**IN THE COURT OF APPEALS OF IOWA**

No. 2-121 / 11-0174
Filed April 25, 2012

**N/S CORPORATION,**
Plaintiff-Appellee,

**vs.**

**CAR WASH CONSULTANTS, INC.,**
Defendant-Appellant.

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**CAR WASH CONSULTANTS, INC.,**
Counterclaimant,

**vs.**

**N/S CORPORATION,**
Counterclaim-Defendant.

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Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Car Wash Consultants, Inc. challenges the district court's refusal to submit consequential damages to the jury for its breach of implied warranty claim, and contends the jury's verdict was inconsistent. **REVERSED AND REMANDED IN PART, AFFIRMED IN PART.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**TABOR, J.**

N/S Corporation (N/S) supplied Car Wash Consultants, Inc. (CWC) with a conveyor system and other equipment to install in James Martinez's car wash. After experiencing several problems with the system and cleaning accessories, Martinez decided to use a different distributor to equip his second car wash. The main question before us is whether the district court improperly excluded CWC's request for consequential damages related to its loss of future business with Martinez from the jury instruction concerning N/S's alleged breach of implied warranty of merchantability.

Because CWC provided substantial evidence as to the certainty and foreseeability of its future business with Martinez, the district court erred by refusing to submit the question of consequential damages under the breach of implied warranty claim. The resulting prejudice was not remedied by allowing the jury to consider consequential damages under an alternative theory of recovery. On the question of N/S's limited warranty, the district court properly held that the language was too ambiguous to bar CWC's recovery for a breach of implied warranty. Last, the jury's verdict regarding the amount owed to N/S on its open account claim was not inconsistent with a finding of breach of implied warranty, as it could be harmonized with the evidence before the jury.

***I. Background Facts and Procedures***

N/S is a California-based company that manufactures and sells vehicle wash systems and related goods internationally. CWC is an Iowa corporation located in Cedar Rapids which sells and services car wash equipment for several

manufacturers. In 1998 the two companies entered into a distributorship agreement wherein CWC would sell N/S vehicle wash systems.

James Martinez took over ownership and responsibilities of his father's business, Russ's Car Wash, in 2002. Located in Grand Island, Nebraska, the business included a car wash, detail center, oil change center, and convenience store.[1] Martinez was looking to renovate Russ's Car Wash to a more "state-of-the-art" facility, and was also contemplating building another car wash at a second location.

In December of 2003, Martinez and CWC reached an agreement for the sale of two N/S conveyor car wash systems. Parties dispute whether Martinez and CWC actually entered into a contract for the second car wash. But Martinez's statements in his deposition and communication between N/S and CWC show all parties were on notice of Martinez's intentions in December of 2003. Martinez testified that he paid CWC a $20,000 down payment for the second N/S system, and CWC submitted a proposal to Martinez to install the second system for $339,856. Martinez also asserted in his testimony that he had contracted with CWC for the second car wash. On December 9, 2003, Kirk Knickerbocker, owner of CWC, emailed N/S advising them he would be wiring $2500 for the first car wash, and $20,000 as a down payment for the second car wash. N/S acknowledged the email the same day.

Martinez's renovated car wash reopened on March 5, 2004, but the occasion was marred by problems with the equipment. First, the over/under

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[1] Russ's Car Wash went out of business in October 2007.

electric conveyor designed to move vehicles through the car wash would often fail. The first motor, a three-horsepower motor manufactured by Nord, would seize up while the vehicle was in the wash. A second, five-horsepower Nord motor experienced similar malfunctions.[2] N/S switched to a Sumitomo five-horsepower motor, which successfully conveyed the vehicles through the car wash. Additionally, the Lammscloth[3] installed in the car wash would damage the vehicles, bending license plates and stripping off side mirrors and antennas. The Lammscloth began to rip and tear from the brushes and curtains in the car wash. N/S replaced the defective equipment with sturdier components.

Martinez became frustrated with the deficiencies in his car wash. The failing motor required him to hire additional staff to drive the vehicles through and to temporarily close the entire wash down. His customers also filed several claims based on the damage caused by the Lammscloth. Representatives from CWC and N/S both visited the location, working to remedy the problems plaguing the business. When it came time to purchase the car wash for his second location, Martinez chose to buy another N/S system, but rather than using CWC, which he previously agreed to use as his distributor, Martinez purchased the second system through Wash Plus, a Florida distributor.

