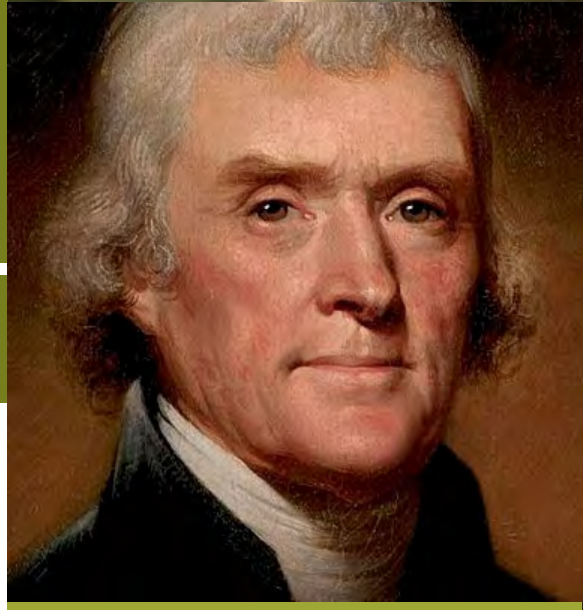
Monticello

THE QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

A Non-Profit Organization for Architect-Lawyers

Issue No. 26

Winter Issue - January 2019



PRESIDENT'S MESSAGE:
By Suzanne Harness, AIA, Esq.
Harness Law, PLLC

Happy New Year, TJS Members! I hope 2019 will be your best year ever!

As you plan your 2019 events calendar, be sure to schedule a flight to Las Vegas so that you will be there on Wednesday June 5 to attend two important TJS events. First, from 8:00 a.m. to 12:00 noon, four of your TJS colleagues will present a half-day Workshop at the AIA Conference on Architecture. We can't thank Founder and Director Chuck Heuer enough for doing all the work to prepare and submit the workshop for AIA approval. Founder Craig Williams, Vice-President Donna Hunt, and I will join him to present the program, and we look forward to seeing you and colleagues from your offices in the audience. The Workshop is WE103: "Legal Best Practices for Architects" and registration opens January 16, 2019.

Also, on June 5, 2019 is our Annual Meeting at 5:30 p.m., with venue to be announced, followed by cocktails and dinner. For the first time this year, spouses and guests will be invited for the cocktail hour and dinner following the meeting, which should make for a much larger group than in past years. You won't want to miss it.

Our editor, Bill Quatman, has outdone himself once again with this issue, not only by giving *Monticello* an entirely new "look", but also by providing page after page of substantive content that is sure to help you in your practice along with the latest news about your fellow TJS members. Kudos also go to Bill for becoming the first person to become a fellow in both the AIA and the DBIA — don't miss the story and photo on page 4.

Also, see on page 4 that TJS Director Rebecca McWilliams is now the newest member of the New Hampshire House of Representatives! Although the AIA has for many years encouraged architects to run for office and become more active in their local political races, very few have picked up that gauntlet. With two small children, a farm, and a practice to run, it can't have been easy for Rebecca, and we wish her much success. Congratulations, Rebecca!

If you think that the AIA is turning out new contract documents so fast that you can't keep

(cont'd on p. 2)

Know of Another Architect-Lawyer Who Has Not Yet Joined The Jefferson Society, Inc.?

Send his or her name to TJS President Suzanne Harness, AIA, Esq. at: sharness@harnessprojects.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

Inside This Issue:

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

up with them, you are not alone, but we have help for you. See the article below for a list of 13 new AIA Contract Documents just released on October 30, 2018.

Of particular interest to me is the AIA's "Guide to Equitable Practice," now in draft form and covered in depth on pages 7-8. The AIA is seeking feedback, and I encourage you to provide it, especially if you are involved in architecture firm management. The Guide is part of the AIA's goal to make the profession as diverse as the nation and is the result of an AIA Board Resolution passed by member delegates at the 2015 annual conference. One of the stated reasons for members to "realize the goal of equitable practice" is to retain talent, which is always a challenge in boom years. A recent opinion by Allison Arieff, "Where Are All the Female Architects?" published in the *New York Times* on December 15, 2018 sheds some light on the topic of vanishing women in our profession. We know that half of all architecture graduates are women, but we don't know why they represent only 20% of licensed architects and only 17% of firm principals. The opinion does not provide one answer, but offers the thoughts of several prominent women architects across the US. See the opinion by Ms. Arieff at this link:
https://www.nytimes.com/2018/12/15/opinion/sunday/women-architects.html

Lastly, if you did not receive an email from our Treasurer, Jose Rodriguez, asking you to pay your very nominal annual dues of $50, please look for it in your spam filter. The emails went out on January 7, 2019 under the name "Semone Menard." If you did not receive it, please send Jose an email at jrodriguez@drbdc-law.com.

AIA Releases 13 New and Updated Contracts

(Washington, D.C.) On Oct. 30, 2018, the American Institute of Architects (AIA) released 13 new and updated contract documents. One of the most notable changes among this set of updated contracts, includes the new Contractor-Subcontractor Master Agreement (MSA) and its accompanying work order. The new agreement allows a contractor and subcontractor to agree to a predefined set of terms and conditions that will apply to multiple scopes of work. Another significant update is the new Joint Venture Agreement for Professional Services, which was revamped to address the significant legal implications associated with joint venture business relationships. The following is a complete list of new and updated forms and agreements being released:

- **A121–2018,** Standard Form of Master Agreement Between Owner and Contractor where Work is Provided Under Multiple Work Orders
- **A221–2018,** Work Order for Use with Master Agreement Between Owner and Contractor
- **A421–2018,** Standard Form of Master Agreement Between Contractor and Subcontractor Where Work is Provided Under Multiple Work Orders
- **A422–2018,** Work Order for Use with Master Agreement Between Contractor and Subcontractor
- **A701–2018,** Instructions to Bidders
- **B121–2018,** Standard Form of Master Agreement Between Owner and Architect for Services Provided Under Multiple Service Orders
- **B221–2018,** Service Order for Use with Master Agreement Between Owner and Architect
- **C101–2018,** Joint Venture Agreement for Professional Services
- **C402–2018,** Standard Form of Agreement Between Architect and Consultant for Special Services
- **C421–2018,** Standard Form of Master Agreement Between Architect and Consultant for Services Provided Under Multiple Service Orders
- **C422–2018,** Service Order for Use with Master Agreement Between Architect and Consultant
- **G709–2018,** Proposal Request
- **G711–2018,** Architect's Field Report

The new and revised 2018 documents are currently available online. For more information, go to:
https://www.aiacontracts.org/

Jefferson Society Plans for Nov. 2020 Supreme Court Admission Day

TJS Members Jessyca Henderson and Jessica Hardy have worked to secure space with the United States Supreme Court for a group of twenty-five Jefferson Society members to be admitted in a ceremony on Nov. 16, 2020. If you are interested in joining the group, please let them know as soon as possible by adding your name to the roster of candidates. You may also fill out the application paperwork in advance, but should wait until Dec. 2019 to do so, because the certificates of good standing are only good for one year. We will need to have everyone's applications completed and turned in by the end of Aug. 2020 to ensure that we have everything in place in time for the event. The event planners will keep track of the group's progress and send out reminders as the date draws closer. We hope you will consider joining in! For more information, contact Jessyca at jessyca.henderson@gmail.com. To fill out the application in advance, go to this link: application paperwork.

(Above) The Nov. 13, 2017 class of Jefferson Society members and friends who were admitted to the U.S. Supreme Court. Don't miss your chance to be in the next class for Nov. 2020.

NEW YORK: Engineer Not Liable to Workers Exposed to Toxic Soil

In connection with a highway construction project in New York, the general contractor hired an environmental consultant ("Conrad") to prepare environmental safety plans required by the state because the location of the project contained a landfill that was known to be contaminated by hazardous waste. The state of New York entered into a contract with another engineering firm ("Liro") to perform engineering inspection services. During construction, several employees of the contractor complained of dizziness while working, and were taken to a nearby hospital for treatment. These employees drove dump trucks and filled the trucks with soil from the area of the landfill. The employees sued the two engineering firms, Liro and Conrad, alleging that they were exposed to, and injured by, toxic substances in the soil they were excavating, and that they were not provided with proper protective equipment. The plaintiffs moved for summary judgment on the causes of action alleging violations of Labor Law §§ 200 and 241(6) insofar as asserted against Liro. Thereafter, Liro and Conrad separately moved for summary judgment, which the trial court granted in their favor. The workers appealed.

In affirming the summary judgments for the two engineering firms, the Supreme Court, Appellate Division held that Liro established that it lacked the authority to supervise the work to a sufficient degree to impose liability under a theory of common-law negligence or under the Labor Law. The workers did not present any evidence to raise a material issue of fact so as to preclude summary judgment. As to the other engineering firm, the Court held that Conrad submitted evidence that, as the entity charged with creating environmental safety plans, it exercised no supervisory authority at the highway construction project work site and owed no duty of care to the plaintiffs. Again, the workers did not present any contrary evidence so as to preclude summary judgment. Regarding the other allegations regarding proper protective equipment under Labor Law § 241(6), the Court noted that this code section refers to the atmosphere of unventilated confined areas where dangerous air contaminants are present or where there is an insufficient oxygen supply. As such, it was inapplicable here, and summary judgment was properly granted. *Marl v. Liro Engineers, Inc.,* 73 N.Y.S.3d 202, 159 A.D.3d 688 (N.Y.A.D. 2 Dept. 2018).

Rebecca McWilliams Wins Election to New Hampshire House of Representatives!

TJS member Rebecca McWilliams is the newest member of the New Hampshire House of Representatives, representing Merrimack 27. She was elected to office on Nov. 6, 2018 with 52.5% of the 12,217 votes cast. Her term runs through 2020. Rebecca is an Architect, Attorney and Farmer, who lives in Concord, N.H. She got her B.Arch. from Roger Williams Univ., and her J.D. from Suffolk Law School. Rebecca and her husband own and run Lewis Farm. "I am no stranger to hard work. As a woman of action, when I say I'm running to make a difference, I will do it," she said.

"As a mother of two, an employer, an architect, and a business owner, I know how to balance a budget. I believe it is important to secure the funds for a project before committing. As a transactional attorney, I am skilled at the art of compromise and negotiation. I am comfortable reaching across the aisle to solve our pressing state issues. If you are looking for a progressive candidate, who cares about constituent services, and making Concord a great place to live, the buck stops here: I won't let you down." Congratulations to new state representative, Rebecca McWilliams! You make us proud.

DBIA Designated Design-Build Professional™ FELLOW

TJS Member Bill Quatman Elevated to Fellow of The Design-Build Institute of America

On Nov. 8, 2018, the Design-Build Institute of America (DBIA) inducted its first class of Fellows (FDBIA) at the annual convention in New Orleans. The fellowship program is modeled on the AIA's College of Fellows and is the highest level of DBIA Certification, acknowledging "the achievements of the nation's most accomplished design-build professionals." Per the DBIA's press release, "Elevation to Fellow status celebrates individual career achievements and promotes DBIA principles through the DBIA College of Fellows. DBIA Fellow status is limited to 2% of Designated Design-Build Professionals who are elected to Fellowship by a jury of their peers." Among the inaugural class of 2018 was our own Bill Quatman, FAIA, Esq. Bill is the first person to become both a fellow of the AIA and DBIA. (See photo, below, Bill second from right)

ARIZONA: Owner Can Sue A/E Firm Which Was Sub to A Design-Build Contractor

The department store giant Macy's Inc. sued a design-build contractor and its architect/engineering firm ("HMA"), after a sprinkler system leaked in an Arizona distribution center. Macy's contended that the sprinkler heads had been hand-tightened, rather than wrench-tightened, and, as a result, one of them became loose and fell off the pipe, causing water to cascade onto shoes being held at the distribution center. The water damaged 44,490 pairs of shoes, only some of which could be sold in a salvage sale, resulting in a net loss of nearly $3.8 million. The design firm moved to dismiss the complaint against it because Macy's did not adequately allege duty or specific negligent conduct by HMA. The federal trial court granted that motion, without prejudice, and Macy's filed an amended complaint, which included two exhibits that were intended to satisfy the Arizona certificate of merit law, A.R.S. § 12-2602. (That statute requires the plaintiff's lawyer to certify whether expert testimony is required and, if so, to serve a preliminary expert opinion affidavit with the initial disclosures that are required). However, the trial court struck the amended complaint and the two exhibits because Macy's failed to comply with a local rule. In response, Macy's refiled its amended complaint but failed to refile the two exhibits meeting the Arizona certificate of merit law. The court ordered Macy's to refile the two exhibits by a certain date, but Macy's ignored this deadline. As a result, HMA moved to dismiss a second time based on the missing exhibits and for failure to state a claim.

