1969

Arthur 0. Nauman v. Harold K. Beecher & Associates, A Utah Corporation : Respondent's Brief

Utah Supreme Court

In The Supreme Court of the State of Utah

ARTHUR O. NAUMAN,
Plaintiff-Respondent,

vs.

HAROLD K. BEECHER AND ASSOCIATES A Utah Corporation,
Defendant-Appellant.

RESPONDENT'S

Appeal from the Judgment of the
Court for Salt Lake
Hon. Stewart M.

RONALD C. BARKER
STEPHEN B. NEBEKER
A. LADRU JENSEN
Deseret Building
Attorneys for Defendant
and Appellant

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In The Supreme Court of the State of Utah

ARTHUR O. NAUMAN,
Plaintiff-Respondent,

vs.

HAROLD K. BEECHER AND ASSOCIATES A Utah Corporation,
Defendant-Appellant.

Civil No. 11579

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries sustained from a trench cave-in at the construction site of the Metropolitan Hall of Justice in Salt Lake City, Utah.

DISPOSITION IN LOWER COURT

The Trial Court, sitting without a jury, granted judgment in favor of the Plaintiff against the corporate architect based on the architect's negligence in failing to stop work on the trench until unsafe conditions were remedied.

RELIEF SOUGHT ON APPEAL

Respondent, Arthur Nauman, seeks to have the Trial Court's judgment affirmed.

STATEMENT OF FACTS

The Trial Court, as the determiner of facts, having heard the evidence and observed the demeanor of the witnesses prepared detailed Findings of Fact and Conclusions of Law in support of its decision. On appeal all the evidence and all reasonable inferences fairly to be drawn therefrom must be reviewed most favorably to those findings. If there is substantial evidence furnishing a reasonable basis in support thereof the judgment must be affirmed. **Rummell v. Bailey,** 7 Utah 2d 137, 320 p. 2d 653 (1958); **Lake v. Penders.** 13 Utah 2d 76, 368 P. 2d 593 (1962); **John C. Cutler Association v. D. J. Stores,** 3 Utah 2d 107, 279, P. 2d 700 (1955). Since the Appellant Architect did not present its Statement of Facts in accordance with the above law, Respondent deems it necessary to present the Statement of Facts in full.

The Appellant, Harold K. Beecher and Associates, in 1960 entered into separate but similar agreements with Salt Lake County and Salt Lake City to provide professional architectural services in connection with the proposed construction of a City-County complex (T. 520, 521; Pl Ex. 1). Pursuant to its contracts wiht the public bodies, the Architect agreed to perform architect's professional services consisting of the necessary conferences, the preparation of the working drawings, specifications, the **drafting of the contracts,** and **the general administra-**

tion of the construction project (Pl Ex. 1). The General Administration Section of the contract provided in part that the Architect was to furnish at his own expense a **qualified, on-site inspector during the entire time the constructon work was in progress,** whose duties were to consist of checking all shop drawings, to determine the quality and acceptance o fthe material and/or equipment to be used, and **to supervise and inspect all phases of the work being done.** (Pl Ex. 1-paragraph 7).

Thereafter the Architect in accordance with the above agreements prepared the contract documents for the construction of the Metropolitan Hall of Justice (T. 5; Pl Ex. 2). Those contract documents consisted of the general contract, the general conditions, the special conditions, the drawings and specifications, the instruction to bidders, the notice to creditors, the bid proposal, and the bond. All of the above documents were part of the contract which Salt Lake City, and Salt Lake County entered into with Christiansen Brothers, Inc., the general contractor (Pl Ex. 2).

The specifications were prepared into sections with the general contract, the general conditions, and the special conditions being expressly made applicable to each section of the specifications (P. Ex. 2, paragraph 56-A general conditions). The General Contractor under the contract documents was required to perform in part as follows:

> a) to promptly obey and follow every order or direction given by the architect (paragraph

3 of general contract);

b) to do the work in strict conformity to the drawings, specifications and contract documents (paragraph 11 of general contract);
c) to close down the work and stop all operations upon written notice from the architect that conditions were dangerous (paragraph 12a of general contract);

d) to maintain his work in a clean and safe condition during the entire performance of the contract (paragraph 15a general contract);
e) to take all necessary precautions for the safety of the public employees on the work and to comply with all applicable provisions of Federal, State and Municipal Safety Laws and Building codes to prevent accidents or injury to persons on the premises where the work is being performed and to erect and maintain all necessary safeguards for the protection of the public and workmen (paragraph 1b of the Special Conditions Section of the Contract);
f) to provide adequate sheet piling to safeguard life and property when earth banks are to deep or are too steep (Section 2, page 2 of the Specifications on Excavations).

