **EQUIPMENT/MACHINE:** means the EQUIPMENT described in the extended service contract certificate.
- **ADMINISTRATOR:** means the company appointed by US to administer this CONTRACT. The ADMINISTRATOR has no liability to YOU.
- **MECHANICAL BREAKDOWN or FAILURE:** means the actual breaking or electronic failure of any covered part of the covered MACHINE while in ordinary use arising from faults attributable to manufacturing defects in workmanship or materials in such MACHINE causing sudden stoppage of the functions thereof and necessitating repair before it can resume work.
- **DEDUCTIBLE:** means the portion of the repair that is covered by this CONTRACT, which YOU must first pay for each, unrelated FAILURE. The DEDUCTIBLE amount is \$500.00.

**WHAT YOUR CONTRACT COVERS:**

The service contract coverage is limited exclusively to the repair or replacement of covered parts as they pertain to the machine (listed below in section I.) determined to have failed due to a MECHANICAL BREAKDOWN or FAILURE as defined under terms and definitions. No person has the authority to change or to waive any of its provisions. This CONTRACT is for the sole benefit of the CONTRACT HOLDER named herein and applies only to the Equipment described in the extended service contract certificate.

- I. Full Machine covers all parts except those specifically identified as not being covered under the section within this contract titled "What is not covered". Please note that Full Machine coverage is not available for balers and headers.

**WHAT IS NOT COVERED:**

**MECHANICAL BREAKDOWN OR FAILURE:**

- Caused by accident, misuse, negligence or natural calamity.
- Caused by using other than the recommended manufacturer genuine parts/filters or installing attachments to equipment not authorized in writing by the manufacturer.
- Caused by changes, alterations or modifications to the equipment or any of its components/parts other than authorized by the manufacturer/dealer which in the sole judgment of the manufacturer/dealer affects the performance, stability or purpose for which it was manufactured. Additionally, accessories are not covered, if they are not installed on the unit or considered in the cost of the unit when the extended warranty is purchased.
- Caused by non-operational defects, which generally do not affect the stability or reliability of the equipment.
- Caused by service maintenance, such as engine cleaning, brake adjustment, etc., replacement of consumable parts/consumable items, such as oil, grease, fan belts, batteries, pistons, fuses, brake or clutch linings, fuel filter, tires, cables, carbon brushes, bulbs, glass, and other similar maintenance and/or supply items and all other parts not made of metal.
- Caused by wear items but not limited to; cutting components, knives, pickup lines, scrapers, augers, belts, wear plates, ground contacting components, undercarriage components, components that contact crop during normal operation, cuttersbars, PTO Shafts, slip clutches and U-joints.
- Freight or storage charges, transportation or towing charges, loading or unloading charges, rental or loaner equipment charges, loss of time, inconvenience, bodily injury and property damage. Incidental or consequential damage that results from a MECHANICAL BREAKDOWN OR FAILURE.
- Damage to a covered component that is caused by the failure of a non-covered component.
- Minor adjustments.
- A product recall or a product support program.

**CONTRACT RESPONSIBILITIES, LIMITATIONS AND EXTENSIONS**

**A. OUR RESPONSIBILITIES**

WE agree to repair or replace any of the parts covered, if required due to a MECHANICAL BREAKDOWN or FAILURE; when the MECHANICAL BREAKDOWN or FAILURE is deemed to be covered under this warranty.

**B. YOUR RESPONSIBILITIES**

To keep this CONTRACT valid, YOU must upon request show proof that YOUR EQUIPMENT has been serviced as recommended by the EQUIPMENT manufacturer, during the time period in which a claim is being considered for payment. Failure to provide proof of service may terminate the service contract and result in the denial of the claim. In the event of MECHANICAL BREAKDOWN or FAILURE, you must protect the equipment from further damage. Any further damage shall be considered YOUR failure to protect the equipment and shall not be covered. In order to keep this contract valid, the DEALER and or YOU must notify the ADMINISTRATOR of any alterations or additions to the Equipment and of any proposed departure from ordinary working conditions from which the equipment is designed to operate. The ADMINISTRATOR must approve the alterations, additions, or changes in operation of the equipment with written consent.

**C. CONTRACT PERIOD/TERRITORY**

If this is a NEW EQUIPMENT CONTRACT, the time and hour limits of the term selected start the day the EQUIPMENT Manufacturers Warranty starts and at zero (0) hours. Coverage expires when the length of time or accumulated hours (whichever occurs first) of the term selected is reached.

If this is a USED EQUIPMENT CONTRACT, the time and hour limits of the term selected start on the DATE ISSUED/EQUIPMENT DELIVERY DATE and from the hours on the service meter on that date. Coverage expires when the length of time for the term selected shown in the

Valid 2/23/09

extended service contract certificate is reached or total hours on the EQUIPMENT is equal to the sum of the selected term hours plus stated hours on the EQUIPMENT at delivery date, whichever occurs first. This CONTRACT applies only to a MECHANICAL BREAKDOWN or FAILURE occurring within the United States, Canada and Mexico.

#### D. LIMITS OF LIABILITY

Limit shall be limited to the reasonable price for repair or replacement of any covered part; compensated in accordance with the manufacturer's standard warranty policy. The repair or replacement is based upon nationally recognized flat rates and/or factory manuals. Labor reimbursement will be based on the dealer's suggested list price for shop labor and field labor as they are documented on file with KRONE North America. If a part is unobtainable, our liability shall be limited to the manufacturer's or supplier's latest suggested retail price. In no event will the liability for each MECHANICAL BREAKDOWN or FAILURE, under this CONTRACT, exceed 20% of the original EQUIPMENT transaction price. Additionally, the total of all benefits payable shall never exceed 80% of the price YOU paid for YOUR EQUIPMENT. The intent of this extended warranty is not to restore the product to a like-new condition, but rather to restore the product to its operating condition just prior to the extended warranty covered failure. All repairs must be performed by a manufacturer authorized repair facility. The repair facility that performs the repairs must warrant its work for a period no less than 3 months or 500 hours, starting from the date that the machine is put back into service, to be free of defects in material or poor workmanship.

#### E. SUBROGATION

YOU agree that WE, after honoring a claim on YOUR CONTRACT, have all rights of subrogation against those who may be responsible for YOUR MECHANICAL BREAKDOWN. All amounts recovered by YOU for which YOU were previously reimbursed under this CONTRACT shall become OUR property or the property of OUR designee and shall be forwarded to same by YOU, up to the total amount paid by US under this CONTRACT.

#### F. ARBITRATION

In the event of any dispute concerning the interpretation of the CONTRACT by Us and/or the ADMINISTRATOR, shall be resolved by arbitration in accordance with the rules of the American Arbitration Association. For claims arbitration, written demand must be made to ADMINISTRATOR or US within (60) days of the claim denial.

#### G. TRANSFER OF THIS CONTRACT

Contact US and submit the following:

1. This CONTRACT
  2. Written evidence verifying all maintenance requirements have been met.
  3. A copy of documentation evidencing change of ownership and service hours at date of sale.
  4. Photocopies of documents sent to the manufacturer verifying transference of factory warranty, if applicable.
- Conditions:
1. This CONTRACT cannot be transferred to other EQUIPMENT. It can only be transferred to a different owner.
  2. The EQUIPMENT is subject to inspection.
  3. Transfer must take place within fifteen (15) days of change of ownership.
  4. All remaining underlying warranties must be transferred to the new owner.
  5. Failure to notify the ADMINISTRATOR of the transfer will void the remaining contract period.

#### H. START / STOP WARRANTY IN EFFECT FEATURE

A dealer may stop and restart the effectiveness of the warranty for those machines that are received on a trade in and are stored at the dealership until such time that the machine is resold. The amount of time that the warranty can be stopped is a maximum of 6 months from the date the machine is brought to the dealership for a trade in. In order to keep this feature in effect the dealer must adhere to the following:

1. The DEALER must notify KRONE denoting the date in which the machine was delivered to the dealership for trade in to stop the warranty. The DEALER must provide a copy of the required documentation denoting this date.
  2. The DEALER must notify KRONE denoting the date in which the machine was resold in order to restart the warranty. The DEALER must provide a copy of the required documentation denoting this date.
  3. Upon receiving the machine the DEALER must inspect the machine denoting any pre-existing problems. This information must be provided to KRONE. Please note this is not an opportunity to perform work on the machine updating the machine to a like new condition; that work is at the DEALER'S expense.
  4. The DEALER must provide KRONE with current oil sample reports on all lubricated components denoting the current condition of the machine at the time of trade in.
  5. The DEALER must perform a new oil change on all lubricated compartments ensuring that the machine has clean oil.
  6. The DEALER must start the machine and exercise all of its functions at least once every four weeks.
- Any failure that is deemed to have occurred due to not adhering to the above described instructions or that is the result of corrosion will not be covered under this warranty.

#### I. CANCELLATION

This CONTRACT is noncancelable, except by the ADMINISTRATOR within the first sixty (60) days, should the EQUIPMENT not meet underwriting guidelines. In such a case, YOU will receive a full refund of the CONTRACT charge from US.

#### IN CASE OF MECHANICAL BREAKDOWN OR FAILURE

1. If the cost of repair is greater than one thousand (\$1000.00) dollars, the DEALER and or YOU must. If requested, provide the ADMINISTRATOR with adequate photographic evidence of the affected parts, or preserve the parts affected, and make them available for inspection by the ADMINISTRATOR, or its representative. If the repair estimate exceeds five thousand (\$5,000.00) dollars, you can contact KRONE before proceeding with repairs in order to pre-qualify the repairs.
2. Within ninety (90) days of the date of FAILURE, and within sixty (60) days of the date of REPAIR, the repairing DEALER must provide the ADMINISTRATOR with a Repair Order detailing the FAILURE and the repairs, along with such other explanations or evidence as may be reasonably required by the ADMINISTRATOR, including a statutory declaration verifying the contents of the Repair Order, other explanations or evidence. If WE ask YOU, YOU must allow the ADMINISTRATOR to inspect YOUR EQUIPMENT to gather necessary information regarding any claim. YOU may be required to supply the ADMINISTRATOR with all maintenance records for service performed on the EQUIPMENT.

3. All repairs must be performed by a manufacturer authorized repair facility. The repair facility that performs the repairs must warrant its work for a period no less than 3 months or 500 hours, starting from the date that the machine is put back into service, to be free of defects in material or poor workmanship.

**IF YOU HAVE A MECHANICAL BREAKDOWN OR FAILURE IT IS YOUR RESPONSIBILITY TO NOTIFY YOUR REPAIRING DEALER. IT IS THEN THE RESPONSIBILITY OF THE DEALER TO NOTIFY KRONE NORTH AMERICA:**

Notify:  
KRONE NORTH AMERICA  
901-842-5011  
[www.krone-northamerica.com](http://www.krone-northamerica.com)

Submit claims to:  
KRONE NORTH AMERICA  
P.O. Box 18880  
Memphis, TN, 38181  
[www.krone-northamerica.com](http://www.krone-northamerica.com)

Administered by:  
KRONE NORTH AMERICA  
P.O. Box 18880  
Memphis, TN, 38181



**BRADY LAW, CHARTERED**  
**Michael G. Brady, ISB #1293**  
**St. Mary's Crossing**  
**2537 W. State Street, Suite 200**  
**Boise, ID 83702**

**TELEPHONE: (208) 345-8400**  
**FACSIMILE: (208) 322-4486**

**Attorneys for Defendant/Cross-Claimant,**  
**Burks Tractor Company, Inc.**

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

**WESTERN COMMUNITY INSURANCE**  
**COMPANY, as Subrogee of DNJ, INC.,**  
**Subrogor, an Idaho corporation,**

**Plaintiff,**

**v.**

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

**Defendants.**

**BURKS TRACTOR COMPANY, INC., an**  
**Idaho corporation,**

**Cross-Claimant,**

**v.**

**KRONE NA, INC., a Delaware corporation,**

**Cross-Defendant.**

**Case No. CV-14-2977**

**Judge G. Richard Bevan**

**DEFENDANT BURKS TRACTOR**  
**COMPANY, INC.'S ANSWER TO**  
**THIRD AMENDED COMPLAINT,**  
**CROSS-CLAIM, AND DEMAND FOR**  
**JURY TRIAL**

**DEFENDANT BURKS TRACTOR COMPANY, INC. ("Burks"), by and through its**  
**attorneys of record, Brady Law, Chartered, as and for an Answer to Plaintiffs' Third Amended**  
**Complaint, pleads and alleges as follows:**

**DEFENDANT BURKS TRACTOR COMPANY, INC.'S ANSWER TO THIRD AMENDED**  
**COMPLAINT, CROSS-CLAIM, AND DEMAND FOR JURY TRIAL – Page 1**

0161.0019

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**FIRST DEFENSE**

Burks denies each and every allegation contained in Plaintiffs' Third Amended Complaint, unless expressly and specifically hereinafter admitted.

**PARTIES, JURISDICTION AND VENUE**

1. With regard to Paragraph I of Plaintiffs' Third Amended Complaint, Burks admits that Plaintiff Western Community Insurance Company ("Western Community") was and is an insurance company licensed to do business in the state of Idaho, but is without knowledge or information sufficient to form a belief as to the remaining allegations contained therein, and therefore denies the same.

2. With regard to Paragraphs II, III and IV of Plaintiffs' Third Amended Complaint, Burks admits each and every allegation contained therein.

3. With regard to Paragraph V of Plaintiffs' Third Amended Complaint, Burks admits that jurisdiction is proper in this Court.

4. With regard to Paragraphs VI and VII of Plaintiffs' Third Amended Complaint, Burks admits that venue is proper in Twin Falls County, Idaho.

**GENERAL ALLEGATIONS**

5. With regard to Paragraph VIII of Plaintiffs' Third Amended Complaint, Burks admits each and every allegation contained therein.

6. With regard to Paragraphs IX and X of Plaintiffs' Third Amended Complaint, Burks admits that Krone NA was the manufacturer/owner of the Krone Chopper, and that the Krone Chopper was covered by a Krone New Equipment Limited Warranty ("New Equipment Warranty"), which Krone New Equipment Warranty provided warranty coverage as stated therein, and denies each and every other allegation contained therein.

7. With regard to Paragraphs XI and XII of Plaintiffs' Third Amended Complaint, Burks admits that the New Equipment Warranty provided warranty coverage for one (1) year or one season after date of delivery, and that the Krone North America Crown Guarantee ("Extended Warranty"), provided warranty coverage as stated therein, and denies each and every other allegation contained therein.

8. With regard to Paragraph XIII of Plaintiffs' Third Amended Complaint, Burks admits that the Extended Warranty provided warranty coverage as stated therein, and denies each

and every other allegation contained therein.

9. With regard to Paragraphs XIV, XV and XVI of Plaintiffs' Third Amended Complaint, Burks denies each and every allegation contained therein.

10. With regard to Paragraph XVII of Plaintiffs' Third Amended Complaint, Burks admits that on October 15, 2012, the Krone Chopper was damaged by fire, and denies each and every other allegation contained therein.

