IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1177
Summary Calendar

LEEMAN LABS, INC.,

Plaintiff-Counter
Defendant-Appellee,

VERSUS

ENRECO, INC. d/b/a
ENRECO LABORATORIES,

Defendant-Counter
Plaintiff-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(2:91-CV-0078)

October 8, 1993

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Following a jury verdict in favor of plaintiff, Leeman Labs, Inc., for breach of contract, the defendant, Enreco, Inc. d/b/a Enreco Laboratories, appeals. We affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Leeman Labs, Inc. ("Leeman Labs"), is a company that manufactures spectrometers, which analyze dirt, water, and other samples to determine the presence of tiny amounts of metals such as iron, aluminum, or lead. These devices are utilized by companies, such as Enreco, Inc. d/b/a Enreco Laboratories ("Enreco"), that perform environmental cleanup operations.

Sometime during September 1989, Enreco contacted Leeman about purchasing a spectrometer. After sales presentations were made to Enreco, Leeman quoted a price of $119,890.54 for the purchase of a Leeman PS3000 spectrometer, including various add-on items, and a one-year warranty on parts, labor, and travel.

Enreco accepted Leeman's quotation on or about October 23, 1989. Prior to accepting Leeman's price quotation, Tom Dye, the lab director of Enreco, made inquiries to Leeman's salesman about rumors in the industry of dissatisfied customers and returned equipment. Nonetheless, Dye accepted Leeman's price quotation after being assured by Leeman's salesman that the rumors were untrue.

Leeman proceeded to manufacture and deliver the spectrometer that was ordered by Enreco. Leeman shipped the spectrometer to Enreco on November 30, 1989, and it was delivered to Enreco on December 5, 1989. Carla Butler, Enreco's laboratory manager, signed a customer acceptance form for delivery and installation of the instrument on December 21, 1989. Enreco also received an invoice from Leeman stating the purchase price of $119,890.54.

Enreco experienced difficulties utilizing the spectrometer and decided to return it to Leeman. Enreco sent a formal letter on January 30, 1990, informing Leeman that it would be returning the spectrometer. Leeman responded in a letter dated February 6, 1990, demanding payment for the spectrometer. The spectrometer was returned to Leeman on or about February 22, 1990. Leeman subsequently sold the spectrometer for $53,700 to its German subsidiary.

II.

Leeman sued Enreco in federal court on the basis of diversity jurisdiction, seeking damages for breach of contract, quantum meruit, prejudgment interest, and attorney's fees. The quantum meruit claim subsequently was abandoned. Enreco filed an answer denying the claims and stating certain affirmative defenses along with a counterclaim for breach of contract, breach of warranty, deceptive trade practices, and negligence. The negligence counterclaim was abandoned at trial.

The case was tried to a jury. At the close of the evidence, Enreco moved for a judgment as a matter of law on the ground that Enreco had not been given notice of Leeman's intent to resell the spectrometer pursuant to TEX. BUS. & COM. CODE ANN. § 2.706. The motion was denied, and the jury awarded $66,000 in actual damages to Leeman.

The court entered judgment for Leeman for $66,000 in total damages, plus prejudgment interest and expenses. The court awarded attorney's fees of $117,515. An additional $10,000 in attorney's

fees were awarded in the event of an appeal.

III.

Enreco first contends that no evidence was presented as to the market value at the time and place that the spectrometer was tendered, as prescribed by TEX. BUS. & COM. CODE ANN § 2.708, which permits recovery by a seller of the difference between the contract price and the market value of the goods. We employ the "sufficiency of the evidence" standard and uphold the jury verdict "unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive" at the verdict reached by the jury. Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir. 1988).

Leeman's principal, John Leeman, testified "that price had to have a direct relationship to fair market value." Furthermore, when questioned about the assertion of Enreco's counsel that the standard resale price of six-month-old repossessed custom equipment was approximately eighty percent of full list price, he responded that this assertion was "wrong," "not even close," and "very high." This evidence shows that the jury reasonably could determine that the spectrometer's modification and transfer to Germany was reasonable under the circumstances and that the price received for the modified instrument was its fair market price.

IV.

Enreco next contends that Leeman cannot recover damages, since

it failed to provide notice of intent to resell as required by section 2.706 and by the trial court's instructions. We need not address this contention, as the district court predicated damages on section 2.708, and, as discussed above, we affirm that finding. Moreover, Enreco waived the notice requirement by failing to plead it or to mention it in the pretrial order.

V.

Enreco also argues that it was denied a fair trial because the district court excluded the testimony of Victor Bendict and Mark Krouzi, who were dissatisfied customers of Leeman's. The district court found that the witnesses' testimony was irrelevant because they purchased different models of spectrometers from Leeman than the model purchased by Enreco. Furthermore, the court found that the prejudicial effect of the witnesses' testimony would outweigh its probative force and that the proposed testimony was cumulative of evidence already in the record. Finally, the court ruled that Enreco was improperly offering Mark Krouzi's testimony to impeach deposition testimony of Steve Jordan, which had been introduced by Enreco, on a collateral matter.

