## 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.

# Upcoming Events

- **Save the Date: Second Annual Meeting, June 25th!**

Join us for our second official membership meeting and election of officers and directors. Several venues are being considered for this dinner and meeting, ranging from an historic house designed by H.H. Richardson to a river cruise of downtown's remarkable architecture. RSVP to our event host, and TJS member Julia A. Donoho, AIA, Esq. at jdonoho@legalconstructs.com.

- **AIA Annual Convention, June 26-28, 2014, Chicago!**

Click here for details:
http://convention.aia.org/event/convention-home.aspx

- **TJS President to Speak from Coast to Coast!**

Our own Craig Williams, AIA, Esq. will be a featured speaker at the DRI Construction Law Seminar in San Diego, CA on Sept. 10-11. Craig will speak about issues relating to architectural practice and the defense of architects. Craig is also speaking at the ALFA Construction Law Seminar in Asheville, N.C. on July 31, and at the DesignGreen Conference in New Orleans, on Oct. 23. When not speaking, Craig is general counsel for HKS Architects in Dallas.

 



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# Monticello

## Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to President Craig Williams at cwilliams@hksinc.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

**AUTHORS WANTED**

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

**JOIN US ON FACEBOOK & LINKEDIN**

Want to connect with other members? Find us here.

## A Visit to Monticello

**By R. Craig Williams, AIA, Esq.**
**HKS Architects**

Last October I, and a group of fourteen other bikers, embarked on a motorcycle tour (all Harleys) of historic sites in Virginia, West Virginia, Maryland, and Pennsylvania. The sites included Harper's Ferry, Manassas, Chancellorsville, Appomattox Courthouse, Antietam, Gettysburg, and the home of Thomas Jefferson. Although we made the trip during the dormancy of the United States government, undeterred from our mission to see the battlefields, we bikers jumped fences and barricades and were not disappointed. There is much history at those sites, and much to remember.

Visiting Monticello in the midst of battle against government numbness, and between battlefields and the surrender site, I was reminded that events which seem to have happened remotely only in books, happened *actually* and only recently. For example, my great grandparents, who I well knew, were the children of veterans of the War-Between-the-States that took place 150 years ago; and, I am now watching six living generations in my family as they all age.

What is the relevance of all this to The Jefferson Society? None, really. Visiting Monticello somehow makes Thomas Jefferson seem closer, more real, and personal, so I chose for this newsletter to venture away from business and focus on history.

Touring his home, room by room, I had the feeling that Jefferson had left each room just a few minutes before I arrived. Of course, he cherished the gardens and forests of Monticello, writing from France, "I am savage enough to prefer the woods, the wilds, and the independence of Monticello, to all the brilliant pleasures of this gay capital [Paris] . . . . for tho' there is less wealth there, there is more freedom, more ease, and less misery."

Here are a few Jefferson facts for you to consider. He was just 25 years old when elected to the House of Burgesses, and earthwork began at Monticello, elected to the Continental Congress at age 32, and drafted the Declaration of Independence at 33. In 1777, at the age of 34, he drafted the Virginia Statute for Religious Freedom. I have a personal connection with that event. My fourth-great-grandfather, Rev. Jeremiah Moore, a Baptist minister in Virginia who was jailed twice by the British for "preaching baptistery", was personally acquainted

(continued on page 2)


**The Weathervane at Monticello (above the east portico).** This photo shows how Thomas Jefferson was able to look up at the soffit and tell which way the wind was blowing each day. *(photo by R. Craig Williams, AIA, Esq.)*

*A Visit to Monticello*

(continued from page 1)

with Mr. Jefferson and urged action to establish religious freedom in Virginia. He sold his personal library of 6,700 books to the Library of Congress.

After serving as a governor, vice-president, secretary of state, and president, he believed his greatest achievement was the establishment of the University of Virginia. TJ wrote that architecture was worth "great attention" for Americans, opining "it is then among the most important art, and it is desirable to introduce taste into an art which shews so much." Of course, Monticello was his architectural laboratory, serving as a place to develop ideas later displayed in his designs for public buildings.

The Jefferson Society, Inc. is a tribute to the original architect-lawyer.

As members, we all have a little "TJ" in our genes. If you haven't yet visited Monticello, I encourage you to make the trip. You may find part of yourself there.