11. With regard to Paragraph XVIII of Plaintiffs' Third Amended Complaint, Burks admits that the October 15, 2012 fire resulted in the complete loss and destruction of the Krone Chopper, and denies each and every other allegation contained therein.

12. With regard to Paragraph XIX of Plaintiffs' Third Amended Complaint, Burks admits each and every allegation contained therein.

13. With regard to Paragraph XX of Plaintiffs' Third Amended Complaint, only legal conclusions are contained therein, which do not require an answer; however, to the extent that factual allegations are alleged therein relating to Burks, Burks denies the same.

14. With regard to Paragraph XXI of Plaintiffs' Third Amended Complaint, Burks admits that the Extended Warranty was transferred to a replacement 2013 Krone Big X 1100 Chopper purchased by DNJ without the request of Burks, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein, and therefore denies the same.

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION – BREACH OF EXPRESS WARRANTIES**

15. With regard to Paragraph XXII of Plaintiffs' Third Amended Complaint, Burks repleads and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiffs' Third Amended Complaint as if fully set forth herein.

16. With regard to Paragraph XXIII of Plaintiff's Third Amended Complaint, Burks denies that it was the warrantor of the Krone Chopper and affirmatively alleges that the New Equipment Warranty provided the coverage as stated therein, and denies each and every other allegation contained therein.

17. With regard to Paragraph XXIV of Plaintiffs' Third Amended Complaint, Burks denies that it was the warrantor and/or warranted the Krone Chopper under the terms of the

Extended Warranty, and affirmatively alleges that the Extended Warranty provided the coverage stated therein, and denies each and every other allegation contained therein.

18. With regard to Paragraph XXV of Plaintiffs' Third Amended Complaint, Burks denies each and every allegation contained therein.

19. With regard to Paragraph XXVI of Plaintiffs' Third Amended Complaint, Burks admits that DNJ attempted to submit a warranty claim through Burks to Krone, and that Krone told Burks that the claim would be denied if it was filed. and denies each and every other allegation contained therein.

20. With regard to Paragraph XXVII of Plaintiffs' Third Amended Complaint, Burks denies each and every allegation contained therein.

21. With regard to Paragraph XXVIII of Plaintiffs' Third Amended Complaint, Burks denies each and every allegation contained therein.

22. With regard to Paragraph XXIX of Plaintiffs' Third Amended Complaint, only legal conclusions are contained therein, which do not require an answer; however, to the extent that factual allegations are alleged against Burks therein, Burks denies the same.

#### **SECOND CAUSE OF ACTION – BREACH OF OBLIGATION OF GOOD FAITH**

23. With regard to Paragraph XXX of Plaintiffs' Third Amended Complaint, Burks repleads and realleges each and every admission, denial and defense pled in answering the foregoing paragraphs of Plaintiffs' Third Amended Complaint as if fully set forth herein.

24. With regard to Paragraphs XXXI, XXXII, XXXIII and XXXIV of Plaintiffs' Third Amended Complaint, Burks denies each and every allegation contained therein.

25. With regard to Paragraph XXXV of Plaintiffs; Third Amended Complaint, only legal conclusions are contained therein, which do not require an answer; however, to the extent that factual allegations are alleged against Burks therein, Burks denies the same.

#### **ATTORNEY'S FEES**

Burks denies that Plaintiffs are entitled to attorney's fees and costs in this case.

#### **SECOND DEFENSE**

Western Community, as the subrogee of DNJ, is subject to all the admissions, denials and defenses pled in this Answer.

**THIRD DEFENSE**

Plaintiffs' damages, if any, were caused by the negligence, fault or responsibility of DNJ.

**FOURTH DEFENSE**

Plaintiffs' damages, if any, were caused by accident, misuse, and/or negligence of DNJ.

**FIFTH DEFENSE**

Plaintiffs' damages, if any, were caused by changes, alterations or modifications of the Krone Chopper by DNJ not authorized by Krone or Burks.

**SIXTH DEFENSE**

Plaintiffs' damages, if any, were caused by the abuse, misuse, assumption of risk, or lack of maintenance of the Krone Chopper by DNJ.

**SEVENTH DEFENSE**

Burks made no representations or warranties, express or implied, to DNJ, including the implied warranties of merchantability or fitness regarding the Krone Chopper.

**EIGHTH DEFENSE**

Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would, or should, in the exercise of reasonable care, reveal the existence of the defective condition alleged in the Third Amended Complaint.

**NINTH DEFENSE**

Burks did not have knowledge or reason to know of the defective condition of the Krone Chopper alleged in the Third Amended Complaint.

**TENTH DEFENSE**

Prior to the sale of the Krone Chopper to DNJ, Burks did not alter, modify or install any part or component of the Krone Chopper alleged to be defective in the Third Amended Complaint.

**ELEVENTH DEFENSE**

Burks did not provide any plans or specifications to Krone for the manufacture of the Krone Chopper.

**TWELFTH DEFENSE**

Plaintiffs' claims are barred in whole, or in part, by the economic loss rule.

**THIRTEENTH DEFENSE**

Plaintiffs' claims are barred by the Idaho Product Liability Reform Act, *Idaho Code* Title 6, Chapter 14.

**FOURTEENTH DEFENSE**

All representations made by Burks to DNJ regarding the sale of the Krone Chopper were included in the New Equipment Warranty and the Extended Warranty.

**FIFTEENTH DEFENSE**

DNJ did not rely on any representations made by Burks regarding the Krone Chopper that were not included in the New Equipment Warranty and the Extended Warranty.

**SIXTEENTH DEFENSE**

Burks made no express or implied warranties regarding the Krone Chopper.

**SEVENTEENTH DEFENSE**

Burks made no express or implied warranties regarding the Krone Chopper in addition to the express warranties contained in the New Equipment Warranty and the Extended Warranty.

**EIGHTEENTH DEFENSE**

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

**NINETEENTH DEFENSE**

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

**TWENTIETH DEFENSE**

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

**TWENTY-FIRST DEFENSE**

All warranties, express or implied, relating to the Krone Chopper were specifically excluded by Burks.

**PRAYER FOR RELIEF**

WHEREFORE, Burks prays for judgment as follows:

1. That Plaintiffs' Third Amended Complaint be dismissed with prejudice and that Plaintiff take nothing thereunder.

2. That Burks be awarded attorney fees pursuant to *Idaho Code* §§ 12-120(3) and 12-121.
3. That Burks be awarded costs and disbursements necessarily incurred in defending this action pursuant to *Idaho Rules of Civil Procedure*, Rule 54.
4. For such other and further relief as the Court may deem just and proper.

### **CROSS-CLAIM**

Defendant/Cross-Claimant Burks Tractor Company, Inc. (“Burks”), as and for a cross-claim against Defendant/Cross-Defendant Krone NA, Inc. (“Krone”), pleads and alleges as follows:

### **PARTIES**

1. Burks was and is an Idaho corporation, organized and existing under the laws of the state of Idaho, with its principal place of business in Twin Falls, Idaho.
2. Krone NA, Inc., was and is a Delaware corporation, organized and existing under the laws of the state of Delaware, with its principal place of business in Memphis, Tennessee, and licensed to transact business in the state of Idaho.

### **JURISDICTION AND VENUE**

3. Jurisdiction and venue are proper in this Court.

### **GENERAL ALLEGATIONS**

4. Krone manufactured a 2012 Krone X 1100 Forage Chopper (“Krone Chopper”), serial number 841659.
5. Burks is an authorized Krone dealer in the state of Idaho.
6. On September 12, 2012, DNJ, Inc. (“DNJ”) executed a Purchaser’s Order and Addendum to purchase the Krone Chopper owned by Krone from Krone.
7. The Krone Chopper was covered by a Krone New Equipment Limited Warranty (“New Equipment Warranty”) and a Krone North America Crown Guarantee (“Extended Warranty”) delivered by Burks to DNJ.
8. Incident to the sale of the Krone Chopper by Krone to DNJ, Burks made no representations or warranties, express or implied, to DNJ.
9. On October 15, 2012, the Krone Chopper was damaged in a fire.

10. On December 15, 2015, Plaintiff filed a Third Amended Complaint against Burks and Krone, alleging that the October 15, 2012 fire was due to defects in the materials and workmanship and/or a mechanical breakdown or failure of the high capacity wires connecting the battery to the starter and alternator and/or the turbocharger turbine housing of the Krone Chopper.

### **FIRST CAUSE OF ACTION**

#### **(Indemnity)**

11. Burks repleads and realleges each and every allegation set forth in paragraphs 1 through 7, as if fully set forth herein.

12. Pursuant to Idaho Code § 6-1407(2), the defense and indemnity of Burks in this action was tendered to Krone.

13. Idaho Code § 6-1407(1) provides that product sellers (Burks) other than manufacturers (Krone) shall not be subject to liability in circumstances where Burks did not have a reasonable opportunity to inspect the Krone Chopper in a manner that would or should, in the exercise of reasonable care, reveal the existence of the alleged defective condition.

14. Burks made no express or implied warranties to DNJ concerning the design or manufacture of the Krone Chopper; an inspection of the Krone Chopper by Burks would not have revealed or discovered the alleged defect; Burks had no reason to know of the alleged defect; and Burks did not alter, modify or install any parts or materials, or perform any work on the Krone Chopper alleged to be defective in the Third Amended Complaint.

15. Krone has failed to accept the tender of defense from Burks and agree to indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the action and/or to indemnify Burks for any judgment rendered against Krone, for which Burks may be legally liable.

16. Pursuant to Idaho Code § 6-1407(1) and (2), Burks is entitled to a defense from Krone, and indemnity for reasonable attorney fees and costs incurred by Burks in defending this action, and indemnity for any judgment rendered against Krone for which Burks may be held liable.

17. Additionally, the New Equipment Warranty and the Extended Warranty were issued by Krone, for delivery by Burks to DNJ. As such, Burks is entitled to indemnity from



Krone for any judgment or liability rendered against Burks relating to the Krone New Equipment Warranty and the Krone Extended Warranty.

**PRAYER**

WHEREFORE, Burks prays for judgment against Krone as follows:

1. To indemnify Burks for reasonable attorney fees and costs incurred by Burks in defending the Third Amended Complaint and prosecuting this Cross-Claim.
2. To indemnify Burks for any judgment rendered against Burks for which Krone is primarily liable.
3. For attorney fees incurred in defending the Third Amended Complaint and prosecuting this Cross-Claim pursuant to *Idaho Code* §§ 12-120(3) and 6-1407(2).
4. For costs and disbursements incurred in defending the Third Amended Complaint and prosecuting this Cross-Claim pursuant to *Idaho Rules of Civil Procedure*, Rule 54 and *Idaho Code* § 6-1407(2).
5. For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Burks hereby demands a jury trial pursuant to *Idaho Rules of Civil Procedure*, Rule 38(b).

DATED this 29<sup>th</sup> day of March, 2016.

BRADY LAW, CHARTERED

Michael G. Brady

By: Michael G. Brady  
Attorneys for Defendant,  
Burks Tractor Company, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29<sup>th</sup> day of March, 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) using the Court's Electronic E-filing System:

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*Attorneys for Defendant/Cross-Defendant Krone NA, Inc.*

*Michael G. Brady*  
Michael G. Brady

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2016 MAR 31 PM 1:41

BY \_\_\_\_\_  
CLERK  
  
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE	)	
COMPANY, as Subrogee of DNJ, INC.,	)	Case No. CV 2014-2977
Subrogor, and DNJ, INC., an Idaho	)	
Corporation,	)	<b>MEMORANDUM OPINION AND</b>
	)	<b>ORDER ON MOTIONS IN</b>
Plaintiffs,	)	<b>LIMINE</b>
	)	
vs.	)	
	)	
BURKS TRACTOR COMPANY, INC., an	)	
Idaho Corporation, and KRONE NA, INC.,	)	
a Delaware Corporation,	)	
	)	
Defendants.	)	

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**I. BACKGROUND**

This matter is before the court on the following motions: Defendant Krone's Motion in Limine to Exclude Scott Kimbrough's Opinions, filed on 02/25/16 and joined

by defendant Burks on 03/09/2016; Krone NA's Motions in Limine, filed on 03/11/2016 and joined in part by Burks on 03/11/2016; and Krone NA's Supplemental Motion in Limine, filed on 03/16/2016. The plaintiff filed memoranda in opposition to these motions on 03/18/16, and a hearing was held on 03/24/2016. At the hearing, David Lloyd and Rodney Saetrum appeared for the plaintiff. Benjamin Cluff and Philip Dupont represented defendant Krone and Michael Brady represented defendant Burks.

The court orally ruled on certain issues and memorialized those rulings in the Order on Motions in Limine filed 03/25/2016. The court reserved determination of the following remaining issues: 1) the admissibility of expert Scott Kimbrough's testimony, including any opinions about electrical wires causing the fire; 2) the admissibility of Leslie Preston's alleged oral representations to DNJ; 3) the admissibility of arguments that Krone instructed Burks not to file a claim on DNJ's behalf; and 4) whether the court should bifurcate this trial.

**II. MOTION IN LIMINE STANDARD**

Idaho recognizes the importance of a motion in limine. A motion in limine seeks an advance ruling on the admissibility of evidence. *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001). A motion in limine enables a judge to make a ruling on evidence without first exposing it to the jury. It avoids juror bias occasionally generated by objections to evidence during trial. The court's ruling on the motion enables counsel for

both sides to make strategic decisions before trial concerning the content and order of evidence to be presented. *See generally Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003), *overruled on other grounds by Blizzard v. Lundeby*, 156 Idaho 204, 322 P.3d 286 (2014).

The motion in limine is based upon an alleged set of facts rather than the actual testimony in order for the trial court to make its ruling and *therefore is not a final order*. The trial court may reconsider the issue at any time, including when the actual presentation of facts is made.

*Id.* at 605, 322 P.3d at 779 (emphasis added) (citations omitted). The rationale for this is that:

[A] motion *in limine* is based on an alleged or anticipated factual scenario, [and] without the benefit of all the other actual evidence which will be admitted at trial, the trial judge will not always be able to make an informed decision regarding the admissibility of the evidence prior to the time the evidence is actually presented at trial.

*Kirk v. Ford Motor Co.*, 141 Idaho 697, 701, 116 P.3d 27, 31 (2005) (quoting *State v. Hester*, 114 Idaho 688, 699, 760 P.2d 27, 38 (1988)).

When presented with a motion in limine, a trial court has the authority to deny the motion and wait until trial to determine if the evidence should or should not be excluded. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005) (citing *Lanham v. Idaho Power Co.*, 130 Idaho 486, 492, 943 P.2d 912, 918 (1997)). If the trial court decides to wait and hear the actual foundation laid before determining whether to admit or exclude evidence, the moving party is required to continue to object as the evidence is presented. *Id.* at 25, 105 P.3d at 685 (citing *Hester*, 114 Idaho 688, 760 P.2d 27).

