UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20840

GARY ALRED, ET AL.,

Plaintiffs-Counter Defendants-Appellees Cross-Appellants,

VERSUS

BORDEN, INC.,

Defendant-Counter Claimant-Appellant Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(92-CV-2630)

November 8, 1996

Before KING, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

This is a breach of contract action which was removed to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1332. Trial was before a jury. The jury found that Borden, Inc. had entered into and breached contracts with five former distributors of Borden dairy products, and that Borden converted a refrigerated tractor trailer of a sixth former distributor. The jury also found that four of the distributors had breached contracts with Borden by failing to pay Borden for products which they had purchased. Final Judgment was entered against Borden in favor of the distributors, offset by Borden's partial recovery on its counterclaims. The district court denied Borden's motion for judgment as a matter of law and Borden timely appealed. For the following reasons, we reverse, in part, the district court's denial of Borden's motion for judgment as a matter of law and we render judgment in favor of Defendant Borden, Inc.

BACKGROUND

The Appellees/Plaintiffs are all former independent distributors of Borden dairy products. They sold and delivered Borden dairy products to grocery stores, convenience stores, gas stations, schools, hospitals, markets, and other institutions and retail outlets. Each distributor was designated a specific territory within which to do business. Each distributor worked

independently from the other distributors, and each distributor maintained an independent relationship with Borden.

There were two principal means through which the distributors did business with Borden. First, the distributors purchased milk from Borden at Borden's "dock price" and then resold it at whatever price they chose. Second, they hauled milk products to customers with whom Borden had already negotiated a sale and purchase agreement. For this service, Borden would pay the distributors a "haul fee."

In their pretrial order, the parties stipulate that the distributors had no written agreement with Borden. Instead, the parties stipulate that business was conducted according to the following "few basic rules": (1) each distributor had to mark his vehicles with the Borden logo and a designation that he was an independent distributor; (2) each distributor had to maintain his own liability insurance; (3) each distributor had to provide and maintain his or her own vehicle; (4) each distributor agreed to distribute only Borden products in these vehicles; and (5) Borden and each distributor were supposed to settle their accounts weekly.

The parties agree that Borden offered to the distributors various discounts, rebates, allowances, subsidies and other credits or payments. The extent to which these benefits were guaranteed, if at all, is disputed.

In 1991, Alred, Bosque, Frost, and Weldon sued Borden in Texas state court alleging claims for tortious interference, predatory pricing, conversion of their distributorships, breach of contract and, in the case of Alred, conversion of a refrigerated tractor trailer. Borden removed the case to federal district court where the entire suit was dismissed with prejudice.[1] Final Judgment was entered on March 23, 1992. No appeal was taken.

Approximately four months later, Alred, Bosque, Frost, and Weldon, along with Denman and Smith, filed the instant action. Borden filed a motion for summary judgment arguing that the causes of action brought by Plaintiffs in this suit are barred by the doctrine of *res judicata* because they are identical to the causes of action which were dismissed in the first suit. Plaintiffs contend that the causes of action alleged in the two suits are different. The district court granted Borden's motion for summary judgment on Plaintiffs' claims for predatory pricing and tortious interference with contract, but it denied Borden's motion for summary judgment on Borden's counterclaims, Borden's statute of

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[1] The district court's final judgment did not explicitly state that the dismissal was with prejudice. However, "it is well established that a dismissal is presumed to be with prejudice unless the order explicitly states otherwise." **Fernandez-Montes v. Allied Pilots Assoc.**, 987 F.2d 278, 284 n.8 (5th Cir. 1993); **Federated Dep't Stores, Inc. v. Moitie**, 101 S. Ct. 2424, 2428 n.3 (1981). The district court's final judgment includes no language which explicitly states that the judgment was entered without prejudice. Accordingly, the final judgment is presumed to be with prejudice.

limitations defense, the distributors' breach of contract claims, and Alred's claim for conversion of his refrigerated truck. The district court limited the claims of Alred, Bosque, Frost, and Weldon to "events, if any, arising after March 23, 1992" (the date judgment was entered in the first lawsuit).

