Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

Inside This Issue

Monticello Issue 20 July 2017

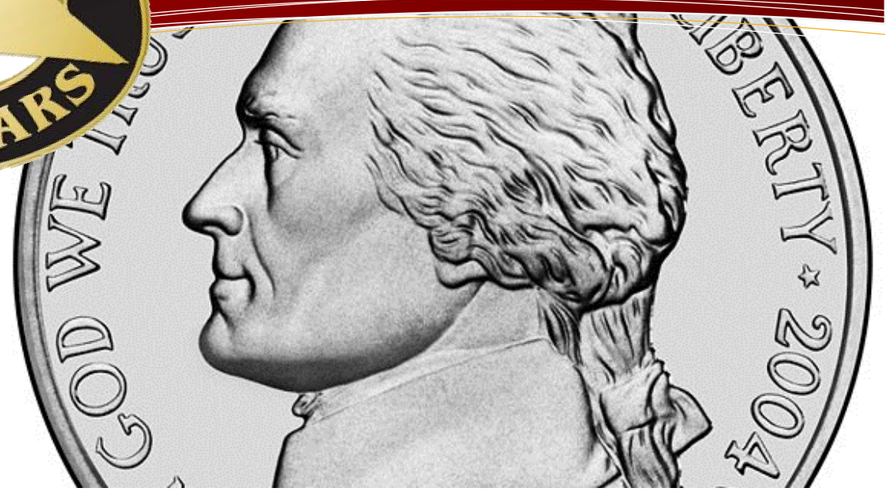
The Jefferson Society, Inc.

c/o 2170 Lonicera Way
Charlottesville, VA 22911

ISSUE 20 July 2017

QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello



Know of Ano… Architect-Law…er Who Has Not Yet Joined?

Send his or her name to President Suaznne Harness: sharness@harnessprojects.com and she will reach out to them. Must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

JOIN US ON FACEBOOK & LINKEDIN

Want to connect with other members? Find us here.

WEBSITE:

www.thejeffersonsociety.org

2017 PRESIDENT'S MESSAGE:
By Suzanne H. Harness, AIA, Esq. Arlington, Va.

What an honor it is to serve as the sixth President of The Jefferson Society!

Intimidated by writing my first message, and always one to do my research, I read through the initial messages of the prior five Presidents, Bill Quatman, Craig Williams, Chuck Heuer, Tim Twomey, and Mehrdad Farivar. The common theme that emerged was each President's expression of sincere thanks for the work of the passionate few who started this organization and have worked so hard to get us where we are today. I echo the praise and thanks—we would be nowhere without them—but I long for more. Yes, I am greedy for more of our members to step forward and help me move this organization into its sixth year and beyond.

We can't thank our Founders enough, but I believe that to grow and mature as an organization we need to tap into the vast resources of our more than 100 members and move more of them into the leadership pipeline. It is my personal goal over the next two years as President to encourage more members to take on at least one small task for the Society. By volunteering, you will get to know your colleagues all over America, and you will have fun! We have many opportunities. See just three of them below:

Member Survey: Vice President/Immediate Past President Mehrdad Farivar suggested last year that we survey our members to find out more about who we are, how we practice, and what we think. At the fifth annual meeting in Orlando (see pp. 2-5 of this issue) we agreed to move forward with this survey, which we will send out using Survey Monkey. It takes a certain skill to write survey questions. If you have the skill, write to me, Mehrdad, Donna Hunt, or Jeffrey Hamlett. You'll find email addresses on our web site: www.thejeffersonsociety.org.

ABA Forum on Construction Law: Are you a member? If so, please identify yourself and assist me in discussions I have already started with the Forum's leadership to establish a formal liaison relationship between the ABA Forum and TJS. Each organization offers opportunities for publication, and the Forum

(Continued on page 2)

President's Message
(cont'd from page 1)

has a division specifically for attorneys who represent design firms. This sounds like a win-win to me. Please help me put a small emissary group together for the Forum's meeting October 5-6 in Boston.

Monticello: Building your resume? If so, write an article for publication in *Monticello*, our online journal. Our editor, Bill Quatman, would be delighted to publish your writing. A simple brief of a recent case in your state that is helping you out, or causing you trouble, would be a welcome contribution. Better yet, if you have experience writing and publishing a newsletter, or would like to get it, volunteer to assist Bill in putting *Monticello* together four times each year.

Returning to the topic of gratitude, it is very important to me to thank each member who has already paid his or her 2017 membership dues. Your dues money fully supports the Society—without it we could not do anything. Going into our sixth year, we are finally beginning to build up a little money that we can use to improve our web site, and maybe hire an accountant. The dues of every member count toward helping us grow. Thank You.

Donna Hunt is serving her second year as Treasurer and doing an amazing job of managing our finances. Treasurer-Elect Jose Rodriguez will assist Donna this year. If you have received a note from Donna asking you to bring your dues up to date, please do so.

See below the Minutes of our Fifth Annual Meeting to find out all about it, and welcome our new Board members, Jacqueline Pons-Bunney and Jeffrey Hamlett. Mark your calendars now for the Sixth Annual Meeting, June 20, 2018 in New York City.


Suzanne Harness

5th Annual Meeting.

The Fifth Annual Meeting of the Members of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held at the Garden Room of Castle Hotel, Orlando, Fla. beginning at 8:30 pm on April 26, 2017. Members of the Society attending the meeting are identified on p. 5 of this newsletter. Also attending were two guests from Rimkus Consulting who had graciously agreed to underwrite part of the cost of the meeting, Ken Homfeld and Paul Marsenison. Suzanne Harness served as secretary.

PRESIDENT'S REPORT:

Mr. Farivar thanked Ms. Harness and Ms. Hunt for planning and executing the meeting and for their service as Secretary and Treasurer, respectively. He recognized and thanked four members who were not present, but whose terms of service on the Board of Directors expire at this meeting: D. Wilkes Alexander, Timothy W. Burrow, Eric O. Pempus, and Scott M. Vaughn. Mr. Farivar also thanked Mr. Quatman for his work on the quarterly newsletter and encouraged the members present to submit articles for publication. Mr. Farivar then reported on the previous actions since the last annual meeting held May 18, 2016, noting the beneficial Bylaw changes that the members approved at last year's annual meeting and implemented over this past year. He thanked Messrs. Twomey and Heuer for their work on that effort. He also thanked Ms. Hunt for creating Jefferson Society lapel pins, which she distributed to the members present. Regarding potential members, he encouraged those present to reach out to architects who may be considering attending law school and to current law school students who may be qualified for membership in the Society.

TREASURER'S REPORT:

Treasurer Hunt reported on the finances of the Society. The Society recorded 110 members, with 91 members fully paid and 19 members showing outstanding dues amounts. Twelve of those members have outstanding payments for three years. During discussion, Mr. Bell suggested that the Board consider creating a "lifetime membership" category for paid-up members who retire from practice.

ELECTION OF OFFICERS AND DIRECTORS:

The next item of business was the election of officers and directors. President Farivar asked Ms. Harness to present the recommendations of the Nominating Committee. Ms. Harness then provided copies of the report of the Nominating Committee. Ms. Harness explained that due to the 2016 Bylaw revisions and the 2016 election of officers, Treasurer Hunt would be serving the final year of a two-year term in the coming year, and Secretary Harness would commence the first year of a two-year term as President. For that reason, it was necessary to nominate members for only two officer positions, Treasurer-Elect and Secretary. The Treasurer-Elect will serve a one-year term as Assistant Treasurer and assume a two-year term as Treasurer at the annual meeting in 2018, and the Secretary will serve a one-year term concluding at the annual meeting in 2018. Nominees for these Officers were as follows:

- Treasurer-Elect: Jose Rodriguez, AIA, Esq.; and,
- Secretary: Julia Donoho, AIA, Esq., RIBA

Regarding positions on the Board of Directors, the By-law revisions require reducing the Board from eleven

(continued on p. 4)

Supreme Court of the United States - Admission Day Nov. 13, 2017

TJS member Donna M. Hunt, AIA, Esq. has organized a very special event for admission for up to 50 Jefferson Society members (in good standing) to the United States Supreme Court on Monday Nov. 13, 2017. Twenty-two (22) of these spots are currently reserved. If you would like to attend please let Donna know ASAP and she will add you to the list and send you the application information.

NOTE: Each Candidate may have one (1) guest accompany him or her.

We currently have space for additional candidates and invite you to add your spouse, partner, children, etc. (who are attorneys) to also submit an application for admission.

All applications and the $200 fee, payable to the Jefferson Society, **are due to Donna on or before Sept. 1, 2017.** Email Donna at Donna.Hunt@Ironshore.com or call her at (617) 502-5374 for more information.

2017-18 Jefferson Society's Officers and Directors

Officers (2-year term, 2017-19)
President: Suzanne H. Harness, AIA, Esq. (Harness Law, PLLC)
Vice-Pres/Immediate Past Pres: Mehrdad Farivar, FAIA, Esq. (Morris, Povich, et al.)
Treasurer: Donna M. Hunt, AIA, Esq. (Ironshore)
Treasurer Elect: Jose B. Rodriguez, FAIA, Esq. (Daniels Rodriguez, et al.)

Directors
(1-year term, expiring 2018):
1. Julia A. Donoho, AIA, Esq. (Legal Constructs)
2. Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy, LLP)
3. Donna Hunt, AIA, Esq. (Ironshore)

(2-year term, expiring 2019):
4. Charles R. Heuer, FAIA, Esq. (Heuer Law Group)
5. Rebecca McWilliams, AIA, Esq. (Independent Design, LLC)
6. Jose B. Rodriguez, FAIA, Esq. (Daniels Rodriguez, et al.)

(3-year term, expiring 2020):
7. Suzanne H. Harness, AIA, Esq., (Harness Law, PLLC)
8. Jacqueline Pons Bunney, Esq. (Weil & Drage)
9. Jeffrey Hamlett, AIA, Esq. (Hamlett Risk Management)

Annual Meeting (cont'd)

to nine Directors, each serving a three-year term with the terms staggered. The Bylaws authorize the Executive Committee to adjust the term lengths of existing Directors to achieve the staggered terms.