A motion in limine ruling is reviewed under an abuse of discretion standard. *Leavitt v. Swain*, 133 Idaho 624, 631, 991 P.2d 349, 356 (1999). Under this standard, an appeals court will conduct the three-pronged *Sun Valley* inquiry to determine whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with applicable legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. *Id.* at 624, 991 P.2d at 356; *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). An appeals court will not overturn the district court's exercise of that broad discretion, absent clear abuse. *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 900, 665 P.2d 661, 664 (1983), *superseded on other grounds by* I.C. § 6-1604, *as recognized in* *Cummings v. Stephens*, 157 Idaho 348, 363 n.5, 336 P.3d 281, 296 n.5 (2014).

Once evidence has been deemed relevant, the determination of whether its prejudicial effect outweighs its probative value is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Matthews*, 124 Idaho 806, 809, 864 P.2d 644, 647 (Ct. App. 1993). However, evidentiary rulings involving relevancy are not discretionary matters, and as such, are reviewed de novo on appeal. *State v. Cannady*, 137 Idaho 67, 69-70, 44 P.3d 1122, 1124-25 (2002).

Motions in limine should be granted sparingly and only when the evidence is clearly inadmissible. *Warnecke v. Nitrocision, LLC*, No. 4:10-CV-00334-CWD, 2012 WL 5987429, at \*14 (D. Idaho Nov. 29, 2012). It is the moving party's burden to establish clear inadmissibility. *SEC v. Ferrone*, No. 11-CV-5223, 2016 WL 824721, at \*2 (N.D. Ill. Feb. 22, 2016).

### III. ISSUES

#### A. Scott Kimbrough's opinions are admissible.

The core of defendants' motions with respect to plaintiff's expert, Scott Kimbrough, is that his testimony would not assist the jury because it is too speculative. Within that general objection, defendants lodge three more specific objections. First, because Kimbrough is unable to state precisely which part of the chopper failed, the defendants argue that his testimony is not helpful to the jury in determining whether there was a breach of the warranty. (2/25 Motion 4.) Second, the defendants argue that because the cause of the fire should be classified as "undetermined" under the National Fire Protection Association (NFPA) guidelines, Kimbrough should not be able to opine on possible causes. (2/25 Motion 6.) Finally, defendants argue that Kimbrough should not be allowed to opine that electrical wires may have caused the fire because Kimbrough has stated that the probability of such a cause was less than 50%. (3/11

Motion 4.) With respect to each argument, the court finds the defendants have not shown Kimbrough's testimony is clearly inadmissible.

Idaho's standard for the admissibility of expert testimony is Idaho Rule of Evidence 702. *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998). I.R.E. 702 states that "[i]f scientific, technical, or other specified knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." However, "[e]xpert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and, therefore is inadmissible as evidence . . . ." *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct. App. 1992). "When an 'expert's opinion is based upon scientific knowledge, there must likewise be a scientific basis for that opinion' because if the reasoning or methodology underlying the opinion is not scientifically sound, then the opinions would not assist the trier of fact." *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007) (quoting *Swallow v. Emergency Med. of Idaho*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003)).

It is true that Kimbrough cannot pinpoint a particular part of the chopper that failed and caused the fire. It is also true that the Extended Warranty requires a mechanical breakdown or failure of a covered part. However, Kimbrough's inability to specifically identify a failed part does not mean his testimony is inadmissible as



speculative or unhelpful. Courts in Idaho and in other jurisdictions have permitted product liability and breach-of-warranty plaintiffs to prove a defect circumstantially. *Farmer v. Int'l Harvester*, 97 Idaho 742, 747-48, 553 P.2d 1306, 1312-13 (1976) (product liability); *Garrett v. Nobles*, 102 Idaho 369, 374, 630 P.2d 656, 661 (1981) (product liability, negligence, and breach of warranty); *Anderson v. Chrysler Corp.* 403 S.E.2d 189, 195 (W. Va. 1991) (collecting cases). Thus, the court does not find that Kimbrough's testimony is clearly inadmissible simply because he cannot state precisely which part failed.

Kimbrough admits that the cause of the fire should be understood as "undetermined" according to the NFPA guidelines. As the defendants frame it, this classification means there are only "possible" causes, in effect arguing that Kimbrough should not be allowed to opine on *any* cause. *State v. Schneider*, cited by the defendants in support of this argument,<sup>1</sup> does state that ordinarily, evidence about possibilities is too speculative to warrant admission. 129 Idaho at 62, 921 P.2d at 762. However, *Schneider* is also clear that in some cases, and depending on context, evidence regarding possible causes may be admissible. 129 Idaho at 63, 921 P.2d 763.

In *Schneider*, a medical doctor was unable to rule out any one of three possible causes of the victim's death. *Id.* at 63, 921 P.2d at 763. However, he had already stated

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<sup>1</sup> The defendants also cite NFPA guideline 18.6.5.1 in support of this argument. However, that guideline only states that when a fire is classified as undetermined, it is improper to opine on causes *that have no evidence to support them* even if all other causes have been eliminated. Based on the court's review of Kimbrough's report and affidavit, his theory as to cause does have evidentiary support, so the applicability of the cited NFPA guideline is questionable.

his opinion about the actual cause of death, and each of the three causes implicated the defendant as an aider and abettor of murder. *Id.* at 63, 921 P.2d at 763. The Idaho Court of Appeals held admissible the expert's testimony as to one possible cause of death, noting that the decision would have been different if the defendant's involvement in the murder had been such that conviction would have required proof that the victim died from one particular cause. *Id.* at 63, 921 P.2d at 763.

In this case, Kimbrough is apparently prepared to opine that based on the evidence, the more likely cause of the fire was the turbo/spray combination. He will testify to probabilities based on his review of the available evidence. (Aff. of Dr. Scott Kimbrough in Supp. of Pl.'s Opp'n to Mot. in Limine to Exclude Scott Kimbrough's Ops. paras. 4, 7.) Assuming that Kimbrough testifies as such at trial, *Schneider* would support admission of his opinion even as to possible causes, and even if other theories cannot be ruled out. Kimbrough has an opinion about the cause, as in *Schneider*, and as discussed *supra* the defendants' liability for breach does not necessarily depend on the plaintiff directly proving the failure of one specific part.

Finally, defendants argue that Kimbrough should not be allowed to opine that electrical wires may have caused the fire because Kimbrough has stated that the probability of such a cause was less than 50%. (3/11 Motion 4.) *Schneider* applies with equal force to this argument. Kimbrough places electrical wiring in the top three potential causes. (Pl.'s Expert Witness Disclosure Ex. A, at para. 6.) Although

Kimbrough believes there is a greater likelihood that the turbo/spray combination caused the fire, this does not necessarily render testimony about the other possible causes inadmissible.

In sum, the defendants have not shown that Kimbrough's expert testimony is clearly inadmissible as speculative or unhelpful to the jury. He will be allowed to testify as to his opinions consistent with this opinion.

**B. Leslie Preston's oral representations are admissible.**

The defendants seek exclusion of statements made by Leslie Preston, a Burks employee, to DNJ regarding the improved design of the chopper's fuel tank. The defendants argue that this evidence is not relevant to the plaintiff's remaining claims, and Krone also argues that Preston was not authorized to make representations on behalf of Krone.

Idaho rules with respect to relevance and prejudice appear in Idaho Rules of Evidence 401, 402, and 403. Relevant evidence is generally admissible, except where "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." I.R.E. 402, 403. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

The court agrees, and the plaintiff acknowledges, that an allegation of a faulty fuel tank is not a claim in this case. However, what DNJ knew about the chopper's fuel

tank at the time it was purchased has a tendency to establish that DNJ knew about the potential risk of fuel tank fires. As the plaintiff points out, this is of consequence to rebutting the defendants' likely argument that DNJ was at fault for improperly maintaining the fuel tank area. Moreover, the court does not see how Preston's alleged lack of authority to make statements on behalf of Krone affects the admissibility of his statements. Even if it is somehow prejudicial to Krone, at this juncture the court does not conclude that the potential prejudice substantially outweighs its probative value. For these reasons, the court does not find Preston's oral representations are clearly inadmissible on relevance grounds, nor do they violate I.R.E. 403.

**C. The plaintiff can present Stratton's testimony and make arguments related to that testimony.**

Krone requests exclusion of any facts or argument that Krone instructed Burks to not file a warranty claim on behalf of DNJ. In support, Krone argues two things: first, that attorney Tim Stover's statement on the matter lacks foundation, and second, that such arguments mischaracterize the testimony of Ken Stratton.<sup>2</sup> Western Community does not object to excluding Stover's letter, except as might be necessary for impeachment purposes. With that understanding, the court hereby orders its exclusion except for that limited purpose.

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<sup>2</sup> Stratton's testimony includes a statement that "Krone told Burks the claim would be denied if it was filed."

As to Stratton's testimony, the court finds that it is relevant to the plaintiff's claim of breach of the implied covenant of good faith. A jury could interpret Stratton's testimony to mean that, in so many words, Krone "instructed" Burks not to file the warranty claim. A jury should be permitted to weigh the credibility and import of Stratton's testimony. That same jury will be instructed that an attorney's arguments are not evidence. A preemptive ruling forbidding the plaintiffs from making arguments related to this testimony is not supportable at this juncture.

**D. Bifurcation is not appropriate in this case.**

As an alternative to excluding the argument just discussed, Krone proposes that the court bifurcate the trial, and try the breach of express warranty claim prior to the breach of good faith claim. (3/16 Motion.) The primary basis for Krone's request is that "the claim for breach of the implied covenant of good faith is contingent upon Plaintiffs proving breach of either of the express warranties at issue." (3/16 Motion para. 5.) Krone also argues that evidence related to the breach of implied covenant of good faith claim, particularly with respect to the argument that Krone instructed Burks not to file a claim, would "unfairly inflame the passions of the jury" against Krone. (3/16 Motion para. 9.)

The court acknowledges that the implied covenant of good faith "only requires the parties to perform in good faith the obligations contained in their agreement." *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 824 P.3d 841, 864 (1991).

However, this requirement is not limited only to performance of express terms. See *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989) (“[A]ny action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, *whether express or implied*, is a violation of the covenant.”) (emphasis added).

Krone’s argument is that the implied covenant of good faith is only in play if the plaintiff can prove Krone breached the express warranty. This is too narrow a view of the covenant. As *Metcalf* states, any action which violates any benefit or right arising from express or implied terms in the contract is actionable.<sup>3</sup> Thus, evidence relating to Krone’s alleged breach of the covenant of good faith is not conditionally relevant based on Krone’s breach of the express warranty, as Krone argues. (3/16 Motion para. 9.)

In exercising its discretion on the issue of bifurcation, a trial court should consider convenience, avoidance of prejudice, and judicial economy. I.R.C.P. 42(b). These factors do not support bifurcation in this case. A second trial would consume significant additional judicial resources, and would require duplicate presentation of

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<sup>3</sup> The court is mindful that “[a] violation of the implied covenant is a breach of contract. It does not result in a cause of action separate from the breach of contract claims, nor does it result in separate contract damages unless such damages specifically relate to the breach of the good faith covenant.” *Idaho First Nat’l Bank*, 121 Idaho at 289, 824 P.2d at 864. However, this does not mean that Western Community’s claim of breach of the implied covenant of good faith depends on a breach of the express warranty. See *Western Electronics LLC v. Designer Floors Inc.*, No. CV-OC-2008-15305, 2011 WL 7990241 (4th Jud. Dist. of Idaho May 31, 2011) (“It is not necessary to plead a breach of contract [sic] as a pre-condition to pleading a breach of the covenant.”). In this case proving breach of the implied covenant of good faith is simply a different method of proving breach of the underlying contract.

some of the evidence to establish the essential facts of the case. The plaintiff does not allege damages specific to the breach of the implied covenant, and despite whatever prejudice might arise from allegations of the breach of the covenant, all that evidence still addresses the central issue of breach. In its discretion, the court finds that any evidence directed to that issue—whether related to the express warranty or to the implied covenant of good faith—would be most appropriately be heard in one trial.

At the same time, during the oral argument on this motion there were intimations that the course of this litigation itself might give rise to additional allegations of bad faith. The court does not see how any such allegations are relevant to the arguments raised in the Third Amended Complaint. Therefore, although the court declines to bifurcate the trial, it agrees that any allegations of breach of the covenant of good faith must be relevant to—and controlled by—the issues raised in the pleadings. Conduct of the litigation itself is inadmissible to prove a breach of the implied covenant of good faith.

#### **IV. CONCLUSION**

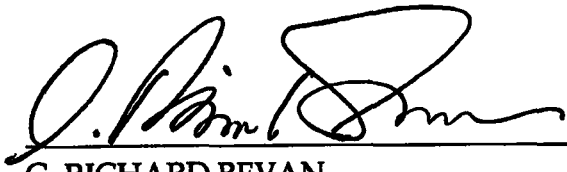
Based on the foregoing, the defendants' motions in limine are DENIED with respect to Scott Kimbrough's opinions, including his opinion as to electrical wiring, and Leslie Preston's oral representations. Krone's motion is DENIED with respect to arguments that Krone instructed Burks not to file a warranty claim; however, Tim Stover's letter shall be admissible only for impeachment purposes. Finally, Krone's

motion for bifurcation is DENIED; however, the court HEREBY ORDERS that evidence related to the plaintiff's breach of implied covenant of good faith claim is limited to the issues raised in the pleadings.

IT IS SO ORDERED.

March 31, 2016

Date



G. RICHARD BEVAN

District Judge



CERTIFICATE OF MAILING/DELIVERY

I, Shelly Bartlett, hereby certify that on the 31 day of March, 2016, a true and correct copy of the foregoing Order was e-mailed, mailed, postage paid, and/or hand-delivered to the following persons:

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE	)	
COMPANY, As Subrogee of DNJ, INC.	)	Case No. CV-14-2977
Subrogor, and DNJ, INC, an Idaho	)	
Corporation,	)	
	)	<b>KRONE NA'S ANSWER TO</b>
Plaintiff,	)	<b>PLAINTIFFS' THIRD AMENDED</b>
	)	<b>COMPLAINT</b>
v.	)	
	)	
BURKS TRACTOR COMPANY, INC., an	)	
Idaho Corporation, and KRONE NA, INC., a	)	
Delaware Corporation	)	
	)	
Defendants.	)	

COMES NOW defendant Krone NA, Inc. (hereinafter "Defendant Krone"), by and through its attorneys of record, Sandberg Phoenix & von Gontard and Coleman, Ritchie & Cluff, and for its response to Plaintiffs' Third Amended Complaint states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Defendant Krone admits that Plaintiff Western was an insurance company licensed to do business in the state of Idaho, but is without sufficient information to admit or deny the remaining allegations contained in paragraph I and therefore denies the same.
2. Defendant Krone admits the allegations contained in paragraph II.

