

**IN THE COURT OF APPEALS OF IOWA**

No. 9-646 / 08-2008  
Filed October 7, 2009

**LEWIS ELECTRIC CO.,**  
Plaintiff-Appellee,

**vs.**

**RONALD E. MILLER and**  
**KATHLEEN F. MILLER,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Defendants appeal the district court judgment for plaintiff in this contract dispute, and against them on their counterclaim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jeffrey Sar of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellants.

Jeffrey Poulson and Jessica R. Noll of Thomas & Poulson Law Firm, P.C.,  
Sioux City, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman,  
S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**SCHECHTMAN, S.J.**

This is a suit for the collection of two accounts, for labor and material, allegedly owed to an electrical contractor, Lewis Electric Co., by the owners and operators of two retail stores, Ronald and Kathleen Miller (hereinafter Miller). Miller filed an affirmative defense alleging a failure of consideration resulting from a breach of contract by Lewis Electric. Miller also counterclaimed contending that the work performed by Lewis Electric was defective and constituted a breach of their oral contract for failure to complete its terms, resulting in damages in a sum required to be expended to complete the terms of the contract.

After a bench trial, the trial court awarded Lewis Electric a judgment for the total of its two accounts, \$21,092.03. After having allowed certain offsets for labor and materials not furnished, the court denied the counterclaim and found that the contract had not been breached, resulting in this appeal. We affirm the smaller Sioux City account, but reverse and remand the portion of the judgment for the Le Mars project and the dismissal of the counterclaim arising from that project.

**I. Scope of Review.** The scope of review is for corrections of errors at law. Iowa R. App. P. 6.4. The findings of fact, in a case tried to the court, shall have the effect of a special verdict. *Id.* The district court's findings are binding on us, if supported by substantial evidence. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000); *Grinnell Mutual Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings.

*Hendricks*, 609 N.W.2d at 490. Nor is it insubstantial merely because it would have supported contrary inferences. *Grinnell Mut. Reins. Co.*, 431 N.W.2d at 785. We construe the district court's findings broadly and liberally. *Hendricks*, 609 N.W.2d at 490. In case of ambiguity or doubt, we construe them to uphold, rather than to defeat, the judgment. *Id.* A corollary rule prohibits us from weighing the evidence or the credibility of the witnesses. *Id.*

**II. Background Facts.** Miller operated a business in Sioux City known as The Tool Depot. The company's customers are about evenly divided between retail purchasers and commercial contractors. Its products include power tools, industrial tools, lumber products, welding supplies, and survey equipment. In 2003-2004 Lewis Electric, an electrical contractor in Sioux City for over fifty years, was retained, on time and materials, to perform some electrical work at the Tool Depot. Though timely billed, by three separate invoices, the bill was not paid by Miller. Miller does not contest the work or the amount. That portion of the judgment (\$4164.53) is separately affirmed without further comment.

Miller decided to expand to Le Mars and erect new quarters for a similar outlet. Miller sought bids from local electrical contractors. A Le Mars contractor returned its quote with written specifications pertaining to the scope of the electrical work, including lighting, power, telephone data, security system, intercom, options, and exclusions. Miller asked Lewis Electric to submit a bid based on these specs. After rejecting the first bid, a second bid was accepted in the sum of \$49,200, on September 17, 2003, with some modifications. Foremost

of the changes, was the reduction of the number of light fixtures from 108 to “96 Low Bays To Maintain 76 Ft Candles.” A fax sent to Miller, signed by Lewis Electric’s project manager, confirmed the quote and revisions.

Lewis Electric was given a rough sketch of the general layout of the proposed Le Mars store. It was a rectangular structure, 150 feet by 110 feet, with a sloped ceiling starting at eleven and one-half feet on the sides extending to fifteen and one-half feet at its peak. Miller advised Lewis Electric that they wanted the Le Mars store to be set up like the Sioux City store with minor variations.

Lewis Electric was abundantly acquainted with the Sioux City outlet as it had done some work there recently and was a frequent customer. Lewis Electric requested a shelving layout from Miller of the new store. It was told that none was available, but the shelving was the same type and height of shelving as the Sioux City store, with similar aisle widths and work stations. The placement of the shelves, their height and aisle width, are important to lighting placement, the level of light, and its uniformity. The Le Mars building is not an exact replica of the Sioux City building, but reasonably similar. Though requested, a shelving plan for the Le Mars facility was never received or promised. Lewis Electric proceeded, without a shelving plan, to bid the project.