Four existing Director's terms will continue for another two years: Mr. Heuer, Ms. McWilliams, Ms. Harness, and Mr. Rodriguez. To achieve the staggered terms, the Committee authorized that: 1) the terms of three Directors, Mr. Farivar, Ms. Hunt, and Ms. Donoho, whose terms were expiring at this meeting, be extended for one additional year; and, 2) Ms. Harness's remaining two-year term be extended one additional year to coincide with her last year in office. To complete the nine-member Board, the following two members were nominated to serve three-year terms commencing at this meeting:

- Jacqueline Pons-Bunney, Esq., (Weil & Drage, APC)
- Jeffrey Hamlett, AIA, Esq., (Hamlett Risk Management)

Mr. Farivar asked for any other nominations from the floor. There being none, it was moved by Ms. Hall and seconded by Mr. Bell that the full slate of Officers and Directors be adopted as presented. The slate was adopted by unanimous vote of the Members attending. The newly elected Officers and Directors were congratulated in person.

After adjourning the Fifth Annual Meeting of The Jefferson Society, the attendees posed for a group photo, with our hosts from Rimkus Consultants. The members elected new officers and directors after dining at The Castle Hotel Restaurant in Orlando.

OLD BUSINESS:

Educational Programs. Ms. Harness presented a report by Ms. Donoho, who was unable to attend, regarding preparing a submission for the 2018 AIA Conference on Architecture, to be held at the Javits Center in New York City June 21-23. Ms. Donoho indicated the she would be re-submitting a half-day workshop entitled: "Legal Bootcamp for Practicing Architects" for presentation by herself, and members Eric Pempus and Sue Yoakum.

U.S. Supreme Court. Ms. Hunt reported that we have 50 slots available for the Nov. 13, 2017 swearing in of Society members Ms. Hunt will send out another email regarding this opportunity.

NEW BUSINESS:

Member Survey. Mr. Farivar proposed that we conduct a member survey to collect a baseline of information and to repeat the survey periodically. Mr. Farivar, Ms. Hunt, and Mr. Hamlett agreed to assist in this effort.

Forum on Construction Law. Ms. Harness informed the members of an initiative to establish a formal relationship with the ABA Forum on Construction Law.

OTHER TOPICS:

Members discussed alternative meetings of the Society; and how to further define our purpose and the constituency we intend to serve.

The next Annual Meeting will he held on Wed., June 20, 2018 in New York City.

There being no further business, on motion by Mr. Hamlett seconded by Mr. Twomey, the meeting was adjourned at 9:30 p.m.

Attendees at the Annual Meeting in Orlando.

The following sixteen members of the Society were in attendance at the Annual Meeting:

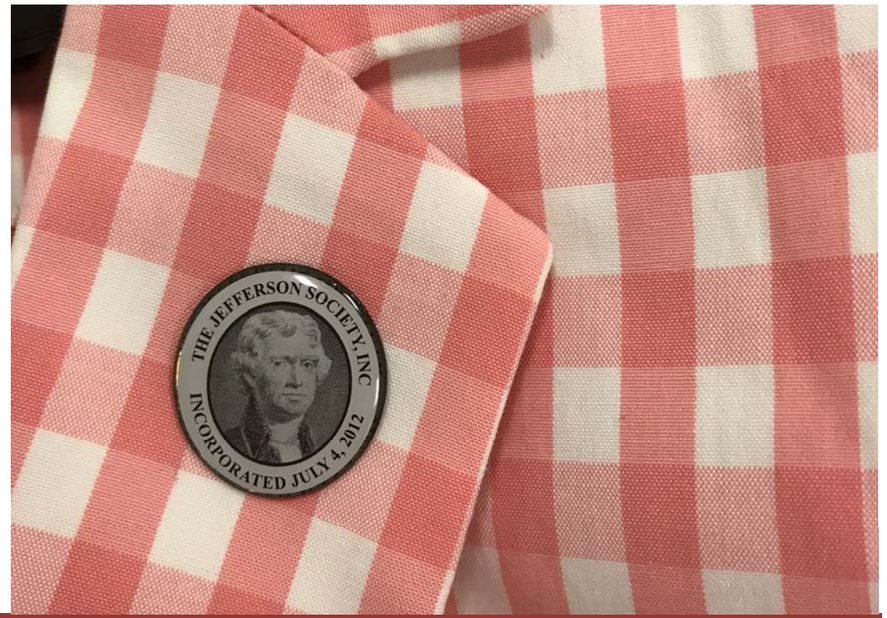
1. Robyn Baker
2. Michael Bell
3. Dennis Bolazina
4. Mehrdad Farivar
5. Josh Flowers
6. Cara Hall
7. Jeffrey Hamlett
8. Suzanne Harness
9. Donna Hunt
10. Mike Koger
11. Laura Jo Lieffers
12. Jacqueline Pons-Bunney
13. Joyce Raspa-Gore
14. Jose Rodriguez
15. Tim Twomey
16. Jay Wickersham

Also attending were our dinner sponsors from Rimkus Consulting, Kenneth Homfeld and Paul Marsenison.

Be sure to make plans to attend the **Sixth Annual Meeting** of The Jefferson Society, which will be held in **New York City** on Wednesday, **June 20, 2018,** just prior to the opening of the AIA National Convention held in the Big Apple on June 21-23, 2018.

Interested in helping to plan the TJS reception and dinner in New York? If so, please contact TJS President Suzanne Harness at sharness@harnessprojects.com

(Above) TJS Members Michael Bell and Tim Twomey at one of the the AIA Convention sessions. (Below) The stylish new TJS member pin, which was unveiled at the Fifth Annual Meeting, in anticipation of the Society's second trip to the U.S. Supreme Court for a group admission. Designed by TJS member Donna Hunt, we thought it would be fitting to present the Justices with a pin that represents our amazing group. The Board will decide how to distribute the pins to all members.



Membership Update!

The Jefferson Society has 110 Members, which includes: 12 Founders, 96 Regular Members, and 2 Associate Members.

Please Welcome Our Newest Member!

The following have joined since our last Newsletter:

NEW MEMBER:

Russell N. Weisbard, Esq.
Frisco, TX

(see his Member Profile on pp. 24-25 of this issue)

Do you know of someone we've overlooked? Please help us to recruit those potential members who hold dual degrees in both architecture and law.

Send their names to:

Suzanne Harness, AIA, Esq.
President
The Jefferson Society, Inc.
sharness@harnessprojects.com

Missouri: "Spearin Doctrine" Adopted (In a Case of First Impression)

In this case, a general contractor brought a breach of contract action against a school district based on the breach of implied warranty for furnishing deficient and inadequate plans and specifications, also known as the "Spearin Doctrine" (after the famous 1918 case, 248 U.S. 132). The trial court entered summary judgment for the district and the contractor appealed. The Court of Appeals reversed, holding that as an issue of apparent first impression in Missouri, contractors and subcontractors are permitted to bring claims under *U.S. v. Spearin*; and, as another issue of first impression, the "modified total cost method" can be used to calculate contractor's damages in claims under *Spearin*. While the facts are rather complicated, suffice it to say that the contractor sued the school district, and the district sued the architect over alleged defects in the plans and specs used for bidding. The contractor claimed that under the *Spearin* Doctrine, the district impliedly warranted that the plans it furnished were adequate for completing the project, and the district breached the contract by providing inadequate and defective plans and specifications, which caused damages to an electrical sub. To prove damages for the electrician's labor loss of productivity, the contractor sought to use the "total cost method" or "modified total cost method." The Court of Appeals noted that an action based upon the *Spearin* Doctrine "has not previously been expressly accepted or rejected in our State." Under the Doctrine, the government impliedly warrants that the design plans are "reasonably accurate"; however, the specifications need not be perfect. The Court noted that, "effectively, the *Spearin* Doctrine places the risk of loss stemming from defective plans and specifications on the owner who renders the plans to the contractor. * * * This is equitable. The owner in a construction contract is better positioned to assess the accuracy and adequacy of the project's plans and specifications; therefore, it is better positioned to prevent losses from ever occurring. * * * Accordingly, we believe Missouri principles would be upheld by permitting contractors and subcontractors to bring *Spearin* claims in our State."

The second major issue was the contractor's attempt to prove its damages by using either: 1) the total cost method ("TCM"); or, 2) the modified total cost method ("modified TCM"). This was another issue of first impression in Missouri, as no reported Missouri case has expressly accepted or rejected either approach. After examining cases from other states, the Court of Appeals held that "the goal of the modified TCM and the goal of Missouri contract law are consistent: both seek to place the non-breaching party in the same position he would be in absent the breach, while only penalizing the breaching party to the extent he is responsible for the non-breaching party's damages." Compared to the rigid all-or-nothing approach of the TCM, the Court felt that the modified TCM "is more nuanced," and "its framework—or a similar framework—should not be prohibited in Missouri as a matter of law." The Court noted that both damages theories are "disfavored by the courts" and generally considered "theories of last resort." Nonetheless, they were permitted in this case. Accordingly, the district was not entitled to summary judgment for the district and its architect. The holding was reversed and the case remanded.

Penzel Constr. Co., Inc. v. Jackson R-2 Sch. Dist., 2017 WL 582663 (Mo. App. 2017), reh'g and/or transfer denied (Apr. 10, 2017).

TJS Members in Chicago. From left to right, Ted Ewing, Yvonne Castillo, and Bill Quatman, all attending Schinnerer's 1st Annual Large Firm Conference on May 24th at 11:30 am at the InterContinental Magnificent Mile in Chicago. (Not pictured, Frank Musica).

Kentucky: ELD Is No Bar to Sub's Negligent Misrepresentation Claim Against Architect

A subcontractor sued the general contractor over work on a high school and the contractor filed a third-party complaint against the architecture firm, alleging negligent misrepresentation based on allegations of defects in the plans and specifications. The trial court granted the architecture firm's motion for summary judgment based on the economic loss doctrine (or rule) ("ELD"), and the contractor appealed. The Court of Appeals reversed, holding that the doctrine did not apply.

The Court held that the basis for a negligent misrepresentation claim is found in Restatement (Second) of Torts § 552 and that "other jurisdictions have observed that there is no reason to exclude architects from the duty imposed under Section 552." The Court concluded that the trial court erred when it held that architect did not owe a duty to the contractor separate from its contractual duties to the owner. As to the ELD, the Court disagreed that the doctrine barred the claim for negligent misrepresentation. "Whatever limitations on the economic loss rule that our Supreme Court ultimately accepts or rejects, we are convinced that it does not apply to a claim under Section 552 where there is no contractual relationship between the parties. It is the very purpose of the tort to compensate purely economic losses when there is no contractual remedy available but there is a breach of the duty described in that Section. To apply the rule would essentially eviscerate the tort * * * the result would simply be "nonsensical. * * * We conclude that the economic loss doctrine does not apply to a claim of negligent misrepresentation in the architect/ contractor scenario."