## TJS Board Votes On Membership Criteria; Creates New Associate Member Category.

Since its founding in July 2012, The Thomas Jefferson Society, Inc. has had occasional applicants who are licensed attorneys and hold a 4-year, non-accredited degree in architecture. The Board has discussed whether to allow full membership to such applicants or not. On December 18, 2013 the Board took up the question and engaged in a lively debate. A quorum was present and, after discussion, on a formal motion, duly seconded, the following motion was passed:

"**The bylaws should be amended to clarify the qualifications for membership to be that an applicant for membership must be a licensed attorney and must be a registered architect in a State or Commonwealth of the United States, or if not a registered architect, must have a professional degree in architecture from an educational institution based in the United States that would qualify the applicant to have taken the Architect Registration Exam if the applicant had chosen to pursue registration."**

The by-laws will be amended accordingly.

At this meeting, a second related motion was made and also passed. The motion was: "The board should consider creating a second category of membership for those applicants who do not otherwise qualify because the applicant does not have a professional degree in architecture, similar to the associate member category of the American Institute of Architects."

At a Special Meeting of the Board held on Feb. 5th, the Board took up that related question: "Should The Jefferson Society, Inc. consider admission of applicants to membership who do not qualify because they are not licensed attorneys, but do have a law degree?" The Board voted to amend the by-laws to add a new membership category of "Associate Member." This new membership category will include those applicants who have an unaccredited degree in architecture and are licensed attorneys The Board also voted that those applicants who are licensed as architects and hold a J.D., but who have either not taken the bar exam or allowed their license as an attorney to lapse would still qualify for full membership, as licensure in either profession is required for full membership, not just dual degrees.

## NEW YORK: ARCHITECT MAY BE LIABLE FOR ADA VIOLATIONS DESPITE 3-YEAR STATUTE OF LIMITATIONS UNDER "CONTINUOUS REPRESENTATION" THEORY . . .

The owner of a 132-unit multi-family housing project sued the land surveyor and architect to recover damages for professional malpractice and breach of contract because the project did not comply with the Fair Housing Act and the ADA, among other laws. The two defendants moved to dismiss based on the 3-year statute of limitations. The trial court denied the defendants' motion to dismiss, which was upheld on appeal.

Construction began in February 2003 and was substantially completed in July 2007. The surveyor and architect's last services were in March 2006. In September 2008, the owner received notice from the New York State Attorney General that the project did not comply with accessibility laws. As a result, costly alterations had to be made to remain in compliance. The owner filed suit in December 2010.

Although the suit was filed more than 4.5-years after all professional services were completed, New York law provides that a professional malpractice cause of action asserted against an architect or engineer may be tolled under the "continuous representation" doctrine if the plaintiff shows its reliance upon "a continued course of services related to the original professional services provided." The doctrine applies when a plaintiff shows that he or she relied upon a continuous course of services related to the particular professional duty allegedly breached. The court ruled that whether the continuous representation doctrine may be applied is a question of fact, and there was evidence that the defendants continued to provide professional services up to April 2010, when the owner reached a settlement with the Attorney General's office. Given the conflicting evidence as to when the defendants provided professional services, the motion to dismiss was properly denied.

See *Regency Club at Wallkill, LLC v. Appel Design Group, P.A.,* 976 N.Y.S.2d 164 (N.Y.A.D. 2 Dept. 2013).

## . . . BUT, DECADES OLD CLAIMS ARE HELD TIME-BARRED ON AN OLD SEWER PROJECT!

A sewer system built throughout two counties in the 1970's and 1980's settled, causing damage to roadways, sidewalks, and curbs. Plaintiffs filed ten lawsuits in July 2009 alleging a single cause of action for continuing public nuisance. The trial court dismissed each suit. In New York, "[i]n cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance." This rule applies "no matter how a claim is characterized in the complaint" because "all liability" for defective construction "has its genesis in the contractual relationship of the parties" and the rule applies even if the plaintiff is not a party to the contract if the relationship between the plaintiff and the defendant is the "functional equivalent of privity." "Because [plaintiffs] waited until 2009 (16 years too late), plaintiffs' actions are plainly time-barred," the court concluded. *Town of Oyster Bay v. Lizza Industries, Inc.*, 2013 WL 6589560 (N.Y. 2013).

