Monticello

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A Non-Profit Organization for Architect-Lawyers

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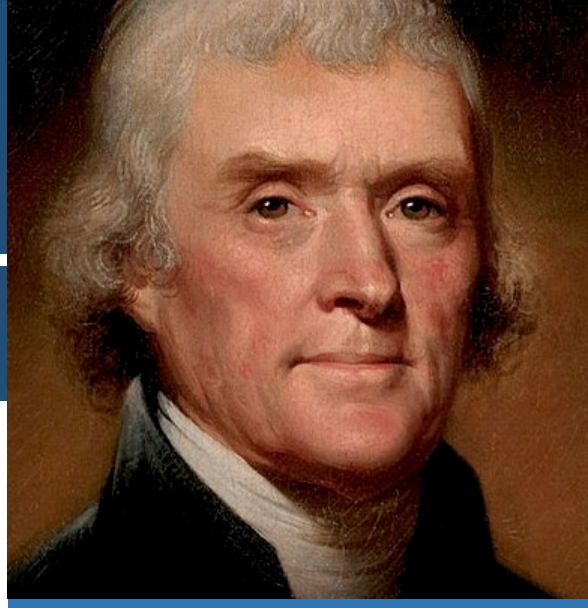


PRESIDENT'S MESSAGE:

By Donna M. Hunt, AIA, Esq.
Ironshore Specialty Casualty

Welcome to the fall!

I hope everyone had a wonderful summer and that you were able to take some time away from work to do something fun and relaxing with family, friends or just yourself! I would like to begin this President's message by acknowledging one of our own. It is with great admiration that I report the well-deserved recognition that Michael Bell, FAIA. Esq. and his firm Bell Architecture received from the City of New Orleans. "Since 2001, Bell Architecture of New Orleans has partnered with New Orleans Area Habitat for Humanity (NOAHH) to provide decent, safe and affordable homes for hard-working, low-income families. Bell Architecture has created 15 different designs and donated the drawings for 500 new homes, including those in the now iconic Musicians' Village. The National Trust for Historic Preservation's Spring 2019 magazine ranked Musician's Village 3rd in its list of the 40 most important, most interesting, and quirkiest American places less than 40 years old. Bell Architecture and NOAHH celebrated the 500th home born of their collaboration at the dedication of the home at 6170 S. Hermes Street in New Orleans on August 15." Michael, congratulations to you and your firm and thank you for making people's lives better. (See the full article and photographs on pages 11-12 of this issue of *Monticello*.

Four months have passed since our annual meeting in Las Vegas in June, and it is time to focus on the incentives set out by the 2017-2019 President Suzanne Harness at that meeting. Specifically: The Membership Committee; Website and Other Technology Improvements; United States Supreme Court Admission – Nov. of 2020; and becoming an AIA Continuing Education Provider.

The Membership Committee. Bill Quatman, Craig Williams and Jeffrey Hamlett have been diligently focusing on member recruiting, and their efforts have paid off. As of Oct. 1st, *eight new members* have been added to the Membership. I would like to welcome the following on behalf of the entire Jefferson Society: James Holmberg, Esq., Richard Salpietra, Esq., Bruce A. Spence, Esq., Ryan Westhoff, Esq., Travis B. Colburn, Esq., Sara Miller, AIA, Esq., Michael W. Spinelli, J.D., AIA, and Col. Tom E. Lewis, FAIA, Esq.

Website and Other Technology Improvements. Alex Van Gaalen has taken the lead to up-

(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 Donna M. Hunt, AIA, Esq. at: donna.hunt@ironshore.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

Inside This Issue:

Check us out on Facebook and LinkedIn

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

grade The Jefferson Society's technology and communication systems. At present, the New Square Space web site, payment portal, list serve, and other features are approximately 75% complete. Alex will continue to be our new webmaster and assist us with other new technology. Again, our thanks to Kenton Quatman for managing our site the past several years.

United States Supreme Court, Nov. 2020. In November 2019, Jessyca Henderson and Jessica Hardy will start sending out emails for members to get their documents together for the third U.S. Supreme Court admission. If you have not yet been admitted to The United States Supreme Court, I highly recommend you do it. It is a once in a lifetime experience!

AIA Continuing Education Provider. As noted at the annual meeting, the Board has approved the seeking of official CEU provider status from the AIA. As a provider, the Society would develop programs, submit and receive HSW credit for them, and distribute slides for member use across the country at local programs. If any member is interested in being part of a committee to lead this initiative, please let me know.

I hope everyone enjoys the fall and the upcoming holidays.

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.

LOUISIANA. OWNER MAY BE LIABLE FOR DEATH CAUSED BY FAULTY RAMP - DESPITE ITS RELIANCE ON ARCHITECT'S ADVICE.

An elderly woman fell at the end of a concrete ramp while leaving a restaurant and died from a head injury. The ramp did not comply with requirements that the handrail extend at least 12 inches beyond the end of the sloped ramp, per the ANSI Code and the Americans with Disability Act ("ADA") Accessibility Guidelines. The woman's daughters sued the restaurant for negligence and strict liability. The restaurant filed third-party demands against the architect and the contractor, but the architect filed a "peremptory exception of statutory preemption" based on the Louisiana statute of repose, La. 9:2772, and was dismissed from the suit. The case proceeded solely against the restaurant. The trial court granted the restaurant's motion for summary judgment on the basis that it relied on others for advice on the handrail, and had no knowledge of the defect prior to the accident. The daughters appealed and the Court of Appeals reversed, holding that genuine issues of material fact existed as to whether the restaurant had constructive knowledge of an unreasonably dangerous condition of the handrail, thus precluding summary judgment. There was also a question of whether or not the defective handrail was open and obvious. Louisiana statutes provide for liability of a building owner when damage is caused by "neglect to repair it." 5 La. C.C. art. 2322. However, the statute provides that the building owner "is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care."

The plaintiffs' expert, an architect, testified that the International Building Code ("IBC") Section 1009.11.5 and ADAAG Section 4.8.5(2) requires that ramp handrails must be extended 12 inches beyond the last sloped ramp segment; and the ramp in question was non-compliant. Therefore, the plaintiffs argued that the restaurant knew or should have known of the vice or defect that created an unreasonable risk of harm. In granting summary judgment in favor of the restaurant, the trial court emphasized that the owner reasonably relied upon an architect, a general contractor, and

a building inspector to ensure that the handrail was installed in compliance with building codes and standards. The lawyer for the restaurant apparently argued that his client's expertise is in "seafood, gumbo and red beans and rice, not handrails and building codes." The plaintiffs argued, however, that the owner cannot escape from liability for an unreasonably dangerous condition by merely complaining ignorance of it. The Court of Appeals rejected the owner's attempts to avoid liability by shifting the blame for the existence of the unreasonably dangerous condition to the architectural firm that allegedly designed the access ramp, the contractor who installed the defective handrail, and the City Of New Orleans inspectors who approved it, stating, "The owner of a building is solely responsible for damages caused due to vices and/or defects in the building. *** This is a non-delegable duty vis-à-vis persons who claim injury due to vices or defects in the building." As a result, the plaintiffs established a genuine issue of material fact as whether the restaurant had "constructive knowledge of the defect" on its handrail based on the alleged errors by its architect, contractor, and inspector.

The owner also argued that it should not be liable because there have been no prior accidents involving the defective handrail. Even if true, however, the Court held that "that the absence of prior falls may relate to actual knowledge, this does not affect constructive knowledge, which is at issue here."

As to whether the defect was open and obvious, photographs showed that the handicap ramp gradually sloped downward, and a pedestrian using it would not have realized that the handrail abruptly ended before the end of the slope until she reached the end of the handrail. "This defect is not one that is open and obvious to all," the Court held, and the restaurant, "has failed to establish a prima facie case that the handrail was an open and obvious danger." Thus, with so many remaining genuine issues of material fact, the Court held that summary judgment is not appropriate and reversed the trial court's order granting summary judgment and remanded the case. *Carrero v. Mandina's, Inc.,* 2019 WL 3719552 (La.App. 4 Cir. 2019).

UTAH: CONTRACTOR NOT LIABLE FOR PENALTIES WHEN SUB ISSUES FALSE LOCAL LICENSE.

Under Utah law, a contractor is required to only hire subcontractors who are properly licensed in Utah. In this case, a drywall contractor ("Muddy Boys") subcontracted work to a then-licensed company known as "ITY LLC." Unbeknownst to Muddy Boys, that company lost its contractor's license, and its principal formed a new company known as "ITY of Texas LLC," but the new company was unable to obtain a contractor's license. The new company nevertheless falsely assured Muddy Boys that it was licensed, and offered as proof a state certificate that resembled a license. Muddy Boys apparently fell for the ploy and, under the impression that the new entity was licensed, continued to subcontract work to the new entity on nearly sixty projects. Well, state officials within the Department of Commerce learned that ITY of Texas was not licensed and filed an administrative action against Muddy Boys, seeking a $2,000 fine for each violation, for a total of $116,000 in fines and also asked for an order placing Muddy Boys's contractor license on probation. Muddy Boys defended itself at a cost of over $80,000 in legal fees on the basis that it was a victim here, who was defrauded by an unethical subcontractor. The Department argued, however, that the law was a strict liability regulation, which did not require intent, and that this was not the first time they had violated the law. The Administrative Law Judge (ALJ) agreed with the contractor's defense, since the Department could not prove "recklessness." Muddy Boys then filed a motion with the ALJ to recover the legal fees it had spent in defending itself. The Department argued that the applicable Utah statute did not permit an award of attorney's fees. The fee claim was denied and Muddy Boys filed an appeal.

The Utah Court of Appeals affirmed the ALJ's ruling that the fines were not appropriate, but also rejected the claim for attorney's fees. The Court was sympathetic to Muddy Boys's situation, however, stating: "We are not without sympathy to Muddy Boys's plight. The company was inaccurately accused of committing administrative violations, and threatened not only with sanctions against its contractor license but also with imposition of a six-figure fine. It required the expenditure of over $80,000 in attorney fees, and two significant pre-hearing rulings, for [the Department] to realize that it could not and should not proceed with its case. If this were just a question of fairness, we would have no trouble concluding that Muddy Boys should be entitled to recover its attorney fees so that it could be made whole. But the question before us is not one of fairness. It is one of statutory interpretation." See, *Muddy Boys*

v. Dept.of Commerce, 440 P.3d 741 (Utah App. 2019).

MICHIGAN. ARCHITECT, AS SUB TO DESIGN-BUILDER, IS FOUND NOT LIABLE TO CITY FOR NEGLIGENT CERTIFICATION OF PAYMENT AND COMPLETION DATES.

A design-build contractor entered into a subcontract with an architectural firm for design services for a four-story concrete parking structure for a city in Michigan, AIA Document B143–2004. The city then entered into an Owner–Builder Agreement with the contractor for the design and construction of the Project. The architect, which was not a party to that contract, was listed as the architect for the Project. The Owner–Builder Agreement included a liquidated damages provision of $1,000 a day for late completion. After completing the Project (allegedly behind schedule), the majority shareholder and president of the contractor dissolved the company and left Michigan without paying its subcontractors. Prior to this, the architect certified the last payment to the contractor for the full amount of the Owner–Builder Agreement contract sum, less only $13,409 as retainage, without any allowance for the liquidated damages. Unable to recover from the now-defunct design-builder, the city sued the architect directly for professional negligence and negligent misrepresentation, claiming that the architect was aware of late completion yet failed to withhold LD's to protect the city. The city claimed that the Project was completed several months after the con-tractually specified time for completion and, therefore, the architect was on the hook for the lost LD's. The city also alleged that it had to pay "two times for some of the same work" because it was forced to pay the subcontractors (wasn't the contractor bonded?).

