COURT OF APPEALS DECISION DATED AND FILED

June 13, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2448 **Cir. Ct. No. 2002CV1794**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CORNERSTONE DESIGN, LTD.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ELUMATEC USA, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Elumatec USA, Inc., has appealed from a judgment awarding damages and costs of $392,267.86 to Cornerstone Design, Ltd. Cornerstone has cross-appealed from the same judgment. We affirm the judgment in its entirety.

¶2 This is a Uniform Commercial Code (UCC) case involving the sale of goods under WIS. STAT. § 402.105(1)(c) (2005-06).[1] The litigation arose from Cornerstone's purchase of two automated custom saws from Elumatec. Cornerstone ordered the saws for use in two assembly cells that it was designing and building for Boone International Ltd., a subsidiary of Fortune Brands. Boone manufactured dry erase boards and cork boards, framed in aluminum, wood or vinyl. The assembly cells being built by Cornerstone were to be used in Boone's manufacture of aluminum-framed dry erase boards.

¶3 The manufacture of the saws was problematic. Ultimately, Cornerstone accepted the saws from Elumatec, and did extensive repair and rebuilding work on both saws before and after providing them to Boone as part of the assembly cells.

¶4 Cornerstone commenced this action against Elumatec in September 2002. Cornerstone made claims for breach of contract, breach of warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. Elumatec counterclaimed for $115,389.92, the amount that remained owing by Cornerstone on the contract for the purchase of the saws.

¶5 After a multi-day trial, the jury returned a verdict finding that Elumatec did not breach its contract with Cornerstone by failing to deliver the saws by July 1, 2001. However, the jury found that Elumatec breached the contract by failing to provide saws that met its contractual obligations. The jury further found that Cornerstone provided Elumatec with notice of the alleged

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

nonconformity, and that Elumatec's failure to provide saws that met its contractual obligations caused damages to Cornerstone. It found that damages of $328,523 would reasonably compensate Cornerstone for its costs to rebuild and/or repair the saws, and that $180,000 was the value of Cornerstone's lost profits.

¶6 In motions after verdict, Elumatec requested a directed verdict on its counterclaim in the amount of $115,389.92. Elumatec also moved to change the jury's answers to special verdict questions 4 and 5, wherein the jury found that Elumatec breached the contract by failing to provide saws that met its contractual obligations and was provided with notice of the alleged nonconformity. It also moved to change the jury's answers to special verdict questions 7A and 7B, wherein the jury determined damages. In addition, Elumatec moved for a new trial pursuant to WIS. STAT. § 805.15(1), alleging, among other things, errors in the jury instructions and special verdict, that the verdict was contrary to the great weight and clear preponderance of the evidence, and that a new trial was warranted in the interest of justice.

¶7 After briefing and oral argument, the trial court denied Elumatec's motion to change answers or for a new trial. However, it granted Elumatec's motion for a directed verdict on its counterclaim. It therefore deducted $115,389.92 from the total of $508,523 found as damages by the jury. After the offset and an adjustment for costs, judgment in the amount of $392.267.86 was awarded to Cornerstone. We affirm the judgment.

¶8 Evidence at trial indicated that Cornerstone and Elumatec entered into a contract in March 2001. Paul Zens, the president and CEO of Cornerstone, testified that prior to entering the contract, he told Craig Cocanig, Elumatec's sales representative, that he was looking for a world-class provider of aluminum saws

for use in a manufacturing process destined for Boone, a company related to Cornerstone's largest customer, Fortune Brands. Zens testified that he told Cocanig that the saws were so pivotal to the process that if the saws failed, everything would fail, and if Cornerstone failed to satisfy Fortune Brands, Cornerstone "may likely fail as well."

¶9 Zens testified that Cocanig showed him a saw manufactured by a German company called Sturtz in a catalog of equipment that Elumatec could provide. Zens testified that he traveled with Cocanig to Republic Window in Chicago to view a Sturtz saw. Zens testified that the saws Cornerstone was ordering needed to be able to machine aluminum extrusions in such a way that they could be bent around the dry erase boards, rather than being cut through. He testified that the saws needed to be robust and able to run day in and day out. He testified that he was satisfied with the quality of the Sturtz saw that he was shown, and that Cocanig represented to him that Elumatec could provide him with Sturtz saws.

¶10 Zens testified that he also explained to Cocanig that Boone needed the assembly cells by July 15, 2001, to increase productivity for the back-to-school season. Cornerstone subsequently sent Elumatec purchase orders for two saws, specifying a delivery date of June 15, 2001.

¶11 In late April 2001, Steve Van Tongeren, vice-president for Elumatec, advised Zens that Sturtz would not be manufacturing the saws, and recommended a company called Brogantech. Zens testified that he was very concerned that the project had not yet been started, and went with Cornerstone's project manager, Scot Johnson, to meet with Van Tongeren and Jim Brogan of Brogantech. Zens testified that he told Van Tongeren that failure to produce the

saws in June would put the entire manufacturing process in jeopardy and jeopardize Cornerstone's ability to satisfy its customer, Boone and Fortune Brands. However, after being shown a sample of what was purported to be a Brogantech saw that appeared to be constructed as well as a Sturtz saw, Zens agreed that Brogantech could produce the saws and consented to changing the delivery date to July 15, 2001. Zens further testified that he reiterated that he "expected a Sturtz saw no matter who built it."

