1969

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

Utah Supreme Court

IN THE SUPREME COU
OF THE STATE OF UT

ARTHUR O. NAUMAN,

vs.

HAROLD K. BEECHER AND ASS
a Utah Corporation,

RESPONDENT'S
PETITION FOR

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR O. NAUMAN,
Plaintiff,

vs.

HAROLD K. BEECHER AND ASSOCIATES, a Utah Corporation,
Defendant

Case No. 11579

RESPONDENT'S BRIEF ON REHEARING

STATEMENT OF CASE

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

DECISION ON ORIGINAL HEARING

This Honorable Court reversed the Trial Court's judgment.

RELIEF SOUGHT ON REHEARING

Your Petitioner seeks to have this Court carefully reconsider its decision because it failed to consider some

material evidence in the case, as well as failed to look at the evidence and all reasonable inferences fairly to be drawn therefrom, in the light most favorable to the Trial Court's findings, and even based part of its decision on the mistaken assumption that a projection of earth which the Trial Court referred to as falling did not fall. Your Petitioner seeks to have this Court compare the testimony referred to in the Court's opinion with the testimony that is actually in the record. In the event this Court, after carefully reconsidering its opinion and the evidence in the record, is of the opinion that it did commit error, then Petitioner prays for whatever relief this Court deems reasonable including, affirming the Trial Court's judgment or a remittitur of damages to whatever amount this Court deems reasonable or even a new trial.

STATEMENT OF FACTS

The Defendant Corporate Architect on March 1, 1960 entered into separate but similar contracts with Salt Lake City and Salt Lake County to provide professional architectural service consisting of the necessary conferences, the preparation of the working drawings, specifications and the drafting of the contract documents (Pl Ex. 1). In addition the Defendant Architect agreed to be in charge of the general administration of the construction project which required the architect 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 — paragraph 7).

The Defendant employed Jonathan H. Tucker as its on-site inspector and supervisor while the public bodies employed Harry Butcher as their project representative (T. 522,523,525). Wally Christiansen was the project mananger for the General Contractor and will hereafter be referred to as Wally (T. 770,772).

It was a necessary part of this construction project to first excavate a trench approximately 900 feet long in order to install a utility tunnel to bring heat from the new boiler rom to the old City-County Building (T. 523,771). The excavation for this utility tunnel began approximately the first part of September, 1963 and proceeded westerly across 2nd East Street to the old City-County Building (T. 538,539). As the excavation of the trench progressed westward a safety line for the normal slope of the trench for safety purposes was never established (P. Ex. 52, p. 20). The trench was nearly perpendicular except for about 3 feet at the top (Pl Ex. 52, p. 20). The architect's qualified on-site inspector and supervisor complained to Wally nearly every day concerning the condition of the walls of the excavation due to the lack of slope and shoring (Pl. Ex. 52, p.22,27).

Because of Complaints on that job the State Safety Inspector on September 16, 1963 visited the project and observed the excavation area to be dangerous in that the walls were vertical and without shoring (T. 612, 615, 624, 625, 626). The State Inspector ordered Wally to live up to state regulations (T. 613). In the later part of September Mr. Casper Nelson, the Industrial Commissioner in charge of safety, visited the trench area and observed no shoring at all in the trench (T. 626, 627, 635). On Sep-

tember 30, 1963 the Architect's on-site inspector and supervisor sent a letter to the General Contractor stating that the excavated area for the east-west utility tunnel required additional safety measures to comply with City, County and State requirements (T. 552; Pl Ex. 10).

Work stopped in that area of the excavation for about two weeks because the General Contractor wanted to stop until spring, but work was resumed thereafter since the Architect wanted to finish the tunnel to the end before winer (Pl Ex. 53 p.30). During the time the work was stopped there were cave-ins in the trench large enough to bury men if they had been working in that trench (Pl Ex. 53 p. 52). According to the Architects own daily report sheets work resumed in that excavation on October 10, 1963 (Pl Ex. 8).

On October 16, 1963 Art Nauman, a carpenter, was brought on the project to finish constructing the tunnel (T. 652). When he arrived the General Contractor was just completing the excavation for the tunnel (T. 652). Nauman was not experienced in regard to trench excavations nor in working in such confined areas (T. 691). Nauman had likewise never supervised or even done labor on shoring the walls of an excavation (T. 666). During his first day on that project Nauman spent his time working on several different matters. He spent his time meeting with Wally, working to find a sewer leak so it could be repaired, pumping water, leveling the gravel for the base of the rough floor of the tunnel, and putting up barracades around the job (T. 660,661).

On the morning of October 17, 1963, just 30 to 45 minutes after he had arrived on the project, Mr. Nauman had just set up his surveyors level approximately 8 feet from the end of the utility tunnel when a cave-in occurred from a point high on the south bank of the excavation rendering Mr. Nauman quadriplegic (T. 649).

