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Arthur Nauman v. Harold K. Beecher and Associates, A Utah Corporation, and Harold K. Beecher, An Individual : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR NAUMAN,

Plaintiff and Appellant,

vs.

HAROLD K. BEECHER AND ASSOCIATES, a Utah corporation, and HAROLD K. BEECHER, an Individual,

Defendants and Respondents

Case No. 10609

APPELLANT'S BRIEF

Appeal from the Final Order of the Third Judicial District Court for Salt Lake County
Honorable Albert H. Ellett, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR NAUMAN,

Plaintiff and Appellant,

vs.

HAROLD K. BEECHER AND ASSOCIATES, a Utah corporation, and HAROLD K. BEECHER, an Individual,

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STATEMENT OF THE CASE

This appeal raises the question of whether the Second Amended Complaint of the Plaintiff and Appellant herein sets forth a cause of action upon which relief may be granted and thereby raises the question of whether an architect employed by an owner to prepare plans, specifications and to supervise all of the work, can be negligent and thereby become liable to an injured employee of the general contractor that is injured during the construction of the job.

DISPOSITION IN LOWER COURT

The District Court entered a Final Order against Plaintiff and Appellant, holding the Second Amended Complaint of Plaintiff failed to state a claim for relief upon which relief may be granted.

RELIEF SOUGHT ON APPEAL

Plaintiff and Appellant seeks reversal of the lower Court's Final Order of Dismissal of Second Amended Complaint and a ruling that Plaintiff and Appellant's Second Amended Complaint states a cause of action upon which relief may be granted.

STATEMENT OF FACTS

The Complaint of the Plaintiff was filed. After motions of the Defendants, a First Amended Complaint was filed and shortly before the Final Order of the District Court dismissing the Complaint of the Plaintiff and Appellant, the Second Amended Complaint was filed. At no time did the Defendants and Respondents file an Answer to either of the Complaints filed by the Plaintiff and Appellant. The Second Amended Complaint of the Plaintiff and Appellant was filed in the District Court on the 16th day of March, 1966, and the Court, on the 18th day of March, 1966, entered an Order dismissing with prejudice the Complaints of the Plaintiff. The Second Amended Complaint of the Plaintiff and Appellant is found in the record filed with the Supreme Court on pages 146 through 163. It seems necessary to repeat the pertinent terms thereof exactly for the scrutiny of the Court in their determination of whether the said Second Amended Complaint does state a cause of action upon which relief may be granted.

Attached to the Second Amended Complaint was an exhibit identified as Exhibit "A", which was annexed to the Complaint and incorporated therein by reference. The Exhibit "A" is an Agreement by and between Salt

Lake City Corporation and Harold K. Beecher and Associates, dated the first day of March, 1960, from which the employment of the defendants arose. The pertinent portion of the Second Amended Complaint is reproduced as follows:

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

ARTHUR O. NAUMAN, Plaintiff, vs. HAROLD K. BEECHER AND ASSOCIATES, a Utah corporation, and HAROLD K. BEECHER, an Individual, Defendants	SECOND AMENDED COMPLAINT Civil No. 157284

Comes now the plaintiff and complains of the defendants as follows:

COUNT I

1. That at all times herein mentioned, the defendant Harold K. Beecher and Associates, a Utah corporation, was and now is a Utah corporation duly licensed to do business as an architect in the State of Utah and that during said times alleged herein, the defendant Harold K. Beecher, an individual, was a resident of Salt Lake County, State of Utah, and was duly licensed to do business as an architect in the State of Utah, and at all times herein, was an officer, director and general manager of defendant

corporation and was in charge of and had general supervision over the defendant corporation's operations under that certain architect's Agreement referred to in paragraph 2 hereof.

2. That on or about March 1, 1960, the defendants entered into an Agreement with Salt Lake City Corporation, a municipal corporation of the State of Utah, to provide professional architectural services in connection with the proposed construction of a Public Safety and Jail Building in said City, in accordance with said Agreement, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

3. That paragraphs 1 and 7 of the Agreement referred to in paragraph 2 above provide in part as follows:

> "1. THE ARCHITECT'S SERVICES. The architect's professional services consist of the necessary conferences, the preparation of schematic and preliminary studies, working drawings, specifications, large scale and full size detail drawings for architectural, structural, plumbing, heating, electrical, and other mechanical work; assist in the drafting of forms of proposals and contracts to conform to Owner's standard requirements;***."
>
> "7. GENERAL ADMINISTRATION. The Architect shall furnish at his expense a qualified on-site inspector, acceptable to both Owner and Architect, during the entire time the construction work is in progress, whose duties shall consist of checking all shop drawings, for approval of the City Engineer, to determine the quality and acceptance of the material and/or equipment proposed to be used in the facilities being constructed; to supervise and inspect all phases of the work being done."

4. That on or about May 20, 1960, the defendant corporation, as Architect, entered into an Agreement with Salt Lake County, a political subdivision of the State of Utah, as Owner, to provide professional architectural services in connection with the proposed construction of a Public Safety and Jail Building in Salt Lake City.

5. That paragraph 1 of the Agreement referred to in paragraph 4 above provides as follows:

> "1. The parties hereto hereby incorporate by reference the terms and conditions of the Agreement entered into on or about the first day of March, 1960, by and between the Architect and Salt Lake City Corporation, a Municipal Corporation of the State of Utah a copy of which is annexed hereto as Exhibit "A", so far as the provisions thereof are applicable, and as modified by the terms and conditions contained herein, and provided that the name of the Owner herein shall be substituted therein wherever the name of said Salt Lake City Corporation appears, and the Board of County Commissioners shall be substituted therein wherever the name of the City Commissioners appears, and the project referred to therein shall refer to the project herein described."

6. That pursuant to the foregoing Agreements for architectural services, the defendants prepared the specifications, bidding and contract documents for the construction of the Public Safety and Jail Building on behalf of Salt Lake City Corporation and Salt Lake County, all of which are set forth in that certain Contract dated June 18, 1963, by and between Salt Lake City, a Municipal Corporation of the State of Utah, and Salt Lake County, a Political Subdivision of the State of Utah, acting in concert and referred to therein as the Joint Au-

thority and Christiansen Brothers, Inc., a corporation, therein called the Contractor.

