Monticello

THE QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

A Non-Profit Organization for Architect-Lawyers

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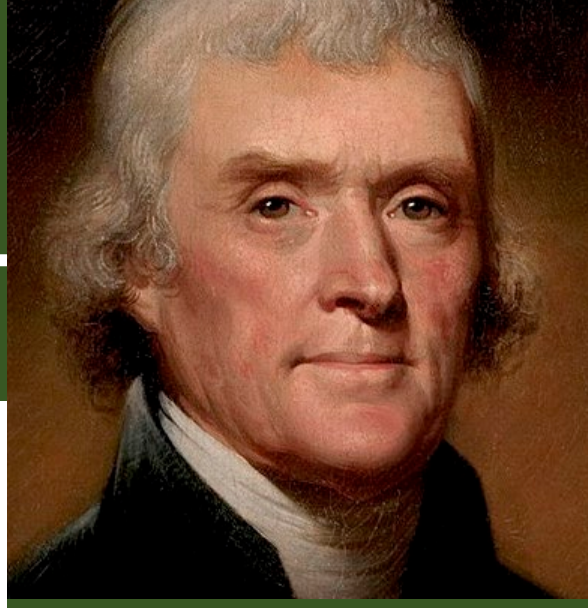


PRESIDENT'S MESSAGE:

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

Happy New Year! Welcome to Twenty-Twenty!

It is with great pride that I provide you all with an update on the initiatives laid out at the last annual meeting of The Jefferson Society, Inc.:

Website and Other Technology Improvements. Alex Van Gaalen has the new website up and running. It is our hope that by the time you are reading this edition of *Monticello*, the new payment portal will be activated to make easier to pay annual member dues and other fees without licking a stamp. Once the portal is running, TJS Treasurer Jose Rodriguez will send each member a dues reminder which will include payment options. The new features of the website will include the New Square Space web site, payment portal and list serve. Alex, thank you for your continued commitment to being TJS's new webmaster!

U.S. Supreme Court, November of 2020. Jessyca Henderson and Jessica Hardy have sent an initial email for members to get their documents together for the third 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. (See details on page 27).

Membership Committee. Thanks to Bill Quatman, Craig Williams and Jeffrey Hamlett, our membership has grown to 117 members and we have continuing requests for applications.

AIA Continuing Education Provider. Laura Jo Lieffers and Chuck Heuer have successfully completed the application for The Jefferson Society to become and an AIA Continuing Education Provider. It is now up to the Society, led by the Education Committee (Chuck Heuer, Laura Jo Lieffers and Jeffery Hamlett) to start the development or collection from Members of programs for HSW credit for AIA members to present to the design community.

Some Thoughts. In line with the news that the TJS is now an AIA CES provider, I typed the above paragraph thinking about how I am amazed at how complicated it has become to actually construct a project, either horizontally or vertically, in the current environment. Some members have been involved with constructing with design-build contracts for many years and are very successful because of putting together a team of "known entities," careful writing of contracts, and aligning the risks with the parties that are most suited to handle those risks

(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:

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

(Bill Quatman). In my current position as a Risk Manager and policy preparer to designer and contractor insureds, I have witnessed quite a bit of angst with this growing delivery method which can, in some cases, create an undue burden on both contractors and design professionals. The idea that a project can be bid successfully with a fixed-price contract, with 30% pre-bid documents without any scope creep or additional costs is tough. As part of our commitment to providing educational sessions to the design community, I ask the membership if there are members who would be interested in preparing a seminar or two for presentation to local AIA chapters, universities or other professional organizations (including construction organizations) pointing out the benefits and pitfalls of design-build delivery and how the parties may be able to position themselves to succeed. Please contact me if you are interested in speaking on this topic in 2020.

Thank you, and I hope you enjoy this edition of *Monticello*!

NORTH CAROLINA: NEW STATUTE PROTECTS A/E's FROM DUTY TO DEFEND

TJS member Joelle Jefcoat has alerted us to a big change in with the passage of HB 871, entitled: "An Act to Protect the Interests of Designers, Particularly Small and WMBE Entities, From Unfair Contracting and Duty to Defend Requirements That Violate the Existing Public Policy of North Carolina." The new law, effective Aug. 1, 2019, focused on making contract provisions requiring a design professional to defend a promisee void and unenforceable. Two new provisions were added: The first establishes that a contract cannot require an indemnitor to indemnify an indemnitee unless the "fault" of the indemnitor (or its derivative parties) are a cause of the loss. The second applies to design agreements only, and prohibits inclusion of a duty to defend in a design contract. The statute defines "defend" as furnishing or paying for a lawyer to defend an indemnitee before a court or arbitration panel has determined that the indemnitor is at fault. It does not prohibit reimbursement of attorneys' fees of indemnitee, but timing must be after trial and limited to when indemnitee is found to be at fault. See Joelle's ABA article at this link:
https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/winter2019/duty-to-defend-north-carolina/

2019 STATE LEGISLATIVE ROUND-UP.

As always, there were several hot topics in the state legislatures in 2019 dealing with architects and engineers. Here are a few bills that passed, and some that did not:

Good Samaritan Acts.

Two laws passed in 2019 that protect design professionals from liability in certain volunteer situations. Maine House Paper No. 363 provides civil immunity for architects, contractors, environmental professionals, land surveyors, landscape architects, planners and professional engineers who provide voluntary professional services during or within 90 days of a natural disaster or catastrophe when the services are provided under the applicable license or certification are related to the natural disaster or catastrophe and are provided at the request of a federal, state or local public official, law enforcement official, public safety official or building inspection official. No immunity is provided for reckless or intentional misconduct. This bill passed both houses and was signed into law on April 22, 2019; it is based on a similar Massachusetts law.

Iowa Senate File No. 570 also provides architects and engineers with immunity from civil liability when providing disaster assistance in specified circum-stances. This bill passed in both houses and was signed into law by the governor on May 10, 2019.Several similar bills failed, however, in two other states.

Not passing, however, was New York Assembly Bill No. 4094, which would enact "The Engineers', Architects', Landscape Architects' and Land Surveyors' Good Samaritan Act" to protect engineers, architects, landscape architects and land surveyors who render voluntary services from liability for personal injury, wrongful death, property damage or other loss, when they act without compensation, as long as acting reasonably and in good faith, at the scene of a natural disaster or catastrophe. Also failing were three Mississippi bills, including House Bill Nos. 1350 and 1488 which each would have created a Good Samaritan law for architects and engineers to provide protection from liability in emergency situations; and, Mississippi Senate Bill No. 2596, which would have likewise provided civil immunity from liability resulting from personal injury, death or property damage caused by an architect's or engineer's acts, errors or omissions under emergency situations that are caused by catastrophic events,

other than gross negligence or willful misconduct. This bill also died in committee.

Insurance.

New Jersey Assembly Bill No. 5706, introduced on Aug. 23, 2019, requires architects to disclose their insurance coverage. The specific language of the bill states that, "c. An architect shall, prior to entering into an agreement for architectural services, disclose to any other party to the contract for architectural services the type of professional liability insurance under which the architect is covered." And, "d. Any architect entering into a public contract for architectural services according to the provisions of chapter 34 of Title 52 of the Revised Statutes, P.L.1971, c.198 (C.40A:11-1 et seq.), N.J.S.18A:18A-1 et seq., or P.L.1986, c.43 (C.18A:64-52 et seq.) shall carry errors and omissions insurance."

Statutes of Repose.

Texas House Bill No. 1737 would have shortened the time to bring an action against architects, engineers, and other contractors for defects discovered in the property from 10 years to 7 years after the substantial completion of the improvement. This bill appears to have died in committee as the legislature adjourned without passage and the Texas legislature only meets every two years.

Licensure.

Missouri Senate Bill No. 509 and companion House Bill No. 1238 would have exempted non-profit organizations from provisions requiring a certificate of authority to practice as an architect, professional engineer, land surveyor, or professional landscape architect. The bills were voted "do pass" in committee but never got a vote on the Senate or House floor.

Anti-Indemnity, Defense, Insurance and Standard of Care Clauses.

Texas Senate Bill No. 771 would have amended the anti-indemnity statute, 130.002(b), Civil Practice and Remedies Code, to void clauses requiring architects and engineers to "defend" others from the results of their own negligence. Although that bill failed, the companion Texas House Bill No. 1211 passed the House but was never put to a vote in the Senate. It adds much broader protection for design professionals, voiding any clause in a contract for engineering or architectural services which requires a licensed engineer or registered architect to defend a party, including a third party. However, an owner could still require in the contract that the engineer or architect name the owner as an additional insured under the engineer's or architect's commercial general liability insurance policy and provide any defense to the owner provided "by the policy to a named insured." This same House Bill No. 1211 would have also amended Section 130.0021 of the Texas Civil Practice and Remedies Code, dealing with the standard of care, to state that, "A contract for engineering or architectural services related to an improvement to real property *may not require a licensed engineer or registered architect to perform professional services to a level of professional skill and care beyond that which* would be provided by an ordinarily prudent engineer or architect with the same professional license under the same or similar circumstances." The Texas legislature only meets every two years, so it may be a while before this issue comes up again.

Also introduced in 2019 was a Pennsylvania anti-indemnity bill for contractors and subs. House Bill No. 1887, introduced on Sept. 25, 2019, voids any provision or term in any construction contract in which an owner, contractor, subcontractor or supplier or the agents or employees of the owner, contractor, subcontractor or supplier shall be indemnified or held harmless for damages, claims, losses or expenses arising out of bodily injury to persons or damage to property caused by or resulting from the negligence, in whole or in part, of the owner, contractor, subcontractor, supplier or the agents or employees of the owner, contractor, subcontractor or supplier. The bill was pending in committee when the legislature adjourned.

Incidental Practice.

Kentucky House Bill No. 498 would have amended the state licensing law, Section 322.030, to clarify that a licensed architect may engage in the practice of engineering incidental to the practice of architecture; and allow the State Board to promulgate administrative regulations that define aspects of a building that are not considered incidental to the practice of architecture. The specific language of the bill said that the term "incidental" denotes "any secondary element of a building which does not contribute to the building's overall structural integrity." That bill failed to pass, however.

Special Days.

New Mexico Senate Memorial No. 98 was signed into law declaring March 7, 2019 as "New Mexico Architects' Day" in the state senate, with a vote of 43-0. Likewise, Pennsylvania's

House Resolution No. 81 passed by an overwhelming vote of 195-0 making June 11, 2019, as "Architects Action Day" in Pennsylvania. South Carolina House Resolution No. 3764 made Feb. 20, 2019 "Professional Engineers Day" in South Carolina and Pennsylvania House Resolution No. 363 made August 7, 2019, as "Professional Engineers Day" in Pennsylvania by a vote of 198-0.

Climate Change.

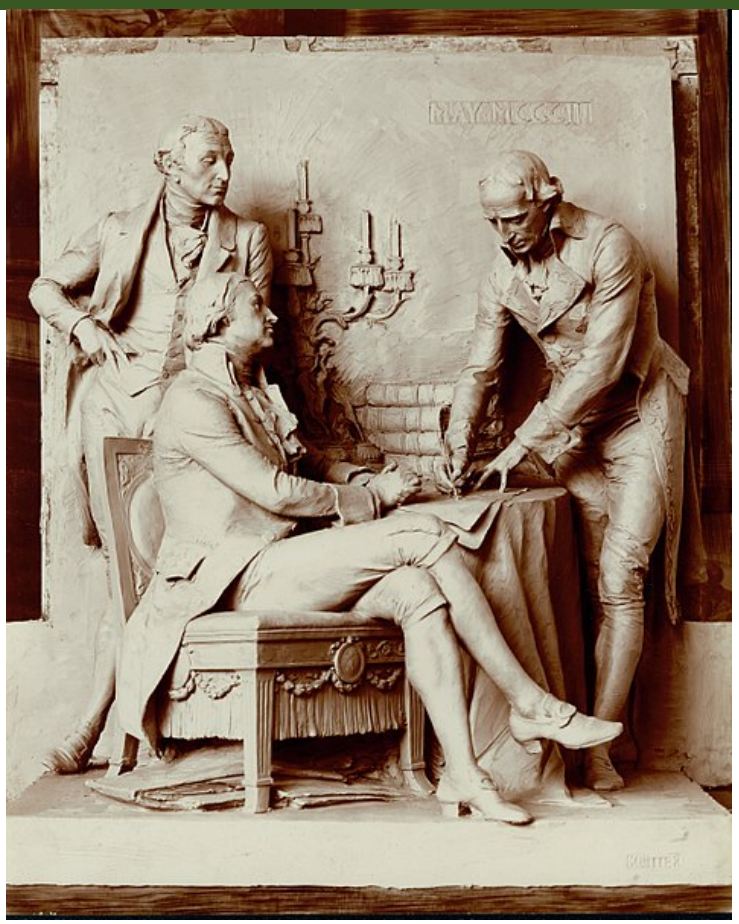
Minnesota House File No. 2452 and Senate File No. 2658 would have required professional engineers to earn two (2) professional development hours dedicated to climate change impact, but both bills failed to pass.