POINT ONE

THIS COURT ERRED IN HOLDING THAT THE "NEGLIGENCE OF THE ARCHITECT WAS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES BECAUSE THE EARTH PROJECTION DID NOT FALL," SINCE THE EARTH PROJECTION WHICH THE COURT CLAIMS DID NOT FALL WAS NOT THE SAME EARTH PROJECTION REFERRED TO BY THE TRIAL COURT AS FALLING IN ITS FINDINGS OF FACT AND ITS MEMORANDUM DECISION.

According to this Court's opinion the earth projection which the Trial Court referred to as being involved in the cave-in was still standing after the accident and therefore could not have fallen on the form that injured plaintiff. The projection which this Court contends did not fall was not even the one which the Trial Court had reference to. This mistake regarding where the cave-in occurred or as to which projection fell shows just how difficult it is for an Appellate Court to know and understand the exact meaning of the spoken word as transcribed without being present and being able to see the witnesses point to areas on the exhibits as they testify and explain their testimony.

At trial the defendant attempted to establish that the accident occurred as a result of earth sluffing off from the south side of the bank at a point below the level of the tunnel (T. 72). Counsel for defendant in cross examining Harry Butcher attempted to convince the Court of the possibility that the earth sluffed off below the level of the tunnel.

> Question: (By Mr. Nebeker) Obviously, but you don't know whether it came from above the level of the tunnel or below the tunnel?
>
> Answer: I am pretty sure it came from above the tunnel.

The Trial Court rejected defendant's attempt to established the earth sluffed off below the tunnel and it noted that "if that sluffing is viewed in light of the testimony given by the defendant, it would have only possibly have covered the plaintiff's feet." The Trial Court finding that a large amount of earth was on top of the plaintiff, concluded the sluffing must have involved a large projection near the top of the trench. The testimony regarding the area of the cave-in makes clear the fact that the earth projection referred to by the Trial Court was not the one which this Court states was still standing after the cave-in. Edwin M. Schneider testified regarding the area of the cave-in and stated that immediately following the cave-in he went and stood on the top of the tunnel and observed the area where "a chunk had fallen out of the wall on the south bank which was 8 to 9 feet above the top of the tunnel where he was standing." (T. 604). Mr. Schneider further testified that the chunk that fell was approximately 10 feet long and 3 feet deep (T. 605). Since

the tunnel itself was approximately 8 feet high it is obvious that the area which Mr. Schneider was testifying about involved a point approximately 17 to 18 feet above the bottom of the trench.

Harry Butcher likewise testified that he noticed a bulge in the south bank approximately 8 to 10 feet from the end of the tunnel (T. 563). Joe Ulibarri, an employee who was working just 10 feet from the area where the cave-in occurred, likewise identified for the Trial Court on Plaintiff's Exhibit 13, the area where the cave-in came from which was high on the south bank as shown on that exhibit. Jonathan Tucker likewise 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 which was above the area where the cave-in occurred. Immediately after the cave-in occurred, he observed the "hole in the bank and the dirt down in there on the panel (Pl. Ex. 53, p.. 65)."

Even defendant's own witness Evan Ashby testified that the cave-in occurred above the tunnel. The Court's opinion is in error in so far as it states that Evan Ashby testified that the cave-in occurred 3 to 4 feet from the tunnel. A careful examination of the transcript of Mr. Ashby's testimony indicates that Mr. Ashby on cross examination upon being shown Plaintiff's Exhibit 13 admitted that the area where the cave-in occurred was more than 4 feet above the tunnel (T. 989). Based upon all of the above evidence the Trial Court rejected the defendant's assertion that the sluffing occurred below the tunnel on the south bank of the trench. We ask the Court to look at Plaintiff's Exhibits 13 and 16 and see for itself

the area where the cave-in occurred. The policeman with the fire extinguisher, who is standing in these photographs, is standing below the area where the cave-in occurred. These photographs show clearly that the area where the cave-in occurred was at a point high on the south bank approximately 8 to 10 feet above the 8 foot high tunnel. The projection which this Court has referred to as still standing is immediately above this area but is not shown on these photographs.

This mistake points out the importance of looking at evidence in the light most favorable to the Findings of the Trial Court. Certainly the records does contain sufficient, competent, substantial evidence upon which the Trial Court could conclude that the cave-in occurred at a point high on the south bank of the trench.

POINT TWO

THIS COURT IN CONCLUDING THAT ART NAUMAN WAS CONTRIBUTORILY NEGLIGENT ERRED SINCE IT (1) RELIED ON PLAINTIFF'S DEPOSITION WHICH, ALTHOUGH PUBLISHED, WAS NEVER ADMITTED INTO EVIDENCE AND (2) IT FAILED TO LOOK AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE FINDINGS.