The manner in which Martinez selected Wash Plus is the subject of some dispute. Wash Plus salesman Michael Kelch testified that he initially met

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[2] Although the parties dispute the number of motors that failed at Russ's Car Wash, both seem to agree at least two Nord motors failed before N/S delivered a Sumitomo motor.

[3] Lammscloth is a fabric attached to rotating brushes that comes into contact with a vehicle during the wash cycle. The material provides friction on the surface of the vehicle, scrubbing it with soap and water.

Martinez at a trade show, and had had no prior dealings with him. Martinez informed Kelch he was building a car wash, but did not mention his prior business with CWC or N/S, or that he already had agreed to purchase his second car wash equipment through CWC. Kelch testified he could not remember whether he learned of Martinez's prior dealings with CWC before or after the two reached an agreement for Martinez to purchase an N/S system from Wash Plus.

Martinez described a different introduction to Kelch. He recalled faxing to N/S numerous customer claims relating to the Lammscloth, informing N/S that because of his dissatisfaction with the N/S system, he would not be purchasing his second Car Wash equipment from N/S. In his deposition, Martinez testified:

> I told them I wanted to do another facility and at this point I wasn't interested in using them anymore, and then that's when they kind of, you know—I guess basically tried pointing the finger at Kirk Knickerbocker and his company and wanted me to use Mike Kelch and Wash Plus.
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> . . . . N/S, they're the one that convinced me into going with Wash Plus. . . . [Myron Levin] just said that [Kelch] would get me taken care of, he would straighten out all of my issues, I wouldn't have any problems with him. Basically they trusted him. You know, just pretty much building a solid reputation around him and pushing the blame off onto [CWC].

Martinez recalled Levin's subsequent visit to his original car wash, during which he blamed all mistakes and defects of the system on CWC. Levin suggested Kelch visit and diagnose the issues. On May 16, 2005, CWC learned Martinez entered a contract with Wash Plus for his second car wash system.

On August 18, 2008, N/S filed suit against CWC, seeking $9510.72 in damages based on CWC's open account with the company. CWC filed an

amended counterclaim on September 12, 2008, asserting claims of breach of express and implied warranty, negligence, interference with contract, and defamation. A four-day jury trial began on November 8, 2010. During trial, CWC withdrew its negligence and defamation counterclaims. N/S moved for a directed verdict on CWC's counterclaim for breach of implied warranty. In its order denying that motion, the court stated it would allow the interference and implied warranty claims to go to the jury, but would "limit damages with regard to each of these specifications" based on the issue of causation associated with each claim.

In addition to N/S's claim that CWC owed money on an open account, the district court instructed the jury on the theories of N/S's breach of implied warranty, interference with business contract, and interference with a prospective business relationship. The court instructed the jury that it could find consequential damages for loss of profit on the interference theory but not on the breach-of-implied-warranty claim.

On November 15, 2010, the jury returned a verdict finding CWC owed N/S $8330.91 on an open account with N/S. The jury also found N/S breached its implied warranty of merchantability, causing $11,635 in damages for work that was not billed for servicing the problems at Russ's Car Wash, but that CWC failed to prove N/S interfered with the Martinez Contract or that N/S interfered with any prospective business relationship with CWC's existing customers.

CWC filed a motion for a new trial, which was denied by the district court on January 3, 2011. In its denial of CWC's motion, the court held

> . . . as it did at trial, that CWC's breach of warranty claim could not, as a matter of law, have been the proximate cause of any alleged

damages sustained as a result of Martinez' failure to follow through on his alleged agreement with CWC to build a second car wash.

On January 28, 2011, CWC timely filed its notice of appeal.

## *II. Standard of Review*

We review claims that a trial court gave improper jury instructions for correction of errors of law. *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 110 (Iowa 2011). A claim that the trial court should have given a party's requested jury instruction is reviewed for an abuse of discretion. *Schmitt v. Koehring Cranes, Inc.*, 798 N.W.2d 491, 496 (Iowa Ct. App. 2011). A party is entitled to an instruction if it is supported by the pleadings and substantial evidence. *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 200 (Iowa Ct. App. 2006). "Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion." *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). Reversal is required only if the trial court's error in giving a jury instruction results in prejudice to the complaining party. *Schmitt*, 798 N.W.2d at 496.

