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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY OF UTAH
JUN 22 1967
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ARTHUR O. NAUMAN, *Plaintiff and Appellant,* vs. HAROLD K. BEECHER & ASSOCIATES, a Utah Corporation, and HAROLD K. BEECHER, an individual, *Defendants and Respondents.*	PETITION FOR REHEARING Civil No. 10609

RESPONDENT'S BRIEF ON REHEARING

~~STATEMENT OF THE CASE~~

UNIVERSITY OF UTAH
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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR O. NAUMAN, *Plaintiff and Appellant,* vs. HAROLD K. BEECHER & ASSOCIATES, a Utah Corporation, and HAROLD K. BEECHER, an individual, *Defendants and Respondents.*	PETITION FOR REHEARING Civil No. 10609

RESPONDENT'S BRIEF ON REHEARING

STATEMENT OF THE CASE

This petition for rehearing involves the questions of whether Count II of plaintiff's complaint states a valid third party beneficiary action against defendant architect Harold K. Beecher and Associates, a Utah corporation,—an issue which the Court has not decided, and whether Count I of plaintiff's complaint is fatally defective in failing to plead the duty of care and the breach thereof by said defendant according to the standard of

learning, skill and care customarily practiced by architects practicing in the vicinity where the defendant practices?

DECISION ON ORIGINAL HEARING

This Honorable Court has decided the case against the defendant without resolving the above two issues.

RELIEF SOUGHT ON REHEARING

Your petitioner seeks to have the Court reason the case on traditional contract and tort law which is the basis of decision in the cases cited by the Court when the particular fact situations are carefully analyzed.

STATEMENT OF FACTS

The facts in this case which should be determinative on rehearing are: first, plaintiff did not plead that the architect had a right or a duty to provide written specifications which would make definite the degree of sloping and/or shoring of the temporary trench; second, no specifications of the degree of sloping or of the kind and extent of shoring of the excavation exist in this case, which would make definitive the method and manner of excavation to be followed by the contractor; third, the temporary excavation was not adjacent to buildings which would allow the application of inherently dangerous doctrine of tort law; sixth, there was no special additional contract for an extra fee to the architect to write out specifications for shoring and to agree to enforce compliance with such definite specifications; seventh, and of controlling importance, the authority, duty and manner of ordering a

work stoppage, if any, by the architect's participation, is spelled out with limitations on the architect in paragraph 13 of the architect's agency agreement with the owners requiring not unilateral action by the architect but bilateral action by owner and architect or unilateral action by the owners. See Exhibit "A" of Plaintiff's Complaint.

The architect has made no subscribed agreement to answer for the misfeasance of the contractor.

ARGUMENT

POINT I

THE ARCHITECT AND ITS EMPLOYEES SHOULD BE GRANTED THIRD PARTY IMMUNITY UNLESS THE COURT FINDS A THIRD PARTY BENEFICIARY AGREEMENT SUBSCRIBED BY THE ARCHITECT TO ANSWER FOR THE MISFEASANCE OF THE CONTRACTOR WHICH THE COURT HAS NOT YET FOUND.

Until the amendment of the Workmen's Compensation Act of 1945, an injured workman had no third party action. That amendment did not grant workmen on building projects a third party action for all injuries wherein a third party might be involved. In *Cook v. Kiewit Construction Company*, 15 Ut. 2d 20, a case involving an alleged tort of misfeasance (not an alleged claim for passive non-feasance), Justice Crocket interpreted the legislative limitation on third party actions by workmen entitled to compensation thus:

> The—Statute—seems plainly designed to apply to strangers to the employment and not to co-workers engaged in the same endeavors.

A reasonable view of the fact situation would seem to compel the conclusion that here the architect was not a stranger to the employment and that the architect and the contractor (through and by his servants) were engaged in the same endeavor. See: Defendant's original brief (pp. 20-27).

Fairness to the architects of Utah and the legal profession would seem to indicate that if the Court is determined to reason to its decision simply on a non-traditional, new, humanitarian, public policy argument it should set out the reasons why it favors workmen and penalizes architects under the particular facts of this case.

The existence or the non-existence of a third party beneficiary action was definitely an issue in this case. Defendant's counsel briefed the issue rather fully (Defendant's original brief, pp. 9-12 Inc.).

The opinion of the Court fails to state whether or not the Court found that a third party beneficiary contract exists in favor of plaintiff. Plaintiff's counsel failed to brief this issue and in effect asked the Court to find liability on the basis of some humanitarian principle rather than on the basis of an established rule of law.

This plea was made by plaintiff even though the architect's agency agreement made it clear that the architect did not intend to make and did not make a third-party beneficiary contract, and even though plaintiff does not allege that the architect is guilty of any misfeasance or that the architect assumed a moral obligation which he then performed in a negligent manner.

