

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 23, 1996

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

NOTICE

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No. 95-1915

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MATERIAL SERVICE CORPORATION,

Plaintiff-Appellant,

v.

MICHELS PIPE LINE CONSTRUCTION, INC.,

Defendant-Respondent,

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. In another of the myriad of cases arising out of the Milwaukee deep tunnel construction project, Material Service Corporation sued

to recover amounts not paid for the sale of concrete pipes to Michels Pipe Line Construction, Inc. Michels Pipe Line counterclaimed for damages resulting from Material Service's delivery of defective pipes. Prior to trial the parties stipulated that Michels Pipe Line owed Material Service \$186,550.12 for the pipes. After a bench trial, the trial court found that Michels Pipe Line was entitled to a credit of \$31,734.34 and damages of \$158,221.55. A judgment for the net amount of \$3,405.77 was entered in favor of Michels Pipe Line, and Material Service appeals.

Material Service contends that the trial court erred in holding that the terms and conditions in Material Service's price quotation, including limitations on warranties and damages, were not a part of the sales contract. Material Service also contends that there was insufficient evidence to support the court's finding that a second delivery of pipes included defective pipes. Further, Material Service challenges various items included in the award of damages. Except for Material Service's challenge to the award of damages for home office overhead and for lost profits, we reject Material Service's arguments. Therefore, we affirm the judgment in part and reverse in part and remand the case to the trial court for entry of a new judgment.

FACTS

After the Milwaukee Metropolitan Sewerage District announced that it was accepting bids for construction of the portion of the deep tunnel identified as the North Shore - 6 collector system, Orville Burdick, Material Service's sales representative, reviewed the bidding documents to determine if Material Service could provide any of the concrete pipes required to line the tunnel. Material Service then prepared a price quotation, good for thirty days from the bid opening, for the various sizes of pipes required by the Sewerage District. The quoted prices were net prices, F.O.B. job site, and subject to an 8% escalation after three months. The quote also advised that it was subject to the terms and conditions on the reverse side of the document. Included in the terms and conditions were a disclaimer of all warranties, a provision limiting Material Service's liability for defective products to replacement or return of the purchase price, and a provision rejecting liability for special or consequential damages. The quotation was sent to all contractors expected to bid on the Sewerage District project.

Michels Pipe Line received the quotation and negotiated a discount of thirty percent off of the quoted prices. Incorporating the discounted prices into the bid it submitted to the Sewerage District, Michels Pipe Line was the successful bidder.

Rather than digging a trench to lay the pipes, Michels Pipe Line constructed the North Shore - 6 by jacking the pipes into place. In this procedure, a shaft for operations and equipment is dug to the ultimate depth of the tunnel. A machine begins at the shaft and bores the hole for the tunnel. This machine is the leading edge of the construction. A jacking machine, which is stationary, pushes the pipes into the hole created by the boring machine. As the boring machine advances, an additional pipe is positioned on the jacking machine's launch pad and pushed into the pipe ahead of it. Ultimately, the first pipe pushed into place behind the boring machine will be the pipe at the far end of the tunnel. A lubricant is pumped between the earth and the pipes to reduce the friction between the string of pipes and the ground.

Each concrete pipe has a spigot end and a bell end. Neither end is as thick as the body of the pipe. The outer diameter of the spigot end is less than that of the pipe itself, and the inner diameter of the bell end is greater than the pipe's. When the spigot end of one pipe is inserted into the bell end of another pipe, the joint is flush both inside and outside, provided the ends of the pipe are of uniform thickness and completely circular. In the procedure used by Michels Pipe Line, the spigot end was the leading edge and was jacked into the bell end of the pipe ahead of it. Because of the pressure from the jacking machine and the length of pipes to be pushed, two steel rings embedded in the concrete reinforced the spigots.

Michels Pipe Line jacked the pipes for the North Shore - 6 in two runs. Consequently, it rented land to dig a temporary, intermediate shaft. The initial run, approximately three hundred feet on a curve, was completed without problems using pipes supplied by Material Service. The pipes and operations in the initial run are not at issue in this litigation.