It is customary in the trade for the wholesale supplier of the light fixtures to calculate the number of luminaries needed to produce the contracted level of foot

candles.<sup>1</sup> Lewis Electric obtained its fixtures from Rogers Electric who afforded it a “Lumen Method Summary.” It detailed the foot candle level at multiple locations, as well as the placement, spacing, and aligning of the fixtures. It deduced a 77.8 fc average with ninety-six fixtures (12 columns x 8 rows) placed in the ceiling at the constant height of eleven feet.<sup>2</sup>

The fixtures are described as 250-watt clear metal halide low bay lights. Their installation cost was \$150 each (\$90 material, \$60 labor). Without explanation for its reasons, Lewis Electric only installed seventy-eight light fixtures. Included in the seventy-eight fixtures were fifteen older fixtures Miller demanded using from their Sioux City store. Miller paid \$30,000 as the work progressed. Lewis Electric left the job in June 2004. Miller opened in Le Mars shortly after. No alterations were made to the lighting scheme up to the time of trial.

Terry Burns was the project manager for Lewis Electric. He was diagnosed with brain cancer after Lewis Electric vacated the project. He arranged the bid and designed the installation. Burns did not testify. The foreman did testify but could not explain the reason only seventy-eight fixtures were installed. Dan Lewis, a licensed master electrician and vice-president of

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<sup>1</sup> A foot candle (fc) is a unit of illumination measured by a light meter. It is measured in retail at thirty inches above the floor. It is calculated, before installation, by a computer program, after imputing critical data, including dimensions, height of fixtures, number and type of fixtures, spacing, and other relevant information to the subject proposal.

<sup>2</sup> With a column starting point of 6.25 feet on each end, and a row start of 6.875 feet this permitted installation of eight evenly spaced luminaires in each column (11 x 12 feet plus 13.50 feet on the ends equals the building length of 150 feet; 7 x 13.75 feet plus 13.75 feet on the ends, equals the 110 feet width of the interior).

Lewis Electric, assumed the collection of the account and fielded the complaints, having had little to do with its bid, design, or compliance.

Miller, before their Le Mars opening, became aware of the reduced number of fixtures. Dan Lewis met with Miller. Miller had prepared a written checklist of uncompleted items which were explained and delivered to Lewis. It included a statement that areas of the interior were “dark,” “see bid for candle power” and “shortage of light fixtures (18 short)”; Lewis responded that he would look into the problems. Lewis Electric had not been paid for the smaller Sioux City job and had a sizeable balance due on the Le Mars store, with bills remitted but unpaid. Very little happened for months.

About ten months later, in early April 2005, Dan Lewis proposed, in writing, three optional resolutions to Miller, on a take-it-or-leave-it basis: (1) deduct for the eighteen fixtures not installed at \$150 each, plus deduct for the fifteen fixtures brought from Sioux City at \$90 each (total of \$4050); (2) re-space and install the eighteen fixtures with credit for the fifteen older fixtures at \$90 (\$1,350 credit), but waive the foot candle requirement, or the same deal, but replace the fifteen fixtures at \$150 each adding \$2250, without the waiver of foot candles; or (3) maintain the existing spacing, install forty 400-watt fixtures in the middle, eliminate and replace the fifteen older fixtures, and deduct for the missing eighteen. There was no acceptance of any alternative by Miller. Days later, Lewis remitted a final statement for \$19,679, after adding in some extras, but deducting \$4050, per its option 1. Suit followed on September 22, 2006.

Miller obtained the services of Mark Joffer in May 2007 to develop a plan for a resolution of the controversy, as well as to opine at trial. Joffer is a licensed professional engineer in eighteen states, including Iowa, an electrical inspector, and a past journeyman electrician. He expressed an opinion that the lighting in the Le Mars store did not meet acceptable standards for this retail establishment. Joffer said the proposals for resolution given by Dan Lewis were each unacceptable: attempting to squeeze in eighteen more fixtures would not provide uniformity; to relocate the seventy-eight fixtures to allow for ninety-six fixtures would be cost prohibitive; and adding the forty larger fixtures would not provide illumination in the dark areas around the perimeter. Joffer checked the foot candle level where the new fixtures were installed (not where the fifteen older fixtures were installed from Sioux City), with a light meter. The brightest point was seventy-four foot candles, with some lower shelves readings as low as five foot candles. Joffer opined that an appropriate resolution is the installation of rows of fluorescent light fixtures between the rows of the metal halide fixtures. A reasonable cost for those corrections is \$18,930.

**III. Analysis.** Miller contends that Lewis breached its contract, which bars its recovery, and entitles Miller to damages for its breach. Miller asserts that the findings of fact by the trial court are not supported by substantial evidence.