The design-build contract represented that HMA "would assume the responsibility of being the project architect." Macy's amended complaint asserted negligence claims against both the contractor and against HMA. Although the complaint alleged that the contractor and HMA were "affiliated corporations which represent they operate jointly as a single entity and provide construction and engineering/architectural services as 'H&M Company' ", it also alleged separate conduct on the part of each defendant. With respect to HMA, the amended complaint alleged that it "took numerous actions to actually supervise construction of the Macy's distribution center," "assumed the responsibility for providing professional engineering/architectural services to design and construct the addition to Macy's distribution center in a first-class and workmanlike manner, [and] failed to do so," and "assumed the responsibility of directing construction of the Macy's distribution center to achieve such a result, [and] similarly failed to properly supervise that construction." Further, the amended complaint alleged that HMA "failed to require in its plans, drawings, directives or otherwise that its employees or its subcontractors wrench-tighten the sprinkler heads in compliance with the governing standards."

The disputed issue was whether HMA owed a "duty of care" to Macy's, which is one of the elements of a claim for negligence. However, the only duty-related argument properly raised in HMA's motion to dismiss was a narrow one (i.e., whether, as a factual matter, the amended complaint contained any allegations suggesting it bore responsibility for the faulty sprinkler system). The court rejected that argument as "unavailing," stating that the amended complaint specifically alleged that HMA was responsible for the system's design and for supervising the system's installation. Next, HMA argued that Macy's did not have a "special relationship" with the design firm. The court rejected that argument also, holding that Macy's had advanced several different theories as to why a special relationship came into existence, including a contract theory and a negligent-undertaking theory, adding, "Arizona courts have accepted those theories when authorizing negligence claims against professionals, even in the absence of a contractual relationship between the parties." As a result, the Court denied HMA's motion to dismiss the first amended complaint, and gave Macy's an extension to file the exhibits required to meet the certificate of merit law. See, *Macy's Inc. v. H&M Construction Company Inc., et al.,* 2018 WL 6040054 (D.Ariz. 2018).

MONTANA: Architectural Firm Not Liable To Owner's Civil Engineer For Payment

A civil engineering firm ("Big Sky") sued the project owner ("Dunlavy Corp.") and sued both the principal shareholder of the owner's architectural firm ("Thomas") and the firm ("WAPC") seeking payment for services rendered on a building construction project. The trial court entered a default judgment against the project owner, a non-existent company, and subsequently granted the architect's motion for summary judgment. The engineering firm appealed to the Montana supreme court, which affirmed.

The evidence showed that incident to providing architectural and

design services to the project owner, WAPC commissioned Big Sky to provide onsite engineering services. WAPC gave Big Sky a notice to proceed via email, which read: "Please accept this email as your authorization to begin work on the Shelby [project] site. You can proceed on an hourly basis per the schedule you sent me. For now, you can invoice your time to [WAPC] as listed below. This may change as things proceed on the project." Several weeks later, Big Sky emailed an invoice to WAPC for $19,610.86 for Big Sky's completed project work. The next morning, WAPC replied by email, stating: "The owner would like you to bill him directly for your services. If you could modify the invoice so it is to him and send it there that would be great." Without objection or question, Big Sky re-addressed the invoice as directed and sent it to the address specified in the WAPC email. When the invoice went unpaid, Big Sky filed this lawsuit. Big Sky ultimately obtained a default judgment against the project owner for the principal amount of the contract debt ($19,610.86), plus costs and interest. Big Sky then moved for summary judgment against WAPC for the same amount on claims of account stated and breach of contract. WAPC argued that it never assented to the Big Sky invoice as a debt owed by WAPC, and that WAPC was not liable in contract because Big Sky was aware that WAPC was acting as an agent for the project owner. The trial court denied Big Sky's motion.

Later, WAPC and Thomas filed their own motion for summary judgment on the asserted grounds that: 1) neither of them assented to the Big Sky invoice as a debt they owed; 2) WAPC was not liable because it entered into the Big Sky contract merely as an agent for a disclosed principal; and, 3) Thomas was not liable for any debt attributed to WAPC because he, in turn, was merely acting as a known agent for an identified principal (WAPC) and that grounds did not exist to pierce WAPC's corporate veil. The trial court granted summary judgment to both defendants, concluding that Big Sky had reason to know that WAPC engaged Big Sky as an agent of the project owner; and Big Sky neither pled nor made a supported factual showing for piercing WAPC's corporate veil. In affirming, the Montana supreme court held that WAPC's directive to invoice it was qualified (i.e. "for now ... you can invoice" WAPC but "[t]his may change as things proceed ..."). The court found that Big Sky's own contemporaneous conduct eliminated any ambiguity in WAPC's initial email statement, when it responded by email directly to WAPC and the owner, and then promptly redirected the invoice to the owner as instructed "without question, objection, or statement evincing any prior understanding or manifestation of mutual intent that WAPC would be personally bound."

Next, Big Sky asserted that the trial court erroneously disregarded the unqualified common-law rule that an agent who contracts on behalf of a non-existent principal is personally liable on the contract regardless of the agent's good-faith belief in the principal's existence. The supreme court deflected that argument, stating, "Here, while Dunlavy Corp. did not exist, it is beyond genuine material dispute that Allen Dunlavy did exist and that Big Sky had reason to know of his existence at the time of contracting. Not only was WAPC an authorized and apparent agent for a disclosed principal (Dunlavy), . . . Big Sky made no non-conclusory showing rebutting WAPC's assertion that WAPC did not expressly or implicitly agree to be personally bound." Summary judgment was affirmed. *Big Sky Civil and Environmental, Inc. v. Dunlavy,* 429 P.3d 258 (Mont. 2018).

Opposition Voiced Against Thomas Jefferson Plantation Exhibit At Detroit's African-American Museum

(Detroit, MI). According Nov. 2018 articles in the *Detroit Free Press*, a coalition of community groups has voiced strong opposition to a planned Thomas Jefferson Monticello plantation exhibit coming to Detroit's Charles H. Wright Museum of African-American History. The Coalition for Black Legacy is calling the museum's decision to exhibit featuring Thomas Jefferson's plantation "a slap in the face," referring to the third U.S. president as a "slave master." A spokeswoman for the museum said in a statement that the "Paradox of Liberty" exhibition is "a powerful exhibit that tells the story of Sally Hemings and other families who were enslaved at the Monticello Plantation — from their perspective." The Wright Museum in Detroit was founded in 1965 and contains artifacts that depict the "the exploration and celebration of African-American history and culture," according to its website. The coalition said it may consider the possibility of a lawsuit against the museum and its board members, and that it "will not stop" until demands are met. Protesters held signs reading "Do the Wright thing" and "Hands off our museum" at a November 2018 news conference.

AIA Announces New Guide to Equitable Practice

(Washington, DC) On Nov. 30, 2018, AIA released the first three chapters of the draft Guide to Equitable Practice. The sneak peek of the Guide was released for AIA members only and will be available to the public early in 2019. The Institute is soliciting member feedback to help determine the next steps to take with this resource. To provide feedback, email the AIA at equityguides@aia.org.

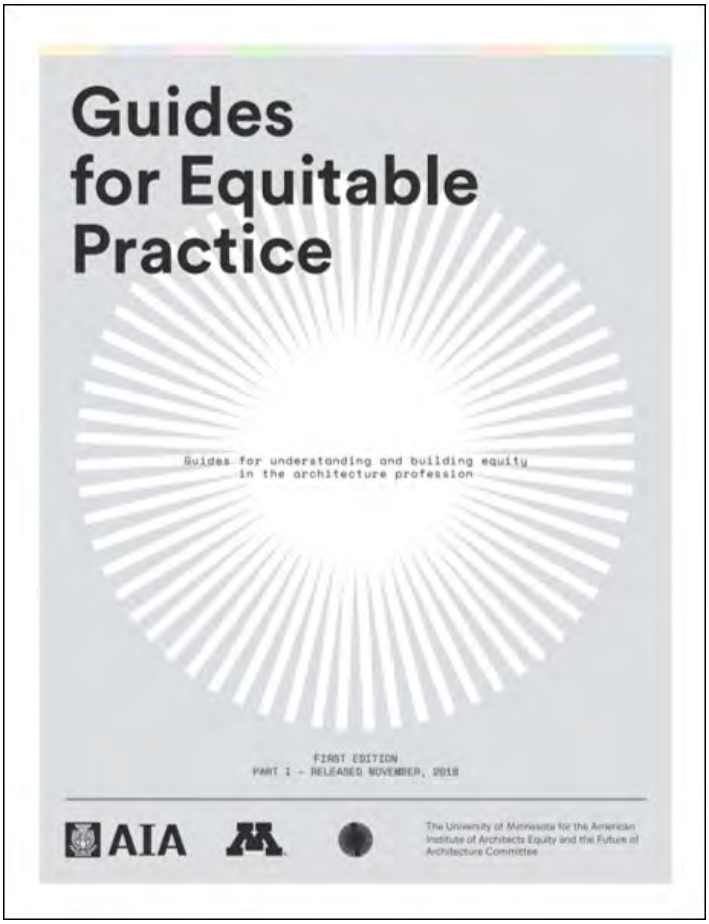
In its early release, the AIA stated that increasingly, architects will be called to lead efforts in finding solutions to many of our society's most pressing issues. "To meet these challenges, as well as the unknown ones ahead, we must have the talent, passion, and creativity of a diverse cohort of students, professionals, and leaders," the AIA stated.

The Guides for Equitable Practice, done in partnership with the University of Minnesota and the American Institute of Architects' Equity and the Future of Architecture Committee (EQFA) are a vital part of AIA's long-term commitment "to lead efforts that ensure the profession of architecture is as diverse as the nation we serve." These guides will help members make the business and professional case for ensuring that their organization meets the career development, professional environment, and cultural awareness expectations of current and future employees and clients.

Each chapter includes real-world-derived best practices, relevant research, and other tools to help AIA members address a variety of employment and personnel issues about equity, diversity, and inclusion. Each guide begins with a baseline explanation of its topic, conveying the knowledge and language required to have meaningful conversations with individuals at any level of a firm. The user-friendly layout and short, consumable sections are designed so that members can find the content they need easily and quickly.

The November 2018 release included only Part I of a planned 3-part Guide. Part I includes an Introduction, and chapters on: 1) Intercultural Competence; 2) Workplace Culture; and, 3) Compensation. Part II will include: 4) Recruitment & Retention; 5) Negotiation; and, 6) Building Relationships. Part III will cover: 7) Managing a Career; 8) Engaging Communities; and, 9) Assessing & Measuring.