Michels Pipe Line began experiencing problems with the pipes in the second run almost immediately. Spigots cracked and did not fit correctly into bells. Examination of the pipes showed that the thickness of individual

spigots was not uniform, and examination of selected pipes revealed only one reinforcing wire ring in the spigots. Witnesses testifying for Michels Pipe Line claimed that the non-uniformity of the spigot edges caused the defective pipes to shift slightly to fit into the bell of the preceding pipe and that this shift led to stress and breakage. In addition, the tunnel went off grade. Michels Pipe Line's witnesses testified that the non-uniform spigots also meant that the exterior joints were not flush, which caused a plowing effect as the string of pipes was pushed forward. The plowing effect pushed the string of pipes downward.

After seventeen pipes were in the ground, Michels Pipe Line rejected the entire delivery of pipes for the second run and required Material Service to manufacture new pipes to replace the rejected ones. The seventeen pipes already in place were pushed through the entire length of the tunnel and removed at the end of construction. While waiting for delivery of the replacement pipes, Michels Pipe Line installed sheet bands in the seventeen pipes to reinforce the spigots for the remainder of the construction.

When the replacement pipes were delivered, Michels Pipe Line personnel inspected them. McLeod testified that a normal quantity was rejected for cosmetic reasons (the interior or exterior was rough). A sample of the pipes was inspected for spigot uniformity, and the internal and external diameters of the sampled pipes were measured. No problems were found. Once installed in the tunnel, however, the replacement pipes fractured at a higher than normal rate. The Sewerage District ultimately required significant repairs to thirty-one pipes or approximately thirty percent of the pipes used.

When construction recommenced, Michels Pipe Line first corrected the tunnel's grade. To raise the grade, workers split pipes to gain access to the earth, shaved small amounts off of the top, and filled in areas under the pipes. Initially, Michels Pipe Line over-corrected the grade, and it reversed the procedure to slightly lower the correction. After the grade was corrected, the mining proceeded at a normal pace. Gordon McLeod, Michels Pipe Line's project engineer, described the final product as a straight line at the correct grade.

Michels Pipe Line refused to pay for the pipes used in the second run of the North Shore - 6, and Material Service sued to collect the amount due.

In addition to disputing the amount claimed, Michels Pipe Line successfully sought damages for expenses it incurred as a result of the delivery of the rejected pipes and for expenses it incurred to repair the defective replacement pipes.

STANDARD OF REVIEW

In reviewing the trial court's findings of fact, this court will not set them aside unless they are clearly erroneous. Section 805.17(2), STATS. We examine the record for any credible evidence upon which the court could have based its decision. See *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). This court reviews the evidence in the light most favorable to sustaining the findings of fact. *Id.* Conflicts in the testimony are resolved in favor of the trial court's findings of fact. *Id.* When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trial court. *Id.*

CONTRACT TERMS

Material Service contends that the limiting terms and conditions of the price quotation are part of its contract with Michels Pipe Line. The terms included an express warranty that the concrete pipes would satisfy a particular standard. All other express and implied warranties, including warranties of merchantability and fitness for a particular purpose, were disclaimed. The terms and conditions also limited Material Service's liability to replacement of the pipes or return of the purchase price and excluded liability for any special or consequential damages.

Material Service argues that its price quotation was an offer, which was modified by negotiations and accepted without objection by Michels Pipe Line's purchase order. Material Service relies on § 402.207, STATS., which abrogates the common law's "mirror-image" rule. The "mirror-image" rule required that unless an acceptance of an offer mirrored the terms of the offer, a contract was not formed. *Steiner v. Mobil Oil Corp.*, 569 P.2d 751, 757 (Cal. 1977).

Michels Pipe Line Counters that the quotation, even if an offer, expired before acceptance. Consequently, its purchase orders constituted the offer, which Material Service accepted by performance. Michels Pipe Line argues that because the purchase orders lacked provisions concerning warranties and remedies, the default provisions of the Uniform Commercial Code are read into the parties' agreement. See §§ 402.314 (implied warranty of merchantability), 402.315 (implied warranty of fitness for a particular purpose), and 402.715 (seller's liability for incidental and consequential remedies), STATS.