A second defense raised by the architect was based upon the AIA General Conditions, where acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

The architect argued that the contractor accepted final payment and, therefore, its claim was barred. The Court rejected this argument, saying: "There is nothing in the change orders or application for final payment which would waive or release a negligent misrepresentation claim against [the architect]."

The case is *D.W. Wilburn, Inc. v. K. Norman Berry Assocs., Architects, PLLC*, 2016 WL 7405774 (Ky. Ct. App. Dec. 22, 2016)

Montana: Statute of Repose Bars Claim for Roof Collapse

A school district sued its designer and builder of a high school roof, which partially collapsed after a heavy snowstorm, asserting claims for negligence, breach of express and implied warranty, breach of contract, negligent misrepresentation, deceit, and fraud. The trial court granted summary judgment in favor of both the designer and builder and the school district appealed. The Montana Supreme Court affirmed that ruling, holding that: 1) the defendants "completed" the roof when the school was in full use, and thus, school district's claims were barred by the 10-year statute of repose; 2) the period of repose could not be tolled, and thus was an absolute bar to the school district's claims; and, 3) as to the claims against the designer (which were barred), the designer, as prevailing party, was entitled to attorney fees by contract.

The Court found that although there was some dispute over the "completion" date, a final walkthrough had occurred in Jan. 1998 in which the parties prepared a punch list, and the school was in full use by April 1998. Also, the school district issued final payment around that same time. The problems emerged with the new roof almost immediately and, after a heavy snowstorm in Dec. 2010, a large portion of the roof collapsed. The district filed suit a year later, in Dec. 2011.

The evidence showed that the roof had been installed and was put to its intended purpose in April 1998, and was, therefore completed as defined by the statute of repose. Therefore, a suit filed in Dec. 2011 would be have been time-barred. The Court held that, "Facts showing the School District's dissatisfaction with the roof's condition and that the roof continued to leak do not present substantial evidence that the roof was incomplete." In concluding that alleged fraudulent concealment or late discovery of facts would not toll the statute of repose, the trial court emphasized that the district had not alleged "that the fraudulent or deceitful conduct created some separate injury as opposed to the injury allegedly caused by the roofing project." Accordingly, the court concluded, the district's allegation that the defendants deceitfully concealed problems with the roof "does not circumvent the statute of repose and consequently all of the claims are barred because they still relate to [the] roofing project that was completed in 1998."

As to recovery of attorney's fees, the contract between the designer and the district provided that all reasonable litigation or arbitration expenses incurred by the prevailing party shall be paid by the non-prevailing party. Since the suit against the designer was barred by the statute of repose, the designer was a "prevailing party" by contract and, thus, entitled to recover its attorney's fees. One judge dissented on the basis that the date of completion was a disputed material fact which should have precluded summary judgment. See, *Hill Cty. High Sch. Dist. No. A v. Dick Anderson Constr., Inc.*, 390 P.3d 602 (Mont. 2017).

California Dreamin' $2.7 Mil. Arbitration Award For Architect Upheld

Architect FCA performed architectural services for a hospital before a dispute broke out. The parties entered into a 2002 contract, a 2008 addendum, 40 purchase orders for particular services, and certain 2013 agreements. The 2002 contract contained a termination clause and an arbitration clause. The termination clause allowed the contract "for convenience" after seven days' written notice. If the termination occurred during the design or bidding phases of the work, the hospital was obligated to pay the architect a termination fee in the amount of 20% of all compensation. The arbitration clause stated that "In any judicial proceeding to enforce this Agreement to arbitrate, the only issues to be determined shall be those set forth in 9 U.S.C. Section 4 Federal Arbitration Act," and "[a]ll other issues, such as, but not limited to, arbitrability, and prerequisites to arbitration ... shall be for the arbitrator(s), whose decision thereon shall be final and binding." The 2008 addendum extended the Agreement's term by 15 years and stated that all the terms and conditions of the Agreement remained in full force and effect. The 40 purchase orders outlined the fee proposal, for design services to be performed on the Project.

The various fee proposals and purchase orders did not expressly reference the Agreement and did not contain any arbitration clauses themselves.

As time went on, the relationship between the parties soured. In 2013, the hospital asked FCA to submit a fee proposal for the bidding and construction administration phases of the project. FCA proposed to do the work for $9.5 million, while the hospital proposed a fee of just $5.5 million. As a result, the hospital hired another architect. The next day, FCA confirmed its termination by letter and invoiced the hospital for the 20% termination fee pursuant to the Agreement, in the amount of $2.7 Mil.. The hospital refused to pay. The parties then signed six additional contracts in late summer and fall of 2013 — after the hospital's purported termination of FCA — related to the transition of design services to the new firm. In Dec. 2013, FCA filed for arbitration, seeking its termination fee.

The arbitrators awarded the full $2.7 Mil. to FCA and the hospital moved to vacate the award, contending that there was no valid agreement to arbitrate. The hospital's position was that the purchase orders were the contracts for the design of the Project and, therefore, the Agreement and its arbitration provisions did not apply to termination.

On appeal, the Court noted that, "A court may not confirm an arbitration award without first finding that the parties entered into an enforceable written agreement to arbitrate their dispute. Here, the trial court made the required finding." The hospital also argued that the Agreement was illegal because it violated Cal. Business and Professions Code section 5536.22 and section 70713 of the Cal. Code of Regulations, which require that an architect "shall use a written contract when contracting to provide professional services," and the "written contract shall include," among other things, (1) a *description of services* to be provided by the architect to the client; (2) a *description of any basis of compensation* applicable to the contract and method of payment agreed upon by both parties; and (3) a description of the *procedure to be used by either party to terminate the contract*. The Court rejected this argument, finding that the hospital never referred the arbitrators to the illegality issue now raised under the licensing statutes. Thus, the threshold arbitrability issues were for the arbitrators to decide and that was never raised in arbitration. Regardless, the Court of Appeals found that the Agreement complied with section 5536.22. After disposing of numerous other lengthy arguments and defenses, the Court of Appeals upheld the $2.7 Mil. arbitration award in the architect's favor. The case is *Fong & Chan Architects v. Washington Hosp. Healthcare Sys.,* 2017 WL 1164915 (Cal. Ct. App. 2017).

AIA 2018 Call for Proposals

Next year, the 2018 AIA Conference on Architecture is in New York City, June 20-23, 2018. It will feature hundreds of speakers and an unrivaled range of education sessions on emerging trends, thought-provoking topics, practice strategies, and some of the most interesting ideas in architecture. Do you have a proposal that we can submit as The Jefferson Society? If so, contact Suzanne Harness, AIA, Esq. at sharness@harnessprojects.com ASAP. **Proposals are due by Aug. 1, 2017.**

New ADR Journal Issues Call for Articles!

The American Journal of Construction Arbitration and ADR is seeking articles from interested authors. TJS member Lawrence M. Prosen is a founding editor-in-chief and is organizing the publication for Juris Publications. The new journal is not intended as a formal law review, but instead as a forum to provide practical knowledge and discussion of topics relating directly (or indirectly) to construction arbitration and other ADR methods, such as mediation and DRB's. The current anticipated publication schedule is for the first two issues to be published in May and Nov. of 2017. Articles should be of sufficient length to cover 20 pages of the journal, including footnotes and citations. For more information contact Larry Prosen at (202) 481-9940 or by email at lprosen@kilpatricktownsend.com.

Texas: Surprise Ending! We Won't Spoil It For You!

This case arose from alleged defects in the design and construction of a hotel near the airport in Austin. The owner (RLJ) filed suit against multiple defendants involved in the design and construction of the hotel, including the architect (Elness), alleging that the defendants' work caused the hotel to have a defective foundation that caused building movement and further damage. RLJ had previously purchased the hotel from White Lodging, which had previously entered into contracts with the defendants for design and construction of the hotel. The trial court ruled that RLJ had capacity to bring suit against the architect as an assignee of the contract between White Lodging and Elness.

Other defendants settled out prior to trial, leaving Elness as the lone defendant (never a good situation). The jury found that Elness had failed to comply with the original AIA contract between Elness and White Lodging and awarded RLJ $785,000 in damages. Elness cleverly asked the trial court to apply settlement credits to the damage amount based on the payments RLJ had received from its settlements with other defendants, which was granted. The trial court then awarded RLJ legal fees in the amount of $901,651 against Elness, for a total judgment of $1.68 Mil. The trial court then applied the settlement credits (a total of $1.17 Mil.) to the amounts awarded against Elness in damages and attorney's fees. The net result was that the architect was ordered to pay RLJ a sum of just $516,651. Both parties appealed.

The first issue on appeal was whether RLJ had legal capacity to bring suit against the architect for breach of contract (because the Assignment did not specifically assign "causes of actions" under that contract). The Court of Appeals first noted that causes of action in Texas are freely assignable. The Assignment agreement included "all other intangible assets relating to the Property," which RLJ maintained included causes of action. The Court ruled that "choses in action are intangible property" and, therefore, the claims against the architect were assigned to RLJ. As to the award of attorney fees, the architect argued that RLJ was not entitled to recover any of its legal fees because, although RLJ was awarded damages by the jury, it did not actually "recover damages" due to the application of the settlement credits. Therefore, Elness argued, RLJ was not actually a "prevailing party." After considerable analysis, the Court of Appeals agreed on this technical point, because the trial court had properly applied settlement credits to the jury award, leaving RLJ with less than $0 in damages. The net award against Elness was for attorney's fees, not damages. Accordingly, RLJ was not a "prevailing party." The Court of Appeals reversed and rendered judgment that RLJ take nothing from the architect! I bet you didn't see that coming!