Again, if the members of the Court believe that the

architect by its subscribed agreement including paragraph 13 on SUPERVISION (which the court overlooks) intentionally and knowingly made a third party beneficiary contract to answer for the tortious defaults of the contractor under the particular facts of this case, then the opinion should so declare. One cannot be quite sure whether the Court intends to hold that plaintiff's alleged second cause of action, Count II, does or does not allege a valid third party beneficiary agreement.

We respectfully request that the Court upon rehearing specifically find on this issue.

POINT II

THE COURT'S OPINION COMPLETELY OVERLOOKS THE FATAL NEGLECT AND OMISSION OF PLAINTIFF'S COMPLAINT TO PLEAD A BREACH OF DUTY OF DEFENDANT ARCHITECT ACCORDING TO THE STANDARD OF DUTY AND CARE GOVERNING DUTIES OF ARCHITECTS PRACTICING IN THE VICINITY WHERE THE DEFENDANT ARCHITECT PRACTICES.

Plaintiff's first and abandoned complaint pleaded on architect's duty of care properly as follows:

> That the reasonable and standard exercise of judgement and care ordinarily exercised in like cases by reputable members of the architect's profession practicing in the same locality would dictate that in accordance with the duty specified in the authorized contract the work should have been shut down until the proper safety and precautionary measures had been provided. (Plaintiff's original complaint pp. 2-3.)

Plaintiff's second amended complaint omits the foregoing allegation of standard of care which is essential to a validly pleaded complaint. It says nothing about a duty to exercise a discretionary judgement which skilled architects practicing in the vicinity would exercise under the circumstances. It simply alleges without reference to the applicable legal standard of care governing architects.

> 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 the authority to do.

The Paxton case, infra, (which the court erroneously cites as supporting its opinion) approved the trial court's instruction regarding the standard of care required of an architect which reads in part as follows:

> You are not permitted arbitrarily to set up a standard of your own. The standard is that set up by the learning, skill and care ordinarily possessed and practiced by others of the same profession in the same locality at the same time. It follows, therefore, that the only way you may properly learn that standard is through evidence presented in this trial by other persons in the field of architecture called as expert witnesses. (259 P. 2d 934, 938).

The Supreme Court of Illinois in its unpublished opinion in the *Miller Case, infra,* observed that the complaint properly pleaded the standard of care required of an architect thus:

> (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. (p. 9.)

A California case squarely in point on the necessity of properly pleading an architect's duty and the breach thereof reads:

> Plaintiff's complaint does not allege a duty of the architect according to the standard of leaning, skill and prudence of architects practicing in the vicinity, nor any violation of that established standard of care by the architect or any of its agents in performance of its supervisory duties. *Bourie v. Spring Valley Water Company,* 1908, 8 Cal. App. 588, 97 P. 530.

POINT III

THE COURT FALLS INTO THE ERROR OF ENGAGING IN UNJUSTIFIABLE JUDICIAL LEGISLATION WHERE NO INTERSTICE OR GAP EXISTS IN THE LAW GOVERNING LIABILITY OF ARCHITECTS. THE APPLICATION OF STARE DECISIS TO THE PARTICULAR FACT SITUATION IN THE NAUMAN CASE WILL PRODUCE AN OPPOSITE RESULT FROM THAT OF THE FIRST OPINION.

Traditional law holds that an architect should not be held liable for the wrong of a contractor unless the subscribed agreement of the architect clearly shows an intent to answer for the contractor's default as shown in Erhart, *infra.*

Counsel recognize that it is only in cases of great importance to social groups such as Utah architects and workmen on building projects that members of the Court can be persuaded to reconsider their legal opinions and attempt to do so *de novo.* Nevertheless, reanalysis of the fact situation (particularly paragraph 13 of the arch-

itect's agreement) in the Nauman case is necessary in our opinion to achieve justice. Courts sometimes do reanalyze their opinions. This court has done so.

In Miller V. Stuart 69 Ut. 250, the Court said:

> "This conclusion is at variance with what was said upon the subject in National Bank of the Republic V. Price 65 Ut 57 where we think this Court fell into error."

Justice Cardozo gives the legal test for determining whether a court has been guilty of unjustifiable judicial legislation in coercing a group, such as architects, into new liabilities which they did not intend to assume and to which they did not understand that they were obligating themselves.

Justice Cardozo in *The Nature of the Judicial Process*, 7th ed., 1931 in Lecture III, the Judge as a Legislator pp. 103, 113-114, and 115 writes:

> "We must keep within these interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges as for legislators, is one of fitness to an end."
> (p. 103)

> "Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn

it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges his predecessors and his colleagues, by the collective judgement of the profession, and by the duty of adherence to the prevading spirit of the law." (p. 113-114.)