This Court has always taken the position that 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 the plaintiff is contributorily negligent the question is one for the

Finder of Fact. When the trial judge has made Findings of Fact and entered a judgment thereon, those findings are entitled to a presumption of correctness and on appeal the evidence should be surveyed in the light most favorable to them. The Trial Court's findings should not be overturned if there is any reasonable basis in the evidence to support them, even though they may be different from those which this Court on appeal would have decided. Sullivan vs. Turner, 22 Utah 2nd 85, 448 P. 2d 907 (1968); Hindmarsh vs. O. P. Skaggs Foodliner, 21 Utah 2nd 413, 446 P. 2d 410 (1968).

This Honorable Court has referred to the testimony of Art Nauman in his deposition of February 19, 1966 in support of its conclusion that Art Nauman was contributorily negligent. That deposition, although published, was never admitted into evidence and it would therefore be error to rely on that deposition (T. 693). The defendant at Trial failed to meet its burden of proof in regard to contributory negligence and therefore in its reply brief on page 8 has attempted to insert testimony from a deposition not in evidence to convince this Court it has met its burden. Since this Court is bound by the evidence in the record it should not permit defendant to interject matters not even in evidence.

The evidence that is in the record does not support this Honorable Court's conclusion that Art Nauman was contributorily negligent. Nauman testified that he was brought on the project to complete the service tunnel that had been started west of 2nd East Street (T. 652). The excavation was just being completed when Nauman was brought on the job. (T. 652). This Honorable Court is

not looking at the evidence in the light most favorable to the findings when it states that Wally told Nauman at the time he started work that a portion of the work had been stopped because the prior foreman had not safely directed the work. The evidence in the record indicates such was not the case. Nauman testified that the reason he was given for why he was brought on the project was that a foreman by the name of George was not doing an efficient job in constructing the tunnel as far as the carpentry work (T. 672, 673). Nauman further testified that nothing was said to him about the tunnel project being discontinued for a period of time because of any difficulties other than a leaking sewer line (T. 673). The record further indicates that Nauman's conversation with Wally Christiansen on the morning of October 16, 1963 was brief because Wally was busy at the time (T. 679). Nauman testified that Wally told him that complaints were made about sloping but that said complaints were over exagerated (T. 654).

On the morning of October 16, 1963 when Nauman first arrived on the project he testified he was told that the excavation was to be prepared for gravel which was to be used as a base for the tunnel floor (T. 658, 660). Nauman further testified that he did not order the gravel (T. 659). During a portion of the first day Nauman was told to borrow a pump to pump water from the trench excavation. He also spent a portion of the first day on the job over at another area finding and exposing a sewer leak for repair (T. 659, 660). Nauman spent only a small portion of that first day in the excavation area.

On cross examination when asked if shoring could have been installed Nauman testified that because of the operations of distributing and leveling the gravel, which had already been ordered and dumped into the trench, the shoring could not have been installed since it would have interferred with the drag line operations in leveling the gravel (T. 688, 689). As far as Nauman understood conditions at the time he considered the trench safe for the type of work he was doing in regard to leveling the gravel, pumping the water, taking the higher portion of soil out of the excavation, with the gravel fill. Nauman further noted at trial that he had only been on the job for approximately 30 to 45 minutes on the second day when the cave-in occurred (T. 662).

This Court, in its opinion, is in error in making the statement that Nauman in testifying as to his prior experience stated that he had worked *in* an excavation about 18 feet deep. Nauman only testified that the deepest excavation that he could ever recall working *around* was on the east side of the University Medical Center which was 18 feet (T. 668). Nauman further noted, however, that even on that project he was not working in or even adjacent to the excavation since at the time he arrived on that project two floors of cement had been poured and he only worked in the basement area on the inside of the concrete walls that had already been poured (T. 668). Such a remote relationship with that excavation hardly supplies Mr. Nauman with experience in excavations. Nauman further testified that he had only worked in two trench type excavations before this project and neither of those trenches were over six or seven feet in depth

(T. 691). The record further indicates that Nauman had never done any earth shoring at all, but rather just shoring against concrete forms (T. 666). Nauman was a carpenter and not an experienced excavation man.

The following testimony of Wally Christiansen, the contractors man in charge, fails to support the Court's opinion that Nauman was fully advised by Wally regarding safety and conditions on that project:

> Question: Did you say anything to Mr. Nauman about safety, or safety practices on the job?
>
> Answer: I can't remember exactly whether I mentioned there was safety — "safety" or not, I can't recall (T. 801). . .
>
> * * * * *
>
> Question: Did you have any discussion with Mr. Nauman concerning any shoring?
>
> Answer: I don't recall whether we did or didn't (T. 803).
>
> * * * * *
>
> Question: (By Mr. Barker) Did Mr. Nauman ever say anything to you about the adequacy of the bracing, shoring, sloping, of the excavation?
>
> Answer: I can't remember whether we talked — you were talking about that particular area. I can't remember talking about any additional shoring, or whether we should or whether we shouldn't (T. 806).