¶12 Zens testified that in August 2001, Scot Johnson and Art Campbell, Elumatec's engineer, traveled to the Brogantech facility, and discovered that the first saw was incomplete and the second one had not yet been started. Evidence indicated that Johnson prepared a list dated August 16, 2001, identifying issues and detailing items remaining to be done on the first saw. In addition, Johnson sent a fax transmission to Jim Brogan and Art Campbell dated August 17, 2001, adding to the August 16, 2001 list of things that needed to be completed.

¶13 Zens testified that he was concerned that the situation was out of control at this time, with the first saw "not remotely complete" and the second saw not yet started. He testified that he expressed this concern to Van Tongeren, Campbell, and Brogan.

¶14 Zens' testimony indicated that Scot Johnson went back to Brogantech for more tests on August 28, 2001, and that Johnson again created a list of things that remained to be done on the first saw, more extensive than the first list. Zens testified that because the first saw was not remotely ready for transmittal to Boone and there was no sign of the second saw, on September 4, 2001 Cornerstone demanded delivery of the first saw.

¶15 Zens testified that the saw provided through Brogantech absolutely failed to meet the quality of a Sturtz saw. He testified that it was made of bolted-together aluminum rather than welded steel construction with a vibration-isolating leveling pad. He testified that it failed to meet the specifications of the contract with Elumatec, including the requirement that the tooling be capable of being changed out in five minutes. He testified that the tooling was barely capable of being changed out at all, that material could not be pushed through the machine to come out the other side, and that the saw simply did not work.

¶16 Zens testified that a substantial amount of work was performed on the first saw at Cornerstone before the first assembly cell was delivered to Boone. He testified that the saw still had problems and failed to perform to specifications when the first cell was installed at Boone in September 2001. Zens testified that, among other deficiencies, the saw could not operate continuously for four hours. He also testified that he sent a fax letter to Van Tongeren on October 3, 2001, demanding delivery of the second saw by October 8, 2001. In the letter demanding transmission of the second saw, Zens stated: "We further expect to expend efforts to bring it and first saw up to level of professional and OSHA compliance that Stirtz (sic) demonstrated when we visited Republic Window."

¶17 The second saw was delivered to Cornerstone on or about October 8, 2001. Zens testified that it was "not remotely" complete. Zens testified that after work by Cornerstone, it was delivered to Boone in late 2001.

¶18 Zens testified that Cornerstone spent the fall and winter of 2001 attempting to get both saws to work properly. On December 20, 2001, Zens wrote a letter to Gus Jimenez, director of engineering at Boone, enclosing billing invoices for the assembly cells and requesting payment. In the letter, Zens stated:

"The capability of the machines when operated with the proper level of understanding had been demonstrated to your personal satisfaction during my last visit to your facility."

¶19 Zens also wrote to Van Tongeren on January 4, 2002, stating:

> I just received your final invoices from your accounting department. I assume this was an error. In our dealings with vendors we are more than cooperative when it comes to paying for goods received in accordance with our PO specification and delivery date.
>
> Your organization failed to deliver any machines on time and failed to deliver industrial quality both in the area of build standards or more importantly safety.
>
> You were fully aware that we had assumed the task of completing the machines that we had hired your organization to deliver. This was especially burdensome to us both financially and more importantly with respect to our relationship with our customer which I'm sure Elumatec will agree is more valuable than the one single sale.
>
> I remember telling you that when this is done we would look at costs. We have run the costs related to the successful delivery of the saws.
>
> …
>
> … The difference between the cost of the machines had they been completed correctly and what we had to do ourselves is $52,547.48. I will await your answer as to how Elumatec can reimburse Cornerstone for completing your work.

¶20 Zens testified that although he believed that the saws were working satisfactorily when he wrote the December 20, 2001 letter, problems with the saws remained ongoing. Zens testified that despite hundreds of hours of work by Cornerstone, the saws functioned for only short periods of time, could not consistently cut properly, and did not do what they were intended to do under the contract. He testified that the saws could not produce a consistent product over an

extended period of time in an industrial environment. Exhibits demonstrating poor-quality cuts made by the saws at the Boone plant after January 2002 were shown to the jury.

¶21 Zens testified that in February 2002, Cornerstone agreed to take the saws back from Boone to tear them down and rebuild them. Eventually, after rebuilding by Cornerstone, the saws were returned to Boone, with the last saw being delivered on September 20, 2002. Zens testified that the saws did not meet the requirements of the contract with Elumatec until they were rebuilt, and denied that they were rebuilt to meet demands outside of that contract. He further testified that Cornerstone did not involve Elumatec in the work performed on the saws after September 27, 2001, because it had lost confidence in Elumatec's ability to do the job.

¶22 Zens' testimony regarding the problems encountered by Cornerstone was corroborated by the testimony of Art Campbell, Elumatec's engineer. Campbell testified that he went to Brogantech during the weeks of August 15 and August 28, 2001, that the first saw was unfinished and not ready to be tested, and that there was no sign of the second saw. He testified that Boone's delay in sending testing materials did not delay the construction of the saws, that Scot Johnson was expressing concern about the whereabouts of the second saw in August 2001, and that the items on the to-do lists created by Johnson in August 2001 were legitimate and needed to be done. He conceded that not all of these things were done when the first saw was shipped from Brogantech on September 4, 2001, and that Cornerstone was expressing exasperation with the delay and the quality of the saw.