> "None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative." (p. 115.)

Counsel respectfully represent to this Honorable Court that in this case there is no interstice or gap in the law. The established law of third party liability of architects to answer for the default or miscarriage of another has been fully and well established over the last half century.

In the Paradoxes of Legal Science 1928 at Page 8, Cardozo quotes Pound as follows:

> "Much of the administration of Justice says Pound, is a compromise between the tendency to treat each case as one of generalized type of case, and the tendency to treat each case as unique."

Cases involving the law of architects are uniformly decided on the special facts of each case as will be shown hereinafter in distinguishing the cases cited by the Court from the fact situation alleged in plaintiff's pleadings.

The law which applies and should be applied to the above facts is that governing open excavations where

there are no specifications and the work is not inherently dangerous. The law applicable to this situation is adequately brief in defendant's original brief, Pages 16-18 citing 23 ALR 1084 in which all of the cases limit the duty of the architect to supervision of the details as spelled out in the drawings and specifications. Plaintiff's brief shows no contra cases except on facts inherently dangerous.

POINT IV

THE COURT UNJUSTIFIABLY METAMORPHOSES AN ALLEGED CONTRACTOR'S UNILATERAL CONSENT STATED IN THE CONSTRUCTION CONTRACT TO WHICH THE ARCHITECT IS NOT A PARTY, INTO A LEGALLY UNDEFINED DUTY OF THE ARCHITECT (COURT DOES NOT SAY WHETHER CONTRACT OR TORT) TO ANSWER FOR THE MISFEASANCE OF THE CONTRACTOR WHEREIN NO ARCHITECT'S SPECIFICATION WAS REQUESTED OR MADE AS TO THE MANNER OF EXCAVATING THE OPEN, VISIBLE TRENCH WHICH DID NOT COME WITHIN THE TORT LAW OF AN INHERENTLY DANGEROUS SITUATION.

(A) THE ARCHITECT'S POWERS OF SUPERVISION AS OWNER'S AGENT ARE EXPRESSLY LIMITED BY PARAGRAPH 13 OF THE ARCHITECT'S OWN AGREEMENT IN PRIVITY WITH THE OWNERS (WHICH PARAGRAPH THE COURT OVERLOOKS) TO BE EXERCISED ONLY UNDER THE SUPERIOR CONTROL OF THE ENGINEERS OF THE OWNERS, AND NOT UNILATERALLY.

(B) THE CONTRACTOR EXPRESSLY AGREES TO PROVIDE SAFETY CONDITIONS FOR WORKMEN. THE ARCHITECT DOES NOT. THE ARCHITECT'S SUBSCRIBED AGREEMENT DOES NOT AGREE TO ANSWER FOR THE DEFAULT OF THE CONTRACTOR. THE ARCHITECT'S AGREEMENT WITH THE OWNERS CONAINS NO REFERENCE TO WORK STOPPAGE.

It is elementary contract law that a party, in this case the architect, should be bound only by the terms, intent and understanding of its subscribed agency agreement and the Court should not broaden the architect's duties to a special unilateral duty of supervision forbidden by paragraph 13 of the architect's agency agreement regarding a work stoppage, if any.

The Court quotes paragraphs 1 and 7 of the architect's agreement with the owners, but completely overlooks paragraph 13 on the specific point at issue with its express words of limitation upon the authority and duties of the agent architect. It reads:

> 13. SUPERVISION. The City Engineer will represent the owner, Salt Lake City Corporation, with respect to this agreement, and the *Architect shall perform and conduct all required services under his direction and supervision and shall submit his reports of study,* drawings, design, details, specifications and *recommendations to him for City approval,* as well as all shop drawings, change orders, estimates for payment to Contractor, as required. (Italics added for emphasis.)

The foregoing limitations of authority and enumeration of duties requiring the Architect to "perform and conduct

all required services under" the "direction and supervision" of the City Engineer is reinforced by paragraph 3(b) of the General Conditions Section of the Specifications which reads in part, that the architect,

> Will direct the supervision of construction and is acting in cooperation with the City Engineer and County Engineer as outlined above in paragraph 3 and 3(a). (R. 148).

The Court overlooks the foregoing limitations and definitions of duty plainly spelled out in the architect's agency agreement denying any unilateral action by the Architect in any situation of claimed right to stop the work "due to circumstances—that may be construed to be dangerous." The Court quotes a consent provision regarding work stoppage found in the contractor's contract with the Owners to which the Architect is not a contracting party. It reads in part as follows:

> "If, in the judgement of the Architect and/or the City Engineer or County Engineer it is necessary to close down the work—due to circumstances—that may be considered to be dangerous", etc.