Our review of a district court's ruling on a motion for new trial depends on the basis of the motion. *Pavone v. Kirke*, 801 N.W.2d 477, 496 (Iowa 2011). If the motion relates to the court's discretion, we review for an abuse of discretion, but if the motion is rooted in a legal question, our review is for corrections of error at law. *Id.* Because CWC claims the answers in the verdict were inconsistent, our review is limited to correction of legal error. *See id.*

## *III. Analysis*

### A. Did the District Court Err in Refusing to Submit CWC's Consequential Damages Instruction for Breach of Implied Warranty?

Jury instructions are designed to explain the law to jurors so they may apply it to the facts shown at trial. *AMCO Mut. Ins. Co v. Lamphere*, 541 N.W.2d 910, 913 (Iowa Ct. App. 1995). If the instructions, as a whole, are insufficient to convey the relevant law, we must order a new trial. *Manno v. McIntosh*, 519 N.W.2d 815, 823 (Iowa Ct. App. 1994). Because the district court determined as a matter of law that N/S's alleged breach of an implied warranty of merchantability could not be the proximate cause of CWC's loss of future profits, it opted against submitting a consequential damage instruction with its breach-of-implied-warranty instruction to the jury. CWC contends substantial evidence existed to allow the jury to determine if the failure of the first system to be merchantable proximately caused Martinez to forgo ordering the N/S system for his second location through CWC.

The implied warranty of merchantability is based on a buyer's reasonable expectation that goods purchased from a merchant will not harbor significant defects and will function in the way goods of that kind should function. Iowa Code § 554.2314; *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 84 (Iowa 1984). A breach of the implied warranty occurs when (1) the seller of the goods is a merchant; (2) at the time of the sale, the goods were not "merchantable;" (3) the plaintiff sustained damage; (4) the goods' defective nature caused the

damage "proximately and in fact;" and (5) notice of the injury was given to the seller. *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 828 (N.D. Iowa 2000).

Our legislature recognizes a claim for consequential damages resulting from a seller's breach. Iowa Code § 554.2715(2) (2009) (encompassing "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise," as well as "injury to person or property proximately resulting from any breach of warranty."). A party is entitled to consequential damages so long as they are both reasonably foreseeable when the contract was entered into, and can be proved with reasonable certainty. *Shinrone, Inc. v. Tasco, Inc.*, 283 N.W.2d 280, 285–86 (Iowa 1979). When a purchaser communicates "special circumstances" to the seller, both parties reasonably contemplate the circumstances, and because losses of which the seller would have previously been unaware are now foreseeable, the seller will be liable for the loss. *Id.*

Section 554.2715(2) includes "loss of profits resulting from failure of the goods to function as warranted, loss of goodwill, and loss of business reputation," and "other loss proximately resulting from a defective product beyond direct economic loss." *Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 309 (Iowa 1995) (internal quotations omitted).

CWC argues Martinez's frustrations with the defective conveyor motors and Lammscloth caused him to contract with Wash Plus for his second location, and because N/S and CWC signed purchase agreements for N/S systems on

both of Martinez's car wash locations, N/S was aware of the special circumstances at the time the contract was executed between the two. CWC concludes its loss of Martinez's business in supplying a system for the second location constitutes a loss compensable through section 554.2715(2)(a).[4]

N/S counters that the district court was correct in finding a lack of evidence the alleged breach of an implied warranty of merchantability was the proximate cause of CWC's consequential damages. At trial, the district court explained its rationale for refusing to include the lost-profit claim for the second car wash as consequential damages under the breach of implied warranty theory:

> I don't believe that . . . a breach of warranty can be included in the type of improper conduct that leads to damages . . . that are more correctly compensable in a potential interference with contract claim. I don't think you can go on ad infinitum on a breach of warranty claim to take every loss that a company has and try to take it back to the breach of warranty . . . from another job site, another customer, or even the same customer, different job site, because I don't think they're reasonably related and I don't think that's foreseeable.

N/S highlights Knickerbocker's testimony that Martinez had already begun designing his second facility to accommodate an N/S system based on the first car wash facility before deciding against doing business with CWC. N/S argues the fact Martinez ordered a second N/S conveyor system—notwithstanding the issues with the first—show that any breach of implied warranty did not cause CWC's loss of business.