LEGAL BRIEFS:

**LOUISIANA:**
**Architect Can Sue Individuals Who Did Not Disclose They Worked For an LLC!**

An architect was hired to design a facility in Louisiana and was stiffed on his fees to the tune of $97,650. The architect sued the two individuals with whom he dealt, although they claimed they were acting for an LLC. The trial court found that the two men never disclosed to the architect that they were acting for a limited liability company and they were, therefore, individually liable. The two defendants appealed.

Evidence showed that the two men never disclosed to the architect that the project was owned by a corporation or limited liability company. La. Civil Code Art. 3017 states that "[a] mandatary who contracts in his own name without disclosing his status as a mandatary binds himself personally for the performance of the contract." Here, neither of the two men informed the architect they were employed by, or acting on behalf of, an LLC. The trial court's ruling was affirmed. *Allain v. Tripple B Holding, LLC*, 2013 WL 6492268 (La. App. 3 Cir. 2013).

# Economic Loss Rule of the Third Kind - *Nothing New or Alien Concepts?*

John Hawkins, Esq.
Porter Hedges, LLP
Houston, Texas

The Texas Supreme Court recently heard oral argument in a construction case from the Dallas Court of Appeals concerning the economic loss rule ("ELR") and derivative sovereign immunity. The project designer argued that the ELR precluded the contractor's recovery of damages from the designer on a negligent misrepresentation claim. The Court of Appeals rejected that defense. The project designer also raised a derivative sovereign immunity defense. See, *Martin B. Eby Const. Co. v. LAN/STV,* 350 S.W.3d 675 (Tex. App.–Dallas, 2011) (pet. granted)("*Eby* II"). The Texas Supreme Court's decision could have far-reaching implications for all construction project stakeholders in the Lone Star State. First, a bit of context.

**Background**

When the Dallas Area Rapid Transit Authority (DART) built a rail project, its contractor, Eby, claimed substantial damages from delays and disruptions caused largely by flaws in the construction documents. Eby sued DART for breach of contract and also sued LAN/STV, the design team, for negligent misrepresentation. The trial court entered judgment against the designer based upon the jury's finding of negligent misrepresentation. The Court of Appeals in *Eby* II affirmed, finding that "the economic loss rule does not bar Eby's recovery of damages on its negligent misrepresentation claim." *Id.* at 688. The Court observed that benefit-of-the-bargain damages cannot be recovered in the absence of a contract between the parties. However, the Court ruled that a contractor *can recover* against a design professional on *a negligent misrepresentation* claim for reliance damages as measured by out-of-pocket expenditures and consequential losses. *Id.* at 687.

**Negligent Misrepresentation and the ELR**

The project designer, LAN/STV, exhorted the Texas Supreme Court to hear the case because it provided an opportunity for the Court to further address the interaction of the ELR and torts left unexplored in a 2011 Texas Supreme Court case, *Sharyland Water Supply Corp. v. City of Altonl,* 354 S.W.3d 407 (Tex. 2011). LAN/STV argued that the ELR clearly bars Eby's claim for purely pecuniary loss. Under the designer's formulation of the ELR, a claim for pure pecuniary loss between parties in a contractual chain on a construction project is barred even if the claim is couched as "negligent misrepresentation." LAN/STV contended that Eby's negligent misrepresentation claim in this context would allow a circumvention of contractual relationships and should, therefore, be rejected.

Eby responded that this case is unworthy of the Supreme Court's review. Eby contended that the ruling in *Sharyland* confirms that negligent misrepresentation claims are *not* affected by the ELR. Eby asserted that the "difference in value" damages it sought for its negligent misrepresentation claim against LAN/STV are distinct from the benefit of the bargain damages it sought from DART for breach of contract.

The Supreme Court in the *Sharyland* case observed that it has only applied the ELR in pecuniary loss cases involving defective products or failure to perform a contract. 354 S.W.3d at 418. The Supreme Court observed that the intermediate Court of Appeals in *Sharyland* crafted *a second kind of ELR*. That rule held that one *can never recover* economic loss from a tort claim, a rule that the Supreme Court found overstated and oversimplified. *Id.* The Supreme Court cited several cases in which courts have allowed recovery of economic damages even absent physical injury or property damage, including for negligent misrepresentation. *Id.* The Court observed, however, that it has not addressed *a third formulation* of the ELR, whether purely economic losses may ever be recovered in negligence.