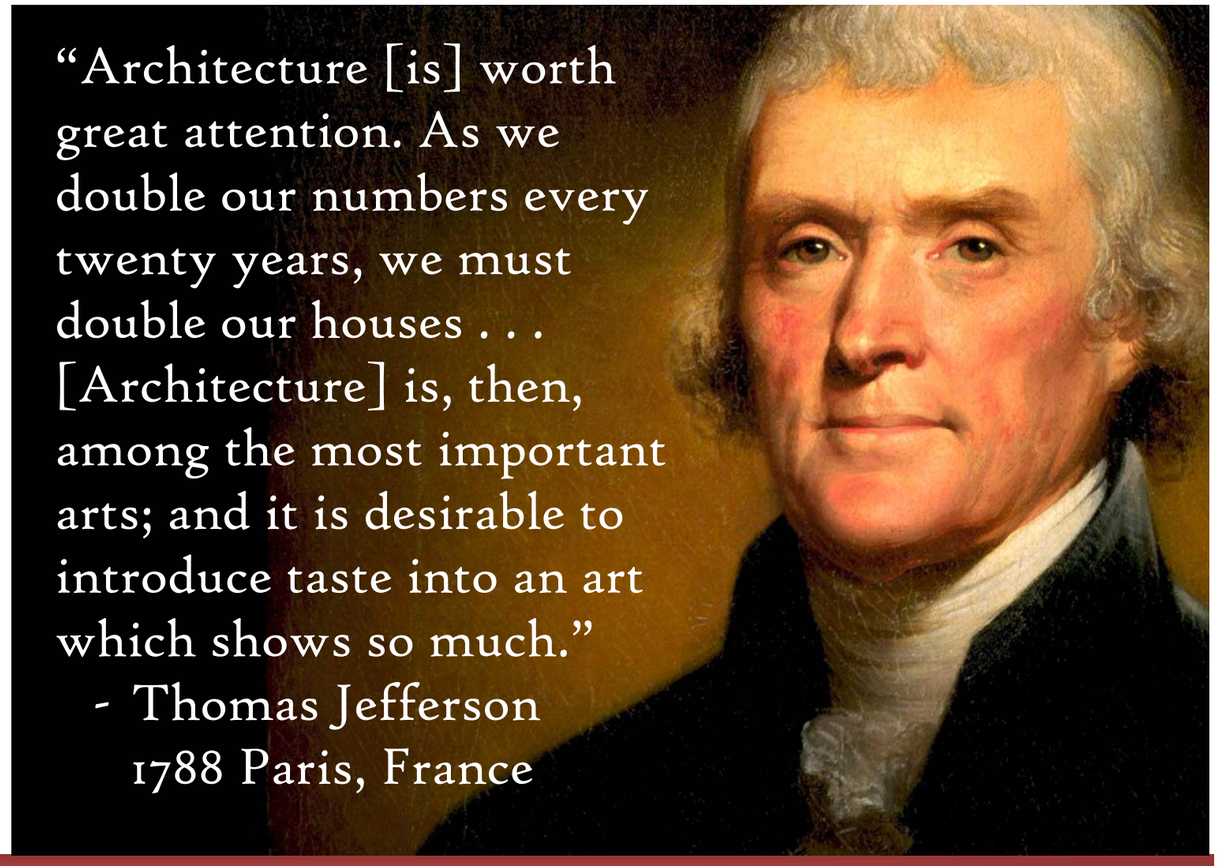
Elness Swenson Graham Architects, Inc. v. RLJ II–C Austin Air, LP, 2017 WL 279598 (Tex. App. 2017).

Illinois: AE's Not Liable in Condo Case for Breach of Implied Warranty

In this case, a condo association sued the developer, architects, engineering firms, general contractor, material suppliers, and subcontractors, asserting claims for breach of implied warranty of habitability against them all. The trial court granted motions to dismiss filed by the architects, engineering firms, material suppliers, and subcontractors, and dismissed the general contractor's counterclaims against subcontractors and material suppliers. The court then certified certain questions for interlocutory appeal. On appeal, the Court of Appeals held that: 1) the architect and engineering firms were not subject to implied warranty of habitability of construction; 2) material suppliers were not subject to implied warranty of habitability of construction; 3) the condo association could maintain breach of implied warranty of habitability claims against subcontractors; but, 4) the general contractor could not maintain claims against the subcontractors. Focusing solely on the claims against the design professionals, the first issue on appeal concerned whether claims for breach of the implied warranty of habitability may be asserted against design professionals who otherwise did not actually perform construction work.

The Court noted that the implied warranty of habitability is a "creature of public policy that was explicitly designed by our courts to protect purchasers of new houses upon discovery of latent defects in their homes." Generally, the claim must be asserted against the builder-vendor. The issue of whether the implied warranty extends to design professionals had been explored thoroughly in a 2015 Illinois case in which the Court held that such claims could not be asserted against an architect. See *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC*, 48 N.E.3d 1250 (Ill. App. 2015). The Court of Appeals found that 2015 ruling to be dispositive on the issue. In that case, the Court held "generally speaking, only builders or builder-sellers warrant the habitability of their construction work. Engineers and design professionals * * * provide a service and do not warrant the accuracy of their plans and specifications." The Court also noted that "breach of implied warranty of habitability claims against design professionals have [largely] been rejected in Illinois and most other jurisdictions." As in *Park Point*, the Court rejected the plaintiff's argument "that we should expand the extent of the implied warranty of habitability to a new class of defendants who designed, but were not involved in the actual construction, of the condominiums at issue," adding, "We find no reason to depart from our precedent, including *Park Point*, which makes clear that an architect or engineering firm that assisted in design but otherwise did not participate in the construction of the real property is *not* subject to the implied warranty of habitability."

See, *Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 2017 IL App (1st) 143364.



Indiana: Architect Acting as Design-Build Contractor Owed a Non-Delegable Duty to Worker for His Safety

A subcontractor's employee sued the general contractor (an architectural firm acting as design-builder) for injuries he suffered when he fell 8-10 feet off a ladder on a retail construction project. The injured worker claimed that the contractor breached its duty to provide him with a safe workplace. The trial court entered summary judgment in favor of the contractor and the employee appealed. The Court of Appeals affirmed and the persistent employee petitioned for transfer to the state Supreme Court, which was granted. The Indiana Supreme Court reversed and remanded the case, holding that the general contractor had assumed a "non-delegable duty" of care related to worksite safety for the subcontractor's employees when it entered into the construction contract with the owner of the retail store. The contractor had entered into a standard DBIA Form 530 Owner / Design-Builder Agreement for the project, which included the DBIA standard Form 535 General Conditions. The parties did not use a DBIA subcontract, but drew up their own form which placed the duty for site safety on the subcontractor. The sub then entered into a sub-subcontract with a sheet metal contractor that placed safety duties on the sub-sub. At issue was whether the design-build contractor could shed itself of the prime contract responsibility by delegating site safety downstream in this manner.

The trial court ruled that under Indiana law, as to the duty owed by a general contractor, the long-standing rule is that "a principal will not be held liable for the negligence of an independent contractor." Therefore, a general contractor will ordinarily owe no outright duty of care to a subcontractor's employees, much less so to employees of a sub-subcontractor. "The rationale behind this rule is that a general contractor has little to no control over the means and manner a subcontractor employs to complete the work." However, there are five exceptions to the general rule, and one such exception allows for the existence of a duty of care where a contractual obligation imposes a "specific duty" on the general contractor. Under Indiana law, a contract that is found to demonstrate the general contractor's "intent to assume a duty of care" exposes that contractor to potential liability for a negligence claim where no such liability would have otherwise existed. The Court held simply, "A duty imposed by contract, once formed, is non-delegable and is thought to encourage the general contractor to minimize the risk of resulting injuries." Thus, a question of contract interpretation is at the heart of this case. Looking at the contracts, the Court found that under the DBIA Form 535 General Conditions, the contract placed site safety on the shoulders of the design-builder. See, *Ryan v. TCI Architects / Engineers/Contractors, Inc.*, 2017 WL 1488853 (Ind. 2017).

Colorado Defect Action Reform Passes

On May 23, 2017, Gov. Hickenlooper signed HB 17-1279 which amends the Construction Defect Action Reform Act ("CDARA"). Due to a steep drop in condo development, the governor and the legislature took an interest in reforming CDARA by, among other things, making it more difficult for condo boards and associations to sue construction professionals. Under HB 17-1279, the executive boards of homeowners' associations ("HOA") will have to satisfy three elements before suing a construction professional. First, HOAs will have to give notice to all unit owners and the construction professionals against whom the lawsuit is being considered. Second, before proceeding with a lawsuit, HOAs will have to call a meeting at which both the executive board and construction professional will have an opportunity to present relevant facts and arguments. Third, HOAs will have to obtain approval from the majority of unit owners before proceeding with a lawsuit, after disclosing the potential costs and benefits of proceeding with a suit. HB 17-1279 will make it more difficult for HOAs and plaintiffs' attorneys to bring defect actions against construction professionals.

New York: 3-year Statute of Limitations Did Not Bar Claims Against Architect After Substantial Completion

In Feb. 2015, a city school construction authority filed a professional malpractice action against its architect concerning alleged faulty design of custom etched-glass windows. The trial court granted the architect's motion to dismiss on statute of limitations grounds and the owner appealed. Under New York law, a cause of action to recover damages against an architect for professional malpractice is governed by a 3-year statute of limitations, which accrues upon "termination of the professional relationship." New York courts say that is when the architect "completes its performance of significant (i.e., non-ministerial) duties under the parties' contract." The Court of Appeals found that the defendant continued to carry out its contract duties well after Feb. 2012 by, for example, assisting the owner with obtaining a final certificate of occupancy. Also, the architect was contractually obligated to review "as built" drawings by contract, which it continued to do after Feb. 2012. The architect relied on a provision of its contract that the parties' relationship ended (in 2009) when the work was "substantially completed." The Court found this clause was "at best ambiguous, and certainly not sufficient to satisfy defendant's threshold burden of establishing untimeliness." As an alternative holding, the Court held that "the continuous representation doctrine" toll applied, at least with respect to the architect's attempts after Feb. 2012 to remedy the faulty design of the custom etched-glass windows. The ruling in favor of the architect was reversed. See, *N.Y. City Sch. Const. Auth. v. Ennead Architects,* 49 N.Y.S.3d 462 (N.Y. App. Div. 2017).

