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Arthur A. Nauman v. Harold K. Beecher And Associates, A Utah Corporation, And Harold K. Beecher, An Individual : Brief of Amici Curiae

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR A. NAUMAN,
Plaintiff and Appellant,

— vs. —

HAROLD K. BEECHER AND ASSOCIATES, a Utah Corporation, and HAROLD K. BEECHER, an Individual.
Defendants and Respondents.

Brief of Amici Curiae on

the Utah Chapter of

American Institute of Ar

ALLAN E. MEC
Amici Curiae
351 South State Stre
Salt Lake City, Utah
Telephone: 322-2516

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— vs. —
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Case No. 10609

Brief of Amici Curiae

MAY IT PLEASE THE COURT:

The Amici file this brief on permission of the Court granted, pursuant to Amici's petition, and order of the Court. Amici represent the Utah Chapter of the American Institute of Architects.

The American Institute of Architects is a corporation organized and existing under the laws of the State of New York with its principal administrative and executive offices in Washington, D.C. The Institute is a professional organization of over twenty thousand nine

hundred and seventy eight (20,978) corporate members, all of whom are registered architects. The Association has been in existence for over a century, and its membership includes a majority of the architects registered to practice that profession in the United States. There are 155 Chapters in the 50 states of the Union.

The Utah Chapter was founded in 1921 and currently has 267 members. More than 90% of all resident registered architects practicing in the State of Utah are members of the Utah Chapter of the American Institute of Architects.

STATEMENT OF THE CASE AND REASON FOR INTERCESSION

The plaintiff in this case claims damages against Harold K. Beecher and Associates, Inc., an architectural firm, for personal injuries which he received from the cave-in of an excavation. The plaintiff was employed by Christiansen Brothers, Inc., the prime contractor, which entered into a contract with Salt Lake County and Salt Lake City for the construction of a City-County complex.

The defendant architects were employed under contract by Salt Lake County and Salt Lake City to prepare plans and specifications in connection with the construction. The form of the contract between the joint authority and the architects is similar to such architectural contracts in use throughout the country during 1960 when the defendant architects entered into their agreement with the joint authority.

After hearing the architects' motion to dismiss, the District Court ruled that plaintiff's complaint failed to state a claim against them. This Court in Nauman v. Harold K. Beecher & Associates, 19 Utah 2d 101, 426 P2d 621 (1967), in reversing the lower court's decision held that Nauman's second amended complaint stated a claim against the defendant architects. Through dicta, this Court indicated that if the architects knew or in the exercise of reasonable care should have known the excavation was unsafe, the plaintiff had the right and the corresponding duty to stop the work. Judgment in favor of the plaintiff was granted by the District Court after hearing the case de novo.

The decision of this Court and the District Court in this cause vitally affects the interests of all architects who perform services pursuant to such contracts. Since it represents a majority of the architects in the State of Utah, the Utah Chapter of the American Institute of Architects has sought leave to intervene amici curiae to present certain points and authorities.

THE ARCHITECTS HEREIN HAD NO DUTY TO PRESCRIBE OR TO INTERFERE WITH THE CONTRACTOR'S METHODS OF DOING HIS WORK.

The architect, by contract and by custom, has a definite function and specific role in connection with the planning and drawing of specifications for structures. He is, however, not the contractor and, in fact, the pro-

fessional standards adopted by and enforced by the American Institute of Architects prohibit him from engaging in building contracting.[1]

The instant decision appears to controvert the normal function of the architect in designing and planning structures into a kind of super safety-engineer who guarantees the safety and well being of all persons employed on the project. He is not, and cannot be such a creature for a multitude of practical and economic reasons. It is respectfully submitted that the subject decision strays from established law with respect to the role of an architect in the designing and planning of structures and places upon him a responsibility which is not contemplated by the architect's professional status, by his contract with his employer, or by the laws of Utah and other states which have considered the matter.