The jury found in favor of Alred, Bosque, Frost, and Weldon, individually, and awarded damages against Borden. The jury also found that Borden was entitled to receive from Denman, Frost, Smith, and Weldon, individually, partial recovery on Borden's counterclaims. The district court entered judgment[2] on the jury's

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[2] Pursuant to the jury's findings, the district court entered, in relevant part, judgment in the following amounts:

> Plaintiff Gary Alred is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $104,500.00 and Borden, Inc. takes nothing from Gary Alred in the counterclaims asserted by Borden, Inc.
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> Plaintiff Del Bosque is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $303,573.00.
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> Plaintiff Carl Denman is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $120,000.00, which judgment shall be offset in the amount of $17,460.37, the amount of counterclaims of Borden, Inc. granted Borden, Inc. against Carl Denman by the jury verdict.
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> Plaintiff Rodney Frost is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $133,000.00, which judgment shall be offset in the amount of $34,507.47, the amount of

verdict and denied Borden's motions for judgment as a matter of law and for new trial. Borden appealed to this Court. The distributors cross-appealed seeking (1) affirmation of the jury verdict on their breach of contract and conversion claims, (2) a set aside of the 40% offset allowed Borden and, (3) an increase in attorney's fees.

STANDARDS OF REVIEW

This Court conducts a *de novo* review of the district court's conclusions of law. **Magnolia Fed. Bank for Sav. v. United States**, 42 F.3d 968, 970 (5th Cir. 1995).

In reviewing the district court's denial of Borden's motion for judgment as a matter of law, this Court applies the same

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> counterclaims of Borden, Inc. granted Borden, Inc. against Rodney Frost by the jury verdict.
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> Plaintiff Maurice Smith is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $869,166.00, which judgment shall be offset in the amount of $58,494.78, the amount of counterclaims of Borden, Inc. granted Borden, Inc. against Maurice Smith by the jury verdict.
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> Plaintiff Phil Weldon is granted judgment against Borden, Inc. on his claims asserted against defendant Borden, Inc. in the amount of $975,000.00, which judgment shall be offset in the amount of $56,468.87, the amount of counterclaims of Borden, Inc. granted Borden, Inc. against Phil Weldon by the jury verdict.

standard as that applied by the district court -- judgment as a matter of law should be granted whenever the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict. **Boeing v. Shipman**, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "On the other hand, if there is substantial evidence opposed to the motion[], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." **Boeing**, 411 F.2d at 374. "A mere scintilla of evidence is insufficient to present a question for the jury." **Id**.

This Court reviews the district court's denial of Borden's motion for new trial for an abuse of discretion. **Polanco v. City of Austin, Texas**, 78 F.3d 968, 980 (5th Cir. 1996).

DISCUSSION

Res Judicata

Borden first argues that the claims of Alred, Bosque, Frost, and Weldon are barred by the doctrine of *res judicata* because a prior judgment was rendered upon these claims and the same set of operative facts in the 1991 suit. The distributors conversely argue that *res judicata* does not bar the second suit because the causes of action in the two suits are different.

In reviewing Borden's claim on this issue, the district court held that the parties in the two suits are identical (excluding Denman and Smith), the claims are the same, and a final judgment was rendered in the first suit by a court of competent jurisdiction. The district court accordingly granted summary judgment in favor of Borden on the issue of *res judicata*, but "only to the extent that Plaintiffs' claims are based on events prior to March 23, 1992." In effect, the district court limited the claims of Alred, Bosque, Frost, and Denman to those arising from events which occurred after March 23, 1992 (the date of judgment in the first suit).

The doctrine of *res judicata* applies if a second lawsuit arises from the same operative facts as those made the basis of a prior lawsuit.