We are keenly aware of our mandate to liberally construe the findings of the court, and if any doubt arises, to settle on a construction that upholds, rather than defeats, the trial court's conclusions. Our background facts are reasonably uncontroverted, not weighted, and absent any findings of credibility.

The dispute centers on the number of fixtures installed and the foot candle levels at various locations of the shelving. A retail type environment requires adequate illumination for customers to not only conveniently and distinctly observe the product, but also to detect its pricing. Miller has no warehouse, so their products are displayed on shelving in the sales area.

The district court addressed this subject accordingly:

The agreement does not provide an installation schematic. The amount of foot candles is clearly identified in the contract but that information is worth very little without a shelving diagram and a clear understanding between the parties as to how compliance with a foot candle requirement will be determined. All of these discrepancies or ambiguities are held against Miller as the general contractor and as the preparer of the documents which support the oral contract.

Lewis Electric has an understanding of foot candles and basic requirements for lighting requirements in buildings such as the one here. They submitted Miller's requests for specific foot candle requirements to their wholesalers and relied on what they received to plan the installations. In fact it appears that Lewis Electric intended to meet the contract requirements with regard to foot candles as their wholesaler, Rogers Electric had calculated the required number of specific fixtures to be installed to obtain 76 foot candles in the Le Mars store. That calculation assumed an empty building appropriately so as Miller had not provided Lewis Electric with a shelving diagram nor had he provided clarification as to how the foot candle component of the agreement would be determined so as to confirm compliance with the agreement. Without providing these two key bits of information to Lewis Electric, Miller has effectively defeated his own claims that Lewis Electric failed to abide by the terms of the agreement with regard to the foot candle issue.

Those findings and conclusions are not substantiated by the evidence. No bidder was given a shelving diagram. Lewis Electric had just completed an electrical project in the Sioux City store (one of the litigated accounts was for the balance due on that work). Miller's response to the shelving inquiry was that it

was to be like the shelving arrangement in Sioux City. The Sioux City store has eight-foot-high shelving around the perimeter and five-foot-high shelving in the middle. The shelving was the same brand and off-white color. It had a similar configuration as Miller was vending the same products. There were variations, but not significant. Miller never contracted to furnish a shelving plan, nor was one ever promised. Lewis Electric proceeded with its quote, and eventual work, without a shelving scheme. The risk appears to have been assumed by Lewis Electric.

Nor was compliance with the foot candle requirement a mystery for one in the electrical contracting business. Although available, Lewis Electric does not subscribe to a computer program that generates foot candle illuminations. It relies upon its wholesalers to determine the foot candles. It relied upon Rogers Electric on this project. The analysis by Rogers Electric to formulate the bid was using ninety-six light fixtures, not seventy-eight. A fair conclusion from that fact is that the foot candle reading was something less than seventy-six foot candles. Dan Lewis admitted that his file does not show any foot candle readings, during or after installation. Light level readings in foot candles, at any point in a room, can be made by a handheld meter that has a digital readout.

The finding that Lewis Electric attempted to comply with the foot candle requirements, by receiving calculations from Rogers Electric, is not substantiated by the evidence. The fact that Rogers Electric's estimate of foot candles was assuming an empty building does not aid Lewis Electric, but detracts from their proof. Shelving, beams, girders, ducts, and dark-colored walls all detract from

illumination. A computer program can anticipate these diffusing items, but Rogers Electric did not incorporate their presence in its lumen report. Rogers Electric's report, relied on by Lewis Electric to determine the number of foot candles, was further flawed as it assumed a height of eleven feet for the luminaries. It was a sloped ceiling which means the fixtures have graduated placements, with the side walls being eleven and one-half feet. The lowest fixture would exceed eleven feet which distorts the foot candle assessment adopted by Lewis Electric.

Lastly, that Miller was the general contractor was not supported by substantial evidence. The specifications (taken from another quote) demanded 108 light fixtures. Lewis Electric's first bid was for that number, but noted at the bottom that "Note: 96 Fixtures Maintain 76 Ft Candles." That bid was refused and a bid for the ninety-six fixtures with seventy-six foot candles was accepted. The foot candle level was triggered by Lewis Electric's report from Rogers. The specifications designated only the materials to be furnished, without any directions for the work itself, inspections, or periodic payments based on percentage of completion. The placement and spacing of the light fixtures were determined by Lewis Electric. The manner and method of the work was the contractor's. Lewis Electric was not under the direction of any other contractor, as a sub-contractor. There is nothing in the record to suggest that Miller was anything other than the owner hiring others to erect, plumb, and electrify the building.

