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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

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

The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

Know of Another Architect-Lawyer 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

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Want to connect with other members? Find us here.

WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:

By Suzanne H. Harness, AIA, Esq.
Arlington, Va.

I sincerely wish that every TJS member could have joined us in New York City for our Sixth Annual Meeting and Dinner. We would have needed a bigger venue for all 107 of us, but we would have found it! This evening of camaraderie with peers is just so much fun, as I believe you can see from the photos that our editor, Bill Quatman, has scattered about this issue. Please make your plans now to join us in Las Vegas on ***Wednesday June 5, 2019***. For the first time in 2019, we will open up attendance at our social hour and dinner to non-members. Doing so will provide a great opportunity to include not only your spouses and significant others, but also other guests, such as prospective members and design industry colleagues. Our business meeting will be open only to members and we will schedule the evening to allow for that.

At the Annual Meeting we discussed what we accomplished last year and reported on what we are planning for this coming year. For details, please look over the Minutes of our Annual Meeting which starts on page 2. We also elected new TJS Board Members and Officers. See the official roster of 2018-19 Officers and Directors on page 3. Congratulations to all new officers and directors!

I am particularly pleased to announce that Jessyca Henderson agreed to coordinate a third class of our members for admission to the U.S. Supreme Court. If you have not been admitted yet, this will provide the opportunity for you to do so with a group of your TJS colleagues. Once the date is set with the Court, Jessyca will send out an invitation for any interested members.

Another initiative that is getting off the ground is our member survey. A small committee is writing survey questions, and you can expect to receive a Survey Monkey invitation to share your thoughts in the near future.

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

As always, if you have a story to tell, an article to publish, a presentation to publicize, or you would like to become more involved in The Jefferson Society, Inc., please write to me at *sharness@harnessprojects.com*.

LAS VEGAS

JUNE 5, 2019

Mark Your Calendar, and make plans to attend the ***Seventh Annual Meeting of The Jefferson Society,*** which will take place in Las Vegas on Wednesday, ***June 5, 2019***, just prior to the opening of the AIA National Convention, held June 6-8, 2019.

Ken Homfeld of Rimkus Consulting thanks the board and members for the opportunity to sponsor the Annual Dinner and Meeting of the Society.

Are you interested in helping to plan the 2019 TJS Social Hour and Dinner Meeting in Las Vegas? If so, please contact TJS President Suzanne Harness at: sharness@harnessprojects.com

6th Annual Meeting.

The Sixth Annual Meeting of the Members of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held at the Il Punto Ristorante. begining at 9:00 pm on June 20, 2018, following dinner and a social hour. Members of the Society attending the meeting are identified on p. 6 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 Pat Vincent. Bill Quatman served as secretary.

PRESIDENT'S REPORT:

Society President Suzanne Harness opened the meeting by welcoming the nineteen members attending, plus two guests, Kenneth Homfeld and Patrick Vincent of Rimkus Consulting. She also extended her sincere thanks to member Joyce Raspa, who organized the social hour and the dinner at Il Punto Ristorante. Suzanne then thanked three members of the board of directors whose terms expired at the meeting, Julia Donoho, Mehrdad Farivar and Donna Hunt. Finally, she thanked Ms. Hunt for her excellent services as Treasurer for the Society.

The first item of business was to approve the minutes of the April 26, 2017 Fifth Annual Meeting, which were published in the July 2017 issue of *Monticello*. There were no corrections noted and upon motion by Mr. Twomey, seconded by Mr. Heurer, the minutes were approved as submitted. Ms. Harness then asked for a report from Treasurer, Donna Hunt.

TREASURER'S REPORT:

Ms. Hunt reported on the finances of the Society. The Society currently has 107 members, with 99 members fully paid and 8 members showing outstanding dues owed. Several of those members have outstanding payments for two years or more. Ms. Hunt reported that the bank account balance as of June 20, 2017 was $16,930.26, which does not include the expense of the annual dinner meeting.

ELECTION OF OFFICERS AND DIRECTORS:

The next item of business was the election of officers and directors. President Harness asked that Jeffrey Hamlett, on behalf of the Nominating Committee, give a report on the candidates for officers and directors of the Society. Other members of the committee included Jose Rodriguez and Jacqueline Pons-Bunney. Mr. Hamlett then provided the report of the Nominating Committee. For the position of a three-year Director, the nominees were: Donna Hunt, Mark Ryan and Joshua Flowers. There were no further nominations from the floor and Ms. Harness called for a voice vote. The three nominated candidates were unanimously elected, with their terms to begin immediately following the annual meeting. For the position of Secretary, which was a vacant officer position, the committee nominated Joyce Raspa for a one-year term. For the position of Vice-President / President-Elect, the committee nominated Donna Hunt. Ms. Harness called for any further nominations and there were none. Therefore, she declared the nominations closed and called for a voice vote. Ms. Raspa and Ms. Hunt were unanimously elected. Ms. Harness explained that Mr. Rodriguez, as Treasurer-Elect, will step into the role of Treasurer following the meeting for a two-year term, and that Ms. Harness will remain the President for

(continued on p. 4)

2018-19 Jefferson Society's Officers and Directors

Officers (2-year term, 2017-19)
President: Suzanne H. Harness, AIA, Esq. (Harness Law, PLLC)
Vice-Pres/President-Elect: Donna M. Hunt, AIA, Esq. (Ironshore)
Treasurer: Jose B. Rodriguez, FAIA, Esq. (Daniels Rodriguez, et al.)
Secretary: Joyce Raspa, AIA, Esq. (Attorney at Law)

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

(2-year term, expiring 2020):
4. Suzanne H. Harness, AIA, Esq. (Harness Law, PLLC)
5. Jacqueline Pons Bunney, Esq. (Weil & Drage)
6. Jeffrey Hamlett, AIA, Esq. (Hamlett Risk Management)

(3-year term, expiring 2021):
7. Mark A. Ryan, AIA, Esq. (Ryan Patents)
8. Donna M. Hunt, AIA, Esq. (Ironshore)
9. Joshua Flowers, FAIA, Esq. (Hnedak Bobo Group)

Annual Meeting (cont'd)

one more year, with her term expiring in June 2019. The full slate of officers and directors is printed on p. 3 of this newsletter. The newly elected Officers and Directors were congratulated in person by the members.

OLD BUSINESS:

Educational Programs. Ms. Harness reported that Chuck Heuer agreed to take on the leadership of this important committee and turned to him for his report. It was reported that a TJS seminar had been submitted for the 2018 AIA Conference but, due to circumstances beyond our control, the half-day seminar was conducted by just one member and two non-members from an insurance provider. Ms. Harness asked for input on future plans for educational seminars. Mr. Heurer proposed that the Society become an AIA-approved CEU provider, and that programs be approved for HSW credits. There was discussion of expanding the range of Society educational programs beyond the AIA Convention and into the AIA's regional chapters. It was agreed that the Society's board of would develop program content, and offer this to members to present in their regions, with local modifications to meet HSW standards and to incorporate local case law and statutes.

Past board chairs Chuck Heuer and Tim Twomey join current chair Suzanne Harness at the Annual Meeting in New York City.

Member Survey. Ms. Harness reported that a committee consisting of Mehrdad Farivar, Donna Hunt, and Jeffrey Hamlett would be working over the summer on preparing survey questions and completing the member survey, which we will distribute via Survey Monkey. Mr. Farivar advised that he would provide the first draft of survey questions to the committee by the end of June.

U.S. Supreme Court. Ms. Harness reminded the attendees that for the second time, TJS organized a Supreme Court admission. The first such event was in Dec. 2015, when just five members were admitted, and the second was Nov. 2017, when 23 TJS members were admitted. Ms. Harness asked for a volunteer to organize a third admissions event, and Jessyca Henderson graciously accepted the challenge. Donna Hunt offered to provide Ms. Henderson with the information she needs to get started.

NEW BUSINESS:

List Serve. Ms. Harness opened the topic of developing a list-serve for our members to share ideas, post questions and discuss issues of law and practice. All were in agreement that this was of interest and would be utilized by the membership.

Website. Next, Ms. Harness asked if there was any member who had skills in developing websites, who could assist in updating the Society's webpage. Mr. van Gaalen volunteered to lend his skills to this effort.

Annual Meeting. There was discussion about opening up the TJS Annual Meeting and dinner to non-members, such as spouses and guests of attending members. It was the consensus that this would encourage attendance, and that in 2019, the pre-meeting social hour would be opened to spouses and member guests, who would be permitted to enjoy more social time while the members adjourned to conduct the business meeting. Then, both members and guests would reconvene for dinner. All agreed that this would benefit attendance at the meeting.

Honorary Membership. Bill Quatman proposed the creation of a new category of membership, based on the AIA's "honorary member" category, for those non-members who show continued support of the Society's efforts. All agreed that the TJS board of directors should study this concept. Upon motion by Mr. Quatman, seconded by Mr. Hamlett, the motion to study a new membership category was approved.

ADJOURNMENT:

President Harness announced that the next Annual Meeting of the Society will he held on Wed., June 5 in Las Vegas, Nevada, in advance of the AIA 2019 Conference on Architecture, which is scheduled for June 6-8. There being no further business, on motion by Mr. Hamlett seconded by Mr. Twomey, the Sixth Annual Meeting of The Jefferson Society, Inc. was adjourned at 10:05 p.m.

(Above) TJS Members Richard Elbert and Jessica Hardy join host Pat Vincent of Rimkus (center) at the Annual Meeting held at Il Punto Ristorante. (Below) TJS Members Laura Jo Lieffers and President-Elect Donna Hunt enjoy a pre-dinner conversation with Alexander van Gaalen.

Membership Update!

The Jefferson Society has 107 Members, which includes: 12 Founders, 93 Regular Members, and 2 Associate Members.