The architect filed a motion for summary judgment, which was granted by the trial court because the city had failed to identify any provision of the Builder–Architect Agreement that required the architect to "assess [p]laintiff's right to liquidated damages or to approve payment claims." Therefore, the trial court ruled that the city failed to prove that the architect owed any duty to the city to administer the construction or approve payments to the contractor. The city appealed, arguing that the architect owed it a legal duty "to properly and accurately certify" the contractor's pay applications for work completed on the Project, which duty came from the General Conditions of the Owner–Builder Agreement. Among the alleged negligent acts was the architect's failure to "conduct inspections to determine the date or dates of Substantial Completion and the date of Final Completion ... and to issue a final Certificate of Payment." The Court of Appeals rejected the city's arguments and affirmed judgment for the architect, finding that the duties had to arise from a contract, and the Builder–Architect Agreement did not "contain the kinds of duties that plaintiff alleges." Even the architect's certification duties were qualified (under AIA contracts) only to certify that "to the best of [its] knowledge, information and belief the documents or services to which such certifications pertain (a) are consistent with the Project Criteria provided to the Architect by [contractor] except to the extent specifically identified in such certificate, (b) comply with applicable professional practice standards, and (c) comply with applicable laws, ordinances, codes, rules and regulations governing" the Project." Further, the architect's con-tract with the design-builder did not require the architect to assess whether the city was owed any liquidated damages due to delays in completion. The city failed to produce any evidence that demonstrated that the architect had an obligation to assess liquidated damages or to notify the city that the contractor was not paying its subcontractors. As a result, the ruling for the architect was affirmed. See, *Auburn Hills Tax Increment Finance Authority v. Haussman*, 2018 WL 385057 (Mich. App. 2018)

[Editor's Note: While not mentioned in this case, whenever an architect is required to certify payment or completion dates to a contractor with whom it has a direct contract, there is a potential for conflicts of interest. Will the contractor pressure the design professional to issue certifications? Is the architect's own invoice among the monthly pay applications? In this case, the city attempted to turn the architect into a surety for the defaulted contractor, seeking lost LD's and double payments to subs. The city would have been better served by requiring payment and performance bonds from the contractor!]

"*Honesty is the 1st chapter in the book of wisdom.*"
- Thomas Jefferson to Nathaniel Macon
Jan. 12, 1819

TJS Members Russell Weisbard, Jessica Hardy, Bill Quatman, and Craig Williams attended the August 1, 2019 meeting of the Dallas Bar Association's Construction Law Section at the historic Belo Mansion, located in downtown Dallas on Ross Avenue. Bill gave a presentation on the "Hyatt Skywalk Collapse: What Really Happened? And Why?"

NEW INDUSTRY RESEARCH PROJECT SEEKS YOUR INPUT.

In the Oct. 2014 issue of *Monticello*, we reported on the release of the study sponsored by the AIA's Large Firm Round Table "Managing Uncertainty and Expectations in Building Design and Construction," a SmartMarket Report by McGraw Hill. TJS Member Craig Williams, FAIA, Esq., was very influential in getting this study to press by the AIA LFRT. As a follow-on to that study, in 2018, the sponsors produced another publication, *"The Project Planning Guide for Owners and Project Teams,"* based on the original research. Both documents are available without charge at www.construction.com/toolkit/reports

The program sponsors have now commissioned Dodge Data & Analytics to develop a new, interactive project planning and budgeting tool, powered by a database of actual project experience, so that owners and their project teams can better anticipate and manage risks to improve project outcomes. The Construction Owners Association of America (COAA) and indi-

vidual owners have endorsed this initiative and confirmed its value as a unique industry resource. The sponsors are not asking industry members to help build this valuable new database of project experience. In a "pilot" stage of this initiative, Dodge Data & Analytics is interviewing office, education and healthcare project owners about quality, cost, and schedule outcomes, the impacts of critical uncertainty factors and measures used to manage risk in past projects. Individual contributors and project data will be kept strictly confidential, according to Dodge Data & Analytics. The information will be compiled to provide collective experience accessible to database users.

In exchange for some preparation and a phone interview with the Dodge team, you will receive a report summarizing our findings from this interview process – a report that will not be publicly available. You can also be involved in further developing this Managing Uncertainty initiative and will receive a discounted rate for use of the database and planning tools when they're launched.

For more information or to schedule an interview, please contact Donna Laquidara-Carr, Industry Insights Research Director at Dodge Data & Analytics:
donna.laquidara@construction.com or 781-430-8874.

PROJECT PLANNING GUIDE FOR OWNERS AND PROJECT TEAMS.

As mentioned above, the AIA's Large Firm Round Table "Managing Uncertainty and Expectations in Building Design and Construction" had a supplement issued in 2018, *"The Project Planning Guide for Owners and Project Teams,"* based on the original research. Dodge says this about the publication:

"This construction project management planning guide will help owners and project teams think about construction risks as they begin building projects and plan to mitigate the uncertainties that are part of the design and construction process. The guide is based on original industry research by Dodge Data & Analytics about the sources of uncertainty, recommendations for managing uncertainty and improvement strategies in building design and construction. It provides expert advice from owners, architects and contractors based on real data about their experiences. It includes a link to a Contingency Calculator that construction project management teams can use to appropriately budget for risks throughout the project life-cycle." One of the tools in the 2018 supplement is a "Contingency Calculator," a spread-

sheet developed largely by Clark Davis, FAIA, formerly of HOK, which is designed to help owners and their consultants establish project contingencies for project changes and other uncertainty factors which might impact the project cost. See sample on page 7, below. The research was sponsored jointly by the American Institute of Architects (AIA), the AIA Large Firm Roundtable, Associated General Contractors (AGC), the Design-Build Institute of America (DBIA), the Lean Construction Institute (LCI), Autodesk, Graphisoft, and other industry groups.

AIA POSTS "SALARY CALCULATOR"

On Sept. 6, 2019, the AIA posted its salary survey with a "salary calculator" that lets you compare your compensation with other architects in the U.S. There is no salary for "General Counsel," so next closest is "CEO/President." Here are the results:

Compensation (All Regions).

Base Pay

Lower quartile	$109,000
Median	$137,000
Upper quartile	$183,000

Additional Cash Compensation: Average $90,6000

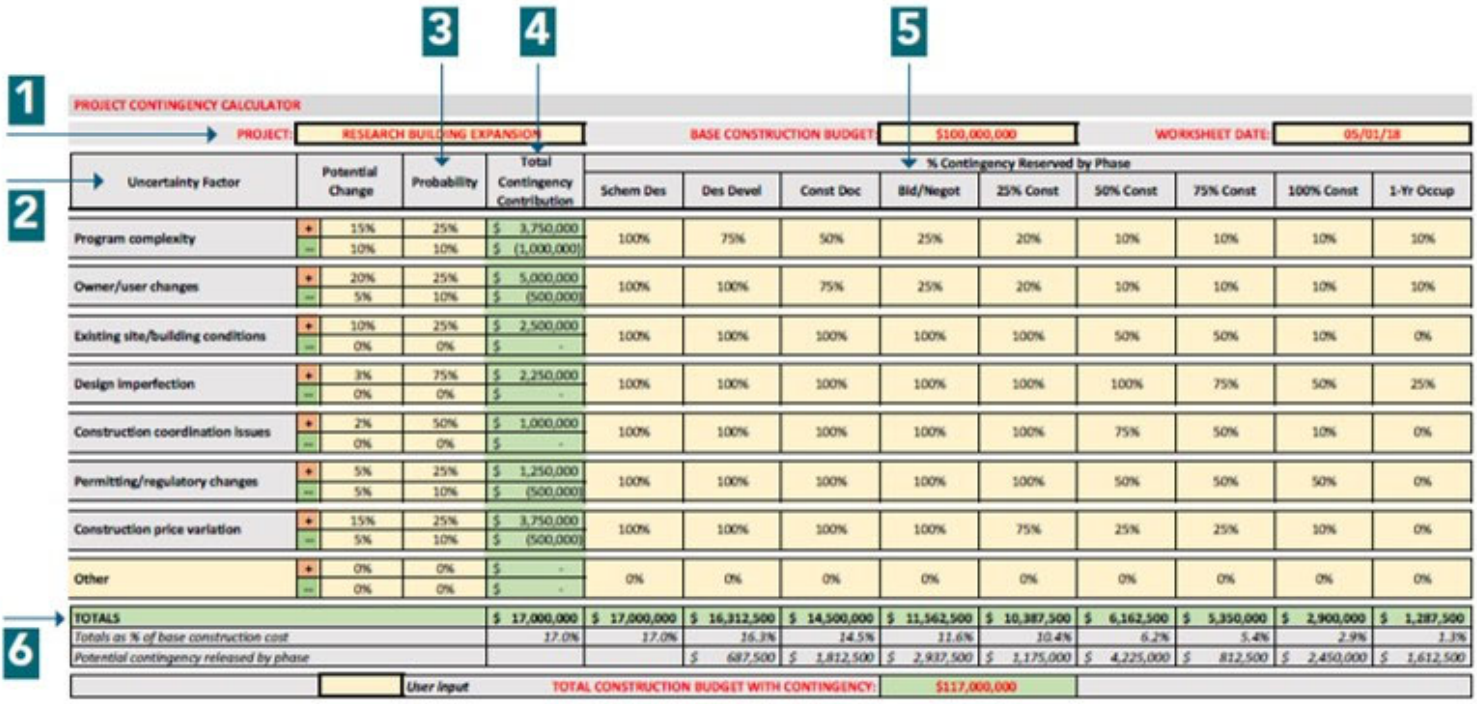
So, if you are making more than $273,600 today, you beat the top-paid CEO's in the nation (average). How about recent grads? Do you remember what you made fresh out of college? Here is what the AIA survey shows for "Recent College Graduate."

Base Pay

Lower quartile	$ 49,000
Median	$ 53,000
Upper quartile	$ 56,860

Additional Cash Compensation: Average $ 2,970

Here is the link to the AIA salary site:
http://info.aia.org/salary/salary.aspx



PROJECT CONTINGENCY CALCULATOR

PROJECT: RESEARCH BUILDING EXPANSION — BASE CONSTRUCTION BUDGET: $100,000,000 — WORKSHEET DATE: 05/01/18

Uncertainty Factor		Potential Change	Probability	Total Contingency Contribution	% Contingency Reserved by Phase: Schem Des	Des Devel	Const Doc	Bid/Negot	25% Const	50% Const	75% Const	100% Const	1-Yr Occup
Program complexity	+	15%	25%	$ 3,750,000	100%	75%	50%	25%	20%	10%	10%	10%	10%
	–	10%	10%	$ (1,000,000)									
Owner/user changes	+	20%	25%	$ 5,000,000	100%	100%	75%	25%	20%	10%	10%	10%	10%
	–	5%	10%	$ (500,000)									
Existing site/building conditions	+	10%	25%	$ 2,500,000	100%	100%	100%	100%	100%	50%	50%	10%	0%
	–	0%	0%	$ -									
Design imperfection	+	3%	75%	$ 2,250,000	100%	100%	100%	100%	100%	100%	75%	50%	25%
	–	0%	0%	$ -									
Construction coordination issues	+	2%	50%	$ 1,000,000	100%	100%	100%	100%	100%	75%	50%	10%	0%
	–	0%	0%	$ -									
Permitting/regulatory changes	+	5%	25%	$ 1,250,000	100%	100%	100%	100%	100%	50%	50%	50%	0%
	–	5%	10%	$ (500,000)									
Construction price variation	+	15%	25%	$ 3,750,000	100%	100%	100%	100%	75%	25%	25%	10%	0%
	–	5%	10%	$ (500,000)									
Other	+	0%	0%	$ -	0%	0%	0%	0%	0%	0%	0%	0%	0%
	–	0%	0%	$ -									
TOTALS				$ 17,000,000	$ 17,000,000	$ 16,312,500	$ 14,500,000	$ 11,562,500	$ 10,387,500	$ 6,162,500	$ 5,350,000	$ 2,900,000	$ 1,287,500
Totals as % of base construction cost				*17.0%*	*17.0%*	*16.3%*	*14.5%*	*11.6%*	*10.4%*	*6.2%*	*5.4%*	*2.9%*	*1.3%*
Potential contingency released by phase						$ 687,500	$ 1,812,500	$ 2,937,500	$ 1,175,000	$ 4,225,000	$ 812,500	$ 2,450,000	$ 1,612,500