Colorado: Third-Party Claim Against Architect Not Barred by Statute of Repose or Limitations

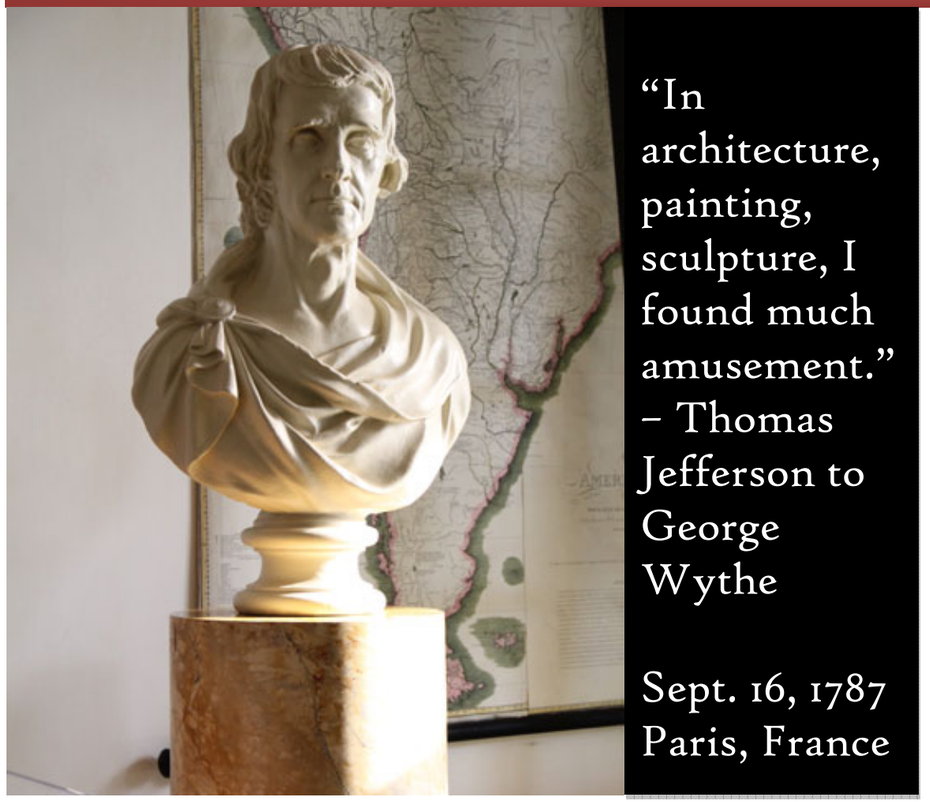
Heritage Builders, Inc. ("Heritage") built a new single-family home for the Lord family. The county issued a certificate of occupancy in Sept. 2006. In Nov. 2011, Mr. Goodman purchased the property from the Lords. Then, sometime between March and June 2012, Goodman discovered construction defects in the home. He gave Heritage informal notice of his defect claims in July 2013. Three months later, in Oct. 2013, Goodman sent a formal notice of claim letter to Heritage pursuant to the Colorado Construction Defect Action Reform Act, sections 13-20-801 to - 808, C.R.S. Heritage then sent a notice of claim letter to subcontractors Studio B Architects ("Studio B") and Bluegreen, Inc. ("Bluegreen") alleging design deficiencies at the residence. In Dec. 2013, Goodman sued the contractor asserting negligence against Heritage and some of its subcontractors. Heritage filed a third-party complaint against Studio B and Bluegreen, alleging design deficiencies. Studio B and Bluegreen each filed motions for summary judgment, arguing that Heritage's claims against them were barred by the 6-year statute of repose. The trial court granted summary judgment to the subs based on the statute of repose. In a matter of first impression, the state Supreme Court held that third-party claims brought during construction defect litigation are timely irrespective of the statutes of limitations and repose, overruling prior Colorado cases.

The key statute in question was § 13-80-104(1)(b)(II), which states that the statute of repose does not bar claims for indemnity or contribution "against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person" so long as they are brought within 90 days "after the claims arise, and not thereafter." Colorado courts have held that such claims do not "arise" until settlement or entry of judgment. As a result, neither Colorado's 6-year statute of repose, 13-80-104(1)(a) C.R.S., nor the 2-year statute of limitations, 13-80-102, C.R.S., barred the third-party action so long as the claim was brought at any time before the 90-day timeframe. The court vacated the summary judgment ruling in favor of Studio B and Bluegreen. *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Co. 2017).

Maryland: Architect Entitled to Recover Time Spent in Enforcing Contract In Addition to the Fees Owed

This case involved a contract for design and professional management services provided by an architectural firm in connection with the construction of a visitor center on a corporate campus. The owner withheld $56,249 and the architect filed suit for unpaid fees and interest. The owner filed a counterclaim for damages due to alleged design defects and inadequate management.

(continued on p. 14)



(Maryland, cont'd)

The jury found in favor of the architect on both claims and awarded damages of $58,940. Following entry of the jury's verdict, the architect filed a motion for $288,617 in attorneys' fees, costs, expenses, and other "losses." The court awarded a total of $287,920 and the owner paid all but $62,190, which was the amount awarded for "losses." The modified AIA contract contained section 11.10.2 that said, "If Architect employs counsel or an agency to enforce this Agreement, Owner [appellant] agrees to pay the attorneys' fees, costs, expenses, **and losses incurred** by Architect prior to and through any trial, hearing, and / or subsequent proceeding, relating to such enforcement." The "losses" consisted entirely of the value of the time expended by a principal in the firm and several employees of the firm on matters related to the enforcement of the contract. The architect made it clear that he was not seeking "lost profits" on new business not obtained but merely the value of his time that he was not able to devote to that pursuit. The court noted that section 11.10.2 was not a part of the standard form contract, was negotiated separately, and added as an addendum. The architectural firm produced evidence that its employees had expended 79.5 hours evaluating the case and preparing for and attending mediation, 154.5 hours investigating the facts, dealing with discovery, and preparing for and attending depositions, and 69.5 hours preparing for and attending trial. At oral argument, the Court was advised, without objection, that architectural firm was a small local firm with between 20 and 30 employees. The Court agreed that diverting a total of more than 300 man-hours of staff time at hourly rates ranging from $100 to $200 from income - producing work to assist legal counsel in preparing a lawsuit to collect wrongfully withheld fees and defending against a meritless lawsuit by the owner certainly constituted a measure of "injury" or "harm" incurred by the firm. As a result, the award of $62,190 as a "loss" was upheld by the appellate court. See, *Under Armour, Inc. v. Ziger/Snead, LLP*, 2017 WL 1507671 (Md. Ct. Spec. App. 2017).

Maryland: Supreme Court Adopts Economic Loss Doctrine in Suit Against Engineer

The project at issue was a wastewater treatment plant for the City of Baltimore. During construction, the contractor encountered leaking joints and other problems, which resulted in delays and cost overruns. The contractor sued the City's engineer for damages, arguing that it had followed the engineer's design, and that any leaking from the expansion joints was a "direct result of deficiencies in [the engineer's] design." The contractor further alleged that the engineer's "design of the pipe support system was defective," which caused it to suffer additional financial losses and delays. Finally, the contractor claimed that the engineer "failed to warn" the bidders of potential delays and established an unreasonable time line for completion, on which the contractor relied. The contractor sued for professional negligence, negligent misrepresentation, and information negligently supplied. The trial court granted the engineer's motion to dismiss the suit under the economic loss doctrine (ELD) and the contractor appealed. The Court of Appeals affirmed and the contractor petitioned for a writ of certiorari, which was granted. The ruling was affirmed again on the writ, with the Maryland Supreme Court, holding that in economic loss cases, design professionals do not owe a tort duty to contractors, and the engineering firm did not owe the plaintiff-contractor a duty of care, as required to support a negligent misrepresentation claim. The contractor argued that the ELD only applies in product liability cases and that the engineer owed a duty of care to the bidders. The state Supreme Court held that, "In Maryland, the economic loss doctrine bars recovery when the parties are not in privity with one another or the alleged negligent conduct did not result in physical injury or risk of severe physical injury or death." However, the Court recognized that other jurisdictions are split over whether to apply the doctrine in the construction context. After reviewing the cases across the nation on the ELD, the Court cited, with approval, Indiana law that, "Perhaps more than any other industry, the construction industry is vitally enmeshed in our economy and dependent on settled expectations. The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required—owner, architect, engineer, general contractor, subcontractor, materials supplier — and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects. Imposition of tort duties that cut across those contractual lines disrupts and frustrates the parties' contractual allocation of risk and permits the circumvention of a carefully negotiated contractual balance among owner, builder, and design professional." The Court held that, "We apply the economic loss doctrine and decline to impose tort liability on [the] Engineer for purely economic injuries alleged by [the] Contractor that was neither in privity nor suffered physical injury or risk of physical injury." See, *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445 (Md. 2017).

Texas: Suit Against Architect Dismissed Based on Inadequate Certificate of Merit

The owner of a retail project hired an architect to design the project and oversee construction. Disappointed with the architects' services, the owner sued, alleging breach of contract and negligence in the project's design and development. As required by Texas law, the plaintiff provided an affidavit of a third-party licensed architect stating his professional opinion about the architects' work. The trial court denied the architect's motion to dismiss that was based on an inadequate certificate of merit and the architect filed an interlocutory appeal. The Court of Appeals affirmed in part and reversed in part and the architect appealed again. The Texas Supreme Court ruled for the architect, holding that the purported expert was not shown to be qualified to render a certificate of merit in this case. The plaintiff argued that the expert's knowledge of the practice area does not have to be expressed in the affidavit itself but may be inferred. The Court disagreed. The expert's affidavit did not disclose his knowledge or background in the design of shopping centers or other similar commercial construction. "We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation." *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 2017 WL 727269 (Tex. Feb. 24, 2017).

MEMBER PROFILE: SUZANNE H. HARNESS, AIA, Esq.

Harness Law, PLLC
Arlington, VA

"Nice kitty!" Suzanne Harness and her husband, Ray Kogan (also an architect), on a trip to South Africa a few years ago, walking with lions.

As a young girl, our new president Suzanne Harness always wanted to be an architect. "My parents designed and built their own house when I was about six years old," she said, "and there were other houses being built around us. I drew floor plans for fun, and dragged home building materials from the new houses going up. I built my own fort in the back yard, and that's when I learned how hard it is to keep the water out!" She later attended architecture school at Catholic Univ. of America in Washington D.C. Her interest in law school came after working as an architect for many years, where she gravitated toward construction contract administration and project management. "After more than a dozen years of negotiating with contractors, I decided that I really should have been a lawyer," Suzanne said. "I always liked to be on job sites and inside buildings as they were being constructed."

Suzanne's first job after college was at Chloethiel Woodard Smith's office. Smith had a long, and remarkable career as an architect and city planner, and had powerhouse developer clients in D.C. "We worked on institutional projects and also on the largest office buildings in town," she recalled fondly. "Eventually, I went to a commercial real estate developer as owner's project manager, but after three years, the D.C. real estate market crashed. I landed at the GSA National Capitol Region, because it was the only real estate developer in town with money."

Suzanne's architectural career with the GSA involved managing design and construction contracts for the renovation of federal buildings in the nation's capital, like the National Archives and the Pension Building (National Building Museum). She was also the project manager during design and procurement for the first construction manager-at-risk construction contract in that region, the Dept. of Justice Modernization. She also served as project manager for a large addition to the D.C. Federal Courthouse and was thrilled to serve on the Design Excellence selection panel and speak individually with Phillip Johnson, Robert Venturi, Michael Graves, and Peter Bohlin.

While working for the GSA, she attended the GW Law School night program. "I loved it!" Why law school after such a successful career in architecture? "In both private and federal projects, I had sought legal counsel to deal with some disputes. Usually, after a short conversation with my lawyer I could settle the dispute myself by putting together what I knew about the facts with what I had learned about the law and could keep disputes from escalating. Combining my knowledge of design and construction with knowledge of the law felt like a natural next step for me."