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[4] At trial, Knickerbocker testified to anticipating $127,550.92 in profits from the second Martinez location.

CWC previously asked our court to find a car wash equipment manufacturer's breach of implied warranty resulted in consequential damages of lost profits. In *Car Wash Consultants, Inc. v. Belanger, Inc.*, No. 08-1195 (Iowa Ct. App. Nov. 12, 2009), the jury awarded CWC $52,066.34 in lost profits from Iowa Wash's refusal to use CWC in constructing its future Johnson Avenue location. When CWC contracted to purchase equipment from Belanger, the equipment manufacturer, Knickerbocker informed Belanger that Iowa Wash was looking to add locations. *Belanger*, No. 08-1105. After CWC installed a Belanger system at Iowa Wash's C Street location, the car wash experienced certain motor and electrical problems. *Id*. At trial, parties disputed whether Belanger's products or CWC's installation methods were the cause of the issues. *Id*.

Our court cited authority noting the "loss of a customer" theory of consequential damages is oftentimes rejected for being too speculative. *See* Lary Lawrence, *3A Lawrence's Anderson on the Uniform Commercial Code*, § 2-715:97 (3d ed.); *Harbor Hill Lithographing Corp. v. Dittler Bros., Inc.,* 348 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1973). We held the theory of consequential damages from the Johnson Avenue location required a number of inferential leaps, such as Iowa Wash deciding to use the same Belanger equipment at its next location, and forgiving any issues caused by CWC. *Belanger*, No. 08-1195. Iowa Wash also was unsure whether it would be able to obtain financing for additional locations. *Id*.

Moreover, no evidence showed Belanger was aware of the Johnson Avenue prospect beyond CWC's statement that Iowa Wash may build additional locations. *Id*. We found this general communication "to talk up the importance of a nascent, potential customer" was not sufficient "to trigger potential consequential damage liability" for any profits otherwise arising from the Johnson Avenue location. *Id.*

Although *Belanger* didn't state whether a reseller may recover consequential damages for a manufacturer's breach of an implied warranty, other jurisdictions have held such damages to be recoverable. *See Laird v. Scribner Coop*, 466 N.W.2d 798, 805 (Neb. 1991); *Kelly v. Hanscom Bros., Inc.*, 331 A.2d 737, 739 (Penn. 1974); *see also Hendricks & Assocs., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214–15 (1st Cir. 1991) (affirming jury verdict for prospective profits awarded to distributor/consultant from anticipated distributor-purchaser contracts because substantial evidence showed manufacturer had reason to know that poor product quality could cause harm to future business between distributor and purchaser, and substantial evidence showed such poor quality caused the loss of future contracts); *Lohmann & Rauscher, Inc. v. YKK (U.S.A.) Inc.*, 477 F. Supp. 2d 1147, 1157 (D. Kan. 2007) (denying motion for summary judgment because sufficient evidence existed showing manufacture's breach of implied warranty of merchantability could have caused distributor consequential damages in the form of lost future profits from end-user); *Carbo Indus. Inc. v. Becker Chevrolet*, 491 N.Y.S.2d 786, 790 (App. Div. 1985) (finding car leasor's loss suffered by its client's cancellation of an order to lease an additional vehicle constituted

consequential damages which a jury could have found to be recoverable under one of the dealer's warranties).

In deciding whether the court should have instructed on consequential damages, we are cognizant that causation is generally a question of fact to be decided by the jury. *Thompson v. Kaczinski*, 774 N.W.2d 829, 836 (Iowa 2009). This principle extends to disputes arising out of contract law. *See Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 424 (Iowa 1999) (considering consequential damages arising out of contract, and recognizing "questions of proximate cause are ordinarily questions of fact that, only in exceptional cases, may be taken from the jury and decided as a matter of law."). Likewise, questions of foreseeability are generally questions of fact to be determined by the jury. *Thompson*, 774 N.W.2d at 835; *see also Laird*, 466 N.W.2d at 805 ("[F]oreseeability of consequential damages, as a general rule, is an issue of fact for determination by the fact finder.").

