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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR O. NAUMAN,
Plaintiff - Respondent,

vs.

HAROLD K. BEECHER & ASSOCIATES,
a Utah Corporation,
Defendant - Appellant.

Case No. 11579

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR O. NAUMAN,
Plaintiff - Respondent,
vs.
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a Utah Corporation,
Defendant - Appellant.

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APPELLANT'S REPLY BRIEF

STATEMENT OF THE NATURE OF THE CASE

Action against architect by injured foreman of general contractor on theory that architect failed to prevent injured foreman from performing his work in an unsafe manner.

DISPOSITION IN LOWER COURT

Judge Ellett held that the architect owed no duty to enforce safety regulations by the contractor and dismissed Plaintiff's complaint. The Utah Supreme Court reversed stating that although the architect had no right to interfere with the contractor's method of execution of the work, the architect had a right and duty to insist that the work be carried on in a safe manner. The Court then added (apparently as dicta) "that if the defendant knew

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or . . . should have known that the trench was unsafe . . . the defendant had the right and the corresponding duty to stop the work until the unsafe condition has been remedied." Nauman v. Beecher, 19 U. 2d 101, 426 P. 2d 621.

Judge Hanson followed the "but for" reasoning established by that dicta and ruled in favor of Nauman.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Defendant reasserts the statement of facts contained in its appellant's brief pages 2 through 12 and the statement of facts contained in its petition for rehearsing pages 2 and 3 in Nauman vs Beecher case 10609 filed with this court.

REASON FOR REPLY BRIEF

The only picture taken of the South bank of the excavation showing how it appeared immediately after the Nauman accident was in the possession of Nauman's attorneys, was obscurely attached by them to the original of the Tucker deposition taken some three years before the trial and was not again produced by them until it appeared on the back cover of the Nauman brief. Judge Hanson did not have the benefit of that picture in making his decision. That picture was not considered in appellants original brief herein.

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The Nauman brief photograph shows conclusively that Nauman's injuries did not result from the alleged negligence of Beecher in permitting resumption of work in the excavation without first requiring removal of the "large projection" of earth above the accident scene. Judge Hanson ruled that said "large projection" fell and injured Nauman. The photograph in the Nauman brief shows that the "large projection" simply did not fall. Accordingly Beecher was not in fact responsible for Nauman's injuries and Judge Hanson's decision is in error.

ARGUMENT

POINT I

THE COURT ERRED IN CONCLUDING THAT THE PROJECTION OF EARTH LEFT NEAR THE TOP OF THE EXCAVATION FELL ONTO THE FORM THAT PINNED NAUMAN AND WAS THE PROXIMATE CAUSE OF HIS INJURIES.

Judge Hanson observed a projection of earth near the top of the excavation and to the left of the light pole as shown in the picture taken the day before the accident (Ex. P-7), which he concluded must have fallen onto the form that pinned Nauman. In his opinion the sluff off of earth from the side of the excavation shown in exhibit P-13 would not have had sufficient weight to have caused Nauman's injuries in view of the testimony to the effect that the earth which fell from that area was not sufficient to have covered Nauman's shoes. (R. 458).

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Judge Hanson therefore concluded that the architect was negligent in permitting work to be resumed in the excavation while the dangerous condition caused by the projection of earth remained, applied the "but for" test of liability stated in the Supreme Court decision (quoted in part on page 2 above), and found the architect liable for Nauman's injuries.

While it might appear obviously dangerous to permit the leaving of an earth projection near the top of a deep excavation it would be quite another thing to conclude that the architect knew or should have known that a slough off would occur in the middle of an earth bank (of a size insufficient to cover Nauman's shoes) and that it would strike an unsupported form that would in turn strike Nauman in such a manner as to fracture his neck. Judge Hanson made no such finding. Without such a finding or a finding that the earth projection fell onto the form there simply is no finding of negligence that would support a judgment against the architect.