7. That the Contract referred to in paragraph 6 consisted of the following complimentary documents, all of which formed said Contract according to paragraph 10 of the Special Conditions thereof: The Contract, Instructions to Bidders, General Conditions, Special Conditions, Drawings and Specifications, Notice to Contractors, Bid Proposal and Bond, including all addenda incorporated in the documents before their execution.

8. That paragraph 3(b) of the General Conditions Section of the Contract referred to in paragraph 6 above provides as follows:

> "3(b). Whenever in these Specifications, the Contract or any supplementary agreements or instruments in which these specifications govern, the words 'Architect' or 'Architects and Associates' appears, it shall be interpreted to mean Harold K. Beecher and Associates, who, under contract, furnished the Drawings and Specifications for this work and who will direct the supervision of the construction and is acting in cooperation with the City Engineer and the County Engineer as outlined above through paragraph 3 and 3(a)."

9. That paragraph 3(c) and 12(a) of the General Contrac t Section of Contract referred to i n paragraph 6 above, provide as follows:

> "3(c). The Contractor, his Superintendent and Foreman, shall promptly obey and follow every order or direction which shall be given by the Architect and/or the City Engineer or the County Engineer in accordance with the terms of the Contract."

"12(a). 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 inclement weather or due to other circumstances arising during the progress of the work, that may be construed to be dangerous or that may be caused by non-compliance with the Specifications; the Contractor shall comply and he shall stop all operations upon written notice from the Architect and/or City Engineer or County Engineer so to do, and the work shall remain closed down until further orders in writing are given by said Architect and/or City Engineer or County Engineer to the Contractor to proceed with the work of the project, and there shall be no claim against either Salt Lake City Corporation or Salt Lake County or the Architect or Engineers, for such action."

10. That paragraphs 1(b) and 17(a) of the Special Conditions Section of the Contract referred to in paragraph 6 above provides as follows:

"1(b). The Contractor shall take all necessary precautions for the safety of the public and employees on the work and shall comply with all applicable provisions of Federal, State and Municipal Safety Laws and Building Codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of the public and workmen and shall post danger signs warning against hazardous conditions."

"17(a). Shoring: Contractor shall provide and be responsible for all temporary shoring required for executing and protecting the work."

11. That on page 2 of Section of the Contract referred to in paragraph 6 above, relating to "EXCAVATION, FILL AND GRADING", under the sub-heading of "SHEET PILING" it is provided as follows:

> "In excavating near or against necessary remaining buildings, or to safeguard life and property when earth banks are too deep or are too steep, this Sub-Contractor shall provide adequate sheet piling to prevent failure of adjoining foundations or to protect workmen."

12. That pursuant to the Contracts hereinabove referred to, the defendants undertook the inspection of the construction project on behalf of Salt Lake City Corporation for the purpose of determining whether said work was being done in accordance with the plans, specifications and contract therefor and for the enforcement of safety regulations and procedures for the protection of workmen on said construction project.

13. That on or about October 17, 1963, in Salt Lake City, County of Salt Lake, State of Utah, at a point approximately 35 yards west of Second East Street in said city at the construction site of an underground connecting service tunnel located between the Salt Lake City and Salt Lake County Building and the Public Safety and Jail Building which was part of the construction included within the Contracts hereinabove referred to, and which work was being done by Christiansen Brothers, Inc., the general contractor, a portion of the 25 foot high earthen embankment of said tunnel excavation caved in upon the plaintiff, a construction employee on said project, trapping and crushing him under wooden cement forms, mud and earth, for approximately forty (40) minutes, caus-

ing the plaintiff to suffer total, permanent and complete disability and paralysis in each and every limb of his body, in his body trunk, in his bodily function, including control of vital organs and excretion, and in his muscle function as a result of the injuries suffered by him in said accident.

14. That the excavation for the construction of said underground service tunnel was dangerous and unsafe, causing an extreme hazard to the workmen therein; that said excavation did not comply with the safety regulations of the Utah State Industrial Commission which were then in force and effect; and that said defendants both knew said dangerous condition for many days prior to said accident and negligently failed to shut down the work on said tunnel as they had the duty and authority to do.

15. That as a direct and proximate result of the defendants' negligence, the plaintiff has suffered the following injuries and physical impairments: . . .

(a) Crushed and broken vertebrae in the neck in two places.

(b) Permanent paralysis from the neck down, resulting in complete loss of ability to control hands, arms, feet, legs and bodily functions.

(d) Kidney infection controlled by anti-biotic drugs, but which doctors have no hope of curing.

(e) Constant nausea, upset stomach, inability to eat, and necessity of special diet.

(f) Loss of breathing control.

(g) Constant and unrelenting headaches and pain in neck, back, legs and toes.

(h) Constant sore throat.

(i) Infected toenail which drugs fail to heal.

(j) Permanent and total loss of normal bodily functions such as walking, standing, sitting up, controlling excreta, etc.

(k) Loss of body tissue.

(l) Other injuries and losses of bodily functions relating to the foregoing.

16. That as a direct and proximate result of the defendants' negligence, the plaintiff's resulting injuries have caused, do now cause and will in the future cause the plaintiff to suffer great pain and mental anguish, permanent confinement, continuing medical treatment and wasting away of body tissue; that said injuries have deprived the plaintiff of his normal association with his wife and children and they with him; that said injuries have rendered the plaintiff unable to provide his family with his loving guidance and physical and financial support; and that said injuries have permanently and totally disabled the plaintiff from earning a livelihood for himself and his family for the remainder of his natural life without any hope of recovery, all to his general damage in the sum of $520,000.00.

17. That as a direct and proximate result of the defendants' negligence and plaintiff's resultant injuries, the plaintiff has suffered a loss of wages in the amount of $20,000.00 to date and his incurred up to the present time doctor bills, hospital bills and special care bills,

nursing bills and other medical expenses in the amount of $30,000.00, and is at the present time undergoing continuous medical treatment for which additional special damages will accrue to the plaintiff prior to the trial of this action.

18. That as a direct and proximate result of the defendants' negligence as aforesaid, and of said injuries, it will in the future be necessary for plaintiff to, and he will, secure further medical care and attention of the reasonable value of $300,000.00 for which he will be required to pay said sum and by reason thereof, plaintiff has been further damaged in the sum of $300,000.00.

WHEREFORE, plaintiff demands judgment in the amount of $520,000.00 general damages and $330,000.00 special damages, together with his costs and disbursements incurred herein and such other and further relief as the Court deems just in the premises, against each of the defendants jointly and severally.