We review evidentiary rulings only for abuse of discretion. See Herrington v. Hiller, 883 F.2d 411, 414 (5th Cir. 1989). Relevance determinations usually are committed to the broad discretion of the trial court and receive little, if any, review. United States v. Dobbs, 506 F.2d 445 (5th Cir. 1971). See also United States v. Silva, 748 F.2d 262 (5th Cir. 1984). Given the

broad discretion afforded to a trial court in such evidentiary matters, it was not improper for the court to find the proffered testimony irrelevant; thus, it was proper for the court to find that the prejudicial effect of allowing said witnesses to testify outweighed any probative value.

It is within the power of the district court to exclude testimony that is repetitious and cumulative of testimony already before the court. Leefe v. Air Logistics, Inc., 876 F.2d 409 (5th Cir. 1989). See also Harvey v. Andrist, 754 F.2d 569, 572 (5th Cir.), cert. denied, 471 U.S. 1126 (1985); FED. R. EVID. 403. In determining whether the proffered testimony of the two witnesses would have been cumulative, we take into consideration the testimony of John Leeman concerning problems with previous customers. He testified that Leeman Labs sold an instrument to a laboratory in Atlanta that subsequently had trouble with the machine. He further testified that after working to resolve the problems, the buyer of the machine remained unhappy and that Leeman Labs agreed to take the machine back.

We find that through Leeman's testimony, Enreco was able to present sufficient evidence that Leeman Labs had experienced problems with dissatisfied customers. Moreover, said testimony was sufficient to warrant the district court's conclusion that further testimony as to customer dissatisfaction would be cumulative.

VI.

Enreco further argues that it was denied a fair trial by the exclusion of testimony by Enreco's president as to when Enreco's key employees were present to work with Leeman's equipment. That testimony was proffered to refute Leeman's argument that said employees were on vacation during the critical learning phase after installation of the equipment. The court sustained Leeman's objection to the proposed testimony after the acknowledgement by Enreco's counsel that Leeman had requested employment vacation records during a deposition of Enreco's president, Dave Musser, and that Enreco had never produced them. Again, such an evidentiary ruling will be reviewed under the abuse of discretion standard.

It appears that Enreco was never noticed or required to bring documents concerning employees' vacations to a deposition. However, it appears that Enreco was requested to produce every document or tangible item relative to any claim of damages. Furthermore, it appears that it was understood by the parties, at the time of the deposition, that said vacation records would be produced once they were located. It has long been the rule in this circuit that exclusion of a witness's testimony is a proper remedy for failure to comply with discovery requests. See Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990). We conclude that the trial court was justified in finding that Leeman had made an adequate request for the vacation records and that such request was not honored by Enreco.

Alternatively, we find that Enreco failed to make an adequate

offer of proof of what Musser's testimony would have been had he been allowed to testify. Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected, and if the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. FED. R. EVID. 103(a)(2).

Defendant's counsel propounded the following question to Musser: "Mr. Musser, since we have had some allegations that one of our operators took a lot of time off during vacation, I want to ask you have you had an opportunity to review and look at that situation and determine whether Carla or Teresa actually took vacation time at the time in question." The context in which the question was asked raises the inference that the proffered testimony was being tendered to rebut allegations by Leeman Labs that Enreco's employees took vacation time when the spectrometer was installed. Said inferences are not sufficient to inform the court of the substance of the evidence being presented, however. Finding that a proper offer of proof is lacking, we do not review the exclusion of the testimony further. See United States v. Winkle, 587 F.2d 705 (5th Cir. 1979).

Accordingly, we find that the district court did not abuse its discretion in excluding the testimony concerning employee vacations. In the alternative, we further conclude that Enreco failed to make an offer of proof of what Musser's testimony would have been had he been allowed to testify.

VII.

Lastly, Enreco argues that the district court's awarding of attorney's fees in the amount of $117,515 was excessive, since the jury only awarded actual damages in the amount of $66,000, and that said attorney's fees should therefore be reduced by remittitur. We review the district court's award of attorney's fees for abuse of discretion and its finding of fact supporting the award for clear error. See Von Clark v. Butler, 916 F.2d 255 (5th Cir. 1990).

Upon a review of the evidence submitted concerning attorneys' fees, it is apparent that the court was justified in awarding attorney's fees in excess of the jury award for actual damages. Taking into consideration the fact that nineteen depositions were taken in this cause, thirteen of which were out of town, along with the numerous discovery disputes and abandoned causes of action, the award of fees was not an abuse of discretion. Finally, it is well settled that when there is sufficient evidence of the time spent and necessity for legal services, awards well in excess of actual damages can be upheld. See City of Riverside v. Rivera, 477 U.S. 561 (1986).

For the foregoing reasons, the judgment of the district court is AFFIRMED.