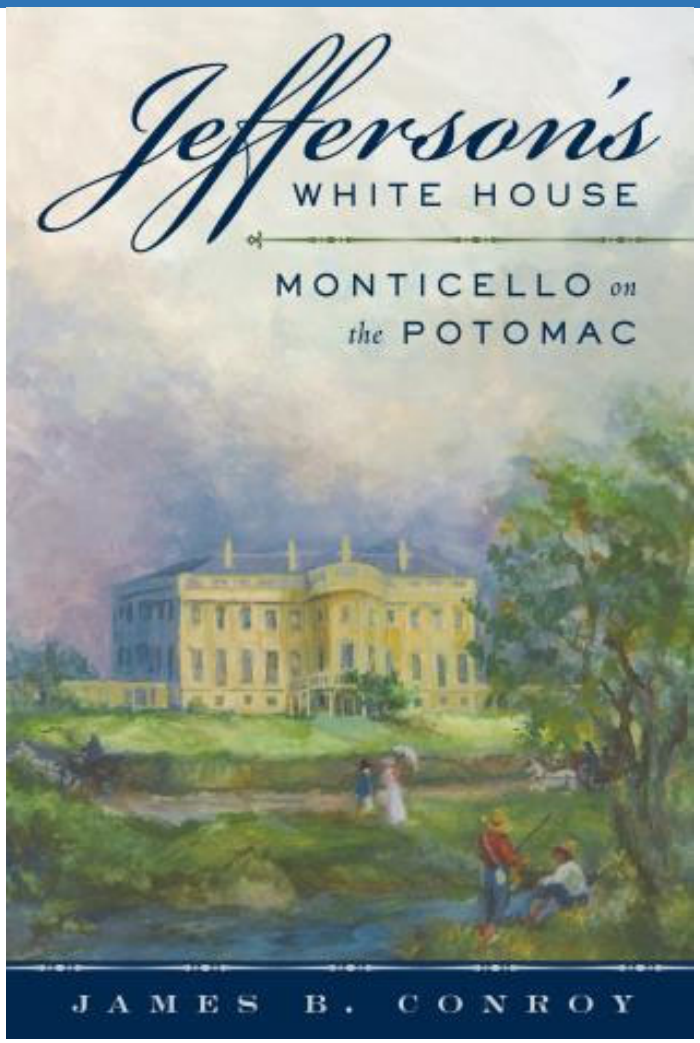
User input — TOTAL CONSTRUCTION BUDGET WITH CONTINGENCY: $117,000,000

1. Basic Project Information (Name, Budget)
2. Uncertainty Factors and Potential Change in Cost (%)
3. Probability of Experiencing Potential Change
4. Total Contingency Contribution for Each Uncertainty Factor
5. Percentage of Contingency Reserved by Phase for Each Uncertainty Factor
6. Total Contingency Reserve Required by Phase

The "Contingency Calculator" (above) is included in the 2018 report titled "The Project Planning Guide for Owners and Project Teams," and is designed to help estimate the costs of uncertainty on a project.

NEW YORK. CONSTRUCTION MANAGER COULD BE LIABLE FOR INJURY TO WORKER.

An employee of the general contractor was injured by an electrical shock that knocked him off of a ladder. He sued the construction manager (Turner), and both parties filed motions for summary judgment. The Court held that New York's Labor Law § 240 (1) was designed to prevent the types of accidents in which the scaffold, hoist, stay, ladder, ropes or other protective device proved inadequate to protect a worker from harm directly flowing from the application of the force of gravity to an object or person. This statute imposes "a nondelegable duty upon owners, contractors, or their agents" to provide appropriate safety devices for the protection of workers. Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240 (1), the Court said, "it may be vicariously liable as an agent of the property owner for injuries sustained where the manager had the ability to control the activity which brought about the injury." To avoid liability, a defendant must prove that "the accident did not occur as a result of gravity operating to cause the fall of the plaintiff, or that it provided adequate safety devices to avoid such an occurrence." The Court concluded that the failure to provide a proper ladder was not a proximate cause of the accident. Instead, it was the interceding electrical jolt, together with failure to provide an adequate safety device that was the proximate cause of plaintiff's injuries. Even though Turner had contractual responsibility for the safety protocols and had the authority to stop work until conditions were rendered safe, it was for a jury to determine, on the issue of damages, whether the plaintiff was careless and, thereby, partially culpable. As a result, Turner's motion for summary judgment on the Labor Law was denied and the plaintiff's cross motion for summary judgment was granted on his claims under the Labor Law. *Rodriguez v Sea Crest Construction Corp.*, 2019 WL 3070996 (Sup Ct., July 11, 2019).



New Book on Jefferson's Monticello.

The Jefferson Society was contacted by the author of the upcoming new book, "*Jefferson's White House: Monticello on the Potomac*" (Rowman & Littlefield 2019). Author James B. Conroy wrote: "I thought I would let you know of its October publication by Rowman & Littlefield, and ask if you would like to have a copy of the bound, prepublication galleys sent to your designee. Much of the book is devoted to the architectural elements of Jefferson's time in the President's House, including his fraught relationship with Benjamin Latrobe. Having written two award-winning books on aspects of Lincoln's presidency, I have enjoyed the transition to Jefferson and the endorsements of the Jefferson scholars Peter Onuf, John Boles, Gaye Wilson, and Patrick Phillips-Schrock, author of *The White House: An Illustrated Architectural History*. All the best to you and your colleagues, and many thanks for your work." The publisher says this about the book in the promotional webpage: "As the first president to occupy the White House for an entire term, Thomas Jefferson shaped the president's residence, literally and figuratively, more than any of its other occupants. Remarkably enough, however, though many books have immortalized Jefferson's Monticello, none has been devoted to the vibrant look, feel, and energy of his still more famous and consequential home from 1801 to 1809. In *Monticello on the Potomac*, James B. Conroy, author of the award-winning Lincoln's White House offers a vivid, highly readable account of how life was lived in Jefferson's White House and the young nation's rustic capital." The book is available on amazon and other on-line book sellers for $27.00 in hard copy.

CONNECTICUT. A CONTRACT CASE YOU JUST HAVE TO READ!!

While the case is two years old, we only recently ran across it. Although an unpublished opinion, the writing of Judge Thomas G. Moukawsher is insightful, humorous and right on point as to the realities of construction contracting in today's market.

Semac Electric Co., Inc. v. Skanska USA Building, Inc., 2017 WL 4508507 (Conn.) dealt with a dispute between a contractor (Skanska) and an electrical subcontractor (Semac) over the construction of a 12–floor hospital building in Stamford. There was a question whether changes ordered by the contractor were unreasonable and whether Skanska had proper grounds to terminate the subcontract, and whether Skanska could enforce some very tough provisions of its standard subcontract form.

On the issue of Changes. The testimony from the contractor was that on large projects, changes and strains are routine. The sub argued that the changes were extreme and caused a loss in productivity. The Court summed it up this way: "The question is whether the changes and strains here crossed a line into the radical—into the intolerable— into the realm in which we can say the work promised no longer resembles the work demanded—where the promise to build a church has become a demand to breed a chinchilla, or as [the contractor's] counsel put it: a contract to build a water cooler becomes a demand to build a water tower. * * * But a choppy church, with the steeple out of place and water raining on the altar is still a church not a chinchilla. It is still a water cooler, not a water tower. And as for time delays—assuming they matter—as much as Skanska can't pretend the job was routine, Semac can't ignore that the job was completed close to on time in addition to never changing its basic character. There was no year of delay; no surprise second tower

to erect. Indeed, Skanska credibly claims that—for matters under its control—it would have met the pre-opening substantial completion date described in the schedule but for Semac bailing out at a critical moment. It also rightly emphasizes that out of 67 subcontractors nobody bailed out but Semac. And this raises the question of why Semac left. If Semac didn't bail out because of a radical change, it would mean that Semac can't claim any harm even if there were a radical change. But it may also mean something more: it may support the conclusion that there was no radical change at all. *** [The changes] are not dramatic enough in part because changes are normal on a big job. But they are also not dramatic enough when viewed against the cautious case law surrounding radical or cardinal changes. This case law leaves Semac at the mercy of a callous but enforceable contract."

A very tough contract. As to that "callous but enforceable contract," the Court noted: "Skanska crafted a contract heavy and hard. Despite universal common-law rules, it says that it must be construed in favor of its drafter and against the subcontractor who signed it. *** The contract is such a lopsided bargain it illustrates that here there was hardly a bargain at all. Financially distressed, far-smaller Semac had little choice but to sign the heavy-handed thing Skanska wrote and hold its breath. None of its senior leadership even bothered to read the contract in its entirety. With another bidder offering to do the job for much the same price, Semac's executives may have thought they would get little more than upset stomachs by reading every page of this more than 200–page tome. Whatever was in it, these were the best terms Semac could get. Today, reading this contract is like reading Semac's obituary. Back then this large, juicy-looking job may have seemed Semac's only hope. If this were a consumer contract, the case law might spring to Semac's defense. But this was a bargain between two commercially sophisticated entities. Semac may have been small relative to Skanska but it had recently handled many big jobs with many big companies—including Skanska. It had the experience, the executives, and the legal advice needed to evaluate the contract Under these circumstances—regardless of the parties' relative bargaining power—the courts almost never intervene."

The Court held that, despite the apparent uneven bargaining power, Semac simply made a bad deal and "courts don't rebalance bargaining power between commercial entities in ordinary commercial cases. *** So Semac will have to live with the strict application of the contract terms. This is deadly to Semac."

Notice clause not followed. Not finished yet, the Court was equally hard on Skanska, noting that the contract required a 48-hour cure period before termination, and that Skanska had the right to terminate (for cause or not), but only on 48-hours' notice. "The contract doesn't name any exception or qualify this rule in any way. It doesn't say that the provision doesn't apply when the other party breaches first. It doesn't say it doesn't apply when the other party isn't likely to make use of the 48–hour period to cure. Elsewhere in the contract it does say that Skanska may seek any other remedies available at law outside the contract, but it doesn't say anything about rewriting explicit provisions already contained in the contract to make them easier on Skanska. So, the 48–hour notice that was not given had to be given for Skanska to terminate Semac for cause. In pressing a strict application of the contract, Skanska must suffer the consequences of its own handiwork. We will never know what might have happened during that 48–hour period."

Since Skanska failed to follow the 48-hour notice clause, the Court held that Skanska breached the contract be terminating (even if good cause existed). The clause saying that an erroneous termination for cause converts automatically to a termination for convenience meant that Skanska owed the money due for the work performed to date. But that wasn't the end of it. Semac said it was due around $3.6 million for work completed to date when it left the job; Skanska's counterclaim sought some $26 million, almost all of it for the cost of completing the work using replacement subcontractors. But the Court held that, "Because they both assume a breach of contract only by their adversary both parties' claims for damages are wrong."