WEST VIRGINIA: TORT CLAIMS BARRED UNDER THE "GIST OF THE ACTION" AND BORROWED SERVANT DOCTRINES

While not using the term "economic loss doctrine," a West Virginia federal court came to a similar ruling in dismissing tort claims against an engineering firm where the firm had a contract with the plaintiff. In this case, a manufacturer sued an engineering firm under various tort theories related to the design of the foundation of a methanol plant. The plaintiff claimed that it was forced to incur additional foundation design and construction costs, delays, and lost profits. The complaint alleged that the engineering firm contracted to provide an employee to the manufacturer for engineering services related to the design of the foundation and had breached its contract, but also was liable in tort for professional negligence and negligent selection. The firm moved to dismiss the tort claims for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court stated that West Virginia, courts apply the "gist of the action" doctrine "to prevent the recasting of a contract claim as a tort claim." Analyzing the various causes of action, the court concluded that the plaintiff had not alleged any tort claim independent of the existence of the contract, stating, "Each negligence claim relies upon the contractual relationship between the parties, and any liability stems from [engineer] breaching the contract." Therefore, the tort claims "essentially duplicate the breach of contract claims, and are therefore barred under the gist of the action doctrine." The motion to dismiss was granted as to the tort claims.

Alternatively, the plaintiff claimed that the engineering firm was liable for "negligent selection" for providing an engineer who was not qualified. The trial court said this claim was barred under the "borrowed servant" doctrine. Under the borrowed servant rule "a general employer remains liable for the negligent act of his servant unless it affirmatively appears that he has completely relinquished control of the servant's conduct from which the alleged negligence arose to the person for whom the servant is engaged in performing a special service." The test is "who has the power to control and direct the servants in the performance of their work." In this case, the contract with the engineering firm stated that the plaintiff would be in charge of the "technical direction of the work being performed by [the engineer] on assignment" and that "the content of such work will be [plaintiff's] responsibility." Since the contract established that the plaintiff, not the engineering firm, directed and controlled the work of the design engineer, the engineering firm would not be liable for the negligent acts of its loaned employee. That claim was also dismissed. See, *US Methanol, LLC v. CDI Corporation*, 2019 WL 5390014 (S.D.W.Va. 2019).

Looking to Complete Your Thomas Jefferson look? Here is a 3D full-print Thomas Jefferson hoodie sweatshirt from Gearhuman, priced at $48.99. You'll be the envy of the office (or neighborhood) in high-quality polyester but "feels as soft as cotton" hoodie. This garment is available in various sizes from S to 3XL from www.gearhuman.com. "Guaranteed not to fade."



Signing of the Louisiana Purchase. Above is the temporary plaster bas relief sculpture by artist Karl Bitter (1867-1915), later recast in bronze for the Missouri State Capitol Complex. The piece shows Robert Livingston (standing), James Monroe (seated), and Francois Barbe-Marbois, representing France.

"The Signing Of The Treaty."

The great relief commemorating the signing of the treaty by which the United States acquired the Louisiana Purchase was designed and executed by the eminent sculptor Karl Bitter. It formed an important part of the decorative sculpture of the Louisiana Purchase Exposition at the 1904 St. Louis World's Fair. The artist, Karl Bitter, was an Austrian-born American sculptor best known for his architectural sculpture, memorials, and residential work. As a young man, he trained extensively in Vienna before immigrating to the United States in 1889 in protest of Austrian military service during peacetime. In New York, he was discovered by famous architect Richard Morris Hunt, and continued on to establish a career as a successful sculptor in his own right.

Since Thomas Jefferson's acquisition of Louisiana was epoch-making for this country, and without this purchase Missouri (as we know it) could never come into being, it was deemed fitting that this image by Bitter should later be cast in imperishable bronze and placed on the grounds of the Missouri State Capitol, located in Jefferson City, Missouri. No more appropriate locations could be found than the one the relief now occupies on the brow of the bluff overlooking the Missouri River, which drains a large part of the territory purchased by Jefferson.

By conquering Spain, Emperor Napoleon had secured all her possessions in North America, including what is now known as "The Louisiana Purchase." The United States could ill afford to see a strong European power in control of New Orleans and of the commerce of the Mississippi River. Therefore, President Jefferson authorized Robert Livingston, our Ambassador to France, to negotiate with Napoleon for the purchase of New Orleans by this country. James Monroe, afterwards President, was sent to Paris to assist Ambassador Livingston. The deal encompassed 828,000 square miles, which equates to approximately 512 million acres. With land costs today averaging between $1,000 and $4,000 per acre in the continental U.S., the total value of the Louisiana Purchase is, therefore, likely to be near $1.2 trillion. The Louisiana Purchase extended United States sovereignty across the Mississippi River, nearly doubling the nominal size of the country.

It was 1803, and Napoleon was in need of money. England was on the eve of declaring war with France and the first act of that war would be the seizure by England of these new possessions of France in the New World. Francois Barbe-Marbois, Napoleon's treasurer, advised the sale, saying: *"Why should we hesitate to make a sacrifice of that which is slipping from us?"* So, not just New Orleans, but the entire possessions of France in North America, were offered to the U.S. for $15 million. Neither Jefferson nor his Commissioners had authority to make the purchase. Nevertheless, the purchase was made. Jefferson was widely criticized for acting above and beyond his constitutional authority, especially given his strict interpretation of the Constitution.

The sculpture shows the climax of the discussion. Livingston is standing, Monroe is seated and Marbois, for France, is signing the document. By that signature, a vast empire changed hands. Today, the bronze "Signing of the Treaty" sits just behind the State Capital building, overlooking the Missouri River. (See p. 9).

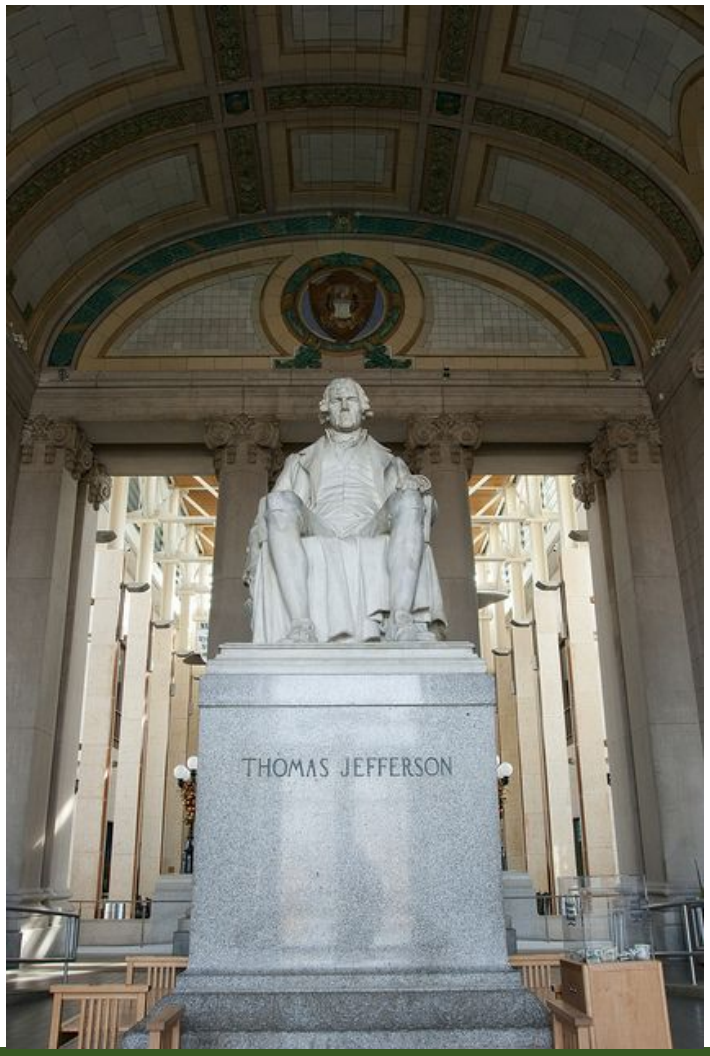
TORNADO DESTROYS THOMAS JEFFERSON HIGH SCHOOL IN DALLAS.

The devastating series of nine (yes nine!) tornadoes that hit North Dallas on Oct. 20, 2019 left a path of destruction that included Thomas Jefferson High School. Amazingly, there were no fatalities. An editorial in the Dallas Morning News (Oct. 21) stated: "Rebuild Thomas Jefferson High School…We don't mean put up any old high school where TJ stands now in a ruin. That's going to happen no matter what. We mean join together as a single Dallas to focus on building a school so beautiful and so inspiring that it will stand as an emblem of what public education can be in this country…Aesthetics matter. Architecture matters. It is the outward reflection of the significance we place on the buildings we occupy. So the new TJ should be beautiful. But this isn't simply about appearance. It is about function. It is about determining that the students who attend school there get great science labs, and a great band room and a library worthy of their potential as people."

The students and staff from Dallas' Thomas Jefferson High School spent homecoming week adjusting to a new home – a stand-in school building nine miles away from their tornado-damaged building. As a result of the damage and turmoil caused by the EF-3 tornado that touched down on top of Thomas Jefferson High, as it carved a 17-mile path through the city, the Dallas Independent School District was forced to scramble to ready a replacement campus in West Dallas, in the former Thomas Edison Middle Learning Center, and procure the equipment needed to carry on class and host a Homecoming football game. The school's football game was rescheduled from Friday night to Saturday morning to buy some extra time. A football team equipment container was blown from the Thomas Jefferson campus across the street and landed on top of a neighbor's home. Many uniforms and sets of players' pads were inside of the damaged Thomas Jefferson building, which meant that replacements became necessary. Southern Methodist University's football program donated cleats and gloves to the Thomas Jefferson team, Big Game Football Factory donated several footballs for the team to use in upcoming games, and Jerry Jones and other representatives for the Dallas Cowboys attended the Homecoming game to make a contribution. Dallas Cowboys Owner Jerry Jones performed the coin toss before the game. He and Dallas Mavericks' owner Mark Cuban each donated $1 million to the school district toward rebuilding the damaged high school.

ILLINOIS. CHANGES TO PROMPT PAYMENT ACT FOR PRIVATE PROJECTS.

Illinois recently amended its prompt pay act to include a new retainage provision. The prompt pay act does not apply to government projects or to certain residential projects. The amendment, which went into effect August 20, 2019, applies to contracts entered into after that date and provides that a maximum of 10 percent retainage may be withheld from payments under private construction contracts. After the contract work is fifty percent complete, retainage must be reduced to just 5 percent, and kept at 5 percent for the remainder of the contract. Illinois now joins the majority of states that have enacted laws pertaining to retainage on construction contracts. The statute is are unique to Illinois projects and, therefore, parties to Illinois design and construction contracts should understand how the new law will impact their projects. Here is the new language: "Sec. 20. Retainage. No construction contract may permit the withholding of retainage from any payment in excess of the amounts permitted in this Section. A construction contract may provide for the withholding of retainage of up to 10% of any payment made prior to the completion of 50% of the contract. When a contract is 50% complete, retainage withheld shall be reduced so that no more than 5% is held. After the contract is 50% complete, no more than 5% of the amount of any subsequent payments made under the contract may be held as retainage." (SB 1636) This is an amendment to the Contractors Prompt Payment Act, 815 ILCS 603/1 ("CPPA"), which governs the timing of payments to contractors on private projects in Illinois.



TENNESSEE. LICENSING BOARD APPROVES OF TITLE "ARCHITECTURAL ASSOCIATE."

The Tennessee Board of Architectural and Engineering Examiners approved proposed rules on April 4, 2019, effective on October 30, 2019, which allows a person gaining practical experience in an office of a practicing architect to use the title, appellation, or designation of "associate architect." Such use is not considered a prohibited offering to practice architecture. Paragraph 0120-01-.03(1), Clarifications to Offering to Practice, is amended by adding a newly designated subparagraph, which reads: *(f) Any person gaining practical experience in an office of a practicing architect may use the title, appellation or designation "architectural associate."*

NEW YORK. ARCHITECT LOSES FEE CLAIM BASED ON EMAIL CONTRACT TERMS REQUIRING CLIENT TO APPROVE DESIGN.