The question presented is what constitutes the offer in this case. Chapter 402, STATS., does not define the term "offer." Thus, we apply the common law to determine which document is the offer. *Gulf States Util. Co. v. NEI Peebles Elec. Prods., Inc.*, 819 F. Supp. 538, 549 (M.D. La. 1993). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979).

Under the common law, a price quotation may be merely an invitation to make an offer. *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868, 871-73, (7th Cir. 1976); RESTATEMENT, *supra*, § 26 cmt. c. Whether a price quotation is an offer or an invitation to make an offer depends upon the intent of the party making the quotation as manifested by the facts and circumstances of the particular case. *Nickel v. Theresa Farmers Coop. Ass'n*, 247 Wis. 412, 416, 20 N.W.2d 117, 118-19 (1945). This presents a question of fact. Relevant factors to be considered by the finder of fact include the extent of prior inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom the price quotation is communicated. RESTATEMENT, *supra* § 26 cmt. c.

In its findings of fact, the trial court found that the price quotation letter offered to sell pipes for use in the North Shore - 6 and that the letter was sent to all contractors expected to bid on the project. The price quotation indicated that the prices were firm for thirty days from the opening of bids. The first paragraph of the general terms and conditions of the price quotation indicated that it was an offer to sell or a contract for sale, but only on the terms and conditions set forth. The trial court concluded that the price quotation was an offer, and this conclusion was supported by the evidence.

The trial court also found that Michels Pipe Line did not accept Material Service's offer; rather, Michels Pipe Line negotiated a new, independent agreement that provided for lower prices than in the initial offer. Further, the court found that more than thirty days after the bid deadline, Michels Pipe Line issued purchase orders for pipes at the new, lower price. The purchase orders did not include any limiting terms and conditions and did not refer to the quotation letter. The trial court concluded that Michels Pipe Line did not accept Material Service's offer. Consequently, Michels Pipe Line's purchase orders constitute the contracts between Material Service and Michels Pipe Line.¹

Again the trial court's findings are supported by the evidence, and the court's conclusion flows from its findings. It is uncontested that the parties renegotiated the price for the pipes. Section 402.207, STATS., is thus inapplicable because Michels Pipe Line did not merely respond to the quotation letter with its own purchase order. Rather, the company responded by negotiating over price. The various sections of chapter 402, STATS., do not address this scenario, and we again turn to the common law.

Generally, under common law, a counter-offer acts as a rejection of the original offer. RESTATEMENT, *supra* § 39, cmt. a. Although it operates to continue, rather than terminate, negotiations, it terminates the offeree's power to accept the original offer unless the counter-offer manifests a contrary intention. *Id.* § 39(2) and § 39, cmt. a. The trial court found that Michels Pipe Line's request for a discount was a rejection of a material term of Material Service's offer, i.e., the price, and a request for further negotiations. After Michels Pipe Line issued its purchase orders, which became the offer, Material Service did not attempt to reintroduce its limiting terms and conditions into the contract. Therefore, it did not disclaim implied warranties nor preclude Michels Pipe Line's recovery of consequential and special damages.

¹ Michels Pipe Line argues that because the purchase orders have all the essential terms of a contract and are unambiguous, a court may not look behind the face of the orders and consider extrinsic evidence. *See* § 402.202, STATS. This argument ignores Material Service's contention that the parties did not intend the purchase orders to be the final embodiment of the contract and that they were merely the acceptance of Material Service's offer. It also ignores § 402.207, STATS., which applies where merchants each use competing forms. While Michels Pipe Line argues that the parties treated the purchase orders as the whole contract, the testimony cited was not incorporated into the trial court's findings of fact. Accordingly, we do not rely on this theory.

DEFECTS IN REPLACEMENT PIPE

Material Service does not contend that the rejected pipes were not defective. Its objection is to the trial court's finding that thirty-one of the replacement pipes were also defective. The trial court found that the latter pipes were defective because they cracked and had fractured joints even though they were properly used by Michels Pipe Line.