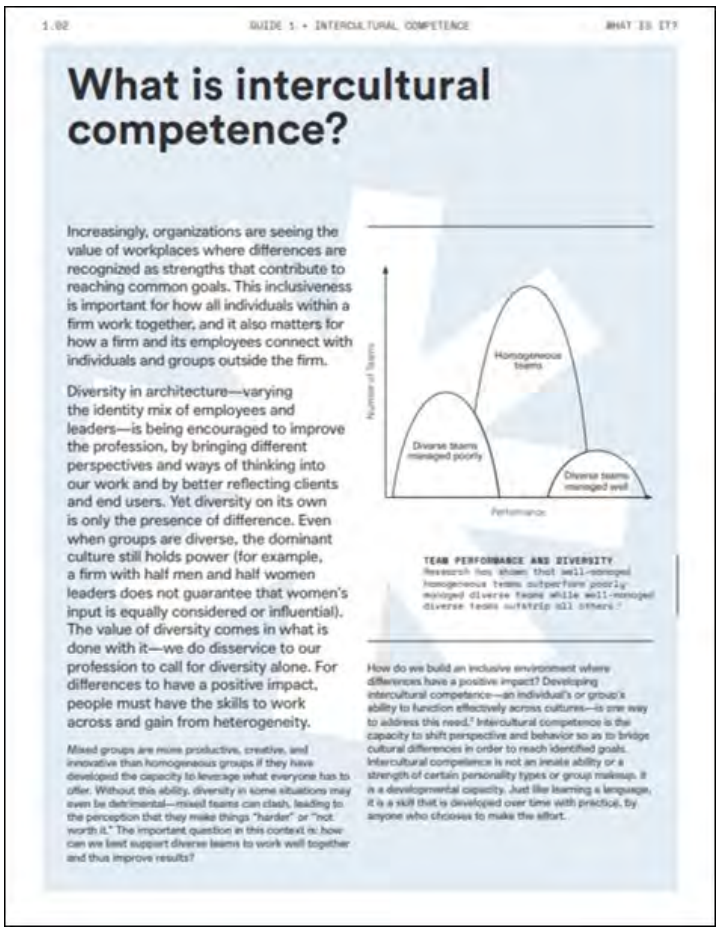
According to the Introduction, the Guides for Equitable Practice emerged from a series of AIA resolutions responding to growing awareness of equity issues in the architecture profession and the need for greater understanding of ways to improve the architecture community. In 2015, the AIA board ratified Resolution 15-1: Equity in Architecture, which was passed by member delegates at the National Convention, calling for "women and men to realize the goal of equitable practice in order to retain talent, advance the architecture profession, and communicate the value of design in society." The resolution called for the establishment of a Commission on Equity in Architecture, which in 2017 released five areas of focus with eleven priority recommendations for "expanding and strengthening the profession's commitment to equity, diversity, and inclusion in every practice," to be implemented by the AIA over the following three years. The Equity and Future of Architecture Committee (EQFA) launched in 2017 to implement the recommendations and support related initiatives. To begin addressing the fourth recommendation, "Create guides for equitable, diverse, and inclusive practice," the EQFA developed the list of topics for the guides. In 2018, the AIA issued a request for proposals to develop the guides and selected the research team based at the University of Minnesota.



The Introduction explains that the guides are intended for individuals, firms, and other organizations within the architectural community. Though the antecedents to these guides (particularly, AIA, Parlour Guides and Equity by Design's research) were primarily gender focused, as is much of current research, the AIA's intent was that the guides should define differences broadly. Therefore, the guides include the range of identities in the profession and address the importance of acknowledging, valuing, and benefitting from the differences between them. The AIA emphasized data about people of color and women since the research on discrimination against these groups in the workplace is substantial. At the same time, there is growing awareness and research on issues around other identities, such as gender identity and expression, sexual orientation, social class, age, and disability. For clarity, the AIA specified where research findings are gender-specific or otherwise, and in order to start recognizing and naming differences, used the contributors' preferred pronouns and identities in quotes and stories. Each guide opens with an introduction that defines core topics and helps develop readers' shared understanding of them. It then presents information through several lenses to connect to readers at different stages of their careers and levels of development around these topics. "Recognizing that people and groups can share similar goals but prefer different means to achieve them, we hope that the guides provide readers a resource to better learn and practice what moves you and your organizational culture forward in ways that support your values-, mission-, and vision-driven efforts," AIA stated.

Will the AIA guide create any legal duties for AIA members? Will it be used as evidence of how architects should practice? The guide ends with a disclaimer which reads:

"The views expressed are the views of the authors, not necessarily those of the AIA. The Guides for Equitable Practice are designed to provide resources to individuals, firms, and other groups for achieving equitable practices in the profession of architecture. The content of the Guides does NOT constitute legal advice. The Guides are NOT a substitute for engaging competent legal counsel. Ensure legal and regulatory compliance in enacting any portions of the Guides. THE GUIDES ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR USE OR PURPOSE, OR NONINFRINGEMENT. Some jurisdictions do not allow the exclusion of implied warranties, and the above exclusion does not apply to them."



NEW YORK: Contractor and Engineer Not Liable to Condo Owner for Economic Loss

A lady purchased a condominium unit and less than one year later, the condo began to sink. Walls cracked, the floors sloped almost four inches, and doors and windows would not close. She sued the seller, the contractor and the civil engineering firm that prepared plans, alleging negligence. The trial court granted defendants' motions to dismiss and the purchaser appealed. In affirming, the Supreme Court, Appellate Division, held that the purchaser could not a state claim for negligence against the contractor or engineer with whom she had no contract. The Court stated, "under New York law, a plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship." Judgment for the contractor and engineer was affirmed. *Sacks v. Knolls at Pinewood, LLC,* 69 N.Y.S.3d 677, 157 A.D.3d 917 (N.Y.A.D. 2 Dept. 2018).

Site Photography

Eric O. Pempus, FAIA, Esq.
DesignPro Insurance Group
Cuyahoga Falls, OH

The Design Professional shall visit the site to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. As they become "generally familiar with the progress and quality of the Work," Design Professionals customarily, although not required under standard agreements, use photography (either photos or videos) to document work on the site. You can use this photography to satisfy the contractual requirement to "keep the Owner reasonably informed about the progress and quality of the Work." The ever-evolving technology of photography is irrelevant to this discussion. We will instead talk about what to photograph and what photographic format to use.

What to Photograph?

Appropriate subjects for site photography fall into three categories: (1) deviations from the Contract Documents, (2) specific areas where significant construction progress has been made since the previous visit, and (3) the overall progress of the construction. Each category has its own guidelines.

1) Deviations: You should document deviations, including defective work, with photographs, from as many angles as to make the nature of the deviation clear. Stand close to the defective work so the defects can be readily seen in the photos. If showing scale is important, include in the photo either a scale with visible markings in inches or an object with a commonly known size (say, a pen).

2) Areas Showing Progress: On a typical site visit, you will spend most of your time observing work that has been performed since your previous visit. These areas should be photographed to graphically support your field report descriptions of the work. Frame your photos so only the new work in included.

3) Overall Progress: Indiscriminately snapping numerous shots of the site on each visit may not be the best practice. You'll end up with a lot of photos you will never need, either for your field reports or for your office. However, once these unseen photographs are filed they could be used against you if a dispute arises. For example, if one of these photos shows a defect that you hadn't identified in your field report. The owner and contractor could claim that you were negligent in not identifying the defect, since you had obviously seen it.

Don't include the faces of construction workers or others in your photos unless it's unavoidable. If the photos are used for any reason other than your field report, you may consider blurring people's faces. If you see a condition that you believe is unsafe, don't photograph it. Instead, report the condition immediately to the contractor's superintendent.

Photographic Formats.

All you need for site photography is a smart phone or a small pocket camera; you're a design professional, not a professional photographer. These tools can give you still and video records, as well as a flash when needed. Time-lapse photography of the site over a long period of time is usually outside the design professional's scope.

In Conclusion.

Each photo should be short for a specific purpose, usually to visually support your field report narratives. When used with your professional judgment, photographs can be an effective tool in documenting the construction progress and in helping you produce effective field reports.

About the Author.

Mr. Pempus has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years.

The comments and advice of this author are his own, and are not meant to reflect the position of The Jefferson Society, Inc.

CALIFORNIA: Owner's Claim Against Architect Barred By 2-Year Tort Statute; But Not As to Separate Contract Claims

A hospital entered into a written contract with an architectural firm to serve as the lead architect to design and administer the construction of a new eight-story hospital building that would both replace an existing facility and put the entire campus into compliance with current and forthcoming seismic requirements without interrupting the hospital's ability to continue to serve the health care needs of the community. The contract contained a negligence-based standard of care clause, stating that, *"Architect's services called for by this Agreement shall be performed consistent with that degree of care and skill ordinarily exercised under similar conditions by similar design professionals practicing at the same time in the same or similar locality."* It also required that the design services, which included preparing schematic design documents through completed construction documents, be in conformity with the applicable California building code requirements and other governmental authority requirements.

In Nov. 2013, the hospital became aware of the serious defects in the construction documents and subsequently terminated the architect's contract. Under a Termination and License Agreement, the architect granted the hospital the right to correct the designs with another architect and to continue with the project. The Termination Agreement also preserved the hospital's right to bring claims directly against the architect for damages arising from work performed prior to termination. Thereafter, the hospital hired a replacement architect and completed the project with significantly increased design and construction expenses. Per California's certificate of merit law, the hospital filed a certificate with the court on July 30, 2018, and filed suit against the architect the next day for a single claim for breach of contract. California law requires that in "every action ... arising out of the *professional negligence* of a person holding a valid architect's certificate ... the attorney for the plaintiff ... shall file and serve the certificate specified in subdivision (b)." Cal. Code of Civ. Pro. § 411.35(a). The architect thereafter removed the action based on diversity jurisdiction and four days later filed a motion to dismiss.

The first issue before the court was which state law applied. The architect argued that Texas law applied, based on a choice of law provision in the parties' agreement ("the law of the principal place of business of the Architect"). While the architect's principal place of business was Texas at the time the agreement was created, the firm was later acquired by a larger firm, whose principal place of business was in California. The court concluded that, it must draw all inferences in plaintiff's favor at the motion stage and, therefore, California law applied.

The next question was whether the suit was time-barred under California law. The architect maintained that although pled as a breach of contract claim, the hospital's claim sounds in negligence and, therefore, the two-year negligence statute of limitations applied rather than the longer four-year contract statute. The court agreed that "the gravamen of the allegation that Defendant failed to meet the standard of care required by the agreement is professional negligence. The relevant agreement provision merely restates the legal duty the law imposes on architects. The claim based on that provision therefore sounds in tort." However, construing the factual allegations in the light most favorable to the plaintiff, the court stated that it could not conclude, as a matter of law, that the substance and gravamen of "the entirety of Plaintiff's complaint sounds in tort as opposed to contract as pled."

In the end, the court granted the architect's motion to dismiss in part, only to the extent that the plaintiff's breach of contract claim rests on the defendant's ordinary obligation to perform work consistent with the standard of care imposed on an architect, but denied the motion to the extent plaintiff's claim is based on a different breach of the contract.

Chinese Hospital Assn. v. Jacobs Engineering Group, Inc., 2018 WL 6069169 (N.D. Cal. 2018).

Call for Articles on ADR!

TJS member Lawrence (Larry) M. Prosen is the Editor In Chief of the *American Journal for Construction Arbitration and ADR* published by Juris Publications. Larry has reached out to all TJS members seeking new "articles, case studies, rule commentary/ comparisons, and other like pieces on anything construction arbitration and ADR, DRBs, and other aspects of ADR, whether domestic or overseas/inter-national." These are intended to be practical pieces, not the level of a formal law review, although Larry says, "we are willing to have those as well." See this link: http://www.jurispub.com/Bookstore/All-Journals/American-Journal-of-Construction-Arbitration-ADR-.html.

ILLINOIS: Architects Should Be Impartial; Certificate of Substantial Completion Is Rejected When Actions Were Arbitrary

The facts in this case are fairly complex, so stay with me on this one. A school board planned a $32 million project to renovate and expand five schools. The board awarded the construction contract to D & D Associates, Inc. ("D & D"), in three separate contracts known as Contracts 1A, 1B, and 1C, and the project was expected to be completed by Sept. 2002. The contracts imposed liquidated damages of $500 per day for milestone dates and $1,000 per day for substantial completion dates. AMICO provided payment and performance bonds as D & D's surety for the project. The Vitetta Group, Inc. ("Vitetta:) was the project architect, with the responsibility to determine the dates of substantial completion for each contract.

In 2003, the board terminated D & D and called on the surety to complete the project. In 2005, the surety sued the school board in New Jersey for approximately $2.2 million in contract balances owed by the board. The board filed a counterclaim for liquidated delay damages of $15 million.

In Aug. 2012, the circuit court of Cook County, Illinois entered an agreed order of rehabilitation with respect to the surety, which was domiciled in Illinois. The order enjoined the bringing of, or further prosecuting, any affirmative claims against AMICO outside of the Illinois proceeding. In May 2013, the Illinois court entered an order of liquidation with a finding of insolvency, which converted the rehabilitation into a statutory liquidation and again enjoined the bringing of or prosecuting any claims against AMICO outside of the Illinois proceeding. Lumbermens Mutual Casualty Co. ("Lumbermens") became the successor to AMICO.