An architect sued its client for about $8,100 based on a breach of a contract for architectural services, in quantum meruit, and on an account stated. The architect-plaintiff testified that the defendant owned a piece of property and plaintiff had done some drawings on the property for various developers. When none of the developers proceeded with the project plaintiff had proposed, defendant's principals considered using plaintiff to draw up designs for an apartment building. The two parties exchanged emails wherein the plaintiff wrote that, upon defendant's approval of design drawings, defendant was to pay him $10,000. One of the principals responded, "OK, you have a deal we would like preliminary as soon as possible." In April 2014, plaintiff presented "drawings" to the principals and requested the money. The principals gave plaintiff a $2,000 check. While there had been drawings prepared for previous developers, some changes

had been made to them, including the number and sizes of the apartments that would be included in the proposed building. The architect testified that, thereafter, he spent about four hours making additional changes requested by the principals. By May of 2014, plaintiff was informed that defendant was in negotiations to sell the property and was not going to proceed with the development. Consequently, plaintiff sought to recover the $8,000 contract balance due, plus $122.40 in reimbursable expenses. The defendant rejected the claim, stating that no design drawings had ever been approved, and the designs presented at trial by plaintiff were not good enough to get approval. The trial court dismissed the suit, finding that there had been no contract entered into.

On appeal, however, it was held that the emails exchanged between the parties created a valid contract but the contract provisions, as provided for in the emails, directed that plaintiff was to be paid "only upon defendant's approval of the design drawings." Since the architect failed to establish any breach, in that there was no showing that defendant's principals had ever approved any design drawings or had unreasonably withheld approval, there was a failure of a condition precedent to recovery. Also, the plaintiff's contention that he should recover under under a quantum meruit theory was rejected, as the existence of a contract between the parties precluded his quantum meruit claim. Finally, the architect did not establish an account stated because there was no underlying indebtedness between the parties. Judgment for the defendant was affirmed. *Schaffer v. View at Dobbs, LLC,* 2019 WL 5281175 (N.Y. Sup. Ct. 2019).

THOMAS JEFFERSON'S UNFORGETTABLE LETTER … *TO A MARRIED WOMAN!*

By Sean Braswell

(reprinted from www.ozy.com, Dec. 11, 2019 issue)

It makes sense that the man who penned the Declaration of Independence — perhaps the most eloquent breakup note in history — could write one hell of a love letter. Even knowing that, however, won't prepare you for the missive titled "The Dialogue Between My Head and My Heart" that Thomas Jefferson wrote 10 years later, in 1786.

That year, while serving as the U.S. minister to France, Jefferson did what so many middle-aged men in Paris do … he fell in love with a much younger woman. In this case, one who was also quite married. After a magical six-week romance in the City of Light, Jefferson, 43, escorted 27-year-old Maria Cosway on a crisp October morning to the carriage waiting to take her back to her husband and home in England. He then sat down to write a 4,000-word masterpiece of passion and unrequited love … left-handed (more on that later).

"My Dear Madam," the letter begins, "having performed the last sad office of handing you into your carriage … and seen the wheels get actually into motion, I turned on my heel and walked, more dead than alive, to … where my own was awaiting me." It's not hard to see what the multitalented Virginian saw in Maria Cosway. She was a true Renaissance woman: fluent in six languages, adept at the harpsichord and the harp, and a gifted painter, who had been elected into the Academy of Fine Arts in Florence at 19. She was slim and graceful with long golden hair, blue eyes and an Italian accent picked up from a childhood in Tuscany where her English father owned three inns. As Jefferson confided in a friend, Cosway had "qualities and accomplishments … such as music, modesty, beauty and that softness of disposition which is the ornament of her sex and charm of ours."

Maria's father had died when she was 18, and to support her family she entered into an "advantageous marriage" with a man twice her age, a prominent portrait artist named Richard Cosway, known for his sexual escapades and the pornographic miniatures he liked to paint on the inside of wealthy Englishmen's snuff boxes. Cosway was jealous of his wife's artistic ability and prohibited her from painting portraits. Maria became a kept woman, resigned to using her talents to entertain guests at their Pall Mall mansion in London. She hated London and resented her husband, so she jumped at the chance for an extended vacation in Paris, where she would meet a charming, intelligent American diplomat who would turn her world upside down.

Jefferson was at a very different stage in his life. After his wife had died in 1782, he had fallen into what to modern eyes looks like clinical depression. His old friends John Adams and Benjamin Franklin convinced him to join them in France to help negotiate treaties with European countries. But another tragedy befell the new U.S. minister to France during his first winter in Paris when his 2-year-old daughter died back home. Meeting the engaging Maria Cosway the following year was tonic for his soul, says John Kaminski, director of the Center for the Study of the American Constitution and editor of Jefferson in Love. "Maria

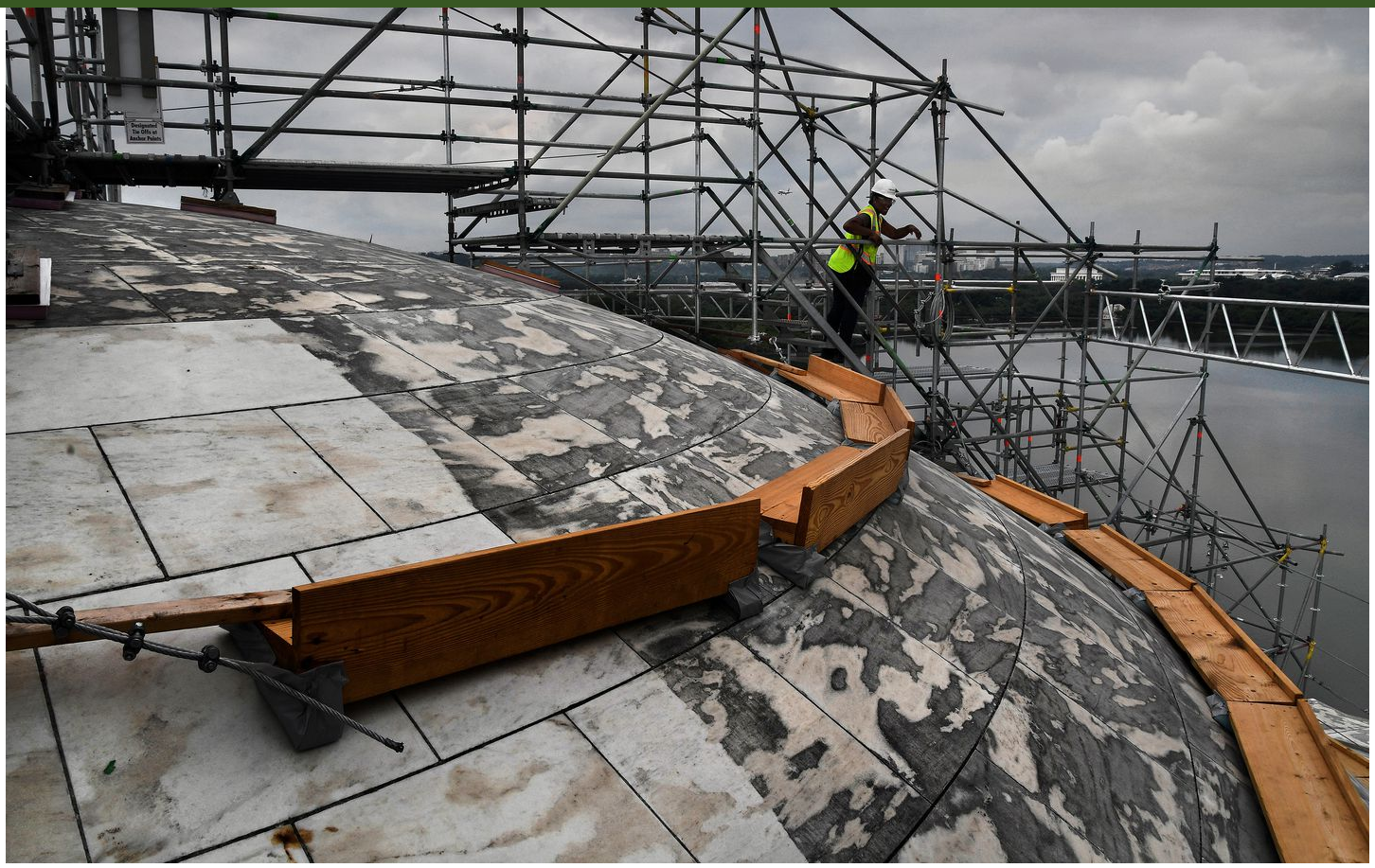
"Signing of the Treaty," Missouri State Capital, Jefferson City, Missouri.

brought Jefferson back to the world of the living."

After meeting through the American artist John Trumbull, Cosway and Jefferson saw each other almost daily for six weeks. They dined together and went for long walks. They talked for hours. During one outing, a smitten Jefferson tried to leap over a hedge, falling and dislocating his right wrist. No one knows why he made such a leap — he wrote a friend only that an explanation of the injury "would be a long story for the left [hand] to tell." Jefferson's injury, however, did not prevent him from using his left hand to pen a long and unusually personal letter after Cosway's departure from Paris. Most of that remarkable letter (which you can read here in its entirety), is a conversation between Jefferson's reason and his emotions that he recounts for Maria's benefit. "This is one of the scrapes into which you are ever leading us," his Head chides his Heart, warning it, "Do not bite at the bait of pleasure till you know there is no hook beneath it." But his Heart cannot shake the memory of those days with Maria: "Every moment was filled with something agreeable … what a mass of happiness had we traveled over!"

Cosway was overwhelmed by the missive, telling her suitor that she could spend "an hour to consider every word, to every sentence [she] could write a volume." But, alas, it was not to be for these star-crossed lovers. Maria was a staunch Catholic, so divorce was unlikely, says Kaminski, and she was also fearful of oceanic travel, which was a problem after Jefferson was called back to America, where he would have an affair with another influential woman in his life, the slave Sally Hemings. They continued their correspondence for the rest of their lives as Jefferson became U.S. president and Cosway founded a school for girls. "I am always thinking of you," Jefferson wrote. "If I cannot be with you in reality, I will be in imagination." Thirty-five years after his "Dialogue," Cosway, 62, wrote to Jefferson, 78, expressing regret over their unrequited love. "In your Dialogue, your head would tell me, '*That is enough*,'" she wrote, [but] "your heart perhaps will understand, I might wish *for more*."

Want to read the entire letter? Go to this link:
https://founders.archives.gov/documents/Jefferson/01-10-02-0309



Thomas Jefferson Memorial in D.C. Gets Much Needed Restoration.

The memorial, already undergoing an $8.2 million external rehab, received a private donation of $10 million that enabled an improved lower-level exhibit space and new exhibits on the main level. Billionaire philanthropist David Rubenstein announced in October 2019 that he was donating $10 million for upgrades, new exhibit space and other improvements to the ailing Jefferson Memorial in Washington. The money will go toward rehabilitating the antiquated 25-year-old exhibits on the lower level and creating a new exhibit area on the main level near the 19-foot-tall bronze statue of Thomas Jefferson, the nation's third president and main author of the Declaration of Independence. Restrooms and mechanical systems will also be upgraded.

The National Park Service is restoring the exterior of the tattered landmark, which had grown dingy in recent years from the advance of a black biofilm of algae, fungi and bacteria, as well as other effects of its exposure to the District's weather, climate and insects. The Jefferson Memorial remains open during restoration, and the external work should be finished by Spring of 2020, the Park Service has said. The memorial sits on fill dredged in the late 1800s from the Potomac River, and on 634 pilings and caissons sunk down to bedrock on the south side of the Tidal Basin. One support goes down through 138 feet of soft earth. Over its seven decades of life, the structure has been affected by the vagaries of its location and the capricious piece of ground on which it sits. Rubenstein has also donated millions to other public restoration projects.

A Note From Our New Webmaster:

Our new TJS website is up, and we are ready for the next decade! We have placed the *Monticello* newsletter front and center. Also, very soon we will be able to receive membership dues through this website and will be following up with instructions shortly. The experience will be the same as any other web purchase. Let us know what you think. Thank you!

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Policyholder Pros, LLP (and Lewis Farm)
Concord, N.H.