Semac was overpaid. Since Semac was terminated, it did not need to complete the job, so it isn't liable for the costs of replacement subcontractors, and is due the money that was owed to it at the time it left. "But fatally for Semac, it wasn't due any money at the time it left and actually had money the contract required it to return to Skanska." In the end, the Court found that Semac was 65% complete at termination and, based on its contract price of $19,114,535, was owed $12,424,447. However, Semac collected $14,785,764 from Skanska before termination – meaning Semac was overpaid! Therefore, Semac owed money back to Skanska.

No fraud by Semac. Next, Skanska argued that Semac's CEO [Mr. Scanlon] and its CFO [Mr. Pope] personally defrauded Skanska by overcharging for work performed, which Skanska argued amounted to bad faith and even civil theft. The Court rejected this, noting: "As commercial and consumer contracts become increasingly intricate and the bargains increasingly unbalanced, it is a sad truth that hardly anyone reads them anymore while the courts and the lawyers keep on reading them and the courts almost always enforce them. This predictable form of neglect can't form the basis for fraud since in this context Scanlon's neglect was more pragmatic than reckless. This and some of his arguably inconsistent and inadequate efforts may have put his company on the hook for breach of contract but they don't support a finding that Scanlon committed fraud. *** In addition to the absence of the requisite mental state, some of the problems Skanska points to may have resolved themselves had the contract never been terminated."

Skanska also sought $2 million for correction of defective work by Semac. The Court noted: "Both sides recognize that with Skanska's back against the contractual wall—bound to get the job done on time for the hospital—a feeding frenzy was set off in which its completion contractors piled on charges that no one in this lawsuit defends as reasonable. The job Semac contracted to do for around $14 million cost Skanska nearly $29 million more than that. Skanska admits this charge is unreasonable yet swallows whole these same contractors' reports that a large amount of Semac's work had to be redone. *** In light of the concession that the completion work was overbilled, Skanska can't convincingly say this nearly $2 million bill is reasonable. Nor does it break the bills down in any way that might support a lesser award. Skanska will not be awarded anything for rework because it hasn't met its burden to prove what was necessary and what a reasonable charge for the work was."

No attorney's fees. The Court said, "If that isn't enough, there is Skanska's own breach to consider. Had the contract been performed, Semac wouldn't have paid for any rework; it would have done the rework as a matter of course. Bearing substantial blame for the contract's bungled termination, Skanska can hardly expect the court to reward it by imposing a charge it might have avoided by even a hypothetical 48–hour opportunity for Semac and Skanska to come to terms about finishing the job." Therefore, the Court denied Skanska's claims for attorney's fees, noting that both sides breached the contract and "Neither side acted so egregiously as to warrant attorneys fees as punitive damages."

Conclusion. "For Skanska, the Contract that Made it Marred it." The Court closed with this summation: "This contract was always a hard climb for Semac. If Semac had been in better shape it might have made it, but it wasn't, so it didn't. Semac failed in its duty. But it was saved from the worst consequences of its wrongs by Skanska's own wrongdoing." The Court entered a partial judgment for Skaska on the overpayment claim only.

Welcome To Our Eight New Members!

Travis B. Colburn, Esq.
Hermes Law Firm, PSC
Everett, Washington

James Holmberg, Esq.
Greystone Housing Foundation, Inc.
San Diego, California

Col. Tom E. Lewis, FAIA, Esq.
Tallahassee, Florida

Sara Miller, AIA, Esq.
Marks, Golia & Pinto, LLP
San Diego, California

Rick Salpietra, Esq., CCAL
Law Offices of Richard Salpietra
Rancho Sante Fe, California

Michael W. Spinelli, JD, AIA
Cashin Spinelli & Ferretti, LLC
Hauppauge, New York

Bruce A. Spence, Esq.
Spence Law
Tulsa, Oklahoma

Ryan Westhoff, Esq.
Dentons US LLP
Kansas City, Missouri

Bell Architecture Designs 500th Home for Habitat.

New Orleans, LA (August 20, 2019) - Since 2001 TJS Member Michael J. Bell, FAIA, Esq. and his firm, Bell Architecture, of New Orleans has partnered with New Orleans Area Habitat for Humanity (NOAHH) to provide decent, safe and affordable homes for hard-working, low-income families. Bell has created 15 different designs and donated the drawings for 500 new homes, including those in the now iconic Musicians' Village. The National Trust for Historic Preservation's Spring 2019 magazine ranked Musician's Village 3rd in its list of the 40 most important, most interesting, and quirkiest American places less than 40 years old. Bell Architecture and NOAHH celebrated the 500th home born of their collaboration at the dedication of the home at 6170 S. Hermes Street in New Orleans on August 15. "Not only has Bell Architecture's contribution been critical to our success, but their designs have been the inspiration for the designs of several other Habitat affiliates," says Jim Pate, Former Executive Director of NOAHH. "NOAHH's work truly transforms lives, and we are humbled to help them fulfill their mission," says Michael J. Bell. "At Bell Architecture, we believe every family should have an affordable, safe, and well-designed home. And since we love to design homes, we are in a good place to help!" said Mr. Bell. Since 2001, Bell Architecture has partnered with New Orleans Area Habitat for Humanity. "For every home or addition we design for our clients, we in turn donate the architectural services necessary for Habitat, their volunteers, and the homeowners-to-be to work together to build a simple, contextual and affordable home." Michael added.

Mr. Bell is a native of New Orleans and earned a Master's Degree in Architecture and a Juris Doctor degree at Tulane. Since 1992 Bell Architecture has focused on their specialty: providing quality services and creating truly distinctive custom homes. Michael has consistently and enthusiastically given back to the architectural profession, including as AIA New Orleans'

(Below) Dedication on Aug. 15, 2019. Homeowner Rashad Magee receives from TJS Member Michael J. Bell, Esq., FAIA the key to his new home, the 500th Habitat home designed by Mr. Bell's firm.

post-Katrina president, and as a Chairman of AIA's National Documents Committee, which creates the most commonly used design and construction contracts. In 2015 AIA elevated Michael to the College of Fellows, an award bestowed upon "architects who have made a significant contribution to architecture and society and who have achieved a standard of excellence in the profession." Michael's philanthropic endeavors over the last several decades extend beyond NOAHH and include the Louisiana Children's Museum, St. Charles Avenue Presbyterian Church, Trinity Episcopal School and Tulane, among others.

BELL ARCHITECTURE HAS PROVIDED

0507

HOMES TO HABITAT FOR HUMANITY

NORTH CAROLINA. DUTY TO DEFEND CLAUSES NOW VOID IN DESIGN PROFESSIONAL CONTRACTS.

How they got this passed, we do not know, but under a new North Carolina law (House Bill 871), signed by the governor on July 8, 2019, the state anti-indemnity statute now voids "duty to defend" clauses in contracts with design professionals. Until now, an A/E's duty to defend clauses in professional service contracts have generally been found valid and enforceable in North Carolina provided they did not run afoul of the existing anti-indemnity prohibitions. Prior to 2019, N.C. Gen. State § 22B-1 declared void and against public policy construction contract indemnity agreements requiring a party to be indemnified for that party's own negligence. However, under subsection (c) of the new anti-indemnity statute, any such duty to defend in an agreement that includes design professional services is now against public policy, void, and unenforceable. Subsection (c) now provides: "Provisions in, or in connection with, a construction agreement that includes design professional services or a design professional agreement *purporting to require a design professional to defend a promisee*, the promisee's independent contractors, agents, or employees, the promisee's indemnitees, or any other person or entity *against liability or claims for dam-*

For every home or addition that Bell Architecture designs for its clients, the firm donates the architectural services necessary for Habitat, their volunteers, and the homeowners-to-be to work together to build a simple, contextual and affordable home.

ages or expenses, including attorney's fees, proximately caused or allegedly caused by the professional negligence, in whole or in part, of the promisor, the promisee, or their derivative parties, whether the claim is alleged or brought in tort or contract, *is against public policy, void, and unenforceable*."

The new law became effective August 1, 2019, and applies to contracts entered into, amended, or renewed on or after that date. While it remains to be seen how Courts will interpret the new law, it seems reasonably clear that any provision in an agreement that purports to require a design professional to defend the other contracting party from third-party claims will be found void and unenforceable. The statute applies only to certain listed design professionals including architects, landscape architects, engineers, land surveyors, geologists, and soil scientists. The new prohibition also applies not just to design professional agreements but to any construction agreement that includes design professional services. Thus, the revised statute could have wide-ranging implications in design-build contracts, which are project delivery systems in which both the design and construction of a project are contracted by a single entity. While the revised statute clearly prohibits duty to defend clauses in contracts involving professional design services, it does not expressly prohibit the recovery of attorney fees altogether. A design professional may still be contractually required to pay a promisee's attorney's fees as part of its duty to indemnify the promisee from losses caused by the design professional – while not required to front the costs of defense prior to a finding of liability.

NEW HAMPSHIRE. STATUTE OF REPOSE APPLIED TO OWNER'S INDEMNITY AND CONTRIBUTION CLAIMS AGAINST ITS ARCHITECTS.

A man and his wife were leaving a downtown business, when the man fell on a ramp or "partial stair." The couple sued the property owner for damages and the owner, in turn, sued the architect and landscape architect for indemnity and/or contribution. The underlying suit against the owner alleged a number of defects in the ramp or stair on which the man allegedly fell, including that it was "too steep" and was "not designed, built, or maintained with appropriate handrails," and, therefore, did not meet applicable building codes. The owner hired the architects for renovations that took place between 2002 and 2009, and were substantially completed by Jan. 2009. The accident happened in March 2015. The architects argued that the claims against them were barred by the 8-year statute of repose. The trial court found that "a substantial basis exists for a difference of opinion as to whether the current version of [the statute of repose] applies to indemnity and/or contribution claims arising out of a deficiency in the creation of an improvement to real property," and transferred the question to the State Supreme Court.

Prior to June 1990, the statute of repose was six years "after the performance or furnishing of such services and construction." The statute was amended to eight years and added "economic loss" to the list of barred claims. The current statute provides, in relevant part:

> "Except as otherwise provided in this section, all actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property, including without limitation the design, labor, materials, engineering, planning, surveying, construction, observation, supervision or inspection of that improvement, shall be brought within 8 years from the date of substantial completion of the improvement, and not thereafter."

The owner argued that because the pre-1990 version of the statute explicitly mentioned actions for contribution and indemnity, and the current version omits such reference, the legislature must have intended to exclude such claims from the statute of repose. The Supreme Court disagreed, stating, "we cannot conclude that the legislature intended to write indemnity and contribution actions out of the statute when it added language that covers those actions and more." The Court also held that term "economic loss," as used in statute, should be construed and understood according to the plain and ordinary meaning of the term "economic loss," i.e. a loss that is financial, fiscal, or monetary; that the owner's third-party action against the architects fell squarely within meaning of term "economic loss" as term was used in statute; and, that the statute of repose included not only direct actions, but indirect actions such as those for indemnity and/or contribution. The case was remanded to the trial court. *Rankin v. South Street Downtown Holdings, Inc.,* 2019 WL 3562167 (N.H. 2019).

OHIO. LETTER AGREEMENT HELD UNENFORCEABLE WHERE IT CONTEMPLATED A MORE FORMAL SETTLEMENT AGREEMENT WOULD BE SIGNED.

"Litigation often stirs emotions, hardens principles, and drains the rationality from perfectly rational people. Cost-benefit analyses can be tossed out the window, and positions might be pursued regardless of the odds. At the end of the day, after the court or jury declares a winner and a loser, however, for many the bitterest pill of all to swallow is their lawyer's bill."