A New Jersey court enforced the Illinois anti-suit injunction and dismissed the school board's counterclaim for liquidated damages, without prejudice to the board's right to bring the claim in the Illinois proceeding. In July 2013, the school board filed a petition for relief in Illinois from the anti-suit injunction so that its counterclaim could be pursued in New Jersey. The Illinois court denied that request and confirmed that the board could not assert its delay claims in New Jersey. A bench trial in New Jersey was held on AMICO's claims, and in May, 2015, the New Jersey court entered judgment in favor of AMICO for $2,647,115, with no offset for LD's. The school board then filed a claim against AMICO in the Illinois proceeding, contending that AMICO was liable for liquidated and actual damages for delays of $14,022,883 plus interest in liquidated damages and $1,471,017.96 plus interest in actual damages. In response, the liquidator for Lumbermens filed a motion to disallow the board's claim, arguing that the board was not entitled to liquidated damages for delayed substantial completion because: 1) the board took occupancy in time for the 2002 school year; 2) there were no liquidated damages for delayed substantial completion of various interim milestones; and, 3) the board could not recover actual damages per the construction contract and applicable law. The board filed a response, noting that the liquidator had proffered the board's expert reports from the New Jersey proceedings stating completion of Contract 1A in Dec. 2004, and Contract 1B in Nov. 2004. These dates of substantial completion were established by the architect's certifications, which could be overcome only by proof of fraud or bad faith, the school board argued.

For Contracts 1A and 1B, surety maintained that the substantial completion date was in Sept. 2002, per temporary certificates of occupancy and statements from the board's superintendent. Further, the surety argued that there was evidence that the architect "was biased and acted arbitrarily." The Illinois trial court found that part of the delay pertaining to demolition was directly caused by the architect, Vitetta, and the board, in that neither of them understood the existing condition of the structure when the project began. Further, the court held that the board was not entitled to actual damages under New Jersey law. The school board appealed.

As to the LD's, the board argued that the court should have adopted the architect's certifications as to substantial completion in 2004, not 2002. First, the appellate court disposed of arguments that the surety was barred from challenging the architect's certificates based on collateral estoppel and judicial estoppel, finding that the surety had preserved its right to challenge them. Next, as to entitlement to liquidated damages, the court held that under New Jersey law, "Substantial completion occurs when construction is sufficiently complete...so the owner can occupy or utilize the building" and the only remaining task is the punchlist, which is a final list of small items requiring completion, or finishing, corrective or remedial work.

As to adopting the dates certified by the architect, the court noted: "Generally speaking, the architect's role is significant. In the typical construction contract and in the American Institute of

Architects documents used here, the architect or other designated design professional has multiple roles, functioning as an agent of the owner, consultant, and arbiter. The architect occupies a position of trust and confidence, and he should act in absolute and entire good faith throughout." The court continued, noting, "When the architect acts under a contract as 'the official interpreter of its conditions and the judge of its performance' he should side neither with the Owner nor with the Contractor but exercise impartial judgment." However, the court held that an architect's decision is not conclusive if he acted in bad faith, fraudulently, or arbitrarily, or if the architect made a gross mistake.

"When the architect acts under a contract as 'the official interpreter of its conditions and the judge of its performance' he should side neither with the Owner nor with the Contractor but exercise impartial judgment."

The trial court did not rely on the architect's dates because there was evidence that the architect had, at one point, declared Contract 1A substantially complete well before the dates later certified. "This change in position supports the circuit court's finding that the architect acted arbitrarily with regard to the Certificate of Substantial Completion," the court said. "Further, the architect's arbitrary conduct as to Contract 1A undermines the integrity of the architect's date of substantial completion for Contract 1B . . . Based on the record before us, we agree with the circuit court's decision not to defer to the architect's dates of substantial completion."

Without a reliable architect's certificate of substantial completion, the trial court properly referred to temporary certificates of occupancy as an appropriate benchmark for substantial completion. As a result, the decision of the trial court was found not unreasonable, nor did the court abuse its discretion in denying liquidated damages. For the foregoing reasons, the judgment of the trial court was affirmed. See, *In re Liquidation of Lumbermens Mutual Casualty Co.*, 2018 WL 6173580 (Ill .App. 1 Dist. 2018).

TEXAS: Court Refuses to Hear Interlocutory Appeal from Arbitration Panel on Certificate of Merit Requirement

A November 8, 2018 ruling by the Dallas' Fifth Court of Appeals answered the question whether a party can appeal an arbitrator's ruling on the validity of a certificate of merit under Texas law. In *SM Architects v. AMX Veteran Specialty Services*, the claimant ("AMX") filed a demand for arbitration in Aug. 2016 with the American Arbitration Association against SM Architects and one of its architects, Roger Stephens, as respondents. AMX stated the nature of the dispute was "professional negligence against architect and architectural firm; breach of contract; tortious interference with contract; and business disparagement." AMX followed Section150.002 of the Texas Civil Practices & Remedies Code by filing a "certificate of merit" with its demand. That Section requires that in any action or arbitration proceeding based on the provision of professional architectural services, the plaintiff must file a certificate of merit affidavit by a third-party licensed architect in support of its claims.

Some eight months after the arbitration proceedings commenced, the architect filed a motion to dismiss the arbitration claims, by alleging that the certificate of merit was inadequate. The arbitration panel denied the architect's motion without a hearing. The architect requested a state district court to vacate the arbitration panel's decision, claiming that an order denying or granting relief under §150.002 is immediately appealable.

However, AMX moved to dismiss the motion, stating there was nothing in § 150.002 to indicate that the Texas Legislature intended to confer jurisdiction on state courts to review an interlocutory order issued by an arbitration panel. The trial court denied the motion to vacate the arbitration panel's order, but stated its court order was a "final appealable order." The architect then appealed the denial of vacatur to the Fifth Court.

In ruling against the architect, the Court of Appeals stated that this was a case of first impression in Texas, and that, "Because we conclude the right to interlocutory appeal granted by section 150.002 does not apply to an order rendered by an arbitration panel, and the Texas Arbitration Act (TAA) does not provide a means for judicial review of such an order, we vacate the trial court's order as void and dismiss this appeal for lack of jurisdiction." Texas law favors arbitration and, therefore, judicial review of arbitration proceedings is extraordinarily narrow, the Court added. The court noted that, "We recog-

nize the goal of section 150.002, like the TAA, is to increase efficiency in conflict resolution. It does so by providing a means to quickly eliminate patently unmeritorious claims against licensed or registered professionals." The court reviewed the legislative history of Section 150.002 and found no indication that the authors intended significant judicial intrusion into ongoing arbitration proceedings. "If the legislature intended to expand judicial review of arbitration decisions beyond our limited review of arbitration awards, it could have done so by amending these sections. Absent a clear expression of intent to expand the court's jurisdiction, we cannot conclude the legislature intended anything more by its inclusion of arbitration proceedings in section 150.002 than to require plaintiffs in those proceedings to file a certificate of merit," the Court said. It is reported that SM Architects plans to appeal the ruling to the Texas Supreme Court. *SM Architects, PLLC v. AMX Veteran Specialty Services, LLC*, 2018 WL 5839657 (Tex. App.-Dallas 2018).

SOUTH DAKOTA: Engineer Not Liable to Contractor For Decisions Made In Good Faith; Summary Judgment Affirmed

On a road construction project, the contractor was late and the owner's engineer assessed the contractor $103,950 in liquidated damages. In response, the contractor sued the engineer, alleging that the engineer was negligent in its design, interpretation, and application of the plans and specifications, seeking damages of over $1.1 million. The engineer moved for summary judgment based on this paragraph of the construction contract:

"9.09 Neither Engineer's authority or responsibility under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, or any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them."

The trial court agreed with the engineer and granted summary judgment, finding that Par. 9.09 to insulate the engineer from liability to the contractor for negligence, absent a claim that the engineer acted in bad faith. The contractor appealed, arguing these five different theories:

1) that the engineer failed to plead Par. 9.09 either in avoidance or as an affirmative defense;
2) that Par. 9.09 is unconscionable;
3) that the construction contract was a contract of adhesion;
4) that the exculpatory clause should be construed as an indemnity provision that violates the anti-indemnity statute; and,
5) that the clause is against public policy.

The state supreme court rejected most of these theories because they were not properly raised before the trial court and, therefore, could not be raised for the first time on appeal. The Court found that, "under South Dakota law, an engineer can owe a duty to a contractor despite the lack of contractual privity between the parties," but here, the contract between the owner and contractor, via Par. 9.09, insulated the engineer from liability for its good-faith acts and failures to act by the authority given to them under the contract and contract documents.

As to the public policy argument, the Court stated, "Public policy is found in the letter or purpose of a constitutional or statutory provision or scheme, or in a judicial decision." Although state statute SDCL 20-9-1 mandates responsibility for injury caused by willful acts or want of ordinary care or skill, the Court said, "Nothing in this statute prohibits one party from agreeing by contract to release a third party from liability for ordinary negligence." The contractor argued that the clause exempted the engineer from both willful or negligent acts.

The Court pointed out that the contractor's suit against the engineer alleged only professional negligence, not a willful or negligent violation of law. The Court commented that the power of courts to declare a contract void for being in contravention of sound public policy, "is a very delicate and undefined power … [and] should be exercised only in cases free from doubt." But, in this case, "the exculpatory language unambiguously informed [the contractor] that [the engineer] would be immune from suit in tort or contract arising out of [engineer's] good-faith acts and failures to act by the authority given to them under the contract and contract documents." Summary judgment was affirmed for the engineer.

One justice dissented in part on the issue of the contractor's claim of negligent design of the project plans.

See, *Domson, Inc. v. Kadrmas Lee & Jackson, Inc.,* 918 N.W.2d 396 (S.D. 2018).

TEXAS: Contractor Could Not Avoid Certificate of Merit Requirement Under a Broad Exemption to the Licensing Law

In this case, engineering firms performed analysis of aggregate for a highway repair project and issued a report finding that the aggregate met the Texas DOT's specifications. During construction, however, the state, using its own engineers, independently analyzed the aggregate and found that only one of four batches met the specifications. The asphalt suppliers notified the contractor that they could not produce any more qualified aggregate and the contractor was forced to obtain aggregate from other suppliers in excess of its bid. The contractor sued the engineers for breach of contract, fraudulent inducement, negligence, negligent misrepresentation, gross negligence, and breach of implied warranty. The trial court granted the engineers' motion to dismiss for the contractor's failure to include a certificate of merit as required by Texas law. The contractor appealed, claiming that an engineer employee's preparation of aggregate analysis report did not constitute the "practice of engineering" due to an exemption under the Occupation Code.

The Court of Appeals examined the exemption for a "regular or full-time employee of a private business entity who is engaged in erecting, constructing, enlarging, altering, repairing, rehabilitating, or maintaining an improvement to real property in accordance with plans or specifications that have an engineer's seal." Tex. Occ. Code Ann. § 1001.062(a). The Court noted that to exempt an engineer by characterizing him as a "regular full-time employee of a private business entity" and by asserting he was not engaged in the practice of engineering, "renders the Legislature's intent meaningless," adding, "The Legislature is not presumed to have done a useless or meaningless act." In this case, a senior engineer, performed a service, i.e., an analysis of aggregate, "which required engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service. He signed a report confirming that the aggregate met TXDOT's specifications for a sealcoating project." Thus, the lawsuit for damages arose out of professional services rendered by a licensed professional engineer working for a registered engineering firm and a certificate of merit was required to be filed with the complaint. Judgment was affirmed for the engineering firms. *Ronald R. Wagner & Co., LP v. Apex Geoscience, Inc.,* 2018 WL 4344713 (Tex. App.-Amarillo 2018).

FDR Lays Cornerstone of Jefferson Memorial

The news website *Politico* ran a story on Nov. 15, 2018 noting that on that day in 1939, President Franklin D. Roosevelt laid the cornerstone of the Jefferson Memorial, located south of the National Mall along the Tidal Basin and directly south of the White House. In addition to a copy of the Declaration of Independence, the hollow cornerstone contains copies of the U.S. Constitution, the 10-volume "Writings of Thomas Jefferson" by Paul Leicester Ford, Jefferson's "The Life and Morals of Jesus of Nazareth" (aka "The Jefferson Bible," see pp. 25-26 of this issue) and an edition of each of the city's four major newspapers that were being published at the time.