> We have adopted a transactional test for determining whether two complaints involve the same cause of action. Under this approach, the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts. If the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry.

Agrilectric Power Partners v. General Electric, 20 F.3d 663, 665 (1994). Additionally, the parties and causes of action must be the same in both lawsuits, and there must be a final judgment on the merits in the first lawsuit which was rendered by a court of

competent jurisdiction. *See* **Nevada v. United States**, 463 U.S. 110, 103 S. Ct. 2906, 2918-19 (1983); **Slaughter v. AT&T Information Systems, Inc.**, 905 F.2d 92, 93 (5th Cir. 1990); **Jones v. Texas Tech University**, 656 F.2d 1137, 1141 (5th Cir. 1981).

After carefully reviewing the record, including the various pleadings, we hold that the claims of Alred, Bosque, Frost, and Weldon in the instant suit arose from the same set of operative facts as those facts which formed the basis of their prior lawsuit. In each suit, these Plaintiffs complained of the same conduct, alleged breach of the same contract and agreements, and claimed the same damages. There is no evidence in the record showing that the facts giving rise to the claims in the instant suit are different from those facts which gave rise to the claims in the first suit. In fact, the complaints filed in the two suits are, for all relevant purposes, identical. Accordingly, because both suits were based upon the same set of operative facts, the doctrine of *res judicata* completely bars the claims of Alred, Bosque, Frost, and Weldon in this their second suit. The ruling of the district court, as to this issue, was in error.

Contract Existence

Having found that the doctrine of *res judicata* bars the claims of Plaintiffs Alred, Bosque, Frost, and Weldon, we need only examine whether there is sufficient evidence in the record to allow

a reasonable jury to conclude that contracts existed between Borden and Denman, and Borden and Smith. Denman alleges that Borden had breached contracts with him concerning subsidies, special allowances, and credit on returned merchandise. Smith argues that Borden had breached contracts with him concerning price setting as well as "primary or exclusive resale rights of Borden dairy products in a pre-determined or set geographical territory or route area."

Borden denies both the claims and argues that there was not sufficient evidence from which a reasonable jury could have found the existence of such contracts. In the alternative, Borden argues that the terms of the alleged contracts were too indefinite to be enforceable. For the following reasons, we agree with Borden and hold that the evidence does not support a finding that either Denman or Smith had a contract with Borden which guaranteed either of them "primary or exclusive resale rights of Borden dairy products in a pre-determined or set geographical territory or route area," or payments of rebates, credits, or subsidies.

Whether a contract exists involves both questions of fact and questions of law. The district court's interpretation of a contract is a conclusion of law reviewable *de novo* on appeal. **American Totalisator Co., Inc. v. Fair Grounds Corp.**, 3 F.3d 810, 813 (5th Cir. 1993). The initial determination of whether the contract is ambiguous is also reviewed *de novo*. **Thrift v. Hubbard**,

44 F.3d 348, 357 (5th Cir. 1995). However, "once the contract is found to be ambiguous, the determination of the parties' intent through the extrinsic evidence is a question of fact." **Watkins v. Petro-Search, Inc.**, 689 F.2d 537, 538 (5th Cir. 1982). A jury's findings of fact are examined on appeal for sufficiency of the evidence. **Granberry v. O'Barr**, 866 F.2d 112, 113 (5th Cir. 1988). The standard of review for a challenge to the sufficiency of the evidence is well-settled. Unless the evidence is of such quality and weight that reasonable and impartial jurors could not arrive at such a verdict, the findings of the jury must be upheld.