She worked during the day for GSA and went to law school at night, and also had a family, "So I was pretty busy," she said. "I did not seek any summer internships, because I didn't want to leave my projects at work. During my last year of law school, however, the GSA sent me to some courses taught by local construction law firms. During the breaks I spoke to the lawyers who were presenting and asked a lot of questions. I followed up with those lawyers and they remembered me!" Suzanne was very focused on getting a job with a construction law firm and was thrilled to land her "dream job" in the construction and government contracts practice group at Seyfarth Shaw. She then went on to spend six years in-house at the AIA as Managing Director and Counsel for AIA Contract Documents. "I have some great friends on the staff at the AIA," Suzanne added.

Today, Suzanne is a sole practitioner with her own consulting practice, Harness Project Solutions, LLC, and also her law firm, Harness Law, PLLC. She serves as an arbitrator, but most of her daily focus is on contract drafting and review for project owners, contractors, and design professionals.

"I have always been fascinated by project delivery and I present seminars and write about Integrated Project Delivery, Design-Build, and Public Private Partnerships." The best part of her job is "making people happy by taking the fear and loathing out of contract negotiations."

Suzanne is married to another architect, Raymond F. Kogan, AIA, who she met while working in the architecture team at Dewberry in the 1980's. The couple lives in Arlington, Va. and has four grown children and seven grandchildren. "Our children live in four different cities from Boston to LA, so we travel a lot!"

As for hobbies, Suzanne admitted, "I am addicted to home remodeling. I never saw a house I didn't want to improve. I love old houses, and have designed renovations for several old houses for our family." Not surprising, Suzanne loves "very old buildings, and their ruins, designed and built by craftsmen using natural stone, wood, brick and hand-blown glass that flows and shows bubbles. I have great nostalgia for these old structures and all of the life they have seen. I never like to see a building demolished because I feel that buildings have their own life and dignity."

When not running her law firm, consulting, or remodeling, Suzanne likes to run, particularly along the Potomac River near her home. "I also love the beach - any beach. We take our whole family to the Outer Banks for a week every summer."

Suzanne is very active in the ABA Forum on Construction Law, where she has served on committees. She enjoys speaking and writing for the ABA and other industry groups.

Suzanne has no single favorite architect but respects that Eero Saarinen could uplift spirits and inspire awe with such simple geometric gestures as in the St. Louis Arch and Dulles Airport. "I wish he could have lived longer."

For a young architect thinking about law school, Suzanne says, "Follow your passions. If you are not passionate about architecture, choose another path."

Suzanne standing in front of the tunnel boring machine used to drill the Port Miami Tunnel. "I represented one of the insurance companies during construction and I made about four site visits, which was quite a treat for me."

ARIZONA: General Contractor Need Not Prove Sub's Negligence or Causation to be Indemnified

In a Feb. 2017 case dealing with a housing development project, the general contractor hired Swann's Grading, Inc. ("SGI") as a subcontractor. Under the subcontract, SGI agreed to defend, indemnify and hold harmless the contractor from claims and "liability of every kind whatsoever arising out of or in connection with [SGI's] work." This indemnity extended to any claims asserted by any subsequent owner alleging improper or defective workmanship. After the project was finished, several homeowners sued the contractor, alleging construction defects. The contractor then sought indemnification from its subcontractors, including SGI. Ten of the homeowners arbitrated their claims to award and the remaining eight settled with the contractor, who then settled with all of its subs except SGI. Prior to trial, the contractor and SGI each moved for summary judgment regarding the scope of SGI's indemnity obligations. The trial court ruled for the contractor, finding that the subcontract obligated SGI to defend and indemnify the contractor for claims related to SGI's work. To recover on its indemnity claim, the contractor only had to prove that its settlements with homeowners were reasonable and that the allocated amount "arose out of or was in connection with [SGI's] work." The trial court determined that SGI was obligated to indemnify the contractor for 72.7% of the arbitration award and 70.6% of its litigation settlements. The court also granted SGI an offset for the amount the contractor received in settlement from its other subcontractors.

On appeal, SGI argued that it should only be required to indemnify the contractor if there was proof SGI was negligent and, further, that the indemnification amount should be limited to the damages that SGI had actually caused. The appellate court rejected both of these arguments, finding that under the subcontract, SGI's indemnity obligation applied to *any claim arising out of or in connection with its work*. Thus, the court held that the contractor did not have to show SGI was negligent in order to be indemnified, and its indemnity would not be limited to the amount of damages SGI had actually caused. The case is *Amberwood Devel., Inc. v. Swann's Grading, Inc.*, No. 1 CA-CV 15-0786, 2017 Ariz. App. Unpub. LEXIS 207 (Az. App. 2017).

Two Licensing Cases Go Against Architects!

OREGON. An architectural firm and its principals were found to have engaged in the unlawful practice of architecture and unlawfully represented themselves as architects. On appeal, the Court of Appeals reversed in part, so the licensing board appealed to the Oregon Supreme Court. The board argued that the respondents, who were not licensed to practice architecture in Oregon, engaged in the "practice of architecture" when they prepared master plans depicting the size, shape, and placement of buildings on specific properties in conformance with applicable laws and regulations for a client that was contemplating the construction of commercial projects. The firm's drawings contained a logo that showed the words "Architecture" and "Design," indicating the nature of the services. The board also complained that the firm's website used the phrase: "Licensed in the State of Oregon (pending)."

The Court of Appeals agreed with the architectural firm that the preparation of feasibility studies did not constitute the "practice of architecture." However, citing to ORS 671.010(6) and the broad definition of the "practice of architecture," the Supreme Court reversed. "The legislature defined the practice of architecture to encompass 'planning' and 'designing,' and those are preliminary activities that do not necessarily require that construction actually take place * * * Respondents were paid to plan commercial shopping center buildings for a client who was contemplating the construction of the buildings shown in the plans * * * we conclude that respondents 'planned' 'buildings' for purposes of [the statute], and thus engaged in the 'practice of architecture' without licenses to do so." As to the website, the Court said, "false statements about pending licensure on respondents' website, when viewed in conjunction with information on the website about architectural projects in Oregon, could mislead Oregon consumers into believing that respondents were authorized to practice architecture in Oregon." See, *Twist Architecture & Design, Inc. v. Ore. Bd. of Architect Examiners*, 2017 WL 2392560 (Or. 2017).

MISSOURI. Mr. Curtis, an Arizona-based architect, got his Missouri license but it was placed on probation for one year in June 2014, because he failed to inform the board when renewing his license that he had been subject to discipline in Nevada. After he allegedly violated his terms of probation, the board placed his license on another 3-year probation with conditions similar to those imposed in June 2014. Curtis appealed and lost. Among his violations, he was charged with practicing engineering without a license. He claimed it was only "incidental practice," as permitted by statute, claiming that the plumbing and electrical work did not exceed 10%. He also testified that he had taken coursework in mechanical, plumbing, and electrical engineering as part of his architecture studies. He admitted that he did not calculate whether the electrical service was adequately sized because on small projects, where no additional fixtures are added, the code does not require such calculations, so he did not perform them. The Court found, however, that his work exceeded "incidental practice" in Missouri. When the city required an engineer to seal the plans, Curtis got a Missouri engineer to seal them. The Court found that Curtis had enabled another to violate the law and breached professional confidence and trust. The licensing board's action was upheld. See, *Curtis v. Mo. Bd. for Architects*, 2017 WL 2241516 (Mo. App.).

New AIA Contract Documents Released

On April 27, 2017 the American Institute of Architects announced the release of the 2017 edition of the A201 family of documents. This release includes updated versions of the AIA's flagship documents, developed for the design-bid-build delivery model. Working with architects, contractors, subcontractors and owners, the AIA Documents Committee updates this core set of documents every 10 years. This helps ensure that the AIA legal form and agreements reflect changes and trends in the industry, and that the AIA Contract Documents remain the industry standard. "It is critically important that industry professionals learn about the 2017 revisions," says Kenneth Cobleigh, Esq., Managing Director and Counsel of AIA Contract Documents. "The changes impact the roles and responsibilities of each of the parties directly, and understanding the changes will help everyone to promptly review and finalize project contracts. We hope that all industry participants take advantage of the significant written resources and education programming opportunities available to learn about, and understand, the 2017 revisions and the full portfolio of AIA Contract Documents."

What's New For Architects?

Some of the major owner/architect changes include:

· Single Sustainable Projects Exhibit that can be used on any project and added to most AIA contracts to address the risks and responsibilities associated with sustainable design and construction services.

· Agreements contain a fill point to prompt the parties to discuss and insert an appropriate "Termination Fee" for terminations for the owner's convenience.

[Note: See Fong & Chan case on p. 8 of this issue on why this clause is so important!]

· The architect is no longer required to re-design for no additional compensation if he or she could not have reasonably anticipated the conditions causing the bids or proposals to exceed the owner's budget.

· Services beyond Basic Services and identified at the time of agreement are now categorized as Supplemental Services, to avoid confusing them with Additional Services that arise during the course of the project.

· Agreements clarify how the Architect's progress payments will be calculated if compensation is based on a percentage of the owner's budget for the Work.

New for Contractors?

Some of the major owner/contractor changes include:

· New exhibit with comprehensive insurance and bonds provisions that can be attached to many of the AIA owner / contractor agreements.

· New provisions relating to direct communications between the owner and contractor.

· Revised provisions pertaining to the owner's obligation to provide proof that it has made financial arrangements to pay for the project.

· Simplified provisions for the contractor to apply for, and receive, payments.

· Sustainable Projects Exhibit, as noted above.

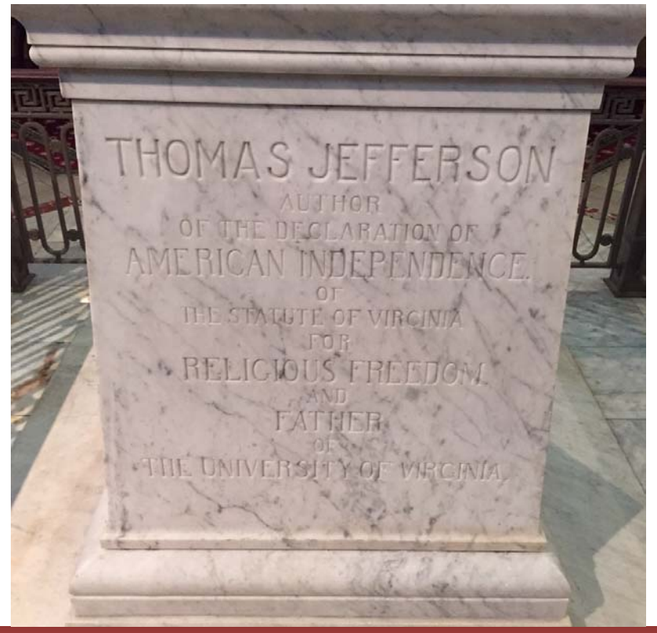
The Jefferson Hotel in Richmond, Va.