The Construction Contract expressly provided that the Architect, as the representative of both the City and County, was in charge of directing supervision of construction (Pl Ex. 2—paragraph 56-A, General Conditions). The Architect, Harold K. Beecher and Associates, had in part the following rights and powers under the contract documents:

a) The architect was in charge of directing supervision of construction (paragraph 56a of

general conditions);

b) the architect had the right to inspect and reject all work and materials and the manufacture of such materials from the beginning of construction until the final completion and acceptance of the work (paragraph 3 of general contract);

c) the architect had the right to assign such assistance as necessary to inspect the materials to be furnished and the work to be done under the contract to see the same strictly conformed to the specifications (paragraph 3a of the general contract);

d) the architect had the right to give orders to the Contractor, his superintendent, and Foreman, who were required to promptly obey and follow (paragraph 3c of the general contract):

e) the architect had the right to close down the work due to circumstances arising during the progress of the work which might be construed to be dangerous or that may be caused by noncompliance with the specifications, upon written notice and the work was to remain closed down until further orders were given in writing by said architect (paragraph 12a of general contract);

f) the architect had the right to direct the contractor to suspend, remove, or reconstruct, or make good without charge any work which the architect may consider to be defectively executed (paragraph 14 of general contract);

That as part of this construction project it was necessary to first excavate a trench approximately 900 feet long in order to install a utility tunnel con-

necting the new boiler room to the old City-County complex (T. 523, 771). The corporate architect hired Johnathan H. Tucker as its qualified, on-site inspector and job representative (T. 522, 523). The President of the Corporate Architect was Harold K. Beecher who was a licensed architect and a member of the American Institute of Architects (T. 534). Both Harold K. Beecher and Johnathan H. Tucker on behalf of the corporate architect had considerable experience with the excavation of deep banks (T. 962; Pl Ex. 52 Tucker's 1st Deposition—pages 5, 10, 14). At the time of trial Mr. Tucker was living in California and because of his absence both of his depositions were admitted into evidence as if Mr. Tucker had been present and had testified (T. 601, 1117; Pl. Ex. 52, 53). Mr. Harry F. Butcher was the project representative for Salt Lake City and Salt Lake County during the course of construction (T. 525). Mr. Butcher's duties included the job of inspecting to see if things were done according to the plans and specifications called for (T. 538). Wally Christiansen, the Vice-President of Christiansen Brothers Construction, Inc., was the project manager on the Metropolitan Hall of Justice project in charge of the entire project for the general contractor (T. 770, 772).

The excavation for the east-west utility tunnel began approximately the first part of September, 1963, and proceeded westerly across 2nd East over to the old City-County Building (T. 538, 539; Pl Ex. 53 p. 13). The trench was approximately 20 to 23 feet deep as it proceeded west of 2nd East (T. 541,

666). As the excavation and tunnel work proceeded, Mr. Harry F. Butcher representing the City Engineer's office and Mr. Johnathan Tucker the qualified representative and on-site inspector for the corporate architect occupied a joint office and worked closely together (T. 536; Pl Ex. 53 p. 9). Both Mr. Butcher and Mr. Tucker saw the utility tunnel trench on many occasions both prior to and after the accident (T. 542; Pl Ex. 15, 20). Mr. Tucker on behalf of the architect prepared written daily reports which he submitted to Harold K. Beecher on behalf of the corporate architect (T. 524, Pl Ex. 8). Mr. Tucker and Mr. Beecher, both representatives of the architect, had almost daily contact and conversations regarding the progress of the work (T. 524). During the progress of construction Mr. Harold Beecher, who admittedly had considerable experience in excavating deep banks, visited the construction site several times a week, every week (T. 534, 962).

Mr. Tucker testified that he observed the excavation of the trench as it progressed every day and that a safety line for the normal slope of the trench for safety purposes was never established (Pl Ex. 52, p. 20). The trench was nearly perpendicular except for about 3 feet at the top (Pl Ex. 25, P. 20). The standard safety slope for trench excavations, according to Mr. Tucker as well as the provisions contained in Section 69 of the Utah General Safety Orders applicable to trenches on that project, should be one-foot back on each side for every two feet of depth (Pl Ex. 52, p. 13; Pl Ex. 25, Pl Ex. 51). Mr. Tucker testified that he complained to Wally Chris-

tiansen nearly every day concerning the condition of the walls of the excavation in the utility tunnel trench due to the lack of slope or shoring (Pl Ex. 53 p. 22, 27). Wally Christiansen told Tucker it would cost too much money to haul dirt away and then have to back-fill afterwards if they sloped, therefore, he wanted to keep the trench to a minimum (Pl Ex. 52, p. 24, 67; Pl Ex. 53 P. 40).