COUNT II

Comes now the plaintiff and as an alternative cause of action alleges as follows:

1 - 13. As paragraphs 1 through 13 of this Count II, the plaintiff herein incorporates paragraphs 1 to 13, inclusive, of Count I.

14. That the excavation for the construction of the said underground service tunnel was dangerous and unsafe, causing an extreme hazard to the workmen therein; that said excavation did not comply with the safety regulations of the Utah State Industrial Commission which

were then in full force and effect; and that the defendants knew of said dangerous conditions for many days prior to the said accident and failed to shut down the work on said tunnel as they had the duty and authority to do under the foregoing Agreements.

15. That the plaintiff was a construction employee on said project and was therefore a member of the class of persons for whose benefit the provisions of the foregoing Agreements were intended to protect.

16. That the defendants breached their contractual obligations to Salt Lake City Corporation and Salt Lake County and to the plaintiff as a third party beneficiary thereof, by failing to enforce their supervisory powers and control over the work to see that the same complied with the contract therefor, and in failing to shut down the work as they had the authority and duty to do after discovering the hazardous and dangerous condition of said excavation.

17. That as a direct and proximate result of said breach, the plaintiff has suffered the following injuries and physical impairments: . . .

18 . . . 19 . . . 20 . . . are same as the Count I paragraphs of Complaint.

DONN E. CASSITY
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EXHIBIT "A" (See R. 156-163)

The injuries sustained by the Plaintiff and Appellant herein were of such a nature that, though he lives and

his mind remains clear, he is totally unable to move knowingly so much as a single muscle below his neck. The Plaintiff and Appellant was a thirty-seven year old man at the time of the accident, having a wife and three children of tender age and had been on the job where he was injured one working shift and for approximately an hour prior to the cave-in which caused his injuries. Although there are many facts and thence testimony that will be introduced into evidence in the District Court for the Court and jury to consider relative to the negligence of the Defendants and the consequent injuries to the Plaintiff, the only issue before the Court at this time is whether or not the Second Amended Complaint of the Plaintiff states a cause of action and thus, those facts which can be readily established for purposes of trial, will not be here set forth. It is important to note, however, that the underground connecting service tunnel was constructed according to the plans and specifications of the Defendant architects, and was an important part of "all of the work" that was being supervised by the Defendant architects.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING THE SECOND AMENDED COMPLAINT OF THE PLAINTIFF AND APPELLANT IN THAT SAID COMPLAINT DOES STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED, ON EACH AND ALL OF THE FOLLOWING GROUNDS.

A. WHERE A CONTRACT BETWEEN AN ARCHITECT AND AN OWNER REQUIRES INSPECTION AND SUPERVISION DURING CONSTRUCTION, THE ARCHITECT MUST EXERCISE REASONABLE DILIGENCE AND SKILL IN THE PERFORMANCE OF THAT DUTY.

B. ARCHITECTS ARE UNDER A DUTY TO EXERCISE ORDINARY, REASONABLE CARE, TECHNICAL SKILL AND ABILITY AND DILIGENCE, SUCH AS IS ORDINARILY REQUIRED OF ARCHITECTS, IN THE COURSE OF THEIR PLANS, INSPECTIONS AND SUPERVISION DURING CONSTRUCTION FOR THE PROTECTION OF ANY PERSON WHO FORESEEABLY AND WITH REASONABLE CERTAINTY MIGHT BE INJURED BY THEIR FAILURE TO DO SO, REGARDLESS OF PRIVITY, AND WHETHER OR NOT THEY EXERCISED SUCH CARE IS A QUESTION FOR THE JURY.

C. ARCHITECTS WHOSE DUTIES WERE NOT LIMITED TO THE PREPARATION OF PLANS AND SPECIFICATIONS, AND WHO WERE ALSO EMPLOYED TO SUPERVISE THE CONSTRUCTION HAD THE DUTY TO SUPERVISE THE PROJECT WITH DUE CARE UNDER THE CIRCUMSTANCES.

D. BOTH THE GENERAL CONTRACTOR AND THE ARCHITECTS BY VIRTUE OF THEIR CONTRACTS WITH THE OWNER AND THEIR POSITIONS WERE REQUIRED TO EXERCISE DUE CARE AND SKILL FOR THE PROTECTION OF

THE EMPLOYEES ON THE CITY-COUNTY MUNICIPAL COMPLEX.

E. THE QUESTION OF NEGLIGENCE OF ARCHITECTS WHO WERE EMPLOYED BY THE CITY-COUNTY, NOT ONLY TO PREPARE PLANS AND SPECIFICATIONS FOR CONSTRUCTION OF THE CITY-COUNTY COMPLEX, BUT ALSO TO SUPERVISE CONSTRUCTION, IN FAILING TO PROPERLY SUPERVISE THE SHORING AND THE TAPERING OF THE WALLS OF THE EXCAVATION TO PREVENT THE HAZARDOUS CONDITION FROM ARISING, OR ONCE HAVING ARISEN FROM CONTINUING, RESULTING IN COLLAPSE OF THE WALL OF THE EXCAVATION AND INJURIES TO THE EMPLOYEE OF THE GENERAL CONTRACTOR IS A QUESTION FOR THE JURY.

F. AN ARCHITECT IS LIABLE FOR NEGLIGENCE IN EXERCISING SUPERVISORY POWERS UNDER HIS CONTRACT OF EMPLOYMENT.

G. WHERE AN ARCHITECT KNEW OR IN THE EXERCISE OF REASONABLE CARE SHOULD HAVE KNOWN THAT A HAZARDOUS CONDITION EXISTED ENDANGERING EMPLOYEES OF THE CONTRACTOR, THE ARCHITECT HAD THE RIGHT AND THE CORRESPONDING DUTY TO STOP THE WORK UNTIL THE UNSAFE CONDITION HAD BEEN REMEDIED.