When paragraph 13 of the architect's agreement is laid alongside the above conflicting consent statement in the contractor's contract, the controlling question is,

Which should determine the architect's duty: The subscribed agency agreement of the architect with its stipulated limitations of authority and duty, or the said contractor's consent in its contract with the owners to which the architect is not in privity?

The above question should be answered by applying the law of agency. This means that the agent's contract

must be construed against the particular fact situation. It should be emphasized that any attempted stopping of work of the contractor by the owners, "on the recommendation of the Architect," would require the exercise of discretionary judgement regarding an extraordinary, non-customary and unusual act and would create a controversia l situation where no definitive specifications exist. It is elementary egency law in cases involving extraordinary action that the agent must act strictly within the express limitations of his authority.

The law of agency requires that "effect must be given to every word and clause of the agent's agreement. Mechem on Agency Vol. 1, 1914, Secs. 768 and 776. A general agency to "supervise the work" or "all phases of the work" is not an unlimited agency. Ibid., Mechem, Sec. 714. An agent cannot increase his authority and duties by his representations to a third party, such as the contractor in the Nauman case, that he has broader authority than he in fact possesses under the limitations of his agency agreement, paragraph 13. Ibid., Mechem, Secs. 755 and 757.

The Court correctly finds that

> The method of construction was a matter solely under the control of the contractor, and the defendant had no right to interfere with the contractor's execution of the work.

However, the Court erroneously concludes that:

"The defendant had a right to insist that the work be carried on in a safe manner." This statement is in error because in the matter of work stoppage the agent's agree-

ment limits the architect to "study and recommendation to the City Engineer for City approval."

The foregoing statement of the Court on a duty of the architect to insure a safe manner of excavation is good law only where an inherently or intrinsically dangerous situation exists as was the case in *Miller V. DeWitt, infra*, and in withdrawal of lateral support from an adjacent building as was true in the *Erhart case, infra*. In all other situations the manner, means and method of carrying on the work is the exclusive domain of the independent contractor, unless a clearly intended third party agreement containing definitive specifications can be found as was found by the special, added, architect's agreement in the *Erhart case*.

The Court then completely and unjustifiably overlooks the clearly stated terms of authority and duty of paragraph 13 of the architect's agreement, Exhibit "A". The Court imposes a different agency contract on the architect.

The opinion reads in part:

> We are of the opinion that if the defendant knew or in the exercise of reasonable care should have known that the trench was unsafe either by reason of the contractor's failure to properly shore the walls of the trench or by its failure to slope the sides of the trench in such a manner as to make the excavation a safe place to work, the defendant had the right and the corresponding duty to stop the work until the unsafe condition has been remedied.

There are several things wrong with this reasoning and conclusions:

First: The conclusion of the Court makes an agreement for the architect which was not intended as, and is not the architect's agency agreement, and under the special facts of this case is contrary to the express limitations upon the architect's right and scope of supervision as the owner's agent which is spelled out by paragraph 13 of the architect's subscribed agreement.

Second: In the history of contract law, discretionary options create rights but not contract duties.

Third: The Court's newly made agreement for the architect is impracticable of enforcement. Just suppose a practical case which does not involve any detailed specification by the Architect.

There is then no standard of action of a definite thing to be done by the Contractor, since there are no specifications of sloping and/or shoring specified by the architect before the work is done. Suppose that during the excavating of the open trench the Architect says to the contractor:

> "I order you to stop work, in my judgement your combination of sloping and shoring does not provide a safe place for workmen."

The contractor replies:

> "In my judgement it is safe. You haven't made any detailed specifications as to the manner of sloping or shoring which I shall follow, my contract leaves that to my discretion and judgement. I have done the excavation this way for an eighth of a mile and there is no evidence to indicate that my present methods of excavating are unsafe."

How will the architect enforce his supposed judgement

about an unsafe condition? Will he have to go to a court for an injunction? How long will it take the Court to determine whether the condition of the open trench in which no accident has occurred and regarding which there are no specifications is a safe or an unsafe condition for workmen? What happens while the litigation goes on? Are we not in no man's land of impracticability? Does not this simple illustration demonstrate that unless there are definitive specifications as to the manner of shoring as is found in the *Erhart Case, infra,* that the Court should not do judicial legislating in such fact situation, but should decide the case on the traditional law governing architects? Before holding the architect in any way responsible for the methods and procedures used by the contractor, the Court should require definiteness of contract by requiring the existence of detailed specifications to which the Contractor agrees to conform. This would give validity and enforceability to intended and understood contract provisions.

Historically, the architect is not responsible, but the contractor is responsible for construction means, methods, techniques, sequences, procedures and for safety precautions and programs in connection with the work. The excavation of a trench is not a part of the materials to be incorporated into the completed building and, therefore, no specifications are provided unless a special architect's agreement is made to define the methods to be used by the contractor.