Wally also testfied at trial that on the morning of the 16th in the construction shack he told Nauman that "We won't be worrying about — we won't be concerned about

shoring the bank because we have sloped the banks now so we won't have the shoring to contend with." (T. 798). This Court, in stating that Nauman personally examined the walls of the excavation, has implied Nauman was fully aware of the conditions in that trench. Nauman's own testimony indicates that on the first day he was on that project that he would probably observe the area between the tunnel and the excavation without paying special notice to the conditions on either side. (T. 684) During his short exposure on that project Nauman was engaged in carrying out several different jobs for Wally and was not able to concentrate all of his time without distraction on the conditions in that trench.

The defendant has failed to prove that Nauman was contributorily negligent; and even if there is a question of contributorily negligence, the evidence is such that reasonable minds could differ and therefore the issue of contributory negligence is for the Finder of Fact. The evidence, indicates that Nauman was not brought on the project for the purpose of being in charge of the excavation. He had relatively no experience in either excavations or shoring. He was not warned by Wally of any dangerous conditions that existed. It is clear that the defendant who had the burden on this issue contributed nothing by way of proof to take this issue from the Finder of Fact.

POINT THREE

THIS HONORABLE COURT ERRED IN HOLDING THAT THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF NEGLIGENCE.

This Court has not considered the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to the findings of the Trial Court. The Trial Court, having heard and seen the evidence and having noticed the areas where the witnesses were pointing, concluded that the Defendant Architect who had its own on-site inspector supervising and inspecting all phases of the work being done knew, or in the exercise of reasonable care should have known, that the trench was unsafe either by reason of the contractor's failure to properly shore the walls of the trench or by its failure to properly slope the sides of the trench in such a manner as to make the trench excavation a safe place to work. Based on those findings the Court held that the architect was negligent in that it violated its duty and failed to stop the work until the unsafe conditions had been remedied. The following substantial competent evidence in support of the Trial Court's findings was overlooked by this Court:

(A) *The testimony of the Defendant Architect's own on-site inspector*: It is important to note that the defendant is a Corporate Architect and notice of a danger-

ous condition if given to a qualified employee of that Corporate Architect would be notice to the Corporate Architect itself. In the instant case the Defendant Architect hired Jonathan H. Tucker as its qualified, on-site inspector and job representative (T. 522, 523). The president of this Corporate Architect was Harold K. Beecher who was a licensed architect as well as a member of the American Institute of Architects (T. 534). The record indicates that both Harold K. Beecher and Jonathan H. Tucker on behalf of the Corporate Architect had considerable experience with the excavation of deep banks (T. 962; Pl Ex. 52, p. 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). As the excavation and tunnel work proceeded Jonathan Tucker occupied a joint office and worked close together with Mr. Harry F. Butcher (Pl. Ex. 53, p. 9). Mr. Tucker saw the utility trench tunnel on many occasions both prior to and after the accident (Pl. Ex. 52, p.20). Mr. Tucker, on behalf of the Defendant Architect, prepared written daily reports which he submitted to Harold K. Beecher on behalf of the Corporate Architect (T. 524, Pl. Ex. 8). The record indicates that both Mr. Tucker and Mr. Beecher as representatives of the architect had almost daily contact and conversations regarding progress of the work (T. 524).

Mr. Tucker testified that he observed the excavation of the trench as it progressed everyday and that a safety line for the normal slope of that trench for safety purposes was never established (Pl Ex. 52, p. 20). Accord-

ing to Tucker, the trench was nearly perpendicular except for about three feet at the top (Pl. Ex. 52, p. 20). According to Tucker, the standard safety slope for trench excavations applicable to trenches on that project should have been one foot of slope back on each side for every two foot of depth (Pl.Ex. 52, p.13). Tucker testified that nearly everyday he complained to Wally Christiansen concerning the conditions of the walls of the excavations in the utility tunnel trench due to the lack of slope or shoring (Pl. Ex. 52, p. 22,27). According to Tucker, Wally Christiansen told him 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). The Defendant Architect, which had the duty to stop work on that project until unsafe conditions were remedied failed to issue any stop work order and permitted the unsafe conditions to exist merely because Wally wanted to save some money.