The memorial was designed by John Russell Pope (1874-1937), an architect trained in the Beaux Arts tradition, who modeled the memorial after Jefferson's design for the rotunda at the University of Virginia. (Pope also designed the National Archives and the west building of the National Gallery of Art.) After his death, Pope's partners completed the work. FDR again presided on April 13, 1943, when the completed memorial was dedicated on Jefferson's 200th birthday. Excerpts from the Declaration of Independence, which Jefferson helped write in 1776, appear on the panel along the memorial's southwest interior wall.

Thomas Jefferson "believed, as we do, that the average opinion of mankind is in the long run superior to the dictates of the self-chosen," said President Franklin D. Roosevelt at the Nov. 15, 1939 cornerstone ceremony.

Pres. Roosevelt speaking at the 1939 ceremony laying the cornerstone for the Jefferson Memorial in D.C.

MEMBER PROFILE: DONALD ("DON") GRAY

Mueleman Law Group, PLLC
Boise, Idaho

TJS Member Don Gray married his high-school sweetheart, "as corny as that is," he says. Don and his wife, Samantha ("Sam") Gray, do not yet have any children, just a golden retriever puppy ("Piper") that keeps them very busy, "and demands our time," Don added. The couple live in Boise, Idaho, which Don tells us is "a great city nestled along the Boise River and the Idaho foothills. We are a very rapidly growing city that offers a tremendous amount of outdoor activities, amenities, and a very affordable cost of living. We have hundreds of miles of hiking and mountain bike trails minutes from downtown and are less than 20 miles from a ski resort. We are also about two hours away from 3 additional major ski resorts and the mountain lake resort town of McCall."

Don and Sam grew up in the mountain resort town of McCall, Idaho, which is about 200 miles south of Moscow, Idaho. Not surprising, when it came time to select an architecture school, Don chose the University of Idaho in Moscow. "Ever since I was young, I considered myself both a right and left-brain thinker. I loved designing and planning spaces, but also enjoyed the rigidity of logic, math, and science. Architecture provided a nice blend between these two areas, allowing me to be creative while designing within the more strict confines of construction realities. I chose to go to U of I because they have a great architecture program and was in state."

Towards the end of his Master's degree, which Don got at U of I in Boise, Don realized that he was not finished learning, and that he wanted to continue to pursue "the other half of my brain." Don and his wife, Sam, had moved from Moscow to Boise to be closer to work and internship opportunities during Don's Master's degree. "I had been interning with a local architecture firm for two years and began to realize that project managers working in architecture firms served more as a client counselor role, serving to regulate compliance, budget, and code issues. I realized that I could combine an architecture degree with a law degree and serve in a similar role." For law school, Don chose the University of Idaho in Boise.

What was his first job out of architecture? Don told us that during his last two years of getting his Master's degree, he worked for a regional design firm in their Boise office, where he did a lot of preliminary design/visualization work and some production. During his last year of law school, Don began working at a small boutique law firm based in Boise that focused on construction litigation and transactional work. The small firm setting allowed Don to get lots of client interaction, as there were only three attorneys in the office. Their clients were mainly general contractors and specialty subcontractors. Today, Don still works for that small boutique construction litigation firm, the Meuleman Law Group. "The best part of my job," he said, "is helping clients manage risk and evaluate business decisions. I also am a glutton for factually intensive, interesting construction litigation cases."

Don's wife recently started her own wedding design and planning company, "So for now, that is her baby," he said. "We stay very busy serving as honorary weekend parents to many nieces, nephews, and friends' children."

Outside of the office, Don is involved in the Central Idaho chapter of the AIA as an affiliate member, where he serves on the golf committee each year. He and his wife enjoy travelling, hiking, and "eating their way through new places." "We try to get as much hiking and travelling in as possible, despite our busy schedules. Before we settle down and have kids of our own, we want to travel to as many countries as possible," Don told us. He also serves as a committee member for a local Boise non-profit company called NeighborWorks that strives to provide education, counseling, and low-income housing for underserved citizens. Don is also the current president of the Idaho AGC's Construction Leadership Council, which is an organization to help foster young leaders in the construction industry.

What building inspires him? Don is fond of Tom Kundig's Delta Shelter, adding, "I like the raw aesthetic of the materials and the kinetic nature of the structure. The shelter feels at home in the woods and becomes a part of the landscape." His favorite architects include Kundig, as well as Santiago Calatrava and Bjarke Ingles.

(Above) Don's wife, Samantha Gray, with their puppy, Piper.

(Above) A Long Way From Boise! Sam and Don enjoying some cool water while on vacation in Bali, Indonesia. The couple "want to travel to as many countries as possible," Don told us. Bali is a good start!

Any advice for a young architect thinking about law school? Don said, "It's never too late to go back to school, and the combination of both an architecture and law degree provide a valuable insight that is hard to otherwise achieve. The combination of both degrees provides near limitless opportunities and makes you a competitive candidate for any industry dealing with design, construction, or development."

MEMBER PROFILE: DON BARRY

A3C Collaborative Architecture
Ann Arbor, MI

TJS Member Donald F. Barry, JD, AIA, LEED AP did not start out to become an architect or a lawyer. He began his academic pursuits at Kenyon College as a religious studies major. "My focus was on eastern religion and the works of Kierkegaard, Dostoevsky, and Kazantzakis," he said. Then, unlike most members of the Jefferson Society, Don went in reverse order, getting his law degree first - then his architectural degree. He returned to southeast Michigan and attended Wayne State Univ. Law School. While representing the underserved communities of Detroit at the Free Legal Aid Clinic at WSU, Don developed an attentiveness to social justice. Upon admission to the bar, he became a staff attorney at the Legal Aid Bureau of Southwestern Michigan in Kalamazoo. "It was there that I met my wife, Ramona Fernandez," he told us, "a brilliant and amazing woman who is the best thing that ever happened to me." Ramona is now an Administrative Law Judge for the Social Security Administration. "But at that time," Don says, "she was my *enabler*, allowing me to return to school at the Univ. of Michigan and become an architect. I was an older student (one of my peers called me 'the father figure of our class')." He wonders how many of us in this group owe our success in combining these two disciplines to such very special people in our lives? Probably most of us can identify a mentor, or enabler.

Don claims that he went into architecture as an alternative career but found the benefits of a legal background to be an inexorable advantage. "Architecture was a more natural fit and I found a home. I have been fascinated by the process of making things since my first childhood erector set. I was drawn to architecture through my hobbies, which now have grown to include woodworking, metalsmithing, leatherwork, and music." Don's approach to architecture is to combine clarity of vision with a process of inclusion. "Architects best serve their clients and communities by listening, collaborating, and delivering an appropriate yet unexpected result," he told us. "I admire architects that value the process of creation and can set their egos aside."

Don spent a decade of his career as Director of Operations for two larger A/E firms. It was a position that allowed him to combine his legal background with architecture in ways that he never anticipated. "It's been gratifying to help architectural professionals manage their risk. Many architects either are unaware of the risks they take, or assume that they are a necessary evil. My legal background has given me a unique take on architectural firm management." This year, Don joined A3C Collaborative Architecture in Ann Arbor, Michigan. "I now live and work in the town I love and have called home for thirty years," he says. "A3C is a firm that values sustainability, wellness, and inclusion. Ann Arbor is a university town with abundant music, culture, and food. It has been a fitting place to raise two great kids."

Don and Ramona have two sons: Louis, a social worker in the

Don and "his enabler," Ramona Fernandez, enjoying a cold drink on a beautiful day.

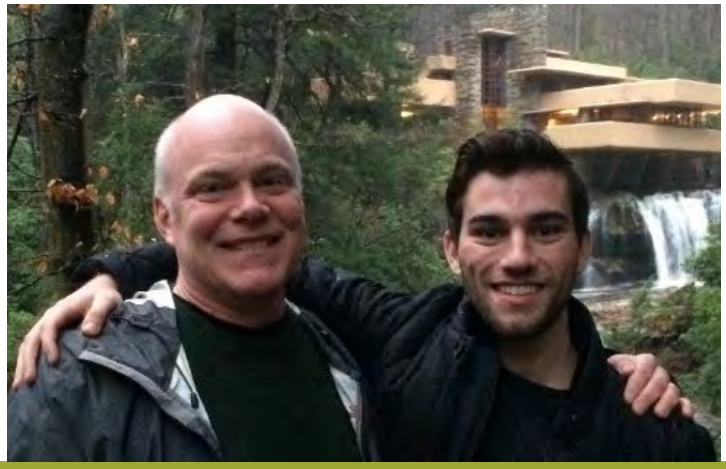
(Left) The family on game day, Jesse Fernandez, Don Barry, Louis Barry, Ramona Fernandez. Louis was the Center Snare on the Drumline for the Wolverines! (Right) Nature-loving Don in his "happy place" – Isle Royale National Park. (Below, right) Don and Jesse at Falling Water.

city of Detroit; and Jesse, a law student in Madison who also works for the Wisconsin Innocence Project.

Returning to Ann Arbor after working in Detroit for many years has allowed Don to become more active in the local community. He was recently honored to be elected as Vice President/President Elect of the Huron Valley Chapter of the AIA. "It's rewarding now to be focused on community-based projects," he said. "I particularly enjoy the challenges posed by our healthcare, education, and religious clients. Passionate (and compassionate) clients and colleagues lend meaning to the work. It has been rejuvenating to be around such committed people."

Don's favorite architect is the master of spatial sequence and intricate detail, Carlo Scarpa. In his eulogy to Scarpa, Louis Kahn wrote, "The detail is the adoration of Nature." That's "Nature", with a capital "N". To Don Barry, Scarpa's architecture represents a process, a journey, and a reverence for something other. "As someone who prefers traveling well to arriving, I find this to be an admirable perspective." Once a year Don goes to his "happy place," Isle Royale National Park for a backpacking trip. It is said to be the national park with the lowest number of visitors each year but the greatest percentage of returning visitors. Lake Superior, the world's largest freshwater lake, protects the park from the casual tourist. There are no motorized vehicles, aside from the passenger ferry that brings you on a four-hour jaunt across unforgiving water to the park on a remote island cluster near Michigan's border with Canada. Don says: "There are wolves and moose but no deer, bears, or raccoons. It is unparalleled. It is a sacred place that enters and calls you back."

What advice would he give to prospective architect-lawyers? "My approach has been to try to find a way to help that individual find meaning in their own journey. Respect Joseph Campbell's counsel and, 'Follow your bliss.' Be honest about your own path. Embrace the agony and the delight. If they want to combine architecture and the law, help them to find a singular route… one that leads to personal fulfillment and a transformation of both professions. Because sometimes the journey is more important than the destination."



GEORGIA: Suit Against Restaurant is Deemed One for Professional Negligence

After tripping and falling over a concrete wheel stop in the parking lot of a restaurant, a customer sued Chick-fil-A, Inc. ("CFA") and the store's owner and franchisee, on theories of negligence and nuisance. The trial court granted summary judgment to the store owner, ruling that he had no control over the design or repair of the parking lot, and partial summary judgment to CFA, finding that the negligent design and nuisance claims failed as a matter of law, but that she could proceed under the "distraction doctrine." CFA and the plaintiff both appealed.

With regard to plaintiff's allegations that the parking lot was defectively designed and engineered, the Court of Appeals characterized those as claims for professional negligence or professional malpractice. "To support a claim for negligent design or engineering, a plaintiff must present evidence of the applicable standard of care against which to measure the acts of the defendant … The plaintiff generally satisfies this requirement by presenting expert opinion testimony," the Court said. The plaintiff argued that she was not required to provide expert testimony because the issues were not beyond the knowledge of an average juror. The Court was not persuaded, holding that her professional negligence claim failed and both defendants were entitled to summary judgment on that claim.