¶23 Campbell further testified that upon receipt of the first saw by Cornerstone, Cornerstone complained that it was not working. He testified that he went to Cornerstone the week of September 9, 2001, to try to correct the problems. He admitted that Cornerstone's complaints about the saw were valid and legitimate, including complaints that there were "OSHA problems" with the wiring. He testified that the fixturing did not work satisfactorily and that the tooling was not capable of holding a piece of aluminum. He testified that Cornerstone was conveying a sense of urgency to him about getting the saws running and delivered to Boone in the assembly cells, but that when he left at the end of the week, work remained to be done on the first saw, and there was still no sign of the second saw.

¶24 Campbell testified that he was sent to Boone the week of September 21, 2001, to work on the saw. He testified that he left Boone with the permission of Scot Johnson on September 27, 2001, after observing an entire shift run.

¶25 Campbell testified that he knew Cornerstone was dissatisfied and frustrated with the first saw. He further testified that when Cornerstone demanded delivery of the second saw on October 3, 2001, the second saw was not even remotely complete. He conceded that Cornerstone was very frustrated and completed the second saw itself. He testified that Elumatec was fully aware that Cornerstone was finishing the second saw and that, to his knowledge, no one at Elumatec objected to Cornerstone's actions or stated that Elumatec wanted to complete the work. He acknowledged observing Cornerstone working on the second saw in November 2001, and conceded that the Cornerstone employees seemed to know what they were doing. Campbell also conceded that even though the specifications in the contract between Cornerstone and Elumatec did not specify the quality of the cuts to be made by the saws, they did not need to. He

testified that Elumatec knew that the saws should not make bad cuts or routinely break down after running four hours. In addition, he testified that the saws were supposed to have a welded steel base construction with vibration-isolating leveling pads, but did not satisfy this requirement until reconstruction by Cornerstone.

¶26 Zens' testimony regarding deficiencies in the saws was also corroborated by the testimony of John Troglia. Troglia was an electrical engineer who testified regarding electrical problems and safety defects in the saws as manufactured by Brogantech, concluding that they failed to comply with national electrical codes and standards for wiring industrial equipment. He opined that a reasonably competent manufacturer would not have designed and installed wiring like that in the saws provided by Brogantech.

¶27 Cornerstone also presented the deposition testimony of Stanley Johnson, an industrial designer who testified that when the saws were delivered to Cornerstone, they were functionally defective and did not conform to OSHA standards and other national safety standards. He testified that bolted aluminum framing was inappropriate for a working industrial saw and that it should have been welded steel. He detailed numerous safety defects and testified that, as delivered, the saws could not perform the quantity and quality of cuts that they were intended to perform as part of the assembly cells. He also testified that schematics and other necessary documentary materials were not provided with the saws.

¶28 Zens' testimony was also corroborated by Boone's director of engineering, Gus Jimenez. Jimenez testified that the saws were the major problem in the assembly cells delivered by Cornerstone, and that with the exception of the saws, problems with the assembly cells were minor. Jimenez testified that Boone

continued to have major problems with the saws after December 20, 2001, and that this ultimately led to Cornerstone taking the cells back to rebuild the saws. He testified that after rebuilding by Cornerstone, the saws worked properly.

¶29 We have described the evidence in detail because it controls many of the issues raised by Elumatec on appeal. Elumatec's first argument is that the trial court failed to apply the correct legal standard to the notice issue. It correctly contends that because Cornerstone accepted the saws, it could not recover for breach unless it first provided Elumatec with notice of the alleged breach as required by WIS. STAT. § 402.607(3)(a). It contends that Cornerstone failed to provide notice of the alleged breach in accordance with § 402.607(3)(a), and that its claims are therefore precluded as a matter of law.

¶30 Initially, we reject Elumatec's contention that an issue of law is presented concerning notice. WISCONSIN STAT. § 402.607(3)(a) states that, when a tender has been accepted, the buyer must "within a reasonable time after the buyer discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Whether Cornerstone provided sufficient notice of the breach presented an issue of fact for the jury. *See* ***Marvin Lumber and Cedar Co. v. PPG Indus., Inc.***, 401 F.3d 901, 907 (8th Cir. 2005).

¶31 In question 5 of the special verdict, the jury found that Cornerstone provided Elumatec with notice of the alleged nonconformity of the saws. The trial court denied Elumatec's motion to change the jury's answer.

¶32 A motion challenging the sufficiency of the evidence to support a verdict and asking the trial court to change the jury's answer may not be granted unless, considering all credible evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party, there is no credible evidence to

support the jury's finding. ***Richards v. Mendivil*¸** 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). In addressing a motion to change a jury's special verdict answer, the trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. ***Id***. at 671. On appeal, we are guided by these same rules. ***Id***. Moreover, we afford special deference to a jury determination in situations like this where the trial court has approved the findings of the jury. ***Morden v. Continental AG***, 2000 WI 51, ¶40, 235 Wis. 2d 325, 611 N.W.2d 659. In such circumstances, we will not overturn the jury's verdict unless there is such a complete failure of proof that the verdict must be based on speculation. ***Id.*** (citation omitted).