Material Service contends that there is no evidence to support the trial court's findings. It argues that witnesses testified that Michels Pipe Line inspected the replacement pipes before they were used in the tunnel. Although some pipes were rejected for cosmetic reasons, Michels Pipe Line found no apparent fault with the pipes that were used.

Witnesses testified that the fracture rate of replacement pipes requiring significant repairs was greater than would normally be expected. While witnesses for Michels Pipe Line could not opine on the specific reasons for the greater rate of fracturing, they testified unequivocally that the fracturing did not result from inadequate lubrication or the way the pipes were jacked. Michels Pipe Line's witnesses disagreed with Material Service's expert, Michael Robinson, who testified that a change in soil type and the "kinkiness" caused by raising and then lowering the grade contributed to the fracturing of the replacement pipes. Michels Pipe Line's witnesses also contradicted testimony that it incorrectly placed gaskets on the spigots and with testimony that questioned using a launch pad rather than a crane to bring pipes together.

If there is conflicting evidence, the trial court decides which to accept and which to reject. Here, the trial court concluded that Michels Pipe Line followed proper procedures. If the operations were proper and a higher than usual number of pipes developed fractures, a reasonable inference is that the cause was inherent defects within the pipes. The trial court is not required to reject this inference simply because the defects were not apparent during visual inspections or because witnesses could not identify specific defects.

CHALLENGES TO ITEMS OF DAMAGES

The trial court found that Material Service's delivery of defective pipes delayed the completion of the North Shore - 6 a total of thirty-nine days. Michels Pipe Line spent eight additional days on the project investigating the initial defective pipes and applying steel reinforcing bands to the defective pipes already in the tunnel. Re-mining the tunnel to correct the grade delayed the project eleven days. Three additional days were required to push the initial seventeen pipes out the other end of the tunnel. Finally, Michels Pipe Line spent an additional seventeen days patching fractures in the defective replacement pipes.

The trial court awarded Michels Pipe Line damages for labor costs, material costs, field service supervision costs, equipment costs, home office overhead costs, and lost profits for each type of delay. Michels Pipe Line was also awarded the cost of renting the land for the intermediate shaft for the additional thirty-nine days. In determining the amount of each type of damage, the trial court generally allowed the amounts claimed by Michels Pipe Line. The exception was for re-mining, where the trial court found that the length of the delay was less than what Michels Pipe Line claimed. Michels Pipe Line's evidence regarding its damages followed the cost-reimbursement method of payment contained in its contract with the Sewerage District. The contract provision applied to modification or change orders made by the Sewerage District during construction.

Material Service challenges the damages allowed by the trial court. Damages for breach of contract are recoverable to place the non-breaching claimant in the same position it would have been in had the breach not occurred. *Schubert v. Midwest Broadcasting Co.*, 1 Wis.2d 497, 502, 85 N.W.2d 449, 452 (1957). The claimant is not to profit from the breach, however; it is merely to receive the benefit of the contract as if the contract had been performed. *Hanz Trucking, Inc. v. Harris Brothers Co.*, 29 Wis.2d 254, 268, 138 N.W.2d 238, 246 (1965). Pursuant to § 402.715, STATS., a non-breaching buyer may recover expenses reasonably incurred incident to the breach (incidental damages) and any loss resulting from the particular requirements of the buyer if the seller had reason to know of the requirements at the time of contracting and if the loss could not reasonably be prevented by cover (consequential damages).

To obtain incidental or consequential damages, the claimant must present sufficient evidence to allow the trier of fact to estimate damages with a

reasonable degree of certainty. *Murray v. Holiday Rambler, Inc.*, 83 Wis.2d 406, 432, 265 N.W.2d 513, 526 (1978). Mathematical precision or absolute exactness is not required; a fair and reasonable approximation is sufficient. *Id.*

Material Service contends that all damages for re-mining to correct the grade and for repairing fractures in the replacement pipes are not recoverable. This includes the portion of the land rental for days attributable to these activities. Michels Pipe Line argues that these claims relate to the replacement pipes, which it claims were not defective. We have already concluded, however, that there was sufficient evidence to support the trial court's finding that thirty-one of the replacement pipes were defective. Additionally, we concluded that the evidence supported the trial court's finding that the defects in the initial seventeen pipes caused the tunnel to go off-grade. Therefore, Michels Pipe Line may recover damages for patching the replacement pipes and for correcting the grade.

