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Court of Appeals of Nebraska.

John A. ALBERS, Trustee, appellee,
v.
ATLAS ROOFING CORPORATION, a Mississippi corporation, appellee, and Krause Roofing & Sheet Metal, Inc., a Nebraska corporation, appellant.

No. A–00–1314. | Sept. 3, 2002.

Apartment complex owner filed claim against roofing contractor for breach of contract and negligence, and claim against manufacturer of roofing shingles for breach of express warranty and manufacturing defect. The District Court, Hall County, James Livingston, J., granted directed verdict for manufacturer, entered judgment on jury verdict for owner and against contractor, denied contractor's motion for new trial, and permitted owner to amend pleadings to conform to the evidence. Contractor appealed. The Court of Appeals, Hannon, J., held that: (1) contractor could not challenge grant of directed verdict for manufacturer; (2) whether shingles were applied in a manner conforming to the manufacturer's instructions and whether deficiencies in their installation were the cause of the delamination presented questions for jury; (3) adequate foundation was laid for testimony of expert witness in ascertaining replacement cost of the shingles; and (4) permitting apartment complex owner to amend petition to conform to evidence was not abuse of discretion.

Affirmed.

Appeal from the District Court for Hall County: James Livingston, Judge. Affirmed.

Attorneys and Law Firms

O. William VonSeggern for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee John A. Albers.

HANNON, SIEVERS, and MOORE, Judges.

Opinion

INTRODUCTION

HANNON, Judge.

***1** The John A. Albers Revocable Trust owns an apartment complex in Grand Island, Nebraska. The trustee, John A. Albers, contracted with Krause Roofing & Sheet Metal, Inc. (Krause), to reshingle the apartments, and they were reshingled by Krause with shingles manufactured by Atlas Roofing Corporation (Atlas). After installation, the shingles began to separate and some of them came off the roof. Albers sued Krause and Atlas, jointly and severally, for $54,389.12, the alleged cost of replacing the shingles. Krause was sued upon theories of breach of contract and negligence, and Atlas was sued upon theories of breach of express warranty and manufacturing defect. At the jury trial, the court granted Atlas a directed verdict at the close of Albers' case in chief. A professional roofer was allowed to testify, over the objection of insufficient foundation, that the cost of replacing the roof in the spring of 1998 would have been $85,263. The jury returned a verdict of $70,000. At the hearing on Krause's motion for new trial, Albers was allowed to file a second amended petition containing a prayer for $85,263 in damages, and the motion for new trial was overruled. Krause alleges, restated, that the trial court erred in allowing the professional roofer to give an opinion as an expert without sufficient foundation, in allowing Albers to amend the petition to conform to the evidence, in denying Krause's motion for a directed verdict, and in granting Atlas' motion for a directed verdict. We affirm.

BACKGROUND

Bellwood Square is an apartment complex composed of several buildings located in Grand Island, Nebraska. The apartment buildings are two stories tall, with what is

called a mansard roof. In this type of roof, the actual top of the building is flat, but the walls to the upper story are shingled for aesthetic effect. These walls are not vertical. There is an overhang of a few feet at approximately the level of the second-story floor, and the outer wall curves, slopes in, and then is vertical, or almost so, until the top of the building is reached. All of this area is shingled. Awnings are constructed over the doors, and these have a less vertical slope and extend downward below the other part of the mansard roof.

A hailstorm had damaged the shingles to the extent that Albers wanted to replace them with new shingles. Krause's bid of $41,652 was accepted, in which acceptance Krause agreed to remove the old shingles and replace them with similar shingles that had a 30–year warranty. Krause selected Atlas' "Pinnacle I" asphalt shingles. The work was done during June through September 1996. Parts of some of the shingles commenced to fall to the ground even before the installation was complete. The issues of this lawsuit have to do with who is responsible for the falling shingles and the damages resulting from that problem.