KRONE NA'S ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT - 1

3. Defendant Krone admits the allegations contained in paragraph III.
4. Defendant Krone admits the allegations contained in paragraph IV.
5. Defendant Krone admits the allegations contained in paragraph V.
6. Defendant Krone admits the allegations contained in paragraph VI.
7. Defendant Krone admits the allegations contained in paragraph VII.
8. Defendant Krone admits the allegations contained in paragraph VIII.
9. Defendant Krone admits that Plaintiff DNJ was provided a New Equipment Warranty, but denies each and every other allegation contained in paragraph IX.
10. Defendant Krone admits that Plaintiff DNJ was provided a New Equipment Warranty, but denies each and every other allegation contained in paragraph X.
11. Defendant Krone admits the allegations contained in paragraph XI.
12. Defendant Krone admits that Plaintiff DNJ purchased a Krone NA Extended Warranty, but denies each and every other allegation contained in paragraph XII.
13. Defendant Krone denies each and every allegation contained in paragraph XIII.
14. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XIV and therefore denies the same.
15. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XV and therefore denies the same.
16. Defendant is without sufficient information to admit or deny the allegations contained in paragraph XVI and therefore denies the same.
17. Defendant Krone admits that on or about October 15, 2012, the Krone Chopper was damaged by a fire, but denies each and every other allegation contained in paragraph XVII.

18. Defendant Krone admits that the October 15, 2012 fire resulted in the complete destruction of the Krone Chopper, but denies each and every other allegation contained in paragraph XVIII.

19. Defendant Krone admits the allegations contained in paragraph XIX.

20. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph XX and therefore denies the same.

21. Defendant Krone denies each and every allegation contained in paragraph XXI.

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION-BREACH OF EXPRESS WARRANTIES**

22. By way of response to paragraph XXII, Defendant Krone incorporates by reference its responses to paragraphs I through XXI above as if fully set out herein.

23. Defendant Krone admits the allegations contained in paragraph XXIII.

24. Defendant Krone admits the allegations contained in paragraph XXIV.

25. Defendant Krone denies each and every allegation contained in paragraph XXV.

26. Defendant Krone denies each and every allegation contained in paragraph XXVI.

27. Defendant Krone denies each and every allegation contained in paragraph XXVII.

28. Defendant Krone denies each and every allegation contained in paragraph XXVIII.

29. Defendant Krone denies that Plaintiffs are entitled to recover anything from it and is without sufficient information to admit or deny the remaining allegations contained in paragraph XXIX and therefore denies the same.

**SECOND CAUSE OF ACTION: BREACH OF OBLIGATION OF GOOD FAITH**

30. By way of response to paragraph XXX, Defendant Krone incorporates by reference its responses to paragraphs I through XXIX above as if fully set out herein.

31. Paragraph XXXI consists of legal conclusions to which Defendant Krone is not required to respond. To the extent any response is required, Defendant Krone denies the same.

32. Defendant Krone denies each and every allegation contained in paragraph XXXII.

33. Defendant Krone denies each and every allegation contained in paragraph XXXIII.

34. Defendant Krone admits that the Krone NA Extended Warranty was transferred to a different machine, but denies each and every other allegation contained in paragraph XXXIV.

35. Defendant Krone denies that Plaintiffs are entitled to recover anything from it and is without sufficient information to admit or deny the remaining allegations contained in paragraph XXIX and therefore denies the same.

**ATTORNEY'S FEES**

Defendant Krone denies that Plaintiffs are entitled to attorney's fees or costs in this case.

**AFFIRMATIVE DEFENSES**

1. Plaintiffs' damages, if any, were caused by the negligence, fault, or responsibility of DNJ.

2. Plaintiffs' damages, if any, were caused by accident, misuse, and/or negligence of DNJ.

3. Plaintiffs' damages, if any, were caused by changes, alterations, or modifications of the Krone Chopper by DNJ not authorized by Krone or Burks.

4. Plaintiffs' damages, if any, were caused by the abuse, misuse, or lack of maintenance of the Krone Chopper by DNJ.

5. Plaintiffs' claims are barred in whole, or in part, by the economic loss rule.

6. Plaintiffs have failed to mitigate their damages, if any.

**ANSWER TO BURKS' CROSS-CLAIM AGAINST DEFENDANT KRONE**

1. Defendant Krone admits the allegations contained in paragraph 1.

2. Defendant Krone admits the allegations contained in paragraph 2.

3. Defendant Krone admits the allegations contained in paragraph 3.

4. Defendant Krone admits the allegations contained in paragraph 4.

5. Defendant Krone admits that Defendant Burks was an authorized dealer in the state of Idaho during all times relevant to this Complaint.

6. Defendant Krone admits the allegations contained in paragraph 6.

7. Defendant Krone admits that the Krone Chopper was covered by a Krone New Equipment Warranty but denies each and every other allegation contained in paragraph 7.

8. Defendant Krone is without sufficient information to admit or deny the allegations contained in paragraph 8 and therefore denies the same.

9. Defendant Krone admits the allegations contained in paragraph 9.

10. Defendant Krone admits the allegations contained in paragraph 10.

11. By way of response to paragraph 11, Defendant Krone incorporates by reference its responses to paragraphs 1 through 10 above as if fully set out herein.

12. Defendant Krone admits the allegations contained in paragraph 12.

13. Paragraph 13 consists of legal conclusions to which Defendant Krone is not required to respond. To the extent any response is required, Defendant Krone denies the same.

14. Defendant Krone has insufficient information to admit or deny the allegations contained in paragraph 14 and therefore denies the same.

15. Defendant Krone admits the allegations contained in paragraph 15.

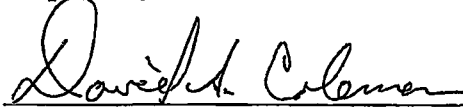
16. Defendant Krone denies each and every allegation contained in paragraph 16.

17. Defendant Krone denies each and every allegation contained in paragraph 17.

WHEREFORE, Defendant Krone requests the Court enter judgment on its behalf, award Defendant Krone costs and disbursements incurred pursuant to Rule 54 of the Idaho Rules of Civil Procedure and reasonable attorney's fees pursuant to I.C. §§ 12-120(3) and 12-121 and any further relief as the Court deems just.

DATED this 31<sup>st</sup> day of March, 2016.

Respectfully Submitted,



BENJAMIN J. CLUFF  
DAVID A. COLEMAN  
Coleman, Ritchie & Cluff  
156 2<sup>nd</sup> Avenue West  
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and

PHILIP R. DUPONT  
Sandberg Phoenix & von Gontard P.C.  
7450 West 130th Street  
Suite 140  
Overland Park, Kansas 66213-2659


**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of March, 2016, I electronically filed the foregoing document with the Clerk of the Court for the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls and electronically served the following individuals:


Rodney R. Saetrum  
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David W. Lloyd  
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dwlesq@cableone.net

Michael G. Brady  
BRADY LAW CHARTERED  
bradylaw@bradylawoffice.com

  
for BENJAMIN J. CLUFF



Signed: 4/18/2016 03:07 PM  
FILED By:  Deputy Clerk  
Fifth Judicial District, Twin Falls County  
Kristina Glascock, Clerk of the Court

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiff, )

v. )

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

Defendants. )

---

BURKS TRACTOR COMPANY, INC., an )  
Idaho corporation, )

Cross-Claimant, )

v. )

KRONE NA, INC., a Delaware corporation, )

Cross-Defendant. )  

---

Case No. CV-14-2977

**JUDGMENT**

**JUDGMENT IS ENTERED AS FOLLOWS:**

1. **Plaintiffs' Complaint, including all amendments to Plaintiffs' Complaint, is dismissed in its entirety with prejudice; and**

2. **Defendant Burks Tractor Company, Inc.'s Crossclaim against Defendant Krone NA, Inc., is dismissed with prejudice**

Signed: 4/15/2016 04:50 PM

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.



\_\_\_\_\_  
**G. RICHARD BEVAN**  
District Judge

**NOTICE OF FILING AND MAILING ORDER**

NOTICE IS HEREBY GIVEN by the Clerk of the above-entitled Court, pursuant to Rule 77(d) of *Idaho Rules of Civil Procedure*, that the foregoing **JUDGMENT** was filed on the \_\_\_\_\_ day of \_\_\_\_\_, 2016, and was served to the following parties on the \_\_\_\_\_ day of \_\_\_\_\_, 2016:

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Benjamin J. Cluff  
COLEMAN, RITCHIE & CLUFF  
Attorneys at Law  
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CLERK OF THE DISTRICT COURT

By Shelley Bowlett  
Deputy Clerk

FILED By:  Signed: 4/18/2016 03:09 PM  
Deputy Clerk  
Fifth Judicial District, Twin Falls County  
Kristina Glascock, Clerk of the Court

**BRADY LAW, CHARTERED**  
**Michael G. Brady, ISB #1293**  
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**Attorneys for Defendant/Cross-Claimant, Burks Tractor Company, Inc.**

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs,

v.

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

Defendants.

BURKS TRACTOR COMPANY, INC., an  
Idaho corporation,

Cross-Claimant,

v.

KRONE NA, INC., a Delaware corporation,

Cross-Defendant.

Case No. CV-14-2977

Judge G. Richard Bevan

**JUDGMENT**

**JUDGMENT – Page 1**

0161.0019

JUDGMENT IS ENTERED AS FOLLOWS:

All claims and causes of action in Plaintiffs' Third Amended Complaint against Defendant Burks Tractor Company, Inc., are dismissed with prejudice, and Plaintiffs shall take nothing thereunder.

Signed: 4/15/2016 04:51 PM

DATED this \_\_\_\_ day of April, 2016.



\_\_\_\_\_  
G. Richard Bevan, District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_ day of \_\_\_\_\_, 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) using the Court's Electronic E-filing System:


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\_\_\_\_\_  
Clerk of the Court

Signed: 4/18/2016 03:10 PM  
FILED By:  Deputy Clerk  
Fifth Judicial District, Twin Falls County  
Kristina Glascock, Clerk of the Court

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**Attorneys for Defendant/Cross-Claimant, Burks Tractor Company, Inc.**

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

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

Plaintiffs,

v.

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

Defendants.

BURKS TRACTOR COMPANY, INC., an  
Idaho corporation,

Cross-Claimant,

v.

KRONE NA, INC., a Delaware corporation,

Cross-Defendant.

Case No. CV-14-2977

Judge G. Richard Bevan

**ORDER GRANTING MOTION FOR  
DIRECTED VERDICT**

**ORDER GRANTING MOTION FOR DIRECTED VERDICT – Page 1**

0161.0019

Defendant Burks Tractor Company, Inc., having moved for a directed verdict at the close of the evidence offered by Plaintiffs; Defendant Burks Tractor Company, Inc., having stated the specific grounds therefor; the Court having heard oral argument and having reviewed the record, and having orally granted Defendant Burks Tractor Company, Inc.'s Motion for Directed Verdict, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant Burks Tractor Company, Inc.'s Motion for Directed Verdict pursuant to *Idaho Rules of Civil Procedure*, Rule 50(a) is hereby GRANTED.

DATED this \_\_\_\_ day of April, 2016.

Signed: 4/15/2016 04:52 PM

A handwritten signature in black ink, appearing to read "G. Richard Bevan", written over a horizontal line.

G. Richard Bevan, District Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_ day of \_\_\_\_\_, 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) using the Court's Electronic E-filing System:


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*Attorneys for Defendant/Cross-Defendant Krone NA, Inc.*

  
\_\_\_\_\_  
Clerk of the Court

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2016 JUN 24 AM 10:48

BY \_\_\_\_\_  
CLERK  
  
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE	)	
COMPANY, as Subrogee of DNJ, INC.,	)	Case No. CV 2014-2977
Subrogor, and DNJ, INC., an Idaho	)	
Corporation,	)	<b>MEMORANDUM DECISION RE:</b>
	)	<b>PLAINTIFFS' MOTION FOR</b>
Plaintiffs,	)	<b>RECONSIDERATION AND FOR</b>
	)	<b>NEW TRIAL</b>
vs.	)	
	)	
BURKS TRACTOR COMPANY, INC., an	)	
Idaho Corporation, and KRONE NA, INC.,	)	
a Delaware Corporation,	)	
	)	
Defendants.	)	

---

**I. PROCEDURAL BACKGROUND**

This matter is before the court on the Plaintiffs' Motion for Reconsideration and for New Trial, filed with a supporting memorandum on 5/2/16. Defendant Burks filed a memorandum in opposition thereto on 5/13/16, as did defendant Krone on 5/16/16. The

court held a telephonic hearing on 5/31/16, at which only Benjamin Cluff appeared before the court in person. David Lloyd argued for the plaintiffs, Philip Dupont for defendant Krone, and Michael Brady for defendant Burks. On 6/13/16, the Court entered an order denying plaintiffs' motion with this memorandum decision to follow.

## II. FACTUAL BACKGROUND

Western Community Insurance Company ("Western") brought an action in subrogation against Burks Tractor Company, Inc. ("Burks") and Krone NA, Inc. ("Krone") following the total loss by fire of a corn chopper manufactured by Krone and sold by Burks to Western's insured, DNJ, Inc. ("DNJ").

Plaintiffs Western and DNJ filed their Third Amended Complaint ("TAC") on 12/17/15. The TAC asserted two causes of action of breach against both Burks and Krone. Plaintiffs alleged that "[t]he Krone Chopper was manufactured and owned by Krone NA and was sold to DNJ on its behalf by Burks." (TAC para. VIII.) Plaintiffs identified Burks as Krone's "authorized seller/distributor," and Krone as the chopper's "manufacturer/owner." (*Id.* at para. IX.) Plaintiffs' theory throughout the litigation was that Krone and Burks were both liable for breaching the terms of a New Equipment Warranty and an Extended Warranty. They argued Krone was liable as the manufacturer and Burks was liable as Krone's authorized dealer who "extended" the

warranties to DNJ and as a “provider” issuing the Extended Warranty.<sup>1</sup> Additionally, plaintiffs alleged that Burks and Krone violated the implied covenant of good faith with respect to each warranty.<sup>2</sup>

At a 3/24/16 hearing on defendants’ motions in limine, Krone and Burks indicated that additional investigation and discovery had disclosed that Burks never owned the chopper sold to DNJ. Accordingly, Burks argued it was never in privity of contract with DNJ and could not be liable for breaching either warranty.<sup>3</sup> Prior to that point, Krone had maintained that *it* was not in privity with DNJ. Burks moved for “clarification” as to whether it was even a necessary party to the lawsuit, which the court denied.

Burks and Krone filed Answers to the TAC on 3/29/16 and 3/31/16, respectively. Burks’s Answer was substantially similar to its previous responsive pleadings, except it now asserted lack of privity with DNJ. Plaintiffs filed motions to strike the defendants’ answers, which the court denied on 4/5/16. As to Burks’s Answer, the court found that although it included new “affirmative defenses” relating to privity, they were really factual issues appropriate for trial. Additionally, the court found no prejudice to the plaintiffs despite the late filing.