On September 25, 1963 a meeting was held on the project involving the subject of general safety on the job at which both Mr. Beecher and Mr. Tucker as employees of the Corporate Architect were present as well as a man representing the contractor and the city (T. 554,555). On September 25th a letter was sent to Christiansen Bros. from the Corporate Architect notifying the contractor that it had not complied with the requirements and specifications for the public safety and to safeguard life and property and urging the contractor to correct all unsafe conditions (Pl. Ex. 52, p. 46,47 and Ex 8 attached thereto). Tucker testified that thereafter on September 27,

1963 Christiansen Bros., Inc. forwarded a letter to the Corporate Architect acknowledging receipt of the letter dated September 25, 1963 and denying that there existed any abnormal hazardous conditions on the project and asking for more specific information as to where the alleged violations existed (Pl.Ex. 52 - Ex. No. 4 attached thereto). Jonathan Tucker and Harry Butcher, the project engineer, then forwarded a letter on September 30, 1963 to Christiansen Bros., Inc. indicating that the excavation in the area for the east-west utility tunnel required additional safety measures to comply with City, County and State requirements (T. 552; Pl. Ex. 10).

Tucker testified that work stopped in that area for approximately two weeks because Christiansen Bros., Inc. wanted to stop until spring, but work resumed thereafter since Beecher wanted the contractor to continue to the end before winter (Pl.Ex. 53, p. 30). Tucker further testified that during the time the job was stopped there were cave-ins which could have buried men if they had been working in the trench (Pl.Ex. 53, p. 52). These cave-ins would certainly constitute notice to the architect that a dangerous condition existed.

Tucker testified that on October 16, 1963 the day Art Nauman was first brought on the project, despite complaints made to Wally regarding failure to comply with safety regulations, the trench on that date was still in an unsafe condition since Wally had no shoring west of the end of the tunnel (Pl.Ex. 52 p. 50). Tucker further testified that on October 16, 1963 the trench was full of mud making it necessary to pump the water out (Pl.Ex. 53, p. 58).

Tucker further testified that on the morning of October 17, 1963, just minutes prior to the cave-in, he was present in the area where the cave-in occurred and inspected the area and observed some loose dirt up under the base of the light pole (Pl.Ex. 53, p. 59,67). Tucker further testified that at the time Joe Rueben (who was an architect employed by defendant) made the remark to him that he did not consider the conditions around the light pole safe (Pl.Ex. 53, p. 62). Tucker further stated that he agreed with Rueben that it was not safe and that it should be removed (Pl.Ex. 53, p. 52). In fact Tucker stated that it was Wally's responsibility and he had requested Wally to remove the light pole but Wally refused because he didn't want to hire an electrician (Pl.Ex. 53, p. 59). Wally, at trial, however, testified that he couldn't taper the trench where the light pole existed because the city wouldn't let them remove it. Harry Butcher, the project engineer for the city denied that Wally had ever asked him or anyone from the city for permission to remove the light pole (T. 592). Tucker further testified 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 the loose dirt that was up by the light pole was down in the hole (Pl.Ex. 53, p. 65).

According to Tucker he and 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 further stated that he never received any orders from Mr. Beecher on any other employee of the architect telling him to stop work on that project until the hazardous conditions were corrected (P.Ex. 52, p. 36). He noted that if any stop work orders were issued prior to the cave-in that the daily report sheets would reflect such a stop order (Pl.Ex. 52, p. 36). The daily reports for September and October failed to indicate any such order was made. It is obvious from Tucker's testimony that the architect knew dangerous conditions existed in that trench. Despite these dangerous conditions, the Defendant Architect which had the right to insist that the work be carried on in a safe manner, failed to stop work in that excavation until the unsafe conditions were remedied and permitted Wally to proceed in an unsafe manner.

(B) *The architect's own records*: The daily report sheets of the Defendant Architect which were prepared by the on-site inspector, Jonathan H. Tucker, for the months of September and October were all admitted into evidence as Plaintiff's Exhibit P-8. Those daily report sheets constituted sufficient competent evidence that a dangerous condition had existed in the tunnel for a long period of time. The daily report sheet of September 16, 1963 indicates that Mr. Holmes, from the safety division of the Utah Industrial Commission, made an inspection of the utility tunnel excavation and instructed the contractor to shore the banks and requested that the general safety orders be followed or that the Commission would close down the job. The September 25, 1963 daily report sheet of the Defendant Architect states that Mr. Rolf

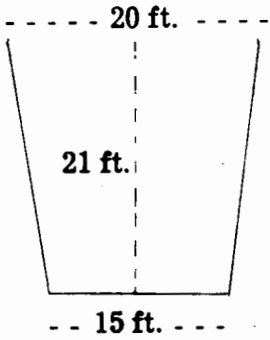
Christiansen disregarded the safety factor which was necessary to protect his workmen. The October 2, 1963 daily report sheet indicates that Mr. Joe Rueben took pictures of the bank cave-ins at the west section of the utility tunnel near the old city hall. The daily report sheet of October 10, 1963 indicates that clean up work was being performed at the tunnel on that day. The October 11, 1963 daily report sheet indicates that work was being performed at the west utility tunnel on that day. The October 15, 1963 daily report sheet indicates that excavation work was being performed at the west utility tunnel area. This Court erred in overlooking the above referred to competent evidence when it stated in its opinion that the work was shut down from about September 27, 1963 to October 16, 1963.A careful examination of all of the daily report sheets from the first part of September to October 17th indicates that no stop work orders were ever given by the architect regarding work in the utility tunnel trench.