¶33 In contending that Cornerstone failed to provide adequate notice under WIS. STAT. § 402.607(3)(a), Elumatec argues that all damages are barred because Cornerstone gave it no opportunity to minimize the problems with the saws before September 27, 2001; it was told on September 27, 2001, that it met its contract; and Elumatec was not provided with notice of deficiencies after September 27, 2001. It also contends that at a minimum, the letter written by Zens to Van Tongeren on January 4, 2002, precludes recovery of post-December 20, 2001 damages. It argues that the letter referred to the "completion" and "successful delivery" of the saws, and provided an end to recoverable damages by eliminating any inference of on-going problems with the saws. It contends that Cornerstone did not indicate in the January 4, 2002 letter or at any time thereafter that Cornerstone remained dissatisfied or that future rebuilding of the saws might take place.

¶34 We reject Elumatec's arguments and conclude that credible evidence supports the jury's finding that Cornerstone provided Elumatec with notice of the

alleged nonconformity. Notification of breach is sufficient if it lets the seller know that the transaction is troublesome and must be watched. ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 523, 319 N.W.2d 855 (1982). The notice need not include a clear statement of all the objections that will be relied on by the buyer, nor need it include a claim for damages or notice of threatened litigation or other resort to remedy. ***Id.*** "Inherent in notice is the concept of reasonableness." ***Id.*** at 523 n.8. The seller must be informed by the buyer that the buyer considers the seller responsible for remedying a troublesome situation. ***Id.*** The principal reason for requiring notice is to enable the seller to make adjustments or replacements or to suggest opportunities for cure to minimize the buyer's loss and its own liability. ***Id.*** at 525.

¶35 A buyer is deemed to have met the notice requirement when the seller has actual knowledge of the product's failure based upon the seller's own observations. ***Arcor, Inc. v. Textron, Inc.***, 960 F.2d 710, 715 (7th Cir. 1992). If a seller's employee observes the failure of a product, this constitutes notice to the seller. ***Id.*** (citation omitted).

¶36 As detailed in the evidence discussed above, Cornerstone made complaints about the quality of the first saw to Van Tongeren, Campbell and Brogan in August 2001 while it was still at Brogantech, and continued to complain after delivery of the first saw to Cornerstone in early September 2001. Because of problems with the saw, Elumatec's engineer, Campbell, was sent to Brogantech and Cornerstone in August and September 2001, and was sent to Boone in late September. Although he attempted to resolve problems, and believed that the first saw was functioning when he left Boone with the permission of Scot Johnson after observing the running of a complete shift, Campbell's testimony indicates that he was aware that Cornerstone remained dissatisfied with the first saw in October

2001. In addition, he was aware that the second saw was not remotely complete when Cornerstone demanded its delivery on October 3, 2001, a week after he left Boone. He observed Cornerstone employees working to finish the second saw in November 2001, and testified that Elumatec did not object to Cornerstone's actions.

¶37 Elumatec's contention that it had no notice of problems with the first saw after September 27, 2001, is belied by Campbell's testimony and by Zens' October 3, 2001 letter demanding delivery of the second saw, wherein Zens stated that he expected to expend efforts to bring it *and the first saw* up to the level of professional and OSHA compliance demonstrated by the Sturtz saw. Elumatec, through Campbell, also knew that the second saw was not remotely complete when delivered to Cornerstone in October 2001, and that Cornerstone was working through the fall of 2001 to bring it up to the standards of a functioning industrial saw that complied with national safety standards.

¶38 Based upon this evidence, credible evidence supports the jury's finding that Elumatec had adequate notice that the saws were problematic and unsatisfactory to Cornerstone. Moreover, since the evidence indicates that Elumatec failed to fix the first saw or provide a completed second saw despite being given multiple opportunities to do so through the end of September 2001, Cornerstone was not required to continue to solicit Elumatec's help or to offer it an additional opportunity to work on the saws when subsequent repair and rebuilding efforts were required. *See* ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶¶17-18, 267 Wis. 2d 873, 672 N.W.2d 141. This is particularly true in light of Elumatec's awareness of the work being done at Cornerstone in the fall of 2001, and its failure to request an opportunity to participate. For these reasons, Zens' mistaken and short-lived belief that the saws were functioning properly

when he wrote to Jiminez on December 20, 2001, and to Van Tongeren on January 4, 2002, does not foreclose damages incurred after those dates. The jury could reasonably find that Elumatec had already been given adequate notice of the problems with the saws and an adequate opportunity to repair them, and that Cornerstone was not required to solicit Elumatec's continued help before rebuilding the saws.

¶39 Elumatec's next challenge is to the jury instructions and special verdict. Elumatec proposed only two jury instructions at trial, both related to its counterclaim. Similarly, it proposed a special verdict which contained questions limited to acceptance and contract price. However, at the jury instruction conference it also responded to the instructions proposed by Cornerstone and the trial court.

¶40 A trial court has wide discretion in framing a special verdict, ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 425, 265 N.W.2d 513 (1978), and determining what jury instructions to give, ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). If the instructions adequately cover the law applicable to the facts, there is no error even though refused instructions would not have been erroneous. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). In addition, a party waives its right to challenge a jury instruction on appeal if it fails to object to the instruction, or the lack thereof, at the jury instruction conference. ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992); WIS. STAT. § 805.13(3). A party must articulate each of its arguments and theories regarding the jury instructions to the trial court in order to preserve its right to appeal. ***Allen v. Wis. Pub. Serv. Corp.***, 2005 WI App 40, ¶20, 279 Wis. 2d 488, 694 N.W.2d 420, *review denied*, 2005 WI 136, 285 Wis. 2d 627, 703 N.W.2d 376.