Please Welcome Our Newest Members!

The following have joined since our last Newsletter:

NEW MEMBERS:

Nolanda Hatcher, AIA, Esq.
Birmingham, AL

Jessyca L. Henderson, AIA, Esq.
Washington, D.C.

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

Attendees at the Annual Meeting in New York City.

The following 19 members of the Society were in attendance at the Annual Meeting:

Michael J. Bell
Bell Architects
New Orleans, LA

Matthew C. Boomhower
Boomhower Law
San Diego, CA

Richard Elbert
Bjarke Ingels Group Architects
Brooklyn, NY

Mehrdad Farivar
Clark Hill
Los Angeles, CA

Joshua Flowers
Hnedak Bobo Group
Memphis, TN

Jeffrey M. Hamlett
Hamlett Risk Management
Mukileto, WA

Jessica I. Hardy
Macdonald Devin P.C.
Dallas, TX

Suzanne H. Harness
Harness Law
Arlington, VA

Jessyca L. Henderson
The American Institute of Architects
Washington, D.C.

Charles R. Heuer
Heuer Law Group
Charlottesville, VA

Donna Hunt
Ironshore
Boston, MA

Mike Koger
The American Institute of Architects
Washington, D.C.

Laura Jo Lieffers
Moyer Law Group
St. Petersburg, FL

G. William Quatman
Burns & McDonnell
Kansas City, MO

Joyce Raspa
Attorney at Law
Red Bank, N.J.

Jose B. Rodriquez, AIA, Esq.
Daniels Rodriguez, et al.
Ft. Lauderdale, FL

Mark A. Ryan
Ryan Patents
Henderson, NV

Timothy R. Twomey
CallisonRTKL
Baltimore, MD

Alexander van Gaalen
c m peck inc
Pasadena, CA

Also attending were guests Kenneth Homfeld and Pat Vincent, of Rimkus Consulting, the dinner sponsor.

Proposed Bylaws Changes Afoot.

At a June 6, 2018 Board meeting, the directors of The Jefferson Society discussed amending the Bylaws, which currently restrict board membership to those members who are dually licensed in **both** architecture and law (Art. V., Sec. 1). However, dual licensure is not a prerequisite for becoming a Regular Member of the Society. One problem is that the Board does not currently maintain a listing of which members hold dual licenses and some members choose to drop a license after joining. Following an extensive discussion, the board members reached consensus to recommend a change to Art. V of the Bylaws to permit any Regular Member to serve as a Director and an Officer of the Society, as long as he or she holds the dual degrees in architecture and law, and is licensed in at least one of those professions. Other potential revisions to the Bylaws will be considered to make them align more accurately with our current practices, including: 1) Timing of the required annual Board Meeting (immediately after the Annual Meeting); 2) Election of Officers by the Board following the Annual Meeting; and, 3) a $2 bill as part of the initial dues requirement. President Suzanne Harness will work with a few people, including Founding Member Chuck Heuer (who drafted the initial Bylaws) to review proposed revisions. We will ask the members to vote during the coming year by an electronic process, or will hold the vote until the 2019 Annual Meeting in Las Vegas. The Bylaws were last amended on May 18, 2016.

AIA Takes A Stand In Support of Licensing Laws for Architects.

On Jan. 25, 2018, the AIA published a statement in support of licensing for architects. The "Where We Stand" statement noted that All U.S. states and territories require a license to practice architecture as a means to ensure buildings are safe for their occupants and the public and stated that, "The AIA believes the public is best served when state regulatory boards, duly constituted under state law, are free to regulate professional licensure on behalf of the public and consumers." The statement was issued in response to legislation and executive orders in some 23 states related to "architect delicensing." The AIA noted that "The essential purpose of licensing architects is to protect the health, safety and welfare of the public and shield consumers from unqualified practitioners," and that, "Diminishing the requirements for the professional licensure of architects is risky; the stakes are simply too high. The American Institute of Architects (AIA) strongly opposes any efforts to reduce or remove requirements for the professional licensing of architects."

While opposing the removal of licensing requirements, the AIA supported "license portability," noting that reciprocal licensing enables architects to practice "across state lines," and is especially needed in times of crisis, where architects can provide mutual aid in a declared disaster that exceeds a state's capacity to respond. The AIA also stated its support for independent licensing boards. The full statement can be found on www.aia.org.

TJS Members in New Orleans. From left to right, Eric O. Pempus, FAIA, Esq. (College of Architecture & Env. Design, Kent State Univ.); Michael J. Bell, FAIA, Esq. (Bell Architects); J. Ashley Inabnet, AIA, Esq. (Salley Hite Mercer & Resor, LLC); John B. Masini, AIA, Esq. (Vanek, Vickers & Masini P.C.); Hollye C. Fisk, FAIA, Esq. (Fisk Alexander, P.C.); former TJS member Frank Musica, Esq. (Victor O. Schinnerer); Caleb M. Riser, Esq. (Richardson Plowden & Robinson, P.A.); G. William Quatman, FAIA, Esq. (Burns & McDonnell Engineering Co., Inc.); and David N. Garst, Esq. (Lewis King Krieg & Waldrop, P.C.). Not pictured, but attending was TJS member Kevin M. Bothwell, Esq. (Thompson Becker & Bothwell LLC). These lawyers were attending Schinnerer's 57th Annual Meeting of Invited Attorneys on May 24th at the Ritz-Carlton Hotel.

Oklahoma: Open Question of "Acceptance" of Architect's Proposal Bars Summary Judgment

A church sued its architect in Jan. 2011 for negligence and breach of contract after disputes arose related to construction defects. The trial court granted the architect's motions to dismiss and for summary judgment on the basis that the two-year negligence statute of limitations and three-year contact statute barred the claims. The architect argued that the church had learned, in the late Spring of 2006, that the architect had not fulfilled its contractual duties. Because the lawsuit was not filed until Jan. 2011 — almost five years after plaintiff learned of the above allegations — the architect said that the negligence claim was asserted well outside the two-year limitations period and was, therefore, barred. On appeal, however, the church argued that there remained a question of fact as to precisely when it discovered the architect's alleged negligence. As to the contract claim, under Oklahoma law, while a five-year statute of limitations applies to an alleged breach of a written contract, a three-year limitations period applies to an alleged breach of any other contract, whether oral or implied. The architect claimed that, in the present case, there was no written contract, since its written proposal was never signed; therefore, the three-year statute applied. The Court of Appeals affirmed that the two-year statute of limitations applied to plaintiff's negligence theory and that after the trial court dismissed the claim, it gave the church leave to amend. However, the plaintiff declined to amend. Therefore, the ruling on the negligence claim was affirmed.

As to the contract claim, because the original suit was filed in Jan. 2011, a three-year limitations period would reach back only to Jan. 2008, while the plaintiff (pursuant to its own allegations) learned in the late Spring of 2006 of deficiencies in the project. The church filed an affidavit of the senior pastor who claimed that he misspoke in his deposition that there was no written contract between the parties when, in fact, there had been one! Since this would trigger the five-year statute, the Court of Appeals reversed and remanded.

The open question related to whether the architect's written proposal had ever been accepted by the church, thus constituting a contract. The Court of Appeals held that, "if a written proposal does not prescribe conditions concerning the communication of its acceptance, it may be accepted in any reasonable and usual mode under the circumstances — the contract formed under such circumstances does not become an oral or implied contract merely because the acceptance is other than by signature." Although "the offeror is entitled to insist on a particular mode of manifestation of assent" and "[t]he terms of the offer may limit acceptance to a particular mode." Thus, at the very least, there was a dispute of material fact as to whether the written proposal was accepted, either orally or through performance. See, *Christ's Legacy Church v. Trinity Group Architects,* 417 P.3d 1223 (Okla. App. 2018).

[Editor's Note: In a footnote, the Court added that a physical signature is not the only method of accepting a written contract; adding that in this case, while the architect's name was typed at the bottom of the cover letter to its written proposal, there were no signature lines for either party to place a signature for acceptance].

Florida: Supervising Architects Might Owe A Duty to Contractors For Pure Economic Losses

In 2009, the Museum of Science entered into an agreement with one architectural firm to serve as "Executive Architect" for a project. The museum then hired a second architectural firm as "Design Architect." The Executive Architect subcontracted with other design professionals to complete the architectural and engineering plans, including structural and MEP designs. Based on those plans, in 2012 the museum hired a general contractor to build the project. The General Conditions of the construction contract made reference to both the Executive Architect and the Design Architect. The museum later terminated the general contractor for convenience and entered into a direct contract with the concrete subcontractor (Baker), and later hired Skanska to complete the remainder of the project.

The original contractor and the concrete sub both claimed that the design documents were flawed, which caused increased costs and delays. They sued both the Executive Architect and Design Architect for pure economic losses. The two architects moved to dismiss on the grounds that they owed no legal duty to the contractors. The Executive Architect then filed a counterclaim against the two contractors, arguing that it was an intended third-party beneficiary of their contracts, prompting the contractors to file their own motions to dismiss.

As to the architects' motions to dismiss, the Federal District Court held that under Florida law, a legal duty "is owed by a particular defendant to a particular plaintiff based on particular circumstances," and the foreseeability analysis is fact specific. In a 1973 case, the Florida Supreme Court had held that a supervising architect owed a duty to a general contractor despite a lack of privity between them. In reaching this case-specific conclusion, the Court balanced various factors, including "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."