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<sup>1</sup> The definitions section of the Extended Warranty includes “dealer” in a list of terms used in the contract to refer to “the Provider issuing this contract.”

<sup>2</sup> However, much, if not all, of the alleged bad faith conduct was by Krone.

<sup>3</sup> The court ruled on 12/18/14 that privity of contract is required for all breach of warranty claims, whether express or implied.

The jury trial commenced on 4/5/16. After the plaintiffs submitted their case in chief on 4/7/16, Burks moved for a directed verdict, which the court granted on the basis that the plaintiffs had not produced evidence that Burks was in privity of contract with DNJ or that Burks made any warranties of its own regarding the chopper. The court concluded that it was not appropriate for a jury to consider whether Burks was liable for breaching either warranty. The trial continued against Krone.

Plaintiffs requested two jury instructions on agency law (the “agency instructions”)<sup>4</sup> that would have charged the jury to consider whether Krone was responsible as principal for the acts of Burks as Krone’s agent. The court denied these instructions on the basis that they presented a legal theory outside the pleadings. The jury reached a verdict against the plaintiffs in all respects, finding Krone not liable for breaching either express warranty or the implied covenant of good faith with respect to either express warranty.

Plaintiffs timely filed this Motion for Reconsideration and for New Trial pursuant to 59(a),<sup>5</sup> arguing the court participated in “trial by ambush” when it 1) denied their motion to strike Burks’s answer to the TAC, 2) granted Burks’s motion for a directed verdict, and 3) declined to give the agency instructions. Plaintiffs argue that the

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<sup>4</sup> IDJI 6.40.1 and 6.41.1.

<sup>5</sup> The plaintiffs errantly cited I.R.C.P. 15(a) in their brief as the authority for their motion. The court understands the motion to be made pursuant to I.R.C.P. 59(a). The plaintiffs also cited I.R.C.P. 11(a)(2)(B) in their motion, but did not conduct any analysis of those standards in their briefing or during oral argument. Therefore, the court has not considered those standards in rendering this decision.

court's decisions regarding Burks's motion for a directed verdict and the agency instructions amounted to legal error at trial. Finally, plaintiffs also allege misconduct by the defendants in the way the litigation was conducted.

## II. MOTION FOR NEW TRIAL STANDARD

Rule 59(a) of the Idaho Rules of Civil Procedure permits a court to grant a new trial for several enumerated reasons. Plaintiffs rely on subsections (1), (6), and (7):

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.

The trial court's decision to grant a new trial is discretionary, and on appeal will be subject to the abuse of discretion standard. *Sheets v. Agro-West, Inc.*, 104 Idaho 880, 883-84, 664 P.2d 787, 790-91 (Ct. App. 1983). *But see Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 134 P.3d 648 (2006) (stating that a court has no discretion where prejudicial errors of law have occurred); *infra* at Part III.C. The court must set forth its reasoning for either granting or denying a motion for a new trial unless the record is such that the reasoning is obvious. *Palmer v. Spain*, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003). In so doing, the court must distinguish between the various motions and grounds proffered by the moving party, and not lump them into a

general grant or denial. *Quick v. Crane*, 111 Idaho 759, 773, 727 P.2d 1187, 1201 (1986).

The burden of justifying a motion for a new trial is on the moving party. *Id.* at 773, 727

P.2d at 1201; *Litchfield v. Nelson*, 122 Idaho 416, 423, 835 P.2d 651, 658 (Ct. App. 1992).

*But see infra* at Part III.A.2 (burden-shifting framework applies in the case of misconduct by opposing party).

### III. ISSUES

#### **A. Plaintiffs have not identified any order of this court or abuse of discretion, or misconduct by opposing parties to justify a new trial under I.R.C.P. 59(a)(1).**

##### **1. “Trial by ambush.”**

Plaintiffs contend that the court participated in a “trial by ambush” when it refused to strike Burks’s Answer to the TAC, granted Burks’s motion for directed verdict, and then refused to give the agency instruction. The court takes this as an argument under Rule 59(a)(1) that certain “order[s] of the court or abuse[s] of discretion” prevented the plaintiffs from having a fair trial.<sup>6</sup>

A new trial is available under Rule 59(a)(1) “where . . . the court has made an erroneous ruling and prejudice is likely. . . . It is sufficient that the error was prejudicial and that it reasonably could have affected the outcome of the trial.” *Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989). A motion relying on this subsection must

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<sup>6</sup> Although plaintiffs refer to a “trial by ambush” several times, they have not relied on I.R.C.P. 59(a)(3) dealing with surprise.

be accompanied by an affidavit, I.R.C.P. 59(a)(1), and the court need not act in the absence of such an affidavit. *Harris v. Alessi*, 141 Idaho 901, 120 P.3d 289 (Ct. App. 2005).

As an initial matter, the plaintiffs failed to submit the affidavit required by the rule, which alone would justify denial of the motion under Rule 59(a)(1). However, even if the Rule 59(a)(1) motion were procedurally sound, the court does not find that the rulings plaintiffs identify were errors contributing to a trial by ambush.

**a. Plaintiffs' motion to strike Burks's Answer to the TAC.**

First, as to the motion to strike Burks's Answer to the TAC, the only new "defenses" plaintiffs complain about related to privity. Privity was an ongoing issue throughout the litigation, and the court had already ruled in its 12/18/14 Order that privity was required for the plaintiffs to maintain the breach of warranty claims. Therefore, the *legal* issue regarding privity had long since been resolved, and the plaintiffs were therefore aware or should have known it was incumbent on them to prove privity with each defendant as part of their case in chief.

As the court stated in denying the motion to strike, whether Burks and DNJ were in privity was really a factual issue to be proven at trial, not a "new affirmative defense." The plaintiffs bore that burden. Finally, ownership of the chopper was an issue raised in the plaintiffs' own TAC, in which they identified Burks as the "authorized seller/distributor" and Krone as the "manufacturer/owner." Given all these



circumstances, the court does not find that refusing to strike Burks's Answer prejudiced the plaintiffs in any way.

Additionally, the court does not find that striking Burks's Answer would have affected the outcome. First, Burks would have still had the opportunity at trial to elicit testimony as to Krone's exclusive ownership of the chopper. Second, as stated before, the burden was on the plaintiffs to establish privity with Burks. As discussed *infra* at Part III.C.2, the plaintiffs failed in this burden. Such issues of proof were independent of the contents of Burks's Answer and were resolved by this court before Burks even presented its defense.

**b. Burks's Motion for Directed Verdict**

For similar reasons, the court does not find that granting Burks a directed verdict was a court order justifying a new trial under Rule 59(a)(1). Again, plaintiffs knew from this court's 12/18/14 Order that privity was required to establish breach of warranty—express or implied—against either defendant. For reasons discussed more fully *infra* at Part III.C.2, the plaintiffs did not establish privity of contract with Burks to pursue their claims against Burks.<sup>7</sup> This was not an unfair “trial by ambush.”

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<sup>7</sup> Plaintiffs devote a significant portion of their argument to suggesting that the court made a “finding” of ambiguity in the Extended Warranty language when it ruled on Burks's Motion for Directed Verdict. This language, they argue, “provided some evidence of privity of contract between DNJ and Burks” such that the question should have been submitted to the jury. Although the plaintiffs made these arguments at trial, based on the court's recollection and review of the record, the court made no such finding. The court acknowledged the possible “loose language” in the Extended Warranty, but this was not a finding of ambiguity and was a statement made during argument. When the court actually ruled on the motion, it

Again, however, the court's decision to dismiss Burks did not affect the outcome of the trial. The jury found that Krone had no liability under either the New Equipment Warranty *or* the Extended Warranty. With respect to the Extended Warranty this verdict was a determination that 1) the damage was not caused by a mechanical breakdown or failure covered under the Extended Warranty, and/or that 2) the Extended Warranty was not in effect at the time of the incident. This verdict would have applied to Burks with equal force even if Burks had been a party to that contract.

**c. Agency Instructions**

Finally, the court also finds no ambush occurred by refusing to give the agency instructions. "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), *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr*, 151 Idaho 889, 265 P.3d 502 (2011). In this case, the plaintiffs did not plead an agency liability theory in the TAC. The evidence did not show that Burks made any independent warranties or representations for which it could have been liable beyond the express warranties.

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reiterated its prior ruling that privity was required to maintain a cause of action for breach of either warranty, and then stated following:

I recognize that the contract, if you want to call it that, or the sales purchase agreement was between technically Burks and the plaintiff DNJ, but in so acting, Burks was in all respects acting as agent for Krone, transferred Krone's warranties, and made no independent warranties of their own.

Under these circumstances, the plaintiffs were not entitled to the requested agency instructions, and were not ambushed when the court declined to give them.

It was plaintiffs' burden to establish a court order or abuse of discretion that prevented a fair trial. The plaintiffs have not met this burden with respect to the three court rulings identified. For this reason, and because of the plaintiffs' failure to submit an affidavit, in its discretion the court denies the relief requested under Rule 59(a)(1).

## **2. Unfair Trial Tactics**

Rule 59(a)(1) also allows relief for irregularities in the conduct of opposing parties if it resulted in an unfair trial. In Idaho, when a motion for a new trial under I.R.C.P. 59(a)(1) is based upon misconduct of the opposing party, "the moving party has only the burden to establish that the misconduct occurred. The party opposing the motion must then establish that the conduct could not have affected the outcome of the trial." *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999). Plaintiffs accuse defendants of the following unfair trial tactics: inviting the jury to speculate about Doug McGrew's conclusions regarding the fire, and by changing positions on the privity issue.<sup>8</sup>

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<sup>8</sup> Again, the court notes that the plaintiffs did not submit an affidavit as required by Rule 59(a). However, the alleged misconduct occurred in proceedings before this court, and the court will consider this part of the motion on the merits.

**a. McGrew's Report**

Throughout the trial, Krone's counsel made numerous references to Doug McGrew, a fire investigator Western hired to conduct an investigation shortly after the incident. McGrew did not testify at trial, and the evidence was not clear whether he made final conclusions or issued a full report or not.<sup>9</sup> Krone's counsel intimated in opening and closing argument, and during questions of some witnesses, that because McGrew's findings did not comport with Western's position as to the defendants' liability the plaintiffs hired a new expert (Kimbrough). The plaintiffs argue that this was misconduct justifying a new trial.

The court disagrees initially because these statements by Krone's counsel were only arguments. The court instructed the jury to consider only evidence presented in the form of witness testimony, exhibits, and stipulated facts. The court does not find that Krone's counsel engaged in any inflammatory or abusive conduct, or misstated the evidence when making these arguments. Because the plaintiffs have not proven there was misconduct, the burden on this issue never shifted to Krone to establish that the alleged misconduct could not have affected the outcome of the trial.

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<sup>9</sup> Plaintiffs state that his conclusions are contained in the record, but have not cited to the record. Based on the court's review of the record, it is not clear to this court what McGrew's conclusions were. The plaintiffs' expert, Dr. Scott Kimbrough, testified that he had seen pictures taken by McGrew and an "email/memo" from McGrew about a page long. Kimbrough testified that when he talked to McGrew, McGrew would not commit to a conclusion as to the fire's cause. It was not clear whether this meant the cause was "undetermined" or just that he personally did not have enough information to come to any conclusion. Doyle Rogers, an adjuster for Western, stated he thought there was a report from McGrew but had never personally seen it.

Moreover, in a civil case, where a witness is particularly aligned with one of the parties, other courts have ruled that it is not improper to make comments about the failure of the party aligned with such witness to call such a witness. *See, e.g., Nisivoccia v. Ademhill Assocs.*, 669 A.2d 822, 828 (N.J. Super. Ct. App. Div. 1996) (“All attorneys in civil cases are charged with knowledge that an adversary may focus on the failure to call a witness.”); *First Interstate Bank of Bedford v. Bland*, 810 S.W.2d 277, 289 (Tex. App. 1991) (“The right to comment on the failure to call a witness arises when the witness has some relationship to the opposing party so as to cause said witness to tend to favor the opposing party, or to place the opposing party in a better position to obtain material information on the point at issue from the witness.”); *cf. State v. Dudley*, 104 Idaho 849, 852, 664 P.2d 277, 280 (Ct. App. 1983) (quoting A.B.A. Standards, *The Defense Function* § 7.8(a) (1971) (“There are often circumstances in which counsel may be entitled to argue to the jury that they should draw an inference adverse to the prosecution as the result of its failure to bring forth some particular item of evidence or to call as a witness someone who has a special relation to the facts of the case.”)). The court finds this analysis persuasive as it pertains to the failure to call Doug McGrew.

Based on these principles the court does not conclude that misconduct occurred. The court denies a new trial on this ground.

**b. Privity**

Plaintiffs also argue that the defendants engaged in misconduct by flipping their position on privity. The court rejects this contention for two reasons. First, the circumstances behind this change of positions indicate no bad faith by either Krone or Burks. The involved attorneys stated clearly on the record at the hearing on the motion to strike and again at the 5/31/16 hearing on plaintiffs' motion for a new trial that the change in positions resulted from a more thorough investigation as part of the discovery process.

Second, even if this could be considered misconduct, the court is satisfied that the change in positions did not affect the outcome. This was a breach of contract case. The terms of the express warranties governed. The jury had to determine whether the chopper was destroyed by a defect that should have been covered under either warranty, and they found that it was not. The jury's conclusion did not depend on who was seated at the defense table. Accordingly, the defendants have carried their burden of proving that their change in position did not affect the outcome of the trial.

**B. There was sufficient evidence to support the jury's verdict.**

In order to grant a new trial on the basis of Rule 59(a)(6), the court must conduct a two-prong test: "(1), the court must find the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict; and (2), the court must conclude that a retrial would produce a different result." *Carlson v.*

*Stanger*, 146 Idaho 642, 648, 200 P.3d 1191, 1197 (Ct. App. 2008). When considering the first prong, the court must determine that “the verdict is not supported by, or is contrary to, the evidence, or is convinced the verdict is not in accord with the clear weight of the evidence.” *O’Dell v. Basabe*, 119 Idaho 796, 805, 810 P.2d 1082, 1091 (1990) (quoting *Blaine v. Byers*, 91 Idaho 665, 671, 429 P.2d 397, 403 (1967)). The second prong is satisfied if the court concludes that it is more probable than not that a different result would be obtained as to the questions answered by the jury. *Blizzard v. Lundebly*, 156 Idaho 204, 208, 322 P.3d 286, 290 (2014).

Applying this standard to the verdict in this case, and after independently weighing the evidence and credibility of the witnesses, the court is unable justify a new trial. The parties produced expert testimony which conflicted as to the cause of the fire, which was the major issue at trial. Krone’s expert’s testimony supports the jury’s verdict, and the court finds he was a credible witness. Thus, the court concludes the jury’s verdict is supported by evidence, that justice would not be served by vacating it, and that it is not more probable than not that a new trial would produce a different verdict.