Rebecca McWilliams is not the typical Jefferson Society member. Far from it! Her job titles include: Architect; Attorney; Mother; Farmer; Business-Woman; and Politician! Since Jan. 2019, she has been a State Representative in the New Hampshire House of Representatives for the Merrimack County District 27. And that is not her only day-job! Together with TJS member Julia Donoho, AIA, Esq., Rebecca runs a law firm called "Policyholder Pros, LLP," which specializes in assisting homeowners with insurance claims following natural disasters. "We currently represent homeowners who are fighting for full policy payouts following the California wildfires," Rebecca told us, "and we are also suing State Farm Insurance Company in federal court for intentionally underestimating policies and, therefore, further hurting homeowners who have lost their life savings." But, let's back up just a bit to find out where she went to school and how she got into this extraordinary career.

Rebecca (Becky) earned her B.Arch. degree from Roger Williams University in Bristol, Rhode Island. During architecture school, she studied abroad at the Palazzo Rucellai in Florence, Italy. She chose Roger Williams University for two reasons: "First, I wanted to get a liberal arts education at a small school with a focus on community service; and, second, I received a full-ride academic scholarship!" she told us. After graduation, Rebecca worked as the Director of BIM for a large Boston A/E firm. It was a passion for contracts that drew her into law school. "When I was working as an architect in Boston, I fell in love with contracts," she said. Becky decided to go to law school to feed her passion and she received her J.D. from Suffolk University Law School in Boston. While in law school, she worked as a Director of Policy for State Rep. Chris Walsh, AIA of Massachusetts, which gave her a peek at life in politics. While working for Rep. Chris Walsh, she helped draft legislation for proposed design-build alternative procurement for public projects and enabling legislation for greywater recycling. Why choose Suffolk for law? "It had a night law school program, which allowed me to keep my day job," she said. After law school, Becky worked as an Associate at Donovan Hatem in Boston, a well-known insurance defense law firm, where she defended claims against architects and engineers. "This is where I really cut my teeth on insurance law," she said. After leaving that firm, Becky ventured out and started her own law firm, McWilliams Law. But that is only half of her story.

Today, Becky and her husband, James Meinecke, own a 130-acre vegetable farm in Concord called "Lewis Farm," which they bought in 2016 to continue the farming operations there, and to offer events such as monthly farm-to-table dinners, a harvest festival, outdoor concerts and nature hikes. "This means I sell vegetables, flowers, compost, and whatever is in season in my down-time. Seeding, weeding, harvesting, chain sawing and splitting logs are my Crossfit!"

Last November, Becky ran for, and was elected, state representative. "I ran because I realized I was capable of doing the work and making a difference as an activist. This is the time for women to get involved in politics and I'm proud to be part of the next generation of political leaders," she told us. Becky is one of 400 State Representatives in her state. "We work part-time and get paid $100/year (that's right – 'per YEAR')." She sponsored a bill to update the NH building code from 2009 to 2015 IBC, and got it passed through a lot of negotiation with the State Association of General Contractors (AGC) and Homebuilders Association. This year, Becky is working on legislation to add an appointed building scientist to the State

(Above) Becky, James and their twins.

Building Code Review Board. Becky feels that her combination of farmer and politician make her stand out "as a bit more Jeffersonian," she said.

What's the best part of her job (*which job*, you might well ask)? "I love fighting for justice on behalf of my insurance policyholder clients. Thanks to the Jefferson Society, if we ever make it to SCOTUS, I'll be able to argue the case myself!" (Becky was part of the Nov. 2017 TJS group admitted to the U.S. Supreme Court). When not in the statehouse, or the courthouse, or working on the family farm, Becky volunteers with the Concord Transportation Policy Advisory Council focusing on bike routes, walkability, and alternative transportation. How does she do it all, you might well ask? "It's a challenge," she said. "At this time, I am barely keeping my head above water with two-and-a-half year old twins, Becca and George, at home. Fortunately, my parents are just 20 minutes away, and I have very supportive farm staff/babysitters too!" she told us.

Becky loves her town of Concord, New Hampshire which she describes as "a really cute city of 60,000 people. It's the state capital, so the population swells to 100,000 daily - with commuters. We have a very walkable downtown and quarterly street festivals that make the city memorable. The nice thing about a small city is that the core group of people who are involved get to know one another and care about the city's future. I think it's just the right size for raising a family and being involved in the community."

She finds inspiration in civic buildings (not surprising), especially those with art deco details. "I love the Rhode Island Supreme Court in Providence, Rhode Island. When I was sworn in as an attorney there, I couldn't stop taking pictures of the elevators and mosaics. I feel the same way about the court rooms at the U.S. District Court for the Northern District of California - the wood acoustic paneling and art deco metal insets are distinctive and beautiful."

Any advice for a young architect thinking about law school? "Are you ready to have student loans equal to the value of a house? Try working at a law firm first. If you love it, go to law school!" One of her favorite quotes is: "You can't wait for inspiration, you have to go after it - with a club!" from Jack London. And Becky has done just that, thus far in her career. We can't wait to see what the next chapter holds for this true Renaissance-woman who, by the way, is running for re-election in 2020!

(Below) Becky and her twins, Becca and George, walk the dogs on their family farm.

MINNESOTA: UNLICENSED ARCHITECT CONVICTED OF "THEFT BY SWINDLE," HAS CONTRACT VOIDED, AND PAYS $10,000 FINE! LOSES ALL APPEALS.

Virginia has never been a licensed architect but, apparently has held herself out as one on several occasions. In 1999, the Minnesota Licensing Board issued her a cease-and-desist order because she was holding herself out as an architect. Nonetheless, in Oct. 2012, she and her husband opened a firm called "Architektur, Inc." and signed a contract with a couple to design and build a new home. Virginia again she stated that she was a licensed architect (she was not) and an associate of the AIA (also not). After paying Virginia $10,000, the couple learned she was not licensed and terminated their contract with Architektur, Inc. Virginia was criminally charged with "theft by swindle," but her company sued the couple for breach of contract. The homeowners counterclaimed for fraud and breach of contract and moved for summary judgment. While that civil case was, Virginia was found guilty of theft by swindle in a case concerning an unrelated commercial real-estate project with different victims. She appealed, and her conviction was affirmed. In Jan. 2015, the couple prevailed in their civil case, and the trial court found that Virginia misrepresented that she was a licensed architect. She appealed, but her appeal was dismissed. She ultimately pleaded guilty to, and was convicted of, theft by swindle for her actions concerning the new house, appealed and that conviction was affirmed. But it was not over.

The State Licensing Board's complaint committee then opened an investigation and sought disciplinary action against Virginia. An administrative law judge (ALJ) found her in violation of the licensing law as well as the 1999 cease-and-desist order. In Sept. 2018, the Board adopted the ALJ's recommendations, and imposed a $10,000 civil penalty. She appealed that fine, which resulted in this opinion.

The Board relied on collateral estoppel, specifically, a determination in the 2015 grant of summary judgment that Virginia misrepresented to the couple that she was a licensed architect. The Court of Appeals held that the requirements for the application of collateral estoppel were met in that: Virginia was a party to the action, and the record indicated that she was given a full and fair opportunity to litigate the matter. "Under the circumstances, application of the collateral-estoppel doctrine is fair," the Court stated. In addition, Virginia failed to re-but the evidence that she unlawfully held herself out as an architect and violated the 1999 cease-and-desist order. As a result, summary disposition was appropriate. Next, she appealed on constitutional grounds of "free speech" in using the term "architect." The Court rejected this as well, stating that, the Minnesota licensing law "prohibits the use of the terms architect, project architect, design architect, and residential architect," and also prohibits "using terms tending to convey the impression that the person is an architect when the person is not so qualified." Next, she claimed that a 2-year statute of limitations rendered the 1999 cease-and-desist order void. However, the Court found that the 2-year statute did not apply to this administrative proceeding. The case is *Matter of Carlson,* 2019 WL 4745369 (Minn. App. 2019).

NEVADA. ARCHITECT NOT PAID UNDER SETTLEMENT AGREEMENT CAN SUE FOR FRAUD AND FOR PUNITIVE DAMAGES!

Two developers hired an architect (Rusk) to design the Verge project, a high-rise building in downtown Las Vegas. The court said that, "the relationship between the parties soured due to budgetary concerns and difficulties securing city approval of Rusk's plans." As a result, the developer terminated Rusk from the project. The parties then asserted claims against each other related to the project's failure, but later agreed to mutually release all their claims based on a settlement agreement that required payment to Rusk. When payment was not made, per the settlement agreement, Rusk sued the developers for breach of contract and fraud, seeking the unpaid balance of the settlement agreement and punitive damages. The developers asserted counterclaims based on the contract and "fraud in the inducement of the settlement agreement," based on allegations that Rusk promised to give them pre-approved plans to complete the Verge project. The trial court bifurcated the trial, limiting the first phase to the issue of whether Rusk fraudulently induced the developers into entering into the settlement agreement. After the bench trial on that issue, the court found for the architect and that the settlement agreement was valid. The court then entered judgment for Rusk on the contract-based claims, ordered the developers to pay Rusk damages and interest for the unpaid amount due under the settlement agreement, and cancelled the second phase of trial. The court did not address Rusk's claims seeking punitive damages. The architect argued that the trial

court erred by depriving him of the opportunity to pursue his fraud claims. The Nevada Supreme Court agreed. "By canceling the second phase of trial, the district court summarily foreclosed Rusk's claims seeking punitive damages without hearing any evidence on those claims." As a result, the trial court was reversed to the extent it rejected Rusk's claims seeking punitive damages. The case was remanded for trial on those damages.

Attia v. Dennis E. Rusk, Architect, LLC, 2019 WL 6119216 (Nev. 2019).

NEW YORK. CM MAY HAVE VALID LIEN FOR DESIGN SERVICES AND CONSTRUCTABILITY REVIEW.

A developer hired a contractor to perform preconstruction management services but terminated those services. The CM filed a mechanic's lien against the property, alleging that it was owed the sum of $250,000 for preconstruction management services. The developer then sued to discharge the lien on the grounds that the "preconstruction management services" provided could not form the basis of a mechanic's lien. The trial court rejected the petition to discharge the lien, reasoning that in the absence of clear case law precluding mechanic's liens for all the types of work described by the CM, the mechanic's lien was "not entirely invalid on its face." The developer appealed. The appellate court held that to be summarily discharged, the notice of lien must be invalid on its face. "When there is no defect on the face of the notice of lien, any dispute regarding the validity of the lien must await the lien foreclosure trial." The CM submitted the affidavit of its president, who claimed that the company was a construction management firm which employed construction professionals, architects, and engineers, and that, in addition to the consulting services it rendered, the CM also prepared "site logistics and access plans" for the property, and performed "a constructability review for the project" at the property. Since the CM would be entitled to file a mechanic's lien if its architects and/or engineers prepared the site logistics, access plans, or constructability review, the mechanic's lien is not invalid on its face, the Court held. As a result, the dispute regarding the validity of the mechanic's lien must be resolved at the lien foreclosure trial.

Old Post Road Associates, LLC v LRC Construction, LLC, 2019 WL 5778046 (N.Y.A.D. 2 Dept. 2019).

MARYLAND. DESIGN-BUILD PROJECT DISPUTE: CONFLICT BETWEEN TERMS OF A TEAMING AGREEMENT AND SUBCONTRACT RESULTS ON LITIGATION OVER DISPUTE RESOLUTION, STATUTES OF LIMITATION, AND LIMITATION OF LIABLITY.

A design-build contractor that builds and repairs roads and bridges entered into a Teaming Agreement with a civil engineering firm to prepare bids for several highway construction projects in North Carolina for NCDOT.

The Teaming Agreement.

Under the Teaming Agreement, the engineer agreed to provide quantity and pricing estimates for the building materials needed to complete the projects. The construction firm would act as the team's general contractor, using the engineer's estimates to prepare the bids that it ultimately submitted. The Teaming Agreement also set out what would happen if the contractor's bids for the highway projects were successful, in that the engineering firm would be awarded a subcontract consistent with the terms of the Teaming Agreement, which would include ACG Document No. 420 "Standard Form of Agreement Between Design-Builder and Architect/Engineer for Design-Build Projects" – as modified by the contractor.

The Subcontract.

The subcontract required the engineer to provide professional liability insurance in an amount not less than $2 million in aggregate for each separate contract, and would cover errors and omissions arising out of the performance of, or failure to perform, professional services. If the parties were unable to mutually agree on the terms of a subcontract after good faith efforts, then neither party would have any obligation to the other. If the bids were not accepted by the NCDOT, then the engineer would receive as payment for its pre-bid services any stipend received from the NCDOT. The Teaming Agreement also limited the engineer's liability for its provision of pre-bid services to the amount of the stipend "actually received," but that limitation did not apply to work or services performed by either party *after award of a contract* by NCDOT and the subsequent execution of a subcontract between the parties.