As to ordinary negligence, the Court ruled that the plaintiff failed to present evidence that the wheel stop constituted a "hazardous condition" under an ordinary negligence analysis, which was her burden of proof. Under Georgia law, "wheel stops and similar static structures are common features of parking lots that should be anticipated by invitees and do not generally constitute hazards," the Court said. The plaintiff argued, however, that she did not see the wheel stop because it "blended in" with the white hatch marks on the buffer strip and pedestrian path, creating an optical illusion that the wheel stop was not an elevated trip hazard." The Court rejected this theory as well, stating, "because [plaintiff] failed to present evidence of a hazard under theories of either professional negligence or ordinary negligence, the defendants were entitled to summary judgment on her negligence claim."

Finally, as to her assertion of the "distraction doctrine," the Court noted that this doctrine "holds that one is not bound to the same degree of care in discovering or apprehending danger in moments of stress or excitement or when the attention has been necessarily diverted." While not an independent theory of recovery, the doctrine may operate to excuse or negate a plaintiff's failure to discover the hazard when the source of the distraction is attributable to the defendant. However, since the plaintiff failed to carry her threshold burden of establishing that a hazard existed, the trial court erred by permitting a "distraction doctrine" claim to survive summary judgment, as there exists no such independent claim. The Court also rejected the nuisance claim, because there was simply no dangerous condition. Both defendants were entitled to summary judgment on all claims. *Bartenfeld v. Chick-fil-A, Inc.,* 815 S.E.2d 273 (Ga. App. 2018).

TJS Members Present at 2018 Construction Super Conference in Las Vegas

Four of our distinguished members spoke at the Dec. 10-12 Super Conference held in Las Vegas at the Encore at Wynn Hotel. Deborah Mastin presented on "Talking Your Way to Project Success: Active Involvement of Dispute Boards to Manage Risk and Minimize Costs and Conflicts." Lawrence Prosen of the firm of Kilpatrick Townsend & Stockton LLP spoke on "Construction Labor Relations Issues for the Construction Litigator & Non-Labor Attorney." Raymond L. Deluca of the Cozen O'Connor law firm spoke on two programs, first: "Advocacy in Construction Litigation: Cross Examination;" and second, "Managing Dispute Resolution Through Pass-Through Agreements: Panacea or Pitfalls?" Finally, Ricardo Aparicio of General Electric Global presented on "Collaboration as a Risk Management Tool: Build a Bridge, not a Wall."

People On The Move!

Make a note of these address changes in your contacts:

Joshua Flowers, FAIA, Esq. (old address)
Hnedak Bobo Group
104 South Front Street
Memphis, TN 38103

The firm has a new name and address:

Joshua Flowers, FAIA, Esq. (new address)
HBG Design
One Commerce Square
40 South Main Street, Suite 2300
Memphis, TN 38103

Also, member **Joe Sestay, AIA, Esq.** has joined a new law firm and can now be reached at this address:

Alston & Bird
333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
joe.sestay@alston.com

Trouble at Thomas Jefferson Law School

(San Diego, CA). According to local news reports, the Thomas Jefferson School of Law in downtown San Diego is in turmoil. It has been reported that several factors are threatening the school's existence. For one, the school built a $90 million facility in the East Village and struggled to pay the debt amid the financial recession. The school has dramatically downsized its campus and taken on far smaller incoming classes as part of its effort to prevent the loss of its national accreditation. Paying off the bonds for the upscale building during a period when consumer interest in law school precipitously dropped proved difficult, resulting in persistent financial woes. The San Diego institution's graduates have also struggled to pass the bar exam and secure legal jobs, generating unflattering headlines that have made it challenging to attract new students. Just 30 percent of the school's first-time takers passed the July 2017 California exam, by far the lowest percentage among the state's 21 ABA-accredited schools. On the state's July 2016 test, only 31 percent of Thomas Jefferson's graduates passed, which was tied for the second-worst performance among its peer schools. The more recent July 2018 California bar exam results did not bode well for Thomas Jefferson. Just 40.7 percent of test-takers passed, a 67-year low for the summer test, according to data the State Bar disclosed.

In Nov. 2017, the American Bar Association placed the law school on probation and warned that a rapid overhaul was needed for the school to maintain its national accreditation. In hopes of forestalling the loss of the ABA's blessing, the school has in recent months drastically reduced the size of its student body and its physical footprint. The school has also taken steps to help students perform better on the bar exam. Those actions include additional workshops, one-on-one support and curriculum revisions.

As recently as 2011, Thomas Jefferson admitted 440 first-year students. But as law school demand decreased, the law school has reduced enrollment to less than 250 first-year students.

In fall of 2018, Thomas Jefferson enrolled only 43 first-year students and has recently announced it won't be enrolling any new first-year students for the Spring 2019 semester. Tuition for its full-time students in the 2018-19 academic year is $49,500. To learn more about this school, go to: https://www.tjsl.edu/

Record Retention In Ohio

Eric O. Pempus, FAIA, Esq.
DesignPro Insurance Group
Cuyahoga Falls, OH

There are two typical questions that come up on a regular basis for design professionals regarding record retention. The following questions apply to both paper copies or electronic media, as most design professionals keep both, fearing their electronic files may erode over time.

1) What should I keep, and what to discard? One approach is the AIA Trust recommendation of keeping your Project Record Files, with some modifications. A typical Project Record File can include: Owner-Architect and/or Owner-Engineer Agreement (and all amendments), copies of all Conditions of the Contract for Construction, all Architect-Consultant and/or Engineer-Consultant Agreements (and all amendments), Owner-General Contractor Agreement or Multiple Prime Contractors Agreements (and all amendments), Project Team Directory, Project Schedule(s), a code research study, calculations on certain elements of the project, Certificate(s) of Substantial Complete, Change Orders, Final Application and Certificate for Payment, Project Cost Summary and any estimates, Project Closeout Checklist, Record-Set of Drawings and Specifications, shop drawing log, and list of all project issues and copies of your insurance policies at the time the project had any issues or claims made.

2) How long should I keep my project records? The general recommendation is at least 15 years from the date of Substantial Completion of each project. The reasoning is that there is a Statute of Repose in Ohio that has a 10-year window that design professionals can be sued within, which can be extended for another 2 years. Add another 3 years as a safety factor = 15 years total. Your best defense in a dispute or claim is your records because they are the most reliable pieces of evidence. And in reality, using your professional judgment, you may want to keep a few of your most important documents beyond 15 years. Up for interpretation is whether the Ohio Statute of Repose applies only to third parties (not your clients). Therefore, in your Owner agreement, it is wise to negotiate a 10-year window of claims that can be made by your clients, such as the AIA B101 (2017) Article 8.1.1.

Thus, the Ohio Statute of Repose and a contract clause such as Article 8.1.1 would work together, like a "horse and carriage."

TEXAS: Suit Against Project's Architect and Engineer Dismissed for Lack of Certificate of Merit Filed with the "First-Filed" Petition

A church sued its contractor and design professionals due to water intrusion and mold following a multi-million dollar construction and renovation project. The architect and engineer filed a motion to dismiss because the plaintiff failed to file certificates of merit law with its original petition, as required by Tex. Civ. Prac. & Rem. Code Ann. § 150.002. The church responded by filing an amended petition accompanied by a certificate of merit from a licensed professional engineer, but without a certificate of merit from an architect. Later, the church filed a second amended petition, which included certificates of merit from both an engineer and a licensed architect. The two design firms argued, however, that the certificates of merit were untimely, because the church did not file them with its "first-filed petition." Also, the church did not allege in its first-filed petition that it was unable to provide certificates of merit because it was filed within ten days of the statute of limitations expiring and, because of that, the church was unable to obtain a timely certificate of merit. This would have entitled the church to an extension of 30 days to file a certificate of merit. Nonetheless, the trial court denied the motion to dismiss and the design firms filed an interlocutory appeal, alleging that the trial court abused its discretion by denying their motion.

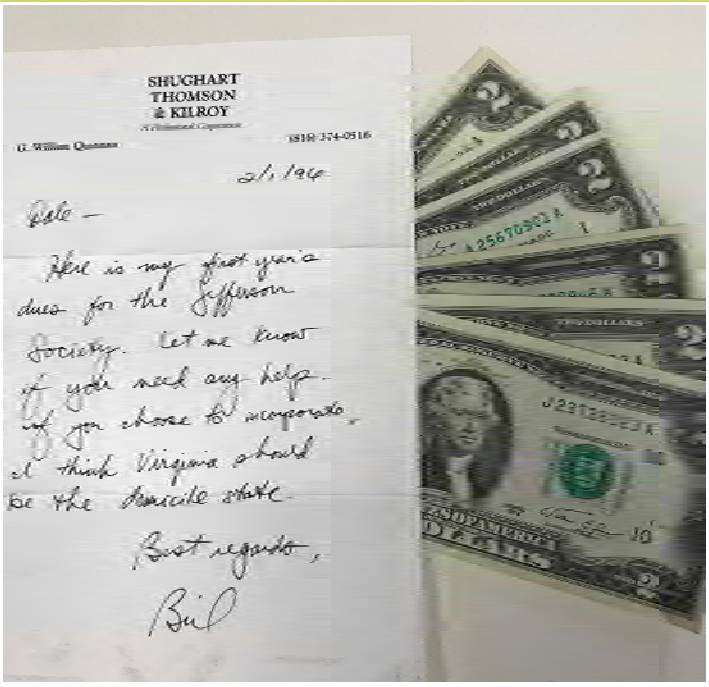
The Court of Appeals held that Texas courts have consistently interpreted the language of Section 150.002 as requiring plaintiffs to file a certificate of merit with a "first-filed petition." There was also no dispute that the church failed to file certificates of merit with its original petition. While the Court of Appeals recognized an exception if a statute of limitations is about to expire, in which case the plaintiff can seek 30 days to file a certificate of merit, in this case the church did not meet the prerequisites to receiving the extension. As a result, dismissal of the suit was mandatory, although the trial court has discretion to determine if that dismissal will be with or without prejudice. The Court of Appeals reversed the trial court's order denying the motion to dismiss and remanded to the trial court to determine whether such dismissal should be with or without prejudice. *Barron, Stark & Swift Consulting Engineers, LP v. First Baptist Church, Vidor,* 551 S.W.3d 320 (Tex. App.-Beaumont 2018).

ALABAMA: Designer of Foundry Equipment Not Liable to Injured Worker

An employee at a foundry that made cast-iron pipe fittings was injured when he tripped on a trough on his work platform and his boot dipped into the molten metal. He sued DISA - the company that designed and installed a new molding system at the foundry. Among the theories of liability were claims under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD"). DISA filed a motion for summary judgment on the AEMLD claim, which was denied and the case went to trial, where the jury awarded $500,000 against DISA, who filed this appeal. DISA argued that there was no evidence indicating that it sold, manufactured, or designed the modified trough and work platform and that the scope of its contract with the foundry did not include any such responsibility.

Plaintiff's theory on the AEMLD claim was that a defect in DISA's design of the modified trough (not including guardrails) caused his injuries that would not have otherwise been suffered. DISA, however, argued that the contract provision referencing design and construction was solely for the molding system and did not include the design or construction of any other part of the furnace.

On appeal, the Alabama supreme court noted that under the AEMLD, "a manufacturer, or supplier, or seller, who markets a product not reasonably safe when applied to its intended use in the usual and customary manner, constitutes negligence as a matter of law." The Court agreed, however, with DISA that the foundry was the actual designer of the trough and work platform and held that the AEMLD was not applicable, "because DISA was not a manufacturer, designer, or seller of the modified trough." Turning next to plaintiffs' negligence claim, plaintiff alleged that DISA's supervisory role on the project created on its part a duty to inform the foundry of the obvious need for guardrails around the modified trough and pour spout. DISA argued that supervising the area around the modified trough was not within the scope of its contract and, therefore, it owed no duty to the injured worker. The Court agreed again, holding that DISA had no contractual duty to inspect or to supervise any area above or beyond the molding line. The Court reversed the trial court's judgment based on the jury's verdict and rendered judgment in favor of DISA. The case is *DISA Industries, Inc. v. Bell*, 2018 WL 3197432 (Ala., 2018).



Letter for TJS Archives Found!