The architect's responsibility to the owners is only with the materials and workmanship incorporated into the finished building. The excavation of an open trench is

only a preparatory step necessarily taken by the Contractor in order to place the specified materials in their proper location.

Fourth: The Courts conclusion is in error because the standard of care is not that of the defendant architect but that of architects practicing in the vicinity as briefed in POINT II *supra*.

Fifth: The Courts conclusion is unsupportable law because in legal and practical effect it makes the architect an insurer of all workmen on building projects who may be injured or killed. Surely the Court will not insist that architects must be insurers of the safety of workmen particularly where the architect has not been specially employed to prepare detailed specifications and where the work is not inherently dangerous.

Sixth: The Court's conclusion makes the rule of res ipsa locquitur and not that of forseeability applicable by its decision. At what point or degree of safeness, by the Court's theoretical and nebulous measure of safety, does the unsafe condition of the open trench occur? In the absence of definitive specifications as to the degree of sloping or of the kind and extent of shoring required the test of an unsafe condition is the condition that existed when the accident occurred, because the accident would not have happened unless there were an unsafe condition. Thus the "if" conclusion of the Court uses the rejected "but for" test of causation on the facts of this case.

Seventh: The contract without privity which the Court makes for the architect is to answer for the default or misconduct of the contractor and is not subscribed by the

architect as is required by the Statute of Frauds in such cases, and as was found in Erhart, *infra.*

Eighth: The Court's "if" statement of law standing by itself is not good law because it leaves no room for honest mistake of judgement by the architect, which the cases regarding liability for discretionary judgement allow. See the *Paxton Case, infra,* page 938 and*Day V. National U. S. Radiator Corporation* 241 La. 283, 128 So. 660 upholding this rule of allowable mistake.

POINT V

EVERY ONE OF THE APPELLATE COURT DECISIONS CITED BY THE COURT FOR SUPPORT OF ITS HUMANITARIAN, PUBLIC POLICY VIEW WERE DECIDED BY APPLYING THE RULE OF STARE DECISIS. BOTH ERHART AND PAXTON WERE DECIDED ON THEIR SPECIAL FACT SITUATIONS CONTRARY TO THE COURT'S REASONING.

(A) THE ERHART CASE, INFRA, WAS DECIDED ON AFFIRMATIVE TORT FEASANCE OF THE ARCHITECT'S AGENT, ALTHOUGH THE COURT ALSO FINDS A SPECIAL THIRD PARTY BENEFICIARY CONTRACT ON THE FACTS.

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(C) THE MILLER V. DEWITT CASES, INFRA, WERE DECIDED ON THE TRADITIONAL TORT DOCTRINE OF ABSOLUTE TORT LIABILITY WHEN DEALING WITH AN INHERENTLY DANGEROUS OR ULTRA-HAZARDOUS FACT SITUATION EXISTING BEFORE ANY WORK WAS DONE.

Erhart v. Hammond 232 Ark. 133, 334 S. W. 869 was decided by a majority of two judges to 1 (2 judges not participating). The facts and law of this case are clearly distinguishable from and do not support the court's decision in this Nauman case, nor does the Erhart decision depart from the traditional law of tort or contract.

The first reason why the Erhart case is not in point and does not support the opinion in the Nauman case is that the plaintiff in Erhart pleaded a tort action for affirmative misfeasance of defendant architects on which the verdict for plaintiff was found to be supported by the evidence. The Arkansas Supreme Court sets out a stipulation of the parties and part of the pleading of the architect's tort of misfeasance as follows:

> The architect stipulated that "Davenport was their agent, servant and employee and acting within the scope of his employment on the J. C. Penney Company job site at the time of (the cave in) and prior thereto." (Material in parenthesis added.)
> The complaint in Erhart alleged "that the agent of the architect had negligently driven a 4600 pound vehicle onto the damp earth adjacent to the point of cave-in contributing to the cave-in and resulting damage and deaths."

The second reason why the Erhart case does not support this court's opinion is because the court found a spe-

cial third party beneficiary contract to answer for the default of the contractor if the architects failed to enforce their detailed, unequivocal specifications for shoring of the trench, and there was an inherently dangerous situation of temporary excavation adjacent to buildings.

The special facts in Erhart were in part, that the architects intentionally signed a second and separate contract for "$12,000.00 additional fee over and above their architectural fee' (p. 869 *supra.*).

By the terms of this special contract the architects agreed to draw up detailed specifications regarding the shoring which the contractor must do in excavating the temporary trench on the J. C. Penney job, "due to the depth of the excavation and *danger to adjacent buildings and workmen*". Also by the terms of the said special contract the architects expressly agreed to supervise the method and manner of installing that shoring and to enforce the requirements of their detailed specifications. The Arkansas Supreme court found that Erhart's complaint alleged that the specifications dictating the manner of shoring by the contractor "were set out in some detail in the" (special, additional) "contract." (Italics added for emphasis.)