The Teaming Agreement did not contain a provision for arbitration of disputes between the companies, but the subcontract did. The subcontract provided that it was to be governed by Maryland law and provided that for delays to the project caused by "*any negligent act, error or omission of [engineer,]*" the engineer would compensate the design-builder for, and indemnify it against, costs, expenses, liabilities or damages which accrued as a result of such delay. The engineer's design fee under the subcontract was $1.2 million and the limitation of liability was $5 million. Disputes were to be resolved first by direct negotiation, then by mediation, then by AAA arbitration.

The Dispute.

The design-builder was awarded a contract by NCDOT to replace seven bridges and five culverts. Thereafter, the parties entered into a subcontract agreement for the project, as the Teaming Agreement required them to do. The Court of Appeals said that, "the parties' relationship began to sour" when the contractor came to believe that some of the pre-bid quantity estimates provided by the engineer (under the Teaming Agreement) were faulty, resulting in delays, cost over-runs, and, ultimately, substantial financial losses. The contractor invoked the dispute-resolution procedure outlined in the subcontract and schedule a meeting to attempt to settle the claims. The parties entered into a tolling agreement and agreed not to file suit "or commence an arbitration proceeding" until the tolling agreement expired on Jan. 31, 2017. The parties extended the tolling period three times.

Arbitration or Litigation? That Is The Question.

While the tolling agreement was still in effect, the parties also engaged in mediation, which proved unsuccessful. On Aug. 15, 2017, the day that the third extension of the tolling agreement expired, the contractor filed a demand for arbitration with the American Arbitration Association. In response, the engineering firm filed a Petition to Stay Arbitration on the basis that the contractor had waived its right to arbitration because its demand for arbitration was made after Maryland's 3-year statute of limitations for filing negligence and breach-of-contract claims had expired; and, alternatively, because the claim was not arbitrable since it did not arise out of, or relate to, the performance or breach of the subcontract (which contained an arbitration provision), but rather under the Teaming Agreement (which did not). The trial court denied the engineer's petition and the firm appealed. As a matter of first impression, the Maryland Court of Appeals had to determine two issues:

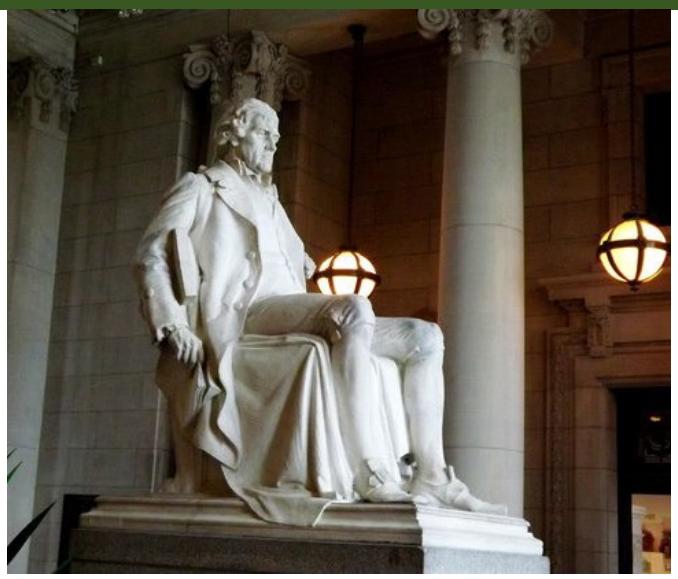
First, whether, in the absence of waiver or a specific deadline imposed by contract, a party forfeits the right to demand arbitra-

ation if the demand is not made within the limitations period which would apply if the claim were brought in an action at law. Second, whether the dispute is substantively arbitrable, that is, whether it falls within the scope of the arbitration provision in one of two agreements between the parties.

The Two-Part Holding.

The Court of Appeals said that when confronted with a petition to compel or to stay arbitration, trial courts are to consider "but one thing—is there in existence an agreement to arbitrate the dispute sought to be arbitrated?" And if so, has that right been waived? As to the issue of "waiver," the Court stated that even if the arbitration agreement sets no demand deadlines, a right to arbitration may be waived if the party waits too long to assert the right to arbitration. The engineer argued that the demand for arbitration was untimely — as a matter of law — since it was filed beyond the 3-year time limit set out in Maryland Statute CJP § 5-101 for professional negligence. However, the Court rejected that argument, holding that "the expiration of a statutory limitations period does not render a demand for arbitration untimely — and, thus, the right to arbitration waived — unless the parties provide for this in their arbitration agreement." On its face, CJP § 5-101 applies only to "civil actions at law" and "arbitration proceedings are not civil actions at law." So, despite a Maryland governing law clause, the statute of limitations did not apply in arbitration.

The engineer's second argument was that the contractor's claim was outside of the substantive scope drawn by the parties in drafting their arbitration agreement, i.e. in the subcontract. The Court of Appeals agreed that the Teaming Agreement and subcontract were separate contracts, imposing differing duties on the parties. However, the arbitration clause in the subcontract was "broadly worded, leaving vague the precise bounds of its scope." The Court did not agree with the engineer that a dispute about faulty pre-bid estimates — upon which the bid was based and which presumably played some role in NCDOT's decision to award the contract to the contractor — is not "related to" the parties' agreement to work together to build bridges and culverts in North Carolina. "Indeed, it appears to this Court that the faulty pricing estimates for the project are intricately and inextricably related to the performance of the Design Subcontract or its breach." Obviously, the engineer wanted the lower limitation of liability to apply from the Teaming Agreement, and the contractor wanted the higher limitation in the subcontract. The Court reasoned that, "the Teaming Agreement was a foundational premise upon which the Design Subcontract was later crafted. It was step one of two for the overall project, making firm the pricing and scope of services to be provided by [the engineer]." In summary, the Court ruled that, "Because the parties' agreement did not limit the period in which arbitration can be demanded, [the contractor's] right to arbitrate the dispute was not barred by the statute of limitations. And because the scope of the arbitration agreement extends to all disputes relating to the Design Subcontract or its breach, and because any doubt over arbitrability should be resolved in favor of arbitration." The trial court's ruling was, therefore, affirmed. *Gannett Fleming, Inc. v. Corman Construction, Inc.,* 2019 WL 6207616 (Md. App. 2019).



FLORIDA: INJURY CLAIM BARRED BY 10-YEAR STATUTE OF REPOSE

In 2016, a repairman sued a homebuilder for injuries he suffered in 2012, when an attic ladder he was climbing to repair a leak collapsed at a home. The trial court granted the builder's motion for summary judgment that the suit was barred by the 10-year statute of repose. In upholding the ruling, the Court of Appeals held that the attic ladder was pre-assembled and the contractor's only involvement with the ladder was its installation. Therefore, the action is founded on the construction of improvement to real property. Since the homeowners took possession of the home in May 2004, and the ladder was part of the original construction, a suit in 2016 was time-barred in May 2014. See, *Harrell v. Ryland Group,* 277 So.3d 292 (Fla. App. 1 Dist. 2019).

MEMBER PROFILE:
JAMES J. HOLMBERG, III, AIA, ESQ.

Greystone Housing Foundation, Inc.
San Diego, CA

Although Jim splits time between the West Coast and Nebraska, he is originally a Midwestern boy, who grew up in Nebraska, where his family owned a manufacturing company, Greystone, Inc. The company manufactured aggregate processing equipment for the sand gravel world. Jim stayed in the Midwest for college, attending architecture school in South Bend, Indiana at the University of Notre Dame. Why Notre Dame? "After surviving Catholic grade, junior and high school," Jim thought, "what's another five years?"

Notre Dame has for decades sent its architecture students to Rome, Italy for a year-long program, and Jim participated in that program during his Junior year. After getting his B.Arch. in South Bend, Jim chose to study law at Creighton University in Omaha, Nebraska. "My whole family went to Creighton," he said, "so this was an easy choice." Why law school? "I graduated from architecture school in the middle of the 70's recession, when there was very little work for architects, so studying law seemed like a good idea." His father was a lawyer and Jim spent of lot of time in his office as a young man, reading court opinions. He was intrigued about combining the two studies to learn the flip side of solving problems.

His first job out of Notre Dame was as an architect for the Army Corps of Engineers. After law school, Jim continued working at the Corps as an architect for another three or so years, then had an opportunity to move to San Diego, where he worked for an A/E firm. He then broke off into a very small firm to finish up and continue to do work for the Diocese of San Diego, specifically the St. Vincent de Paul Center/Joan Kroc Center. A lifelong Catholic, Jim then left that small firm and went to work in-house for the Diocese of San Diego, focusing mainly in the AHERA program for asbestos-abatement in schools. He left his job with the diocese after a few years and worked for a small law firm, and then for St. Vincent de Paul Village, Inc., which separated from the San Diego Diocese and needed a part time attorney and architect for corporate and tax issues and design of its smaller projects. Jim became its general counsel. The St. Vincent de Paul organization designed transitional housing, affordable housing, emergency shelters, and adaptive reuse of commercial

(Above) Jim Holmberg, architect-lawyer and the former Flotilla Commander for the U.S. Coast Guard Auxiliary, at the helm.

buildings. "St. Vincent then rebranded itself as Father Joe's Villages, to consolidate its various entities. It had operations at one point in Las Vegas and Indio, CA." While there, Jim designed emergency and transitional housing with accessory social service components, and several low-income housing projects using tax credits. "I am probably the only architect who ever designed apartments and then spent the rest of his time doing unlawful detainers against the tenants of that same project!"

Jim returned home to Nebraska and worked for the family business for seven years, where he was the company president. Five years ago, the company was sold, and Jim went into retirement, moving back to California. In his present state of semi-retirement, Jim does some small architectural projects, and volunteers for a nonprofit in Mecca, CA, called Galilee Center, Inc., whenever they needed any architectural or legal work. In this role, Jim enjoys the freedom of hours. He helped found another non-profit, known as Fresh Start Surgical Gifts in 1989 and served on its board until 1996. Currently, Jim runs Greystone Housing Foundation, Inc., which designs affordable senior housing. In his spare time, Jim likes to sail, play golf, ski, and write music. He finds inspiration in Frank Lloyd Wright's masterpiece, "Falling Waters," but also admires the work of architect Carlos Scarpa of Italy.

As to his adopted hometown, Jim says that "San Diego is transitioning from a Navy town to a hub for the bio-tech industry. The beaches and marina areas are still relaxed and there is the world-class San Diego Zoo, Sea World, Torrey Pines and La Jolla. It also has perfect weather and seafood."

His advice for a young architect thinking about law school is this: "Take as many of the practical trial classes as possible and get a broad legal education, because it will be a while before you may enter a court room, and being the only lawyer amongst a group of architects, they will be asking you questions left and right, so at least you can direct them to the right legal specialist."

(Below) Jim spends a great deal of his time volunteering in his community. Here, he spends time on a mission trip to LaPosa, Guatemala in 2018. Note the Notre Dame sweatshirt!

MEMBER PROFILE:
MARK KALAR, AIA, Esq.
Cuningham Group Architecture, Inc.
Minneapolis, MN

(Above) Mark Kalar jamming on his bass guitar, one of his favorite hobbies.

Mark Kalar attended the University of Minnesota for his architectural degree. "I had lots of family and family friends who went to the U of M, so it was the natural choice," he said. "And, the program was going through some exciting leadership and pedagogical transitions at the time." His first job out of architecture was at the firm of Rozeboom Miller Architects, a small firm doing K-12 work in and around Minneapolis. "It was a great opportunity for a young architect," Mark recalls, "the partners believed in the 'throw them in the deep end and see if they can swim' model of mentorship, which is not for everyone, but I loved it!" His first big project was to work on Steven Holl's addition to the U of M architecture building.

Mark began to think about law school after hearing a lecture by architect Peter Eisenman. "He talked about his son weighing the two careers and the advice he gave his son was: why would anyone go into architecture if they could go into law?" Mark sees his role in law as being a "translator" for designers. "In my experience, many of the architects I worked with were uncomfortable (at best) with anything verbal, including reading contracts or communicating effectively with clients, and tended to make what seemed to me to be illogical connections. But I think the two disciplines are mutually reinforcing." It is Mark's desire that architecture students receive more instruction on how to build a design argument so that they can face a jury of critics.

