1970

Arthur 0. Nauman v. Harold K. Beecher & Associates, A Utah Corporation : Answer To Petition For Rehearing

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,

Case No. 11579

ANSWER TO PETITION FOR REHEARING

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

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PRELIMINARY STATEMENT

Defendant does not adopt plaintiff's statement of facts in his Petition for Rehearing because it is inaccurate and misleading. The statement of facts contained in this court's opinion is a complete review of all the evidence and is correct.

Defendant will review each point raised in plaintiff's Petition for Rehearing to refute the plaintiff's contentions.

POINT I

THE COURT WAS ACCURATE IN ITS DETERMINATION THAT THE EARTH PROJECTION WHICH JUDGE HANSON SAID FELL ON NAUMAN DID NOT IN FACT FALL AT ALL.

Nauman attempts (Point I) to show that the earth projection which Judge Hanson said fell onto Nauman is a different earth projection than the projection which is still in place after the accident as shown in the picture pasted on the back cover of Respondent's Brief. The larger and clearer photograph of that scene (which shows the South bank of the excavation immediately after the accident) found in the back of Tucker's deposition (Exhibit P-52), when compared with the photographs taken the day before the accident (Ex. P-7 and D-31) conclusively illustrate the accuracy of this Court's decision which holds that the earth projection did not fall. The only earth projection near the light pole is the projection immediately to the left of the large hose which extends from the right side of the light pole into the excavation, and that earth projection simply did not fall. Judge Hanson specifically referred to a "large projection at the *top* of the trench" (R. 458) (emphasis added) and not to a sluffing off "high on the south bank" as contended in Nauman's Petition for Rehearing (P. 7). There simply is no earth projection depicted in the photograph taken the day before the accident (Ex. P-7 and D-31) which is not still there after the accident (photograph in back of Ex. P-52).

Nauman's argument to the effect that Judge Hanson's finding that the "large earth projection at the *top* of the trench" had reference to an alleged earth projection 5 or more feet *below the top* of the excavation is untrue. Nauman admits in his Petition for Rehearing (P. 7, last sentence) that the slough off came from the darker area in the photograph taken after the accident (Ex. P-13 and P-16), which is consistent with this Court's decision and is inconsistent with Judge Hanson's decision (R. 458).

In his brief Nauman says:

> "We ask the Court to look at Plaintiff's Exhibit 13 and 16 and see for itself the area where the cave-in occurred."

We agree that the darker areas in that photograph (moist earth left exposed by the slough off is darker) depicts the source of the earth that sloughed off and fell onto the wooden form that struck and injured Nauman. Nauman's argument, that the earth that fell from the darker area depicted in exhibits 13 and 16 was the "large projection at the top of the trench" referred to by Judge Hanson, is refuted by the language of Judge Hanson's memorandum decision. The following language used by Judge Hanson in his memorandum decision (R. 458) expressly excludes that area as the area from which the earth fell which caused Nauman's injuries:

> "The defendant refers to a certain picture introduced in evidence which shows a sluffing off the side. This picture is the one depicting the removal of the plaintiff from the trench. However, if that sluffing is viewed in light of the testimony given by the defendants it would only possibly have covered the plaintiff's feet. However, in examining other exhibits it appears that there is a large projection at the top of the trench which, in the opinion of the Court, would have to have fallen in order to put the weight on the form that the defendant (sic) was standing behind at the time of the sluffing. This appears to be clearly logical in view of the large amount of dirt that was on top of the defendant at the time they attempted to rescue him."

This Court's decision correctly reasons that the proximate cause of Nauman's injuries was the wooden form, not the slough off from the earth bank which would not have injured Nauman but for the presence of the wooden form. The quantity and weight of the earth which came from the darker area shown in Exhibits 13 and 16 was sufficient to account for Nauman's injuries. The claimed negligence of the architect was not in fact the proximate cause of Nauman's injuries.

POINT II

THIS COURT PROPERLY CONCLUDED THERE WAS NO REASONABLE BASIS IN THE EVIDENCE TO SUPPORT THE TRIAL COURT FINDING THAT PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT.

This court in its opinion stated:

> "[I]f there is no reasonable basis in the evidence to support the findings (of the trial court) they cannot be sustained."