¶41 Elumatec's first argument is that the notice instruction was impermissibly broad because it failed to state that notice of breach of warranty could not be premised upon conversations prior to acceptance if the jury found no delay. This argument is waived. The instruction as given by the trial court included language proffered by counsel for Elumatec, with the addition of language proffered by Cornerstone and derived from ***Arcor.***[2] Elumatec proffered the instruction while arguing that the evidence provided no factual basis for instructing the jury on notice of breach or asking a special verdict question about it. When the trial court concluded that a notice instruction was warranted and stated that it was going to give the instruction proffered by Elumatec, Elumatec did not offer any additional or alternative language to include in the instruction. For purposes of appeal it has therefore waived any argument that additional limiting language should have been included in the instruction. *See* ***Allen***, 279 Wis. 2d 488, ¶18.

¶42 Elumatec's next argument is that the jury instruction concerning express warranty was incomplete because it failed to include qualifying language contained in WIS. STAT. § 402.313(2), which provides that a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. This argument is also waived. While Elumatec contended at the jury instruction conference that the instruction being given by the trial court did not include subsec. (2) of § 402.313, its argument did not clearly convey its theory. Moreover, it did not subsequently renew its objection that the instruction on

[2] Although the parties dispute who drafted the notice instruction, counsel for Elumatec stated at the jury instruction conference that "[w]e object to the notice instruction that we prepared here."

express warranty was incomplete in its motions after verdict. The issue was therefore waived. *See* ***Suchomel v. Univ. of Wis. Hosp. & Clinics***, 2005 WI App 234, ¶¶10-11, 288 Wis. 2d 188, 708 N.W.2d 13, *review denied,* 2006 WI 23, 289 Wis. 2d 10, 712 N.W.2d 34; ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

¶43 Elumatec also objects that the jury instructions given by the trial court failed to instruct the jury on the measure of damages under WIS. STAT. § 402.714(2), which provides that the "measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." Again, we deem this issue waived. At the jury instruction conference, Elumatec contended that in looking at the warranty issues, the parties had "skipped over the limitation which is present in § 402.714, which lays out a series of choices that are available to the buyer in the event of accepted goods." While Elumatec cited to the language contained in § 402.714(2), it did not offer a particular instruction for the trial court's consideration, nor did it renew this issue in its motions after verdict. Like the argument based on WIS. STAT. § 402.313(2), this issue is therefore waived for purposes of appeal. *See* ***Suchomel***, 288 Wis. 2d 188, ¶¶10-11.

¶44 Elumatec's next objection is to the jury instruction regarding incidental damages, which instructed the jury that damages could be awarded "for expenses reasonably incurred in the inspection, receipt, transportation, care, or resale of goods or merchandise; and for commissions, interest, and any other reasonable expense incident to the breach of the contract." Elumatec contends that the instruction as given included damages applicable only to "goods rightfully

rejected" under WIS. STAT. § 402.715(1), and that the instruction should have apprised the jury that damages were limited to "commercially reasonable" expenses.

¶45 We conclude that the instruction as given adequately stated the law. The language regarding "any other reasonable expense" is taken directly from WIS. STAT. § 402.715(1), and thus does not expand recoverable expenses beyond the provisions of the statute. Moreover, even though the statute specifies that a buyer who rightfully rejects goods is entitled to expenses reasonably incurred in "inspection, receipt, transportation and care and custody" of the goods, this does not mean that such expenses, if incurred with regard to goods that are accepted, do not also constitute reasonable expenses incident to a breach which may be awarded when the defective goods are accepted. No basis therefore exists to conclude that inclusion of this language was error or prejudiced Elumatec.

¶46 Elumatec next contends that the jury instruction regarding breach of warranty for a particular purpose should not have been given. It contends that when a seller complies with a buyer's specifications, it does not extend a warranty of fitness for a particular purpose. It contends that the saws met the specifications set forth in the request for quotation (RFQ) by September 27, 2001.

¶47 We conclude that the instruction as given was within the trial court's discretion. As indicated in the previous discussion, evidence presented at trial indicated that the second saw was not remotely complete when transmitted to Cornerstone in October 2001, and that it therefore did not meet the specifications of the RFQ. In addition, testimony at trial indicated that the first saw failed to consistently meet the specifications of the RFQ after September 27, 2001, as well

as before. Based upon this evidence, Elumatec's contention that the instruction should not have been given must fail.[3]

¶48 Elumatec's final jury instruction challenge is to the instruction on consequential damages. It contends that the instruction as given by the trial court expanded consequential damages beyond those specified in WIS. STAT. § 402.715(2)(a). While acknowledging that the instruction as given by the trial court included the language set forth in § 402.715(2)(a), it contends that the failure to include the word "only" in that portion of the instruction, when combined with the language preceding it, expanded recoverable damages beyond those permitted by the UCC.