The shingles are made of asphalt with particles of rocklike material embedded in the side that is exposed to the elements. Approximately one-half of each shingle is intended to be exposed. In order to obtain a desired effect of making the installed shingle appear to be a wooden "shake" shingle, the upper surface of the bottom of the shingle is not flat. Each shingle has four areas of approximately 4 or 5 inches' width which appear to be about double thickness. This is accomplished by the manufacturer's laminating the top part of the shingle to the bottom part. Each course of shingles overlaps the course below at a point just below the lamination. The shingles are nailed to the roof, and the nails are hidden by placing them at a point just a little above the point where the upper course will cover the lower course; this is also the point of the lamination. The shingles applied by Krause had a white, chalklike line running across them at the point where the lamination referred to above is located. This is called the nail line. Expert testimony established that with the Pinnacle I shingles, it is necessary that the nails be placed on that line so that each nail goes through the parts of the shingle both above and below the point of lamination. Albers' expert established that after allowing for the width of the lamination and the diameter of the nails used for attaching the shingles, the margin of error is slight. Without the nail's being in the part below the lamination, the lower part will necessarily fall from the roof if the lamination fails, unless it is somehow stuck to the shingle below it.

***2** There is expert testimony in the record, perhaps disputed, that mansard roofs have some problems that roofs built on a slant do not have. On roofs with a horizontal element, gravity combined with heat causes courses of asphalt shingles to stick to each other, thus tending to keep the shingles in place. Vertical roofs do not have the assistance of gravity, and Albers' expert testified that on vertical roofs, gravity has a negative effect on the shingles' prospects of sticking together. Albers' expert maintains that this effect requires that an adhesive be applied during the shingling process.

Krause was paid in full by October 8, 1996. It attempted to replace or repair the delaminated shingles on at least two occasions up to the spring of 1997, and it offered to continue replacing the shingles as they delaminated. In September 1997, representatives of Atlas visited the complex and concluded that the shingles were not installed properly.

In the first 10 paragraphs of his amended petition, Albers alleged the existence and status of the parties, the May 1, 1996, contract for Krause to reshingle the roof of the apartments with shingles manufactured by Atlas, that the reshingling was done in the summer of 1996, that the shingles started to delaminate and continued to come off, and that he had informed Krause and Atlas that a new roof was needed.

In paragraphs 11 through 14 of the amended petition, which alleged breach of contract, Albers asserted that Krause agreed to install the shingles in accordance with Atlas' instructions; that Krause failed to do so by failing to fasten the shingles with six nails each, by not applying adhesive, and by failing to place the nails on the line indicated; and that this failure caused the need for a repair and replacement of a new roof costing $54,389.12.

In paragraphs 15 through 19, which alleged negligence, Albers asserted that Krause had a duty to use due care in installing the shingles in accordance with Atlas' instructions, that Krause failed to do so by failing to use the six nails placed on the line indicated and to use the adhesive, and that those failures were the proximate cause of damages in the same amount as previously alleged.

Paragraphs 20 through 31 contain allegations only against Atlas. They contain allegations which purport to assert separate causes of action against Atlas for breach of express warranty and a manufacturing defect. In his

prayer for relief, Albers requested judgment against Krause and Atlas, jointly and severally, in the amount of $54,389.12.

The trial judge submitted the case to the jury on Albers' claims only against Krause, and it did so under the following significant instruction:

> The Plaintiff claims that Defendant Krause Roofing breached the contract in one or more of the following ways:
>
> A. In failing to install the Pinnacle I asphalt shingles all in accordance with the Defendant Atlas Roofing's recommended installation instructions.
>
> ***3** B. In failing to install the Pinnacle I asphalt shingles all in accordance with roofing industry standards and in a workmanlike manner.

After the verdict was returned, Albers was allowed to file a second amended petition. This petition, while essentially the same as the amended petition, alleges that Krause had the duty to perform the work in a workmanlike manner and in accordance with the asphalt roofing industry standards, that is, using six nails on the line and using adhesive. The paragraphs concerning negligence were also similarly changed. The first amended petition had an allegation that Krause had a duty to use due care in installing the shingles in accordance with Atlas' installation instructions, and this allegation was replaced in the second by an allegation that Krause had the duty to install the shingles in a workmanlike manner and in accordance with the asphalt roofing industry standards. Significantly, the allegation on damages remained the $54,389.12 figure throughout the body of the second amended petition, but in the prayer for relief, that figure was increased to $85,263.