The construction industry in Utah like the industry generally throughout the 50 states is founded upon a system of competitive bidding. The usual practice, calls for an architect to prepare plans and specifications, on the basis of which bids are invited and received from contractors. Bids, most often are sought and obtained from a substantial number of contractors to insure that the lowest possible bid is obtained. These contractors, generally speaking, have little flexibility in labor and material bid cost items. What breathes life into the system of competitive bidding is the variety of approaches and construction methods employed by contractors as deter-

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[1] Standards of Profession Practice: "1, 3 an Architect shall not engage in building contracting." (1964)

mined by their equipment, personnel, experience, ingenuity and creativity in the use of such equipment and personnel. It can be seen that the feasibility of doing the work at the bid price depends in large measure upon the contractor's *methods*. His methods are crucial to the entire system. If the owner or the architect were to attempt either to prescribe the methods to be used, or to interfere with the contractor after he had begun to proceed using his methods, the system of competitive bidding would break down and the construction of buildings would be engulfed in a circus-like series of architect-owner-contractor orders and counter-orders. Utter chaos would reign supreme if the contractor gave an order to use certain equipment, personnel and know-how, and his order was countermanded by the architect to use another method of performing the work requiring different equipment, skill, technique and judgment.

The objective of the industry is to erect buildings properly and safely. The contractural relationships which are customarily established and which were present here leave the contractor free to do his work as he sees fit and as he had agreed to do. The architect has a duty to see that the structure which results conforms to contract documents, but he is not a super-contractor and he is not a safety-engineer on the project. Nor is there any evidence that casting the architect in such a role would reduce the hazards which attend construction.

In European countries, no distinction of function is drawn in the construction community between architect and contractor. The individual who plans and designs a

building is the individual who actually builds it. However, there is no evidence to indicate that construction per man hour worked in Europe is any safer than in this country, even though the responsibility for all phases of a given project are centered in one or an association of individuals.

In the construction community in this country the contractor is not answerable to the architect for the safety of the project. The architect is not, at least with respect to the methods of doing the work, intended to function as a protector of the contractor's employees. (In many instances, this would mean that the architect would be required to follow up, check, and correct, the work of the very persons whose own negligence brought about their injuries.)

If the architect is required to be informed about and correct the methods of doing the work employed by the contractor, it would mean that every structure would have to be subject to the architect's review. If this were done, it must be done on every structure — the thousands which are erected without incident as well as the occasional ones where accidents occur. Such a burden upon architects, it is submitted, will destroy the huge construction industry in this country which has functioned well without the imposition of liability upon the architect, and any supposed safety advantage will be disproportionate to the havoc visited upon the system. The confusion which such a pattern of "checks-and-balances" would cause among contractor, architect, and owner, would almost inevitably precipitate more accidents than

it would prevent. That the architect, by contract and custom is not a super safety-engineer on a project, is manifest by the general rule that the duty to "supervise the work" creates a duty merely to see that the structure during construction and upon completion, complies with the plans and specifications. Garden City Floral Co. v. Hunt, 126 Mont. 537, 255 P 2d 352; Day v. U. S. Radiator Corporation, 241 La. 288, 128 So 2d 660; Clinton v. Boehm, 124 N.Y.S. 789, 139 App. Div. 73.

Our research has not revealed a single case in the area, which contravenes the general rule by holding that an architect's "duty to supervise" imposes a corresponding duty to prescribe, and if needs be, interfere with the contractor's methods of doing the work in order to insure safety of operation. Under scrutiny, the cases often cited as supportive of the proposition that the "duty to supervise" broadens the architect's horizon of liability, reveal themselves to be in harmony with the time-honored line of demarcation which renders an architect liable for the negligent preparation of plans and specifications, and for negligent failure to demand strict compliance with plans and specifications, but not for failure to prescribe the contractor's mode of operation. The cases too, are distinguishable on their facts from the case at bar.