Liability of an architect is expressed in Montijo vs. Swift (1963) 219 Cal. App. 2d 351, 33 Cal. Rptr. 133,

wherein the Plaintiff brought an action against the Defendant architect who had designed and supervised the construction of a stairway in a bus depot, for injuries sustained when she fell while descending said stairs. The court held as follows at pages 134-135 of 133 Cal. Rptr. 2d:

> "Under the existing status of the law, an architect who plans and supervises construction work, as an independent contractor, is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services. This conclusion is supported by the general principles declared and applied in Chance vs. Lawry's Inc., 58 Cal-2d 368, 376, 377, 25 Cal. Rptr. 209, 374 Pac. 2d 185; Stewart vs. Cox, 55 Cal. 2d, 857, 862-863, 13 Cal. Rptr. 521, 362 Pac. 2d 345; Dow vs. Holly Manufacturing Co., 49 Cal. 2d 720, 724, 321 Pac. 2d 736; Hale vs. DePooll, 33 Cal. 2d 228, 231, 201 Pac. 2d 1, 13 ALR 2d 183, and Dahms vs. General Elevator Co., 214 Cal. 733, 738-742, 7 P. 2d 1013. (See also Prosser on Torts, 2nd edition, page 517; Rest. Torts Sec. 385.)"

The New York Appellant Division in Clemens vs. Benzinger, 211 App. Div. 586, 207 N.Y.S. 539 is cited following a statement of a rule, at 5 Am. Jur. 2d, Architects, Sec. 25, which reads as follows:

> "An architect's liability for negligence resulting in personal injury or death may be based upon his supervisory activities or upon defects in the plans."

In the Clemens vs. Benzinger case, the Plaintiff's decedent was an employee for a steel construction com-

pany building a baseball grandstand. Steel "H" columns were placed on concrete bases in which the plans and specifications required anchor bolts to be set at the time the concrete was poured. This was not done on certain columns and the anchor bolts were placed in holes drilled in the concrete bases and the holes were then grouted in with sand and cement, and part of the protruding lugs on the anchor bolts were removed in order to fit the drilled holes. The anchor bolts were so placed on the day prior to the accident for the column which fell striking the plaintiff's decedent and killing him. The falling column pulled the anchor bolts up about six inches and bent them over with green, partially hardened cement showing at the top of the holes. The Court held that the supervisory engineer who had prepared the plans and specifications and had charge and supervision of the construction was liable for negligence in the supervision of the work, the same as for defects in original plans. Thus the Court permitted recovery against the architect for his supervisory activities, namely his failure to notify the structural steel contractor of the actual conditions of the anchor bolts after he had authorized and directed the placing of the bolts in the drilled holes. See comment in 59 A. L. R. 2d, 1085-1086.

In the instant case before the Court, the contract of employment between the Defendant Corporation and Individual Architect and Salt Lake City and Salt Lake County for architectural services in connection with the design and the construction of the new Public Safety and Jail Building in Salt Lake City, Utah, clearly provided that the Defendant was to prepare the contract document for letting the bids, for construction, and "to supervise

and inspect all phases of the work" to be done thereunder. (See paragraphs 3, 4 and 5 of the Second Amended Complaint). Contract documents prepared by the Defendant for Salt Lake City and Salt Lake County, whereby the construction of a building was let to Christiansen Brothers, Inc. provided that (1) The Defendant corporation "will direct and supervise the construction" on behalf of the City and County, (2) The Contractor "shall promptly obey and follow every order or direction which shall be given by the architect*** in accordance with the terms of the contract", (3) If, in the judgment of the architect, it is necessary to close down the work because of dangerous conditions or non-compliance with the specifications, the contractor shall comply and stop all operations upon written notice from the architect until ordered to proceed by the architect and there shall be no claim against the architect for such action, (4) The contractor shall take all necessary precautions for the safety of the public and employees on the work, shall comply with all applicable provisions of all federal, state and municipal safety laws and building codes to prevent accidents or injuries to persons in the premises, and shall erect and maintain at all times all necessary safeguards for the protection of the public and workmen, and (5) In order to safeguard life and property when earth banks are too deep or steep, the contractor "shall provide adequate sheet piling*** to protect workmen." (See paragraphs 6, 7, 8, 9, 10 and 11 of the Second Amended Complaint, expressly setting forth the above contracted provisions). As alleged in the Second Amended Complaint, the Defendants undertook the performance of their supervisory duties pursuant to the above designated con-

tracts on behalf of Salt Lake City and Salt Lake County and knew of the dangerous conditions which precipitated the caving in of the excavation on the plaintiff for many days prior to the accident. (See paragraphs 12 and 14 of the Second Amended Complaint). (R. 146-155).

In a 1953 case, known as Paxton vs. Alameda County, et al, 119 Cal. App. 2d 393, 259 Pac. 2d 934, the Plaintiff brought an action for injuries suffered when sheathing in a roof over a building being constructed for Defendant County pursuant to specifications prepared by Defendant architect, gave way as Plaintiff was carrying buckets of hot tar thereon. The Plaintiff alleged the architect was negligent in specifying one inch by six inch sheathing with a spread of thirty inches between the rafters, and that the county was negligent for approving such plans, and, additionally, that sheathing of lower grade than that specified was used and the county was chargeable with notice thereof through its agents who supervised and inspected the work of construction. The architect in that case had the contractual obligation to prepare the plans and specifications and to direct and supervise the construction work and thereby was the responsible agent of the county to see that the building was completed in strict accordance with the plans and specifications therefor. Plaintiff recovered a $25,000 judgment against the architect and the county. Upon appeal, the Appellate Court held that the evidence was insufficient to support a finding that the architect had negligently specified sheathing material which was of insufficient strength and, therefore, reversed the judgment against the architect upon the narrow allegation of negligence against him contained in the complaint. As to the county, the Appellate

Court affirmed the judgment upon the ground that sheathing of a lower grade than specified was used resulting in a dangerous and defective condition, the architect had notice thereof and had authority to remedy the condition and that the county's agent, the architect, had discovered the inferior lumber prior to its placement on the roof and was negligent in not making another inspection of the roof until after the sheathing was in place. In so holding the court recognized the liability of the county for the negligent acts of the architect as its agent and in order to clarify the anomaly of the agent not being jointly liable with the county for his negligent acts, the court stated in footnote 5 on page 945 of 259 Pac. 2d Rptr. as follows:

> "While it may seem anomalous to hold the principal (the county) and not the agents (Hass) liable, the reason is that the cause of action against Hass was narrowly limited to alleged "specification" of inferior material, but was not thus limited as against the county."

The undisputed import of the holding in this case which is almost identical to the case at bar with respect to the failure of the architect to exercise his supervisory powers is that the architect would have been jointly liable with the county for his negligent omission which resulted in injury to the plaintiff, had the complaint been so drafted. Any other conclusion would violate every recognized rule of agency and liability under the doctrine of respondeat superior. Thus the Court permitted an employee on the job to recover against the principal county for the negligent supervision and inspection of the construction work by the architect agent. An error in

pleading only permitted the architect to avoid joint liability with the county in the Paxton case.