**C. No legal error occurred at trial.**

A court has a duty to grant a new trial if it commits a legal error that is prejudicial to a party, even when the verdict is supported by substantial and competent evidence. *Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.*, 142 Idaho 797, 801,

134 P.3d 648, 652 (2006). Therefore, to determine whether a new trial is warranted under Rule 59(a)(7), the court must determine 1) whether it committed an error during trial, and if so, 2) whether that error prejudiced a substantial right. *See Goodspeed v. Shippen*, 154 Idaho 866, 870-873, 303 P.3d 225, 229-232 (2013). Plaintiffs claim the court erred at the trial by refusing to give the agency instructions and by granting Burks's motion for directed verdict on the Extended Warranty claim. Although these issues were discussed *supra* at Parts III.A.1.b-c, the court addresses them here more fully under the Rule 59(a)(7) error/prejudice standard.

- 1. The agency instructions were neither warranted by the pleadings nor the evidence.**

Whether this court erred by refusing the agency instruction is governed by the following standards:

If a party requests an instruction on a theory, a trial court must give the instruction if the "theory is supported by any reasonable view of the evidence." *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 392, 257 P.3d 755, 759 (2011) (quoting *Vanderford Co. v. Knudson*, 144 Idaho 547, 555, 165 P.3d 261, 269 (2007)). But, "[a]n instruction is not to be given if it is an erroneous statement of the law, not supported by the facts, or adequately covered by the other instructions." *Schmechel*, 148 Idaho at 185, 219 P.3d at 1201 (quoting *Vanderford*, 144 Idaho at 555, 165 P.3d at 269). Further, the "instructions are to be viewed as a whole in determining whether the jury was properly and adequately instructed on the applicable law." *Id.*

*Goodspeed*, 154 Idaho at 870, 303 P.3d 225 at 229.

The plaintiffs asked for instructions that defined an "agent" and stated that a principal could be liable for the actions of its agent. However, until Burks was granted



its motion for directed verdict, the plaintiffs had not pursued an agency theory of liability, nor did they even allege in the TAC that Burks was Krone's agent. The request was outside the pleadings. The court acknowledges that the relationship between Krone and Burks was discussed and argued at trial.<sup>10</sup> However, whether or not that relationship was one between a principal and an agent is immaterial, because the evidence did not show any independent warranty or representation by Burks for which Krone *could* have been liable as principal.<sup>11</sup> Therefore, the evidence at trial did not support the agency instructions. Such instructions would have also been inconsistent with the court's dismissal of Burks. In sum, the court finds that its refusal to give the agency instructions was not erroneous.

## **2. Burks was entitled to the directed verdict.**

A directed verdict under I.R.C.P. 50(a) is warranted when evidence adverse to the moving party, and every inference that may legitimately be drawn therefrom, is taken as true and there is still not substantial evidence to submit the case to the jury.

*Stephens v. Stearns*, 106 Idaho 249, 252-53, 678 P.2d 41 (1984).

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<sup>10</sup> The court is also aware that when granting Burks's motion for directed verdict, it stated Burks was acting as Krone's "agent." *See supra* note 2.

<sup>11</sup> In support of its requested agency instruction, plaintiffs argued that Les Preston, Burks's salesman, failed to submit a warranty claim even when asked to do so by DNJ and stated to a Krone representative that DNJ would have to buy a new chopper. However, Ken Stratton, Krone's regional business manager who actually denied DNJ's claim, testified that Burks did contact Krone to submit a warranty. Stratton also testified he told Burks not to submit the claim because Krone had independently determined the fire was a debris-caused fire not covered by warranty. Given these circumstances, Preston's actions were not relevant to Krone's denial of DNJ's claim; Krone's decision to deny the claim had nothing to do with Burks failing to submit it.

Burks moved for a directed verdict on the basis that the plaintiffs had not established privity to pursue claims against Burks, and/or that the plaintiffs did not establish that the Extended Warranty was in force during the time of the fire. During argument on Burks's motion, the court directly asked the plaintiffs what evidence established privity between DNJ and Burks. Plaintiffs responded that the Burks salesman signed the purchase order, and the warranty contracts required Burks to work with purchasers on submitting claims. Also, in the case of the Extended Warranty, the definitions section included "dealer" as one of the terms used in the contract to mean the "Provider issuing [the] contract."

However, the trial testimony was undisputed that Krone owned the chopper when it was sold to DNJ, and that despite Burks's role in "extending" the warranties by offering them to DNJ, Krone was the entity providing all coverage and making all determinations under the warranties. Given this evidence, the court concluded that even taking all reasonable inferences from the points highlighted by the plaintiffs, no jury could reasonably find privity of contract between DNJ and Burks on either warranty. It was therefore not appropriate for the jury to consider whether Burks was liable. The court employed the proper standard under Rule 50(a) and believes its decision was not erroneous.


However, even assuming the court erred in dismissing Burks, the court finds no prejudice to the plaintiffs. Again, the testimony was clear that Krone was responsible

for providing the coverage stated in both warranties. Krone was also responsible for the determination to deny coverage to DNJ in this case. Those two warranties controlled the entire scope of liability in this case. With or without Burks in the lawsuit, the jury had every opportunity to consider and find whether the terms of the warranties were breached when Krone determined the fire was not caused by a defect and refused to consider a claim.

#### IV. CONCLUSION

Based on the foregoing, the plaintiffs' motion for new trial is DENIED.

June 24, 2016  
Date

  
G. RICHARD BEVAN  
District Judge

CERTIFICATE OF MAILING/DELIVERY

I, Shelly Bartlett, hereby certify that on the 24 day of June, 2016, a true and correct copy of the foregoing Order was e-mailed, mailed, postage paid, and/or hand-delivered to the following persons:

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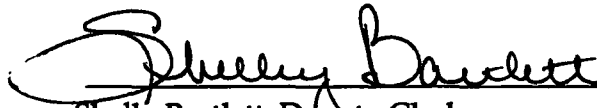
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Shelly Bartlett, Deputy Clerk

DISTRICT COURT  
TWIN FALLS CO. IDAHO  
FILED

2016 JUL -7 PM 4: 53

BY \_\_\_\_\_  
CLERK

SB  
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs, )

vs. )

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

Defendants. )

Case No. CV 2014-2977

**MEMORANDUM DECISION RE:  
BURKS TRACTOR COMPANY'S  
REQUEST FOR COSTS AND  
ATTORNEY FEES**

---

David W. Lloyd, Boise, Idaho, for Plaintiffs.

Michael G. Brady, Boise, Idaho, for Defendant Burks Tractor Company, Inc.

**I.**  
**PROCEEDINGS**

This case was tried to a jury from April 5 through April 8, 2016. At the close of evidence in the plaintiffs' case, the court granted a directed verdict in favor of defendant Burks Tractor Company, Inc. (Burks), dismissing them from the lawsuit. The case went to the jury as to the plaintiffs' claims against Krone, NA, Inc. (Krone). The jury found in favor of Krone on all counts. Judgments were filed dismissing all claims on April 18, 2016. On April 20, 2016, Burks filed its Memorandum of Costs and Attorney Fees, along with supporting Affidavits. In the interim the plaintiffs moved for a new trial. The court denied that motion on June 24, 2016.

The attorney fees and costs questions were scheduled for oral argument on June 14; however, due to overscheduling of the calendar, and after counsel had waited a significant amount of time for the hearing, counsel agreed to submit the matter to the court on the documents filed, without adding argument. The court thus took the matter under advisement at that time. Having considered the moving papers, affidavits, motions and responses and reviewing the applicable law, the court enters the following findings.

## II.

### **LEGAL STANDARDS AND APPLICABLE RULES AND STATUTES**

#### **A. Costs.**

The standards governing an award of costs or attorney's fees are contained in Idaho Rule of Civil Procedure 54. A trial court may award a prevailing party "costs as a matter of right," and "discretionary costs," which are costs that are not enumerated as costs as a matter of right. Whether costs or attorney's fees are awarded, and the amount thereof, is a matter of discretion for this court. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003); *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000).

When ruling upon discretionary costs, the trial court is required to "make express findings as to why such specific item of discretionary cost should or should not be allowed." *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000).

#### **B. Attorney Fees.**

Idaho Code Section 12-120(3) provides that, "... in any civil action to recover on . . . any commercial transaction . . . the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." Idaho Code § 12-120(3) (2004). The action before the court is clearly a commercial transaction and therefore section 12-120(3) applies.

The decision to award attorney fees is likewise discretionary and absent an abuse of that discretion, a trial court's grant or denial of attorney fees will not be disturbed on appeal. *Hoskinson v. Hoskinson*, 139 Idaho 448, 465, 80 P.3d 1049, 1066 (2003). In exercising its discretion, the trial court must consider the twelve factors outlined in I.R.C.P. 54(e)(3). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the court considered them all. *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002).

### III.

#### **COSTS AND FEES ARE AWARDED TO BURKS TRACTOR COMPANY**

Idaho Rule of Civil Procedure 54(d)(5) requires that “[w]ithin 14 days of service of a memorandum of costs, any party may object by filing and serving a motion to disallow part or all of the costs.” The plaintiffs filed a Motion to Disallow some or all of the costs in this case in a timely manner, indicating that they would file a brief in support of the motion later. The plaintiffs filed a Memorandum on May 12, 2016; however, their Memorandum is silent as to any objection regarding Burks’ claims for costs and attorney’s fees.

Rule 54(d)(5) further sets forth that “[f]ailure to timely object to the items in the memorandum of costs constitutes a waiver of all objections to the costs claimed.” The court has no basis from which to conclude that the plaintiffs’ Motion to Disallow and



their Memorandum are directed to Burks in any way. Accordingly, the court concludes that the plaintiffs have waived any objection to the fees and costs claimed by Burks.

The court will order attorney fees and costs in part, as set forth below.

**A. Costs as a Matter of Right.**

Burks memorandum seeks a total of \$2,136.50 for costs as a matter of right. The court has reviewed the Memorandum and Affidavit of Mr. Brady. The costs claimed as a matter of right are appropriately awardable, and the court notes that the cost for preparation of pictures was limited to \$500. Accordingly, the court awards Burks the total amount of \$2,136.50.

**B. Discretionary Costs.**

Idaho Rule of Civil Procedure 54(d)(1)(D) provides that a trial court may award a prevailing party "necessary and exceptional costs reasonably incurred" which "should in the interest of justice be assessed against the adverse party." An award of discretionary costs is subject to the trial court's discretion. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000). "In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance." *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998) (quoting Rule 54(d)(1)(D)).

In this case, even though plaintiffs did not object to Burks' discretionary costs, the court disallows the requested costs because the costs were not *necessary and exceptional*. The costs sought were for copying, outside printing of color photos and additional expense for color blowbacks that was not awarded as a cost as a matter of right. The total requested is \$660.31.

As to whether costs are exceptional, the Idaho Supreme Court has stated that "[a trial] court may evaluate whether costs are exceptional within the context of the nature of the case." *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006). Additionally, the Court has held that discretionary costs may be considered exceptional if the case itself is exceptional. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

The court concludes that the discretionary costs sought were necessary and reasonable for Mr. Stover and Mr. Brady's representation of the Burks, but they were not exceptional as required by the rule. This case was not exceptional in and of itself, and the costs sought do not fit that definition. Moreover, the copying expenses are part of modern litigation overhead, which does not amount to *exceptional* costs. See *Inama v. Brewer*, 132 Idaho 377, 381, 973 P.2d 148, 152 (1999). For these reasons, the court awards no discretionary costs under Rule I.R.C.P. 54(d)(1)(D).

### **C. Attorney Fees.**

The court has reviewed Mr. Brady's request for attorney fees in this case and applied the criteria of I.R.C.P. 54(e). Again, where the plaintiffs have failed to object, the court concludes that Burks' fees are reasonable and necessarily incurred. There is no dispute that Burks prevailed in this action. This case involved a commercial transaction, and fees are thus awardable pursuant to Idaho Code 12-120(3).

The court's effort to apply some of the criteria of I.R.C.P. 54(e)(3) is limited based on Mr. Brady's filing a redacted listing of attorney's fees which does not include any means to identify what work was performed by Mr. Brady, whether it was duplicated by Mr. Stover, and whether, in this court's discretion, attorney fees should be awarded in this case. Nevertheless, without an objection the court concludes, as to both Mr. Brady and Mr. Stover's fees, that the amount is reasonable; that the fees incurred were necessary and that the results obtained support the award sought by Burks for both of its attorneys. The court therefore awards Burks a total of \$54,299.00 for attorney fees.

**IV.**

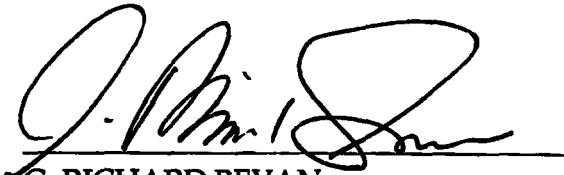
**CONCLUSION**

To sum up, the court awards the following to Burks:

- Costs as a Matter of Right . . . . . \$2,136.50
- Attorney Fees . . . . . 54,299.00
- Total . . . . . \$56,435.50

Counsel for Burks is directed to file an Amended Judgment with this court within seven (7) days of the date hereof.

July 7, 2016  
Date

  
G. RICHARD BEVAN  
District Judge

CERTIFICATE OF MAILING/DELIVERY

I, Shelly Bartlett, hereby certify that on the 7 day of July, 2016, a true and correct copy of the foregoing Order was e-mailed, mailed, postage paid, and/or hand-delivered to the following persons:

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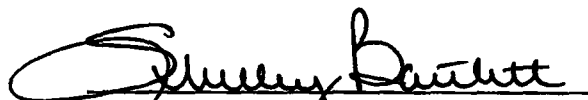
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE	)	
COMPANY, as Subrogee of DNJ, INC.,	)	Case No. CV 2014-2977
Subrogor, and DNJ, INC., an Idaho	)	
Corporation,	)	<b>MEMORANDUM DECISION RE:</b>
	)	<b>KRONE NA, INC.'S MOTION FOR</b>
Plaintiffs,	)	<b>ATTORNEY'S FEES</b>
	)	
vs.	)	
	)	
BURKS TRACTOR COMPANY, INC., an	)	
Idaho Corporation, and KRONE NA, INC.,	)	
a Delaware Corporation,	)	
	)	
Defendants.	)	
	)	

---

David W. Lloyd, Boise, Idaho, for Plaintiffs.

Benjamin J. Cluff, Twin Falls, Idaho, and Philip DuPont, Overland Park, Kansas, for  
Defendant Krone, NA, Inc.

**I.**  
**PROCEEDINGS**

This case was tried to a jury from April 5 through April 8, 2016. At the close of evidence in the plaintiffs' case, the court granted a directed verdict in favor of defendant Burks Tractor Company, Inc. (Burks), dismissing them from the lawsuit. The case went to the jury as to the plaintiffs' claims against Krone, NA, Inc. (Krone). The jury found in favor of Krone on all counts. Judgments were filed dismissing all claims on April 18, 2016. On April 28, 2016, Krone filed a Motion for Costs and Attorney's Fees, along with supporting Affidavits and a Memorandum. On May 9, 2016, plaintiffs filed a Motion to Disallow Costs and Attorney's Fees, with a Memorandum in Support (hereinafter *Memorandum*) filed on May 12, 2016. On May 26 Krone filed a Response, with an Affidavit from Stephen C. Smith.