Judge Hanson's conclusion that the proximate cause of Nauman's injuries was the falling of earth from near the top of the excavation to the left of the light pole shown in the picture (ex. P-7) taken the day before the accident (R. 457-458) is wrong as shown by the following:

(a) *The picture on the back cover of Nauman's brief shows that the earth projection was still there after the accident.*

A careful comparison of the photograph on the back cover of Nauman's brief which depicts the accident scene

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immediately after Nauman had been removed, with exhibit P 57 which is an enlargement of that photograph, clearly establishes that the earth projection referred to and relied upon by Judge Hanson was still intact after the accident. Since it was still there it could not have fallen onto the form that pinned Nauman as Judge Hanson concluded in finding that the excavation was obviously unsafe. Evan Ashby, the drag line operator who saw the accident occur, stated that the earth fell from an area approximately three to four feet above the top of the tunnel (R. 885), which is consistent with the source shown in exhibit P-13.

Judge Hanson's error is a natural mistake since the picture on the back cover of the Nauman brief was not introduced into evidence at the trial, but as obscurely hidden as exhibit 6 in the back of the Tucker deposition which was taken some three years before trial (Exhibit P-52) and apparently was never called to Judge Hanson's attention. None of the photographs introduced into evidence at the trial showed the south excavation bank area at the top of the excavation and to the left of the light pole after the accident. Accordingly Judge Hanson had to speculate and to assume whether or not the earth projection in that area had fallen. His deduction was clearly in error. Even if the resumption of work with that projection remaining was negligence, that negligence was not the proximate cause of Nauman's injuries since the earth projection never fell. Without a finding that the earth projection fell onto the form which pinned Nauman there is absolutely no finding by Judge Hanson of negligence

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by the architect which proximately caused Nauman's injuries and accordingly the judgment must be reversed.

(b) *Judge Hanson's reasoning as to how much dirt had to fall to put sufficient weight on the form to cause Nauman's injuries is in error.*

Apparently Judge Hanson failed to realize the weight of one cubic yard of earth, and how much area it will cover when spread out. Evan Ashby, the dragline operator with 37 years excavating experience, (R. 874) who had dug the excavation, shaped the walls, was leveling gravel on the bottom of the excavation when the accident occurred, and who saw the slough off area immediately before and after the accident, estimated that ½ to 1 cubic yard of earth was on the form (R. 885). Earth weighs approximately 2,700 pounds per cubic yard (R. 988). Even if only ½ yard sloughed off from the area shown in exhibit P-13 and fell on the form it would weigh 1,350 pounds and would be more than sufficient to cause Nauman's injuries.

Ashby testified that he thought that the excavation was safe at the time of the accident (R. 891).

(c) *Judge Hanson was confused as to how Nauman was injured if earth was insufficient to have more than covered his shoes.*

In his memorandum decision Judge Hanson seems to be casting about for the source of additional earth because of testimony that the earth would not have covered Nau-

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man's shoes. (R. 458). The photograph on the back cover of the Nauman brief clears up this problem. The undisputed evidence shows that Nauman was standing in the center of the entrance of the utility tunnel at the time of the accident. The position of the earth that sloughed off as shown in the photograph on the cover of the Nauman brief shows that if the form had not been there that the sloughing earth probably would have little more than covered his shoes and injury to Nauman would have been extremely unlikely. This fact is further illustrated by the testimony of Nauman R. 690, Tucker 10-8-68 Tucker Deposition P-60, Beecher R. 986, Edwards R. 910, Montmorency R. 845, Ruben R. 751 and Ashby R. 891 to the effect that the excavation appeared to be safe for the work that Nauman was doing at the time of the accident.

(d) *The architect fully discharged his duty as defined by the Utah Supreme Court in Nauman v. Beecher, supra.*

Nauman's entire case is based upon the theory that the architect knew that the excavation was unsafe and was negligent in permitting Nauman to work in that excavation without insisting upon correction of the alleged unsafe condition.

As a result of an agreement between the architect and the contractor the work of forming the utility tunnel in the excavation was stopped for approximately two weeks (R. 972) until the contractor obtained a new crew and a more competent and safe foreman (R. 967-971) and not because of any unsafe condition existing at the time the work was stopped or resumed (R. 969). During this shut-

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down period backfilling, cleanup, shaping of walls, etc. with a drag line from on top of the bank was accomplished. When the new competent foreman (Nauman) arrived, his arrival fulfilled the requirements that caused the stopping of the work and the work was resumed.