See *Memmot v. U.S. Fuel Co.*, 22 U.2d 356, 453 P.2d 155, *Smith v. Gallegos*, 16 U.2d 344, 400 P.2d 570, cited by this court.

Plaintiff claims in his Petition for Rehearing this court could not rely on the published deposition of Nauman. The deposition of Arthur Nauman of February 19, 1966, was published (R.593) along with all the depositions in the file. *Plaintiff stipulated that all depositions could be published* (R.593).

The designation of the record on appeal included "all the proceedings, exhibits and evidence in the above entitled action, it being the intent of the appellant herein to designate the entire record." (R. 500) This obviously included all the depositions which were part of the file. *Plaintiff made no objection to the depositions being included in the record on appeal.* The deposition of Nauman was used at the trial and, therefore, was properly included in the record on appeal (R. 703). It is respectfully submitted that the *entire record* on appeal is subject to review by this court.

The fact referred to by this court from Nauman's deposition of February 19, 1966 (which was published) was:

"that he (Nauman) considered the area around the light pole dangerous and observed the earth in that area was not sloped and was near vertical or overhanging."

This fact was undisputed. Nauman testified to this fact on his cross examination (R. 699-670).

"Q. (By Mr. Barker): From the south wall, how far south was the light pole?

A. (Nauman): How far into the lawn from the excavation? The light post was approximately six, to maybe a maximum of maybe eight feet.

Q. Then you would have to add some additional feet to get to the south wall of the tunnel if you answered my full question, would you not?

A. *Very little, since at that point the wall was almost vertical with no slope, as it was in most of the rest of the excavation."* (Emphasis added)

Appellate courts have considered depositions in their review of the record.

In *Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792 (Mo. App. 1951), plaintiff sued defendant for personal injuries sustained in an automobile-streetcar collision. Plaintiff prevailed at trial and defendant moved for a new trial, one ground for which was newly discovered evidence. Defendant had asked plaintiff on deposition if he had ever been hospitalized. Plaintiff answered he had not, but subsequently defendant discovered he had. On appeal from a denial of defendant's motion for new trial, plaintiff claimed the court could not consider the question because the deposition was not a part of the record, not in evidence and was never received in evidence by the trial court. The appellate court reversed, holding:

> "The fact was brought to the attention of the court at the argument for the motion for new trial. It was not objected to then, or later, nor has the fact been controverted at any stage of the proceeding that the question and answer actually appeared in the deposition. Therefore it should and will be considered and weighed notwithstanding the technical considerations advanced. Bradley v. City of Spickardsville, 90 Mo. App. 416, loc. cit. 425. A court of review is not to be hamstrung by such technicalities in its search for truth. Such a handicap would make a mockery of appellate review and give a new and bizarre meaning to the blindfold over the eyes of the Goddess of Justice." *Id.* at 795.

In *St. Louis-San Francisco R.R. Co. v. Fox,* 359 P.2d 710 (Okla., 1961), plaintiff-motorist sued defendant for personal injuries suffered in a collision with a train. Plaintiff obtained a judgment at trial and defendant appealed. The Supreme Court of Oklahoma affirmed subject to remittitur. Defendant unsuccessfully contended that the trial court erred in allowing plaintiff to introduce portions of defendant's depositions as an admission against interest, even though the defendant was present in the courtroom and available to testify.

The Appellate Court held that even if the portions of the depositions were wrongfully admitted, the evidence elicited had already been established by other witnesses. The Court felt that such led ". . . to the inevitable conclusion that such evidence was, at most, merely cumulative and, if erroneously admitted, such constituted harmless error." *Id.* at 714.

Since this testimony was *cumulative* it would be immaterial whether it came from the transcript or from Nauman's deposition.

Viewing the evidence in a light most favorable to the plaintiff does not mean ignoring uncontradicted testimony

which favors the defendant. (See *Kimiko Toma v. Utah Power & Light,* 12 U.2d 278, 365 P.2d 788 (1961).

The following facts, which this court referred to in its opinion were undisputed.

Nauman was authorized to install whatever shoring he considered appropriate.

"Q. (Barker): You were authorized to put in whatever shoring you felt was appropriate.