In the middle of September of 1963, Mr. Casper Nelson, a member of the Utah Industrial Commission, who was directly in charge of the safety division, sent Mr. John Holmes, a state safety inspector, down to inspect the entire project because of complaints he had received from one of the inspectors on the job (T. 624, 625, 626). On September 16, 1963, Mr. John Holmes arrived on the project and observed the east-west utility excavation area to be dangerous in that the walls were vertical and were not supported by any shoring (T. 612, 615). The area of the trench where he observed these unsafe conditions was approximately along the sidewalk on the west side of Second East (T. 613). Mr. Holmes at that time talked to the foreman of Christiansen and ordered them to begin shoring the ground and to live up to state regulations (T. 613). At trial when asked if he had ever seen the shoring that he had ordered them to install, Mr. Holmes testified "I didn't see it completed." (T. 614). Holmes again inspected the tunnel area on September 18, 1963, but Christiansen Brother's men were not working at that time (T. 617). Holmes again inspected the trench area on October 4, 1963, but no work was going on

in the west end of the trench (T. 619). Mr. Casper Nelson testified that in the latter part of September after Mr. Holmes had made his first few visits he personally inspected the trench area and observed no shoring at all in the trench (T. 626, 627, 635).

On September 25, 1963, a meeting was held on the project involving the subject of general safety on the job. Mr. Beecher and Mr. Tucker both employees of the corporate architect were present as well as men representing the contractor and the city (T. 554, 555). All of those present with the exception of the general contractor's representative indicated that things were not being done correctly (T. 557). Rolf Christiansen in that meeting told Beecher to leave him alone and he would build the job (T. 557). That same day a letter was sent to Christiansen Bros., Inc. from Harold K. Beecher on behalf of the corporate architect notifying the contractor that it had not complied with the requirements of the specifications for the Public Safety and Jail Building to safeguard life and property and urging the contractor to correct all unsafe conditions (Pl Ex. 52 P. 46, 47 and exhibit 8 attached thereto).

Thereafter on September 27, 1963, Christiansen Brothers Incorporated forwarded a written letter to the corporate architect acknowledging receipt of the letter dated September 25, 1963, and denying that there existed any abnormal hazardous condition on the project and asking for more specific information as to where the alleged violations existed (Pl Ex. 52 —exhibit No. 4 attached thereto). Thereafter on Sep-

temebr 30, 1963, Johnathan Tucker on behalf of the architect and Harry Butcher, the project engineer, sent a letter to Christiansen Brothers indicating that the excavated area for the east-west utility tunnel required additional safety measures to comply with the City, County, and State requirements (T. 552; Pl Ex. 10).

According to Johnathan H. Tucker, work stopped in that area for about two weeks because Christiansen Brothers, Inc. wanted to stop there until spring, but work was resumed thereafter since Beecher wanted the contractor to continue to the end before winter. (Pl Ex. 53 p. 30). Mr. Tucker indicated that during the time the job was stopped there were cave-ins in the trench which could have buried men if they had been working in the trench (Pl Ex. 53 p. 52). According to the Architect's daily inspection reports on October 2, 1963, Mr. Joe Ruben, an employee of the architect, took pictures of the bank cave-ins, one of which was at the west section of the utility tunnel near the old City Hall (Pl Ex. 8, 34). Mr. Tucker's inspection daily report sheet for October 10, 1963, indicated that clean-up work was performed at the tunnel (Pl Ex. 8). The October 10, 1963, daily report sheet prepared by Wally Christiansen indicates that on that date the contractor had a dragline on the east-west utility tunnel project and was hauling clay away and cleaning out the tunnel that caved in when rain and flood came (Pl Ex. 37). According to the daily report sheets prepared by Mr. Tucker, the architect's representative, excavation work was performed in the east-west

tunnel area on October 11, 1963, and October 15, 1963 (Pl Ex. 8). The daily report dated October 15, 1963, indicated that Harold K. Beecher visited the job on that date and made an inspection of the excavations with Mr. Butcher (Pl Ex. 8).

On October 16, 1963, Art Nauman, the respondent, was brought on the project for the first time for the purpose of finishing the construction of the tunnel that had been started west of the Second East Road (T. 652). Tucker testified that despite complaints made to Wally by him regarding failure to comply with safety regulations, the trench on October 16, 1963, was still in an unsafe condition since Wally had no shoring west of the end of the tunnel (Pl Ex. 52 p. 50). Mr. Nauman had only worked on two trench excavations prior to that which were only 6 or 7 feet in depth (T. 691). Nauman in his experience as a carpenter had never worked in such a confined area, with the depth and water which the utility tunnel excavation had (T. 665). Nauman had likewise never supervised or done any labor on shoring the walls of an excavation; he had only done some shoring against concrete forms (T. 666).