"I think a design background has certainly helped me think creatively and iteratively as a lawyer," he added. Mark chose William Mitchell College of Law (now Mitchell Hamline School of Law) in St. Paul, MN to study law, but kept working as an architect while getting his J.D. "When I started law school, we had a young and growing family, and I needed to keep working. Mitchell had the best part-time program in town, with great

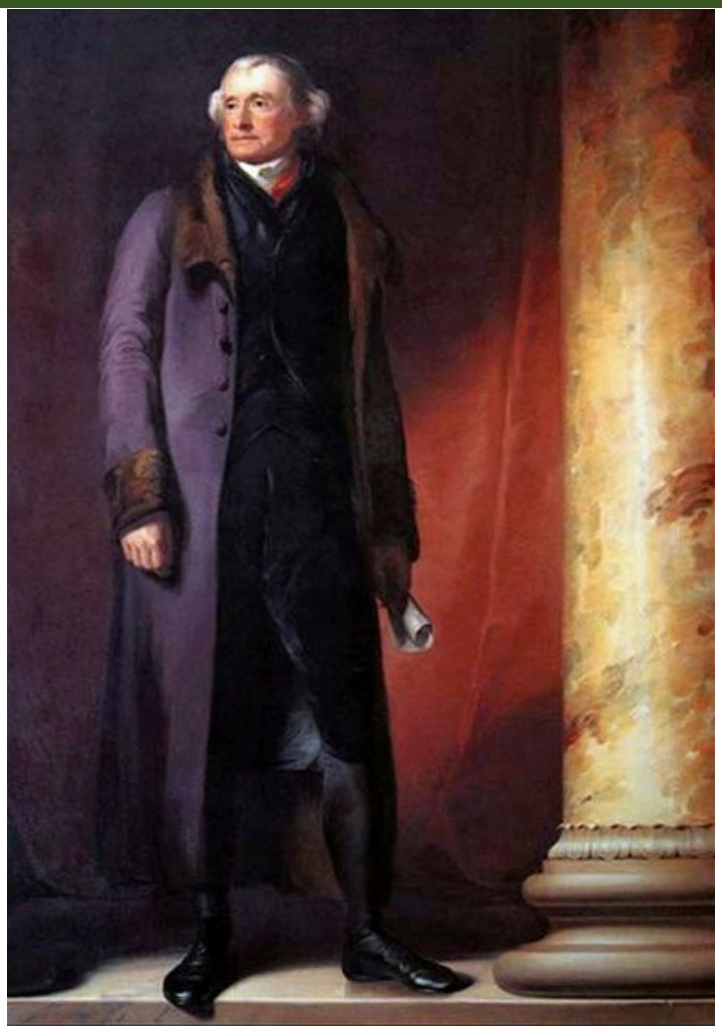
support for working parent students." Right after law school, Mark moved into a role as associate counsel at Cuningham Group, a 330-person architecture firm based in Minneapolis. His timing was perfect. "Our general counsel at the time (and former Jefferson Society member), Roger Kipp, was preparing to retire, so I was able to gradually transition from a project architect to in-house attorney over the course of a few years under his tutelage." Mark took over as Cuningham Group general counsel in 2015. "Our legal team is just me and a paralegal, so I get involved in just about everything going on in the office," Mark said. The best part of his job? Mark told us that he really enjoys working with younger staff, whether it's doing training in the office or helping them work through conflicts. "It's gratifying when someone comes to me in a panic and leaves relieved, knowing there's a plan and a support system for them."

Outside of the firm, Mark is active in the local AIA, and he is a past co-chair of the AIA MN Government Affairs Committee, and currently AIA Minneapolis Treasurer/Director. At AIA National, Mark is about to start serving on the National AIA Risk Management Committee (with fellow Jefferson Society members Craig Williams and Joelle Jefcoat).

Mark cannot leave his work at home. His wife, Amy, is also an architect, working at Cuningham Group. "She's a project manager, so we do sometimes spend romantic evenings talking contracts." Mark and Amy have two children: Xander, age 11, and Cecilia, age 8, whose curiosity and inventiveness Mark finds "endlessly inspiring." Outside the office, Mark is an avid runner, who has done over fifty marathons/ultramarathons around the world. "I've managed to convince my family it's normal to build vacations around running races." He also enjoys playing and listening to music (See picture on p. 19). He plays bass guitar and "likes to noodle around with synths and other electronic noisemakers." When not running or playing guitar, Mark is also active in a local youth organization, Voyagers, and in the PTA.

His advice for a young architect thinking about law school? "Go for it! I think a legal education offers myriad and expansive options for practice in either profession."

(Above left) Mark, Amy, Cecilia, age 8, and Xander, age 11, on vacation. (Above right) Mark is an avid runner, shown here after finishing one of his over fifty marathons/ultramarathons.



NEW YORK. NYC FINALLY CAN USE D-B!

On Dec. 31, 2019, Gov. Cuomo signed into law Bill No. A07636, aka the New York City Public Works Investment Act, which authorizes some New York City agencies to use the design-build delivery method. The State Assembly passed the law in June 2019, which law authorizes the city's DOT and Dept. of Design and Construction, to award design-build contracts for projects: operating under a project labor agreement; that cost $10 million or more; and for the Dept. of Parks and Recreation that cost $1.2 million or more. Other projects, such as for improved sidewalk access for those with disabilities, renovations to cultural institutions and libraries and security improvements of at least $1.2 million may also be delivered via design-build. The law takes effect immediately, and, starting on June 30, 2019, each agency that has issued a design-build contract must submit an annual report on certain metrics. The new law also addresses some state licensing board concerns by requiring that all design-related documents be stamped by licensed professionals.

THOMAS JEFFERSON CALLED FOR THE IMPEACHMENT OF GEORGE WASHINGTON? TRUE! SAYS ONE PROFESSOR.

With the House of Representatives voting in Dec. 2019 to impeach President Trump, historians have been researching the history of impeachment. According to George Washington Law School Professor Paul Rosenzweig, calls for impeachment of presidents date back to the country's earliest days. "It surprised me when I first started studying this 10 years ago to learn that the very first person who was ever thought of as a possible candidate for impeachment as a president was George Washington," Rosenzweig said. "I mean, think of it, George Washington -- the man known for his honesty, his probity, his love of country, the father of our country -- and yet Thomas Jefferson seriously thought that he should be impeached and removed from office," Rosenzweig added.

In 1794, Washington had concluded the Jay Treaty, a final peace treaty with Great Britain to bring an end to the Revolution. The treaty, negotiated by John Jay, committed America to neutrality in the conflict between Great Britain and France. But Thomas Jefferson, "essentially a Francophile," according to Prof. Rosenzweig, viewed Washington's commitment of neutrality between the two powers as a mistake, calling the treaty "treasonous," Rosenzweig explained. "It's really interesting to learn that at the very founding of our nation, one of the most influential Founders thought that impeachment was as much about grave policy differences as it would be about the personal conduct of the president," he added. Jefferson found Jay's Treaty an "execrable ... infamous act" by the "Anglomen of this country." He warned, "Acquiescence under insult is not the way to escape war."

When Alexander Hamilton defended Jay's Treaty in front of New York's City Hall, people threw rocks, leaving his face bloody. In Boston Harbor, mobs set a British ship aflame. In Philadelphia, they cried, "Kick this damned treaty to hell!" Spearing a copy of Jay's pact with a sharp pole, the revelers marched it to Minister Hammond's house, burned it on his doorstep and broke his windows, with Hammond and his family cowering inside.

In August 1795, at Mount Vernon, George Washington bent over his candlelit desk, dipped a quill in black ink and tensely scratched out letter after letter. He was feeling "serious anxiety" in a time of "trouble and perplexities." As the public tempest had swelled, some wanted Washington impeached. Cartoons showed the President being marched to a guillotine. Even in the

President's beloved Virginia, Revolutionary veterans raised their glasses and cried, "A speedy Death to General Washington!"

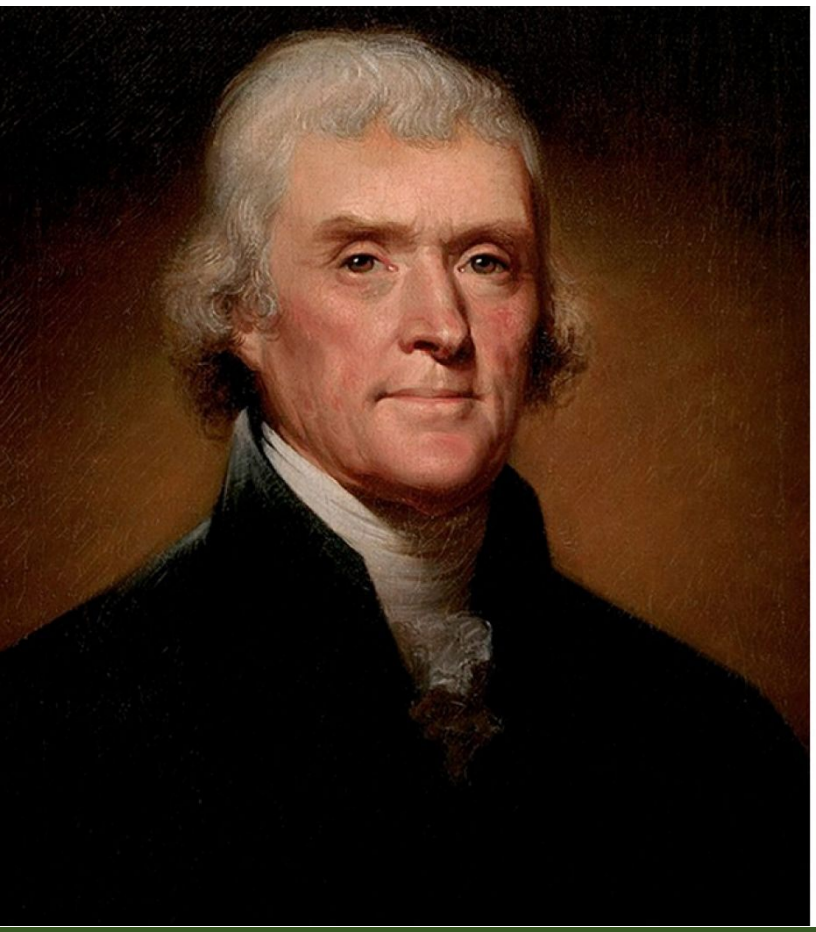
The showdown came on Weds., March 30, 1796. In a message read aloud, Washington reminded the House that the Constitution gave responsibility for treaties to the Senate, whose fewer members were more likely to protect national secrets. He said the only way the House could claim wholesale access to executive documents was to impeach him, adding that "no part of my conduct" had shown a desire "to withhold any information" required by the Constitution. When the House finally voted on funding Jay's Treaty, the result was a 49 to 49 tie. The tiebreaker was Republican Frederick Muhlenberg, a German-speaking Lutheran pastor from Pennsylvania. Muhlenberg shocked everyone by supporting the treaty.

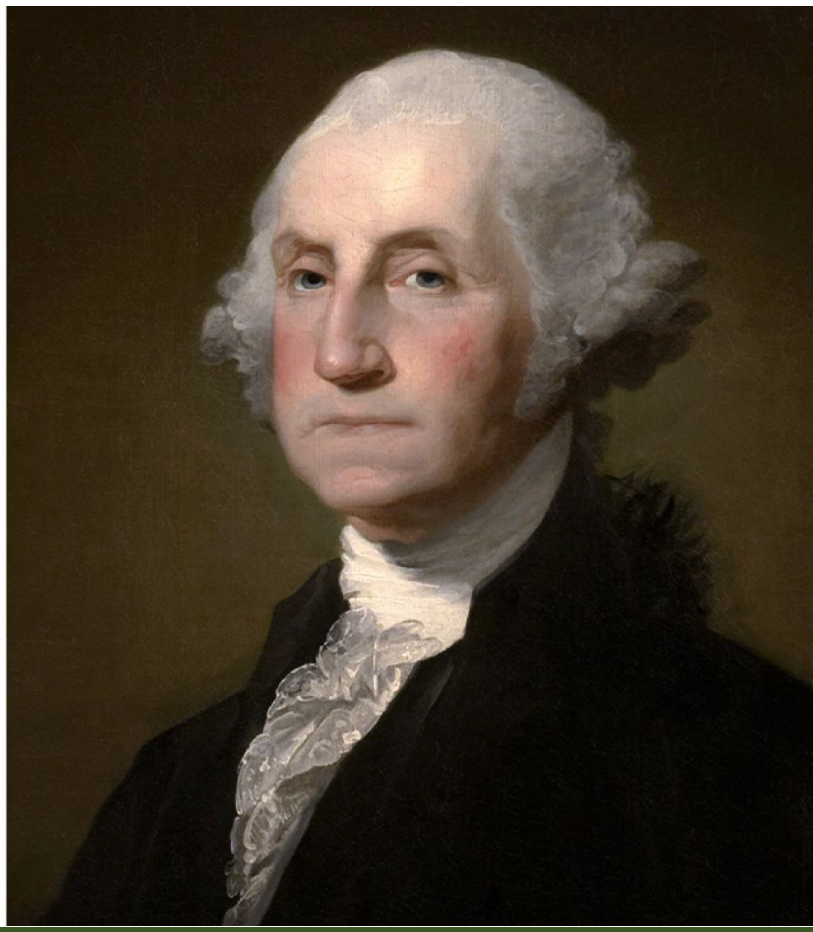
Jefferson's effort to oust Washington fizzled and articles of impeachment were never introduced, but Prof. Rosenzweig said that the episode shows that debate over the intended use of the impeachment clause is as old as the country. It is also an argument that has surfaced throughout nearly every administration. While some believe that a policy disagreement could constitute grounds for impeachment, others limit the clause to include only professional misconduct.