Erhart's complaint then alleges that the architects did not police the contractor's method and manner of install- *and maintaining the shoring according to their said specifications* which neglect proximately caused injury to one and death of the other three workmen. (Italics added for emphasis.)

We point out that Justice Ward in his dissenting opin-

ion accurately characterized the legal nature of the architect's subscribed, special, supervisory agreement to answer for the default of the contractor.

He wrote:

> The prime contractor under the terms of the contract was specifically charged with the duties which the majority would impose on appellants.

The factual differences which made the *Erhart Case, supra*, not in point in the Nauman case are as follows:

First, there was no agreement for a special fee, or at all, of the architect in the Nauman case to draw up written specifications for the detailed manner of shoring the trench to be excavated.

Second, no such specifications were anticipated by anyone or made by the architect in the Nauman case.

Third, the architect in the Nauman case did not intentionally or knowingly or otherwise agree to supervise the method or manner of the contractor's excavation of the trench as was done by the architects in the special third party beneficiary contract in Erhart.

Fourth, the excavation in the *Erhart Case, supra*, involved "danger to adjacent buildings" which does come under the inherently dangerous tort doctrine. (Def's original brief POINT V, Restatement of torts Sec. 520 et. seq.) No such inherently dangerous situation is pleaded in the Nauman Case.

Fifth, The contractor in the Nauman case did not agree to comply with architect's specifications for the shoring and/or sloping of the trench. In Erhart the contractor agreed to conform to the detailed specifications for shor-

ing the trench which the architects specially agreed to inforce.

Sixth, in the Nauman case the manner and method of excavation was left entirely to the discression and control of the contractor as stated by the Court in the first sentence of the next to the last paragraph of its opinion. This was not true in the *Erhart Case*. In the Nauman case the architect did not have any unilateral option right or duty to close down the work within its discressionary judgement but was limited to study and make recommendation on any question of work stoppage by paragraph 13 of its agreement on supervision (entirely overlooked by the Court).

The case of *Paxton v. Alameda County* 119 Cal. 2d 393, 259 P. 2d 934 does not support the Court's opinion in the Nauman case. We thought we made this point perfectly clear in our original brief (p. 32-33). We agree with the Paxton Case because it is reasoned on the traditional rule that the supervisory duties of an architect are commensurate with and limited by a duty of enforcement of his definitive specifications.

The material facts in Paxton were that the architect had provided specifications for a safe quality of sheathing on a flat roof that was to be later tarred and graveled. He saw inferior sheathing stored near the building being erected and neglected to enforce the use of safe better-quality sheathing which he had specified. The architect was held not liable because the defective pleading charged him only with making neglegent specifications and not with neglect to supervise and enforce his safe specifications. The inferior sheathing used allowed a

workman to fall through the roof from which serious injury resulted.

A careful reading of the *Paxton Case* will disclose undisputably that the Court found:

First, that the specifications for roof sheathing were safe according to the standard of architects practicing in the vicinity or community area where the defendant practiced and were not negligently drawn up.

Second, that the general supervision clause required the architect only to exercise the reasonable prudence exercised by architects practicing in the said community area to secure safe sheathing on the roof as an end result according to the specifications which the architect had drafted and included in the contractor's contract. The governing point of the law of architects which the court completely overlooks in the Nauman case is that the specifications define the limit of duty of an architect's supervisory duties.

The Supreme Court of Illinois in the Miller case, infra, declared,

> 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 v. Boehm, 124 N.Y.S. 789, 139 App. Div. 73; Garden City Floral Co. v. Hunt, 126 Mont. 537, 255 P. 2d 352, 356; Day v. National U. S. Radiator Corp. 241 La. 288, 128 So. 660, 666.

It must be admitted that in both the *Erhart Case* and in the *Paxton Case*, those Court's, by decision in the first, and by dicta in the second (since the architect was not

held liable in the *Paxton Case*Q were founded on the traditional line of demarcation in the law of architects that the architect is liable only for negligent failure to require compliance with his specifications, except where the law of a tortious misfeasance as in Erhart or the law of tort governing an inherently or ultra hazardous situation as in the Miller cases applies to and governs the fact situation.