The trench in that area on October 16, 1963, was full of water and mud requiring Mr. Nauman to spend much of the day pumping water out (Pl Ex. 53 p. 58). That morning Mr. Nauman met with Wally Christiansen the project manager who told him that he had received some complaints about sloping from the inspectors which were overly exaggerated (T. 679). Wally told Art Nauman that the sloping was sufficient, that he couldn't afford to slope it any

more than it was already and he would have to rely on shoring (T. 679). Wally further told Mr. Nauman that he couldn't taper in the area of the trench where the light pole existed, since the city wouldn't let them remove it (T. 654). At trial Harry Butcher denied the fact that Wally had asked him, or Roy McLeese, the city engineer, or Woody Walton, or Joe Fenton, city employees, for permission to remove the light pole (T. 592). He stated if they wanted to remove it all they had to do was pay for it (T. 592). John Tucker testified he had requested Wally to remove the light pole, but Wally refused because he didn't want to hire any electricians (Pl Ex. 53 P. 59). According to Tucker it was Wally's responsibility (Pl Ex. 53, p. 59). Thereafter Wally took Mr. Nauman to find a sewer leak so it could be repaired. (T. 657). Wally also introduced Nauman to the clam shovel operator who was told to help Nauman in regard to the sewer line leak and to prepare the excavation in the trench for gravel which had been ordered for that morning (T. 167). The gravel, which was not ordered by Mr. Nauman, arrived about 10:00 that morning and was to be used as a leveling base for the rough floor under the tunnel (T. 659, 660). As Mr. Nauman was being shown the job by Wally Christiansen, he noticed two laborers who were working in the trench (T. 657). One of the laborers was working behind the forms that extended from the poured portion of the tunnel (T. 657). Mr. Nauman spent the rest of the day pumping water out of the excavation, leveling the gravel, finding and exposing the sewer line leak, and putting up barricades around the job (T. 660, 661).

That on the morning of October 17, 1963, when Mr. Nauman arrived on the job and went to the excavation there were four laborers already in the trench (T. 696). Mr. Nauman had set up his surveyors level approximately 8 feet from the end of the existing tunnel and was taking grade shots when the cave-in occurred just 30 or 45 minutes after he had arrived at the excavation (T. 663, 664). At trial the Defendant, through counsel, stipulated that Mr. Nauman received serious, permanent injuries as a result of the above accident (T. 649). Mr. Nauman's neck was broken rendering him quadriplegic.

Both Johnathan Tucker, representing the architect, and Harry Butcher were present near the scene of the cave-in on the morning of October 17, 1963, just minutes prior to the tragedy (T. 561; Pl Ex. p. 67). Butcher testified that he saw several men in the trench spreading gravel with hand shovels (T. 562). When asked if he observed the walls at that time, Butcher testified that the walls were like they always were, straight up and down, except at the top where it was sloped a little (T. 563). Butcher testified that he noticed a bulge on the south bank approximately eight to ten feet from the end of the tunnel (T. 563). When asked if he and Tucker discussed anything about the bulge, he stated, no (T. 568). Tucker testified that just minutes prior to the cave-in he inspected the area and observed some loose dirt up under the base of the light pole (Pl Ex. 53 p. 59). It is important to note that Joe Ruben made the remark to Tucker that he did not consider the conditions around the light pole safe (Pl Ex. 53 p. 62). Tucker

stated that he agreed with Ruben that it was not safe and should be removed (Pl Ex. 53 p. 62). Tucker stated that he and Butcher had just turned to go back to the field office to hunt for Wally to complain about the light pole when they were told "A man has been buried." (Pl Ex. 53 p. 63). Tucker testified that when he went back to the scene of the cave-in he observed that the loose earth that was up by the light pole was down in the hole (Pl Ex. 53 p. 65).

Both Mr. Tucker and Mr. Beecher on behalf of the corporate architect at least five times went together and complained to Wally Christiansen relative to the hazardous condition of the excavation in the east-west tunnel area (Pl Ex. 52 p. 34). Tucker testified that he never received any order from Mr. Beecher or any other employee of the architect telling him to stop the work until the hazardous conditions were corrected (Pl Ex. 52 p. 36). Tucker stated that if any stop-work orders were issued prior to the cave-in, ithat the daily reports would reflect it (pl Ex. 52 p. 36). None of the daily reports indicate any such order.

At trial, Nauman testified that the excavation was approximately 15 feet wide at the base, 21 feet deep, and 20 feet wide at the top (T. 665, 666). At Tucker's first deposition, he identified a picture taken ½ hour after the cave-in of the trench where Nauman was injured which fairly well represented the contours of the trench and the conditions that existed on the morning of October 17, 1963, (Pl Ex. 52 p. 44; and attached exhibit No. 6). A copy of this same picture is attached to the last page of this

brief. Joe L. Ulibarri, an eye witness to the cave-in, who was just ten feet away at the time it occurred testified that the walls were straight up and down on the south side (T. 535). Casper Nelson, the Industrial Commissioner, testified he went down on the project that day after being informed a man had been injured (T. 629). Mr. Nelson, when asked to describe the general conditions, testified that the walls were real verticle, rather than irregular, and that he found no horizontal supports across the excavation west of the end of the utility tunnel (T. 680, 681).

ANSWER TO POINT ONE

THE RECORD IS FULL OF COMPETENT EVIDENCE FROM WHICH THE TRIER OF FACT COULD FIND THE ARCHITECT WAS NEGLIGENT.