In the interim the plaintiffs moved for a new trial. The court denied that motion on June 24, 2016.

The attorney's fees and costs questions were scheduled for oral argument on June 14; however, due to overscheduling of the calendar on the court's part, and after counsel had waited a significant amount of time for the hearing, counsel agreed to submit the matter to the court on the documents filed, without adding argument. The court thus took the matter under advisement at that time. Having considered the

moving papers, affidavits, motions and responses, and reviewing the applicable law, the court enters the following order.

## II.

### **LEGAL STANDARDS AND APPLICABLE RULES AND STATUTES**

#### **A. Costs.**

The standards governing an award of costs are contained in Idaho Rule of Civil Procedure 54. A trial court may award a prevailing party "costs as a matter of right," and "discretionary costs," which are costs that are not enumerated as costs as a matter of right. Whether costs or attorney's fees are awarded, and the amount thereof, is a matter of discretion for this court. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003); *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000).

Also, "[a]s to the disputed discretionary costs in the present matter, [this court must] begin with the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise." *Hoagland v. Ada County*, 154 Idaho 900, 915-16, 303 P.3d 587, 602-03 (2013). When ruling upon objections to discretionary costs, the trial court is required to "make express findings as to why such specific item of discretionary cost should or should not be allowed." *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000).



**B. Attorney's Fees.**

"In any civil action the court may award reasonable attorney's fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in [I.R.C.P.] 54(d)(1)(B), when provided for by any statute or contract." I.R.C.P. 54(e) (1). The attorney's fee question in this case is covered by statute, Idaho Code §12-120(3), which provides:

In any civil action to recover on . . . any commercial transaction, unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The parties do not dispute that this case involved a commercial transaction and therefore section 12-120(3) applies to both causes of action asserted by the plaintiffs.

The decision to award attorney's fees is discretionary and absent an abuse of that discretion, a trial court's grant or denial of attorney's fees will not be disturbed on appeal. *Hoskinson v. Hoskinson*, 139 Idaho 448, 465, 80 P.3d 1049, 1066 (2003). In exercising its discretion, the trial court must consider the twelve factors outlined in I.R.C.P. 54(e)(3). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the court considered them all. *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002).

### **III.**

#### **COSTS AND FEES ARE AWARDED TO KRONE, NA, INC.**

##### **A. Plaintiffs' Objections.**

###### **1. Reasonableness/Needless Increase in Cost.**

The plaintiffs have objected and moved to disallow costs as a matter of right in this case based, in part, on the contention that Krone's costs were not reasonably incurred and were incurred for the purpose of increasing cost of litigation to plaintiffs. The court disagrees.

The plaintiffs' allegation requires the court to find that Krone defended this case in a way that established an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs to the parties. The costs as a matter of right sought by Krone are an expert witness fee of \$2,000 for Mr. John Mertens. This fee is the maximum allowable under the rule, but is a reduction of over \$14,000 from Mertens' actual fee. Mertens testified at trial and was a persuasive and competent expert. There is nothing to indicate that his testimony was utilized to simply harass the plaintiffs or increase their costs.

The remaining costs sought as a matter of right are for depositions of seven witnesses. While these depositions were taken in advance of trial, and some costs were

incurred in 2015, there is no showing that these expenses were incurred simply to increase the cost of this litigation.

This case, while described by the plaintiffs as a “simple contract dispute,” (*see Memorandum*, p. 5), did involve significant questions of causation regarding the fire which destroyed the Chopper. As such, the court does not conclude that the depositions taken in this case were frivolous or otherwise unnecessary.

Moreover, the court does not conclude that Krone maintained a “frivolous” position until just before trial in this case. While Krone did maintain incorrect factual assertions regarding the true owner of the Chopper that was sold to DNJ during the initial stages of this litigation, plaintiffs maintained that same position until filing their Third Amended Complaint on December 17, 2015. Thus, the court does not conclude that such claims were made frivolously.

Furthermore, the court does not decide that Krone alone is responsible for the contention that Burks owned the Chopper sold to DNJ. The court will hold Krone responsible for such claims made very early, within weeks of its appearing in this action; however, the Motion to Dismiss was resolved by January 2015. The parties continued to conduct discovery, research other independent issues and litigate the case as a whole. Thus, Krone’s erroneous position does not preclude it from being awarded fees for the entirety of this litigation.

Finally, the record does not support the claim that Krone's assertions were interposed simply to increase costs to the parties. Privity was an issue throughout this case, but that issue did not engulf the remaining legal issues and expenses required for Krone to defend its position in this court.

2. Prevailing party.

Plaintiffs further contend that Krone maintained frivolous factual positions up until just before trial, and incurred significant costs and attorney fees based on those erroneous positions. Plaintiffs assert, therefore, Krone should not be determined to be the prevailing party in this case.

In making a prevailing party analysis the Idaho Court of Appeals has stated:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and I.R.C.P. 54(d) (1) (B). Thus, under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. . . .

*Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000) (overruled on other grounds *BECO Const. Co., Inc. v. J-U-B Engineers Inc.*, 149 Idaho 294, 233 P.3d 1216 (2010)).

The court concludes that Krone was the prevailing party in this case. Krone clearly prevailed on the gravamen of this action, which was whether it breached express warranties and whether it breached the covenant of good faith. In those regards the jury denied plaintiffs any recovery at all, and found completely in favor of Krone. As noted by the Court in *Daisy Manufacturing*, such a result is “the most favorable outcome that could possibly be achieved,” *id.* at 262, 999 P.2d at 917. The plaintiffs took nothing as a result of their bringing this case.

The court has considered the fact that the plaintiffs prevailed on a portion of the initial motions to dismiss, but that alone does not alter the court’s conclusion regarding the prevailing party analysis. This court, in its discretion, simply feels that the overall outcome in the case is pivotal to the prevailing party question, and that Krone was therefore the prevailing party against the plaintiffs’ claims.

**B. Costs as a Matter of Right.**

Krone seeks a total of \$6,277.66 for costs as a matter of right. The court has reviewed the memorandum and affidavit of Mr. DuPont, which supports these costs and establishes a \$2,000 expert witness fee for John Mertens of Fyrsafe Engineering. The remaining costs are for depositions/copies/video recording. The court concludes that these costs were reasonable and necessarily incurred, as required by I.R.C.P. 54(D)(1)(c). Accordingly, the court awards Krone the total amount of \$6,277.66.

### **C. Discretionary Costs.**

Idaho Rule of Civil Procedure 54(d)(1)(D) provides that a trial court may award a prevailing party “necessary and exceptional costs reasonably incurred” which “should in the interest of justice be assessed against the adverse party.” An award of discretionary costs is subject to the trial court’s discretion. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 59, 995 P.2d 816, 829 (2000). Krone seeks discretionary costs in the sum of \$5,477.22<sup>1</sup>

In this case the plaintiffs correctly note that discretionary costs, to be awarded, must be “exceptional.” This court also finds persuasive the Court’s analysis regarding the “interests of justice” as applied to discretionary cost determinations. In *Hoagland v. Ada County*, 154 Idaho 900, 915, 303 P.3d 587, 602 (2013) (citing *Caldwell v. Idaho Youth Ranch*, 132 Idaho 120, 127, 968 P.2d 215, 222 (1998)) the Court noted that “a court should consider the overall conduct of the lawsuit and balance that conduct against the American Rule, which presumes that each party is responsible for their own attorney fees and costs.” The Court noted further: “we begin with the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise.” 154 Idaho at 916, 303 P.3d at 603.

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<sup>1</sup> Apparently Krone is not seeking Mr. Mertens’ fee in excess of the \$2,000 granted herein as a cost as a matter of right. Even if Krone were seeking such an award, this court’s analysis is equally applicable to denying such excess costs.

As to whether costs are exceptional, the Court has stated that “[a trial] court may evaluate whether costs are exceptional within the context of the nature of the case.” *City of McCall v. Seubert*, 142 Idaho 580, 588, 130 P.3d 1118, 1126 (2006). Additionally, the Court has held that discretionary costs may be considered exceptional if the case itself is exceptional. *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

On all of these fronts, the court concludes that Krone’s requested discretionary costs will not be allowed. The costs sought by Krone are for travel by out-of-state counsel to Twin Falls for trial, or to other locations for depositions. The court concludes that this travel was certainly necessary and reasonable for defense counsel’s representation of Krone, but these costs were not exceptional as required by the rule. Finally, there is nothing in the plaintiffs’ conduct of this case that would change the presumption that the American Rule should apply regarding these discretionary costs. For these reasons, the court awards no discretionary costs under Rule I.R.C.P. 54(d)(1)(D).

In this case all counsel assumed responsibility for this case knowing that it was a Twin Falls case, involving witnesses who resided in Idaho, or in other states. Parties are certainly free to hire counsel of their choosing, but in so doing, the parties must bear the brunt of the required travel to and from Twin Falls. Moreover, this court concludes that travel expenses are the norm in a modern commercial litigation case. *See Inama v.*

*Brewer*, 132 Idaho 377, 381, 973 P.2d 148, 152 (1999). As such, the costs associated with travel to take depositions are part of “modern litigation overhead,” which are not exceptional in any way. Travel expenses must therefore be borne by the parties themselves. *Id.*

#### **D. Attorney's Fees.**

The court has reviewed Krone’s counsel’s request for attorney fees in this case and applied the criteria of I.R.C.P. 54(e). The total attorney’s fees sought are \$207,662.50. The plaintiffs have objected, asserting that Krone should not be awarded fees given its “frivolous” defense asserted for the majority of this case. Plaintiffs also argue that the fees sought are much higher than the fees which are customary in Twin Falls, Idaho and that fees should not be awarded to out-of-state counsel because Krone also retained local counsel through Mr. Cluff’s office.

Krone counters that its fees are reasonable for its attorneys who are based in Kansas, who have a five-year relationship with Krone, and who represent Krone in litigation throughout the United States. Krone also asserts that its defense was not frivolous and that it was incumbent upon the plaintiffs, rather than Krone, to ferret-out through discovery which defendant owned the Chopper that was sold to DNJ in this case. The court concludes, based upon the entirety of the record, the fact that Krone is the prevailing party in this case, and the other factors in Rule 54(e), which have been considered in their entirety, that attorney’s fees will be awarded as set forth below.



1. The fees awarded do not amount to double recovery.

The plaintiffs assert in their *Memorandum* that since Krone retained Mr. Cluff and Mr. Coleman (local counsel) in Twin Falls, while also hiring Mr. DuPont in Kansas, they have incurred duplicative expenses which should not be awarded. The court declines to sustain this objection because local counsel was required to attend court hearings in this case due to their association with Mr. DuPont who was admitted pro hac vice pursuant to the requirements of IBCR 227. Pursuant to section (b)(2) of that rule, “unless specifically excused from attendance by the trial judge, local counsel [must] personally appear with the pro hac vice attorney on all matters before the court.”

This court never excused local counsel from any court proceedings in this matter. It is also noted that local counsel filed the pleadings, motions and other documents in this case under their bar number, and otherwise conducted work that was not simply a duplication of the efforts of Mr. DuPont or his firm. As such, the court will not disallow attorney fees on that basis.

2. The fees incurred while asserting erroneous defenses.

The court does find some merit in the plaintiffs’ objection as to the fees incurred by the plaintiffs in asserting a “frivolous” claim that Burks and not Krone was the owner of the Chopper at the time of its sale to DNJ. This fact proved to be erroneous. Ultimately the plaintiffs filed a Third Amended Complaint December 17, 2015 and both defendants acknowledged the error on the record during a pre-trial hearing. Krone

counters that it was incumbent upon the plaintiffs to track down these facts through discovery, and that the responsibility for the misstated facts lies with the plaintiffs. The court disagrees with Krone's theory in this regard insofar as it pertains to the initial Motion to Dismiss.

Krone filed its Motion to Dismiss on October 3, 2014, asserting, among other things, a lack of privity between Krone and the plaintiffs. Burks Tractor filed an identical motion on October 27, 2014. Both motions were filed within weeks of the service of the initial complaint upon each defendant. Oral argument was held on November 17, 2014, clearly before the time for any significant discovery had elapsed. The court allowed counsel time for additional briefing on the issue of subrogation, and took the matter under advisement as of December 1, 2014. This court initially granted the motion to dismiss on the basis of lack of privity as to the express warranty claim, and dismissed consumer protection act and breach of good faith claims against Krone as well.

The court subsequently granted a motion to reconsider in part, and granted a motion to amend in part, based upon the privity question. The Second Amended Complaint included only two claims: Breach of Express Warranties and Breach of the Obligation of Good Faith. Thus, Krone's initial motion to dismiss, which was granted as to consumer protection claims, was never refiled by the plaintiffs. The point being that a portion of the initial motion to dismiss was successful by Krone.

Ultimately the Third Amended Complaint was filed by the plaintiffs with the consent of the defendants. This filing led to additional litigation immediately before trial which this court resolved in the plaintiffs' favor.

The bottom line is that this case has had a convoluted procedural history that has caused increased litigation costs for all parties. Multiple motions to amend the pleadings and motions to reconsider have been heard, some of which were granted and some of which were not. The plaintiffs feel that they were misled to their detriment in this case, and that they should not have to pay for some or all of Krone's attorney's fees as a result.

The court is aware that an attorney's fee award should not be calculated based upon individual prevailing "theories"; rather, the amount should be determined by appropriate application of the factors in paragraph (e)(3) of Rule 54. *Nalen v. Jenkins*, 113 Idaho 79, 741 P.2d 366 (Ct.App. 1987). The court has applied these factors, and without parsing the individual theories in this case, the court nevertheless concludes that some of the initial work required on the motion to dismiss was based on erroneous facts and assertions made by Krone itself. While the Rule 54(e)(3) elements do not include this as a listed consideration, this court will, in its discretion, deem this a *factor* under subsection (L) – one which this court deems appropriate in calculating the attorney fees to be awarded in this case. *See Hines v. Hines*, 129 Idaho 847, 855, 934 P.2d

20, 28 (1997) (a district court must consider the applicable factors set forth in I.R.C.P. 54(e)(3) and may consider any other factor that the court deems appropriate).

Having reviewed the time and expenses incurred initially regarding the Motion to Dismiss,<sup>2</sup> the court has determined that \$8,353.00 in time was expended on the motion between 9/15/14 and 11/17/14. The court will attribute ½ of that amount to the erroneous privity question, and reduce the fee award here by the total sum of \$4,177.00.

The court declines to determine that Krone's entire defense was misplaced throughout the entire litigation in this case. The increased expenses incurred by Krone's lawyers due to the privity question after January 1, 2015 are subsumed by the overall litigation of the case and will not be parsed out any further.