We asked the Court to look at the October 17th, 1963 daily report sheet which indicates that on that date Mr. Casper Nelson, State Safety Commissioner, made an investigation of the accident and instructed the contractor to give the proper slope to the utility tunnel trench before having the men work on the exterior walls and also to widen the excavation at the tunnel area. Had this trench been properly sloped as defendant has contended it was, there would have been no need for Casper Nelson on that date to order the contractor "to give the proper slope before having the men work on the exterior walls."

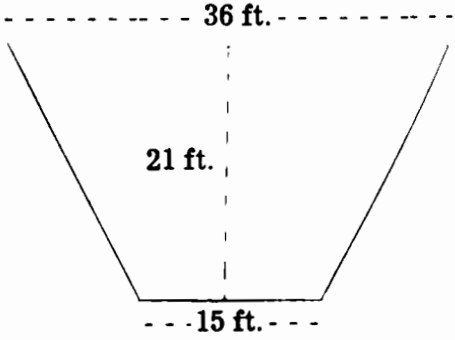
(C) *The testimony of Casper Nelson*: Casper Nelson, the Industrial Commissioner in charge of the State Safety Division, testified that he viewed the accident scene the day of the cave-in and that the walls appeared real vertical and were without any shoring west of the tunnel (T. 630,633). The cave-in occurred in this area west of the tunnel. Mr. Nelson further testified that the Utah General Safety Orders for Utah industries other than mining as well as the American Standard Safety Code for building construction were both state safety codes applicable to that project (T. 633). The Court, in its opinion, has overlooked Casper Nelson's testimony regarding the fact that the walls appeared real vertical. The Court erred in stating that Casper Nelson on cross examination admitted that the walls had been sloped about 10 or 11 feet on both sides. The transcript of his testimony will indicate that no such statement is contained therein. The daily report sheet of October 17, 1963 (which was in evidence as Pl.Ex. 8) prepared by the architect, indicates that on that date Casper Nelson requested the contractor to give the proper slope to the trench before having men work on the exterior walls. Had the trench been propertly sloped as the Defendant has alleged it was, Casper Nelson would not have had to request for a proper slope after the accident.

(D) *The testimony of Art Nauman*: The plaintiff also testified regarding the conditions of the trench. He testified that the width of the trench at the bottom of the excavation was 15 feet, the width of the trench at the top lawn level was 20 feet, and the depth of the trench was 21 feet. That testimony alone is competent evidence from

which the Trial Court could find that the trench was not safe since it would not be in compliance with Section 69 A of the Utah General Safety Orders which provided in part that "The sides of every trench 4 feet or more in depth shall be supported by bracing, shoring, or other methods unless the sides of the trench are sloped a minimum of ½ to 1 angle from the bottom of the trench." Section 69 A further provides that the top width of a trench is obtained by adding the depth of the trench to the bottom width of the trench. Nauman's testimony regarding the depth of the trench as well as the width of the trench at the bottom would mean that the width of the trench at the top lawn level would need to be 36 feet wide in order to be in compliance with the above referred to General Safety Order. The following diagrams show the manner in which the trench would have to be sloped in order to satisfy the manditory requirements of Section 69 A of the Utah General Safety Order.



The trench as it was based on Nauman's testimony



The trench as it shoud be pursuant to Section 69 A of the Utah General Safety Order

It is obvious from the testimony of both Casper Nelson and Art Nauman as well as from the photographs that the trench did not "practically meet th Industrial Commission requirements" as this Court stated in its opinion, but in fact was almost 16 feet short of any such compliance in that area where the cave-in occurred.

(E) *Testimony of Harry Butcher the Project Engineer*: Harry Butcher represented the city engineer's office and occupied a joint office with the architect's on-site inspector and worked closely together with him as the excavation and tunnel work proceeded (T.536). Mr. Butcher saw the utility tunnnel trench on many occasions prior to and after the accident (T. 642). Butcher testified that on September 30, 1963, a letter was sent by him on stationary of the Corporate Architect to Christiansen Bros. 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; P. Ex. 10). Butcher testified that he was present near the scene of the cave-in on the morning of October 17, 1963, just prior to th cave-in and saw several men in the trench spreading gravel with hand shovels (T. 561, 562). Butcher, when asked if he observd the walls at the time, state the walls were like they always were, straight up and down, except at the top where it was sloped a little (T. 563). Butcher further stated that he noticed a bulge on the southbank approximately 8 to 10 feet from the end of the tunnel (T. 563).