Krause answered, alleging that the delamination was caused or contributed to by an excessive amount of wind which was increased by the "Venturi Effect" caused by the configuration of the buildings; by moisture in the interior of the buildings that caused the plywood sheathing to weaken, warp, and buckle, resulting in an uneven surface preventing the shingles from adhering properly; and by the sheathing's being lapped, in some areas, in a manner that prevented the shingles from adhering properly. Krause was without knowledge to admit or deny that the shingles were defective, but specifically denied that it failed to use due care in the installation of the shingles, alleged that less than 1 percent of the shingles delaminated, and denied that the entire roof needed replacement. Krause also stated that it had previously replaced some shingles and had repeatedly informed Albers that it would replace at its own cost any shingles that delaminated. Finally, it alleged that all the shingles that have delaminated could be replaced at a cost of $1,500. In an amended answer, Krause raised the affirmative defense of failure to mitigate damages.

The matter came on for a jury trial. The manager of the apartment complex testified to the making of the contract, the history of the shingles falling off, and Krause's efforts to replace them. Atlas representatives inspected the roof, and in a letter dated November 6, 1997, Atlas stated that in applying its Pinnacle I shingles to a mansard construction such as the complex, a minimum of six fasteners are to be used per shingle and three quarter-sized spots of asphalt cement are to be evenly spaced and applied to the underside of each shingle. The letter further stated:

> Correct fastener location is the single most crucial aspect to this type of roof construction, as the nails are to be placed directly on the nailing line, approximately 6″ up from the butt edge of the exposed shingles. Failure to follow the aforementioned application instructions will result in the shingles becoming detached, resulting in shingle loss.

***4** The letter noted that no cement was used, that only four fasteners were used per shingle, and that upon examination of the photographs, Atlas discovered that many of the nails were located above the nail line. The letter concluded by attributing the shingle loss to application deficiencies and not to a manufacturing defect.

In a letter dated November 17, 1997, Krause stated that when it noticed that shingles were delaminating, it replaced the shingles at no cost to the owner. It further stated that Grand Island suffered a gale-force windstorm the weekend of November 1. Krause received a shipment of replacement shingles from the supplier to replace the shingles which were " 'sucked off by this wind' " or delaminated, but that "appeared to be unacceptable to the owner in that distracted [sic] from the appearance." Krause stated in the letter that it could not distinguish any

difference in the appearance of those shingles compared with those that they had previously replaced and those of the original installation. The letter further stated, "The owner in his conversation to me was for us to install a complete new roof or he would sue for it. I advised him this was unacceptable to us. We will replace the shingles which are missing and feel justified in asking for assistance for obvious wind damage."

Laurence Fehner, a registered professional engineer, inspected the roof on August 17, 2000. He gave a great deal of background testimony, including the explanation of photographs depicting defects in the shingling of the complex. Our above description of the mansard roof, the shingles used, and the problems is largely taken from his testimony.

Fehner opined that the primary problem with the shingles on the complex was that the nails were not installed through the lamination because they were driven in above the nail line and that there were two ancillary problems: the use of four nails instead of six to attach the shingles and no use of asphalt cement to seal the shingles. He testified that the shingles would fall off under any weather condition and that "they don't stand a chance under any kind of wind load." He further stated that there was a high probability that the shingles improperly installed will fall off at some point, that replacement would be continual, and that there is no repair of these shingles because of the high cost to physically lift every single shingle up, put the appropriate nails in, put them in the proper place, put on the asphalt sealant, and reseal the shingle back into place. Fehner testified that to fix the problem, he would replace all the shingles.

Pat Duff, owner of the Duff Roofing Company since 1999, testified that his family-run business had been around for 60 years, primarily in Grand Island, and that 90 percent of its work is commercial roofing. Factors Duff considers in setting a bid are materials, the size of the job, the terrain that surrounds any particular job for access, and the difficulty of tearing off the old roof. Duff had personally inspected the roofs at the complex on approximately four separate occasions in the spring to summer months of 2000. He said the square footage on all six buildings was approximately 30,000 square feet. As of October 2000, Duff said that he contacted Contractors Supply and requested a 1998 price and a 2000 price to replace the Pinnacle I shingles. He also contacted the previous owner of the Duff Roofing Company for the labor costs for 1998, since the previous owner figured out an hourly rate based on the averages of employees and benefits each year. The 1998 historical labor cost that Duff used in formulating his bid for the project was $12 per hour, and he would use six to eight people plus himself to do the work.