Dale Ellickson, FAIA, Esq., was one of the early promoters of the idea of a Jefferson Society to recognize architect-lawyers. In 1996, he and Bill Quatman, FAIA, Esq. corresponded about forming such an organization with $2 bills (with Jefferson on the face) for dues. Dale recently found a letter from Bill dated Feb. 1, 1996 enclosing his first years' dues, along with six $2 bills from other founding members. (See photo, above). One of the bills has the handwritten name of "Timothy R. Twomey."

After the plans went dormant for 16 years, Bill and Tim, as well Chuck Heuer, Craig Williams and several other architect-lawyers, resurrected the idea and The Jefferson Society, Inc. was founded on July 4, 2012 as a Virginia corporation.

Mark Your Calendar for June 5, 2019! The Annual Jefferson Society Meeting

Oh, and did we mention that it's in Las Vegas? You won't want to miss the Seventh Annual Meeting of the Jefferson Society, which will include a social hour, dinner, annual meeting and elections. The meeting will be held on Weds., June 5, 2019, just prior to the opening of the AIA National Convention, held June 6-8, 2019. TJS member Mark Ryan, AIA, Esq., who practices in Las Vegas, is chairing the dinner event and has promised to find an exciting venue. The new schedule is: 5:30 p.m. Business Meeting (members only); 6:00-7:00 p.m. Social hour (open to members and their guests), followed by Dinner (also open to members and guests). We hope to see you in Las Vegas!

MEMBER PROFILE: NOLANDA HATCHER

Studio 2H Design, LLC
Birmingham, Alabama

Nolanda Hatcher is one of the newest members of The Jefferson Society. She is the co-founder of Studio 2H Design, LLC, an architecture and interior design firm with offices in Birmingham and Tuscaloosa. Her interest in architecture began at a young age. "As a child, I loved having an idea and turning that idea into something tangible that others could experience. I remember as a young child, maybe 7 or 8 years old, my dad showing me the plans (blueprints) of his and my mom's dream house with much excitement." Once Nolanda discovered that architects prepared plans to build buildings, she began researching different buildings she liked. By the fifth grade, she was already focusing her school social studies research on Egyptian Architecture. She continued preparing herself in middle school and high school to study architecture in college by selecting classes in art and mechanical drafting.

When the time came to select an undergraduate degree, the choice was obvious. She applied for early admissions and was accepted to Auburn University. On a chance meeting at a college fair in Montgomery, Ala., Nolanda met a college recruiter from the University of Notre Dame in South Bend, Indiana. The recruiter informed her that 3rd year students were required to study in Rome, Italy, as part of the curriculum. That chance meeting changed Nolanda's life. She decided to apply for admission to Notre Dame because of her interest in travel and discovering new places. She reasoned, "If I have to devote 5 years studying architecture in college, I may as well enjoy 1 year living and studying abroad!"

After being accepted to Notre Dame and visiting, Nolanda fell in love with the campus and chose to complete her B.S. in Architecture there. After graduation in 1990, she accepted a position with a well-respected architectural firm, where she worked for several years before pursuing her law degree.

Why law school? As she tells it, "The decision to attend law school after 4 years of professional design experience was a mature decision which has fundamentally shaped my career for the better. As I was growing up, I always thought that designing buildings would be an interesting career. After graduating from architecture school, however, while studying for the architectural registration exam, I became keenly interested in the legal and contractual issues in design and construction. I decided to go to law school because I thought being an attorney with a background in architecture would be something that would distinguish

(Below) Nolanda celebrating her daughter Jamese's (center) graduation from Louisiana State Univ. with her son Nickolas (left).

me from my architect peers and allow me to offer a wider range of services to my clients."

In 1997, Ms. Hatcher received her J.D. from the Cumberland School of Law at Samford University, in Birmingham, a school that *U.S. News & World Report* ranks in the top 10 for Trial Advocacy. In 2002, she branched out to form NHB Group LLC (her initials at the time were "NHB"), and also started her law firm, Bearden & Associates, LLC. In 2015, Nolanda partnered with Creig Hoskins of Hoskins Architecture, and together they formed Studio 2HDesign, LLC. The firm provides a broad range of architectural services. "From large-scale, commercial and redevelopment projects to small-scale residential renovations," Nolanda says, "Studio 2H Design has the inspiration and expertise to transform any space to its maximum potential." Nolanda also keeps a close eye on developments in the construction industry.

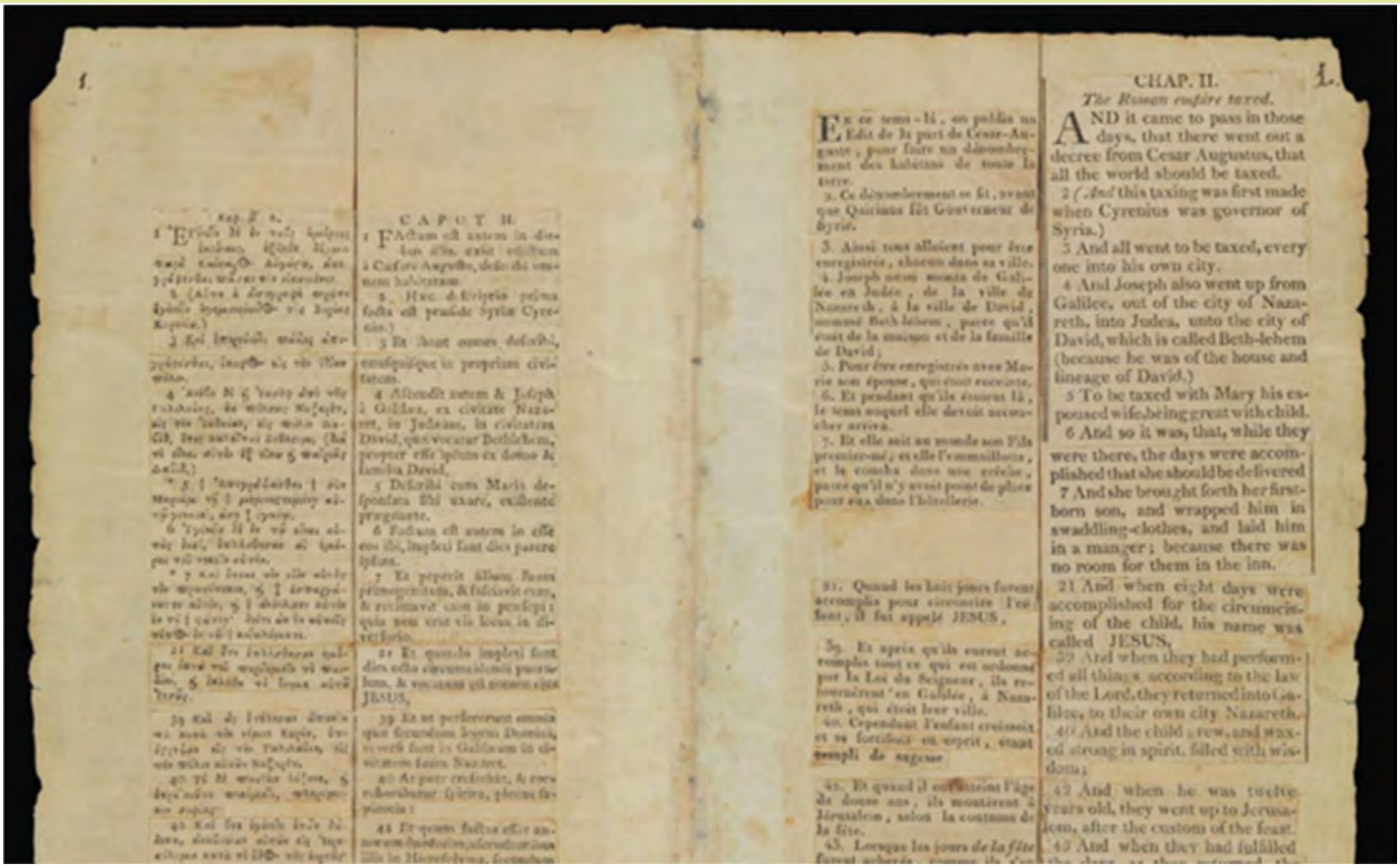
She describes herself as "results-oriented," and her yardstick for success is the satisfaction of her clients. In the course of her career, Nolanda has built a reputation for top-notch customer service and honesty, focusing her energy on the complete satisfaction of her clients as she helps them achieve their design and construction goals.

Nolanda believes that professionals should "play just as hard as they work." Outside the office, her hobbies include traveling, cycling, playing golf and softball, weight training, and experiencing good food with friends and family. Nolanda's most important and most fulfilling role is mother to her two children, Jamese Bearden (age 27) currently living in Baton Rouge and a 2017 LSU graduate with a degree in Kinesiology (see photo, p. 23), and Nickolas Bearden (age 12) a 7th grade student. Nolanda and Nickolas live in Birmingham, the largest city in Alabama, known as "The Magic City," and a place that has much history for the Civil Rights Movement in our nation. Nolanda's office is located in the heart of the Civil Rights and the Theater District in the Famous Theater Building. She also enjoys attending her son's football and basketball games, as well as, traveling with him to college sporting events.

In Dec. 2017, Nolanda took a trip to Liberia, Costa Rica (see photo, right) with 24 friends. She tells us that the trip "was amazing," and that everyone should experience Costa Rica at least once.

We welcome Nolanda to The Jefferson Society, Inc. and look forward to her contributions.

(Above) Nolanda Hatcher is a proud graduate of the Univ. of Notre Dame and follows the Fighting Irish football team closely. (Below) Nolanda in Ocotal, Costa Rica at the Hotel Riu Palace, Dec. 2017.



CHAP. II.

The Roman empire taxed.

AND it came to pass in those days, that there went out a decree from Cesar Augustus, that all the world should be taxed.

2 (*And* this taxing was first made when Cyrenius was governor of Syria.)

3 And all went to be taxed, every one into his own city.

4 And Joseph also went up from Galilee, out of the city of Nazareth, into Judea, unto the city of David, which is called Beth-lehem (because he was of the house and lineage of David.)

5 To be taxed with Mary his espoused wife, being great with child.

6 And so it was, that, while they were there, the days were accomplished that she should be delivered.

7 And she brought forth her first-born son, and wrapped him in swaddling-clothes, and laid him in a manger; because there was no room for them in the inn.

21 And when eight days were accomplished for the circumcising of the child, his name was called JESUS,

39 And when they had performed all things according to the law of the Lord, they returned into Galilee, to their own city Nazareth.

40 And the child grew, and waxed strong in spirit, filled with wisdom:

42 And when he was twelve years old, they went up to Jerusalem, after the custom of the feast.

43 And when they had fulfilled

The "Jefferson Bible"

Did you know that Thomas Jefferson wrote two books, one of which is commonly referred to as "the Jefferson Bible"? The first book, "The Philosophy of Jesus of Nazareth," was completed by then-President Jefferson in 1804, but no copies exist today. The second, "The Life and Morals of Jesus of Nazareth," was completed after he left the White House, in about 1820, by cutting and pasting with a razor and glue numerous sections from the New Testament as extractions of the doctrine of Jesus Christ. Jefferson's condensed composition is especially notable for its exclusion of all miracles by Jesus and most mentions of the supernatural, including sections of all four gospels that contain the Resurrection and most other miracles, and passages that portray Jesus as divine.

In 1819, Jefferson wrote, "I never go to bed without an hour, or half hour's previous reading of something moral, whereon to ruminate in the intervals of sleep." Apparently, the Christian Bible served as one of his bedside companions, but he wanted to rearrange its chapters to place the life of Jesus into chronological order. It is understood by some historians that Jefferson composed it for his own satisfaction, supporting the Christian faith as he saw it.