*1. Substantial Evidence*

CWC now returns with stronger facts weighing in favor of finding the requisite certainty and foreseeability to warrant a jury instruction on consequential damages. CWC's loss is more certain in this case. The present facts lack the speculative attributes of *Belanger*, in which the court held a jury would be forced to make a number of inferential leaps to find damages resulting from loss of the second car wash location. Here the jury received evidence of two contracts executed by CWC and N/S on December 1, 2003. The contracts obligated N/S to provide a conveyor system to CWC for Russ's Car Wash and for

Martinez's second location. Knickerbocker testified to entering an agreement with Martinez before ordering both systems from N/S. Martinez also acknowledged he had an agreement with CWC. Martinez testified to remitting $20,000 as a down payment to CWC, $2500 of which CWC paid to N/S to hold the pricing for the second system. Because he ultimately purchased a second N/S system through Wash Plus, which he testified he would not have engaged absent N/S placing blame on CWC,[5] the jury could have found Martinez planned to purchase his second system through CWC without undertaking the inferential leaps necessary in *Belanger*.

As to foreseeability, CWC provided substantial evidence to support a finding that N/S knew or had reason to know at the time of contracting that Martinez intended to contract with CWC to build a second car wash. N/S and CWC executed contracts on December 1, 2003, for the sale of two conveyor systems.[6] The jury received the December 9, 2003 communication between N/S and CWC. In it, Knickerbocker requested information to transfer funds in part to pay for the initial car wash equipment, and in part to hold pricing for a second job

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[5] N/S argues Martinez's choice to switch distributors while continuing to use N/S for his second system shows he wasn't motivated by N/S's breach of implied warranty. But Martinez testified that he later concluded "the problem was not with the work Car Wash Consultants did, but rather what N/S was sending [him]." Martinez's state of mind is relevant to show that his decision to use another distributor was based on his belief that the equipment's poor performance was caused by CWC. His statement that he now believes N/S is to blame explains (1) why he chose to go through a different distributor, and (2) why he chose to use the same manufacturer. While this statement could suggest interference, it can also show that the system's deficiencies—which the jury could attribute to N/S's breach of implied warranty—caused Martinez to hire another distributor to avoid similar problems.

[6] Mike Levin signed on behalf of N/S and Knickerbocker signed on behalf of CWC. Because Levin is located in California and Knickerbocker is located in Cedar Rapids, they executed the documents through facsimile on the same day.

order. On the same day, N/S acknowledged CWC's communication. Although this information placed N/S on notice of the additional car wash location, it came eight days after execution of the contracts. Based on this evidence alone, N/S would not have had reason to know of Martinez's future intentions at the time of the contract. And similar to *Belanger*, CWC's potential additional business would not have been within the contemplation of *both* parties at the time of the contract, defeating foreseeability. *Sherinone*, 283 N.W.2d at 285-86.

But at trial, Knickerbocker testified N/S was aware of both locations before the December 1, 2003 order contracts were signed:

> Q. Did you ultimately enter into agreements with Mr. Martinez to buy two N/S conveyor car wash systems? A. Yes.
>
> Q. And once you did that, did you contact N/S in order to install—or excuse me, to purchase those two systems? A. Yes, I did.
>
> Q. Had you been talking to N/S before you entered into the order contract with N/S about your contacts and discussions with Mr. Martinez? A. Yes.
>
> Q. Who were you talking to at N/S? A. Mike Levin.
>
> Q. And Mr. Levin, what was his position at N/S? A. I believe he was the sales manager.
>
> Q. Was he the person that you would deal with then as an N/S distributor? A. Yes.
>
> Q. And why would you tell N/S about leads that you were pursuing? Why would you tell N/S about leads you were pursuing before you got a signed—before you had an agreement from the potential buyer? A. I would assume to make sure that everything was right and that they weren't going to cut me out of a sale.
>
> Q. Did you enter into two order contracts with N/S to buy conveyor systems to resell to Mr. James Martinez? A. Yes I did.

Although Levin, who ultimately signed both contracts, was apprised of an additional business prospect between CWC and Martinez, standing alone, these pre-contract exchanges are reminiscent of the "nascent, potential customer" talk highlighted in *Belanger*. But this communication transcends the vague statement

in *Belanger* that the car wash purchaser was "very interested in building multiple locations" when coupled with the fact that CWC and N/S contracted for two separate car washes at the same time. Knickerbocker testified that CWC had already entered into the agreements with Martinez prior to ordering both systems from N/S. A reasonable juror could find conversations between the two parties on or before December 1, coupled with the $149,174 and $80,235 contracts signed for both car washes, would alert N/S to the second Martinez location, profits from which could be lost based on N/S's breach of implied warranty. CWC provided substantial evidence of the second car wash location as to both certainty and foreseeability such that the damages arising therefrom should have been submitted as consequential damages under its breach of implied warranty of merchantability claim.