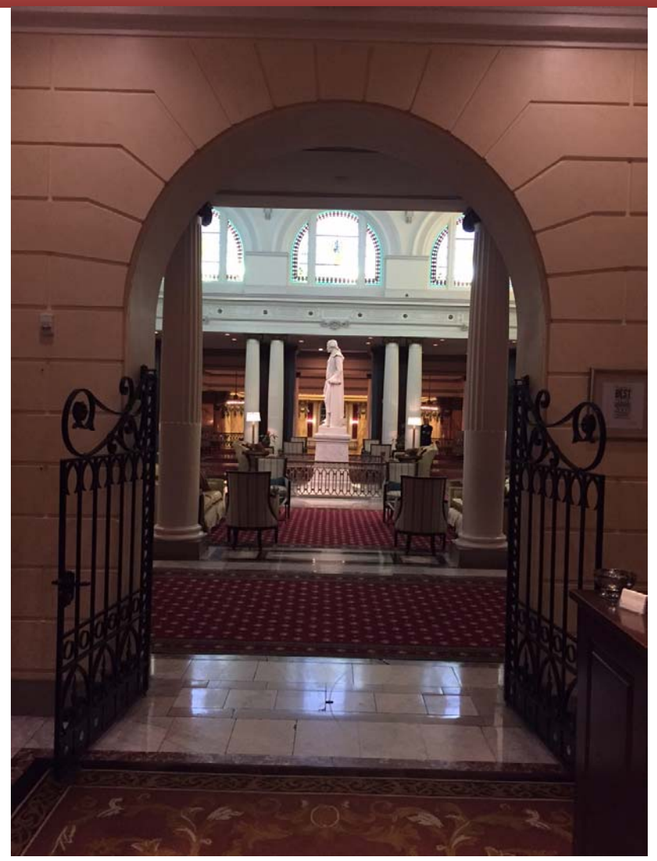
The Jefferson Hotel is a luxury hotel in Richmond, Va. that has been in continuous operation since it opened in 1895. It is listed on the National Register of Historic Places. The Jefferson is one of only 27 American hotels with a Mobil Five Star and AAA Five Diamond Hotel rating. The "Lemaire" restaurant in the hotel was named after Etienne Lemaire, who served as maitre d'hotel to Thomas Jefferson from 1794 through the end of his presidency. The hotel was developed by tobacco baron Lewis Ginter as a premier property in the city of Richmond, capital of the state. It was designed in the Spanish Baroque Style by Carrere and Hastings, a noted architectural firm at the time, based in New York.

Construction began in 1892 and the hotel opened for business in 1895. After a fire gutted the interior of the hotel in 1901, it had a lengthy restoration before it reopened again in 1907. Patrons have included presidents William McKinley, Theodore Roosevelt, Woodrow Wilson, Calvin Coolidge and Franklin D. Roosevelt, as well as numerous celebrities such as Charles Lindbergh, The Rolling Stones, Dolly Parton and Elvis Presley.

As you approach the front doors, you may be startled by a large bronze sculpture of an alligator. The doorman jokes *"he won't bite!"* The story goes that in his autobiography, actor David Niven described a trip from New York to Florida in the late 1930s, when he decided to spend the night at the Jefferson Hotel. Niven said that, as he was signing the guest registry in the lobby, his eyes snapped open with amazement when he noticed a full-sized alligator swimming in a small pool located six feet from the reception desk. The alligators at the Jefferson became world famous. "Old Pompey," the last alligator living in the marble pools of the Jefferson's Palm Court, survived until 1948. Bronze statues of the alligators now decorate the hotel. Its restaurant, Lemaire, has a theme of alligator motifs.

Local urban legend has it that tap dancer Bill "Bojangles" Robinson was discovered while working as a bellhop at the hotel, though some question the story. Another urban legend is that the grand staircase was featured in the film "Gone with the Wind" (1939), also not true. However, author Margaret Mitchell stayed at the hotel during the time she was writing the novel and her description of the staircase is said to have been inspired by the staircase at the Jefferson Hotel. What is true, however, is that the 1981 film "My Dinner with Andre" was shot entirely inside the hotel and its restaurant.





The central lobby features a striking statue of Thomas Jefferson, seen in the photos on page 20-21 (courtesy of TJS member, Bill Quatman). Next trip to Richmond, be sure to stay at the Jefferson Hotel, or have a drink in the Lemaire bar (Jefferson Bourbon, of course!). Not a bourbon fan, that's OK. The Lemaire has a wine list of over 200 offerings, as well as friendly bartenders who can make your favorite cocktail. The hotel is located at 101 W. Franklin Street, Richmond, Va., just a few blocks from the former home of General Robert E. Lee, which was at 707 E. Franklin Street. Of course General Lee never stayed at the Jefferson, as he died in 1870, twenty-five years before the hotel opened.

California Legislature Modifies "Duty to Defend" Law

On April 28, 2017, Gov. Jerry Brown signed into law California's new SB496 which modifies Civil Code section 2782.8 by adding protections for design professionals with respect to **the duty to defend** in private contracts which are executed after Jan. 1, 2018. This is a continued reaction to the *Crawford v. Weathershield* case in 2008 which held that a window manufacturer was obligated to pay defense costs by contract despite being found not negligent by a jury for leaks in a residential project. SB496 limits the "duty to defend" to the comparative fault of the design professional in private and public contracts. Prior to this new law, Civil Code section 2782.8 applied only to public contracts, excluding state agencies defined in the statute. New SB496 places private contracts and public contracts with non-state agencies on equal footing. For private contracts entered into prior to Jan. 1, 2018 (without the protection of SB496) that require the A/E to indemnify and/or defend their client, the design professional may have to pay for their client's attorneys' fees - even if the professional is found not negligent. For private and applicable public contracts entered into after Jan. 1, 2018, the defense obligation is based on the percentage of fault of the A/E. The law has limitations, however. In California, unless the A/E disclaims the duty to defend, agreements to "indemnify" mean that the A/E has to defend against "claims" not caused by the A/E's negligence, but which "PERTAIN TO, OR RELATE TO THE NEGLIGENCE, RECKLESS, OR WILLFUL MISCONDUCT." The new law carves out: a) projects where a project-specific general liability policy covers all design professionals for their legal liability arising out of their professional services on a primary basis; and, b) a design professional who is a party to a written design-build joint venture agreement. We will have to see how this plays out in court, but in the interim, A/E's should still expressly disclaim the duty to defend, not merely strike "defend."

THOMAS JEFFERSON ON U.S. CURRENCY

Did you know that a total of 23 U.S. presidents have appeared on U.S. coin and paper currency? By law (31 U.S.C. § 5114), "only the portrait of a deceased individual may appear on United States currency." The Secretary of the Treasury usually determines which people and which of their portraits appear on the nation's currency, however legislation passed by Congress can also determine currency design. Thomas Jefferson, our 3rd president (1801-1809), currently appears on the nickel and on the $2 dollar bill, although Jefferson has appeared on numerous coins and bills over the years. One reason Jefferson's face is so frequently seen on U.S. currency is because he helped create the money system used by the United States. Mr. Jefferson was one of the earliest Americans to consider a "decimal-based" currency. In 1784, he gave the system its most articulate and persuasive expression in his "Notes on Coinage." He stated: "My proposition then is that our Notation of money shall be decimal, descending ad libitum of the person noting; that the Unit of this notation shall be a dollar, that coins shall be accomodated [sic] to it from ten dollars to the hundredth of a dollar; and that to set this on foot, the resolutions be adopted which were proposed in the Notes, only substituting an enquiry into the fineness of the coins in lieu of an assay of them." Convinced by these arguments, Congress adopted it with little dissent. Mr. Jefferson began advocating decimal reckoning as an orderly alternative to the currency chaos in 1776. He recommended a system with the advantages of convenience, simplicity, and familiarity. The Spanish dollar was convenient in size, its decimal division would make computation simple, and its multiples and subdivisions would accord with already well-known coins. "Even mathematical heads," he admitted, "feel the relief of an easier substituted for a more difficult process." Jefferson's arguments overwhelmed rival plans and the United States soon became the first nation in history to adopt a decimal coinage system.

Thomas Jefferson lives on in the coins and currency that honor him. Here are three enduring pieces of U.S. currency honoring the third U.S. president:

(Above) The 1993 Thomas Jefferson Silver Dollar was actually issued in 1994 although the coins are dated 1993. The commemorative coins were issued to celebrate the 250th anniversary of Thomas Jefferson's birth. 600,000 of these coins were all produced and sold.

The Nickel. Since 1938, Thomas Jefferson has been on the obverse of the U.S. nickel. On the reverse of the nickel, you can see Jefferson's famous Virginia estate, Monticello. Monticello was replaced in the 2004-06 Lewis & Clark commemorative "Westward Journey" nickel by an ocean view (see p. 22). In 2006, the portrait on the nickel changed again, but Jefferson remained as did Monticello (see below left). The nickel is by far the most common — and famous — of all the currency featuring Thomas Jefferson.

The $2 Bill. Did you pay your initial TJS dues with one of these? (see right). Thomas been linked for over a century. Starting in 1869, the $2 bill featured Mr. Jefferson. In 1886, the design changed. Resuming in 1928, the obverse design featured a portrait of Jefferson once again. Starting the same year, the reverse side design incorporated a portrait of Monticello. Next, in 1976 for the bicentennial, a new reverse design was released which featured our forefathers signing the Constitution, Jefferson among them (above). Though the design has changed since then, Jefferson's portrait has remained constant.

The $1 Presidential Coin. The $1 Presidential Coin Program began in 2007 with George Washington. The coins are released in chronological order. Since Thomas Jefferson was the third president, the Thomas Jefferson $1 Presidential Coin was the third coin to be released in the series, in August of the same year as the George Washington coin. (See below right for an example).

MEMBER PROFILE: RUSSELL N. WEISBARD, ESQ.

Frisco, TX

(Above) Russell with his two sons Max and Ben on a road trip to Chicago to see Cloud Gate in Millennium Park; (Below) Hamming it up at Graceland.