A. (Nauman): Yes.

Q. There was material upon the bank for shoring, was there not?

A. *There was material on the bank and in the pipe*[*d*] *tunnel that I was instructed to use for shoring material. If I needed more than that material we could go to the mill and obtain some more.*" (R. 687). (Emphasis added)

Nauman did not have any additional shoring installed because he considered the conditions safe for the work they were doing.

"Q. (Barker): Did you consider the conditions, as they then existed, to be safe for what you were doing?

A. (Nauman): *As I understood the conditions at the time I considered it safe for the work that we were doing in regards to leveling the gravel, pumping the water, taking the higher portions of soil out of the excavation, with the gravel fill.*" (R. 690) (Emphasis added)

As this court stated:

> "There was no showing that he (Nauman) was compelled to proceed with the work until this (making the excavation safe) was done."

Wally Christiansen (project manager for contractor) explained to Nauman the problems he had with the excavation:

> "Q. (Barker): In the construction shack, after Mr. Nauman arrived, I would like you to tell us what was said in that conversation, either by you or Mr. Nauman, concerning shoring or sloping the banks of the excavation, or concerning complaints made by the architect's representative, or by the representative of the City Engineer's office, concerning that excavation.
>
> A. (Wally Christiansen): * * * and as I recall I remember the conversation that *I mentioned that has been a real thorn in my side, the excavation over in that area, that I have had some problems with the inspectors over there and them thinking I was running an unsafe job over there, and, of course, I figured we were not running an unsafe job, and that I was glad he was there to help me out and get this show completed.*
>
> I think I also said that we won't be worrying about—we won't be concerned about shoring the banks because we have sloped the banks now so we won't have the shoring to contend with. *We have sloped the banks, and if you go over there, if you feel we need to slope them any further, I have a dragline over there in the operation working so you can have him slope them even further if you feel we need to do that. In other words, for the safety of the job, we have the trucks and machines there to do it.*

This is about the extent of the conversation. We may have had other things said, and I can't recall them, in explanation. That is the meat of the conversation." (R. 797-798) (Emphasis added)

Nauman admitted that he had been employed in construction work for 17 years (R. 668). He had worked on a number of important projects, including the University of Utah Medical Center and the Boy Scout Building in Salt Lake City, Utah. He also admitted that every job has some amount of excavation from a small amount to a great amount (R. 668).

Nauman worked in the excavation on the Medical Center which was about 18 feet deep.

"Q. (Barker): Some of them had excavations deeper than this excavation, did they not?

A. (Nauman): None. None to my knowledge. The deepest excavation that I can recall was the excavation of the east side of the Medical Center, the University Medical Center.

Q. How deep approximately was that?

A. 18 feet.

Q. Excuse me. I didn't hear you.

A. 18 feet." (R. 668)

Nauman personally examined the walls of the excavation:

"Q. (Barker): Did you look the walls over for safety purposes on the 16th and 17th, the walls of the excavation?

A. (Nauman): *Briefly, to my satisfaction, yes.*" (R. 696) (Emphasis added)

Nauman felt it was safe to send workmen in the trench for the work they were doing.

"Q. (Barker): And did you consider those walls in such manner that it was safe to send workmen into the excavation?

A. (Nauman): Yes, for the type of work we were doing." (R. 696)

It is clear that plaintiff was fully aware of the condition of the walls prior to the cave-in. If the walls of the excavation were unsafe as alleged by Nauman, he had the authority and the means to correct the situation (R. 685-687).

The record substantiates this court's conclusion that Nauman was fully aware of the condition of the walls prior to the cave-in, and plaintiff's arguments that he was inexperienced with excavations and that he was on the job only nine and one-half hours prior to the accident do not relieve him of his responsibility under the circumstances.

POINT III

THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT DEFENDANT WAS NEGLIGENT.

Plaintiff, in his Petition for Rehearing, would have this court completely ignore testimony brought out on cross examination and uncontradicted evidence which favors the defendant.

This court has previously held that the testimony of a witness is no stronger than left on cross examination. See *Alvarado v. Tucker,* 2 U.2d 16, 268 P.2d 986 (1954).

The following review of the points raised in Point III of Respondent's Petition for Rehearing, (considered in the same order) conclusively shows there was *no* substantial, competent evidence to support the trial court's finding of negligence.