Findings of fact that are required to resolve contract ambiguities at a bench trial are reviewed for clear error. Fed. R. Civ. P. 52(a); **Chapman & Cole v. Itel Container Int'l B.V.**, 865 F.2d 676, 680 n.5 (5th Cir.), cert. denied, 493 U.S. 872, 110 S. Ct. 201, 107 L.Ed.2d 155 (1989); **Carpenters Amended & Restated Health Ben. Fund v. Holleman Constr. Co., Inc.**, 751 F.2d 763, 766-67 (5th Cir. 1985). Where a jury verdict is involved, however, the common law standard of review applies because of the requirements of the Seventh Amendment to the United States Constitution. **Granberry v. O'Barr**, 866 F.2d 112, 113 (5th Cir. 1988). "The common law standard of review is not the 'clearly erroneous' standard in a trial before the court as provided in Fed. R. Civ. P. 52(a). Instead it is the same common law standard which is applied in awarding a directed verdict or a judgment

notwithstanding the verdict. The standard of review is usually referred to as a 'sufficiency of the evidence' standard." **Id**.

As for the substantive law, we conduct our review of the jury findings according to Texas contract law. A binding contract exists when each of the following elements is present: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) a communication that each party has consented to the terms of the agreement; and (5) execution and delivery of the contract with an intent that it become mutual and binding on both parties. **Hallmark v. Hand**, 885 S.W.2d 471, 476 (Tex. App.--El Paso 1994, writ denied). Where a party challenges whether a meeting of the minds occurred, the existence of a contract is a question of fact. **Id**. The determination of whether there was a meeting of the minds is based upon objective standards of what the parties said and did, and not upon their alleged subjective states of mind. **Argonaut Ins. Co. v. Allstate Ins. Co.**, 869 S.W.2d 537, 540 (Tex. App.--Corpus Christi 1994, writ denied).

At trial, the jury was asked the following question as to each Denman and Smith:

> Did Borden and [Denman/Smith] have a contract under which [Denman/Smith] would have the right to control prices to customers in his territory or route area in a manner that would afford him the primary or exclusive managing control of profits or losses from his

> business as an independent distributor for Borden?[3]

The jury answered "Yes" for both Denman and Smith. After carefully reviewing the record and for the following reasons, we hold that the record does not provide sufficient evidence upon which a reasonable jury could have inferred the existence of such a contract between Borden and Denman or Borden and Smith.

Denman argues that he had a contract with Borden which ensured him the indefinite payment of certain, rebates, credits, and subsidies. However, in the parties' pretrial order, Denman stipulates that Borden never made such promises: "Borden never agreed that any of the various discounts, rebates, allowances, subsidies and other credits and payments listed above would always continue."[4] Furthermore, Denman stipulated that "Borden never

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[3] It is unclear from the record whether any party challenged the propriety of this jury question. Because it was not raised by any party, we pass no judgment as to whether this question, as phrased, was proper.

[4] The relevant portions of the amended pretrial order state as follows:

> 8. When plaintiffs bought milk for resale, they purchased it at Borden's dock price and were free to resell it at whatever price they chose.
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> . . . .
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> 11. Plaintiffs and Borden had no written distributorship agreement. Instead, Borden and plaintiffs did business according to a few basic rules. The principal ones were: each distributor had to mark his vehicles with Borden logo and a designation that he was an independent distributor; each distributor had

to maintain liability insurance; each distributor had to provide and maintain their own vehicles; the distributor agreed to distribute only Borden products in these vehicles; the distributor could not distribute the dairy products of Borden's competitors; and Borden and each distributor were supposed to settle their accounts each week. Specifically, if at the end of the week, the distributor owed Borden, he was to write Borden a check. By the same token, if Borden owed the distributor, Borden was supposed to write the distributor a check.

12. Borden never agreed in writing with any of the plaintiffs that neither Borden nor anyone else would sell in their territory. Borden never promised any of the plaintiffs that neither Borden nor anyone else would sell in their territory.

13. Borden never agreed with any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past. Borden never promised any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past.

14. From time to time, Borden offered to give plaintiffs various discounts, rebates, allowances, subsidies, and other credits or payments. These have included:

* credits for spoilage;
* a 5% "load and ice" allowance;
* a 5% Advertising and Display ("A&D") allowance;
* some 5% Competitive Marketing Allowances ("CMAs");
* various 7%, 9% and 12% subsidies; and
* a variety of promotional offers for particular stores and particular products.