¶49 Again, this argument is waived. The trial court included the language from WIS. STAT. § 402.715(2)(a) in the instruction at Elumatec's request. If Elumatec had wanted the word "only" added to the language, or took the position that other language had to be removed from the instruction, it was incumbent upon Elumatec to make this clear to the trial court. Instead, it merely noted that the trial court had made Elumatec's suggested change to the end of the instruction, and that this change "appropriately states what the responsibility is in proving consequential damages." While it alluded to a further objection by stating that "[t]he way this plays into the verdict suggests that they're entitled to get that without having to evaluate whether or not consequential damages are something

[3] Elumatec also contends that, at a minimum, the instruction should have incorporated a statement that substantial compliance with specifications would eliminate any breach of warranty of fitness for a particular purpose. However, at the jury instruction conference, it argued only that the instruction should not be given, not that additional language should have been included. Any request for the inclusion of additional limiting language was therefore waived. *See* ***Allen v. Wis. Pub. Serv. Corp.***, 2005 WI App 40, ¶18, 279 Wis. 2d 488, 694 N.W.2d 420, *review denied*, 2005 WI 136, 285 Wis. 2d 627, 703 N.W.2d 376.

that should be provided," this statement did not put the trial court on notice that Elumatec was requesting that the word "only" be added to the instruction. In addition, the statement was not sufficiently clear as to notify the trial court as to what, if any, alternative instruction Elumatec sought. Consequently, the issue is waived for purposes of appeal. *See* ***Allen***, 279 Wis. 2d 488, ¶18.

¶50 In related arguments, Elumatec objects to the special verdict. However, as previously noted, the form of the special verdict is within the discretion of the trial court. ***Murray***, 83 Wis. 2d at 425. The special verdict will not be disturbed if the material issues of fact are encompassed within the questions asked and appropriate instructions are given. ***Id.***

¶51 Elumatec alleges that the special verdict failed to ask all necessary questions and was based upon instructional error. To the extent Elumatec is contending that separate notice and breach questions should have been asked, we conclude that the verdict fully presented the material issues of fact related to notice and breach to the jury. Moreover, based upon our rejection of Elumatec's arguments challenging the jury instructions, we also reject its claim that the special verdict was defective based upon instructional error.

¶52 Elumatec's next argument is that the trial court should have changed the jury's answer to special verdict question 4 and determined that there was no breach as a matter of law. Initially, we note that, like the notice issue, the issue of whether Elumatec breached its contract with Cornerstone presented an issue of fact for the jury, not a question of law. The jury's finding that Elumatec breached the contract by failing to provide saws that met its contractual obligations must be upheld if the finding is supported by any credible evidence.

¶53 Credible evidence supports the jury's finding of a breach. In reaching this conclusion, we reject Eluamtec's argument that the jury's finding of no breach based upon delay precludes a finding that it breached its contractual obligations. The only finding of the jury related to delay was its finding that failure to deliver the saws by July 1, 2001, was not a breach. This finding was reasonable in light of the evidence that Cornerstone extended the delivery date to mid-July when Brogantech became the manufacturer. However, this does not mean that Elumatec's failure to deliver a completed, working first saw in early September 2001 and its failure to deliver a completed second saw in October 2001 could not be considered by the jury in determining whether a breach occurred.

¶54 Credible evidence supports a finding that Elumatec failed to provide saws that met its contractual obligations and breached express and implied warranties. As detailed in the discussion of the evidence set forth above, the first saw had multiple problems when delivered to Cornerstone in early September 2001, did not meet all specifications when transmitted to Boone later that month, and continued to experience significant problems thereafter. When Cornerstone demanded the second saw on October 3, 2001, it was significantly past the time the saw was to have been completed and delivered by Elumatec under the contract, and was not remotely complete. The evidence indicated that neither saw was able to consistently cut properly or operate in an industrial environment until rebuilt by Cornerstone.

¶55 Based upon the evidence, the jury could reasonably conclude that Elumatec breached its contractual obligation of providing two automatic V-notching saws that could cut to length and V-notch the corner joints of aluminum frames for dry erase and bulletin boards, with a cycle time of thirty seconds and a tooling change time of five minutes or less. The jury could find that the saw was

not welded steel with a vibration-isolating pad as required by the contract documents. Based upon the testimony of Troglia and Stan Johnson, the jury could also reasonably find that the saws provided by Elumatec did not meet safety and industrial standards. The jury could therefore conclude that the saws were unfit for the industrial use for which they were intended, that they were unfit for the ordinary purposes for which such industrial saws are used, and that they would not pass without objection in the industrial trade for which they were being built. As such, the jury could reasonably conclude that the saws breached implied warranties of merchantability and fitness for a particular purpose under WIS. STAT. §§ 402.314 and 402.315. In addition, based upon Zens' testimony that he was shown and promised a Sturtz saw and agreed to have Brogantech produce the saws only after reiterating that he still expected a Sturtz-quality saw, the jury could reasonably conclude that Elumatec promised to provide Sturtz-quality saws, and that its failure to do so constituted a breach of express warranty under WIS. STAT. WIS. STAT. § 402.313(1).