This Court in its opinion erred in stating that Butcher conceded on cross examination "that the south bank (where the cave-in occurred) had been sloped back as

much as 10 feet." We refer the Court to pages 591 and 592 of Butcher's testimony on cross examination wherein Butcher maks it quite clear that "they didn't slope past the light pole further toward the east." The area in which Butcher testified to as having been sloped involved only the top portion of the trench at an area west of the cave-in site. Butcher's testimony does not support the statement by the Court that the slope "practically meets the Industrial Commission requirements."

(F) *Testimony of Joe L. Ulibarri*: Joe L. Ulibarri testified that he was an employee of the contractor and was working just 10 feet from the area of the cave-in when the accident occurred (T. 535). He had worked for a number of years as a timber man in the mines. According to the testimony of Mr. Ulibarri the walls were straight up and down on the south side (T. 535). Based upon that testimony this Court could likewise not properly find that the walls were properly sloped as required by the Utah General Safety Orders. Despite that testimony, as well as the fact that Mr. Ulibarri was not even cross-examined, this Court in its opinion has disregarded his testimony based upon the reasoning that Mr. Ulibarri should not be permitted to talk about dangerous conditions when he himself was working in the excavation. The mere fact that Mr. Ulibarri was in the same trench excavation as the plaintiff, should not be grounds for disregarding his testimony. Just because Mr. Ulibarri was working in the trench does not mean that he necessarily felt it was safe. The doctrine of economic compulsion is indeed a reality. Men have worked and will continue to work under such conditions if they are economically

forced to. Such circumstances should not discredit the testimony of this eye witness to the cave-in.

(G) *Testimony of Evan Ashby*: Even the testimony of Evan Ashby, the drag line operator employed by the contractor, indicates that a dangerous condition did exist in the area where the cave-in occurred. Ashby testified that he helped with the use of his dragline in rescue efforts to remove Nauman from the trench. He stated 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). If that trench had been properly sloped on a ½ to 1 basis from the bottom to the top as required by the General Safety Orders there would have been no need to order Mr. Ashby to place his drag line bucket in such a position to prevent further cave-ins.

Despite all of the above eywitness testimony regarding the vertical walls of the trench and the conditions therein, this Court appears to have overlooked that evidence and has relied solely on the testimony of Joe Reuben, an employee of the Defendant Architect, who did not testify regarding what he saw but based his opinion only upon the photographs and some overlays. We ask the Court to refer to the testimony of Joe Reuben in the transcript. It would be difficult, if not impossible, for this Court on appeal, to understand and follow without being present to see for itself the areas on the overlays which he referred to while testifying.

(H) *The Utah State General Safety Order*: The Utah State General Safety Orders Section 69 A requires that

every trench 4 feet or more in depth be shored or sloped at a minimum of ½ to 1 angle from the bottom of the trench. This general safety code which was admitted into evidence, sets forth objective standards of safe construction. Those safety orders were manditory on this project not only because they constituted statewide general safety orders promulgated by the Industrial Commission but also because they were expressly made a part of this construction contract. Section 69 A of the General Safety Orders was evidence of the standard of due care. This Court in Skerl v. Willow Creek Coal Co., 92 Utah 474, 69 P. 2d 502 (1937), held that the violation of a law or ordinance which had reference to safety of life, limb, or property and fixes a standard of care is negligence.

In light of the testimony of Harry Butcher, Jonathan Tucker, Casper Nelson, Art Nauman, Edwin M. Schneider and others, the Trial Court did have sufficient, competent evidence upon which to conclude that a failure to exercise the due care, required by the general safety orders, constituted a danger. In regard to defendant's attempts to argue that no hazard was recognized, this State Safety Code provided the defendant as well as the Court with ideal evidence of notice regarding hazards to be protected against and regarding foreseeable danger. In addition, since the competency of an expert is always in issue, this same state safety code was competent evidence which the Trial Court could properly use to judge the competency of the witnesses. For instance, Harold K. Beecher testified that the south side of the bank need only be sloped on the upper portion and would not need to be sloped for the first four feet (T. 980). That testimony

when compared with section 69 A of the General Safety Orders indicates that Harold K. Beecher was in error since the safety code required a slope beginning at the bottom of the trench to the top for a trench this size. Based on that comparison, the Trial Court could properly discount such testimony of Harold K. Beecher.

(1) *The American Standard Safety Code*: The American Standard Safety Code was also admitted into evidence. According to Casper Nelson, this safety code was considered the "Bible" in regard to safety in construction. This Safety Code, which required sloping or shoring, was incorporated by the reference into the Utah General Safety Orders by Section 69 M. It should be noted that one of the two chief sponsors of that safety code was the American Institute of Architects. This code represents a consensus of opinion carrying the approval of a number of combined interest groups as to the present thinking in the field of safety. Part 2, Sections 1, 3, and 6 of that code contain illustrative evidence of safety practices regarding trench excavations. Failure to comply with even these generally recognized safe practices would be competent evidence for the Trial Court to weigh with other factors in determining the issue of negligence. This safety code also provides competent ideal evidence of notice regarding hazards to be protected against as well as a means of checking the competency of the defendant and its experts.