***5** Duff was asked the following hypothetical question: "If I was an owner of a building and I had a roof that needed to be replaced and I discovered that or determined that in November or December of 1997, would it be reasonable to ask for a bid of, say, in the spring of 1998?" Objections based upon foundation and relevancy were overruled, and Duff answered, "Yes." He explained that he would not reshingle any building in the winter. Duff was then asked for his opinion within a reasonable degree of certainty as to the cost to reshingle the apartments in the spring or the first quarter of 1998 based upon his observations, his review of materials costs for the spring and first quarter of 1998, and his review of labor costs for the spring and first quarter of 1998 for the Duff Roofing Company. A foundational objection was overruled when Duff was asked for his opinion, and Duff testified that his estimate for the first quarter of 1998 was $85,263.

At the close of Albers' case, Krause moved for a directed verdict due to the absence of Atlas' installation instructions. Its motion was overruled. Atlas also moved for a directed verdict, and its motion was sustained because the evidence did not show that the shingles were coming off due to faulty manufacture of the shingles.

Norman Bahr testified that he was the owner of Krause in 1996. He said he has 35 to 40 years' experience with installing shingles. He said that Krause has installed shingles on mansard roofs before and has always used four nails per shingle with no cement. Bahr testified that he examined each building of the complex on May 28 and June 1, 1998, and made a diagram to show how many shingles were missing from each building. According to that diagram, approximately 2,200 shingles had been applied, approximately 70 had been replaced, and approximately 116 were loose or missing. Bahr testified that based upon his experience, he would assume that the Atlas installation instructions would be included in the bundle with the shingles.

Ryan Sheffield, who became the on-the-spot manager for Krause in doing the reshingling, testified that the Atlas Pinnacle I shingles came with "minimal" installation instructions on them. Sheffield said that the instructions showed a picture requiring the shingles "to be on a minimum of a four-twelve pitch," contained warnings about storing the shingles and keeping them out of direct

sunlight, and gave direction on how to start the shingles and how the drip line has to be offset 5 or 5 & frac12; inches. Sheffield said the instructions stated nothing about how many nails per shingle or about adhesive. He also said that the shingles were self-adhesive. The remainder of his testimony essentially denied that the shingles were improperly installed.

At the close of all the evidence, Krause renewed its motion for directed verdict. The motion was overruled. The court accepted the verdict of the jury and entered judgment in favor of Albers and against Krause in the sum of $70,000. Exhibit 5, a proposal dated May 13, 1998, from Olson Roofing, Inc., shows that company's estimate of the proposed cost of reroofing the complex to be $54,389 .12. This exhibit was not offered during the trial and was not offered and received until November 21, 2000, during the motion for new trial proceedings. Krause's motion for a new trial was denied. Albers moved to amend his petition pursuant to Neb.Rev.Stat. § 25–852 (Reissue 1995) to conform to the evidence adduced at trial. The second amended petition prayed for judgment against Krause and Atlas, jointly and severally, "for special damages in the amount of $85,263.00, said amount is the reasonable cost of replacing the roofs on the apartment complex." Krause timely filed this appeal.

ASSIGNMENTS OF ERROR

***6** Krause alleges, restated, that the trial court erred in (1) sustaining Atlas' motion for directed verdict; (2) overruling Krause's motion for directed verdict when the amended petition was based upon an alleged failure to follow the instructions of Atlas, the shingle manufacturer, and no such instructions were received into evidence; (3) allowing a witness to testify as an expert regarding the cost to replace shingles by way of a response to a hypothetical question in the absence of sufficient foundation; (4) entering a jury verdict that was excessive and contrary to the pleadings which contained a judicial admission that Albers' damages were $54,389.12; and (5) allowing Albers to amend his petition to conform to the evidence after the jury returned its verdict.

STANDARD OF REVIEW

[1] [2] In reviewing a trial court's ruling on a motion for a directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed, and that party is entitled to have every controverted fact resolved in its favor along with the benefit of every inference which can reasonably be deduced from the evidence. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

[3] [4] There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994).

[5] [6] The amount of damages to be awarded is a determination solely for the fact finder, and its determination will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000).

The decision to allow or deny a proposed amendment to the pleadings rests in the discretion of the trial court. *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983).

ANALYSIS

Granting Atlas' Motion for Directed Verdict.

[7] Albers did not appeal from the court's order granting a directed verdict to Atlas, but Krause has appealed that ruling. In connection with that issue, Krause argues only the merits of whether Albers' evidence was sufficient to

support a verdict against Atlas and that if the motion had not been granted, it was possible that the jury could have found Atlas entirely responsible for Albers' damages. Atlas has not bothered to support the trial court's dismissal of it as a defendant, and Krause did not file any cross-complaint against Atlas. We are at a loss to understand Krause's interest in this issue.