The two opinions in *Miller v. DeWitt,* first by the intermediate appellate court in 59 Ill. app. 2nd 38, 208 N.E. 2d 249 and second in the unpublished opinion of the Illinois Supreme Court, were properly decided on the traditional tort doctrine of inherently dangerous situation requiring ultra hazardous activity. This is proved by the following quotations from the Miller opinions. The intermediate appellate Court's analysis and conclusions were:

> The particular, immediate matter which was involved was not simple, minor, unimportant, or inconsequential routine, non-vital, day to day detail. The removal of the north-south proscenium truss and the north end columns and the temporary support stay or shoring of the west end of each of the old four west end trusses pending installation of the proposed new north-south main bearing truss *were highly important serious vital steps in the whole construction process to be done once and once only.* The west ends of those old west-east trusses had to be temporarily supported and shored. The job could not be accomplished without doing so. And the nature of the particular matter involved was such that it did not admit any of on-the job experimentation, trial and error correction, approximations or mistakes. If one significant mistake or miscalculation occurred in

> the adequacy of the supports, stays or shoring a collapse would inevitably occur. There could be no second opportunity to do something else. There could be no rectification. The supports, stays, columns or towers had to be correct—not about correct—and they had to be correct the first time. There would be no second time. *The matter was inherently complex, delicate and hazardous.* (p. 286.) (Italics added.)

The Supreme Court of Illinois stated:

> Here it appears that the shoring and removal of part of the old gymnasium roof was a major part of the entire remodeling situation and one that involved obvious hazards. (p. 8.)

From the above quotations, the conclusion follows that the decisions in the Miller cases rest on accepted tort law of absolute liability in dealing with an inherently dangerous fact situation requiring ultra hazardous activity which did not exist in the temporary, open, visible trench in the Nauman case.

A second clear distinction is that the Court finds in the *Miller cases* that the Illinois legislature had passed a third party liability act, the Structural Work Act (Ill. Rev. Stat. 1963, ch. 48, paragraphs 60, 69) which provide a statutory imposed duty on supervising architects to require adequate enforcement of safe shoring by the contractor in "inherently complex, delicate and hazardous situations" known to be such because of the inherently dangerous situation to be dealt with by the architect (pp. 8-9). There is no statutory imposed duty under the facts of the Nauman case.

We observe that the opinion of the Utah Supreme

Court, without mentioning an inherently dangerous situation or a statutory imposed liability (not applicable to the Nauman case), adopts some of the language from the unnecessary, *obiter dicta* of the Illinois Supreme Court in *Miller V. DeWitt, supra.*

If there existed in the Nauman case an inherently dangerous fact situation under traditional tort law and/or a statutory liability under the workmen's compensation act of Utah or some other statute, then the unnecessary *obiter dicta* language of the next to the paragraph of the Court's opinion would be harmless. That would be so because the case would then be decided on proper legal grounds applied to the particular fact situation.

But we respectfully submit that the Court should give effect to paragraph 13 of the written agreement of the architect which was pleaded in Exhibit 1 attached to plaintiff's complaint but overlooked by this Court. It reads:

> 13. SUPERVISION. The City Engineer will represent the owner, Salt Lake City Corporation, with respect to the agreement, and the architect shall perform and *conduct all required services under his direction and supervision and shall submit his reports of study—and recommendations to him for City approval.* (Italics added.)

A third material and controlling difference between the facts of the *Nauman Case* and the *Miller v. De Witt Case, supra,* is the difference in the language of the agency agreements of the respective architects. In paragraph 1 of the architect's agreement in the *Miller Case* is found

only a general agreement for "supervision of the work." The architect's agreement in that case does not contain a special contractual statement of limitations upon the authority and duties of the architect in the matter of "SUPERVISION" as is found in paragraph 13 specially dealing with that subject in the *Nauman case*. As stated earlier that agreement places clearly stated limitations upon the scope of authority and upon the duties of the architect in supervision of the extraordinary and non-customary act of a work coppage, if any.

POINT VI

THE CONTRACTOR'S CONSENT TO THE OWNERS AND/OR THE OWNER'S AGENT ARCHITECT FOR A WORK STOPPAGE IS STATED TO BE DISCRETIONARY IN THE JUDGEMENT OF THE PERSONS NAMED. THIRD PARTY CONSENT CANNOT LEGALLY CHANGE THE LIMITATIONS ON THE ARCHITECT'S DUTIES REGARDING ANY WORK STOPPAGE.

PARAGRAPH 13 OF THE ARCHITECT'S AGENCY AGREEMENT EXPRESSLY RESTRICTS THE ARCHITECT TO STUDY AND A DISCRETIONARY RECOMMENDATION TO THE OWNERS, WHO MAY THEN ACT OR NOT TO STOP THE WORK IN THEIR DISCRETION AND JUDGEMENT. AN HONEST MISTAKE OF JUDGEMENT DOES NOT CREATE LIABILITY.

Traditional construction of contracts and also of third party consent paragraphs where there is no privity of contract would require that all of the material phrases be given their due weight to determine the intent and rights

and duties of the contracting parties.