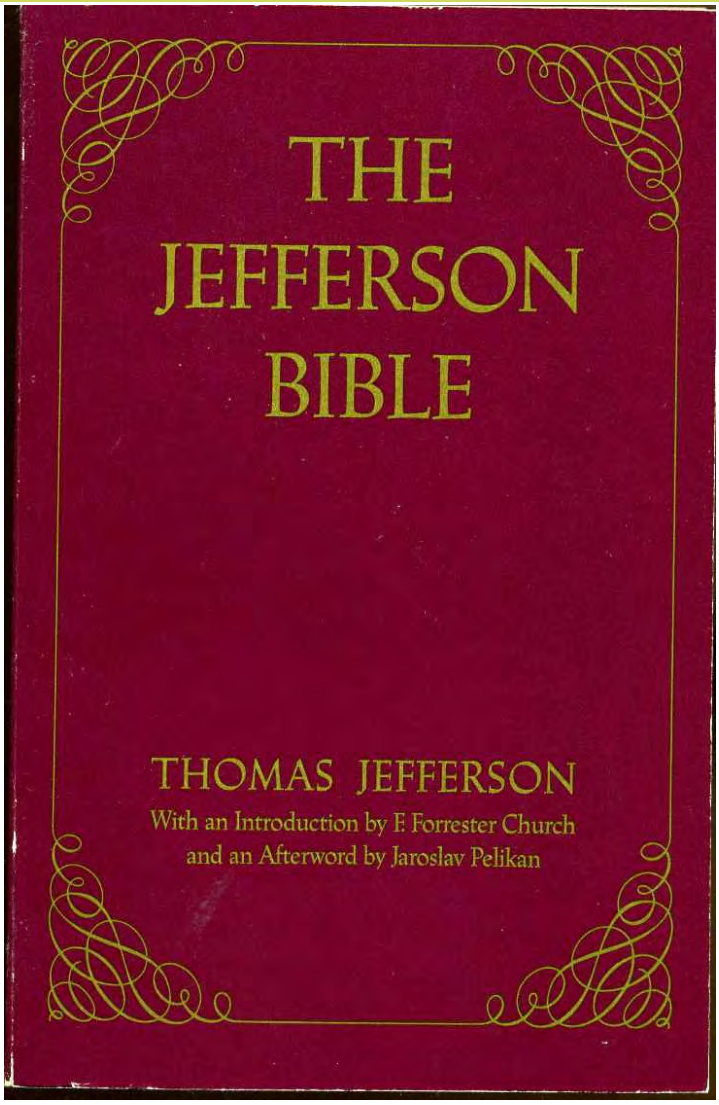
According to the *Monticello* website: "The Jefferson Bible" is Thomas Jefferson's own compilation of the four gospels in the New Testament. The former president cut out excerpts from six New Testament volumes in English, French, Latin, and Greek, and then assembled them together in this single volume. He arranged his chosen passages to create a chronological account of Jesus' life, parables, and moral teachings. He omitted passages that he deemed insupportable through reason or that he believed were later embellishments, including references to Jesus' miracles and Resurrection. In doing so, Jefferson sought to clarify Jesus' moral teachings, which he believed provided, what he called "the most sublime and benevolent code of morals which has ever been offered to man."

Jefferson first excised passages from the New Testament in 1804. He created this first compilation, known as "*The Philosophy of Jesus of Nazareth*," from two English New Testaments he received from Ireland. By 1805, Jefferson had apparently considered revising the compilation, but did not do so. It was not until late 1819, after William Short, his former private secretary in France, encouraged him to do so, that Jefferson began work on what would become "*The Life and Morals of Jesus of Nazareth."* Short wrote, "I see with real pain that you have no intention of continuing the abstract from the Evangelists which you began at Washington. The reason you give for confin-

ing yourself to classical reading & mathematical truths should not, I should think, operate against this agreeable task — & if agreeable to you, I know nothing which could be more so, & at the same time more useful to others. You observe that what is genuine is easily distinguished from the rubbish in which it is buried — if so, it is an irresistible reason for your continuing the work—for others, it would seem, have not found it thus distinguishable."

Jefferson worked with six New Testament volumes in various languages while making his second compilation. Two small maps of Palestine and Asia Minor, which Jefferson pasted into his volume immediately following the title page, were sourced from the Greek-Latin New Testament. Jefferson apparently began by preparing a table of contents and then clipped and pasted the Gospel verses onto blank leaves of paper, occasionally adding new verses as he proceeded. Starting from left to right, he inserted the Greek-Latin, French, and English verses in separate columns. With the Greek-Latin text on the left and the French and English verses on the facing page on the right, Jefferson arranged the verses in chronological order.

As to the first book, "The Philosophy of Jesus of Nazareth," Jefferson described it in a letter to John Adams dated Oct. 12, 1813. He wrote, "In extracting the pure principles which he taught, we should have to strip off the artificial vestments in which they have been muffled by priests, who have travestied them into various forms, as instruments of riches and power to themselves. We must dismiss the Platonists and Plotinists, the Stagyrites and Gamalielites, the Eclectics, the Gnostics and Scholastics, their essences and emanations, their logos and demiurges, aeons and daemons, male and female, with a long train of … or, shall I say at once, of nonsense. We must reduce our volume to the simple evangelists, select, even from them, the very words only of Jesus . . . There will be found remaining the most sublime and benevolent code of morals which has ever been offered to man. I have performed this operation for my own use, by cutting verse by verse out of the printed book, and arranging the matter which is evidently his, and which is as easily distinguishable as diamonds in a dunghill. The result is an octavo of forty-six pages, of pure and unsophisticated doctrines." Jefferson wrote that "The doctrines which flowed from the lips of Jesus Himself are within the comprehension of a child." He explained these doctrines were



such as were "professed & acted on by the unlettered apostles, the Apostolic fathers, and the Christians of the 1st century."

Rejecting the Resurrection of Jesus, "The Jefferson Bible" ends with these words: "Now, in the place where He was crucified, there was a garden; and in the garden a new sepulchre, wherein was never man yet laid. There laid they Jesus. And rolled a great stone to the door of the sepulchre, and departed."

Referring to the 1804 version, Jefferson once wrote, "A more beautiful or precious morsel of ethics I have never seen; it is a document in proof that I am a real Christian, that is to say, a disciple of the doctrines of Jesus." His claim to be a Christian was made in response to those who accused him of being otherwise, due to his unorthodox view of the Bible and conception of Christ. "You say you are a Calvinist. I am not. I am of a sect by myself, as far as I know," Jefferson once wrote.

The entire Jefferson Bible is available to view, page-by-page at: http://americanhistory.si.edu/jeffersonbible/

Is There A Doctrine In The House? The Doctrine of *Contra Proferentem*

G. William Quatman, FAIA, Esq.
Burns & McDonnell

Yes, It's Latin!

Contra proferentem is Latin for "against the offeror," and is a doctrine of contract interpretation that requires ambiguities to be "construed unfavorably to the drafter." Under this doctrine (or rule), ambiguities are generally interpreted against the drafter and in favor of the other party's reasonable interpretation. Construction contracts between the government and private contractors are subject to this doctrine. A contract is ambiguous "when it is susceptible to more than one reasonable interpretation." Therefore, when a dispute arises as to the interpretation of a construction contract, and the contractor's interpretation of the contract is reasonable, the courts will apply the doctrine of *contra proferentem* and ambiguous terms that are subject to more than one reasonable interpretation are construed against the party who drafted the document. But, courts are sometimes reluctant to impose such a harsh rule of law.

A court's task in contract cases is to construe a contract "to effect the parties' intent at the time they executed the contract." In doing so, courts may appropriately look to extrinsic evidence to resolve a contractual ambiguity. If the court is unable to interpret a contract based on its express terms, an ambiguity may be resolved by looking to — in order of preference — course of performance, course of dealing, and common trade practice. If all of these approaches fail, the doctrine of *contra proferentem* is applied as a "rule of last resort."

Contractor's Duty to Inquire (Patent Ambiguity Doctrine).

There is an exception to this rule (and to the *Spearin* Doctrine) when the ambiguity on the face of the contract is a "patent" ambiguity. This exception has its own name, the Patent Ambiguity Doctrine, which applies when the ambiguities are "so patent and glaring that it is unreasonable for a contractor not to discover and inquire about them." *HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004). Where an ambiguity is not sufficiently glaring to trigger the patent ambiguity exception, it is deemed "latent" and the rule of *contra proferentem* still applies. The court will consider whether the ambiguity was sufficiently apparent that there arose an obligation on the contractor to inquire before entering into the contract. In government cases, a patent ambiguity triggers a duty on behalf of a public contractor to inquire about that ambiguity before it even bids on a contract. *Newsom v. U.S.*, 676 F.2d 647, 649 (Ct.Cl.1982). Absent such an inquiry, a patent ambiguity in the contract will be resolved against the contractor, *not the drafter*, for failure to inquire as to the contract's meaning. *P.R. Burke Corp. v. U.S.,* 277 F.3d 1346, 1355 (Fed. Cir. 2002). Government cases have held that the *Spearin* implied warranty does not eliminate the "contractor's duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings." *Caddell Const. Co., Inc. v. U.S.,* 78 Fed.Cl. 406, 413 (2007). Therefore, contractors are given fair warning that, when faced with an ambiguity, they should err on the side of seeking clarification rather than pursue a change order later.

AIA Contract Language.

In the private sector, this same concept is embedded in the standard AIA A201 General Conditions. Par. 3.2.2, states that "the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents [and] promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor. Par. 3.2.4 goes on to put the financial risk on the contractor if it fails to perform the obligations of Par. 3.2.2, including paying "costs and damages to the Owner … as would have been avoided if the Contractor had performed such obligations."

Rule of Reasonableness.

Even if the ambiguity if found to be latent, however, the contractor is not automatically entitled to an extra or a change order. Courts hold that a contractor's interpretation of a latent ambiguity will only be adopted if it is "found to be reasonable." As has been held, "If the court finds that a patent ambiguity did not exist, then the reasonableness of the contractor's interpretation becomes crucial in deciding whether the normal *contra proferentem* rule applies." *Newsom, supra.* Interpretation of the contract requires the court to "place itself into the shoes of a 'reasonable and prudent' contractor." The contractor need not demonstrate that its interpretation of the contract is the only reasonable one, however, it does bear the burden of showing that its conclusion is "at least a reasonable reading."

Thomas Jefferson Univ. Launches World's First International Medical Degree

(Philadelphia, PA). In Nov. 2018, Thomas Jefferson University, in collaboration with prestigious institutions in Italy, announced the world's first-ever dual-medical degree program, enabling physicians to practice medicine in both the U.S. and in the E.U. Under the terms of the partnership, medical students at Catholic Univ. of the Sacred Heart in Rome could earn a Bachelor of Science degree from Jefferson as well as Doctor of Medicine degrees from the Sidney Kimmel Medical College at Thomas Jefferson University and from The School of Medicine and Surgery at Rome's Catholic Univ. – all within just six years.

Medical education requirements in Europe and the U.S. are currently very different. In the U.S., students must earn a four-year undergraduate degree and then a four-year medical degree to practice medicine. In Europe, however, students interested in a medical degree matriculate directly from high school to medical school, completing all requirements to practice medicine within six years, with no undergraduate degree requirement. Catholic Univ. medical students who select the English track will have the opportunity to travel to Thomas Jefferson Univ. in Philadelphia to meet the U.S. undergraduate requirements needed to pursue a medical degree.

Thomas Jefferson Univ. offers 160 undergraduate and graduate programs in a variety of professions, including five degrees in architecture (B.S. in Architectural Studies; B.Arch.; M.Arch.; Masters in Architecture; and an accelerated B.Arch./MS in Architecture/Real Estate Development).

NEW YORK: Contractor Liable to Engineer Injured on Jobsite

An engineer was injured on a jobsite when the nylon sling attaching a two-ton steel plate to an excavator snapped, causing the plate to fall to the ground. The metal plate bounced and severed the pole of a nearby street sign. The impact caused the sign to be propelled toward the engineer, hitting his right forearm. He sued the contractor under New York's Scaffold Law, Labor Law § 240(1). The court found that as an engineer supervising the construction of a subway, the plaintiff was engaged in an activity falling within the protections of the statute. The contractor failed to provide proper protection, in violation of the statute, and the violation was the proximate cause of plaintiff's injuries, thus a prima facie case. The trial court granted partial summary judgment to the engineer and the contractor appealed.

In affirming, the Supreme Court, Appellate Division, held that the contractor's blame of the engineer had no merit as the record showed that the plaintiff had no involvement in attaching the steel plate to the excavator. That work, as well as the transportation of the plate, was performed solely by the contractor's employees. *Makkieh v. Judlau Contracting Inc.,* 78 N.Y.S.3d 123, 162 A.D.3d 468 (N.Y.A.D. 1 Dept. 2018).

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.

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