***7** Albers sought recovery against Krause upon two theories: breach of contract and negligence. Albers also sought recovery against Atlas upon theories of breach of express warranty and manufacturing defect. The theories of recovery are not intertwined. In fact, it would be difficult to imagine a verdict against both Krause and Atlas, but perhaps it would be possible for a trier of fact to conclude that shingles improperly manufactured were not put on in a workmanlike manner and that the two deficiencies combined to cause the shingles to fall off. However, no party pled that position. Krause and Atlas were each free to maintain that the shingles fell off because of the fault of the other. Krause did so, and even after Atlas was dismissed as a defendant, Krause quite properly introduced evidence about the poor direction or lack of adequate direction from Atlas on how the shingles should be put on a mansard roof. In short, after Atlas was dismissed, Krause continued to defend on the basis that Atlas was responsible rather than Krause.

[8] It appears that Krause is not affected by the court's order dismissing Albers' claim against Atlas and therefore does not have a right to complain about it. In *Lewis v. Beckard*, 118 Neb. 533, 225 N.W. 462 (1929), the plaintiff sued the other two drivers involved in a three-car accident and obtained a jury verdict against one of them, Haggerty, but not against the other one, Beckard. Upon Haggerty's appeal, the judgment was set aside and the cause remanded for a new trial. The main reason for reversal was the misconduct of the plaintiff's counsel in telling the jury that Beckard had no insurance. The court even commented on the fact that Beckard was at least as negligent as Haggerty, but it refused Haggerty's request for a new trial against Beckard. The court noted that Haggerty and Beckard were not adverse in the suit, that there was no contribution between the joint tort-feasors, and that the plaintiff might have appealed but did not do so. In *Fick v. Herman*, 161 Neb. 110, 72 N.W.2d 598 (1955), the Nebraska Supreme Court cited *Lewis v. Beckard*, *supra*, in a case with a similar factual situation. However, before accepting *Lewis v. Beckard* as binding precedent, the court examined the reasoning and basis for its holding. The court recognized that it had jurisdiction of such defendants who prevailed below, but stated:

> In the instant case the verdict and judgment for Clifton [the defendant who prevailed below] was not appealed from by the plaintiff. No motion for new trial was filed as to the judgment entered in favor of Clifton. No cross-appeal was taken. It is therefore conclusively presumed that plaintiff was satisfied with that portion of the jury's verdict. The judgment in favor of Clifton is therefore final unless it is interdependent and inseparably connected with that of the appellants.

Fick v. Herman, 161 Neb. at 117, 72 N.W.2d at 602. "Defendant[s] generally cannot appeal from a judgment in favor of a codefendant, but may appeal where the parties are joint tortfeasors and [an] appellant has a claim for contribution against the codefendant." 4 C.J.S. *Appeal and Error* § 169 at 241 (1993). In the case at hand, it is clear that Albers' claim against Krause is not interdependent with or inseparably connected with Albers' claim against Atlas; nor would Krause have a claim for contribution from Atlas. We therefore dismiss this assignment without considering its merits.

Overruling Krause's Motion for Directed Verdict.

***8** **[9]** Krause moved for a directed verdict at the close of the evidence upon the basis that while the amended petition alleged that Krause failed to install the shingles in accordance with Atlas' installation instructions, those instructions were never received into evidence. This motion was overruled, and Krause's argument alleges that that ruling was error. During Albers' case in chief, a letter from Atlas was received into evidence which stated that a minimum of six nails per shingle needed to be applied along the nail line and that three quarter-sized dabs of asphalt cement needed to be evenly applied to the back of each shingle. The letter stated that failure to follow the aforementioned application instructions would result in shingle loss, that the shingles on the apartments were not applied in such a manner, and that deficiencies in their installation were the cause of the delamination. Fehner testified regarding the roofing industry standards in applying shingles to mansard roofs and attributed the shingle loss on the apartment building primarily to not placing the nails on the nail line. He said that using only four nails per shingle and no adhesive contributed to the

loss. Sheffield, Krause's manager for the job, testified that he knew nails were to be placed on the nail line.