The Appellant erroneously contends that this is one of those rare causes of action in which liability can only be predicated upon expert testimony of other architects. Such an argument totally ignores the fact that there was competent testimony of other architects as well as Appellant's own on-site inspector, plus the stafe safety inspectors, upon which the Court could find the Appellant was negligent. Furthermore, none of the authorities cited by Appellant involve the architects liability based on its supervisory undertaking. Instead, they all relate to an architects liability based upon defects in plans or specifications which obviously would require some expert testimony from an architect. In this case,

however, recovery is based upon the failure of the architect who had undertaken for a price to supervise job performance, to see that work was done safely. Under this theory, questions involving safety and notice thereof in construction were not matters which architects were the only ones competent to testify on.

The Court, in **Paxton v. Alameda County,** 259 P. 2d 934 (Ca. App. 1953), recognized this distinction between an architect's liability based upon defects in plans and specifications and the architect's liability in its supervisory capacity. In that case suit was brought against both the County which was constructing the building, and the architect. The only allegation of negligence against the architect involved his negligence in preparing the plans and specifications. The Trial Court found for the Plaintiff against both defendants. On appeal, the Court after weighing the expert testimony held that the evidence did not sustain the verdict of the jury that the architect was negligent in preparing the plans and specifications but found against the County under the theory that the County was liable because of the negligent supervision of its agent, the architect. The Court made it quite clear that had the Plaintiff added a count against the architect based upon its negligent supervision the jury could have found the architect was negligent for not making another inspection.

The Appellant agreed with the public bodies to furnish at its own expense a "qualified" on-site inspector during the entire time the construction work

was in progress to supervise and inspect all phases of the work being done Pl Ex. 1). Johnathan H. Tucker was this "qualified on-site inspector" employed by the architect. Mr. Tucker's work record indicates that he had been general superintendent for several large construction companies and had been in full charge of heavy construction for a number of years. That experience included being in charge of several excavations. The testimony contained in Mr. Tucker's two depositions, both of which were admitted into evidence, standing alone is sufficient, competent evidence from which the trier of fact could conclude the architect was negligent. In support thereof we refer the Court to the numerous references to Tucker's testimony contained in Respondent's Statement of Facts, which clearly establishes that a dangerous condition did exist, that the architect knew of this condition, and that the architect took no steps to correct the danger. Tucker's testimony indicates that he as the architect's on-site inspector and job representative watched the excavation of the trench as it progressed every day. According to Tucker, Joe Ruben, who was an architect as well as an employee of the Appellant, admitted to him prior to the cave-in that the area around the light post didn't look safe (Pl Ex. 53 p. 62). Tucker also testified that despite the fact he had requested Wally to remove it, Wally refused because he would have to hire electricians (Pl Ex. 53 p. 59). In addition to the above, Tucker identified the picture marked exhibit P-6 as one accurately representing the conditions that existed in the trench at the time the cave-in occured. (Pl Ex. 52,

p. 45 picture No. 6 attached thereto). That picture (a copy of which is attached to the last page of this brief) clearly indicates that the trench was not sloped nor shored in the area where the cave-in occurred. Casper Nelson, the Industrial Commissioner in charge of the safety division viewed the accident scene the day of the cave-in and testified that the walls appeared real vertical and were without shoring west of the tunnel. Mr. Nelson, who was also a member of the American Society of Safety Engineers, further indicated that the Utah General Safety Orders for Utah Industries other than mining as well as the American Standard Safety Code for Building Construction were State Safety Codes applicable to that project. According to Mr. Nelson, the American Standard Safety Code is recognized as the Bible for safety standards in the building industry. Both of the above safety codes were expressly made a part of the constructon contract, and both required either sloping or shoring (Pl Ex. 2 paragraph 1b special conditions; Pl Ex. 25, 26, 50).

It is important to note the American Standard Safety Code for Building Construction represents a consensus of a number of combined interests groups as to the present thinking in the field of safety. **The American Institute of Architects,** the American Society of Civil Engineers, the National Safety Council, and **the Associated General Contractors of America** are but a few of the organizations that sponsored this particular safety code. The minimum requirements pertaining to excavation and trenches contained in that code provided illustrative evi-

dence of safety practices or rules generally prevailing in the industry. Failure to comply with these generally recognized safe practices in the industry was competent evidence for the finder of fact to weigh with other factors in determining the issue of negligence.

Harry Butcher, the project engineer who also inspected the job along with Tucker, testified that he was in the area with Tucker when the cave-in occurred just minutes before and noticed that the walls were straight up and down (T. 563). Joe L. Ulibarri an employee of the contractor who was working just ten feet from the area when the cave-in occurred likewise testified that the walls were straight up and down (T. 535). Edwin M. Schneider, another employee of the general contractor, testified that just minutes after the cave-in, he went to the scene and observed no shoring west of the end of the tunnel (T. 605). In addition to that, Mr. Evan Ashby, the dragline operator who helped in rescue efforts testified that he was ordered to place his dragline bucket in such a position so that if there were any additional cave-ins, the bucket would take their impact. (T. 884).