The Supreme Court had determined that, as a matter of policy, supervising architects "simply have too much control over a contractor" not to owe the contractor a legal duty and, therefore, "a third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity." The Federal District Court concluded, based on this Florida law, that in the absence of privity, an architect must have some control over a contractor or a project for a duty to be imposed, and a determination of control will be based on the facts of the case. After reviewing the allegations, the Court ruled that, at this stage of the litigation, the contractor-plaintiffs had sufficiently alleged that each of the architects "exerted control over Plaintiffs and the project such that Defendants owed Plaintiffs a legal duty." However, the Court added: "Of course, following discovery, if the facts show that Defendants had no level of control over the process, such that it was not foreseeable that Plaintiffs would be injured by Defendants' particular reports / plans / designs, then Plaintiffs' negligence claims will fail."

As to the counterclaim by the Executive Architect, the Court dismissed the claim, finding that it failed to properly state a claim for relief as an "intended third-party beneficiary," adding that: "Persons who merely receive an 'incidental or consequential benefit from the contract' cannot be third party beneficiaries." The case is *Suffolk Constr. Co., Inc. v. Rodriguez and Quiroga Arch.,* 2018 WL 1335185 (S.D. Fla. 2018).

Attending the Sixth Annual Meeting of The Jefferson Society were Mark Ryan, from Henderson, Nev., and Chuck Heuer, from Charlottesville, Va.

AIA Fellows Urge Amendment to Code of Ethics

Perhaps in light of the allegations of sexual harassment brought earlier this year against Pritzker Prize-winning architect Richard Meier, FAIA, over 350 members of the AIA College of Fellows introduced a resolution at the New York Convention in June asking the AIA Board of Directors to amend the AIA Code of Ethics and Professional Conduct to require the equitable treatment of design professionals and staff of diverse backgrounds and identities, and to prohibit abuse and harassment within our professional community. The movement was started by Frances Halsband, FAIA in a Petition that was circulated among the College of Fellows, stating: "Recent revelations about misconduct at the highest levels of our profession force us to confront the divergence between our design values and human values. At AIA, much has been written, much has been discussed, but little has been done. It is time for the profession to affirm our ethical values as members of the society we serve. As Fellows, we call upon the AIA Board of Directors to work with the College of Fellows, the National Ethics council, the Equity and Future of Architecture Board Committee, and other interested groups to immediately amend the AIA Code of Ethics to include a requirement for architects to foster a professional environment of mutual respect, free of discriminatory, intimidating, abusive, or harassing behavior, for all members of our professional community. We call upon AIA to set a standard of mutual respect, equitable treatment, and fair pay for every member of our diverse profession. We call upon AIA to enforce an amended Code of Ethics that is not merely "guidance". Adherence to the Code of Ethics should be a requirement for membership. There can be no place in the Institute for people who abuse their status, power, or influence. We cannot continue to watch as people of diverse backgrounds and identities enter the profession with high hopes, only to leave in disillusionment when they encounter the realities of lower pay, lack of respect, abuse, or harassment."

The Resolution read:

WHEREAS: recent revelations of ethical misconduct at the highest levels of our profession make it imperative that we re-affirm our values as architects and members of the society we serve,

WHEREAS: people of diverse backgrounds and identities enter the profession with high hopes, only to leave in disillusionment when they encounter unfair pay practices, lack of respect, abuse, or harassment,

WHEREAS: We the undersigned acknowledge and support the actions taken to date by the many AIA committees convened to address these issues, but feel that swifter, decisive, and public action must still be taken,

WHEREAS: Three hundred fifty AIA Fellows endorsed the statement Fellowship is Leadership, attached hereto, stepping forward voluntarily to hold ourselves to the highest standards of ethical behavior, as an example to the public and the profession, by committing to foster an environment of respect and fairness in our work and in our workplaces,

NOW, THEREFORE, BE IT RESOLVED to call upon the AIA Board of Directors to swiftly move to strengthen the Code of Ethics by including a provision that requires members to ensure that their workplaces are environments of mutual respect and equitable treatment (including pay), free of abusive behavior and harassment,

BE IT FURTHER RESOLVED that the National Ethics Council make the amended Code of Ethics binding for all AIA members, and that penalties for violation will include expulsion from the Institute.

As to Richard Meier, FAIA, when accusations broke in a *New York Times* article in March, he issued a public statement saying, "I am deeply troubled and embarrassed by the accounts of several women who were offended by my words and actions." "While our recollections may differ, I sincerely apologise to anyone who was offended by my behaviour," Meier wrote, shortly before he took a 6-month leave of absence from his firm as founder and managing partner. In 1984, at age 49, Meier became the youngest recipient of the Pritzker Prize, architecture's highest accolade.

The Resolution, passed with 4,272 votes in favor and only 13 votes against at the AIA Annual Business Meeting on June 20th. The AIA Board votes on the change in Sept.


AIA

Ethics

FROM THE OFFICE OF GENERAL COUNSEL

2017 Code of Ethics and Professional Conduct

Preamble

Members of The American Institute of Architects are dedicated to the highest standards of professionalism, integrity, and competence. This Code of Ethics and Professional Conduct states guidelines for the conduct of Members in fulfilling those obligations. The Code is

continuum of knowledge and creation which is the heritage and legacy of the profession.

Commentary is provided for some of the Rules of Conduct. That commentary is meant to clarify or elaborate the intent of the rule. The commentary is not part of the **Code**. Enforcement will be determined by application of the Rules of Conduct alone; the commentary will assist those seeking to conform their conduct to the **Code** and those charged with its enforcement.

Statement in Compliance with Antitrust Law

The following practices are not, in themselves, unethical

NEW YORK: ARCHITECT NOT LIABLE FOR INJURIES CAUSED BY CEILING COLLAPSE

A cook was injured in 2010 at a fast-food restaurant when a portion of the ceiling collapsed in the kitchen area and fell on him in Brooklyn. The ceiling did not contain lightweight fireproof tiles but instead contained heavier 2' x 4' pieces of sheetrock. He sued the building owner and its architect to recover for his injuries. In 2016, the trial court granted summary judgment in favor of the owner (KFC) and the architect. The Supreme Court, Appellate Division affirmed in a short opinion, holding that KFC established prima facie that it could not be held liable for plaintiff's injuries on the basis of the lease agreement for the premises, which showed that at the time of the accident KYC was an "out-of - possession landlord," with no duty to perform non-structural repairs.

The evidence at trial also showed that the architect owed no duty of care to the plaintiff, who was not a party to the owner-architect contract, and that there was no applicable exception here to the rule that a contractual duty will not give rise to tort liability in favor of a third party under New York law. The architect's contract duties did not include performing a site survey during the construction and no elements of his duties were "structural." The contract specifically indicated that no structural changes were to be made. The design detail utilized by the architect was a standard detail based on the New York City reference standard for acoustic ceilings. The area above the dropped ceiling was not designed for storage purposes and the plans he prepared were in compliance with NYC codes, showing the detail required by the NYC codes. The plans also expressly referred to the type of ceiling tiles to be installed, i.e lightweight gypsum bore or fiberglass, not sheetrock panels.

The trial court found that the architect was not required by contract to, and did not, inspect the work during the construction and post-construction phases. Under New York law, in order to prove negligence or malpractice in the design of a structure, the plaintiff must put forth expert testimony that the engineer or architect deviated from accepted industry standards and that such deviation was a proximate cause of plaintiff's injuries. This, however, the plaintiff failed to do. On appeal, the plaintiff argued that the architect "launched a force of harm" by negligently designing the plans that the general contractor used to construct the drop ceiling. However, the appellate court found that pursuant to its contract with the restaurant owner, the architect had no obligations in connection with providing and installing the drop ceiling, for which the general contractor was solely responsible. As a result, the summary judgment was affirmed. *Dinkins v. Kansas Fried Chicken, Inc.,* 2016 WL 6140044 (N.Y. Sup.), *aff'd*, 70 N.Y.S.3d 195, 158 A.D.3d 420 (N.Y.A.D. 1 Dept. 2018).

ADDRESS CHANGE:

Effective July 1, 2018 TJS Member J. Ashley Inabnet is retiring from private law practice. His new address will be: 30285 Spring Hill Drive, Lacombe, LA 70445. Email him at: inabnetlaw@gmail.com Best of luck, Ashley! We are all jealous.

U.S. Supreme Court Denies Cert on Architect's Copyright Case

This case began in 2014 and produced numerous published rulings along its tortured 4-year path. In short, Highway Inn hired architect Frost–Tsuji in Dec. 2012 to design and oversee the development of a full-service restaurant in the Kakaako area of Honolulu. The parties entered into a "letter agreement," which stated (in part) that, "per AIA standard contract, Architect's drawings, specifications, and all design work are 'instruments of service', and all copyrights to all items designed are for the specific jobsite address only, and design copyrights, formulas, custom furniture, fixtures or fabrics remain under the ownership of the Architect." The parties contemplated that the letter agreement would be followed by a formal AIA contract, which the architect sent in Feb. 2013. Highway Inn marked up the proposed contract and returned it to the architect in early March 2013, but the architect did not make any of the changes Highway Inn sought and the AIA contract was never executed. In late April 2013, Highway Inn's attorney sent Frost–Tsuji's attorney written notice that Highway Inn was terminating the contract "effective immediately." On the heels of that notice, in July 2013, Frost–Tsuji registered its copyrights for the project. Thereafter, Highway Inn hired another architect to complete the project. Frost–Tsuji subsequently sued its client, the new architect and multiple others on various legal theories, central of which was a claim of copyright infringement.

"Smile!" TJS Members Bill Quatman, Suzanne Harness, Richard Elbert and new AIA Fellow Joshua Flowers stop for a selfie after the Annual Meeting.