Material Service contends that there was no evidence to support charging it for any equipment costs for the delays. Equipment included the tunnel boring machine and the jacking machine, two cranes, a loader, a pick-up truck, and small tools, as well as other items. Material Service argues that because Michels Pipe Line owned, and did not rent, the equipment, recovery was limited to the actual cost of operating the equipment, e.g., fuel and utilities. Michels Pipe Line did not present testimony regarding actual costs. Rather, it computed equipment costs using a cost reference guide identified in its contract with the Sewerage District for that purpose, and Material Service contends that this was impermissible.

Michels Pipe Line's ownership of the equipment does not mean that it did not incur expenses connected with the equipment's use and availability during the delays. Expenses, such as wear and tear, fuel, utilities, and maintenance, were incurred when the equipment was used to take necessary corrective actions. Even while the equipment was idle, Michels Pipe Line was deprived of the opportunity to use the equipment elsewhere because it had to keep the equipment at the job site for use when needed.

Material Service correctly argues that it is not bound by the provision of the contract between the Sewerage District and Michels Pipe Line

regarding the cost reference guide. Material Service is not a party to the Sewerage District contract. We do not, however, conclude that Michels Pipe Line's reliance on the cost reference guide is insufficient evidence of its damages. A claimant must present evidence of a fair and reasonable approximation of its costs. Where reliance on a particular cost accounting guide is an accepted industry practice for determining the costs of using equipment, we see no reason why a claimant may not rely on it for calculating damages, subject to evidentiary objections and cross-examination. See *Fehlhaber Corp. v. State*, 410 N.Y.S.2d 920, 926 (App. Div. 1978).

Ted Lewtas, a witness for Michels Pipe Line, testified that the cost reference guide was regularly used in the industry to determine the cost of owning and operating equipment. The trial court could also infer that the particular guide was acceptable within the industry from its use in the Sewerage District's contract. Thus, Michels Pipe Line presented evidence concerning equipment costs attributable to Material Service's breach. The evidence satisfied the reasonable certainty standard, and the trial court could rely on it to set damages.

Material Service also challenges the award of damages for field supervisory costs. This item included the salaries and benefits for the project superintendent, the project engineer, and the assistant project engineer.

Material Service invokes the cost-reimbursement provision in the Sewerage District contract and argues that it does not allow for recovery of field supervision costs. As we previously noted, Material Service is not a party to the Sewerage District contract. Therefore, whether Michels Pipe Line could recover field supervision costs for change orders required by the Sewerage District is irrelevant to this case.

Material Service also objects to the field supervision costs because the three field supervisors did not record what work they did each day and they could not identify any particular work that they did on the thirty-nine days attributable to Material Service's breach. Additionally, the hours charged for one or more of the individuals on a given day often exceeded the hours charged for laborers. The field supervisors work was administrative and supervisory. For example, the project engineer was responsible for decisions regarding

setting up equipment although he did not do the actual work himself. He also had surveying responsibilities, and when the re-mining occurred, he calculated the adjustments to be made at each pipe, and the laborers did the work. For all three individuals, a major justification for claiming their salary and benefits as expenses was that their duties were supervisory and they were required to be on site or available until the tunnel was completed. Losses caused by a breach of contract may include the loss of a salaried employee's services on other projects where, because of the breach, the employee must remain longer on the site of the project involved in the breach. *State v. Service Elec. & Supply, Inc.*, 106 Wis.2d 396, 403, 405, 316 N.W.2d 390, 394, 395 (1982); see also *District Concrete Co., Inc. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1038 (D.C. Cir. 1980).

Because of the supervisory and administrative nature of their positions, we also cannot say that the supervisors could not have worked more hours than the laborers on any given day or on all days. The field supervisors' responsibilities are to plan, schedule, and supervise. Presumably, the planning and scheduling of particular tasks is undertaken before the work is done. Additionally, Michels Pipe Line did not claim the same amount of time for each individual or the same number of hours for each person every day. The superintendent testified that he worked on two projects and probably spent more time on the other. Conversely, the assistant project engineer, who was responsible for paperwork, scheduling, and other administrative details, testified that he was required to be on site whenever work was occurring, and he did not testify that he worked on other projects.