In the case of Craviolini vs. Scholer and Fuller Associated Architects, 89 Ariz. 24, 357 Pac. 2d 611, the court observed as follows at page 614 of 357 Pac. 2d Rptr.:

> "Thus the architect has no immunity as an architect;*** he may in the construction of a building assume many roles - planner, designer, supervisor, arbitrator and owner's agent. In the role of arbitrator, and in that role alone, goes the cloak of immunity."

In 1965, the Illinois Appellate Court, in a case known as Miller vs. DeWitt, 59 Ill. App. 2d 38, 208 N. E. 2d 249, sustained a jury verdict against defendant architects wherein the jury had held in favor of three injured employees of the contractor and found the architects negligent in the supervision of the work and awarded Miller $30,000; Furry $90,000 and Plaintiff Engel $5,000 against the defendant architects under both the negligent count of the complaint as well as the structural work act count of the Plaintiff's Complaint. In this case, the defendant-architect prepared plans to remodel the west wall of a gymnasium. The architects prepared the necessary plans, specifications and proposed contracts and caused bids to be received which resulted in the letting of three contracts, one to Fisher-Stoune, Inc. for the general construction work, one for the plumbing and heating and one for the electrical work. Plans for the remodeling job called for the renewal of the west wall of the gymnasium; removal of a proscenium truss from that point to the new west wall of the new gymnasium; the removal of two steel columns in the old west wall, which together with

the proscenium truss originally supported the west ends of four east-west roof trusses; the substitution of a new north-south main bearing truss into which would be fastened the west ends of the old roof trusses and the east ends of the trusses in the new structure.

The relevant provision of the contract between the architects and the school district were as follows:

> "1. The Architect's Services: The architect's professional services consist of the necessary conference, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings, for architectural, structural, plumbing, heating, electrical and other mechanical work; obtaining approval of government agencies having jurisdiction over certain phases of the work consisting of fire marshall, health department, county superintendent of schools and department of education; assistance in the drafting of forms of proposals and contracts; the issuance of certificates of payment, the keeping of accounts, and the general administration of the construction contracts and *supervision of the work.*" (Emphasis added)
>
> * * * *
>
> "6. Supervision of the Work: The architect will endeavor to guard the owner against defects and deficiency in the work of the contractors, but he does not guarantee the performance of their contracts. The supervision of an architect is to be distinguished from the continuous personal superintendance to be obtained by the employment of a clerk-of-the-works. When authorized by the owner, a clerk-of-the-works acceptable to both Owner and Architect shall be engaged by the architect at a salary satisfactory to the Owner, and paid by the Owner, upon presentation of the Architect's monthly statements."

The construction contract between Fisher-Stoune, Inc. and the school district provided in its relevant parts, as follows:

"Article 1. Scope of the Work.

'The General Contractor shall furnish all of the materials and perform all of the work to complete the general work shown on the drawings and described in the specifications entitled 'Second Addition to Maroa High School, Community Unit School District No. 2, Makin and DeWitt Counties, Illinois'."

"Article 6. The Contract Documents.

"The general conditions of the contract, the specifications and the drawings, together with this Agreement, form the contract and they are as fully a part of the contract as if attached or herein repeated."

"Article 12. Protection of Work and Property.

"The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the Owner's property from injury or loss arising in connection with this contract. He shall make good any such damage, injury or loss except such as may be directly due to errors in the contract documents or caused by agents or employees of the Owner or due to causes beyond the contractor's control and not to his fault or negligence. He shall adequately protect adjacent property as provided by law and the contract documents."

"The contractor shall take all necessary precautions for the safety of the employees on the work and shall comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accident or injury to persons on, about or adjacent to the premises where the work is being per-

formed. He shall erect and properly maintain at all times as required by the conditions and progress of the work all necessary safeguards for the protection of the workmen and the public and shall post danger signs warning against the hazards created by such features of construction as protruding nails, holes, elevator hatchways, scaffolding, window openings, stairways and falling materials; and he shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents. The name and position of any person so designated shall be reported to the Architect by the Contractor." (Emphasis added)

"Article 13. Inspection of Work.

"The Architect and his representative shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection."
"Article 14. Superintendent: Supervision:

"The Contractor shall keep on his work during its progress a competent superintendent and any necessary assistants, all satisfactory to the Architect. . . "
"The Contractor shall give efficient supervision to the work using his best skill and attention . . . "
"Article 15. Changes in the Work:

" . . . In giving instructions, the Architect shall have authority to make minor changes in the work not involving extra cost and not inconsistent with the purposes of the building . . . "

"Article 19. Correction of Work Before Final Payment:

"The Contractor shall promptly remove from the premises all work condemned by the Architect as failing to conform to the Contract . . . "

"Article 38. Architect's Status.

"The Architect shall have general supervision and direction of the work . . . He (the Architect) has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract . . . "

"Article 55. Protection:

"Bracing, shoring and sheeting: The Contractor shall provide all bracing, shoring and sheeting as required for safety and for the proper execution of the work and have same removed when the work is completed."

The Illinois Appellate Court took into consideration the contractual provisions between Architect and Owner and between Owner and Contractor *as well as the conduct of the Architect* in determining whether or not the verdict of the jury that the Architect was negligent by omission in causing the injuries to the plaintiffs. The Court refers to the Paxton vs. Alameda case, ibid. as follows: (Emphasis added)

"The only complaint of the Plaintiff against the Architect there was of alleged negligence in the plans and specifications, not in any supervision, and on the particular facts there presented, which are not analagous to those here, they were held not negligent. But the defendant county was held liable because the sheeting actually used was not as specified, was insufficient, and the Architect had authority to remedy such and did not do so. By implication at least, it would seem that had the Complaint against the defendant Architects been based on alleged negligent supervision (as well as alleged negligent plans and specifications), which for some reason it was not, the court likely would have held the Architects liable

consistent with its determination of the cause as against the defendant county."