15. Borden never agreed that any of the

agreed with any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past," and that "Borden never promised any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past." Thus, even if Denman could show that Borden had contracted with Denman to pay certain, rebates, credits, and subsidies in the past, Denman stipulated that Borden was under no contractual obligation to do so in the future.

To the extent that Denman argues that he had a contract with Borden which assured Denman of an exclusive territory within which he could conduct his business, the parties' pretrial order, again, indicates otherwise. In the pretrial order, Denman stipulated that "Borden never agreed in writing with any of the plaintiffs that neither Borden nor anyone else would sell in their territory" and that "Borden never promised any of the plaintiffs that neither Borden nor anyone else would sell in their territory." Furthermore, when asked during trial if Borden ever promised him that he "would have an exclusive territory to run [his] route," Denman replied, "[n]o, there was no promise made." Denman also acknowledged at trial that, during his deposition, he stated that "[t]here was no discussion or agreement concerning it at all."

> various discounts, rebates, allowances, subsidies and other credits and payments listed above would always continue.

After having stipulated that there were no promises or agreements made, Denman cannot now attempt to argue that such agreements or contracts existed.

As for Smith, he also argues that Borden "set" his prices and infringed upon his sales territory, thus, violating the terms of an alleged contract. Specifically Smith asserts that Borden violated their contractual agreement (1) by competing for customers in Smith's territory, and (2) by constructively setting Smith's prices by offering competitive pricing. As to Borden's alleged price setting, Smith argues that, because Borden offered its customers competitive pricing, Smith was forced to compete with Borden for those customers by lowering his prices. Thus, Smith argues Borden "set" Smith's prices by engaging Smith in competition. We disagree. First, we do not find any evidence in the record which would allow a jury to find that a contract existed between the parties as to these terms. At trial, Smith was asked, "[d]id you have any other agreements with Borden in your contract with him as to what your obligations would be to Borden at the time you took over this route as a distributor [in 1979]?" To which Smith replied, "[n]othing other than I could only sell Borden's products." As stated earlier, the parties -- including Smith -- stipulated that Borden never promised Smith an exclusive territory, nor did Borden promise Smith that it would always continue to do business with him in the future in the same manner that it had done

so in the past. The evidence simply does not support a jury finding that Borden had made an agreement with Smith as to exclusive territory rights or non-competition between Borden and Smith.[5]

Second, even if we did hold that Borden had agreed not to set Smith's prices, we find no evidence in the record to support a finding that, in fact, Borden had set Smith's prices. Smith simply asserts that Borden competed with Smith for business by offering its customers competitive pricing. Smith offers no evidence showing that Borden directly forced him to lower his prices or to set them in any manner. To the contrary, the record shows that Smith was, in fact, free to set his own prices.[6]

Denman and Smith do not point to any evidence in the record showing that Borden promised not to sell in their respective territories. Nor do Denman and Smith point to any evidence in the

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[5] We note that Smith's contention that Borden had contracted with him to give him an exclusive territory is further undercut by the undisputed fact that Borden had always done a certain amount of direct business in his territory for which Smith, himself, provided the hauling services. Smith testified at trial that he had provided such hauling services for Borden since 1979, the year that he began as a Borden independent distributor. Such a relationship was common: as stipulated by the parties in their pretrial order, "[h]aul accounts have been common in the greater Houston market for over twenty years, and are becoming more and more common." Thus, Smith cannot now argue that Borden had promised him an exclusive territory when Smith had been effectuating Borden's direct business in that territory for a fee from day one.

[6] Stipulation No. 8 of the pretrial order states: "When plaintiffs bought milk for resale, they purchased it at Borden's dock price and were free to resell it at whatever price they chose."

record showing that Borden promised to sell its products at prices equal to, or higher than, those of Denman and Smith. Accordingly, no reasonable jury could have concluded that any such contractual agreements existed, or that they were breached. We hold that the district court erred when it denied Borden's motion for judgment as a matter of law as to Denman and Smith.