Thus, began the opinion of the Ohio Court of Appeals in the case of *Weckel v. Cole + Russell Architects*, 2019 WL 3437779 (Ohio App. 1 Dist. 2019), a case dealing with recovery of attorney's fees, among other issues. The underlying lawsuit dealt with an architect who was terminated by his employer more than a decade ago. The plaintiff-architect claimed that he helped the firm grow and expand, and that he wore multiple hats at the firm — serving as a managing principal in the firm, a member of the board of directors, and a shareholder. Although the parties tried to negotiate a severance package, those efforts fell through, and the plaintiff sued his firm for wrongful discharge and breach of fiduciary duty. After more than three years of litigation, the parties reached a settlement agreement, set forth in a 2008 "Letter Agreement," which contemplated the plaintiff selling his firm stock to the firm's employee stock ownership plan. The Letter Agreement anticipated a formal "Settlement Agreement" would be drafted, and that is when problems set in. As the Court said, "Unfortunately for everyone involved, that contingency did not come to pass, as the independent advisor concluded that the sale could not proceed as formulated (for various reasons not germane to this appeal)," and the firm proclaimed the Letter Agreement "null and void." At that point, the Court said, the litigation "roared back to life." The plaintiff tried to enforce the Letter Agreement, but the trial court declined, pointing to the failure of the condition precedent. The parties never executed the Settlement Agreement contemplated by the Letter Agreement.

In the first appeal (from the trial court's denial of the motion to enforce), the Court held that the trial court abused its discretion in extinguishing discovery. The Court reversed the trial court's denial of the motion to reopen discovery, vacated the portion of the trial court's order denying the motion to enforce, and remanded for discovery. After more discovery and an evidentiary hearing, the trial court again overruled the motion to enforce the settlement. That was appealed once more and affirmed.

But that was not the issue presented for ruling in this opinion. It seems that during the course of that convoluted procedural history, the firm racked up over $400,000 in attorney fees and expert witness fees. "Evidently frustrated with those costs for litigation that it had prevailed upon, it moved the trial court to have [plaintiff] foot the bill, clinging to a provision in the Letter Agreement that referenced a to-be-included fee-shifting provision in the (never executed) Settlement Agreement." The trial court denied the motion and the firm appealed that decision. The Court noted that Ohio follows the "American rule" with regard to attorney fees: "a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." Absent certain recognized exceptions, the "American rule" dictates that parties must pay their own way in litigation. In denying the firm's request for legal fees, the Court said simply, "Seeing no reason to depart from that principle in this case, we affirm the judgment below denying an award of attorney's fees. *** Having succeeded in the quest to invalidate the Letter Agreement, [the firm] cannot now attempt to breathe new life into the contract that it scuttled. Nor can it selectively pick and choose which provisions should retain vitality—that would run afoul of our prior decision and basic contract law."

"Do you want to know who you are? Don't ask. Act! Action will delineate and define you."

- Quote attributed to Thomas Jefferson

MEMBER PROFILE: JESSICA I. HARDY

Macdonald, Devin, Ziegler, Madden, Kenefick, Harris, P.C.
Dallas, Texas

TJS member Jessica Hardy grew up in what some call "The Heart of Dixie," in the north Alabama town of Cullman. Not surprising, Jessica stayed in-state for her architectural degree, receiving her Bachelor of Architecture degree from the Auburn University College of Architecture, Design and Construction (Auburn, Alabama). Jessica chose architecture because she always enjoyed drawing and painting from a young age. "During my childhood, my father often stressed the importance of specializing in something during college, even if it was basket weaving," she said, "rather than a general major like art." Her father's words made an impression on Jessica and her three sisters, because they all chose professional careers. "One went to dental school, two went to nursing school, and I chose architecture school because it combined creative arts with a profession," she said.

After getting her degree at Auburn, Jessica moved to Portland, Oregon, where she worked at architecture firms for three years. During that time, she also served on the Board of Design Review (n/k/a the Planning Commission) for the City of Beaverton, Oregon. That made another impression on her that, ultimately, led her to law school. "Land use attorneys would often present design review applications before the board, and I found their work interesting," she told us.

"I began to prefer research of zoning and building codes over other work at the architectural firm. I was also intrigued by a lunch-and-learn at work on minimizing risk in the practice of architecture that was presented by an in-house architect-attorney." Those interests led Jessica to apply to law school. She returned to her native Alabama for law school because she missed her family. "So, I chose to attend University of Alabama in Tuscaloosa." Jessica was honored in law school with the Order of the Samaritan, the highest public service award bestowed by the School of Law for students who complete at least 90 hours of volunteer work.

After law school, Jessica moved to Dallas, where she is now a Senior Attorney with the law firm of Macdonald, Devin, Ziegler, Madden, Kenefick, Harris, P.C. There, she practices business, commercial and construction litigation with a focus on architect and engineer professional liability defense.

"I enjoy working with architects and engineers, who are some of my favorite people. The strategy involved in the practice of law is a creative outlet. *Almost* every day is fun, so I know that I made the right move by going to law school," she said. Jessica's background and professional experience in architecture includes working on numerous multimillion-dollar projects for multi-family, retail, office, mixed-use, industrial and institutional clients.

(Above) Jessica and her three children in New York City (Summer 2019)

Jessica lives in Irving, Texas, a suburb of Dallas. She has a 10-year old son who is an avid reader and chess player and will probably grow up to be a lawyer just like his mother. She also has five-year old identical twin daughters who enjoy karate and swimming. Her husband is "a brilliant surgeon" and an avid soccer player. He has two teenage children. Outside of work, Jessica is an associate member of the AIA and she has served on the board of the City of Irving, Texas, Zoning Board of Adjustments since 2013.

The family loves sailing, and Jessica told us that, "My husband and I have a goal to become *bare-boat certified* within the next year so we can charter sailboats around the world for family vacations. We enjoy teaching our children how to sail and to be good stewards of the environment." For us landlubbers, "bare-boat certified" means you are able to skipper a sloop-rigged, auxiliary powered keelboat of approximately 30 to 45 feet in length during a multi-day cruise upon inland or coastal waters in moderate to heavy winds and sea conditions.

As to her favorite architects, Jessica named her professor, Gaines Blackwell, "one of my favorite people on earth." "He has inspired new generations of young architects in design and in living life to the fullest for many years," she said. Any advice for a young architect thinking about law school? Jessica said, "Being a lawyer is similar to being a student for the rest of your career. If you love to research and writing assignments, then law school may be a good fit for you."

(Above) The entire family enjoying the view at North Cascades National Park (July 2018); (Below) Jessica, the twins and her son in Ouray, Colorado in 2018.

MEMBER PROFILE:
JOHN R. HAWKINS, AIA, Esq.

Porter Hedges, LLP
Houston, TX

John Hawkins grew up in the South, so he went to college at Louisiana State University in Baton Rouge because LSU had a reasonably well-regarded architecture school, good football team and very reasonable tuition. John's first job out of architecture school was for a medium-sized architecture firm (BPA), where he worked for five years, mostly for real estate developers. He then moved to a large firm (3D/I), where he spent another five years after the "first oil crash" in the 1980's, working work primarily on larger institutional projects and out-of-state commercial projects. When it came time for law school, John stayed in the South, but chose the University of Houston because it is reasonably well-ranked and in Houston, where he lived at the time. During law school, where he graduated with honors, John was a law intern to The Honorable John R. Brown, Circuit Judge, United States Court of Appeals for the Fifth Circuit. He then went into private practice, accepting a job with for the late firm of Butler & Binion, where he worked as an associate for two and a half years.

Why combine architecture and law? John told us, "The thought first crossed my mind from Hollye Fisk's practice. I was also always intrigued at the idea of practicing law. My uncle was then a judge, and I lived with a law school student when I was studying architecture at LSU. Combining the two professions to practice 'construction law,' in large part, made sense."

(Above) Taking a stroll in Bletchley Park, UK with his "better half," Kathy; (Below) John is willing to take on any challenge for his clients!

Today, John Hawkins is a partner with the law firm of Porter Hedges's Houston office, where he has spent the last 25 years in the Litigation Practice Group. "Most of my practice is in litigation and non-litigation (e.g., contracts) matters related to design professionals, construction law and real estate development. I also handled patent litigation and lender collection/foreclosure cases for many years."

The best part of his job, he said, is "Prevailing in claims against design professionals." We like that! John is a well-respected advocate for architects and engineers, and is listed in *Chambers USA,* Leading Lawyer in Construction (Texas), as well as *Best Lawyers in America*, for Construction Law.

John and his wife, Kathy, have been married for 35 years. They have two "awesome" children, Brooks (a computer analyst for Halliburton) and Graeme (formerly with Deloitte, now in Tulane law). Outside of law and architecture, John and Kathy love to travel out of the country as much as possible. Any other hobbies, we asked? "On a daily basis, it's mostly reading nerdy history books and documentaries. I also like hitting golf balls around a course, but you probably wouldn't call it playing golf." Outside of work, John is active in Central Houston Inc. (an advocacy group for downtown, principally involved in the radical redesign and reconstruction of all freeways in and around the CBD) and the Rice Design Alliance (advocating good design in the built environment).

He enjoys his hometown of Houston, Texas because it is "big, spread out, hot, entrepreneurial, diverse and has some great architecture and restaurants."

Asked what architects and buildings inspire him, John told us that he is inspired by Wright's masterpiece, "Falling Water," as well as John Soane's House in London, The Sydney Opera House (see photo, below), The Reliance Building in Chicago by Burnham & Root) and two buildings in Houston, 700 Louisiana ("Neo-Northern European" by Philip Johnson) and 600 Travis (75 stories tall by the late I.M. Pei). What advice would he give to a young architect thinking about law school? John said, "Don't be afraid to go for it. A lot of fine, accomplished people in the TJS (present company excluded)!"

(Above) Following a Harley ride with family in Sydney (Note the famous Opera House in the rear, and the arched Harbour Bridge).

MEMBER PROFILE: WYATT A. HOCH

Foulston Siefkin LLP
Wichita, KS

Wyatt A. Hoch grew up in Kansas and he chose Kansas State University to study architecture because, he says, "it was the best design school in the region, and I could also play in the bands." After graduating from K-State *magna cum laude*, Wyatt chose arch-rival University of Kansas in Lawrence, Kansas for law school (K-State did not have a law school). His reasons? "I wanted to be close (as compared with Big 10 schools) to my then-fiancé / now wife (Mary Ann) of 38 years, and she was finishing her degree at K-State in nearby Manhattan, Kansas." So, after completing his undergraduate degree in architecture, Wyatt headed to law school at the University of Kansas. It must have been tough for this avid K-State fan - who "bleeds purple" when it comes to supporting K-State Wildcat athletics - to spend three years at KU, but he excelled. There, he was a member of the Order of the Coif, as well as editor of the *University of Kansas Law Review*.

What intrigued him about combining the two studies? Wyatt said he was most influenced by his middle-school English teacher, who encouraged him to become an attorney. During his fourth-year architectural internship in Denver, he observed legal scrapes even a small design firm can encounter, "and the rest is history," he said.