In reviewing a trial court's ruling on a motion for a directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed, and that party is entitled to have every controverted fact resolved in its favor along with the benefit of every inference which can reasonably be deduced from the evidence. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). In treating all of Albers' competent evidence as true and resolving controverted facts in his favor, we find that the trial court properly overruled Krause's motion for a verdict directed in its favor.

Duff as Expert Witness.

[10] Krause also questions Duff's qualifications as an expert, based chiefly on the timeframe of his opinion as compared to the timeframe of his experience in the roofing business. The trial took place around November 1, 2000. Duff graduated from college in 1985 and worked as a teacher and in the insurance business until 1999. He purchased his roofing business from his uncle on May 1, 1999, and he testified that he had done only one mansard roof, using metal shingles because he was more comfortable with them; that he had never purchased shingles from Atlas; and that the only time he had worked with "3–tab laminated shingles" was during his college days. Krause maintains that with this background, Duff was not qualified to render an opinion that it would cost $85,263 to reshingle the apartment complex.

[11] Neb.Rev.Stat. § 27–702 (Reissue 1995) provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." A trial court's ruling to either receive or exclude an expert's testimony that is otherwise relevant will be reversed only when there has been an abuse of discretion. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994).

***9** Duff testified that he worked for the Duff Roofing Company throughout his high school and college years and that he gained experience shingling over that period of time. The company primarily worked in Grand Island. Since becoming the president of the company, Duff worked along with his crew on the job daily and has also prepared bids for those jobs. In assembling the hundreds of bids he has made since purchasing the company, he has taken into account the cost of labor and materials.

Duff also testified about his research of the market history to be able to adjust his estimate of the costs from the timeframe of his experience to the timeframe of when the reshingling would have taken place if it were done within a reasonable time after the breach of contract occurred. Duff explained the factors he considers in making a bid and said that he gets the figure for cost of materials in his bids by using the price quote from a supplier. He also testified that he had personally inspected the apartments at issue approximately four times and had taken measurements of the buildings. He obtained the material and historical labor costs for 1998 and testified, over a foundational objection, that it would cost $85,263 to reshingle the roof. It was also elicited from Duff that Olson Roofing, Inc., had estimated the cost of reshingling the apartments to be around $54,000 to $56,000.

[12] An expert witness may express an opinion based on facts perceived by or made known to him, and if a hypothetical question calling for expert skill or knowledge is framed in such a way as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). Based on our review of the record, we determine that a sufficient foundation was laid for Duff's opinion as to the cost of replacing the shingles in response to the question asking for the cost of reshingling the apartments in 1998 and that Duff had sufficient facts to express a reasonably accurate opinion as to such costs. We thus have no basis for holding that the trial court abused its discretion in allowing Duff to testify as an expert on the cost to replace the roof.

Allowing Amendment of Albers' Petition After Verdict.

[13] Finally, Krause alleges a number of errors relating to the verdict entered against it, to wit, that the verdict was excessive, that it was greater than Albers' "judicial admission" of the cost of repair contained in the pleadings, and that the court erred in allowing Albers to amend the petition to conform to the evidence because the verdict was not supported by the pleadings. In this connection, Krause argues that Albers should not have been allowed to amend his amended petition after trial

because the issue of whether or not Krause had followed Atlas' instructions was the only issue framed in the amended petition and Krause's trial preparation was based upon that allegation.

***10** After the trial, Albers amended the amended petition to allege negligence and breach of contract in Krause's failure to install the shingles in accordance with industry standards.

[14] Section 25–852 provides:

> The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by ... inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of Chapter 25, the court may permit the same to be made conformable thereto by amendment.

The general rule is that an amendment may be made to a pleading at any stage of the proceedings, so long as it does not change the issues nor affect the quantum of proof as to a material fact. *Miller Rubber Products Co. v. Anderson*, 123 Neb. 247, 242 N.W. 449 (1932). The amended petition alleged that Krause failed to fasten the shingles with a minimum of six nails, failed to apply adhesive to the underside of each shingle, and failed to place the nails on the nail line. The added claim in the second amended petition that the shingles were not installed in a workmanlike manner or in accordance with industry standards did not substantially change any claim or defense or the quantum of proof, because those allegations were based on the same, previously alleged actions that Krause failed to take to secure the shingles. The amendment essentially changed the characterization of the facts alleged. The allegations of the second amended petition all arose out of the same occurrence as those contained in the amended petition. Moreover, at trial, Albers presented evidence on what the installation instructions were, evidence that Krause employees knew nails were to be put placed on the nail line, and testimony that the industry standards with respect to shingling mansard roofs were the same as Atlas' instructions. The admission of this evidence was not objected to as contrary to or beyond the issues as framed by the pleadings. In such a situation, the amendment cannot be said to change the issues or affect the quantum of proof as to a material fact.