*2. Prejudice*

N/S contends CWC was not prejudiced even if the court improperly refused to submit the consequential damages instruction because the jury was instructed about lost profits as an element of damage for the interference with contract claim, a claim which the jury rejected. We disagree. With regard to breach of warranty of merchantability, the jury was instructed as follows:

> CWC must prove all of the following propositions to recovere on its breach of warranty of me[r]chantability claim:
>
> 1. N/S was a merchant, at the time it sold the electric conveyor car wash system.
> 2. The electric conveyor car wash system was not merchantable as defined in Instruction No. 15.
> 3. The lack of merchantability was a proximate cause of the CWC's damage.
> 4. The amount of damage.

The court then instructed the jury on CWC's claim of interference with contract:

> CWC must prove all of the following propositions in connection with its claim of interference with contract:
>
> 1. CWC had a contract with James Martinez to sell and erect a car wash system and related products at the James' Car Wash second location.
> 2. N/S knew of the contract.
> 3. N/S intentionally and improperly interfered with the contract in the following particulars:
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> a. Falsely blaming CWC for the problems with the N/S car wash system at the Russ's Car Wash location; or
>
> b. Advising James Martinez to buy N/S products for the James' Car Wash location from Wash Plus.
>
> 4. The interference caused James Martinez not to perform the contract.
> 5. The nature and amount of damages.

Finally, the court instructed the jury on CWC's claim of interference with a prospective business relationship:

> CWC must prove all of the following propositions to establish its claim of interference with prospective business relationship:
>
> 1. CWC had a prospective business relationship with its existing customers that used N/S manufactured systems and parts.
> 2. N/S knew of the prospective relationship.
> 3. N/S intentionally and improperly interfered with the relationship by terminating its business relationship with CWC.
> 4. The interference caused existing customers not to continue their relationship with CWC.
> 5. The amount of damage.

A court's failure to instruct concerning an appropriate form of damages under a theory of liability accepted by a jury causes prejudice to the prevailing party. *Cf. Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991) (holding plaintiff was not prejudiced by any erroneous damage instructions because plaintiff failed to establish liability). The prejudice is not remedied when the consequential damage

is included under an alternative theory because of the distinctly different nature of the alternative claims. *See Struve v. Payvandi*, 740 N.W.2d 436, 422 (Iowa Ct. App. 2007) (finding plaintiff was prejudiced when district court refused to instruct jury on a theory of implied warranty of habitability when common law liability instructions "did not embody the elements of that theory"). Both interference claims require proof that N/S's intrusive conduct caused Martinez to discontinue his relationship with CWC. For the breach claim, however, the lack of merchantability must be the proximate cause of the loss. These causation elements require wholly different acts by N/S.

Due to the nature of the verdict, we do not know which element of the interference claims the jury found to be fulfilled, or more importantly, not fulfilled. It could well be the case that the interference claims were defeated because the jury determined the cause of CWC's loss of Martinez's future business was not N/S's interference, but its breach of its implied warranty of merchantability. As we hold above, loss of profits is a valid form of recovery under a manufacturer's breach of implied warranty of merchantability. The court's refusal to submit all recognizable forms of damage under this claim deprived the jury of the opportunity to fully consider the extent of damage N/S's breach caused CWC. Because the elements which make up the breach of warranty and interference claims differ from each other, including lost profits on the interference instruction alone does not ameliorate this prejudice.

*3. Election of Remedies*

N/S contends allowing recovery of the second car wash under the breach claim and the interference claim is inequitable because "the two theories are logically inconsistent," citing *Parks v. City of Marshalltown*, 440 N.W.2d 377, 379–80 (Iowa 1989). The *Parks* court addressed whether a city employee who was denied a promotion could obtain remedies by means of future pay lost while also receiving declaratory relief in the form of a court order he receive the promotion initially sought. *Parks*, 440 N.W.2d at 379. The court considered whether this question invoked the defense of election of remedies, which requires satisfying the following three elements: (1) the existence of two or more remedies; (2) an inconsistency between them; and (3) a choice of one of the remedies. *Id.* The court found all three, holding "Parks could not reasonably expect damages as compensation for future wages lost and, at the same time, be ordered placed in the job so as to receive the same wages."