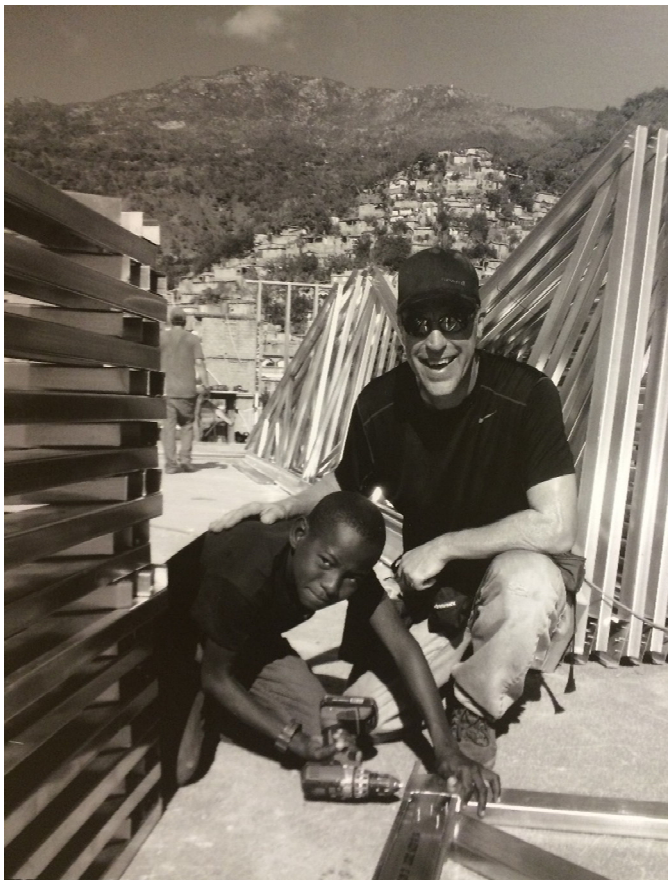
After law school, Wyatt took a job as an associate attorney in private law practice with Foulston Siefkin in Wichita, Kansas where he has remained for the past 36 years. There, he practices construction law and he is the leader of the firm's Construction Team. His transactional and litigation practice encompasses drafting design-build contracts, preparing development agreements, negotiating claims, and resolving disputes through the courts and in arbitration forums.

As a member of the American Arbitration Association's national panel for construction industry cases, he frequently serves as a mediator and arbitrator in alternative dispute proceedings. Wyatt has been named by *Best Lawyers* as the "Lawyer of the Year" for Construction (2011, 2016, 2019) and Construction Litigation (2013, 2017, 2020) in Wichita, Kansas. What he loves about his job is "learning why building components/systems don't work in some contexts, and working with clients and lawyers from all over the county," he said.

Another architect in the family? Grandson Jettson gets his first drawing lesson from Grandpa Wyatt (Sept. 2019).

In 2018, Wyatt was the recipient of the K-State Architecture, Planning, and Design Distinguished Service Award. He is currently the Vice-Chair of the Northern Seminary Board of Trustees in Chicago and a member of his local Boy Scout council (Quivira Council) executive board. An avid landscaper, Wyatt is an emeritus trustee of the Wichita Botanical Gardens.

Wyatt and his wife, Mary Ann, live in Wichita where he enjoys working on home remodeling and gardening projects. They have two children, a daughter (Adele), who is a professional recruiter in Kansas City; and a son (Logan), who is a specialty-metals salesman. They have a 15-month old grandson, Jettson, and a daughter-in-law, Kaitlyn. Outside of the office, Wyatt enjoys not only landscaping (planning, execution, and maintenance), but playing handball, and watching baseball and college football. He is a self- proclaimed "baseball junkie," but takes time out to make occasional presentations to AIA-Wichita and AIA-Kansas gatherings on issues of professional liability and risk management. His hometown of Wichita is known as the Air Capital of the World. "We make many aircraft and aircraft components. We're also currently three years into a downtown renaissance."



Wyatt helped build light-gauge metal trusses on-site in Cap Haitien, Haiti.

As for any favorite building that inspires him, Wyatt named Frank Gehry's 8 Spruce Street Tower (now called "New York by Gehry") in lower Manhattan. The 76-story skyscraper is clad in rippled stainless-steel panels that look like waves, causing Wyatt to ask, "How did they build that?" But his favorite architect is not Gehry, but Moshe Safdie, the designer of Wichita's "Exploration Place" community science center.

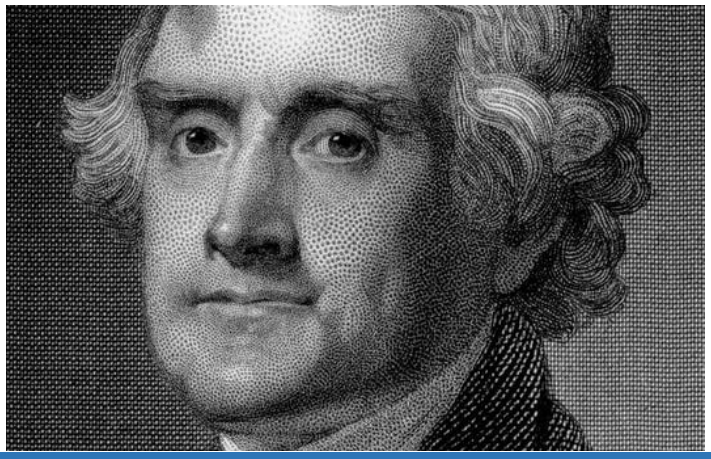
Any advice for a young architect thinking about law school? "Follow your heart, but be ready to have law school totally re-orient your brain from what you learned about in design school."

(Above) Gehry's 8 Spruce Street Tower; (Below) Ready for K-State football with Adele, Mary Ann, Wyatt, Logan, and Kaitlyn in the "other" Manhattan.

FLORIDA. ARCHITECT WITH SUPERVISORY ROLE MIGHT OWE A DUTY TO TERMINATED CONTRACTOR.

In this August 2019 case, a county had separate contracts with the architect and the contractor for the development of an improvement project at the Fort Lauderdale Airport. The county's contract with the architect included certain administrative duties and the construction contract identified the architect as the county's consultant and administrator. As the project neared completion, the county terminated its contract with the contractor. The contractor then sued both the county and the the architect, claiming breach of contract and professional negligence, respectively. The trial court granted the architect's motion for partial summary judgment, finding that it did not owe the contractor a duty of care and the contractor could not recover contract damages in tort. The contractor appealed. The Court of Appeals reversed and remanded.

The architect's contract contained a clause that stated the parties' intent not to "create any rights or obligations in any third person or entity under this agreement." As is typical, the architect's scope of services included certain administrative functions, including the ability to: 1) interpret and give recommendations on disputes arising between the county and contractor; 2) recommend rejection of work not in conformity with the contract; 3) review and act on the contractor's "shop drawings, product data and samples"; 4) coordinate with the county to review "Change Orders for Code Compliance"; 5) conduct site observations, make recommendations, and assist the county in determining the project's completion; and, 6) manage the finalization of the project by preparing a punch list of incomplete or work needing correction and confirm the contractor's "successful demonstration" of the project. The architect's principal described his role as the county's "eyes and ears" for the project.



The principal also admitted that he recommend-ed the contractor's termination to the county and knew termination could happen upon his recommendation.

The contractor argued that the trial court erred in granting partial summary judgment. The architect, however, pointed to Florida precedent and argued that it owed no duty of care to the contractor because Florida case law does not extend the architect's duty of care to the contractor. Citing to a 1973 case, *A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973), the Court noted that, "[A] third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity." The Court justified the contractor's right to sue an architect, noting, "Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor," (citing to a 1958 California case). The discussion then turned to the level of "supervisory duties" or responsibilities and a "close nexus" between the architect and contractor for *Moyer* to apply. In this case, the Court found that, "The architect was broadly responsible for administration of the county/contractor contract and sometimes acted as the county's representative. The architect was also responsible for on-site observational duties, which were later used to certify payment." Although the architect was not given absolute authority to stop work, it had the authority to recommend work stoppage. As a result, although the county had final authority to terminate the contractor or otherwise stop work, it relied on the architect's duty as consultant to make its ultimate determination to terminate the contractor. "The architect was given near absolute authority regarding payments to the contractor, demonstrating the architect's influence over the contractor's economic vitality," the Court held. The Court rejected the architect's economic loss defense that tort damages from the architect are barred. Here, however, since the contractor had not yet recovered from the county in contract, the Court said it was premature to rule on the application of the doctrine. See, *Grace and Naeem Uddin, Inc. v. Singer Architects, Inc.*, 2019 WL 4049511 (Fla. App. 4 Dist. 2019).

NEW JERSEY. ARCHITECT NOT LIABLE TO INDEMNIFY DEVELOPER FOR ITS OWN BREACH OF WARRANTY TO CONDO BUYERS.

A developer hired an architectural firm to develop plans for a 132 residential condominium project in New Jersey. The plans the developer submitted to, and obtained approval from, the town called for a "Type 2B" building, requiring use of fire-retardant-treated wood. However, a consultant the developer hired to review the architect's plans for insurance purposes questioned whether the building had the necessary fire rating to meet the requirements of a Type 2B building. This began a series of communications in which the architect attempted to assist the developer in getting the building classification changed from Type 2B to Type 3A Type 3A (non-combust-ible/combustible) construction type under the building code. The architects wrote a letter to the developer outlining the issue with having plywood in Type 2B construction, and stating the building classification "may need to be changed to a Type 3A," recommending "that this situation be reviewed with the local code authority as soon as possible," and offering their assistance in resolving the issue with the local authority. The developer sent the architect's letter to the local code official and the architect prepare revised plans for the revised building classification. However, beyond that, there was no evidence that the developer took any steps to obtain approval of the classification change beyond hand-delivering the plans, nor anything to show that the town ever approved it. The town eventually issued a certificate of occupancy for the 132 residential units but, officially, the town never approved the plans changing the building's classification from Type 2B to Type 3A.

After completion and occupancy, the condo association sued the developer and the architect and others under various theories based upon the non-conforming plywood. The jury found that the architect was negligent in the design of the project, and that the developer failed to meet an express warranty that the common elements would be fit for their intended purpose. The jury found plaintiff suffered damages of $4 million, for which the developer was responsible for $3 million and the architect responsible for $1 million. As to a claim of consumer fraud, the jury found that the developer "omitted an important and significant fact ... with the intent that others would rely" thereon in connection with the sale of the units by stating the common elements "would be fit for their intended use," and that plaintiff had proved an ascertainable loss of $3 million, trebled to $9 million.

The developer attempted to assert a cross-claim against the architect for contractual indemnity under a clause that read:

> "Architect hereby agrees to assume the entire responsibility and liability for any and all injuries or death of any and all persons and any and all losses or damages to property caused by or resulting from or arising out of any negligent act, error or omission on the part of the Architect, its agents, officers, employees, subcontractors or servants in connection with this Agreement or with the prosecution of the work hereunder, whether covered by the insurance specified herein or not. Architect shall indemnify, and save harmless Owner, its agents, officers, employees, affiliated entities from any and all claims. losses, damages, fines or penalties, legal suits or actions including reasonable attorney's fees, expenses and costs which may arise out of any and all such claims, losses, damages, legal suits or actions for the injuries, deaths, losses and/or damages to persons or property."

However, pre-trial, the trial court denied the developer's motion for indemnification, finding the issue would not be ripe until the jury had assessed the negligence of the architect, if any. After trial, when the motion was renewed, the judge denied indemnification based on the express language of the clause and the jury's findings. Specifically, the judge found the language of the clause was clear that the architect had only agreed to indemnify *its own negligence*, not for the developer's own negligence. Since the developer was found liable for an independent breach of warranty, it could not seek indemnity from the architect under the language of the clause. The developer appealed, claiming it was entitled to $3 million in indemnity from the architect. The Appellate Court affirmed in favor of the architect, stating that the jury awarded damages against the developer for breach of express warranty and consumer fraud and the parties did not contract for the architect to indemnify the developer for those damages. The Court stated: "Indemnity provisions are construed in accordance with the general rules for construction of contracts with one important caveat: ambiguities are strictly construed against the indemnitee." *Grandview Condo. Ass'n v. K. Hovnanian at Port Imperial Urban Renewal II,* 2019 WL 3798427 (N.J. Super. A.D. 2019).