Significantly, Krause did not object to a jury instruction that was given which stated that Albers claimed Krause breached the contract in failing to install the shingles in accordance with the recommended installation instructions or in accordance with the roofing industry standards and in a workmanlike manner. The effect of the amendments to the petition, other than the increase in damages, was merely to bring the theories pled into accord with the court's instruction to the jury as well as the evidence adduced at trial.

[15] Krause claims that Albers' damages should be limited to $54,389.12, the amount alleged in the amended petition, and that the jury verdict of $70,000 was therefore excessive. The jury's determination of damages will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). Duff testified that the damages in 1998 would have been $85,263, and Krause did not object that this amount exceeded the amount alleged or prayed for by Albers. The jury was free to weigh this expert testimony, and we cannot say that the jury's verdict of $70,000 was excessive.

***11** **[16]** **[17]** **[18]** Krause also points out that the second amended petition changed only the prayer for relief, which is not a part of the allegations of fact, and that the rest of the second amended petition still alleged the cost of repair to be $54,389.12. Krause claims that the allegation of damages was a judicial admission.

> "The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions ... but judicial admissions ... i.e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation on the issues."

Knoell Constr. Co., Inc. v. Hanson, 205 Neb. 305, 309–10, 287 N.W.2d 435, 438 (1980) (quoting *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978), *modified* 202 Neb. 447, 276 N.W.2d 84). Further, in *Cook v. Beermann*, 201 Neb. at 682, 271 N.W.2d at 463, the court stated:

> A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.

Krause did nothing to raise this issue at trial. Evidence of damages in excess of those pled was not objected to when offered, the pleading was not offered in evidence, and no judicial admission was brought to the court's attention until after the trial. While the above rule applies to pleadings that are in effect at that time, "[w]hen a litigant files an amended pleading, the averments of which are inconsistent with the averments in his original pleading, the original is not a judicial admission but competent as an evidentiary admission by a party against his interest." *Saum v. L.R. Foy Constr. Co., Inc.*, 190 Neb. 783, 787–88, 212 N.W.2d 648, 651 (1973). It follows that if an amendment was proper, the amended petition ceased to be a judicial admission. Had Krause raised this issue earlier, the trial court may or may not have allowed the pleading to be amended and the results of the trial might have been different. We cannot speculate on such matters. But, it is unfair to allow a litigant to wait until after a jury verdict is rendered to raise such evidentiary matters.

We are bothered by the fact that with respect to damages, Albers amended his petition to increase the prayer for damages but did not amend the allegations concerning the amount of damages. Whether this error resulted from oversight or lack of an understanding of pleading, we do not know. It seems clear that Albers should have amended the allegations concerning the amount of damages as well as the prayer. The situation is similar to the old case of *Root v. Douglas County*, 105 Neb. 262, 266–67, 180 N.W. 46, 48 (1920), where it was held:

> It does not appear that an amendment of the pleadings to conform to the proof, under section 7712, Rev. St.1913 [§ 25–852], would substantially have changed the plaintiff's claim in this case. Such an amendment would undoubtedly have been allowed by the trial court, had request been made, and the defendants could not have been prejudiced thereby. The issues presented here are, apparently, the same as those presented in the trial below, and, since this matter was treated as within the issues there, it should be so considered now.

***12** Since the trial court allowed Albers to amend the prayer for relief as to the damages, it certainly would have allowed Albers to change the allegations of the amount of damages because such an amendment would have merely made the second amended petition conform to the evidence and the prayer for damages. Krause could not have been prejudiced by such an amendment, and we treat those allegations as claiming the cost of repair to be $85,263. We therefore conclude that the trial court did not abuse its discretion by allowing Albers to amend his amended petition to conform to the evidence and the jury instruction.

CONCLUSION

We conclude that the trial court did not err in any of the several ways claimed by Krause, and therefore, we affirm.

Affirmed.

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