3. The rate charged for Mr. DuPont's services will be reduced.

The bottom line in an award of attorney fees is reasonableness. *Lettunich v. Lettunich*, 145 Idaho 746, 750–51, 185 P.3d 258, 262–63 (2008) (citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004) (award of attorney's fees vacated where the prevailing party did not provide the trial court with sufficient information from which to determine the reasonableness of the amount claimed)). Krone seeks an attorney fee award of \$207,662.50. Reasonableness is

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<sup>2</sup> The court will not include the amounts expended for the supplemental briefing in this calculation because that briefing dealt solely with the consumer protection or breach of good faith claims.

determined by applying the criteria of Rule 54(e)(3) to the facts in this case. The court will analyze the relevant criteria as follows:

a. The time and labor involved.

This case involved a significant number of procedural motions as set forth above. Those motions were granted at times, some were withdrawn without argument, and some were denied. The amount of damage sought by the plaintiffs here approximated \$500,000. This was not just a simple warranty case. As such, the court determines that the time and labor involved, for both Krone's Idaho and Kansas lawyers was appropriate for the issues presented.

b. The novelty and difficulty of the questions.

This case presented some novel and difficult issues for resolution. The nature of the time spent and matters researched, briefed and argued to the court is commensurate with the time required to litigate commercial transactions of this type throughout this state.

c. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

This case involved interpretation of warranties, with a significant overlay of products liability issues. Local counsel was required, as set forth above, to have skill necessary to standby for Mr. DuPont and to attend court when required. Mr. Cluff's skills were appropriately utilized throughout this case.

Mr. DuPont is a legal expert, litigating products liability cases throughout the country. He has 30 years' experience as a litigator. His skill was put to good use by Krone and the court does not fault Krone for seeking an out-of-state attorney, familiar with the issues presented, particularly where Krone hires Mr. DuPont to represent its interests in all product liability cases throughout the country. The amount charged and the reasonableness of the fee is based significantly on this factor.

d. The prevailing charges for like work.

This factor weighs most heavily against Mr. DuPont's fees in this case. The prevailing charges for like work are determined by looking at the pertinent geographic area around Twin Falls from which it would be reasonable to obtain counsel. *Lettunich v. Lettunich*, 145 Idaho 746, 750–51, 185 P.3d 258, 262–63 (2008). The court concludes that the geographic area from which counsel competent in products liability litigation could be drawn includes the Boise, Idaho area. Few, if any, attorneys in Twin Falls or the 5<sup>th</sup> Judicial District could handle this case as the primary litigating attorney.

While the plaintiffs argue that Mr. Cluff's hourly rate should be used to determine what is reasonable for all attorney's fees in this case, the court disagrees. Mr. Cluff handled routine matters and he doesn't have the relationship with Krone, or the years of experience in the product liability arena that Mr. DuPont and his firm have.

With that noted, the Boise area certainly provides counsel who would be able to litigate this case well. Krone itself submitted the affidavit of Stephen C. Smith, an

attorney with one of the larger firms in Boise, Hawley Troxell. Mr. Smith has 31 years' experience and is a commercial litigator. This court concludes that the hourly rate of \$300 is reasonable for an experienced litigator given the nature of the case at bar, and the expertise required to litigate the issues presented before this court.

e. The amount involved and the results obtained.

The court has addressed the fact that the Chopper in question was valued at approximately \$500,000. Krone obtained a defense verdict, with the plaintiffs receiving nothing in this case.

f. The nature and length of the professional relationship with the client.

As noted above, Mr. DuPont has a five-year relationship as Krone's litigation counsel throughout the United States. He also represents Krone's German parent company. The court concludes that the relationship Mr. DuPont has with Krone is a significant factor to be considered in making the award in this case.

g. Awards in similar cases.

The court is unaware of any other attorney's fee awards in similar cases in the Fifth Judicial District.

h. Other factors.

Finally, this court notes for the record that the other factors listed in Rule 54(e)(3) are not relevant to this court's analysis. The court did apply another factor to a portion of the fees earlier in this opinion. The court does not apply any other factors to its determination of the reasonableness of Krone's attorney's fees.

i. Summary and conclusion.

Given the factors outlined above, the court concludes that the attorney's fees awarded in this case should be reasonable based upon the analysis set forth above. As noted, the reasonable hourly rate the court applies to Mr. DuPont's services will be \$300.00 per hour, with the court relying upon that amount from Mr. Smith's affidavit and the other factors set forth herein. Therefore, the amount awarded for Mr. Dupont's services is: 351.1 hours<sup>3</sup> @ \$300.00 per hour for a total as to his attorney's fees of \$105,330.00.

The court recognizes that this determination shorts Krone approximately \$38,621.00, since Krone paid the full amount of Mr. DuPont's billed fees in this case. Nevertheless, the court equates that amount as the cost of the relationship and expertise for which Krone was willing to pay in this case, but which reasonableness in this court, in Twin Falls Idaho, will not require at the hands of the plaintiffs. The court will fully compensate Krone for the hourly rates charged by the other legal professionals billing time in this case through Mr. DuPont's office, as no showing has been made that those fees are unreasonable given the nature of the issues litigated and the charges incurred by Krone for those services. The court further concludes that such fees are reasonable given the Sandberg Phoenix law firm's relationship with Krone.

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<sup>3</sup> This number was obtained from the Exhibit attached to Mr. DuPont's Affidavit, page 32.



Therefore, the court awards attorney's fees as follows:

	Amount
Coleman, Ritchie & Cluff	\$26,100.50
Sandberg Phoenix	142,941.00
Credit	(4,177.00)
<b>Total</b>	<b><u>\$164,864.50</u></b>

**IV.  
CONCLUSION**

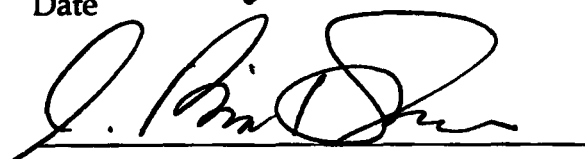
Based on the foregoing, the court awards the following costs and attorney's fees to Krone:

- Costs as a matter of right ..... \$6,277.66
- Discretionary Costs ..... -0-
- Attorney's Fees ..... 164,864.50
- Total Award ..... \$171,142.16

Counsel for Krone is directed to file an Amended Judgment consistent with this opinion within seven (7) days of the date hereof.

IT IS SO ORDERED.

July 29, 2016  
Date

  
G. RICHARD BEVAN  
District Judge

CERTIFICATE OF MAILING/DELIVERY

I, Shelly Bartlett, hereby certify that on the 29 day of July, 2016, a true and correct copy of the foregoing Order was e-mailed, mailed, postage paid, and/or hand-delivered to the following persons:

Rodney Saetrum  
SAETRUM LAW OFFICES

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general@saetrumlaw.com

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Shelly Bartlett, Deputy Clerk

DAVID A. COLEMAN (ISB #5742)  
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE )  
 COMPANY, As Subrogec of DNJ, INC. )  
 Subrogor, and DNJ, INC. an Idaho )  
 Corporation, )  
 )  
 Plaintiff. )  
 )  
 v. )  
 )  
 BURKS TRACTOR COMPANY, INC., an )  
 Idaho Corporation, and KRONE NA, INC., a )  
 Delaware Corporation )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )  
 BURKS TRACTOR COMPANY, INC., an )  
 Idaho corporation, )  
 )  
 Cross-Claimant. )  
 )  
 v. )  
 )  
 KRONE NA, INC., a Delaware corporation. )  
 )  
 Cross-Defendant. )  
 \_\_\_\_\_ )

Case No. CV-14-2977

Judge G. Richard Bevan

**AMENDED JUDGMENT**

**THE JUDGMENT IS AMENDED AND ENTERED AS FOLLOWS:**

1. **Plaintiffs' Complaint, including all amendments to Plaintiffs' Complaint, is dismissed in its entirety with prejudice;**
2. **Defendant Burks Tractor Company, Inc.'s Crossclaim against Defendant Krone NA, Inc. is dismissed with prejudice;**
3. **Defendant Krone NA, Inc. is awarded costs as a matter of right against Plaintiffs, WESTERN COMMUNITY INSURANCE COMPANY and DNJ, INC., jointly and severally, in the amount of \$6,277.66; and**
4. **Defendant Krone NA, Inc. is awarded attorney fees against Plaintiffs, WESTERN COMMUNITY INSURANCE COMPANY and DNJ, INC., jointly and severally, in the amount of \$164,864.50.**

**DATED this \_\_\_\_\_ day of August, 2016.**

Signed: 8/3/2016 02:59 PM

  
\_\_\_\_\_  
G. RICHARD BEVAN  
District Judge

**NOTICE OF FILING AND MAILING ORDER**

NOTICE IS HEREBY GIVEN by the Clerk of the above-entitled Court, pursuant to Rule 77(d) of *Idaho Rules of Civil Procedure*, that the foregoing **AMENDED JUDGMENT** was filed on the \_\_\_\_\_ day of \_\_\_\_\_, 2016, and was served to the following parties on the \_\_\_\_\_ day of \_\_\_\_\_, 2016: Signed: 8/3/2016 04:28 PM

David A. Coleman  
Benjamin J. Cluff  
COLEMAN, RITCHIE & CLUFF  
Attorneys at Law  
156 2<sup>nd</sup> Avenue West  
P.O. Box 525  
Twin Falls, ID 83303-0525  
ben@cretflaw.com

Hand Delivery \_\_\_\_\_  
U.S. Mail \_\_\_\_\_  
Court Folder \_\_\_\_\_  
(Twin Falls Only) \_\_\_\_\_  
E-Filing \_\_\_\_\_ X \_\_\_\_\_

Rodney R. Saetrum  
David Lloyd  
Saetrum Law Offices  
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Hand Delivery \_\_\_\_\_  
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(Twin Falls Only) \_\_\_\_\_  
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U.S. Mail \_\_\_\_\_  
Court Folder \_\_\_\_\_  
(Twin Falls Only) \_\_\_\_\_  
E-Filing \_\_\_\_\_ X \_\_\_\_\_

CLERK OF THE DISTRICT COURT

By Shelley Barrett  
Deputy Clerk

TO: CLERK OF THE COURT  
IDAHO SUPREME COURT  
P. O. BOX 83720  
BOISE, IDAHO 83720-0101

Signed: 11/16/2016 11:22 AM

FILED By:  Deputy Clerk  
Fifth Judicial District, Twin Falls County  
Kristina Glascock, Clerk of the Court

WESTERN COMMUNITY INSURANCE )  
COMPANY, Subrogee of DNJ, INC., )  
Subrogor, and DNJ, INC., an )  
Idaho Corporation, )  
)  
Appellants, )  
)  
vs. )  
)  
BURKS TRACTOR COMPANY, INC., )  
an Idaho Corporation, and )  
KRONE NA, INC., a Delaware )  
Corporation, )  
)  
Respondents. )  
\_\_\_\_\_ )

DOCKET NO. 44372

REPORTER'S TRANSCRIPT

NOTICE OF TRANSCRIPT LODGED

NOTICE IS HEREBY GIVEN that, on this date, I lodged a transcript on appeal of 1102 pages in length, in the above-entitled appeal, with the Clerk of the District Court, County of TWIN FALLS, in the Fifth Judicial District.

Hearings Lodged:

March 24, 2016 - Motion in Limine  
April 5-8, 2016 - Jury Trial

DATED this 10th day of November, 2016.

**Virginia Bailey**

Digitally signed by Virginia Bailey  
DN: cn=Virginia Bailey, o, ou,  
email=ginbailey@msn.com, c=US  
Date: 2016.11.10 19:08:12 -0700'

Virginia M. Bailey, RPR, CSR No. 262

NOTICE OF TRANSCRIPT LODGED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs/Appellants )

vs )

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

Defendants/Respondents )

SUPREME COURT NO. 44372  
CASE NO. CV 2014-2977

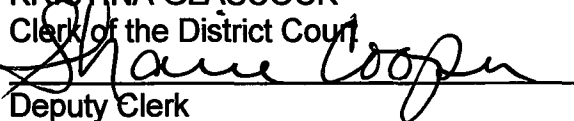
CLERK'S CERTIFICATE

I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify that the foregoing CLERK'S RECORD on Appeal in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, were not requested and will not be duly lodged with the Clerk of the Supreme Court.

WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 3<sup>rd</sup> day of October, 2016.

KRISTINA GLASCOCK  
Clerk of the District Court

  
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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

Plaintiffs/Appellants )

vs )

BURKS TRACTOR COMPANY, INC., )  
an Idaho Corporation and KRONE NA, )  
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SUPREME COURT NO. 44372  
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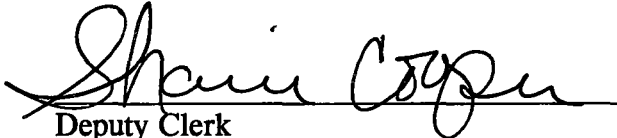
CERTIFICATE OF EXHIBITS

I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify:

There were no exhibits requested in the above entitled matter.

In WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 3<sup>rd</sup> day of October, 2016.

KRISTINA GLASCOCK  
Clerk of the District Court

  
Deputy Clerk



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

WESTERN COMMUNITY INSURANCE ) COMPANY, Subrogee of DNJ, INC, ) Subrogor and DNJ, INC., and Idaho ) Corporation, ) ) Plaintiffs/Appellants ) ) vs ) ) BURKS TRACTOR COMPANY, INC., ) an Idaho Corporation and KRONE NA, ) INC., a Delaware Corporation, ) ) ) _____ Defendants/Respondents )	SUPREME COURT NO. 44372 CASE NO. CV 2014-2977  CERTIFICATE OF SERVICE
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I, KRISTINA GLASCOCK, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the CLERK'S RECORD and REPORTER'S TRANSCRIPT to each of the Attorneys of Record in this cause as follows:

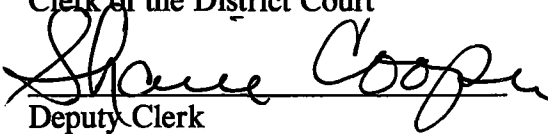
RODNEY SAETRUM DAVID LLOYD SAETRUM LAW OFFICES P. O. Box 7425 Boise, ID 83707  ATTORNEYS FOR APPELLANTS	MICHAEL BRADY BRADY LAW CHARTERED 2537 W. State Street, Suite 200 Boise, ID 83702  ATTORNEY FOR RESPONDENT BURKS TRACTOR
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BEN CLUFF  
DAVID COLEMAN  
COLEMAN, RITCHIE & CLUFF  
P. O. Box 525  
Twin Falls, ID 83303-0525

ATTORNEY FOR RESPONDENT KRONE NA, INC.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said this 16<sup>th</sup>  
day of November, 2016.

KRISTINA GLASCOCK  
Clerk of the District Court

  
Deputy Clerk