The plaintiff also claimed that the copyright management information ("CMI") on its plans was removed, including its name, address, and telephone number, as well as a copyright notice; and that the infringing plans bore the name of the new architect only. However, the trial court ruled that there was no evidence in the record indicating who, if anyone, "removed" Frost–Tsuji's CMI from any document, and Highway Inn denied responsibility for the alleged "removal." The court concluded, as a matter of law, that despite the letter agreement's copyright language, Highway Inn had "a license to use" Frost–Tsuji's architectural plans even after termination of the agreement and granted partial summary judgment in defendants' favor with respect to the copyright claim. The court also rejected plaintiff's claims of civil conspiracy and tortious interference with contract.

As to the core claim of copyright, the trial court ruled that there was no dispute that Frost–Tsuji owned the copyright to works it created. However, the court found that the client, Highway Inn, had an "implied nonexclusive license" to use the architectural drawings Frost–Tsuji had created for the restaurant. The court determined that Highway Inn had asked the architect to create the plans, that Frost–Tsuji had created and delivered the plans to Highway Inn intending that Highway Inn use them, and that Highway Inn had paid substantial consideration for the plans. The court ruled that, "to the extent Frost–Tsuji asserts a copyright claim against other Defendants who used and adapted Frost–Tsuji's plans within the scope of Highway Inn's implied license, those other Defendants are also entitled to summary judgment with respect to the copyright claim. Their license to use the plans derives from Highway Inn's." Citing to a Ninth Circuit case, the trial court ruled that an implied license is granted when "(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee - requestor copy and distribute his work."

The plaintiff argued that its client still owed $39,015 under the contract and, therefore, Highway Inn was not entitled to a license. However, the court rejected that argument, holding that, "full payment is not a condition precedent to implying a license in this case."

In rejecting the copyright claim, the court found that Frost–Tsuji created works that Highway Inn requested and "substantially paid for." Frost–Tsuji then delivered the works to Highway Inn with the intent that they be used in connection with the construction of Highway Inn's restaurant. "Frost–Tsuji could not revoke the implied license that Highway Inn (and its contractors) had to use the copyrighted works," the court stated. Therefore, the architect could not now claim that any use by any defendant of those works violated its copyrights.

In a key holding, the trial court ruled that the letter agreement did not "unambiguously state" what would happen to the work Frost–Tsuji had already done before the termination of the letter agreement. "Under these circumstances," the court held, "Highway Inn had a license to use Frost–Tsuji's architectural plans to build its restaurant, as Highway Inn had requested the creation of the plans, and Frost–Tsuji had made the plans and delivered them to Highway Inn with the intention that Highway Inn use, copy, and distribute them." In addition, Highway Inn's implied license allowed its contractors and another architectural firm to use (copy, reproduce, and adapt) the plans to complete the project.

The architect argued that the intentional removal of its CMI from the plans without its permission violated the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202(b)(1), which states: "No person shall, without the authority of the copyright owner or the law — (1) intentionally remove or alter any copyright management information . . . knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title." The court held that this section contains three elements and a plaintiff must allege that the defendant: (1) without authority of the copyright owner or the law; (2) intentionally removed or altered [CMI]; (3) knowing or having reasonable grounds to know that the removal will induce, enable, facilitate, or conceal an infringement of the federal copyright laws. The court found that the plaintiff failed to meet its burden of proof under the statute, and that "the mere receipt and possession of a copyrighted work that has allegedly had copyright management information removed does not violate § 1202(b)(1). A defendant who does not actually remove copyright management information cannot be said to have violated § 1202(b)(1)."

The district court granted summary judgment in favor of all defendants, and denied Frost-Tsuji's motions for reconsideration of those orders. The court also awarded defendants their attorneys' fees and costs, totaling over $448,500, incurred in litigating the DMCA claim and in litigating the copyright infringement claim, despite plaintiff's strenuous objections.

The plaintiff appealed and in Oct. 2017, the 9th Circuit Court of Appeals rejected all grounds for appeal, and affirmed all of the trial court's rulings. On April 2, 2018, the U.S. Supreme Court denied the architect's petition for writ of certiorari. See, among other rulings, *Frost-Tsuji Architects v. Highway Inn, Inc.,* 2014 WL 4237285 (D.Hawai 2014); aff'd 700 Fed.Appx. 674 (9th Cir. 2017); cert. denied, 138 S.Ct. 1442 (2018).

Il Punto Ristorante on Ninth Ave. in New York City was the site of the Sixth Annual Meeting of The Jefferson Society on Weds., June 20, 2018.

NEW JERSEY: CLAIM AGAINST ENGINEER DENIED BASED ON LACK OF AN AFFIDAVIT OF MERIT

An employee of Home Depot was electrocuted while he was working at a store in Jersey City, New Jersey. While operating an "order picker" to retrieve a water heater from a shelving unit, he was severely electrocuted, suffering permanent and severe injuries that will require extensive treatment, care, and supervision for the rest of his life. He and his wife sued Home Depot, as well as the store's architect and its consulting engineer, among others. The engineer ("DLB") filed a motion to dismiss because the plaintiffs failed to serve an affidavit of merit as required under N.J.S.A. 2A:53A–27. The federal trial court converted DLB's motion to dismiss into a motion for summary judgment, which was granted. The plaintiffs had claimed that DLB's conduct, omissions and performance of its duties constituted not only negligence, but gross negligence, and were in reckless disregard of a known and unreasonably dangerous condition as to the clearance between the light fixtures and the racking system, entitling them to compensatory and punitive damages. Under New Jersey law, a plaintiff is required by statute to serve an Affidavit of Merit ("AOM") to support a claim of professional negligence and/or malpractice. The plaintiffs argued that: 1) the AOM statute was not applicable; 2) DLB's failure to comply with discovery tolled the requirement to comply with the AOM statute; 3) Plaintiffs effectively complied with the statute because they served an affidavit of merit on the architect, a co-defendant; and, that 4) in the alternative, extraordinary circumstances were present. The New Jersey AOM statute provides in relevant part: "In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause . . . [T]he person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case." When a licensed professional covered under the AOM statute is sued based on a deviation from the standard of care applicable to that professional field, the statute's requirements apply.

The plaintiffs argued that under the "common knowledge exception," no AOM was required. However, the court held that the plaintiffs' claims against DLB were based on breaches of professional standards of care and that, "Any alleged deviations from the standard of care applicable to pertinent allegations would require an expert." As a result, the AOM statue applied to the engineering consultant. The court rejected all of the other alternative arguments and granted summary judgment to the engineer. However, the cross-claims by co-defendants remained viable even in the absence of an AOM. New Jersey courts have held that where a defendant subject to the AOM statute asserts a third-party claim in the nature of contribution or joint tort-feasor liability as against another professional also subject to the statute, no affidavit is required.

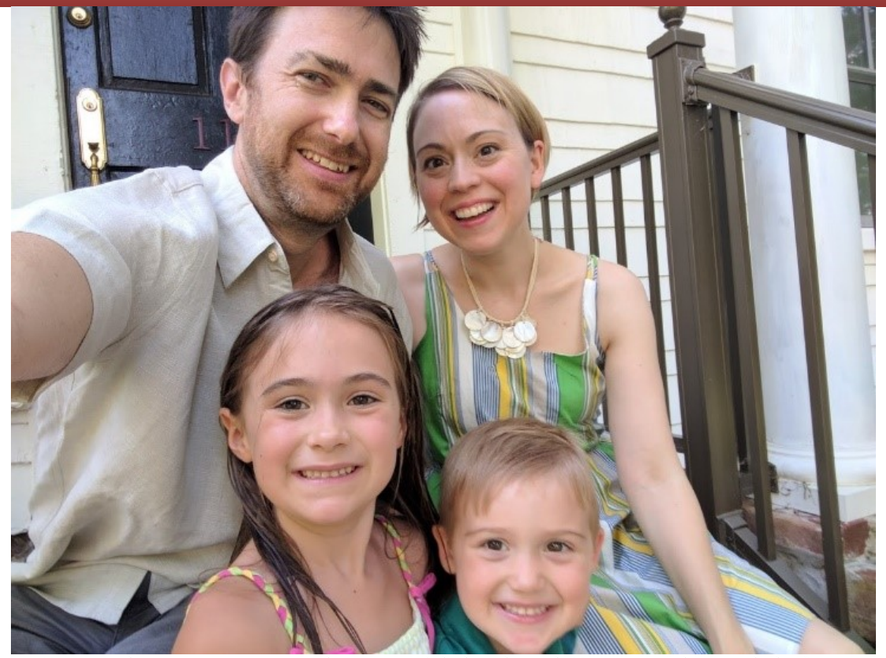
Douglas v. SBLM Architects, 2018 WL 1981479 (D.N.J. 2018).

[Editor's Note: See the Oct. 2015 issue of Monticello on whether Certificate of Merit laws apply in federal court cases; and see also the April 2013 issue for a listing of such statutes across the country].

(Below) Joshua Flowers and Jose Rodriguez enjoy the pre-dinner conversation, followed by delicious Italian cuisine, like the lasagna pictured above.

MEMBER PROFILE: JESSYCA HENDERSON, AIA, Esq.

The American Institute of Architects (AIA)
Washington, D.C.



TJS Member Jessyca Henderson with husband Casey Lide, and their two children, Magnolia (age 8), and Nikolas (age 5).

Jessyca Henderson, AIA, Esq. grew up taking family trips from her hometown of La Porte, Texas to New Orleans, Louisiana where she ended up attending architecture school at Tulane. "As a kid I was really into both art and science, and was looking for a creative environment in which I could combine these two interests, but I also wanted to be able to obtain a professional license," she told us. After visiting a Tulane open house that was held in Houston, she fell in love with the easy-going spirit of Tulane. "New Orleans was beautiful, energetic, and was a little dangerous - and I loved that!" During school, she worked for New Orleans architect Lloyd Vogt. After graduation, Jessyca moved to the Baltimore area and worked for Brennan + Company, a small firm that allowed her to do a bit of everything, from design, detailing, specifications, code review, construction administration and, of course, lots and lots of client management. But then, her interests turned to law.