TEXAS. CERTIFICATE OF MERIT NOT REQUIRED WHEN ALLEGATIONS AGAINST AN ARCHITECT DO NOT RELATE TO ARCHITECTURAL SERVICES!

This is an interlocutory appeal from a trial court's order denying a motion to dismiss claims against an architect for failing to file a statutory certificate of merit, as required by Texas law. Texas Civil Practice and Remedies Code § 150.002(e). The suit involved construction of a house in Austin. The homeowner sued the builder with which he contracted, as well as the project's architect. The owner alleged that the contractor and architect represented themselves as a "team" in their operations. About six months after the suit was filed, the architect moved to dismiss based on plaintiff's failure to file a certificate of merit. Pursuant to section 150.002(e), a plaintiff seeking "damages arising out of the provision of professional services by a licensed or registered professional ... shall be required to file with the complaint an affidavit of a third-party" attesting to the merit of the plaintiff's claims. "The plaintiff's failure to file the affidavit ... shall result in dismissal of the complaint against the defendant." However, the trial court denied the architect's motion to dismiss. The Court of Appeals affirmed, stating that the homeowner, "maintains that he did not sue for damages arising out of [architect's] provision of professional services. We agree." The Court explained that to determine whether a claim falls within the "provision of professional services," one must examine the relevant acts alleged by the plaintiff in his petition. Here, the owner sued the contractor and architect for damages, "asserting claims against them, as a team, for negligence, negligent misrepresentation, common law fraud, fraud in a real-estate transaction, breach of contract, breach of warranty, trust-fund violations, and violations of the Deceptive Trade Practices Act." In his lawsuit, the plaintiff listed twelve "material representations" made by the "team," only two of which involve the architect's status as an architect. But nowhere in the suit did the plaintiff seek damages arising out of the architect's provision of architectural services. Since none of the plaintiff's theories of recovery were based on the defendant's status as an architect or on any architectural services rendered, the Court ruled that no certificate of merit was required. *Marquez v. Calvo*, 2019 WL 2998584 (Tex.App.-Austin).

NEW JERSEY. CONTRACTOR WAIVED RIGHT TO ARBITRATE BY FILING SUIT AND DELAYING IN SEEKING TO COMPEL ARBITRATION.

The arbitration clause in a construction contract required that, "Any issues that may arise during this repair project will be submitted to the architect for his determination. The decision of the architect will be final unless either party submits a claim or objection to the architect within 10 days. Any such issue or dispute shall not result in a delay of the project and shall be finally resolved after completion of construction by submission to an arbitrator selected by the parties." The contract was for renovations to a home for an estimated cost of $280,000. When relations broke down, each party sued the other one, with both sides requesting a jury trial. The homeowners later amended their suit to join the contractor's principal as an individual defendant. In response, seven months after filing its original suit, the contractor moved to consolidate the actions and send them to arbitration. The owners moved to dismiss the contractor's suit and opposed the motion to compel arbitration, arguing that the contractor had waived arbitration by initiating its lawsuit and engaging in discovery and motion practice. The contractor countered that documents exchanged in discovery established the parties had initiated the arbitration process by "going through the architect," as was required by the arbitration clause. The trial court concluded that the communications with the architect might be relevant, but denied the motion to compel arbitration without prejudice.

However, the trial court also dismissed the contractor's suit without prejudice for pleading deficiencies, but allowed the contractor to file a counterclaim in the homeowner's lawsuit, which it did. In the counterclaim, however, the contractor again raised the issue of arbitration. The parties then "intensively litigated the case for the next thirteen months," until the homeowners filed a second amended complaint, adding another principal of the contractor as a defendant. The parties engaged in extensive motion practice over various issues. Approximately one year after the denial without prejudice of the contractor's original motion to compel arbitration, the contractor and its principals filed their second motion to compel arbitration supported only by counsel's certification to which he attached the contract and an email between the parties demonstrating that plaintiffs drafted the arbitration clause. The trial court granted the

The new 300,000 square-foot Thomas Jefferson High School in Jefferson Hills, Pa. features a natatorium with an eight-lane competitive pool, a 1,400-seat gymnasium, an auxiliary gym with sport court flooring, a theater boasting the same Electronic Theatre Controls software platform and fixtures as many current On-Broadway shows, a media center, outdoor learning areas and more. A large mural of Pres. Jefferson keeps an eye on the students (above).

contractor's motion to compel finding a valid agreement to arbitrate and that the parties' dispute fell within the scope of the agreement. Noting that the homeowners' lawyer drafted the clause, the trial court deemed it "extremely broad" and found the parties had "freely agreed to the terms and conditions of the contractual agreement." The court noted the presumption against waiver of an arbitration agreement. The homeowners appealed.

The Court of Appeals reversed, holding that the contractor and its principals waived the agreement to arbitrate, using a 7-factor test: 1) the delay in making the arbitration request; 2) the filing of any motions, particularly dispositive motions, and their outcomes; 3) whether the delay in seeking arbitration was part of the party's litigation strategy; 4) the extent of discovery conducted; 5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; 6) the proximity of the date on which the party sought arbitration to the date of trial; and, 7) the resulting prejudice suffered by the other party, if any. Applying those factors here, the Court of Appeals had "no hesitation in concluding defendants waived any right they had to arbitration." Key was the fact that the contractor was the first to file suit - in derogation of its right to arbitrate, then waited seven months before even raising the arbitration clause. Moreover, when the contractor's motion to compel arbitration was denied without prejudice, the contractor continued in litigation for another year before refiling the motion to compel. In concluding, the Court said, "There is no question but that defendants were aware of their right to seek arbitration during the thirteen months they engaged in discovery and motion practice following the denial of their initial motion *** it is difficult to conclude anything other than the more than one-year delay in refiling the motion was as a result of a deliberate strategy to use arbitration as a means of further delay. The prejudice to plaintiffs in defendants' waiting to compel arbitration until the end of extended discovery and multiple motions to compel defendants' compliance with their discovery obligations is manifest. See, *Barry v. Melmed Construction Co., Inc.,* 2019 WL 3281192 (N.J.Super. A.D. 2019).

OHIO. STATUTE OF REPOSE HELD TO APPLY TO BOTH CONTRACT AND TORT CLAIMS ON CONSTRUCTION PROJECTS.

In the July 2019 issue of *Monticello*, we reported on an Ohio case dealing with a school project and the 10-year statute of repose. (See the *CT Taylor* case, p. 10). Well, along comes another one. In this case, a school district board of education sued an architecture and design firm, the general contractor, roofing contractor, and the contractors' surety, asserting claims for breach of contract, breach of express warranty, and claims on the surety bonds. The defendants filed motions for judgment on the pleadings based on 10-year construction statute of repose. R.C. 2305.131. The trial court granted the motions and the board of education appealed. The Court of Appeals reversed and the case went up to the Ohio Supreme Court. That Court held that the 10-year construction statute of repose applied to all claims, including contract claims and, therefore, reversed again.

The project at issue here was substantially completed and approved for occupancy in December 2002. The school district board alleged that condensation, moisture intrusion, and other deficiencies exist in various areas of the project due to improper design and construction. The school district board filed suit in April 2015 – well beyond the 10-year statutory period. Claims included breach of contract, breach of express warranty and claims against the surety bonds.

The Court of Appeals reversed the trial court's judgment on the basis that the 10-year statute of repose did not apply to breach-of-contract claims, nor did it apply to two of the defendants because the State of Ohio - with which those entities had contracted - is not subject to statutes of repose. As to whether the statute of repose applies to contract claims as well as to tort claims, the Supreme Court said, "Ohio courts have recognized that a plaintiff, in appropriate circumstances, may seek damages for injury to property in an action for breach of contract." Reading the current version of the statute, the Court concluded that Ohio's construction statute of repose "is not limited to tort actions but also applies to contract actions that meet the requirements of the statute."

Not to be totally defeated, the school board argued that even if the 10-year statute is applicable, the statute does not bar its claims, because the 15-year statute of limitations on breach of contract actions begins to run once a cause of action accrues within the 10-year repose period. Thus, the school board still had time to sue under the 15-year statute. The Supreme Court sidestepped that issue, stating that neither the trial court nor the Court of Appeals had addressed it. Therefore, the Court reversed as to the application of the 10-year statute to contract claims, but remanded on the issue of the 15-year statute. Two judges dissented, with one writing that "remand of the case does nothing more than add further delay in resolving this matter." The dissent would have ruled that, "The plain language of R.C. 2305.131(A), read in its entirety, extinguishes liability for injuries arising out of a defective and unsafe condition of an improvement brought against a person who designed, planned, supervised, or constructed that improvement after ten years from its substantial completion." Therefore, the trial court was right in dismissing the lawsuit. The other dissenter felt, however, that the Court was engaging in a legislative function, better left to the General Assembly. He would affirm the judgments of the Court of Appeals. We will try to monitor this case to see how it plays out in an upcoming issue of *Monticello*. The case is *New Riegel Local School District Board of Education v. Buehrer Group Architecture & Engineering, Inc.,* 2019 WL 3209991 (Ohio).

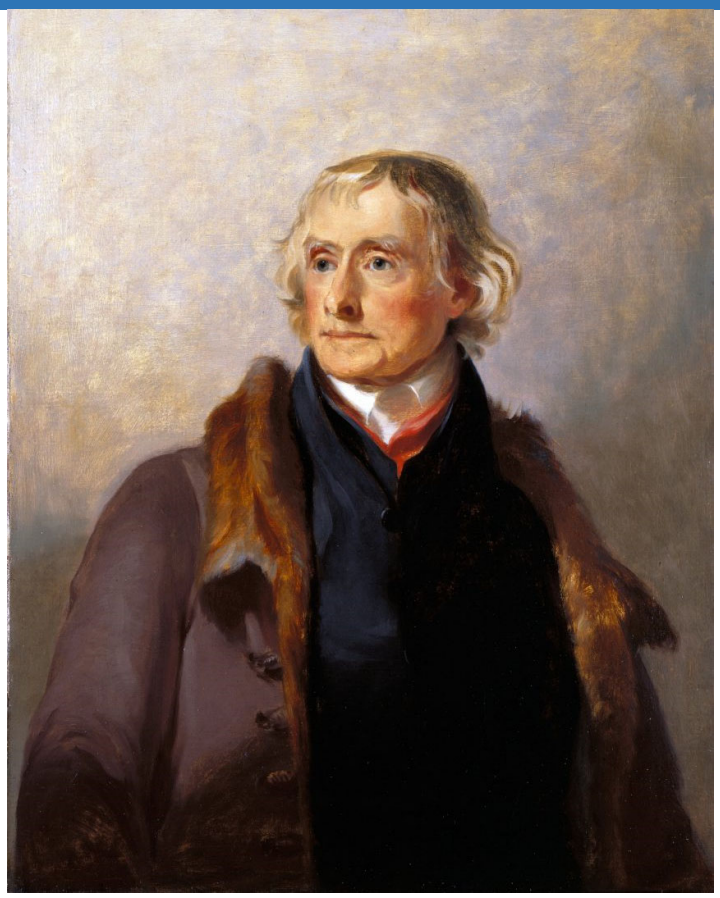
NEW JERSEY. SUIT AGAINST ARCHITECT BARRED BY 6-YEAR STATUTE OF LIMITATIONS THOUGH DESIGN VIOLATED ZONING LAW.