The election of remedies doctrine "is designed to prevent double recovery for a single injury, not to prevent recourse to alternative remedies." *Whalen v. Connelly*, 621 N.W.2d 681, 685 (Iowa 2000). The concern of double recovery for a single injury doesn't present itself here. Rather, this is a case in which CWC wishes to submit alternative theories of recovery for the same damage, a practice which our courts have allowed, so long as the damages awarded are not duplicative. *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 770 (Iowa 1999) ("A successful plaintiff is entitled to one, but only one, full recovery, no matter how many theories support entitlement." (quotations omitted)). Because the jury found CWC failed to prove its claims of interference with

business contract and interference with a prospective business relationship, there is no similar lost profit damage to duplicate if submitted under CWC's breach claim.

**B. Did N/S's Limited Warranty Language Preclude CWC From Claiming Loss of Profits?**

N/S argues its manufacturer's limited warranty contractually prevents CWC from recovering for consequential damages, offering it as an alternative ground to affirm the district court's ruling. The language of its limited warranty states:

> **LIMITED LIABILITY:** N/S shall not be liable (1) for any incidental, special, consequential, or exemplary damages; (2) for commercial loss; (3) for inconvenience; or (4) for any service not expressly provided for herein related to or arising from the vehicle wash machine.

The district court found the warranty did not properly limit CWC's claim for breach of warranty for merchantability and submitted the claim to the jury. It omitted the consequential damages instruction for lack of proximate cause rather than based on the language of N/S's warranty.

Our legislature permits limitations or exclusions of consequential damages, so long as the limitation is not unconscionable. *See* Iowa Code § 554.2719(3) ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."). N/S argues that because its limitation is not unconscionable, it should apply to exclude consequential damages from remedies available or any N/S breach of implied warranty.

The manufacturer in *Belanger* advanced a similar argument with respect to language within an express warranty aimed at limiting damages claimed by the distributor. Despite language stating the warranty to be "expressly in lieu of all other warranties," the *Belanger* court found it was ambiguous as to whether the warranty ran to the dealer and end-user, or the end-user alone. We reach a similar conclusion.

N/S's warranty is ambiguous, failing to specify to whom it extends. One could reasonably interpret it to either include or exclude CWC. Its title, "Manufacturer's Limited Warranty," suggests it applies to all entities subsequently possessing the equipment. But the terms of the warranty imply N/S intended the warranty to cover the end-user. N/S guarantees its equipment "for one (1) year from the *start-up date* of the equipment or until the equipment performs 50,000 washes . . . ." The warranty states any repairs under the warranty will be "free of labor charge for ninety (90) days *after installation*." (Emphasis added.) CWC, as an intermediary, gains no benefit from these warranties, which begin once the equipment is out of its control.

Additionally, the warranty states "no dealer or distributor (nor any agent or employee thereof) is authorized to extend or enlarge this warranty." This language further corroborates the warranty extending to the end-user alone by affirmatively denouncing a dealer/distributor—a third party to the agreement—any authority to act on behalf of N/S to alter the warranty. Leaving "end-user" out of the list of those who cannot alter the agreement further suggests N/S's

intention that the warranty applies to the ultimate owner of the equipment, and not an intermediary.

The language of N/S's warranty allows for reasonably conflicting conclusions as to whom it extends. When a warranty's language is ambiguous, the determination of the parties' intent becomes a question of fact. *See Walsh v. Nelson*, 622 N.W.2d 499, 504 (Iowa 2001). We are not free to substitute our own fact findings for the district court simply because we find certain evidence supports other inferences. *Id.* at 502. Accordingly, we decline to disrupt the district court's determination that the language of the warranty did not impact CWC's right to claim a breach of implied warranty.

**C. Was the Jury's Damage Award Inconsistent With Its Finding of Breach of Implied Warranty?**

*1. Error Preservation*

CWC claims it preserved error for its inconsistent verdict claim by addressing the issue in its motion for new trial. Our rules of civil procedure require

> all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. *No other grounds or objections shall be asserted thereafter, or considered on appeal.*

Iowa R. Civ. P. 1.924 (emphasis added). The rule aims to correct any error in jury instructions before they reach the jury, and to combat the trial tactic of refraining from alerting the court to any errors in the instructions until after the jury returned a dissatisfactory verdict. Iowa R. Civ. P. 1.924 Official Comment.