Harold K. Beecher's testimony indicated that Wally Christiansen, the contractor's man in charge, had not been cooperative with respect to the safety on the job (T. 998). We refer the Court to Pl Ex. 47 wherein Mr. Beecher on behalf of the corporate architect admitted, in writing, a few days after the cave-in that there had been an extreme lack of co-

operation and belligerent attitude that the contractor, Christiansen Bros. Incorporated had taken from the beginning of construction to October 17, the date of the accident at the tunnel cave-in. Mr. Beecher, President of the Appellant, took the position at trial that the architect's liability in its supervisory capacity should be limited to a duty to see that the project was constructed in accordance with the plans and specifications and that it should have no rights or responsibilities with regard to safety on the job (T. 1022, 1023). Mr. Beecher further testified that he did not think he had authority to stop work if he saw an unsafe condition on the job (T. 1021). In addition to that, the Appellant in its answer to Plaintiff's second amended complaint expressly denied it undertook to enforce the safety regulations and procedures for the protection of workmen on that project (T. 221 p. 4).

One need only review the record to see that the Appellant's entire defense at trial was made up of interested witnesses, in the form of architects, who did not feel that they should be responsible for safety. Of the four architects who testified for the Appellant, two were employees of that corporation at the time of the cave-in, and the other two were members of the American Institute of Architects who had never seen the trench, except from pictures. All four based their conclusion that the trench was safe on the erroneous assumption that the trench was properly sloped in compliance with the Utah Industrial Commission Safety Orders. It is basic law that the testimony of such experts is worth no more

than the reasons they give. In the instant case the weight of the evidence established that the walls were vertical and not sloped nor shored. The trial court was not bound to accept the second-hand unsupported opinions of those architects who had never seen the trench, except by photographs, and reject the direct testimony of those witnesses who were present and personally observed the conditions for themselves as they existed on that project.

There was plenty of competent evidence in the form of testimony, photographs, daily reports, letters, and safety codes from which the trial court might clearly find defendant was negligent in failing to see that the work was carried on in a safe manner.

ANSWER TO POINT TWO

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE FINDER OF FACTS COULD REASONABLY CONCLUDE NAUMAN WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

The burden of pleading and proving contributory negligence is upon the defendant and if the evidence is such as to permit reasonable minds to differ as to whether a person is guilty of contributory negligence the question is one for the finder of fact. The Court in **Hindmarsh v. O. P. Skaggs Foodliner,** 21 Utah 2d 413, 446 P. 2d 410 (1968) referred to the above principles of judicial review when faced with the question whether the Plaintiff was guilty of contributory negligence as a matter of law. In that case

the court further indicated that there must be allowed considerable latitude in which the reasoning of the fact finder can operate and draw its conclusion even though those conclusions may be different from that which the Court on appeal would have decided. The Appellant, in contending that if the excavation was dangerous then Nauman was contributory negligent as a matter of law, literally ignores such important evidenciary factors as whether or not Mr. Nauman knew or should have known of the danger, his experience, the fact he had only worked in the trench a portion of one day, and whether or not Mr. Nauman was warned by anyone of the dangerous conditions that existed.

The mere naked finding that a dangerous condition exists does not constitute sufficient evidence to establish contributory negligence without first showing that an ordinary reasonable person knew or should have known of the danger. See **Baker vs. Decker,** 117 Utah 15, 212 P. 2d 679 (1949) where the Court indicated that mere knowledge that a walk was in a dangerous condition did not constitute evidence to establish contributory negilgence. The Court in **Rogalski vs. Phillips Petroleum Co.,** 3 Utah 2d 203, 282 P. 2d 304 (1955) similarly indicated that one couid not be held guilty of contributory negligence as a matter of law, if it appeared that he had no knowledge of the danger. It is important to note that Mr. Nauman when injured was engaged in carrying out the orders of Wally Christiansen, the project manager. The records show that Mr. Nauman had only worked on two jobs which had trench

excavations prior to the cave-in (T. 691). Nauman further testified that in his experience as a carpenter, he had never worked in such confined areas and he further noted that he likewise had never supervised or done any labor or shoring on the walls of an excavation (T. 665, 666). Nauman was told by Wally Christiansen the first morning at work that the complaints about sloping from the inspectors were overly exaggerated (T. 679). Nauman was told that the sloping as it existed was sufficient and that the contractor couldn't afford to slope it anymore than it already had been (T. 679). The evidence further indicates that Mr. Nauman during his short exposure to the project was required to carry out several different errands for the contractor and obviously was not able to concentrate all his time without distraction on the conditions existing in the trench. Nauman spent much of his time finding and exposing a sewer line leak, pumping water out of the excavation, leveling gravel, and putting up barricades (T. 660, 661). According to Nauman's undisputed testimony, he thought the excavation was safe for the type of work he was doing at the time (T. 696).