Plaintiff is the owner of property located in an "R-3 zone," which restricts property to single-family uses. The property contained two structures, which were constructed before the R-3 zone restrictions went into effect and qualified as pre-existing, non-conforming uses. In 2008, plaintiff made plans to renovate one of the buildings after a hot water system burst and the structure sustained significant water damage.

Initially, plaintiff planned to add a second story to the building and filed a use variance which was denied. Plaintiff then revised his approach and hired defendant, a licensed architect, to design the construction plans. The architect completed the plans on July 18, 2009. The local zoning officer approved the plans and issued a building permit. Thereafter, construction began. However, in January 2019, the local code enforcement officer called plaintiff and informed him "that the construction that is being performed is beyond the scope of the zoning permit." The two met and the

official notified plaintiff that he was going to issue a "stop-work order" because local ordinances prohibited renovations that affect more than fifty percent of an existing structure. The stop-work order prohibited any further construction on the property and said that the plaintiff needed to obtain an "update" to the permit before continuing construction. When the architect learned of the stop-work order, he wrote a letter to the local officials challenging the order and detailing the scope of his design plans. However, on Feb. 4, 2010, the officials posted a zoning violation notice on plaintiff's property. Although the plaintiff challenged the stop-work order in a petition to the Board of Adjustment, the Board upheld the stop-work order. The plaintiff appealed the Board's decision and the trial court set aside the stop-work order in part, and allowed plaintiff to resume certain development of the property. The Board appealed from the trial court's judgment. The Court of Appeals reversed the part of the trial court's judgment that vacated the stop-work order, stating that, "absent a variance, plaintiff had no right to restore the nonconforming structure." The plaintiff-owner then sought review by the State Supreme Court, which denied the petition. On Feb. 25, 2014, the Board ordered plaintiff to demolish the structure. Nearly two years later, on Feb. 4, 2016, the plaintiff sued the architect alleging that he suffered damages as a result of defendant's "negligence and carelessness." He claimed that "as a licensed professional," defendant "knew or should have known that removal of the walls of the front house would violate [the zoning ordinances]," and that defendant "had an obligation to ensure that his proposed plans complied with local zoning ordinances." On Feb. 8, 2018, the architect filed a motion to dismiss plaintiff's complaint, arguing that plaintiff did not file the claims against him within the 6-year statute of limitations. N.J.S.A. 2A:14-1. The trial court granted the architect's motion and dismissed the complaint with prejudice, finding that the plaintiff's cause of action accrued on Jan. 21, 2010, when the city issued the stop-work order. The judge also found that plaintiff's appeals challenging the order did not toll the running of the statute of limitations. As a result, a suit against the architect filed on Feb. 4, 2016 was outside of the 6-year statute.

The plaintiff appealed arguing that the "discovery rule" applied here and that when the city issued the first stop-work order on Jan. 21, 2010, he did not, and could not, appreciate that he had sustained an ascertainable injury that defendant caused.



1821 Portrait of Thomas Jefferson by Thomas Sully (1783 - 1872), commissioned for the U.S. Military Academy at West Point

He further argued that defendant contributed to his failure to perceive he had a potential cause of action against defendant, based on the architect's letter to the officials.

In affirming the ruling for the architect, the Court held that, "A cause of action for professional negligence accrues when a defendant's breach of professional duty proximately causes a plaintiff's damages." The record supported the trial court's determination that in Jan. 2010, the local officials informed the plaintiff verbally and in writing that there was a problem with the construction on the property. "On that date, plaintiff was aware of facts, which would place a person of reasonable diligence on notice that he had a potential claim against defendant for professional negligence in the preparation of the design plans. Plaintiff had sufficient facts to claim that defendant had prepared plans that did not comply with the [local] zoning ordinance." The Court concluded that because plaintiff did not file his complaint within six years after that date, his claims against defendant are barred by the statute of limitations. *Motley v. Finelli,* 2019 WL 3162368 (N.J.Super.A.D. 2019).

MEMBER PROFILE:
KURT LUDWICK, AIA, Esq.

McMillan Pazdan Smith Architecture
Spartanburg, SC

Unlike most Jefferson Society members, Kurt Ludwick remains a practicing architect today, although he has practiced law as well. After completing law school at the University of Wyoming, Kurt was hired at the prestigious Kansas City law firm of Shook Hardy and Bacon, which had a practice group that focused on the construction industry. But architecture remained in his blood, and he eventually returned to that profession for good. He has no regrets, however, for spending several years studying and practicing law. "I believe I'm a better architect because of my study and practice of law," he told us.

But let's back up a bit. Kurt went to architecture school at Kansas State University (K-State), in Manhattan, Kansas, which he chose because he was living in Kansas at the time. He went on to obtain an M. Arch. at the University of Texas because of its programs in historic preservation. His first job out of architecture school was in his native Kansas, as an Intern Architect at Breidenthal and Burk in Wichita, which emphasized historic preservation as a practice. "There, I was involved with the restoration of the Sedgewick County Courthouse," he said, acknowledging his first introduction to the legal profession. He became interested in law and decided to go to law school. He chose to go out-of-state, to the University of Wyoming for two reasons: First, he liked the size of the school, the location in the mountains, and the price; second, his dad went to that same college for his Doctorate in Education and, as a legacy, Kurt was able to take advantage of in-state tuition.

Claudia, Grant and Abigail Ludwick at the Magic Kingdom in Orlando, Fla.

Though practicing architecture, Kurt maintains his bar licenses in both Missouri and North Carolina, and he is licensed as an architect in Missouri, Kansas, and South Carolina, and a member of NCARB.

Today, Kurt is the Sports and Recreation Studio Director for McMillan Pazdan Smith Architecture, a regional architectural firm in the Southeast United States. "My focus is designing NCAA Division I and II athletic venues for colleges in the Carolinas, Georgia, Virginia, Tennessee, Alabama, and Florida." He finds designing venues for athletics challenging, but also very exciting! "Working with athletic departments, coaches, college administrations, students, fans, etc. to design an affordable but memorable facility is challenging, but enjoyable. Designing athletic traditions, attending the first contest in the finished venue and listening and watching fan responses is rewarding. I am very thankful for my position and career."

Kurt's wife, Susan, is the Dean of the College of Nursing at Newberry College in Newberry, S.C. She completed her Doctorate in Nursing Practice at the University of Kansas, and she accepted the dean's position at Newberry in January of this year. The couple has three children: Grant (age 22), a senior at Charleston Southern University, majoring in Accounting; Claudia (age 20), a junior at Charleston Southern, majoring in English, with a minor in theater (she would like to attend law school, Kurt thinks); and, Abigail (age 18), a senior at Landrum High School, who is presently visiting colleges this fall. (See photo, to the left). Outside of the office, Kurt enjoys physical exercise and he tries to run in a 5K race at least once every six months. He and Susan also enjoy movies, hiking, running, and working around the house.

The Ludwicks live in Landrum, S.C., a town recently recognized in *Southern Living's* "Best Small Towns." "We are one-mile from

North Carolina, nestled against the backdrop of the stunning Blue Ridge Mountains, in the foothills of upstate South Carolina." The town was founded in 1880 and its small downtown features antique shops, an iconic pub, and historic train station. "It is a great place to raise children. I commute about 30 minutes to the Spartanburg, S.C. office of McMillan Pazdan Smith."

While Kurt admires many architects, he named Philip Johnson as, perhaps, his favorite. Any advice for a young architect thinking about law school? "First, shadow an attorney for a day, a week, whatever it takes to understand the profession and its demands (not the TV-movie version). Second, once in law school, find a study group. Third, develop a hobby, exercise, or other interest to unplug after a long week of classes – find a balance."

(Left) Kurt and Susan; (Below) From Left: Claudia, Abigail, Grant, Susan, Kurt Ludwick

TEXAS. "THE EYES OF TEXAS ARE UPON YOU!" WELL, MAYBE NOT. DESIGN PROFESSIONALS AND CONTRACTORS NOW PROTECTED FROM PRYING EYES.

The school spirit song of the University of Texas says, "*The Eyes of Texas are upon you - All the livelong day. The Eyes of Texas are upon you -You cannot get away."* However, due to the successful passage by ACEC Texas of S.B. 943 (2019), this may no longer be true, at least for contractors and design professionals who submit bids and proposals on public works. The new bill passed on June 14, 2019 provides contractors, bidders and consulting firms with new protection from having to provide proprietary information to those who request copies of their bids or proposals through a FOIA request. The new law amends several sections of the Texas Government Code. Added to Section 552.003 is new definition (7), which reads:

"(7) "Contracting information" means the following information maintained by a governmental body or sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor:

(A) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body;

(B) solicitation or bid documents relating to a contract with a governmental body;

(C) communications sent between a governmental body and a vendor, contractor, potential vendor, or potential contractor during the solicitation, evaluation, or negotiation of a contract;

(D) documents, including bid tabulations, showing the criteria by which a governmental body evaluates each vendor, contractor, potential vendor, or potential contractor responding to a solicitation and, if applicable, an explanation of why the vendor or contractor was selected; and

(E) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body."

In addition, new Section 552.0222, titled "DISCLOSURE OF CONTRACTING INFORMATION," states:

"(a) Contracting information is public and must be released ***unless excepted from disclosure under this chapter***." That Section then goes on to list information that is not protected from disclosure, such as the contract, the final contract price,

the description of the items or services to be delivered, and performance information (including whether there was a breach of contract). The key new section for design firms who submit confidential information in their proposals is Section 552.1101, which states:

"Sec. 552.1101. EXCEPTION: CONFIDENTIALITY OF PROPRIETARY INFORMATION. (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

(b) The exception to disclosure provided by Subsection (a) does not apply to:

(1) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

(2) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

(c) The exception to disclosure provided by Subsection (a) may be asserted only by a vendor, contractor, potential vendor, or potential contractor in the manner described by Section 552.305(b) for the purpose of protecting the interests of the vendor, contractor, potential vendor, or potential contractor. ***A governmental body shall decline to release information as provided by Section 552.305(a) to the extent necessary to allow a vendor, contractor, potential vendor, or potential contractor to assert the exception to disclosure provided by Subsection (a)."***

This bill goes into effect on January 1, 2020. Until then, prying eyes might still have access to your proposals on public works. *"Do not think you can escape them - At night or early in the morn -- The Eyes of Texas are upon you - Til Gabriel blows his horn!"*

COULD JEFFERSON GIVE THE OPENING PRAYER? NOT HERE!

In a July 2019 11th Circuit case, a group of citizens who identified as atheists and Secular Humanists, and organizations for non-theists sued a Florida county, alleging that invocations given before board meetings violated the First and Fourteenth Amendments, as well as the Florida Constitution. The invocation speakers were invited for the specific purpose of making an opening prayer and they are typically volunteer clerics invited by staff members of the Commissioners. The Commissioners take turns inviting the speakers. The Court of Appeals held that the county's process for selecting volunteer invocation-givers for opening prayer at start of board meetings violated the Establishment Clause of the U.S. Constitution. In so holding, the Court noted that the Commissioners would bar "a deist" from delivering an invocation. "Deism" refers to "a rationalistic movement of the 17th and 18th century whose adherents generally subscribed to a natural religion based on human reason and morality, on the belief in one God who after creating the world and the laws governing it refrained from interfering with the operation of those laws, and on the rejection of every kind of supernatural intervention in human affairs."

The Court observed that, ***"A bar on deism would exclude Thomas Jefferson, Benjamin Franklin, John Adams, and many others among our Nation's Founders from the opportunity to deliver an invocation before the Brevard County Board of Commissioners."*** *Williamson v. Brevard County*, 928 F.3d 1296 (11th Cir. 2019).

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