The opinion of the Illinois Appellate Court in Miller vs. DeWitt continues as follows:

"Under the Agreement of the Owner and the defendant's Architects here, they were to perform professional services, consisting of, so far as now relevant, conferences, preliminary studies, working drawings, specifications, large scale and full size detail drawings for architectural, structural, plumbing, heating, electrical and other mechanical work, etc., assisting in drafting proposals and contracts, etc. and the general administration of the construction contracts and supervision of the work . . . The supervision of the Architects was to be distinguished from the continuous personal superintendance to be obtained by the employment of a clerk-of-the-works . . The Contractor was to take all necessary precautions for the safety of employees on the work, comply with all applicable provisions of state laws to prevent accidents or injury to persons on, about or adjacent to the premises and designate a responsible member of his organization on the work whose duty shall be the prevention of accidents, the name and position of such person to be reported to the Architect. The Architect was to have at all times access to the work . . . the Contractor must not have or permit any part of the structure to be loaded with a weight that will endanger its safety. He must provide all bracing, shoring and sheeting required for safety and for proper execution of the work . . . Although we do not believe there is any significant applicable ambiguity in the several agreements and contract documents as to the Architects' functions, if it be thought these qualifications lend some ambiguity, the several documents having been prepared by the

Architects are to be construed where construction is necessary, most strongly against them. *They had general supervision and direction of the work, they had authority to stop the work whenever necessary to insure proper execution of the contract, they were in the first instance, the interpreters of the contract and the judges of the performance, they had to use their powers thereunder to enforce its faithful performance,* and they had to, within a reasonable time, make decisions on all matters as to the execution and progress of the work and interpretation of the contract documents . . . They were to have at all times access to the work wherever it was in preparation or progress . . . They could condemn any work as failing to conform to the contract whether incorporated or not and the Contractor must remove such. The General Contractor, the general administration of whose Contract and supervision and direction of whose work was vested in the Architects, who were to endeavor to guard against defects and deficiency therein, who could stop the work when necessary, who were the first interpreters of the Contract and first judges of its performance, who were to enforce its faithful performance and make decisions on all matters as to execution and progress of the work and interpretation of the documents, was to do the general work shown on the drawings and specifications and do everything required by the Agreement, general conditions, specifications and drawings, to take all necessary precautions for the safety of employees, to comply with all applicable state safety laws to prevent accidents or injury, to have a responsible member on the work to prevent accidents, to keep on the work a competent superintendent and any necessary assistants, to give efficient supervision to the work, using his best skill and attention, and carefully study and compare all drawings, specifica-

> tions and other instructions, to not have or permit any part of the structure to be loaded as to endanger its safety, to provide all bracing and shoring required for safety and proper execution of the work, to complete all structural steel, to carefully shore and brace existing structural steel for installation of new steel, to carefully remove the existing truss re-used, and to provide new connections for the existing trusses and other structural steel members."
>
> "Such were the functions of the Defendant's Architects including the things the general contractor was to do under his contract and his work, the general administration of which contract and supervision and direction of which work was vested in the Architects."

The above itemization by the Illinois Appellate Court of the duties and obligations of the Contractor which were to be supervised and approved by the Architects under the provisions of the respective Contracts, are similar as explained in the pleading entitled Second Amended Complaint of the Plaintiff and Appellant herein and the following language of the Illinois Appellate Court is applicable to the instant case as well, which reads as follows:

> "The terms of the Architects' employment are governed by the terms of the contracts entered into. Their duties here were not limited to the preparation of plans and specifications. They also included in addition supervision of construction. The Architects in contracting for their services, implied that they possessed skill and ability sufficient to enable them to perform the required services at least ordinarily and reasonably well and that they would exercise and apply in the case their skill, ability and judgment

reasonably and without neglect. They held themselves out as experts in their particular line of work and were employed because they were believed to be such. The skill and diligence which they were bound to exercise are such as are ordinarily required of architects. The efficiency of an Architect in the preparation of plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession. He must guard against defects in the plans as to design, materials and construction and he must keep abreast of the improvements of the times. In the absence of a special agreement, their undertaking did not imply or guarantee a perfect plan or satisfactory results and they are liable only for failure to exercise reasonable care and skill. The degree of skill and care which may be required of them in the preparation of their plans was a question for the jury. An Architect will be liable where by reason of his breach of duty to exercise care and skill, his plans and specifications were faulty and defective as to design, materials or construction. Liability rests on unskillfulness or negligence, not upon mere errors of judgment and the question of the Architect's negligence in the preparation of plans is one of fact and within the province of the jury."

The Illinois Appellate Court went on to discuss further possible areas of negligence on the part of the Architects which is particularly applicable to the instant case. The Court continued as follows:

"The Architects may be liable for negligence in failing to exercise the ordinary skill of their profession, which results in the erection of an unsafe structure, *whereby anyone lawfully on the premises is injured. Their possible liability for negligence resulting in personal injuries may be based upon their super-*

visory activities or upon defects in the plans or both. Their possible liability is not limited to the owner who employed them. Privity of Contract is not a prerequisite to liability. They were under a duty to exercise ordinary reasonable care, technical skill and ability and diligence as are ordinarily required of Architects in the course of their plans, inspections and supervision during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so, *and whether or not they so exercise such is a question to be determined by the jury.* The position and authority of the Architects here under these documents and these facts and circumstances were such that they necessarily labor under a duty, inter alia, to supervise the project with due care under the circumstances. *Too much control over the general contractor necessarily rests with the Architects under these facts for them not to be placed under a duty imposed by law to perform without negligence all their functions, including plans, specifications, general administration of the construction contracts, and supervision and direction of the work.* Their power to stop the work is, alone, a drastic power, and that authority and all their other extensive authority as it relates to administration, supervision and direction, necessarily carries commensurate legal responsibility. The Architects were to be paid in part to do their best to see to it that the terms of the contract between the Owner and the general contractor were complied with. *They were employed in part, not so much to detect the fact that the general contractor had erected inadequate temporary supports, shoring, columns, or towers, if they were inadequate, as they were to use their best efforts, skill, judgment, care and experience to guard against and prevent that being done. Both the general contractor and the*

Architects by virtue of their contract with the Owner and their positions were required to exercise care and skill for the protection of the employees on the job. It must have been reasonably within the Architects' contemplation when directing their minds to the removal and relocation of the old north-south proscenium truss, . . . *that such persons as the plaintiffs employees on the jobs would necessarily be affected by the Architects' several pertinent decisions in the course thereof.*" (Emphasis added)