Borden's Counterclaims

In its counterclaims, Borden alleges that each Plaintiff, with the exception of Bosque, owes debts to Borden for monies owed on the balance of running accounts which Borden maintained as to each Plaintiff for items purchased by Plaintiffs from Borden. Specifically, Borden maintained a running account as to each Plaintiff for wholesale items which that Plaintiff had purchased from Borden. The sums owed by Plaintiffs on their respective running accounts were offset by any payments which Borden owed to that particular Plaintiff for performance of hauling services. Borden additionally offset each Plaintiff's running account to reflect adjustments for various cash rebates and discounts which Borden occasionally offered to Plaintiffs.

Borden alleges that during 1988, Plaintiff Alred fell behind on payments owed to Borden. In 1989, Alred executed a promissory note that obligated him to make payments to Borden on the principal amount of $19,441.17. Borden also advanced funds to Alred for the

repair of trucks used by him in the distribution of Borden products. Borden alleges that when Alred ceased delivering Borden products, Alred owed Borden $8,355.18 for monies owed on both the promissory note and for reimbursement of the funds advanced for the truck repairs.

As to Denman, Frost, Smith, and Weldon, Borden alleges that they continually failed to pay Borden the entire amount shown as owing on their weekly statements. Borden attempted to have Denman, Frost, Smith, and Weldon sign individual promissory notes for the amounts they each owed, but Denman, Frost, Smith, and Weldon each declined. Borden claims that Denman owes Borden $43,650.93; Frost owes $86,268.67; Smith owes $146,236.95; and Weldon owes $141,172.117. In its counterclaims, Borden seeks judgment as to each of these debts. Plaintiffs each contend that the debts are not owed as alleged.

The jury found in favor of Borden as to portions of its respective counterclaims and awarded Borden the following recoveries: $17,460.37 against Denman; $34,507.47 against Frost; $58,494.78 against Smith; and $56,468.87 against Weldon. As to Borden's counterclaim against Alred, the jury found in favor of Alred and awarded no recovery against him.

In its motion for judgment as a matter of law, Borden argued, inter alia, that it is entitled to all of the debt which it is

seeking. The district court denied Borden's motion and held, in relevant part, as follows:

> Borden...disregards the evidence heard by the jury, some of it presented by their own witnesses, that Plaintiffs repeatedly objected to errors, discrepancies and shortages in their accounts and in product, that these were not corrected, that Borden's accounting was unusual, if not devious, and incomprehensible both to Plaintiffs and to accounting experts, and that Borden controlled the records. The damages awarded to Borden, as well as the damages awarded Plaintiffs, were within a reasonable jury's discretion and the range of the evidence and testimony presented.

Borden argues on appeal that it is entitled to full recovery and that the district court improperly denied Borden's motion for judgment as a matter of law. After reviewing the record, we affirm the district court and hold that the damages awarded by the jury on Borden's counterclaim are supported by the evidence and within a reasonable jury's discretion. The district court did not err in denying Borden's motion for judgment as a matter of law as to this issue.

Attorneys' Fees

We vacate the judgment of the district court insofar as it relates to attorneys' fees. The issue of attorneys' fees is remanded to the district court for redetermination in a manner consistent with the holdings of this opinion.

CONCLUSION

For the foregoing reasons, the order of the district court denying Borden's motion for judgment as a matter of law as to Plaintiffs' breach of contract claims is reversed and judgment as a matter of law is rendered in favor of Borden. The order of the district court denying Borden's motion for judgment as a matter of law as to Borden's counterclaims is affirmed. Plaintiffs shall take nothing on their causes of action. Borden shall recover on its counterclaims as determined by the jury. The issue of attorneys' fees is remanded to the district court for redetermination.