In the instant case, all four of the architects who testified for the defendant admitted that they were members of the American Institute of Architect's, the group which

co-sponsored this safety code. Two of those architects were employees of the defendant while the other two had never seen the trench except from pictures. In answer to long hypothetical questions in which it was *assumed* that the trench was sloped in compliance with all applicable safety codes both Fred Montmorency and Ralph Edwards stated that it would be safe. In fact the entire testimony of all four architects regarding the safety of that excavation was premised upon the erroneous assumption that the trench was properly sloped. Since the evidence is so clearly to the contrary, as to the slope of the trench, the testimony of all four architects regarding the safety of the trench was properly discounted by the Trial Court.

The defendant has attempted, through the use of architects, to establish its own standard of conduct. The basic test however, is whether reasonable care was exercised by this defendant in its supervisory capacity. In applying that standard, reasonable men recognize that what is usually done *may* be evidence of what ought to be done. What ought to be done, however, is fixed by the standard of reasonable prudence and in law that requirement remains the same whether it is usually complied with or not. Thus, what these architects who testified for the defendant would do in this particular case could not be regarded as what ought to be done unless their conduct and the standard of reasonable prudence are in harmony.

In the instant case, the Trial Court had before it the testimony of a number of on the job employees including

the architect's own on-site inspector. Their testimony, when compared with the requirements of the State Safety Code as well as the American Standard Safety Code, indicates that the conditions in the trench were not in compliance with applicable safety practices. Based upon all of the foregoing it is clear that there was substantial, competent evidence from which the trial court could conclude that the trench was in a dangerous condition for a long period of time, the architect knew or should have known that the trench was unsafe and the architect in failing to stop work until the unsafe conditions had been remedied was negligent.

POINT FOUR

THE COURT'S OPINION IS EITHER IN ERROR OR UNCEAR REGARDING THE EVIDENCE NECESSARY TO ESTABLISH LIABILITY AGAINST THE DEFENDANT IN THIS CASE.

This Court has apparently erred by disregarding almost entirely the testimony of those witnesses who were on the project, and saw the area where the cave-in occurred and who testified regarding the conditions that existed in that trench. Petitioner agrees that where liability against an architect is predicated upon defects in

plans or specifications that architects or engineers would probably be the only ones competent to testify regarding the standard of care. However, the instant case does not involve that type of an action against an architect, rather an action against the architect based upon its negligent failure to perform its supervisory undertaking. Therefore, the testimony of the witnesses who were on this project is very relevant to this case.

This Court, in support of its opinion, has referred to an instruction given by the Trial Court in Paxton vs. Alemeda County, 259 P. 2d 934 (Ca. App. 1953). The Court should not be misled by that instruction since the Court in *Paxton* clearly recognized the distinction between an action brought against an architect based upon defects in plans or specifications and one based upon an architect's liability in its supervisory capacity. The instruction referred to in the Paxton case only related to the count against the architect based upon defects in plans or specifications and is therefore not even relevant to the instant case. Although the Court in Paxton required expert testimony for the Court based upon defects in Plans or specifications is clearly stated that had a count been added against the architect in that case based upon its negligence in supervision the jury could have found the architect was negligent for not making another inspection.

The instant case is also different from the typical architect malpractice case, for two additional reasons. First, in this case the architect was a corporation not just an

individual. The defendant in the instant case hired Jonathan H. Tucker, who was not an architect, as its on-site job representative to supervise all phases of the work being done. Throughout the project the defendant relied on Tucker as its expert. The defendant should not now be permitted to argue that the testimony of Tucker as well as the testimony of other construction men who were also familiar with that excavation project was not competent evidence. Second, the defendant architect in this case not only agreed to provide architectural services but also agreed for a fee to be in charge of the general administration of the construction project and job supervision. We agree with the Courts statement that the method, means and how the excavation was to be constructed were left to the general contractor, and that the architect had no right to interfere with the contractor's execution of the work. The Architect, who undertook the general administration of the Construction project and who undertook to inspect and supervise all phases of the work being done had the right to insist, however, that the work be carried on in a safe manner and if the Architect knew or should have known that dangerous conditions existed it had a duty to stop work on that excavation until the unsafe conditions were remedied.

WHEREFORE, plaintiff respectfully petitions the Honorable Court for a rehearing to reconsider its decision regarding all four points contained in this petition and in the event that this Court is of the opinion that error was committed plaintiff prays for and agrees to accept whatever relief this Court deems reasonable including having the trial courts judgment affirmed or a remittitur on damages or even a new trial.

Respectfully submitted,

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