Montijo v. Swift 33 Cal. Rptr. 133 (1963) involved an error in the *planning* and *design* of the ultimate structure, in that the handrail ended short of the bottom step and the visual illustration created by the wall tile caused the plaintiff to mistake the last step for the bottom plat-

form. This case has nothing to do with the problem here presented (whether an architect is liable for injury resulting from unsafe construction methods employed by the contractor), because the architect there was negligent in the preparation of the plans and specifications which proximately caused the plaintiff's injury.

Erhart v. Hammonds 232 Ark. 133, 334 S. W. 869 is factually dissimilar to the case for decision for the reason that the defendant architects had by contract accepted complete responsibility for the supervision of construction, a responsibility which Harold K. Beecher & Associates, at no time undertook.

The most salient features of the Erhart case are that the architects requested and received $12,000.00, as an additional fee over and above their architectural fee, for supervision, and that the plans and specifications with respect to the shoring of the deep excavation were prepared in great detail by the architects. The architect's field supervisor drove his car up close to the excavation just as the rain-soaked excavation walls collapsed. Certainly, under those circumstances the architects had actively participated in the very methods of construction which were the subject of the lawsuit. Moreover, as the dissenting opinion makes clear, the liability of the architects was predicated substantially (if not entirely) upon the driving of the automobile up to the edge of the excavation.

In the Nauman case there was no special agreement supported by additional consideration to supervise the work, there were no specifications detailing the shoring

operations to be employed by the contractor other than that he was to comply with all state and city safety regulations. As is customary, the manner and method of excavation were left entirely up to the contractor.

Likewise, Paxton v. Alameda County, 119 Cal. 2d 393, 259 P2d 934 is factually at odds with the case before the Court. There it was pleaded that the architect's plans and specifications were defective in that they provided for sheathing of insufficient strength to support workman. The architect was exhonerated when it was made to appear that the sheathing specifications were adequate in every detail. The county was held liable for the reason that its agents, the architects with knowledge, allowed inferior sheathing to be installed. The pleadings in the case had not charged the architects with failure to adequately supervise and enforce the plans and specifications. But even if the pleadings had so charged, the case would not be precedent for the proposition that a duty to supervise the work requires the architect to supervise, and if needs be, prescribe for the contractor the actual methods for doing the work. The learning from the case is merely that an architect is liable for negligence in failing to require strict compliance with the plans and specifications by the contractor.

It can be seen that the Montijo, Erhart and Paxton cases were all decided along traditional lines of authority. They all hold that an architect is only liable for negligent failure to require strict compliance with plans and specifications and/or for negligence in the actual preparation of plans and specifications.

Perhaps the most recent and celebrated case in the area of architect liability is that of Miller v. DeWitt, 37 Ill 2d 273, 226 N.E. 2d 630 (1967). The Miller case is significantly different from the case at bar because the architects were found guilty of negligence through their failure to properly put the stress factors on the plans. Furthermore, an Illinois statute imposed a duty on architects to require that contractors employ adequate and safe shoring methods in "inherently complex, delicate and hazardous situations." A further distinction in Miller is that the Court found the removal of the prosceuium truss and end columns to be a matter which . . ." was inherently complex, delicate and hazardous." In other words, the statute impressed a duty on the architects under such circumstances to insure that safe shoring methods were employed due to the hazardous nature of the work. No such duty was imposed by statute upon Harold K. Beecher & Associates, nor did the architectural firm make any errors or omissions in the plans and specifications with respect to the excavation.

We invite the Court's attention to the case of Garden City Floral Company v. Hunt (cited above). This was a suit by the owner against the contractor and his surety for damage to a building caused by the negligence of the contractor in excavating in an improper manner, while constructing a new adjoining building for the owner. The defendants contended that the specifications contemplated the employment of an architect to give "full supervision" to the work and that since the architect as the owner's agent had not supervised the method of performing the excavation, the owner would not be

entitled to recover from the defendants. The Court held that this "full supervision" as contemplated by the contract *did not* include any supervision of the contractor's method of performing the work. The Court said at 255 P. 2d 357 of the report:

> "To say that he must supervise the method of doing the work before there is full supervision would place the architect in an entirely different role from that of an architect."
>
> ". . . As a matter of law the courts recognize that an architect merely supervises the results and does not dictate the methods when not controlled by the specifications."