The trial court further addressed one of the causes that the foot candle level was less than seventy-six foot candles:

Lewis Electric's installed light fixtures did not attain the level of foot candles called for in the specs (76 fc). One of the reasons for this was that there were light fixtures taken from the Sioux City store and placed in the Le Mars store. There were 15 of these older fixtures. These 15 older fixtures did not provide the same quantity of lighting as the new fixtures in the Le Mars store. It was Miller's requirement that the older Sioux City store fixtures be used in the Le Mars store.

There was not substantial evidence to support these exculpatory findings. Dan Lewis, a licensed master electrician stated that as metal halide lights age, their outputs tend to decrease. But there were no readings of their output. Lewis admitted that the reason for their removal from Sioux City was the glare produced by their placement, not their quality. The foot candle readings done by Joffer was in an area where only the new luminaries were installed and not where these fifteen older fixtures were placed. Nor does it explain the failure to install eighteen fewer light fixtures.

The trial court made the following findings assessing the credibility of the witnesses:

Miller did not contact his expert Mark Joffer until after this lawsuit was filed. His first contact with Joffer was in May 2007. Up to that point in time, it appears that Miller was content with what he had and the work done by Lewis Electric until pressed by this litigation. Further, it is noteworthy that Miller obtained a bid from Thompson Electric in August 2008 to fix the work done by Lewis Electric. These facts cause the Court to conclude that the testimony of the Plaintiff's witnesses have greater credibility than those of the Millers.

Again, these facts do not merit this credibility assessment. Miller had given Dan Lewis the checklist of deficiencies, including the foot candle shortage

and the missing fixtures. Miller described the premises as “extremely inadequate and not usable; It’s dark, dingy. We can’t see the products, read the prices easily. You have to get down on your knees at times to look at the pricing and the labels. It’s just overall unsatisfactory.” Miller had displayed its discontent with the work and never retracted it. The fact that Miller was content with the work is not borne out by the facts. Miller may have taken possession to mitigate its damages. Miller made no further payments to Lewis Electric. Without payment there was an automatic offset. Nor is it unusual to retain an expert after litigation. Thompson Electric was asked for a quote to establish the amount required to prove their counterclaim for corrective damages.

The trial court gave no clear reason why the admitted failure to provide ninety-six light fixtures with seventy-six foot candle levels did not constitute a breach of the terms of the parties’ contract. It recited various general principles of contract law (offer and acceptance, mutual assent, sufficiently definite terms). It did cite *Tindell v. Apple Lines, Inc.*, 478 N.W.2d 428, 430-31 (Iowa Ct. App. 1991), for the propositions that an executory contract may be modified by one party with the consent of the other; consent may be express or implied from acts and conduct; and modification is ordinarily a question of fact. But the court never found the contract had been modified, only that Lewis Electric did not breach its contract as Miller had not provided (1) a shelving diagram, and (2) the manner to compute the requisite foot candle level.

The court’s findings seem to point to a determination that these omissions were material and provided Lewis Electric with an excuse to only partially

perform.<sup>3</sup> But there was no finding that either of these obligations were a part of the contracted terms, express or implied. The matter of foot candles was not a part of the specifications adopted by Miller. It was raised for the first time by Lewis Electric in its first bid where the project manager added the note “96 Fixtures Maintain 76 Ft Candles.” Though that bid was turned down, Lewis Electric modified their final bid by reducing the number of fixtures from 108 to ninety-six to maintain seventy-six foot candles. Those assurances were suggested by Lewis Electric through its supplier. The computation was its own. If Lewis Electric made the assurance, it could be assumed that it had a method to have determined the required foot candles. The evidence was insubstantial to have made that finding and conclusion.

In denying Miller’s counterclaim, the court found that Lewis Electric had not breached the contract. It addressed the interpretation of ambiguous language in a contract, referring again to the absence of a shelving diagram and a method to determine foot candle illumination. As stated, these findings are not supported by substantial evidence.

**IV. Conclusion.** The portion of the judgment for the Sioux City account, separate from the Le Mars account, is affirmed in the sum of \$4164.53. The remainder of the judgment (\$16,927.50) is vacated, and the matter of the Le Mars account and the defendant’s counterclaim is reversed and remanded for

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<sup>3</sup> Iowa Jury Instruction 2400.7 entitled “Performance By Plaintiff” provides:

When a person agrees to do something for a specified consideration to be received after full performance, they are not entitled to any part of the consideration until they have performed as agreed [unless full performance has been (excused) (waived) (prevented) (delayed) by the act of the other party].

resolution. We assess appellate court costs one-half to Miller and one-half to Lewis Electric.

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