A. *The Testimony of Defendant's On-Site Inspector, Jonathan H. Tucker.*

Tucker was at the excavation on the morning of October 17, 1963. He noticed some loose dirt under the lamp pole and was going to look for Wally to tell him about it when the cave-in occurred. Tucker was asked if he said anything to Nauman about the loose dirt.

"Q (Barker): Did you mention anything to Nauman about the loose dirt you saw?

A. (Tucker): *Well, I considered where he was it was perfectly safe.* He was at the end of the concrete that had already been poured. (Tucker Deposition taken October 8, 1968, p. 60)." (Emphasis added)

This testimony was uncontradicted.

On October 16, 1963, Nauman asked Tucker what he considered to be the problem involved with the excavation or why there should have been a complaint as mentioned earlier in the day by Mr. Christiansen (R. 662). Tucker said that in his opinion the walls of the tunnel could be sloped more and that it would make it safer (R. 662).

Nauman obviously felt there was no need for further sloping because he didn't order any additional sloping, although Ashby, the dragline operator, had been told to do whatever Nauman told him to do (R. 685).

Neither Nauman nor Tucker thought the excavation was dangerous. They both considered it safe for the work that was being done.

B. *The Architect's Own Records.*

In reviewing the architect's records, it is important to recall that this construction project covered approximately eleven acres and the trench for the utility tunnel was only a small part of the job. The inspector's daily report sheet dated October 17, 1963, (P-8) states, "Mr. Casper Nelson, State Safety Commissioner, made an investigation of the accident, *and then checked the walls at Area "B".*

Area "B" is the Jail Building approximately one block east of the utility tunnel where the cave-in occurred and has no bearing on this accident. There were tunnels in that area also. (See Exhibit P-9 and Exhibit P-8.)

C. *The Testimony of Casper Nelson.*

At the time of the trial, Nelson testified on direct examination that the walls of the tunnel were "real vertical, rather irregular as one might expect with a drag line excavation." (R. 630) However, on cross examination he admitted the walls had been sloped ten or eleven feet on both sides.

> "Q. (Nebeker): You indicate that the top would be cut back perhaps ten feet on the north side and about the same distance on the south side, is that your testimony?

A. (Nelson): Assuming that this wall originally was in line with this (indicating)?

Q. Yes.

A. Yes.

Q. You are indicating the wall on the south side of the excavation?

A. Yes.

Q. Assuming that had been vertical, it has been cut back maybe ten feet. *Do you recall at the time we took your deposition making the measurement on there and indicating that was probably about eleven feet?*

A. Something like that.

Q. In that neighborhood?

A. We guessed. I don't remember now.

Q. *That was your judgment?*

A. *Yes.*" (R639-640) (Emphasis added)

D. *The Testimony of Art Nauman.*

As heretofore stated, Nauman testified he considered the excavation safe for the work they were doing immediately prior to the cave-in (See page 7 above.)

"Q. (Barker): Did you consider the conditions, as they then existed, to be safe for what you were doing?

A. (Nauman): As I understood the conditions at the time I considered it safe for the work that we were doing in regards to leveling the gravel, pumping the water, taking the higher portions of soil out of the excavation, with the gravel fill." (R 690)

E. *The Testimony of Harry Butcher, the Project Engineer.*

Butcher testified the walls of the excavation were straight up and down except where they had been sloped a little at the top (R. 563). *Butcher admitted on cross examination that the south bank (where the accident occurred) had been sloped back ten feet* (R. 591).

F. *The Testimony of Joe L. Ulibarri.*

This court's analysis of Ulibarri's testimony was as follows:

> "An eye witness to the cave-in, John L. Ulibarri, was working just ten feet away from the area where and when the cave-in took place. He testified the walls were straight up and down on the south side; that the walls of the banks looked dangerous to him. He was not a qualified expert; and he had made no protest, nor called to anyone's attention the condition of the walls. It is difficult to understand why he was working in this excavation if it appeared dangerous to him, since he should have been concerned for his own safety. *Under those circumstances, his testimony, when considered in connection with all of the evidence in the case, could not properly be regarded as substantial evidence that the condition of the tunnel was so dangerous that the architect should have known and acted upon it.*" (Emphasis added)

In view of all the other evidence that the excavation appeared safe or that it was properly sloped, defendant sub-

mits that Ulibarri's testimony does not constitute substantial evidence that the condition of the excavation was dangerous.