On Nov. 19, 1794, American statesman John Jay signed the "Amity, Commerce, and Navigation Treaty" with Britain. The treaty, now known as "Jay's Treaty," left some important issues unresolved and its ratification divided politicians in the young federal government, however, it successfully allowed the United States to avoid war with its more powerful adversary, Britain.

Under Jay's Treaty, the British evacuated their posts in the Northwest Territory, allowing Americans to discover the rich possibilities of the new West. As Washington had dreamed, the country could seize "command of its own fortunes." And just as he had predicted, by the time Americans fought Great Britain in the War of 1812, they were powerful enough to win. Martha Washington later insisted that Jay's Treaty hastened her husband's death on Dec. 14, 1799.

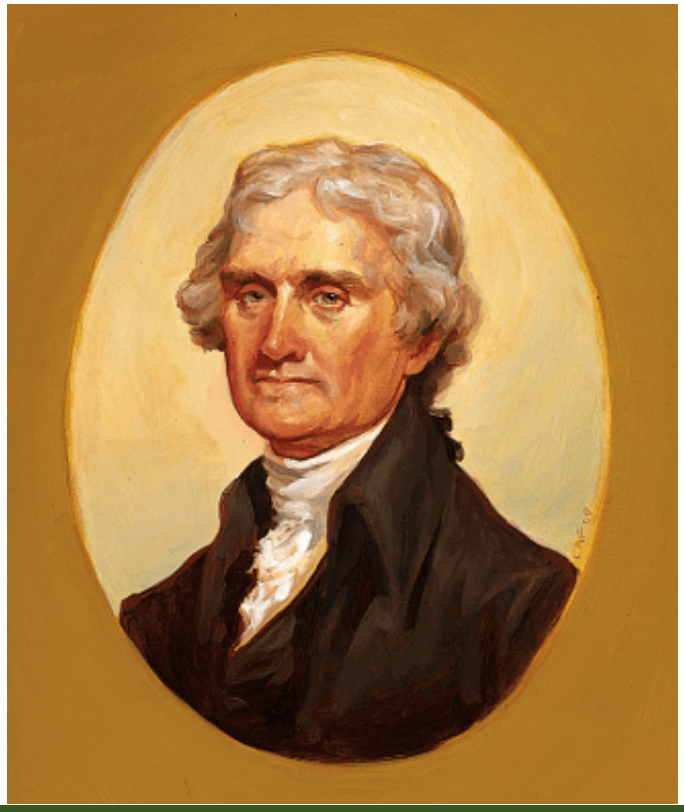
The U.S. Constitution gives the House the power to impeach, the Senate the power of trying and, on a two-thirds vote, removing from office "All civil officers," including the president, vice president, and federal judges, can be impeached for treason, bribery, or other "high crimes and misdemeanors."





ARIZONA. TAXPAYERS WHO ATTEMPTED TO VOID DESIGN AND CONSTRUCTION CONTRACTS ON PUBLIC PROJECT LOSE BECAUSE THE PROJECT WAS COMPLETED.

This was a suit filed by county resident-taxpayers challenging the award of a design contract and a construction contract without competitive bids. The trial court granted partial summary judgment in favor of the county and the taxpayers appealed. The county filed a cross-appeal, contending the taxpayers lack standing to pursue their claims and the issue is moot because the project was completed by the time of trial. The dispute began when, as an inducement to locate a manufacturer in the county, the county proposed to build a new facility and lease it back to the company. The county administrator told the company that preliminary design and cost information was needed. An architectural firm, was chosen to provide the preliminary design services. The architect, in turn, employed a construction firm for preliminary cost estimates. Neither the architect nor the contractor were paid for the preliminary services they provided over the next few months, with the hope that they would be awarded paid contracts if the project materialized. The company told the county that its facility had to be operational by the end of 2016. The county submitted to the company a written proposal to provide it a facility that it could occupy in 2017. In response, the company agreed to move into a building leased



from the county "by approximately November 2016," a completion date that required the facility to be built much sooner than the usual 18 to 24 months to complete such a facility. The county's board of supervisors voted to approve the project. At the same time, the board approved the architect and the contractor without a competitive procurement process, following the county administrator's advice that the board should invoke its emergency procurement authority to select those firms to build the facility. The facility was substantially completed and certified for occupancy by December 2016. For completing the project, the architect was paid $667,709; and the contractor was paid $12,334,531.

Meanwhile, during construction, in April 2016, the resident taxpayers filed a lawsuit claiming, among other things, that the selection of the architect and contractor was "predetermined" and violated competitive procurement requirements under state law and the county code. The taxpayers requested injunctive and declaratory relief. The county moved to dismiss the case, contending, among other things, that the taxpayers lacked standing and the county had acted lawfully under the emergency procurements law, which applies "if a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest, except that these emergency procurements shall be made with such competition as is practicable under the circumstances." The trial court denied the motion to dismiss.

The county then moved for partial summary judgment, arguing that the issue was moot because the project was completed, but the court denied this motion as well, finding the county had conceded the facility was not fully completed at that time and the contractors had not been fully paid, and even if the issue was moot, the "matter presented issues of great public importance and/or issues that are capable of repetition yet evading review."

The county then filed a second motion for partial summary judgment, again contending its procurement process was lawful. The taxpayers filed a cross-motion for partial summary judgment. This time, the trial court granted the county partial summary judgment, concluding that the county administrator had not violated procurement laws in his pre-award consultation with the two firms. It also found that the county had determined the project was in the public interest as a means of economic development, and that the project would have been put at risk had the county not agreed to the November 2016 deadline. The court further de-

termined the board had acted within its discretion when it concluded that any competitive bidding for the project on that schedule would have been impracticable because had there been any competitive bidding, "it would have left a mere 6-8 months for the design and construction of the building and balloon pad — a time frame that appears unrealistic if not impossible."

The taxpayers appealed and the county cross-appealed the court's denial of its motion to dismiss for lack of standing. As to the issue of "standing," the Court of Appeals ruled that: "A taxpayer has sufficient standing in an appropriate action to question illegal expenditures made or threatened by a public agency." Here, the taxpayers had standing and a right of action to enjoin the allegedly illegal expenditures.

As to the county's defense that the lawsuit was now moot, since the project was finished and the architect and contractor had been paid, the Court of Appeals agreed, stating, "We are reluctant to grant relief to challengers of public contracts that have been fully performed." The Court of Appeals held that the taxpayers could have preserved the possibility of a meaningful remedy by seeking to temporarily enjoin performance of the disputed contracts pending the outcome of the lawsuit. They did not do so, however, despite ample opportunity. The taxpayers filed suit less than three months after the contracts were entered, and more than eight months before the facility was substantially completed. "A live controversy therefore evaded review only because the taxpayers did not take appropriate legal action to attempt to preserve one. We therefore decline to decide this moot issue." Therefore, the county ultimately prevailed. See, *Rodgers v. Huckelberry*, 2019 WL 5304152 (Ariz. App. 2019).

MASSACHUSETTS. SIX-YEAR STATUTE OF REPOSE APPLIED TO ENTIRE PROJECT, NOT INDIVIDUAL CONDO UNITS.

This suit arose out of the construction, marketing, sale, and management of a condominium. The project was planned as a "phased condominium" with a maximum of 150 units. Construction took place between 2008 and 2015 and, ultimately, the developer built 150 units over the course of twenty-four phases of construction. The units are enclosed in twenty-eight different buildings. The claims at issue relate to the common areas of these buildings. While the condominium construction was ongoing, the project's architect would submit declarations to the town swearing that individual units or individual buildings were "substantially complete" and could be occupied for their intended use. Shortly after such declarations were submitted, the town issued certificates of occupancies for the respective unit or building. For six of the buildings, the architect signed affidavits of substantial completion for each unit in the building *more than six years* before this action was commenced. For five of these six buildings, the town issued certificates of occupancy for the buildings and all of their units *more than six years* before this lawsuit was filed.

According to the plaintiff, investigations by architects and engineers revealed a significant number of deficiencies and code violations in the design and/or construction of the buildings, common areas, and limited common areas of the condominium. The plaintiff sued for breach of the condominium documents, breach of fiduciary duty, intentional misrepresentation, negligent misrepresentation, negligence, breach of express and implied warranty, and violation of Massachusetts statutes. The developer raised the 6-year statute of repose for any action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property. The District Court held that the six-year statute applied only to two of those claims, i.e., negligence and breach of an implied warranty, as those claims arose out of an alleged "deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property." The analysis then focused on whether the statute applied to each individual building, or to each unit, or to the entire project as a whole. The condo owners argued that this was not 150 different subprojects (the units), nor 28 different subprojects (the individual buildings), but one endeavor to build a single condominium development – with a single architect and a single contractor. If it was one project, then the statute did not run within six years of the plaintiff's lawsuit. The court agreed, saying, "Taken together, these facts indicate that the Condominium was not a series of improvements but one improvement. As a result, the repose period starts running upon completion of the entire improvement, as completion is defined in the statute." Since the suit was filed just two and a half years after completing the entire condominium project, the court held that the statute of repose did not bar the lawsuit. See, *D'Allessandro, et al. v. Lennar Hingham Holdings, LLC*, 2019 WL 5550629 (D. Mass. 2019).

NEW HAMPSHIRE. RESTAURANT WHICH COMPLIED WITH ADA REQUIREMENTS AFTER SUIT WAS FILED WAS ENTITLED TO SUMMARY JUDGMENT.

A non-profit corporation and one of its directors sued a restaurant in federal court claiming that various architectural elements in and around the restaurant failed to comply with requirements of Title III of the Americans with Disabilities Act ("ADA"). They sought a permanent injunction, requiring the defendants to alter the restaurant in order to render their restaurant readily accessible to individuals with disabilities. The defendants argued that since the suit was filed, they had since made substantial renovations to the restaurant and remedied all alleged ADA violations. Therefore, the defendants moved for summary judgment, asserting that plaintiffs' claims were moot.

After being served with plaintiffs' lawsuit, defendants retained legal counsel, an architect, and an architectural consultant/ ADA compliance expert, to assess the claims asserted. Defendants and their experts discussed the ADA violations identified by the plaintiffs and considered how they might be remedied. By August of 2018, the architect had completed plans for the ADA renovation. Changes to the handicapped parking were completed and the last of the interior renovations were completed by January of 2019. Once the weather permitted, the defendants replaced the concrete sidewalk in front of the handicapped parking to bring it into compliance with the ADA. In total, defendants spent approximately $120,000.00 to bring the interior and exterior elements of the restaurant and parking area into compliance with the ADA.

According to their ADA compliance expert, every non-compliant element of the restaurant and parking area identified in plaintiffs' lawsuit had been remedied and the restaurant "now meets or exceeds all ADA accessibility requirements." The plaintiffs conceded that most ADA violations alleged in the complaint had been remedied, but argued that there were still not enough accessible parking spaces, nor an accessible route that connects all accessible building entrances with all accessible spaces; and that the restaurant lacked adequate accessible seating appropriately distributed throughout the facility - specifically, no handicapped-accessible seating in the bar area. The federal district court found that the defendants had the five (5) ADA-compliant handicapped-accessible parking spaces, one of which was van accessible, which is more than the four (4) required by the ADA as a matter of law. As to the "accessible route" within the facility and to the public rest rooms, the Court found that all noncompliant elevation changes along these accessible routes had been eliminated and, therefore, the defendants were entitled to judgment as a matter of law.