"My professional practice course was taught by a local New Orleans attorney who was also an architect, and that sparked an interest. I really loved contracts and building codes, the laws that govern the physical environment. It was just all very fascinating to me." She found that combining architectural and legal knowledge has forged a very strong perspective on the political aspects of the built environment, especially land use, local initiatives and building and zoning code changes.

Although she considered attending law school right after Tulane, Jessyca practiced architecture and then got her law degree from Concord Law School at Purdue University Global. She chose this school for both its flexibility and academic rigor. Jessyca worked her way through law school at the AIA and was eventually offered an internship in the General Counsel's office, which she did for two years alongside her other duties at the Institute. The online program through Concord met the needs of her young family, and avoided a long commute. "It was the best decision for me and for my family," she said. "Our professors were from law schools all around the country, and ironically, I ended up having a professor from Tulane Law for one of my classes." The online program also allowed Jessyca to work full time at the AIA all through law school, and to spend more time with her children, Magnolia, who is now 8, and Nikolas, who is 5. Upon graduation from law school, she was offered a full-time position with the AIA as Associate General Counsel, where she continues to work today.

In her role at the American Institute of Architects, Jessyca drafts contracts, acts as co-counsel to the National Ethics Council, manages changes to the AIA's policies, provide legal advice to internal AIA departments on a variety of issues, works with outside counsel on litigation, and handles employment law matters, among others. She loves the endless variety of challenges that her job provides. But the best part of her job is the internal clients. "I really enjoy assisting AIA staff with sticky legal questions and collaborating with them on their various contracts for venues, consultants, and agreements with other organizations. Another great aspect is assisting the National Ethics Council with the important work they do."

Jessyca is married to a fellow attorney, Casey Lide, who specializes in telecommunications law with the DC firm Baller, Stokes & Lide. Their daughter Magnolia loves anything related to science, especially space vehicles and bugs. Son Nikolas is showing an early proclivity toward architecture and design and routinely instructs his parents on how to rearrange their environment to be more pleasing, both aesthetically and functionally. "That doesn't go there," is his most common observation. He loves to draw and build, says Jessyca, so perhaps a future in design-build lies ahead for him. Casey coaches little league and both kids play baseball. The family also enjoys camping and fishing. They have a border collie named "Bonnie" and two demanding male tabbies, "Truman" and "Leonard."

The family lives in Catonsville, Maryland in a 1929 home that they have gutted and renovated. In her spare time, Jessyca is learning about permaculture and experimenting with it slowly on their property, where they hope to build a greenhouse. "We love to travel, but have not yet had the opportunity to take a big vacation," she said. "Once the kids are a little older, we intend to pack our bags for Europe for a few weeks." There are also plans to purchase an Airstream trailer one day and take off for the mountains.

Jessyca is a volunteer member of the Dean's advisory board at Tulane School of Architecture, and serves as an adviser to the RIT Golisano Institute for Sustainability.

She is inspired by many architects, but chose Fay Jones as her favorite for his "otherworldly use of vernacular form and materials – he turned wood into lace and captured the imagination of an entire region."

Any advice for a young architect thinking about law school? Jessyca said, "If you are attracted to the technical aspects of architecture, combining that with law could be tremendously rewarding. If you really only love to draw, however, and be creative, it might not be the right choice. Just do what you love." Good advice from a person who seems to have found what she loves in life.

"May the force be with you!" Princess Jessyca and her family on Halloween in October 2015.

The Acceptance, or Accepted-Work Doctrine (aka the *Slavin* Doctrine).

By G. William Quatman, FAIA, Esq.

The Doctrine. Black's Law Dictionary has identical definitions for the Acceptance Doctrine and the Accepted-Work Doctrine, so we will treat them the same under the more common name of "The Accepted-Work Doctrine" (also known in some states as the "Completed and Acceptance Rule"). In Florida, the doctrine is known as the *Slavin* Doctrine, after a Florida case, *Slavin v. Kay,* 108 So.2d 462 (Fla. 1958). Under this doctrine, after an acceptance by the owner of its work, an independent contractor is not liable to third parties who have no contractual relations with him, for damages subsequently sustained by reason of his negligence in the performance of his contract duties. Essentially, a contractor, architect, or engineer is relieved of liability to injured third parties caused by a *patent defect* after control of the completed premises has been turned over to the owner. In general, the doctrine is limited to those situations where the defect is so obvious, open or "patent" that the owner could have discovered and remedied it. Under this doctrine, the work of the contractor must be fully completed and accepted before the owner becomes liable and the contractor is exonerated for injuries to third parties caused by the defective work. As a result, the doctrine does not apply where there is, in fact, no acceptance of the work, or where the defect was concealed.

The rationale for the Accepted-Work Doctrine is that by occupying and resuming possession of the work, the owner deprives the contractor of the opportunity to rectify its wrong. Before accepting the work as being in full compliance with the terms of the contract, the project owner is presumed to have made a reasonably careful inspection thereof, and to know of its defects. Therefore, if the owner takes the project in a defective condition, he accepts the defects and the negligence that caused them as his own and, thereafter, "stands forth as their author." Not only does this doctrine provide an affirmative defense for contractors as to patent construction defects, but it has been applied to design professionals as well for patent defects in their designs. See cases on p. 20, below.

Tracing the Roots of the Doctrine. Every lawyer remembers reading the English case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842) in first year torts class. In that case, a contractor for mail coaches was shielded from liability for a third party's injuries because the contractor and the third party were not in privity of contract. In the U.S., some trace the doctrine to a 1919 Connecticut case, *Howard v. Redden*, 107 A. 509 (Conn. 1919) a construction case that adhered to a *Winterbottom*-like rationale (although the English case was not cited). In *Howard*, the court held that the building contractor was not liable to a passerby who was killed when struck by a faulty cornice built by the contractor. The court stated that the plaintiff's injury, which occurred after the contractor had completed the work, was proximately caused solely by the owner's failure to inspect and guard against the cornice's deterioration. The court noted that although the contractor remained liable *to the owner* after completion and acceptance of the work, the contractor's liability did not extend to third persons. The *Howard* court stated: "A contractor or workman is surely not the insurer of the everlastingness of the materials of a cornice built by him. The owner, or occupier, as the case may be, is under obligation to give such inspection and make such repairs as will at least preserve the structure from the dangerous effects of natural causes, wind, rain, dampness, which no foresight of construction can guard against." Nearly 100 years later, that logic still prevails in states that have adopted the Accepted-Work Doctrine. However, not all states subscribe to the doctrine, due to the perceived harsh results it can produce for innocent third parties clonked on the head by a falling cornice.

The Majority Rule (Foreseeability Doctrine). A majority of states have instead adopted the so-called "modern rule," or the "Foreseeability Doctrine," which provides that a construction contractor is liable for injury or damage to a third person as a result of defective work - even after completion of the work and acceptance by the owner - where it was reasonably foreseeable that a third person would be injured by such work due to the contractor's negligence, or its failure to disclose a dangerous condition that was known to the contractor. The Foreseeability Doctrine (or "Rule of Foreseeability") is expressed in Restatement (Second) of Torts § 385, which states: "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others." One commentary has noted that as late as the 1950s, the majority of jurisdictions adhered to the completed and accepted rule but, since then, the rule has been severely criticized and repudiated in most states and is now deemed the minority rule, while the "modern rule" is the majority rule.

Exceptions to the Rule. In recognizing those states that have conditioned the doctrine upon specified exceptions, the Wyoming Supreme Court explained its refusal to adopt the doctrine by pointing out that the "rule of nonliability with its many exceptions is more cumbersome than traditional negligence analysis," as the exceptions to the rule nearly swallow up the rule. One primary exception is known as the "imminently dangerous exception," which imposes liability on the contractor after acceptance where: 1) the defect is imminently dangerous to others; 2) the defect is so hidden that a reasonably careful inspection would not reveal it; and, 3) the contractor knows of the defect, but the owner does not. Essentially, under this exception, a hidden (or "latent" defect) is not covered by the doctrine. Under another limitation, a 1991 Arizona case held that the doctrine applies only when the contractor has no discretion and merely follows the plans and specifications provided by its employer. *Menendez v. Paddock Pool Constr. Co.,* 836 P.2d 968 (Ariz. 1991). The court noted, however, that, "If the contractor is hired to exercise its discretion, special skills, and knowledge to prepare a design, and the owner does not control the design details, the contractor cannot invoke the rule." This would appear create an exception for design-build or EPC contractors who furnish their own designs and plans. Like the *Spearin* Doctrine (see April 2018 issue of *Monticello*), however, to the extent that an owner provides even preliminary designs or specifications that a contractor must follow, there may be some life left in the Accepted-Work Doctrine to the extent that owner-furnished designs caused the defect.

Doctrine Abolished in Many States. More than thirty states have abolished the rigid Accepted-Work Doctrines. Texas abandoned the doctrine in 1962, noting that the exceptions "have largely emasculated the rule." *Strakos v. Gehring,* 360 S.W.2d 787, 790 (Tex.1962). The Texas Supreme Court stated that the doctrine produces a harsh and an unsound approach to the assessment of liability. It explained: "The rule eventually becomes enveloped by complex exceptions to cover such situations as nuisance, hidden danger, and inherently dangerous conditions. The result would be that in each case, after having first decided that there was an acceptance of the work, we would then have to decide issues involving all the various exceptions to the rule and in case any exception was found applicable, the basic issues of negligence and proximate cause would still remain for consideration. We believe that outright rejection of this oft-repudiated and emasculated doctrine would restore both logic and simplicity to the law."