¶56 Nothing in Elumatec's arguments provides a basis for disturbing the jury's finding that it breached its contract with Cornerstone by failing to provide saws that met its contractual obligations. WISCONSIN STAT. § 402.607(2) clearly provides that acceptance of goods does not impair any other remedy for nonconformity under WIS. STAT. ch. 402. While Elumatec contends that Cornerstone modified the contract by demanding delivery of the second saw "as is," contract modification requires mutual assent. ***Lamb v. Manning***, 145 Wis. 2d 619, 627, 427 N.W.2d 437 (Ct. App. 1988). Nothing in the evidence supports a finding that Cornerstone assented to forgoing its remedies for the defects in the saws when it demanded that the first saw be delivered in September and the second saw be delivered in October. With the first saw deficient and the second

saw not "remotely complete" long after the July 15 extended deadline, delivery of testing materials to Brogantech by Boone, and the inspection and run-off dates at Brogantech in August 2001, the jury could conclude that Elumatec had breached its contractual obligations as to time of delivery and quality of the saws. The jury could also conclude that Cornerstone acted reasonably, forgoing no rights, when it demanded delivery of first one saw and then the other, and proceeded to repair and rebuild them.

¶57 Elumatec's next two arguments relate to damages. Its first argument is that Cornerstone failed to prove that its rebuild damages were reasonable. However, since the jury's award of $328,523 as the cost of rebuild and repair damages was supported by credible evidence, we will uphold it. The jury was entitled to find damages under WIS. STAT. §§ 402.714 and 402.715(1) and (2)(a). Thomas Hughbanks testified that Cornerstone's records reflected time and costs to repair and rebuild amounting to $442,345.71. Zens testified that the repair and rebuild work, including the work done after January 2002, was necessary to bring the saws into compliance with the contract between Cornerstone and Elumatec. In light of this evidence, no basis exists to conclude that the repair and rebuild costs awarded by the jury were unreasonable or unsupported by credible evidence.

¶58 Elumatec also challenges the $180,000 in lost profits found by the jury. It contends that lost profits were unrecoverable in this case because they were unforeseeable and speculative. We disagree.

¶59 As set forth in the discussion of the evidence at trial, Zens testified that prior to entering the contract, he informed Craig Cocanig, Elumatec's sales representative, of the importance of the saws and that Cornerstone's failure to satisfy Fortune Brands, Cornerstone's largest customer and the parent company of

Boone, could lead to the failure of Cornerstone. When an agent has authority to deal in general with the subject matter of a transaction, knowledge that he or she gains in the course of the transaction is imputable to the principal. ***Ivers & Pond Piano Co. v. Peckham***, 29 Wis. 2d 364, 369, 139 N.W.2d 57 (1966). Nothing in the record precluded the jury from concluding that, as Elumatec's sales representative, Cocanig's knowledge was imputable to Elumatec. In addition, Van Tongeren personally acknowledged that failing to satisfy a customer might lead to the loss of the customer. Under these circumstances, the jury could reasonably find that it was foreseeable to Elumatec that its failure to produce saws for use by Boone in conformity with its contract obligations might lead Cornerstone to lose business with Boone and Fortune Brands. *Cf.* ***Hendricks & Assocs., Inc. v. Daewoo Corp.***, 923 F.2d 209, 214-15 (1st Cir. 1991).

¶60 The evidence also amply supports the $180,000 award. Jiminez testified that based on the problems with this project, Boone rejected Cornerstone's bids on wood and vinyl process projects. Testimony was also presented regarding the substantial lessening of work awarded by Fortune Brands companies to Cornerstone after this project, and contrasted it with the steadily rising business awarded Cornerstone before this project by Fortune Brands, a conglomerate with billions of dollars in annual sales. While evidence indicated that many of the jobs on which Cornerstone bid after this project were not performed or were performed in-house, evidence also indicated that prior to this project Cornerstone was doing much of the "in-house" work for Fortune Brands. Under these circumstances, this court concludes, as did the trial court, that credible evidence supports the jury's award of $180,000 of the $1.2 million in lost profits claimed by Cornerstone.

¶61 Elumatec's final argument is that a new trial should be granted in the interest of justice based upon cumulative errors at trial and the lack of evidence supporting the jury's findings of breach, notice and damages. Because the evidence supported the jury's verdict and Elumatec has failed to establish error at trial, we deny its motion for a new trial.

¶62 In addition to rejecting Elumatec's arguments on appeal, we reject Cornerstone's arguments on cross-appeal. Cornerstone contends that the trial court erred when it granted Elumatec's motion for a directed verdict and offset the damages awarded to Cornerstone by the jury with the remaining contract price of $115,389.92. Cornerstone acknowledges that Elumatec is entitled to the remaining amount owed under the contract based upon Cornerstone's acceptance of the saws. *See* WIS. STAT. § 402.607(1). However, it contends that the jury had already provided the offset in the damages award. Specifically, it contends that its accountant, Thomas Hughbanks, subtracted the amount remaining on the contract from the repair and rebuild costs incurred by Cornerstone when he calculated Cornerstone's damages.[4] It notes that Hughbank's deduction was presented to the jury through his testimony and a chart shown to the jury, and that the jury's damages award for rebuild and repair expenses was identical to the amount as calculated by Hughbanks after the deduction. It contends that the record therefore establishes that the jury already applied the offset in its verdict, and that the trial court's decision to offset the sum in motions after verdict constitutes a windfall to Elumatec.

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[4] As discussed by Cornerstone, at the time of trial Hughbanks believed that $113,822.50 remained owing on the contract and deducted that amount, rather than the $115,389.92 actually owed.