Finally, as to the complaint that at least 12 of the 240 seating spaces in the restaurant must be wheelchair accessible spaces "distributed proportionally throughout the dining area and the bar area with the same sight lines to the restaurant's many flat screen televisions and equal access to restroom facilities," the Court found that the ADA standards do not require restaurants to provide wheelchair access to every area in the facility. Rather, those standards require that: 1) "at least 5 percent of the seating spaces and standing spaces at the dining surfaces shall" be handicapped accessible; and 2) such handicapped-accessible seating "shall be dispersed throughout the space or facility." ADAAG §§ 226.1 and 226.2.

The Court also noted that, "the caselaw on this issue supports defendants' view that the ADA and applicable regulations do not require the restaurant to have accessible seating in every area of the facility. Rather, accessible seating must be dispersed throughout the space or facility." Plaintiffs did not cite to any precedent - whether binding or merely persuasive - that supported their view that the ADA compels defendants to provide accessible seating in what plaintiffs have defined as the "bar area." The pertinent regulations require only that accessible seating shall be "dispersed throughout the space or facility containing dining surfaces." The record evidence plainly establishes that defendants have complied with that "dispersal" requirement. Therefore, again, the Court held that the defendants had met the ADA.

As a result, the lawsuit was declared moot. Not yet finished, the plaintiffs demanded that the court issue a permanent injunction, requiring defendants to train their employees about ADA requirements and to monitor the restaurant's ongoing compliance with ADA accessibility requirements, and to award plaintiffs reasonable attorney's fees. The court disagreed, noting that plaintiffs' ADA claims are now moot. "Given the undisputed facts presented, injunctive relief is not warranted." *Theodore v. 99 Restaurants, LLC,* 2019 WL 4861201 (D.N.H. 2019).

FINDING MEMBER PROFILES.

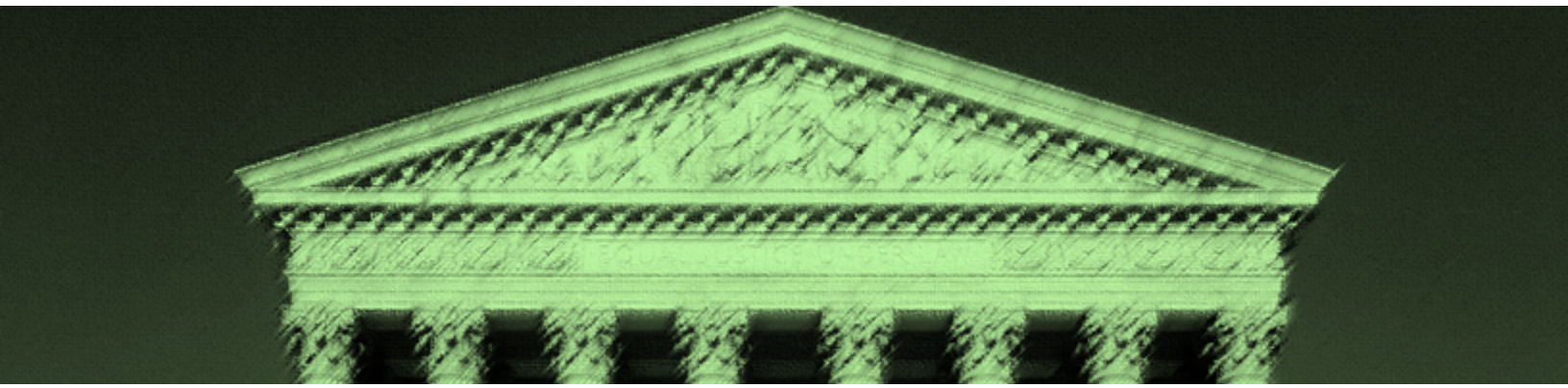
We have now profiled nearly 70 of our past and current members in *Monticello* since 2012. Want to find a profile? Here is the list of names in alphabetical order, and dates of publication. Go to www.thejeffersonsociety.org to find the issue listed below. What? We have not profiled you yet? Contact Editor Bill Quatman at bquatman@burnsmcd.com to reserve a spot in an upcoming issue.

Monticello Member Profiles.

1. Wilkes Alexander – Oct. 2016
2. Ricardo Aparicio – Oct. 2016
3. Robyn Baker – April 2015
4. Don Barry – Jan. 2019
5. Michael Bell – July 2016
6. Wendy Bennett – July 2019
7. Daniel Boatright – April 2019
8. Sheri Bonstelle – Oct. 2018
9. Matthew Boomhower – Oct. 2016
10. Kevin Bothwell – Oct. 2016
11. Timothy Burrow – July 2016
12. Fred Butters – Jan. 2015
13. Yvonne Castillo – July 2014
14. Stefan Chin – Jan. 2017
15. Joseph Di Monda - Jan. 2017
16. Julia Donoho – July 2015
17. Denis Ducran – Oct. 2014
18. Mark Dunbar – Jan. 2018
19. Ross Eberlein – Jan. 2017
20. Bruce Ehrlich – July 2019
21. Richard Elbert – April 2019
22. Kevin Elmer – July 2013
23. Bill Erwin – April 2017
24. Ted Ewing – Jan. 2016
25. Mehrdad Farivar – Jan. 2014
26. Warren Feldman – April 2017
27. Hollye Fisk – July 2015
28. Joshua Flowers – April 2016
29. Scott Fradin – April 2017
30. Kate Enos Frownfelter – April 2017
31. David Garst – July 2016
32. Timothy Gibbons – July 2018
33. Kelli Goss – Jan. 2015
34. Don Gray – Jan. 2019
35. Cara Shimkus Hall – April 2014
36. Jeffrey Hamlett – July 2018
37. Jessica Hardy – Oct. 2019
38. Suzanne Harness - July 2017
39. Nolanda Hatcher – Jan. 2019
40. John Hawkins – Oct. 2019
41. Jessyca Henderson – July 2018
42. Chuck Heuer – Oct. 2012
43. Wyatt Hoch – Oct. 2019
44. James Holmberg - Jan. 2020
45. Donna Hunt – Jan. 2016
46. Joelle Jefcoat – Oct. 2014
47. Joseph Jones – April 2016
48. Mark Kalar - Jan. 2020
49. Mike Koger - Oct 2017
50. Calvin Lee – Jan. 2017
51. Laura Jo Lieffers – July 2019
52. Laura LoBue – April 2018
53. Kurt Ludwick – Oct. 2019
54. Ryan Manies – Oct. 2015
55. Jon Masini - April 2018
56. Francisco Matta – Oct. 2018
57. Ande McMurtry – Jan. 2018
58. Rebecca McWilliams - Jan. 2020
59. James Newland – April 2018
60. Donovan Olliff – Oct. 2013
61. Eric Pempus – Oct. 2015
62. Bill Quatman – July 2015
63. Gracia Shiffrin – July 2014
64. Tim Twomey – Jan. 2015
65. Scott Vaughn - Oct 2017
66. Bruce Waugh – Oct 2017
67. Russell Weisbard - July 2017
68. Jay Wickersham – April 2015
69. Craig Williams – April 2019

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.



Hear Ye! Hear Ye! The Supreme Court Admission Day is Nov. 16, 2020!

All Rise! You won't want to miss this opportunity! We have reserved space with the U.S. Supreme Court for a group of twenty-five Jefferson Society members to be admitted in a ceremony on Nov. 16, 2020. If you would like to join the group, please let us know as soon as possible by emailing Jessyca Henderson AIA, Esq. at jessyca.henderson@gmail.com. Each applicant is permitted to bring one guest. Please let Jessyca know if you plan to bring a guest or not.

Required items for application submission and procedures are as follows:

1. **A Completed Application, which includes:**

a. A typed first and second page of the application can be obtained from the website, at www.supremecourt.gov under the "Rules and Guidance" tab. The application must be filled out online, printed, and then signed.

b. All signatures on the second page of the application – both applicant and sponsors, which must be original, and on the same page. Several TJS Members have already been admitted and could act as your sponsor. It is suggested that you contact two, and prepare addressed, stamped envelopes so that the first sponsor can send along the materials to the second sponsor, who will sign and send the completed application back to you. Only the Certification, Statement of Sponsors, and Oath of Admission sections need to be signed for group admissions.

3. **A Certificate of Good Standing:** You should request a certificate from the Supreme Court of the State where you have been practicing for the past three years. Certificates are usually valid for one year. Make your request after Dec. 1, 2019 so that you know the certificate will be valid at the time the application is submitted.

4. **The Application Fee:** Prepare a $200 check payable to "The Jefferson Society." The Jefferson Society will prepare one check for the group submission.

4. **Final Steps:** Once you have received your application back from your second sponsor, send your signed application, your certificate, and your application fee check to the Jefferson Society, c/o Jessica Hardy at the address below. She will collect all the applications, look through them, check all the signatures, and will call if anything is missing. The Clerk will send information at a later date on the required arrival time at the court.

The Big Day Schedule:

As in the past, we would like to include a catered breakfast, which will be an additional charge per person, and will move arrival to an earlier time, likely between 8:00 and 8:30 a.m. When the applications are submitted, a letter will be sent to the Chief Justice and Associate Justices introducing The Jefferson Society and inviting them to join us in the room where the breakfast is served. The last time we did this, Justice Ruth Bader Ginsburg joined us for a photo. Court will gavel in at 10 a.m. and admissions will be the first item of business.

If you have any questions, please do not hesitate to contact Jessyca Henderson, or Jessica Hardy.

For general questions, and swearing-in day logistics:
Jessyca Henderson, AIA, Esq.
118 Forest Drive
Catonsville, MD 21228
Cell: (410) 292-3085

Send application materials to:
Jessica Hardy, Assoc. AIA, Esq.
1717 Dowling Drive
Irving, TX 75038
Cell: (469) 610-0792

UTAH: TORT CLAIMS AGAINST GEOTECHNICAL ENGINEER BARRED BY ECONOMIC LOSS DOCTRINE

A little more than a year after they built their "dream home," plaintiffs began to notice cracks in their house's foundation and walls, and soon learned that the soil beneath the house was unstable. More than a decade earlier, a geotechnical engineer (Intermountain) had, at the request of a developer, prepared a geotechnical report concluding that residential construction could occur on the site provided certain precautions were taken. Plaintiffs hired a different engineering firm to conduct another geotechnical study of the property which found that the house was experiencing excessive foundation settling, believed to be the result of instability in the slope immediately below and to the east of the home. The report concluded that the existing slope failed to meet the minimum factors of safety and, recommended installing additional support for the foundation, which would extend at least 65 feet below existing foundation elements. Plaintiffs contacted several contractors to ask them to undertake the work, but none was willing to do so because of liability concerns. Unable to stabilize the structure, plaintiffs continued to observe widening cracks in the foundation and walls of the house, and eventually concluded that the house was not safe to live in and was unsalable on the real estate market. The homeowners then sued Intermountain, plus the developer and original builder. Against Intermountain, the plaintiffs brought tort claims for negligence, negligent misrepresentation, and negligent infliction of emotional distress, plus breach of contract claim (as third-party beneficiaries of the

In affirming, the Utah Court of Appeals held that the statutory version of the economic loss rule applies to "actions for defective design or construction." Utah Code Ann. § 78B-4-513(1). That statute applies to "an action for defective design or construction," and states such action "is limited to breach of the contract."

The Court stated that the "more interesting part of the inquiry" was whether the "action" is one "for defective design or construction." The engineer argued that the gravamen of plaintiffs' claim is that their "dream home" was built on unstable soil and has been rendered uninhabitable as a result of settling and cracking, and that, at root, such claims depend on plaintiffs' ability to demonstrate that their house was poorly designed or constructed. Plaintiffs, by contrast, contended that their tort claims were not for defective design or construction, and point out that the engineer's 2004 report was issued before any relevant structure — including their house — was designed or constructed. The Court ultimately rejected the plaintiff's clever argument, however, finding that plaintiffs' claimed damages were aimed at seeking redress "for defective design or construction." "Even if the architect or the builder did not cause this defect, it is nonetheless a defect in the design and construction of the house, and the action is one 'for defective design or construction,' " the Court said.

As a result, the summary judgment for the engineering firm was affirmed. *Hayes v. Intermountain GeoEnvironmental Services Inc.,* 446 P.3d 594 (Utah App. 2019).

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