To support its claim for field supervision costs, Weltin presented exhibits summarizing the wages and benefits for the three individuals attributable to the delay. The summaries included the total hours claimed for each person for each type of delay. The exhibits did not, however, itemize pay rates or the costs of benefits for each individual, to which Material Service also objects. The summaries are adequate evidence to support the trial court's findings on the issue of field supervision costs.

Material Service also contends that the charges for the laborer's costs are speculative and not capable of reasonable computation. Again, Weltin prepared exhibits summarizing labor costs for each of the four delays. The summary included each laborer's hours and his wage rate. Included in the

wage rate were taxes and benefits. Material Service contends that because some of the taxes and benefits have statutory or contractual maximum levels and because the laborers were full-time employees, the maximum levels would have been reached without the additional work attributable to the breach. It argues that because Weltin did not address the effect of the maximum rates, the exact amounts of benefits attributable to the breach is speculative.

Material Service does not refer this court to where, in the record, this argument was made to the trial court or where it solicited testimony supporting the assumptions underlying its argument. From this, we infer that this criticism of Michels Pipe Line's evidence is raised for the first time on appeal, and we decline to consider it. *See Pabst Brewing Co. v. City of Milwaukee*, 125 Wis.2d 437, 459, 373 N.W.2d 680, 691 (Ct. App. 1985).

The final elements of damages challenged by Material Service are Michels Pipe Line's claim for home office overhead and lost profits calculated at 19.7% of the labor, field supervision, equipment, and material costs. Material Service contends that the indirect overhead costs and lost profits are not recoverable because there was no evidence that recovery of these items was necessary to compensate Michels Pipe Line for the breach. We agree.

The percentage calculation of home office overhead was derived from a Sewerage District audit of Michels Pipe Line. The overhead covered Weltin's and his assistant's salaries, accounting costs for the sewer, water and tunnel division of the company, the division's yard and garage facility, and office expenses. There was no testimony that these expenses increased because of the delays attributable to the defective pipes. If a breach does not increase overhead expenses, the expenses are not recoverable as damages attributable to the breach. *See Edward E. Gillen Co. v. John H. Parker Co.*, 170 Wis. 264, 282-83, 171 N.W. 61, 68 (claimant may not recover for expense of salaried employee not specifically hired for or assigned to project if claimant has other work and employee not compensated for extra work caused by breach), *rehearing denied*, 170 Wis. 286, 174 N.W. 546 (1919).

Michels Pipe Line argues in its brief that it obviously lost the opportunity to perform other jobs during the time that it was required to remain on the site of the North Shore - 6. It fails, however, to cite to evidence in

the record to prove that other work was actually delayed. Therefore, recovery of overhead expenses under a “lost opportunity” theory is not supported by the evidence.

We also conclude that the evidence fails to support a claim for lost profits. Lost profits, if proven, are recoverable in a breach of contract action. *Thorp Sales Corp. v. Gyuro Grading Co.*, 107 Wis.2d 141, 148, 319 N.W.2d 879, 882 (Ct. App. 1982), *aff’d* 111 Wis.2d 431, 331 N.W.2d 342 (1983). Here, Michels Pipe Line's profit was from its contract with the Sewerage District. If Michels Pipe Line is “made whole” by the recovery of the actual direct expenses it incurred because Material Service furnished defective pipe, Michels Pipe Line will earn the profit it expected to earn under the Sewerage District contract. Michels Pipe Line does not cite to any testimony to refute this assumption; therefore, there is no evidence that Michels Pipe Line lost profits because of the breach.

Consequently, we conclude that the trial court's award of home office overhead and lost profits to Michels Pipe Line was not supported by the evidence. These items totaled \$15,615.15, and the award to Michels Pipe Line on its counter-claim must be reduced by this amount. Consequently, we affirm the judgment in part and reverse in part and remand the case to the trial court with instructions to enter judgment consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.