The Architects urged the Court to conclude that the liability of the Architects was limited to design and use of materials, etc., and the Court answered this problem appropriately as follows:

"The Defendants Architects urge that under a contract to "supervise the work" of construction, an Architect undertakes only a duty to see that a building is constructed, which, when completed, meets the plans and specifications and is the building for which the Owner contracted and that he has no rights or duties with regard to the manner or means or techniques of construction adopted by the contractor to produce that end result. One of the Defendants Architects' duties here undoubtedly was as they say, but that was by no means their only duty. *Under these contracts and associated documents, they had many other powers, authorities, responsibilities and duties. Some of their rights and correvelant duties did relate to some of what the Defendants Architects possibly refer to as manners or means or techniques of construction of the contractor. But it would be useless to exercise in semantics and speculation to endeavor to examine or define or classify (which the Architects here do not do) what is means by manners or means or techniques of*

construction of the contractor and as to which ones the Architects had duties and as to which ones they had no duties. Under these contracts and documents and under these facts and circumstances, they have substantial relevant and applicable duties to persons in the position of these Plaintiffs as we've set forth, whether those be considered to relate, in part, to what are possibly denominated to be manners or means or techniques of construction or to something else." (Emphasis added)

The Supreme Court of the State of Illinois reviewed the Illinois Appellate Court decision and filed the Supreme Court decision on approximately the 24th of March, 1966, and although Appellant herein has a copy of the Supreme Court decision, unfortunately at the time of this printing does not have a copy of the citation. However, by time of argument of the case before the Supreme Court herein, it is anticipated that a citation will be available. The Supreme Court, after first reviewing some of the pertinent facts relative to provisions in the Owner-Architect Contract and the Owner-Contractor Contract stated in brief as follows relative to the negligence of the Architects:

"It appears that the parties agree that Architects must exercise reasonable care in the performance of their duties and may be liable to persons who may foreseeably be injured by their failure to exercise such care, regardless of privity. The principal question is the extent of the Architects' duties. It is clear from the evidence that the Architects did not prepare detailed specifications for the temporary shoring of the gymnasium roof, nor did they compute on the plans the load that would be placed upon the shores, or provide the contractor with a safety factor

to be used in the shoring. It also appears that the Architects did not oversee and inspect the shoring as used.

"As we view the record, the finding of negligence on the part of the Architects must be based upon one or more of these omissions. As a general rule, it has been said that the general duty to "supervise the work" merely creates a duty to see that the building, when constructed, meets the plans and specifications contracted for. Clinton vs. Boehm, 124 N. Y. S. 789, 139 App. Div. 73; Garden City Floral Company vs. Hunt, 126 Mont. 537, 255 Pac. 2d 352, 356; Day vs. National U. S. Radiator Corp., 241 La. 288, 128 So. 2d 660, 666.

"In the present case, the contract between the school district and the contractor, which was prepared by the Architects, provided in part as follows:

'The Contractor shall provide all bracing, shoring and sheeting as required for safety and for the proper execution of the work. ***

'Existing structural steel shall be carefully shored and braced as required for installation of new connecting steel. Existing truss re-used shall be carefully removed, revised and re-erected as called for***.

"Despite the argument of the Architects that the shoring here was a method or technique of construction over which they had no control, we feel that under the terms of the contracts, the Architects had the right to interfere if the Contractor began to shore in an obviously unsafe and hazardous manner. We agree with the Architects that they had no duty to specify the method the contractor would use in shoring, but we believe that under the terms of these contracts, the Architects had the right to insist upon

a safe and adequate use of the method. Cf. Charles Meads & Co. vs. City of New York, 181 N.Y.S. 704, 706."

The Court continues its analysis of the case hitting at the very heart of this Plaintiff-Appellant's case before this Court, as follows:

> *"From a careful examination of the record, we conclude that if the Architects knew, or in the exercise of reasonable care, should have known that the shoring was inadequate and unsafe, they had the right and corresponding duty to stop the work until the unsafe condition had been remedied.* (Earhart vs. Hummonds, 232 Ark. 133, 334 S. W. 2d 869). *If the Architects breached such a duty, they would be liable to these Plaintiffs who could foreseeably be injured by the breach.* (Emphasis added)
>
> "Here it appears that the shoring and removal of part of the old gymnasium roof was a major part of the entire remodeling operation and one that involved obvious hazards. We think that the shoring operation 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 operation. Cf. Day vs. National U. S. Radiator Corp., 241 La. 288, 128 So. 2d 660.
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> *"We therefore find that the trial court did not err in refusing to direct a verdict for defendants on the commonlaw negligence counts."* (Emphasis added)

The excavated tunnel of a depth of approximately 25 feet was a substantial part of the construction work related to the Salt Lake City-County Municipal Complex which the defendants Architects had contracted to "supervise and inspect all phases of the work being done". The facts of the case, when once permitted to be

adduced before the Court and jury will show that the Architect, in fact, knew that the excavation had been done for some days and weeks prior to the injuries of the plaintiff in a manner contrary to the statutory requirements imposed upon those who would so excavate to such a depth. The evidence will show that the shoring and taper of the walls of the trench were not only obviously unsafe and hazardous, but that the Architect at all times was fully aware of the said unsafe and hazardous condition. As in the Miller vs. DeWitt case, the Defendant Architects in the instant case had the right to stop the work until the unsafe condition had been remedied, but at no time did so. Certainly as in the opinion above stated, the Defendants Architects had not only the right, but "the corresponding duty to stop the work until the unsafe condition had been remedied." In the instant case the Defendant Architects breached the duty owing to the Plaintiff. In the instant case, as the evidence will indicate, the Defendants Architects at all times, while the excavation and work was being carried on by the contractor upon the particular tunnel area, had a qualified on-site inspector, which was acceptable to both the Owner and the Architects during the entire time the construction work was in progress, supervising and inspecting all phases of the work being done and was fully aware of conditions and progress of the work, and reported daily to his superiors Defendants Architects. In addition to this, the Architects were upon the job on numerous occasions and observed personally and in behalf of the defendant Architect Corporation the progress of the work, the hazardous condition, and on at least one occasion had a conference relative to the hazardous con-

dition wherein it was very thoroughly discussed by the Contractor, representatives of the Owner, and the Architect himself, together with his on-site inspector.