The architect discharged his duty by pointing out the reoccuring dangerous conditions being created by the unskilled foreman and crew previously working on the excavation, by causing the job to be shut down until a competent and safe foreman and crew could be obtained, and thereafter the means, methods and sequences to be used in correcting specific minor problems that might have existed was the sole perogative of the contractor and of Nauman as foreman of that portion of the work. The architect had no right or duty to interfere unless the methods being used by Nauman were obviously unsafe. Nauman was fully advised of existing conditions and proceeded in what he considered to be a safe manner.

In his deposition of 2-19-66 *Nauman stated*:

(1) That the architect had recommended that the excavation be made safer. (P. 47)

(2) That he considered the area around the light pole to be dangerous. He observed that the earth in that area was not sloped and as near vertical or overhanging. (P. 66)

(3) That he told Tucker that the area around the light pole was a hazard. (P. 66)

(4) That he took no steps to make the work safer because he did not consider the excavation unsafe for the work that was being done (P. 66, 67, 68)

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(5) After surveying the situation he considered making excavation safer before beginning to form tunnel (P. 67), he observed the condition of the walls (P. 70), and satisfied himself that excavation was safe for what they were doing before workmen went into the excavation (P. 70).

(6) Was told by Wally Christiansen that walls should be safe enough if Nauman shored them as he considered necessary (P. 4) and as given authority to install such shoring as he considered necessary (P. 5)

(7) that he was authorized to install whatever shoring he felt was appropriate from materials on the job or if more was needed he could go to the mill (R. 687).

(8) That he considered the excavation safe for the work that he and the workmen were doing in the excavation at the time of the accident (R. 690).

Ashby, the drag line operator, testified that if Nauman had removed the unsupported form that struck him, he would not have been injured by the slough off (R. 885, 886). Had Nauman caused the unsupported form to be braced with the materials available as he was authorized to do he would not have been injured. *The unsupported form which struck Nauman was the proximate cause of his injury.* Whether that form was braced, removed or left was a method or sequence of construction practice which was the exclusive responsibility of Nauman. The architect had no right or duty to interfere since there is absolutely no evidence that the position of that form appeared unsafe to anyone who observed the scene before the accident. To an inspector who had a duty to observe

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58 workmen who were working over an 11 acre construction site the presence of that form was an unimportant detail of the construction similar to a board with a nail in it. The architect fully discharged his duty when he insisted that this trench excavation for the utility tunnel be supervised by a competent safe foreman. The architect had no duty to watch each act done by the foreman to be sure that he did no dangerous acts. Ralph Edwards, an independent architect, testified:

> "I have been impressed with the thoroughness, I would say far beyond the professional average, . . . of an extremely conscientious attitude with respect to the conditions on the job . . . and I can see very little that a normal architect . . . could have done beyond what Mr. Beecher did." (R. 910)

(e) *The architect fully discharged his duty as defined by the Illinois Supreme Court in Miller v. DeWitt* 37 Ill. 2d 273, 226 NE 2d 630.

The prior decision of the Utah Supreme Court in this matter, *Nauman v. Beecher,* 19 U.2d 101, 426 P.2d 621, cites and relies heavily upon the decision of the Illinois Supreme Court in *Miller v. DeWitt,* 226 NE 2d 630. In that decision the two allegations of negligence which the Illinois Supreme Court found to state a claim for relief against the architect (other than a claim under the Illinois Structural Work Act which is not applicable under Utah Law), are that the architects (at page 638):

> (c) Negligently and carelessly failed to calculate sufficient safety factor to be used in the scaffolding under the roof;

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(d) Otherwise negligently and carelessly failed to apply to the work aforesaid the degree of skill which would customarily be brought to such work by competent architects in and about this community.

The Illinois Supreme court at page 639 in that case found that the shoring operation of the old roof (while the old supports were removed and new supports were installed) was of such importance that the jury could find from the evidence that the architects were guilty of negligence in failing to inspect and watch over the shoring operations.

Since no evidence was presented by Nauman concerning deviation by Beecher from the reasonably prudent architect in the community, paragraph (d) mentioned above is not applicable. Both independently practicing architects who testified agreed that Beecher's performance was equal to or superior to the standard of the reasonably prudent architect practicing in the community at that time. (R. 821, R. 910.) (see also P. 10 above)

In our case the excavation for the utility tunnel was merely a "tag end" of an 11 acre project costing many millions of dollars, and was not extremely important and basic to the overall project like the support of the roof was to the remodeling job involved in the *Miller v. DeWitt* case supra, and the method used by Nauman to brace or protect the excavated walls of the existing excavation was likewise not an important phase of the work that would demand specific attention by the architect or his

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inspector, but rather was one of the means, methods, or sequences of construction which was the exclusive choice of Nauman as the contractor's foreman. Had Beecher tried to tell him how to place his concrete forms in the excavation Nauman could have properly told Beecher that it was none of his business and to stop interfering with his work.