The Appellant's contention that Mr. Nauman knew this portion of the work had been shut down because of unsafe conditions and was specifically directed to be careful and safe is not supported by the evidence. The architect's on-site inspector, Johnathan Tucker, could not remember of any stop-work orders being issued because of safety on that project. (Pl Ex. 52, p. 36). He indicated that if any said stop-work orders had been issued,

the daily reports would indicate so. The daily reports are absent any indication of a stop-work order. According to the testimony at trial, Nauman was unaware that a portion of the work had been shut down because the previous foreman had not safely directed the work (T. 673, 703, 705). All Mr. Nauman understood at the time was that there had been a lapse of time in regard to the work done on the utility tunnel trench.

Wally Christiansen when asked at trial if he said anything to Mr. Nauman about safety or safety precautions on the job stated in substance and effect that he couldn't remember exactly whether he did or didn't (T. 801). Christiansen also testified that he couldn't recall whether he or Nauman discussed the subject of shoring when he went into the excavation on October 16, 1963 (T. 803).

The Defendant has without question failed in its burden of proof to show that the defects were of such an obviously dangerous character that Mr. Nauman under the circumstances was contributorily negligent as a matter of law. We find it difficult to see how the appellant on the one hand can argue that it as well as the general contractor, and all the appellant's witnesses, with all their combined expertise, considered the trench to be safe and on the other hand change hats and contend the unwarned, unexperienced man who had only worked in that trench for a portion of one day knew or should have known. The evidence is clear that when Nauman was injured, he was engaged in carrying out the

orders of his supervisor, Wally Christiansen. When you combine 1) the fact that Mr. Nauman had relatively no experience in excavation work; with 2) Nauman's short period of exposure to this job; with, 3) the fact that Mr. Nauman was not warned of the dangers including the fact that continual complaints had been made about safety on that particular excavation, together; with, 4) the fact that there had been prior cave-ins large enough that men could have be been buried, it becomes clear that there was sufficient evidence from which reasonable minds might conclude that Mr. Nauman was not guilty of contributory negligence. The defendant, who had the burden on this issue contributed nothing by way of proof to take the issue of contributory negligence out of the realm of fact, for determination as a matter of law.

ANSWER TO POINT THREE

THIS COURT IN THE PREVIOUS APPEAL HAS ALREADY RULED THAT PLAINTIFF'S ACTION WAS NOT BARRED BY THE PROVISIONS OF UTAH CODE ANN. 35-1-42 (1953 AS AMENDED).

The Appellant unsuccessfully devoted a total of 8 pages in its brief on the first appeal of this case to the argument that Mr. Nauman's exclusive remedy was workman's compensation. The case of **Cook v. Peter Kiewit Sons Co.**, 15 Utah 2d 20, 386 P. 2d 616 (1963), was relied upon heavily in that appeal just as it is being argued here. We are not aware of any change in the law regarding workman's compensa-

tion which requires a different decision on this appeal. We submit that the prior decision, in which the Court held that Plaintiff's complaint stated a cause of action against the architect, should be binding here. **Nauman v. Beecher** 19 Utah 2d 101, 426 P. 2d 621 (1967).

On page 26 of Appellant's Brief it is argued that under Utah Code Ann. S. 35-1-42, (1953 as amended) that the right to superivse and control is the only element necessary in order to establish an employment situation. We disagree. The right to supervise and control, although important factors in determining whether or not an employment situation exists, must necessarily have combined with its a showing that "such work is a part or process in the trade or business of the employer". The relevant section of the above statute referred to by Appellant together with that part of the statute which Appellant fails to consider reads as follows:

> ". . . Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, **and such work is a part or process in the trade or business of the employer,** such contractor, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor," as herein used, is

> defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design."

This question has been considered by the Utah Supreme Court on several occasions. In **Anderson v. Last Chance Ranch Company,** 63 Utah 551, 228 P. 184, the Court made it quite clear that the general business of the employer was a controlling factor in determining the nature of employment and the right to compensation. In that case the Court denied workman's compensation to a carpenter's helper who had been employed by the ranch company to build a house on the ranch. The reason given was that the ranch company was engaged in the farming business not construction which was merely incidental to said business. In **Murray v. Wasatch Grading Company,** 73 Utah 430, 274 P. 940 (1929), the Court again looked to the general business of the employer. Plaintiff in that case an employee of the railroad company but was injured while helping the defendant contractor whose job it was to clear debris from the railroad tracks. On appeal the Plaintiff's third party action against the contractor was denied. The Court on review, looked to a statute almost identical to 35-1-42 and found that since the Plaintiff was doing work for the contractor,