Staying Alive? Don't think that the Accepted-Work Doctrine is completely dead, however. As recently as 2017, a Missouri appellate court ruled that a paving contractor was not liable for a personal injury after the work was accepted because there was no evidence that the contractor was still in control of, or had a right to control, the area where the injury occurred. Further, the court held that it was not the contractor's burden to prove acceptance but it was the plaintiff's burden to prove there was no acceptance. The Missouri Court of Appeals declined to adopt the "modern rule" set forth in the Restatement (Second) of Torts § 385, deferring instead to the Missouri Supreme Court to make any such policy change. *Wilson v. Dura-Seal and Stripe, Inc.,* 519 S.W.3d 479 (Mo. App. E.D. 2017).

Does the doctrine apply to architects? See page 20 for more discussion on that.

Does the Accepted-Work Doctrine Apply to Architects? Maybe!

In at least two cases, courts have allowed an architect to invoke the Accepted-Work Doctrine to avoid liability. In a 2012 California case, a theater patron sued an architect for personal injury for failure to require contrast marking stripes on stairs. The architect claimed that it was not liable under the "completed and accepted" doctrine. The trial court accepted that defense and granted the architect summary judgment, affirmed on appeal. The appellate court held that under the doctrine, "when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable." Here, it was undisputed that the architect's plans and specifications called for contrast marking stripes to be placed on the stairs and that, "The absence of stripes on the stairs is obvious and apparent to any reasonably observant person." At the time the project was completed and accepted, there were no stripes on the stairs. See, *Neiman v. Leo A. Daly Co.,* 148 Cal.Rptr.3d 818, 210 Cal.App.4th 962 (Cal. App. 2 Dist. 2012). Likewise in a 1997 Oklahoma case, a plaintiff sued the architect of homeless shelter for injuries sustained when he fell off retaining wall where he was sleeping. The state Supreme Court held that the dangerous condition was open and obvious as matter of law and the architect could not be liable for negligent design, as any hazard associated with wall was open and easily discernible under the Accepted-Work Doctrine. Evidence showed that the architect had pointed out the condition, and recommended guardrails, but the building's owner declined to install them. See, *Pickens v. Tulsa Metropolitan Ministry*, 951 P.2d 1079 (Okla. 1997).

However, in a 1995 Montana case, the court rejected this defense when a store employee was injured after a remodeling project, when he fell through a suspended ceiling. The employee sued the remodeling project architect for negligence. The state Supreme Court held that the architect violated the building code and that the accepted work doctrine is no longer available as a defense in Montana. The court stated that a number of courts had expressed dissatisfaction with the doctrine. Asking the question: "How then can we logically conclude that simply because the professional has completed his or her services and the contractee has paid for those services, liability for the contractor's negligence should shift to the innocent and uninformed contractee?" The court said: "We cannot." The court held that elimination of the Accepted-Work Doctrine is more consistent with modern principles of tort liability and is more likely to place liability for negligent conduct on the appropriate party. See, *Pierce v. ALSC Architects, P.S.,* 890 P.2d 1254 (Mont. 1995).

(Below) AIA staff members (and TJS members) Jessyca Henderson and Michael Koger had time to catch up over dinner at the Annual Meeting.

More fun from the Annual Meeting. (Left to right) Joyce Raspa, Michael Bell, Bill Quatman, Richard Elbert, Patrick Vincent, and Jessica Hardy pose for a photo, while Jeffrey Hamlett and Suzanne Harness engage in a deep discussion in the background.

Thomas Jefferson Statue to Remain at Hofstra University.

As reported in the April 2018 edition of *Monticello*, there was movement at Hofstra Univ. to remove a statue of Thomas Jefferson, resulting in opposing student petitions. In May 2018, the university's president ended the debate, saying that the sculpture will not be moved from its location outside the entrance to the student center, despite protests. Instead, a task force will be created to address students' concerns. One group called "Jefferson Has Gotta Go!" says that is not good enough, and demands that the sculpture be removed over Jefferson's ties to slavery. The group issued a list of demands, including the creation of a "tip line" where students can report racist, sexist or bigoted behavior. "The founding fathers represent the duality of the American character and the difficulty of our history: freedom and oppression, equality and injustice, in issues of race, gender, religion and origin," the university president said in a statement. Supporters of the statue, which - was donated twenty years ago – have argued that despite owning hundreds of black slaves, Jefferson was an early abolitionist who worked to end slavery. The university president elaborated that, "These men of their time laid out a vision of a world in which all people are created equal. It is this vision we celebrate and honor in our Founding Fathers, even as we wrestle with their human and indefensible failings."

Risk and Claims Exposures of Design-Builders

By Valerie P. Onderka, Vice President, Ironshore; and
Donna M. Hunt, AIA, Esq. Assistant Vice President, Ironshore

A design-build agreement between an owner and design-builder describes the contractual relationship and the roles of the Owner and design-builder. It is prudent for the design-builder to assess the responsibilities and risks it has assumed in the design-build agreement and determine how best to manage those risks. A design-builder will assume certain risks, insure others, and transfer significant risk to their downstream design professionals and trade subcontractors.

What are the risks and potential claims exposure of a design-builder or contractor utilizing design-build as the project delivery method? The typical risks of the design-builder are both professional and non-professional exposures. The non-professional risks and exposures include direct damage to property, supplies, and materials related to the project; property damage and bodily injury resulting from the contractor's operations on the project premises and occurring after completion of the project; environmental exposures resulting from the release or dispersal of hazardous materials from the project site; railroad liability exposure for operations within 50 feet of a railroad; and payment and performance guarantees, including obligations to complete the project within a certain schedule according to certain performance specifications. The design-builder is responsible for the safety of all employees and third parties on the project site. Accidents on the job site may result in workers compensation claims and OSHA fines and penalties.

The design-builder's professional liability exposures are related to the design services assumed in the design-build agreement with the owner and then subcontracted to design professionals on the project. The level of design risk that the design-builder assumes in the design-build agreement may vary from very onerous to fair and equitable. The design-builder is concerned with geotechnical exposures, differing site conditions, environmental liabilities, and vicarious exposures for design defects. A design-builder should carry its own contractor's professional liability insurance coverage for the professional services (i.e., design services) that it assumes under contract with the owner. This may be provided on a project specific or practice basis. A contractor's professional liability policy operates the same as a designer's professional liability policy. Coverage can encompass the contingent design exposure of the design-builder entity and any design professionals within the joint venture.

The professional liability claims exposure of the design-builder can be either direct or contingent exposure to design claims where a design-builder contracts to provide "all design and construction services." Design-build claims can increase claims made by a design-builder against its sub-consultant design professionals when the design-builder unfairly allocates risk to a design professional who is not suited to manage that risk. For instance, a design professional is ill equipped to manage the risks of a specialty sub-contractor who is contractually obligated to warrant and guarantee their work. For the past few years, the design industry has experienced lower frequency, but higher severity, on Construction Defect (CD) claims particularly in the residential sector. It appears that plaintiffs are settling CD claims against contractors with savvy defense attorneys for small percentage on the dollar. Owners or end-users then seek further recovery from design professionals who are often the last party standing. In addition, emphasis is placed on the design professional's "contract administration" and "observation services," regardless of the actual scope of work articulated in the contract, thus triggering design professionals' liability policies.

Other triggers of claim activity include:

- Increase in claims frequency for MEP and HVAC engineers/ architects for "coordination" on vertical construction defect claims;
- Onerous sub-consultant agreements with misalignment of the allocation of risk puts a burden on the design professionals' defense of "design-related" claims;
- Increased Contractors' cost overruns and delay claims result in triggering design professionals' professional liability policies.

With the increase in quantity and complexity of design-build projects, it is important for design-builders and design professionals to equitably allocate risk to the party most suited to manage that risk. The entire design-build team should be involved in seeking appropriate insurance solutions to protect their respective professional liability exposures. The good news is that there are numerous products available in the insurance industry today.

According to a new study by FMI, Design-Build is projected to account for 44% of all non-residential construction projects in the United States by the year 2021.

Combined Market Study Shows Increase in Design-Build

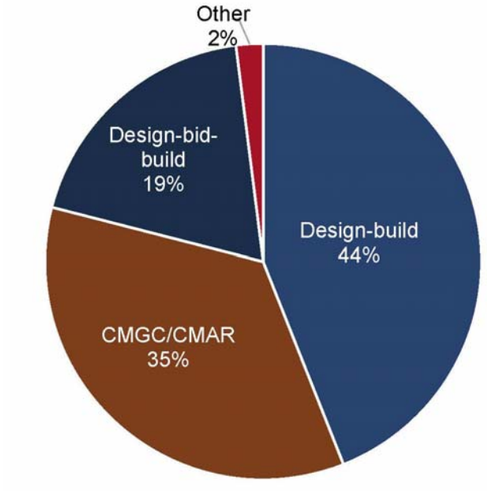
In June 2018, FMI released a new study on "Design-Build Utilization," a combined market study that analyzes the use and growth of design-build in the United States. The report shows that design-build construction spending in the assessed segments is anticipated to grow 18% from 2018 to 2021 and reach over $320 billion. Design-build is anticipated to represent up to 44% of construction spending in the assessed segments by 2021. Design-build spending in Manufacturing, Highway/ Street and Education represent the greatest percentage of design-build construction spending by segment over the 2018-2021 period.

The Mountain (6.3%), Pacific (6.1%) and South Atlantic (6.2%) census divisions are anticipated to yield the highest growth rates over the 2018-2021 period.

According to FMI, owner's have traditionally employed design-bid-build as the project delivery method of choice. As owner needs and project demands have changed, however, owners have become increasingly likely to assess the option to employ alternative delivery methods. Owner selection of a project delivery method involves multiple factors. Overall, owners identified "delivery schedule" as the greatest influence of project delivery method selection. In addition, owner goals and objectives were identified to be highly influential in project delivery method selection. The education process for design-build has continued to expand. A continued emphasis toward educating owners and project stakeholders on the process and benefits associated with design-build will facilitate continued adoption and greater utilization.