An extremely good summary of reasons why the rule in the *Miller v. DeWitt* supra case should be restricted to situations where the omission by the architect is vital and basic to the construction project (so that to fail to inspect is obvious negligence) is found in the dissenting opinion in that case at page 642.

A good statement concerning the respective duties of the architect and contractor is found in the testimony of Architect Montmorency (R. 832 - 839 and ex. D-38, D-39 and D-40).

(f) *A recent Montana Supreme Court case practically identical to Nauman v. Beecher holds the engineer not liable.*

A recent decision by the Montana Supreme Court in *Wells v. Thill,* 452 P.2d 1015 involved an engineer who was employed by a municipal corporation to design and supervise the construction of a sewer system. An employee of the contractor filed action against the engineer for injuries which he sustained in a trench cave-in, claiming that the engineer failed to require the contractor to comply with the safety regulations of the Montana In-

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dustrial Accident Board or those imposed under the terms of the contract.

The Montana Supreme Court held that the duty of the engineer ran to his employer to see that a certain end result was accomplished, namely that the project as finally constructed and turned over to the city met the plans and specifications the engineer had prepared for the city, and that the engineer had no duty to see that the standards set up by the Montana Industrial Accident Board were met. The Court held that said duty lay with the contractor and with the Industrial Accident Board.

(g) *Photograph on cover of Nauman brief refutes most findings of fact and conclusions of law.*

Substantially all of the findings of fact prepared by Mr. Nauman's attorney and adopted by Judge Hanson are in error as pointed out in Defendant's motion to correct those findings (R. 472-483). The Court is invited to examine that motion with reference to the scenes depicted in the following photographs of the accident scene:

(1) Excavation as it appeared shortly after work on tunnel was shut down and prior to completion of excavation by drag line - *Sept.* 27, 1963 - *Ex. P*-3.

(2) Excavation as it appeared the day before the accident, after excavation had been completed, walls had been tapered, gravel had been dumped into excavation, pumping operations commended to remove water, but before resumption of work on utility tunnel - *Oct.* 16, 1963 - *Ex. P*-7.

(3) Accident scene depicting South earth wall from which sluff-off occurred, earth lying on form pinning

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Nauman, and drag line being used to remove form. *Oct.* 17, 1969 - *Ex. P*-13.

(4) Accident scene depicting Nauman being removed from excavation (taken from South bank) depicting form that pinned Nauman and earth on that form. *Oct.* 17, 1969 - *Ex. P*-11.

(5) Accident scene (taken from South bank) depicting area immediately after Nauman had been removed, overhang left by sloughing earth, area actually covered by sloughing earth, no water in excavation, tapered walls, and showing that projection that Judge Hanson found fell onto the farm was still in place and did not in fact fall. - *Oct.* 17, 1969 - *photograph in back of Nauman brief.*

The Court is also invited to re-read the brief filed by Defendant in support of its petition for re-hearing filed in case number 10609 filed in the above entitled court.

CONCLUSION

The photograph produced by Nauman on the back cover of his brief provides additional evidence which clearly establishes that Judge Hanson was in error in his holding that Beecher was negligent in permitting workmen in the excavation without causing the *"large projection"* of earth at the top of the trench to be removed since Judge Hanson concluded that the said *"large projection"* of earth fell onto the form which pinned and injured Nauman, since that photograph shows that the *"large projection" did not fall.* The photograph on the Nauman brief cover was not produced at the trial and apparently

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was not made available to Judge Hanson to assist him with his decision. If the "projection" did not fall it could not be the proximate cause of Nauman's injuries and the judgment should be reversed.

The remaining undisputed evidence clearly shows that Beecher performed all of the duties and obligations imposed by the prior Utah Supreme Court decision in this matter and the duties imposed under the Miller v. DeWitt case cited as authority by the Utah Court in that decision, and that Beecher simply was not negligent.

Respectfully submitted,

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