G. *The Testimony of Evan Ashby.*

Ashby testified he thought the trench was safe for the work that was being done by Nauman.

> "Q. (Nebeker): Mr. Ashby, in your experience in excavations and the observations you made of this trench, do you have an opinion as to whether or not the trench was safe for the work that was being done by Mr. Nauman and the other workmen in that trench?
>
> A. (Ashby): Yes.
>
> Q. What is that opinion?
>
> A. *I felt that the trench was safe.*" (R. 891) (Emphasis added)

H & I. *The Utah State General Safety Order and the American Standard Safety Code.*

These documents state the requirements for sloping a trench over 4 feet in depth which is ½ to 1 angle. This *is not in dispute.* As the court noted in its opinion, there should be one foot of slope to each two feet of depth.

It is respectfully submitted that all the witnesses (except Ulibarri) testified either that the trench was safe for the work that was being done, or was sloped in substantial compliance with the requirements of the Industrial Commission.

Defendant submits that this court properly found there

was no substantial competent evidence to support the trial court's finding that defendant was negligent.

POINT IV

THE COURT'S OPINION CLEARLY STATES WHAT EVIDENCE IS NECESSARY TO ESTABLISH LIABILITY AGAINST THE DEFENDANT IN THIS CASE.

This court in its opinion stated:

> "In a suit against an architect, plaintiff's allegation and *proof* must show (1) the architect failed to meet the standard of his profession in preparing plans or supervising the work, or (2) that failure to supervise the work properly in accordance with the terms of his contract resulted in injury."

It is difficult to see how there could be a more explicit declaration of the law than that made by this court.

This court further stated:

> "The liability of architects is based upon professional negligence with respect to which only those qualified in the field can testify as to the standard of competence and care possessed by professional men in the locality and whether there has been a breach of that Standard of Care." See *Covil v. Robert & Co. Associates,* 144 S.E.2d 450 (Ga. App., 1965).

Plaintiff relied upon paragraph 12a of the contract between the owners and contractor which provides:

> "If, in the *judgment* of the architect and/or the city engineer or county engineer, it is necessary to close down the work due to . . . circumstances arising during the progress of the work, that may be construed to be dangerous . . . the Contractor shall comply and he shall stop all operations . . . until further orders in writing are given . . ."

As this court correctly observed:

> *"Assuming this provision applies to the defendant, even though it was not a party to said contract, and did not sign it, whether or not the architect exercised proper or reasonable judgment, would have to be based upon the testimony of other architects and not upon the testimony of lay persons. Yet, the plaintiff did not produce any architect as a witness."* (Emphasis added)

Defendant submits that the foregoing statement of the law is correct. See *Paxton v. Alameda County*, 259 P.2d 934 (Cal. App., 1953).

Assuming Beecher was bound by the terms of the contract whether or not he exercised proper *judgment* would have to be based upon the testimony of other architects and *not* by lay persons. The plaintiff failed to produce *any* architect as a witness, even though he had one present in the court room during a substantial part of the trial.

As this court stated, if the trench was so dangerous any person could recognize the danger, then the trial court could have based its findings on the testimony of lay persons. *However, as previously discussed, all of the lay persons except one considered that where the plaintiff was it was perfectly safe, or admitted the excavation had been properly sloped.*

All of the expert witnesses (four architects) testified the area appeared safe or met the requirements of the Industrial Commission.

Defendant claims this courts' opinion is a clear expression of the law relating to the liability of architects. The opinion also shows this court made an exhaustive analysis of the evidence and properly concluded that there was *no*

substantial, competent evidence to support the trial court finding that the defendant was negligent.

CONCLUSION

Plaintiff's Petition for Rehearing presents no new legal or factual matters. Defendant respectfully submits that the findings of fact and conclusions of law and judgment entered by the trial court were thoroughly reviewed by this court in its opinion. The record clearly shows that the trial court's findings and conclusions were *not* supported by substantial evidence. The record does show that the defendant met the standard of care observed by architects in the locality. Defendant respectfully requests that the Petition for Rehearing be denied.

Respectfully submitted,

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