¶63 Based upon a careful review of the record, we reject Cornerstone's argument and uphold the trial court's determination. The record indicates that, at the jury instruction and special verdict conference, the trial court agreed with the parties that Elumatec's counterclaim for the amount remaining due on the contract would not be submitted to the jury in the special verdict because acceptance of the saws and the amount owing was conceded by Cornerstone. The trial court stated: "Our dilemma [is] … how do we handle it for the jury so that whatever verdict they come back with, we know whether or not they have considered that 115,000 dollar contract price." Ultimately, the trial court agreed to instruct the jury in accordance with an instruction proposed by Cornerstone. Cornerstone indicated that it was going to rely on the instruction to argue that the jury needed to add the amount remaining due on the contract back into the damages as calculated by Hughbanks.

¶64 Cornerstone did not request that the jury be instructed to deduct the amount that remained owing to Elumatec from the damages found by the jury, and the trial court did not give such an instruction. Instead, as requested by Cornerstone, the trial court instructed the jury:

> In plaintiff's presentation of evidence relating to cost of repair … plaintiff deducted from its total repair damages an amount representing the remaining amount owed it under its contract with the defendant.
>
> The Court instructs you that the law requires a buyer to pay the seller the total contract price for a product if as here the buyer accepts the product. The contract price still remaining to be paid is 115,389 dollars and 92 cents.
>
> By accepting the product and including an offset in its damages calculation for the remaining contract price, plaintiff does not waive its right to allege that the product did not conform to the contract and seek damages from the seller for the non-conformity.

¶65 Counsel for Cornerstone referred to this instruction in his closing argument, arguing:

> [W]ith regard to the damages associated with rebuilding it, $328,523.21. Now, this is going to get confusing, and I'm sorry.
>
> You're going to get an instruction that says this case is governed by the Uniform Commercial Code.
>
> There's a law that says if you accept a product you have to pay for it, okay? And acceptance is deemed any act by a party that is inconsistent with possession by the owner.
>
> When they demanded these saws, give them to us, and basically took them, the law says you accepted them. Guess what? Now you got to pay for it, okay? Whether it stinks or not, you got to pay for it if you accept it. However, the instruction is going to say that doesn't prevent you from suing for all your damages that flow thereafter.
>
> Believe it or not, he owes them 115,000 dollars because he took the saws.
>
> Mr. Hughbanks in his damage calculation backed that number out of the damages on the assumption that they wouldn't have to pay it. They got to pay it. *You got to add that back in, okay?* … But the law is—the Court has determined the law is you got to pay for it even though it —perhaps you're arguing it stunk. You still got to pay it because you took it. *He backed that out of there. Put it back in.*
>
> (Emphasis added.)

¶66 Based upon this record, Cornerstone's cross-appeal fails. As noted by the trial court in its decision on motions after verdict, Cornerstone argued in its closing that the jury should add the amount deducted by Hughbanks back into the damages award. The trial court concluded that it could not be certain that the jury had failed to add the amount back in and that its answer reflected the deduction. Based upon these conclusions, and because Elumatec was entitled to the remaining

$115,389.92 owed on the contract pursuant to WIS. STAT. § 402.607(1), the trial court granted Elumatec's motion for judgment in that amount, and offset it against the judgment awarded to Cornerstone.

¶67 We agree with the trial court that, based upon the record, it cannot be conclusively determined that the jury already provided for the offset. The jury was instructed that the law requires a buyer to pay the seller the total contract price when goods are accepted, and that Cornerstone had deducted the amount that remained owing on the contract from its repair costs. Cornerstone relied on the instruction to argue to the jury that it had to put $115,000 back into the damages award.[5] Based upon the record, it cannot be determined that the jury did not do so. As noted by Elumatec, it is equally plausible that the jury rejected the reasonableness of the total amount of repair and rebuilding costs claimed by Cornerstone, that it rejected the argument that all claimed costs were caused by the breach, or that it rejected the validity of the underlying accounting. Because credible evidence supported the jury's finding that $328,523 would reasonably compensate Cornerstone for its costs to rebuild and/or repair the saws, and the record does not conclusively establish that the jury offset its award by the amount

[5] In its cross-appellant's brief, Cornerstone argues that it was legally entitled to deduct damages from the contract price under WIS. STAT. § 402.717. To the extent Cornerstone is relying on this argument as a basis to reverse the trial court's judgment, it fails. As discussed above, Cornerstone argued at trial that the amount deducted by it in Hughbanks' damages calculation should be added back in by the jury, not that Elumatec's right to recover the remainder due on the contract was extinguished by the deduction.

owed to Elumatec, no basis exists to disturb the trial court's decision.[6] Judgment awarding Elumatec $115,389.92 on its counterclaim and offsetting that amount against the judgment awarded to Cornerstone is therefore affirmed.

¶68 Because Elumatec has not prevailed on its appeal, and Cornerstone has not prevailed on its cross-appeal, costs are denied to both parties.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[6] We reject Cornerstone's argument that we must reverse the judgment in favor of Elumatec because there is credible evidence that it already received its damages via an offset by the jury. This argument distorts the standard of review. Elumatec was entitled to judgment pursuant to WIS. STAT. § 402.607(1) unless the record otherwise established that the jury had already awarded it the $115,389.92 in its answer to special verdict question 7A. For the reasons discussed above, the record does not conclusively establish that the jury made the offset alleged by Cornerstone.