From an industry perspective, alternative project delivery methods have become a more frequent option for both public and private owners. On the public side, enabling design-build legislation has been put in place to facilitate increased use. Private owners indicated utilizing design-build on projects presenting unique challenges. Overall, owners indicated receiving significant value from design-build when employed on larger and more complex projects. These projects allowed for greater opportunity to provide project innovations and subsequent cost savings.

The full study can be found on the DBIA website at www.dbia.org



2018-2021 Construction By Delivery Method
(Source: FMI Study, June 2018)

MEMBER PROFILE: JEFFREY HAMLETT, ESQ.

Mukilteo, WA

(Above) Jackie and Jeffrey on their 23rd Anniversary at Place De L'Homme, in Paris, France; (Below) Jeffrey with his step-sons Kyle and Jason Brudvik.

Jeffrey Hamlett lives in Mukilteo, Washington ("happy camping ground" or "narrow passage" in the Snohomish language, depending on who is translating), a suburb about 23 miles north of Seattle. The Puget Sound is nearby, with a beautiful beach, views of the surrounding mountains, and lots of trees. Jeffrey says, "It is truly a happy camping ground, whether or not that is the actual meaning. And, oh yes, it is green!" He grew up in Ephrata, Washington and obtained his architectural degree from nearby Washington State Univ., but that was not his original career path. "At the time I applied to and was accepted to attend WSU, I didn't even know they had a school of architecture – because at the time I was planning to be an engineer." A chance meeting with a classmate in the halls of his high school changed that career path. "She had a folder with pages of articles she had cut from a magazine showing various residences from around the country. There was one in particular located in Wisconsin where the house was built in a comma shape into the top part of a short bluff overlooking a valley. I was hooked. At that moment I decided to pursue a career in architecture!" It was a good thing that WSU had an architectural department, because Jeffrey excelled there and was elected a member of Tau Beta Pi honorary society. After graduation this young architect took a job as a framer working construction on apartment buildings in Kennewick, WA. "Some of my classmates and I moved there as jobs with architectural firms were few and far between at the time. I found a job on a framing crew, but nearly lost the job by the end of my first day (apparently the foreman didn't consider a 12 oz finish hammer and a cloth nail belt as the appropriate gear for a framer). I was told at the end of the week crew party, that I had saved my job by pointing out to the foreman that studs from one stack we were using to frame a wall were shorter than the studs from the other stack we were using to frame the same wall. The one stack of studs was 5/8" shorter than the studs in the other stack." Jeffrey eventually moved to Seattle and worked for the architectural firm of Arai/Jackson Architects & Designers, a job he kept during the time he attended law school.

For law school, Jeffrey chose the night program at the Univ. of Puget Sound School of Law in Tacoma because it was close-by and had a night program. "I enjoyed attending all the classes (well, most of them anyway) but the 30-mile commute during rush hour was only made enjoyable by my fellow law school carpool mates," Jeffrey told us. Why law school? Jeffrey explained that it was not so much intrigue about combining the two studies that lead him to law school. "It was, rather, because I began to wonder whether or not some of the clauses we included on our drawings were actually enforceable – such as, for a remodel, requiring the contractor to remove anything and everything in the existing building that was necessary to allow for the new construction. Even with that interest, I never would have even taken the LSAT if my best friend, during a road trip to attend a wedding, had not told me he was going to take the LSAT. With that bit of encouragement, Jeffrey enrolled and got his Juris Doctor. After law school, he went to work for Nourse & Assoc., a small construction litigation firm in Seattle, where he worked for less than two years. Then, he returned to the Aria/Jackson firm for a short stint as an architect. He later left to start a firm with two friends, Weber Thompson Hamlett Architects. "We designed residential and mixed-use projects and kept busy until the savings and loan collapse." Jeffrey returned to work at Arai/Jackson for the next 12 years, followed by almost 7 years at Callison Architecture as the Risk Manager. Today, Jeffrey wears three hats: a law practice, Hamlett Risk Management, providing legal and risk advice to several design firms; serving as Executive Director of the AIA Washington Council; and, as an architect. Jeffrey is married to Jackie Brudvik, whom he met through a blind date. They were married a little over a year later. Jackie was in the U.P.S. law school class one year behind Jeffrey and is now a member of the Washington State judiciary. She has two sons, Kyle (age 40) and Jason (age 41). Kyle, and his wife Trinh live in Middlebury, VT, where Kyle teaches in local colleges. Jason is a particle physicist and lives in Lund, Sweden with his wife, Kiyomi. Jeffrey and Jackie have three grandsons, Torbjörn; Torsten; and Tore. The boys speak English and Japanese at home, Swedish at school, and are also taking French at school. Jeffrey and Jackie like to travel, especially to Sweden (to see those grandsons). Jeffrey also enjoys travel to Scotland, to explore his roots!

Your roots are showing! Scottish, that is! Jeffrey Hamlett and Jackie Brudvik at his nephew's wedding outside Durango, CO.

(Above) Member Jessyca Henderson, Assistant General Counsel for the American Institute of Architect, takes a group selfie of her end of the table, including Los Angeles-area lawyer and past TJS board chairman, Mehrdad Farivar, and past TJS board chairs Chuck Heuer and Tim Twomey; (Left) Members Michael Bell, from New Orleans, and past TJS board chairman Bill Quatman, from Kansas City, toast to another successful year.

Nearly twenty members of The Jefferson Society enjoyed a sumptuous dinner at Il Punto Ristorante in New York City before the Sixth Annual Meeting. The social hour and dinner was organized by member Joyce Raspa. At the business meeting, the members elected Donna Hunt as President-Elect, and Joyce Raspa as Board Secretary. In addition, three new Directors were elected, including Joshua Flowers, Donna Hunt and Mark Ryan, each of whom will serve three-year terms from 2018 to 2021.

Jefferson Descendants Reflect on Sally Hemings Exhibit

On June 16, 2018, the *New York Times* ran an article stating that, "Hundreds of people count themselves as descendants of Thomas Jefferson. And their numbers grew substantially after a DNA test in 1998 bolstered the case for Jefferson's paternity of the children of Sally Hemings, his slave." The article focused on a new exhibit on Hemings which opened in Charlottesville in mid-June. The *Times* wrote, "Jefferson's slaves, once ignored, now have the spotlight." It was anticipated that many people who trace their roots back to the enslaved community at Monticello were expected to attend the opening of the new exhibit, along with some of the white descendants of Jefferson's acknowledged family. Three descendants gave interviews for the article on their views. The newly opened exhibit space at Monticello is presented as the living quarters of Sally Hemings, a slave woman who is alleged to have been Jefferson's mistress, with whom he fathered several children. The exhibit opens the door to Mr. Jefferson's relationship with a slave that spanned nearly four decades, from his time abroad in Paris to his death in 1826. Exhibit curators struggled with how to portray a woman for whom no photograph exists, opting to show her in shadow. The story is told entirely in quotes from her son, Madison.

MEMBER PROFILE: TIMOTHY M. GIBBONS, Esq.

Chambliss, Bahner & Stophel, P.C.
Chattanooga, TN

Tim Gibbons is a native Atlantan, who went to architecture school and law school in Georgia. “I never considered anywhere other than Georgia Tech. I wanted to be an architect for as long as I can remember.” After graduation from architectural school, Tim practiced architecture for seven years, but grew frustrated by the relatively small amount of time actually devoted to “design” in the practice of architecture. “In my view, while you can *learn* to be a good, competent designer, you must have something beyond what you can learn in order to be a great designer — a God-given spark that sets you apart,” he told us. Half of his seven years of practice was spent at Heery International in Atlanta, which probably was the largest A-E firm in the city back then (early 1980s). “Heery had a strong, diverse practice, and also had joint ventures with other firms for specialized projects, including large sports venues.”

Tim worked on large projects, including sports venues, large commercial and governmental projects, such as facilities for Herman Miller and for American Honda in the Atlanta area. After seven years of full-time practice in architecture, “I decided I probably did not have that spark,” Tim admitted. When he learned that he could not be “a design guru,” he was much less interested in the other 90% of the job, such as detailing the project, producing contract documents, observing the construction process, checking pay apps, etc. “So I just decided I'd try something else, and took the LSAT on a lark, basically as an aptitude test.”

Tim selected the Univ. of Georgia for law school. “As a married father of two (at that time — we eventually wound up with four kids), I needed to go somewhere with in - state tuition. And UGA is a fine law school, despite my pronounced anti-Bulldog bias remaining from my Georgia Tech days!” he said. Tim’s first job out of law school was with the firm he still practices with 27 years later, Chambliss, Bahner & Stophel. “We have a diverse commercial and business practice, and after an initial focus on litigation, I now devote my entire practice to construction law.” Tim chairs the firm’s Construction Group. “Depending on the volume of work we have in construction-related matters, we have between three and ten lawyers working on construction matters at any given time. We do everything from assisting developers putting deals together, working with owners, GC's and subs negotiating contracts, working out construction problems as they occur, and, of course, handling a wide range of disputes that might arise.” When asked what is the best part of his job, Tim said, “For about the past five years, I've been an arbitrator and mediator. I now provide ADR services for about a third of my time, and the percentage appears to be growing.” Tim serves on the AAA's Construction Panel, and is routinely appointed as arbitrator or mediator through the AAA. Many parties also hire Tim for private non-AAA arbitrations and mediations. “I enjoy both mediation and arbitration, and enjoy the unique challenges each of those roles involve. My goal as a mediator is, of course, to ‘stop the bleeding,’ and encourage the parties to find a workable (or at least tolerable) resolution.”