It is important to note, in light of the Miller vs. DeWitt opinion, that in the complaint of the Plaintiff herein, there is no allegation that the Architects negligently prepared plans or specifications for shoring or in any way negligently prepared plans and specifications relating to the work from which the injuries resulted. The Supreme Court of Illinois covers this subject as follows:

> "There is no evidence that it is the customary or usual practice for Architects to plan shoring or provide specifications therefor. There is no evidence that the Contractor relied on the plans or specifications or requested advice of the Architects in constructing the shoring. All of the testimony of the Architects who appeared as experts indicated that the plans and specifications were sufficient and proper. Only one witness, Dean Wurth, an engineer, but not a licensed Architect, testified over objection, that a structural engineer should indicate the load to be shored on the drawing. There was no testimony that this was necessary to meet the standard of learning, skill and conduct ordinarily possessed by Architects or even structural engineers, practicing in the same or similar localities. See Paxton vs. Alameda Co., 119 Cal. App. 383, 259 Pac. 2d 934, 938.
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> "We feel that except for the duty to stop work in the event of an obviously hazardous dereliction of duty on the part of the contractor, the Architects were under no duty with regard to the methods, means, or techniques used by the Contractor to shore the roof."

In the instant case as alleged, the defendants failed to shut down the work and require the hazardous condition to be corrected when they knew or in the exercise of reasonable diligence should have known that a hazardous and dangerous condition existed which might foreseeably injure the plaintiffs or other employees of the contractor. (R. 150 Par. 14) The Supreme Court of Illinois in the Miller vs. DeWitt case, while upholding the Illinois Appellate Division as to the liability and the negligence of the Architect remanded the case for a trial. The lower court had instructed the jury on certain allegations of negligence in the Complaint of the Plaintiffs, but refused all of the Defendants' tendered instructions relating to the extent or limitation of the Architect's responsibility for the shoring method used. The Court felt that since the jury had been instructed that the Architects perhaps were responsible for the method and technique used in shoring, etc., that the jury might have erroneously relied upon the instructions and held the Architects negligent for their failure to specify procedures, techniques, etc. for the shoring instead of the basis upon which the jury could have found the Defendant Architects negligent and liable, according to law which in such a case is the failure of the Architects to inspect and watch over the shoring operation and to exercise the "right and corresponding duty to stop the work until the unsafe condition had been remedied."

In Plaintiff's case, the Defendants executed a contract which required that the Architects Defendants "supervise and inspect all phases of the work being done". The construction contract provided that the Defendants "will direct the supervision of the construction". The said con-

tract also provided that the Contractor "shall promptly obey and follow every order or direction which shall be given by the Architect and/or the City Engineer or the County Engineer in accordance with the terms of the contract". The construction contract also provided that *"If in the judgment of the Architect* and/or the City Engineer or the County Engineer, *it is necessary to close down the work due to inclement weather or due to other circumstances arising during the progress of the work, that may be construed to be dangerous or that may be caused by noncompliance with the specifications; the contractor shall comply and he shall stop all operations upon written notice from the Architect* and/or City Engineer or the County Engineer so to do, *and the work shall remain closed down until further orders in writing are given by said Architect* and/or City Engineer or County Engineer . . . " (Emphasis added)

The supervisory and inspection duty of the defendants relate to "all phases of the work being done" under the construction contract and the plans and specifications prepared by the defendants. A phase of the work is referred to in paragraph 1 (b) and 17 (a) of the special condition section of the construction contract wherein the contractor was required in his work, "supervised and inspected" by the defendants to 1(b) "take all necessary precautions for the safety of the public and employees on the work and shall comply with all applicable provisions of Federal, state and municipal laws and building codes to prevent accidents or injury on, about or adjacent to the premises where the work is being performed . . . "

Under 17(a) of the construction contract under the title Shoring, the contract reads as follows:

> "Contractor shall provide and be responsible for all temporary shoring required for *"executing and protecting the work"*.

Can it be reasonably argued that Defendants were to supervise and *inspect all phases* of the work, yet be allowed arbitrarily to distinguish from their contractual duty some "phases" of the work as being outside or beyond Defendants' contractual duty? Such reasoning would make a shambles and mockery of the intent and specific language of the contract between the Defendants and Salt Lake City and Salt Lake County, dated March 1, 1960. Such a reasoning would also make ineffectual and verbage of the sections of the construction contract relating to the powers of supervision of the Architect as recited here and in Plaintiff's Second Amended Complaint.

The Architect, in part, was employed to see that the contractor performed as per the construction agreement and built as per the plans and specifications prepared by the defendants. Certain duties arose as a consequence of the agreement, "to supervise and inspect all phases of the work". Reasonably the intent and belief of the "Owner" was that the Defendants were qualified to supervise and inspect and to "exercise" sound judgments and issue sound directives wherever they, as allowed and required by the said contracts, did so, as a result of their efforts expended to complete construction within the terms of the plans, specifications, construction agreement and "all phases of the work". The Defendants and Respondents have contended in arguments heretofore that there was no duty on the Defendants to supervise the

work or to shut down work unless the specific work in progress was being performed contrary to the plans and specifications prepared by the Architect which, of course, violates the very reasoning the Illinois Supreme Court in Miller vs. DeWitt. The fact is the excavation of the trench as a *phase* of the *work* was performed contrary to law, and contrary to safety of personnel employed on the work. As alleged in Plaintiff's Second Amended Complaint, paragraph 14, the Defendants knew by their inspection and contract with government safety inspectors and by their own experience that this *phase* of the *work* being performed by the Contractor was creating a hazardous condition; they knew that the Defendants by terms of the agreements and power vested in them as Architects could require a shut down of that phase of the work until it was made safe; and Defendants knew their judgment was not subject to "claim" by the Architect. (See Paragraph 9, Plaintiff's Second Amended Complaint, Page 4, Line 8, R. 149).

Despite full knowledge of the existence of the hazard and danger to "employees on the work" and the unlawful and negligent manner in which the excavation phase of the work was being performed for many days before the injuries to Plaintiff, the Defendants, as the contractually and lawfully constituted supervisor and inspector of the work, allowed unlawfully hazardous and dangerous progress of that phase of the work to continue until an uninformed employee was damaged for the balance of his life.

CONCLUSION

The law by the reasoning of the Courts throughout the land requires the conclusion that in the instant case the Complaint of Arthur Nauman does state a cause of action upon which relief may be granted against the Defendants.

RESPECTFULLY SUBMITTED,

DONN E. CASSITY

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