Our newest TJS member is a resident of Frisco, Texas, a suburb of Dallas that was the fastest - growing city in the U.S. in 2009, and also the fastest-growing city in the nation from 2000 to 2009. While there is little manufacturing, professional services companies are coming to Frisco, as are professional sports teams. Russell Weisbard tells us that, "Economic benefits discussions aside, the Dallas Cowboys' new practice facility opened here recently, and minor league baseball, basketball, and hockey have been in Frisco for more than just a few years. Also, the schools and parks make it a good place to raise kids."

Russell is not a native Texan, however. He studied architecture at the Univ. of Illinois at Urbana-Champaign, earning his B.S. in Architectural Studies and M. Arch. degrees there. "It had been my childhood dream to practice architecture," he said, "because the creativity and cerebral nature of the profession appealed to me." During his time practicing architecture, Russell was excited to work on many different building types, because the design and documentation variations kept things interesting. "From institutional to residential, healthcare to hospitality, there really wasn't a building type I didn't get to work on."

Russell had a unique opportunity during law school to apply his architectural background to legal work, in researching potential architectural copyright infringing designs and constructed buildings. "Working for the architecture firm's general counsel, as well as outside counsel, I got great feedback on my research. I also learned a lot about copyright litigation," he said.

What does he enjoy about combining the two educations? "Similar to architecture, I believe the practice of law is about problem solving. I liken each discipline to solving a puzzle where you're given limited information at the beginning, having to find additional information through focused research, questioning, and the iterative processes. My collaborative personality was integral to how I approached design and construction projects while I was a project architect, so from the beginning of getting into a law career I intended to bring that mindset to the dispute resolution aspect of construction law." He added that, "Both disciplines involve some degree of creativity inside a given framework, as well as much mental exercise. Finally, that both professions (usually) result in tangible deliverables, which I would get to experience/see after the project / litigation work, greatly appealed to me."

Mr. Weisbard attended SMU's Dedman School of Law after having lived in the Dallas area since 2000. "Not only was SMU Dedman the closest law school, but its part-time program and its connections to the Dallas-Fort Worth business community made it a good choice for me," he told us. While returning to school as an "older" student had its challenges, Russell very much enjoyed SMU Dedman's program, professors, courses, and his classmates.

Like many of us, Fallingwater made a big impression on Russell when he was a teenager. He is a fan of Frank Gehry's Vitra Design Museum, which he says is "particularly exciting for its interplay of sunlight from the skylights and the non-rectilinear walls. The museum is fairly small, but walking inside is architecturally interesting." His favorite architects? Russell admires Frank Gehry, Victor Horta, Richard Meier, and Frank Lloyd Wright.

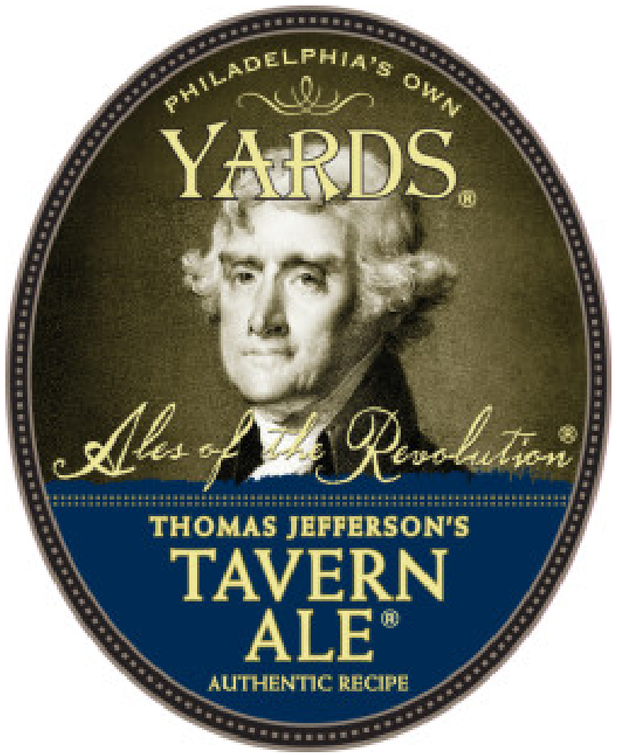
Is Anyone Hiring? Having recently been sworn into the Texas bar, Russell is currently looking for permanent employment in a legal setting. "As the saying goes, I am ready, willing, and able to become a member of a law firm where my background in architecture will benefit the firm's clients and leadership, while simultaneously enabling me to more fully concentrate on the legal aspects of construction law."

Russell is the father of two middle – school - aged sons, Max and Ben. "Getting to see them grow and mature into young men, and getting to watch them develop their interests is incredibly satisfying," he said. He is also dating a wonderful woman with children of her own, so his definition of "family" has grown to include all of them as well.

Russell enjoys reading history and architecture books, so he found *Devil in the White City* by Erik Larson very interesting. He wants to take his sons traveling around the U.S. and internationally, when the opportunities arise. "I also like to expand and/or refine my cooking abilities, when possible. Finally, I enjoy working with my hands, so I dabble in wood working and home improvement projects." He recently converted two chests of drawers that had been his father's, some sixty years ago, into an entertainment center.

When asked about advice for a young architect thinking about law school, he said: "I would advise someone at that crossroads to talk with dual-licensed professionals about their careers, as well as job prospects in the candidate's potential markets. As we all probably know, architecture school and law school are not the same as practicing those professions, and the more the young architect knows about the practice of law, and all that entails, before making such a huge life decision, the better."

Russell and his girlfriend, Tracy, after a great concert by the band Wilco, at the famous Fillmore in San Francisco, Calif.



THOMAS JEFFERSON: BREWER

At Monticello, beer was a "table liquor" served during dinner, and Thomas Jefferson's designs for his plantation included spaces for brewing and the storage of beer. Jefferson's early plans for Monticello included both a brewing room and a beer cellar. The location and design of the brewhouse remain a mystery. In an undated drawing, Jefferson shows a brewhouse in plan and elevation, but whether the one that was in use at Monticello was made to that design is unknown.

In the spring of 1812, while tensions grew between the U.S. and Great Britain, Jefferson embarked on the scientific pursuit of brewing beer. Using malt purchased from his neighbor, William Meriwether, and hops bought locally, Mr. Jefferson was successful in the first brewing attempt at Monticello since his wife had made beer some forty years earlier. On May 12, 1812, he instructed his overseer to "bottle the beer."

Beer and cider were the regular "table drinks" at Monticello. For Jefferson and his countrymen, beer was brewed small quantities in their kitchens for their own personal consumption. In the early years of their marriage, Jefferson's wife, Martha, would brew 15-gallon batches of beer nearly every two weeks.

Taverns sold beer to travelers, and in larger cities established breweries supplied the population with malt liquors. While traveling himself to and from Williamsburg or Philadelphia, Mr. Jefferson purchased beer at taverns and once he arrived in a city, he stocked up on beer by the gallon or cask. Among the "necessaries" for the house in Annapolis that Jefferson shared briefly with James Monroe in early 1784 were "2 ale glasses," while the President's House was furnished with four dozen beer goblets.

In 1804 Jefferson's reputation as a man of science attracted the attention of a young author, Michael Krafft, who requested permission to dedicate his book "*American Distiller"* to Jefferson. Mr. Jefferson not only agreed to the dedication, but went on to endorse the subject of Krafft's study: "I see too with great satisfaction every example of bending science to the useful purposes of life. Hitherto chemistry has scarcely deigned to look to the occupations of domestic life. When she shall have made intelligible to the ordinary householder the philosophy of making bread, butter, cheese, soap, beer, cyder, wine, vinegar etc. these daily comforts will keep us ever mindful of our obligations to her. The art of distilling which you propose to explain, besides it's household uses, is valuable to the agriculturalist, as it enables him to put his superfluous grain into a form which will bear long transportation to markets to which the raw material could never get." Jefferson's correspondence with Krafft apparently excited his interest in brewing, and the next fall he purchased Michael Combrune's "*Theory and Practice of Brewing*," which introduced the scientific approach of using a thermometer for the malting and brewing processes.

On Sept. 17, 1813, Thomas Jefferson and Joseph Miller, an Englishman stranded here during the War of 1812, came together for the purpose of brewing beer at Monticello. Jefferson wrote that day to his neighbor (and malt supplier) William Meriwether, "I lent you some time

ago the London & Country brewer and Combrune's book on the same subject. We are this day beginning under the directions of Capt. Miller, the business of brewing malt liquors, and if these books are no longer useful to you I will thank you for them, as we may perhaps be able to derive some information from them." By the fall of 1814 there was a brewhouse at Monticello and Jefferson had begun malting his own grain instead of purchasing it from his neighbors. By 1820, Jefferson had a house for malting. Once the malt had been ground, the brewing process needed to commence immediately. In the fall, Jefferson brewed three 60-gallon casks of ale in succession. He advocated using a bushel of malt for every 8 to 10 gallons of strong beer, noting that "public breweries" produce 15 gallons from every bushel, which "makes their liquor meager and often vapid."

THOMAS JEFFERSON'S TAVERN ALE

This ale, brewed by Yards Brewing Co., is a powerful and complex golden ale that pays homage to our founding father and fellow brewer, Thomas Jefferson. The beer is based on Jefferson's original recipe, employing honey, rye and wheat, just like the beer brewed at Monticello. In 2003, Yards Brewing Co. partnered with Philadelphia's historic City Tavern - a favorite bar of the nation's founding fathers – to create "Ales of the Revolution," a line of historic beer recreations based on the original recipes of George Washington, Thomas Jefferson, and Ben Franklin. Ingredients in Jefferson's recipe include flaked oats and maize; rye and wheat; and local honey from Fruitwood Orchards. Thomas Jefferson's Tavern Ale, at 8% alcohol, is a deep amber in color, with malty, brown sugary, citrusy, nutty, spicy overtones. It's a big beer that manages to go down fairly smooth.

Jefferson's Recipe? An approximation of what Mr. Jefferson might have brewed comes from Randy Mosher's book, *"Radical Brewing":*

9 lb. pale ale malt;
2 lb. Indian corn, ground to grits and precooked;
1 lb. biscuit/amber malt.
Infusion mash at 154 deg. for 60 min.
2.0 oz. Fuggle Hops for 60 min.
1.5 oz. Fuggle Hops for 10 min.

This recipe is sure to give you an interesting brew, maybe close to what TJ drank with Ben and George! *Do we have any home brewers out there? Care to try this recipe and write an article for Monticello? We'd love to hear from you.*