As an arbitrator, Tim enjoys watching very good construction lawyers present their cases and zealously represent their clients. “The only downside to being an arbitrator is that sometimes you have to make a hard decision in a dispute where the attorneys on both sides are people you know and admire. But of course, I have to be true to my role and also protect the arbitration process. So I must make what I believe to be the ‘right’ decision, no matter what.”

Tim’s wife of 37 years, Joy, is his best friend and the most “aptly-named person” he knows. The couple has four children ranging in age from 33 to 25. “Our kids were dispersed to the four winds for quite a while, but for the past three years they have all returned and live in Chattanooga. They and their spouses (and sometimes others) come to our house for lunch almost every Sunday, which has become my favorite event of the week.” Tim and Joy just recently became grandparents, and since Joy’s mother now lives with them, they can have four generations eating around the table together on a regular basis. “We know we are blessed to have our full extended family nearby. We also know we cannot take it for granted, but we fully intend to enjoy it as long as we can.”

When not practicing law or ADR, Tim enjoys singing. “My wife directs our church choir and music, and I sing regularly with the Chattanooga Symphony Chorus.” Like most TJS members, he also enjoys designing and working on projects for his house (a 1915 renovation project on its third addition). Tim also volunteers with the National Center for Youth Issues and is active in the Construction Lawyers Society of America (a founding Fellow), the Tennessee Association of Construction Counsel (TACC), and the Federalist Society.

Tim lives and works in Chattanooga, a city that has grown from the city with the dirtiest air in America to one consistently ranked highly for livability, outdoor recreation, and a host of its other amenities.

When asked about his favorite building, Tim said that he could not limit himself to one, but admires two classics: The Parthenon and The Pantheon. Moving on in time, Sainte Chappelle in Paris is on his list for maximizing stained glass and minimizing the stone structure. For a modern era building, Tim admires the Chrysler Building in New York City. His favorite architect? That would be Alvar Aalto, who he first admired in college and whose buildings Tim has visited in Finland and elsewhere. “I was struck by his artful use of natural light in very clever ways,” he said. What was Tim’s first architectural commission? It came at an early age. “My first-grade teacher told me that when I became an architect, she would hire me to design her house,” he said. “I never followed up on that one, however.”

(Left to right): Liz and Jonathan Gibbons; Tim and his wife, Joy; Abby (daughter) and Luke Falasca, (parents of the first grandchild); Elizabeth Gibbons (daughter); and Joy’s mother Betty. Another daughter, Anna, was taking the picture so she wasn't in the shot (nor was that grandbaby)!

CONN: STATUTE OF LIMS BEGAN TO RUN ON DATE OF ARCHITECT'S REPORT

A town sued its architect after the collapse of a high school auditorium roof following a snow storm. The town alleged that the architect was negligent in preparing a report preceding the school renovation. The architect filed a motion to bifurcate the issues of its liability from the 7-year statute of limitations, which was granted. In affirming, the Court of Appeals held that the town's professional negligence action accrued, at the latest, on the date when work stopped on the architect's report, not when work on the renovation project was completed. The architect's report was dated June 1998; the town used that report to apply for funding that same month. A year later, the town entered into a design contract, June 1999; and the roof collapsed in Feb. 2011. Suit was filed five months later, in July 2011. The state statute of limitations on design errors runs 7 years after "substantial completion of such improvement." The Court ruled that the allegations of negligence were tied to the June 1998 report, which the town admitted was "the end product of defendants' work on the report project." Since the architect completed work on the report project in 1998, any alleged negligence with respect to the report ran out in 2005 (six years before the roof collapse). The town did not claim that the statute of limitations was waived or tolled on the basis of a continuing course of conduct. Therefore, there was no material issue of fact for a jury to determine and summary judgment was affirmed. See, *Town of Windsor v. Loureiro Engineering Assoc.,* 2018 WL 1905647 (Conn. App. 2018).

CONN: COURT DECLINES TO VACATE ARBITRATION AWARD OVER CONFLICT OF INTEREST

In another Connecticut case, there was a dispute between an owner of a grocery store, its architect, and two of the architect's employees, which went to arbitration. The panel ruled in favor of the owner but assessed minor damages against the architect, and none against the two employees. The owner filed a motion to vacate the award on multiple grounds, including that: 1) the award was untimely, pursuant to state statutes; 2) the award was in violation of well-defined public policies of the state; 3) the arbitrators committed misconduct; 4) the arbitrators exceeded their powers; and 5) the arbitrators exhibited a manifest disregard of the law. As to the public policy challenge, the owner claimed that the two employees had a conflict of interest in acting as both architectural designers and construction managers on the same project in violation of their professional duties as architects. The state code of ethics required the two to make a written disclosure of interrelated financial interests that could influence, and thus potentially impair, their independent judgment, which they did not do. The court concluded that the conflict of interest rules for architects represented "a clear and dominant public policy." However, the court further concluded that although the two employees violated the public policy, no damages resulted from that violation. "Absent harm, the court will not vacate the arbitration award for a violation of public policy." The panel determined that the two employees were not even parties to the arbitration agreement and should not have been parties to the case. Therefore, there was no "misconduct" by the panel in concluding that the employees were not responsible for any damages. As to manifest disregard for the law, the Court ruled that the panel's conclusion that the two employees "should not have been parties here" was not irrational nor in manifest disregard of the law. Therefore, the application to vacate the arbitration award was denied. See, *Little Portion Prop. v. Bennett Sullivan Assoc.,* 2018 WL 2599288 (Conn. Super. 2018).

NEW JERSEY: CERTIFICATE OF MERIT MAY NOT BE REQUIRED FOR CONSTRUCTION PHASE SERVICES

A construction worker was killed during work on the New Jersey Turnpike, when he was struck by a street sweeper. The general contractor had hired a local engineering firm to provide "professional services" for the project, including "construction supervision" and inspection of the work to "ensure compliance with the Contract Plans and Specifications." The engineering firm agreed to provide both a Project Manager and a resident engineer. The PM was required to be a licensed engineer, while the resident engineer could be licensed or show 10-years of experience, or certification by NICET. The worker's estate and his widow sued several parties, including the engineering firm and its subconsultant (who did the resident services). The plaintiffs failed, however, to comply with the Affidavit of Merit statute, which is required in cases alleging professional negligence. N.J.S.A. 2A:53A–29. As a result, the trial court dismissed the engineering firm and the subconsultant. On appeal, the plaintiffs argued that based upon affidavits from two experts, the work performed by the engineers did not involve "professional engineering services," but rather involved "construction supervision services," which would not trigger the Affidavit of Merit statute. The appellate court stated that determining whether a matter alleges professional negligence, ordinary negligence, or work outside the licensed profession, demands scrutiny of the legal claims alleged. "It is not the label placed on the action that is pivotal, but the nature of the legal inquiry." Here, plaintiffs asserted that they were not claiming that the engineers deviated from an engineering standard of care; rather, they were asserting ordinary negligence. The appellate court reversed the trial court's orders dismissing the claims against the two engineering firms, and remanded for further proceedings. As to the subconsultant, the Court held that if it is determined that the subconsultant was acting under the direction and supervision of licensed engineering professionals and that the function he was performing was part of the "practice of engineering," plaintiffs would need to comply with the Affidavit of Merit statute. See, *Estate of Alexander by Alexander v. Northeast Sweepers*, 2018 WL 1865751 (N.J. Super. A.D., 2018).

MARYLAND: NO CERTIFICATE OF MERIT REQUIRED IN CASE AGAINST ENGINEERING FIRM

Alpha contracted with Comcast Cable for a building extension and upgrade. Alpha also contracted with Galletta to provide certain engineering design services for the extension and upgrade; and with High Constr. Co., a general contractor, to oversee the work. When concrete work proved to be defective, Alpha and its insurer paid others to perform remedial work costing over $625,000. Alpha and its insurer then sued the contractor, the engineer and others in federal court for damages. The engineering firm moved to dismiss the suit for failure of the plaintiffs to file a certificate of a qualified expert pursuant to state law. CJ § 3-2C-02. Maryland law requires a Certificate of Merit in cases involving a licensed engineer's negligent act or omission in rendering engineering services within the scope of the engineer's license. However, the defendants in this lawsuit were all corporations, not individuals and, therefore, did not fall within the definition of "a licensed professional." Because they are professional entities and not individuals, the federal court ruled that it was premature to conclude that an expert certificate was required. Accordingly, the motion to dismiss was denied. *Federal Ins. Co. v. High Constr. Co.,* 2018 WL 2121617 (D. Md. 2018).

INDIANA: STATE'S ENGINEER MAY BE LIABLE FOR DEATH DUE TO MUD ON ROAD

A driver was killed near a state bridge construction project allegedly due to mud on the roadway. His estate sued the contractor and the state's engineering firm, among others. The trial court granted summary judgment for the engineer. The engineer's design included all state DOT-mandated erosion control measures and maintenance of traffic plans. That design was reviewed and approved by the state DOT. Near the site of the accident, was a ditch running along the side of a "super-elevated curve." The engineer determined that silt fencing was not required in that area, nor did its maintenance of traffic plan call for signage warning of mud on the roadway, and no such signs were installed. The engineer's and the plaintiff's experts submitted conflicting testimony on whether the design met the standard of care. On appeal, the Court held that by designating expert evidence that the erosion control measures were defective, and that a reasonable designer would have included better erosion control measures in its plans, the plaintiff created a genuine issue of material fact as to whether the engineer breached its duty and the standard of care. As a result, summary judgment was reversed. See, *Smith v. Walsh Constr. Co.,* 95 N.E.3d 78 (Ind. App. 2018).