Our supreme court has recently echoed this sentiment, noting "[i]t would be unfair to approve a trial tactic to allow counsel to implant a ground for a new trial should the jury verdict later prove objectionable." *Pavone,* 801 N.W.2d at 496. Like the *Pavone* court, we address the merits of the issue, despite our doubt as to the mechanics used to preserve the error. *See id.*

*2. Merits*

The first two questions in the jury verdict address N/S's open account claim. They read:

> **Question No. 1:** Has N/S Corporation proven that CWC owes it money on an open account?
> . . .
> **Question No. 2:** State the amount of money CWC owes N/S Corporation on its open account?

The jury answered the first question affirmatively, and found CWC owed $8330.91 to N/S. CWC argues this amount includes the cost of the failed motors, which is inconsistent with the jury's finding that N/S breached their implied warranty of merchantability, and that under rules 1.1004(5) and (6), a new trial is required. CWC concedes it did agree to owing N/S $8330.91 for the open account during negotiations, but that their agreement predated evidence that the account included charges for the two failed Nord motors. N/S points to Knickerbocker's testimony in which he acknowledged the same amount was what CWC concluded it owed.

The test for whether a verdict is consistent is whether it "can be harmonized in a reasonable manner consistent with the jury instructions and the evidence in the case, including fair inferences drawn from the evidence." *Clinton*

*Physical Therapy Servs. v. John Deere Health Care*, 714 N.W2d 603, 613 (Iowa 2006). In making such determination, we must consider the manner in which the jury could have viewed the evidence, and how it may fit into the requirements of the instructions. *Id.* The jury's verdict should be liberally construed to give effect to the intention of the jury and harmonize its answers if possible. *Pavone*, 801 N.W.2d at 498.

The jury's finding of a breach of implied warranty doesn't require a finding that the motors were defective. CWC presented evidence of other deficiencies at Russ's Car Wash that the jury could have found as the basis for N/S's breach, such as Martinez's struggles with the Lammscloth. N/S provided testimony suggesting CWC was to blame for motors failing. Robert Knott, N/S's director of engineering, stated CWC failed to notify N/S that the motor would be around water in the specifications, referencing the photographs of the sump pump CWC installed by the motor.[7] He argues that had N/S been aware of the condition, the company would have opted for a different manner of mounting the motor, concluding the blame for any motor failure rests solely on CWC.

As the finder of fact, the jurors are free to accept or reject evidence presented to them at trial. *Blume v. Auer*, 576 N.W.2d 122, 126 (Iowa Ct. App. 1997). CWC presented evidence of multiple defective components within N/S's car wash system as the basis of N/S's breach, in addition to motor failure. An N/S employee testified that CWC was at fault for failing to apprise N/S that the motors would be mounted in a manner which would expose them to water. The

[7] In his testimony, Knott referred to the photos showing the gearbox and drive motor near the PVC piping as "a smoking gun in this case."

jury's verdict can be liberally construed to find N/S breached its implied warranty of merchantability, while not providing damages for the failed motors. Knickerbocker's admission that CWC owed N/S $8330.91 also lends to this conclusion. Given the evidence presented at trial, the jury's verdicts can be readily harmonized.

## *IV. Disposition*

We reverse the district court's refusal to submit consequential damages for N/S's breach of implied warranty of merchantability, and remand for a new trial solely on the issue of consequential damages as to that claim. We affirm all other verdicts and holdings by the district court.

**REVERSED AND REMANDED IN PART, AFFIRMED IN PART.**

Vaitheswaran, P.J., concurs; Mullins, J., concurs in part and dissents in part.

**MULLINS, J.** (concurs in part and dissents in part)

I concur in part and dissent in part. I respectfully dissent as to the majority's decision to reverse and remand on the issue of consequential damages. For the reasons articulated by the trial court in its rulings during trial and post trial, concluding as a matter of law that the alleged breach of warranty could not be the proximate cause of damages arising out of Martinez's failure to purchase equipment from CWC for a second car wash, I would affirm on that issue. In all other respects, I concur.