which work was the business occupation of the contractor, the Plaintiff was therefore an employee of the contractor, despite the fact he was also an employer of the railroad company. The case of **Cook v. Peter Kiewit Sons Co.,** supra, (1957), although not specifically addressing itself to 35-1-42 does indicate and recognize that the work being performed by the employee must be a part or process in the trade or business of the employer. In that case both the Plaintiff's employer and the Defendant agreed to unite their efforts to complete a tunnel by sharing profits and losses. Both were regarded as one employing unit and the employees of both companies were treated as engaged in the same employment. The Court based its reasonings on the fact that 1) the Defendant had as much control over Plaintiff as he did his own immediate employees and because 2) the work which was being performed by the Plaintiff was for the joint venture which work included the trade or business of the joint venture. The case of **Gallegos v. Stringham,** 21 Utah 2d 139, 442 P. 2d 31 (1968), presents the most recent consideration of the statute by the Utah Supreme Court. In that case the defendant truck owner wholly agreed to furnish the truck including the driver to Gibbons & Reed Company in connection with Gibbons & Reed's contract to lower the grade of the street. The expenses in connection with the use of the truck were borne by the Defendant truck owner who was paid hourly by Gibbons & Reed for the use of the truck. During the course of the job, the Plaintiff, an employee of Gibbons & Reed Company,

was injured by the defendant. The Court, in declaring defendant was an employee of Gibbons & Reed, gave the following reasons which are certainly appropos here:

> "In the instant case, Gibbons & Reed had full control of defendants truck and directed the driver, whether it was Stringham or his employee. **The work done by the Defendant and his truck was the very work being performed by Gibbons & Reed Company pursuant to its contract with Ogden City."**

It is obvious from the above decisions as well as from the express language contained in 35-1-42, that the mere right to supervise and control without first establishing that the work done is a part or process in the trade or business of the employer is not enough to bring one's work within the purview of the workman's compensation act. In the instant case the public bodies procured worked to be done for it by Christiansen Bros., an independant contractor. Since the work of Christiansen Bros. involved the business of construction and was not part or process in the trade or business of the public bodies, the language regarding same employment found in Section 35-1-42 is not applicable. The case of **Cook v. Peter Kiewitt Sons Co.,** supra, which Appellant relies heavily on can easily be distinguished. In that case, the Plaintiff's employer and the defendant were engaged in a joint venture, they were sharing profits and losses, the employees of both employers were under the control of both employers,

and the work being performed by both the Plaintiff's employer and defendant as well as their employees was work which included the trade or business of the joint venture. In the instant case, however, the architect and Christiansen's Bros. were not engaged in a joint venture, they were not sharing profits and losses, the work done by the general contractor was not a part or process in the trade or business of ether the public bodies or the architect, and last but not least the element of control is lacking since the architect had no right to interfere with the contractor's execution of the work providing it was being carried on in a safe manner. See **Nauman v. Harold K. Beecher & Associates,** supra (1967).

ANSWER TO POINT FOUR

SINCE REASONABLE MINDS COULD HONESTLY CONCLUDE THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE EVIDENCE, THE RULING OF THE TRIAL COURT SHOULD BE SUSTAINED.

The Court in **DeVas v. Nobel,** 13 Utah 2d 133, 369 P. 2d 290 (1962), in addressing itself to the question whether the Trial Court was obliged to make the finding demanded by the defendants, set forth the following principles of review which should be applied:

> ". . . In order to compel such a finding it is necessary that the evidence concerning the fact in question be of sufficient quality and substance to support a finding that it is true, but

> it must go beyond that and be such that all reasonable minds would so conclude."

Appellant's contention that findings No. 13, 15, 16, and 18, were not supported by the evidence is without merit. In support thereof we incorporate, by reference, the evidence referred to in Respondent's Statement of Facts, as well as the Answers to Appellant's first three points. Since the evidence concerning the facts as presented by Appellant was not of such "sufficient quality and substance that all reasonable minds would so conclude", the ruling of the Trial Court should be sustained.

CONCLUSION

The evidence, taken in its entirety, leads solely to the conclusion that Appellant undertook for a price to inspect and supervise all phases of the work being done. An aspect of that undertaking involved the safety of persons upon the construction site. The architect's specifications and contracts included safety. For more than two weeks prior to the "cave-in" the Architect had knowledge that the trench was unsafe due to water problems, prior large cave-ins, and due to the failure of the contractor to slope or shore. Under these circumstances a duty devolved upon the architect to stop work on the project until the contractor had properly sloped or shored in such a manner as to make the excavation a safe place to work. See **Nauman v. Harold K. Beecher and Associates,** supra; **Erhart v. Hammonds,** 232 Ark.133, 134 S.W.2d 869; **Miller v. De Witt,** 59 Ill. App.2d 38; 208

N.E.2d 249; **Miller v. DeWitt,** (Ill. Sup. Ct.); **Paxton v. Alameda County,** supra.

The ad terrorem appeal by amicus curiae that utter chaos in the construction industry will result if architects are held to the standard of due care is fanciful. If the architects will perform their function with due care, as must everyone else under our law, there will be less accident liability. We reject the faulted logic of amicus that the entire architectural industry is on trial here. It might not be an overstatement to suggest, however, that the modi operandi of some of its practitioners are.

Respectfully submitted

DONN E. CASSITY
EUGENE H. DAVIS
FORD G. SCALLEY

Attorneys for Respondent