Assuming for sake of argument, without admitting that a third party consent without contract privity may override the architect's paragraph 13 on SUPERVISION. It is one thing to allow plaintiff's attorney Donn E. Cassity to impose a judgement upon the defendant architect to close down the work by use of the general term "hazardous", and another thing entirely for the court to hold to established law, that if architects practicing in the vicinity would have made a judgement that the work should be closed down, and the defendant architect failed to make such a recommendation to the owners as required in his agreement, paragraph 13, then a legal basis for liability might be found.

The cases hold that where discretionary judgement is allowed, honest mistake of judgement does not create liability.

The Paxton case, supra, states of the architect's specifications for sheathing

> These computations he made in compliance with actual building law and in accordance with the standards of good practice in his profession and his community. That we think would negative any basis for a finding of negligence *even if he had made some mistakes in his computation* and there is no evidence he made such mistakes. (p. 938.) (Italics added.)

The case of *Day v. National U. S. Radiator Corporation* 241 La. 288 128 So. 660 grants immunity from liability of public officers and architects acting on a public project where invested with discretionary judgement, unless the plaintiff pleads "willfulness, malice or corruption in the

conduct of the owner or architect."

From the foregoing law on discretionary judgements, it appears that the Court errs in its too broadly stated sentence in the next to the last paragraph of the Courts opinion, to which Justice Henroid dissents. That questioned statement of law precludes non-liability for an honest mistake of a discretionary judgement. We believe the court inadvertently overlooked the law governing non-liability for honest mistake of judgement and should declare that law applicable on rehearing.

The direct and primary cause of the alleged accident is the negligence of the Contractor clearly assumed by him in his subscribed contract. Any alleged negligence of the architect is of secondary or passive nature—failure to detect negligence of contractor and recommend work stoppage to the owners if that be his honest discretionary judgement.

CONCLUSIONS

The foregoing analysis supports the following conclusions:

First, The opinion is much too short to properly consider the applicable law of architects against the particular background of the instant fact-situation as is done by all the cases cited by the Court.

Second, The immunity from liability granted to third parties by the 1945 amendment to the Workmen's Compensation Act should be applied to defendant architect unless the architect made a third party beneficiary contract waving that immunity. The Court should find no

such third party beneficiary contract.

Third, The Court erred in failing to hold that the complaint was fatally defective on the ground that the complaint did not plead a customary duty and failure to exercise the standard of care in the matter of discretionary work stoppage by architects practicing in the vicinity where the question of liability of the architect was involved.

Fourth, The Court engaged in unjustifiable judicial legislation because under the particular facts and applicable traditional law there are no intersticies or gaps to be filled in by the Court.

Fifth, The Court imposes upon architects and private and municipal property owners engaged in building projects the unjustibiable position of insurers of all workmen against injury and the heirs of workmen against death of workmen by misfeasance of the building contractor. This unjustifiable result is founded on unnecessary *obiter dicta* of the Illinois appellate opinions in *Miller V. DeWitt, supra,* which case was decided on the accepted tort doctrine of inherently dangerous situation requiring ultra-hazardous activity, and upon a statutory imposed duty by the Illinois Structural Work Act of 1963.

Sixth, The Court erred in failing to recognize the express terms of limitation upon the architects supervisory activities spelled out in paragraph 13 of the architect's agency agreement which the Court overlooks, although pleaded in Exhibit "A" of plaintiff's complaint, which requires the discretionary judgement of the City Engineer as to whether the contractor's work should be stopped on

study and recommendation of the architect, or on the owners own initiative.

Seventh, The architect should not be bound to answer for the default or misconduct of the contractor except upon the written contract subscribed by the architect coming within the statute of frauds or upon established tort law as found in the Erhart and Miller cases.

Eighth, The cases cited by the Court were each one decided upon traditional legal grounds of the law of architects. The Paxton and Erhart cases were decided by applying the general rule of law that a general agreement of an architect to become the supervising agent of the owner requires only that the architect enforce his definitive specifications and also by the application of the applicable tort law governing misfeasance of an architect's servant in Erhart.

Ninth, The Court's opinion does not allow an honest mistake of judgement by the architect in his study and recommendation to the City Engineer, on any work stoppage, which is allowed by the traditional law of architects.

Tenth, The decision in the Nauman case makes the architect the unlimited insurer of the safety of all workmen who are injured or killed on construction work, created by acts or omissions of the contractor whose liability for injuries or death is limited by Workmen's Compensation Laws. The obligations of an insurer should not be imposed by judicial decision.

WHEREFORE we respectfully submit that upon rehearing and reconsideration, the Court should apply tra-

ditionally established law of architects to the unique facts of the Nauman case.

Done this 20th day of May, 1967.

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