CONCLUSION

The imposition on Harold K. Beecher & Associates, of a duty of continuous supervision of construction methods is neither contemplated by, nor given under the defendant architect's contract with the owner. The instant decision represents a radical departure from the traditional rule that architects are liable only for negligent preparation of plans and specifications or negligence through failure to require strict adherence to the plans and specifications. The departure is unwarranted and will cause ruinous results upon the construction industry and substantial additional expense to the public.

The dissenting opinion in the Miller case sums up the consequences for the public and the industry if the case for decision is affirmed:

> "If the duty of architects is expanded to require that they be on the job at all times and prescribe

methods of construction or be held liable for the negligence of the contractor, they will reflect the added burden in their supervision fees. All of this adds up to an additional and, I think, unnecessary and unwarranted financial burden upon the public without a commensurate benefit."

"The huge construction industry in this country has functioned well without the imposition of liability on architects and engineers who design, but do not build, structures and other facilities. I see no justification for extending the common law to place liability on architects."

THE ARCHITECTS HEREIN ARE NOT LIABLE AS THIRD PARTIES WITHIN THE MEANING OF WORKMEN COMPENSATION LAWS

Section 25-1-62 Utah Code Annotated, 1953, provides inter alia:

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of *another person not in the same employment,* the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person.

As is evident from a reading of section 35-1-62, Utah, like most states through its workmen's compensation laws, subjects third persons outside the employer-employee relationship to common law tort liability, but such subjection to liability only applies to persons *not in the same employment* as the injured employee.

In commenting upon the meaning of "person not in the same employment" this Court in Cook v. Peter Kiewit Construction Company ,15 Utah 2d 20, 386 P2d 616 (1963), said it "*seems plainly designed to apply to strangers to the employment and not to co-workers jointly engaged in the same endeavor.*" In the subject case, plaintiff sued the defendant for injuries sustained while working on a diversion tunnel. Plaintiff was an employee of Coker Construction Company which had a contract with Kiewit to construct the tunnel. Under the contract arrangement Coker and Kiewit agreed to share profits and losses. Defendant contended that plaintiff was in its employ and therefore, it was immune from common law tort liability under the exclusive remedy provision of the Utah Workmen's Compensation Act.

This court in reversing the lower court's refusal to grant defendant's motion for summary judgment held that plaintiff was an employee of the defendant, and as such, defendant was immune from common law tort liability.

Though the court found a joint venture and stated that in a joint venture arrangement "the partnership entity should be regarded as the employing unit; and the employees of both companies as engaged in the same employment," the real basis for decision seems to be that both employers were engaged in a common endeavor. Indeed, the dissenting opinion claimed that the majority placed little reliance on the formal elements of a joint venture in reaching their decision.

Applying the rationale of Kiewit to the case for decision, it would appear that Harold K. Beecher & Associates, and the plaintiff were in the same employment and were co-workers jointly engaged in the same endeavor. The plaintiff's employer, Christiansen Brothers, Inc., and the defendant architects were all working for the joint authority towards a common goal — construction of the City-County complex.

The defendant architects provided the plans and specifications for the project and furnished supervision to see that all materials used conformed to the grade and quality specified and to see that each completed phase of construction met specifications. Christiansen Brothers, Inc., plaintiff's employer, furnished the materials and the labor to place the materials. Under such circumstances can it be said that the architects were strangers to the employment of the plaintiff.

CONCLUSION

The architects respectfully submit that they, under the doctrine of Kiewit, were co-workers with the plaintiff engaged in a common endeavor to construct a City-County complex and therefore, are immune from common law tort liability under the exclusive remedy provision of the Utah Workmen's Compensation Act.

ALLAN E. MECHAM, Esq.
Amici Curiae
351 South State Street
Salt Lake City, Utah 84111
Telephone: 322-2516