The Court could decide the case on this third kind of ELR. It is LAN/STV's position that the Court should and put a stop to what it sees as a wholly new type of claim by contractors against designers to circumvent contractual relationships. Eby says its recovery is nothing new, and in any event, amounts to negligence, not negligent misrepresentation.

**Derivative Sovereign Immunity**

LAN/STV also raised a type of derivative sovereign immunity defense in the Supreme Court, based upon TEX. TRANS. CODE ANN. § 452.056(d). That statute provides: "[An] independent contractor of [a Public Transportation] authority (*e.g.,* DART) that … performs a function of the authority … is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function [.]"

LAN/STV obtained a summary judgment that it was immune from the negligent misrepresentation claim under this statute in the first *Eby* case, which the Court of Appeals reversed. *Martin B. Eby Const. Co. v. LAN/STV,* 205 S.W.3d 16 (Tex. App.–Dallas, 2006) (pet. denied) ("*Eby* I"). LAN/STV was unable, however, to convince the Court of Appeals in *Eby II* to reverse its holding in *Eby I.* LAN/STV now argues in its Supreme Court briefing that the language in § 452.056(d) "only to the extent the authority would be liable" means the courts should focus on the type of claim brought. LAN/STV contends that if DART itself had prepared the plans, a negligent misrepresentation claim could not have been brought against DART because of sovereign immunity. Thus, since DART could not be liable for negligent misrepresentation damages, neither can LAN/STV.

Eby counters that the Court's decision in *Eby I,* which the Supreme Court declined to review after full briefing, is the law of the case and should not be reviewed. Eby goes on to defend the holding in *Eby I,* focusing on the language in § 452.056(d) "would be liable if the authority or entity itself were performing the function." Eby argues that if DART performed the function of preparing the plans it would be liable for damages under a contract claim for the flaws. Since DART would be liable for damages for performing this function, then so would LAN/STV, Eby claims.

**Conclusion**

The ELR issue has the potential for far-reaching consequences. Supreme Court affirmation of the appellate court ruling would almost certainly result in a significant increase in construction project stakeholders suing one another for purely economic loss outside of their contractual relationships.

*Editor's Note:*
*The Economic Loss Doctrine has confounded construction lawyers and courts for three decades or more, with conflicting outcomes state to state. In some, pure economic losses must follow the chain of contract, while in others there is either no bar at all, or the damages can be sought if the plaintiff merely re-couches the claim as one for negligent misrepresentation. This seems to put form over substance and create a loop-hole in the logic for companies that rely on contracts to create sole remedies for lost benefits of the bargain, when there is no personal injury or property damage involved. How do you keep up with the variety of rulings on the ELD?*
*The Seattle law firm of Skellenger Bender, P.S. published a "Bibliography of Economic Loss Doctrine Cases" in December 2013 which summarizes the law in each of the 50 states. To view this bibliography, go to www.skellengerbender.com*

## California: In-House Lawyer Who Defended Employee At Deposition May Be Liable To The Employee For Malpractice

By Keith Paul Bishop
Allen Matkins Leck Gamble Mallory & Natsis LLP
Orange County, CA
*(reprinted with permission)*

Corporations may have free speech rights (*Citizens United v. FEC*, 558 U.S. 310 (U.S. 2010)) but they can't talk. Thus, any deposition testimony must come from the mouths of people who are the agents, employees and directors of the corporation. These people usually come to the deposition with lawyers. But whom do these lawyers represent – the corporations, the deponents or both? How this question gets answered can have significant legal ramifications as illustrated by an opinion issued in November 2013 by California's Third District Court of Appeal in *Yanez v. Plummer,* Cal. App. Case No. C070726 (Nov. 5, 2013).

The *Yanez* case involved a malpractice suit in which the plaintiff sued his former employer's in-house counsel, Plummer. The employee, Yanez, had written two statements describing a workplace accident. Later, Yanez was deposed in the injured employee's lawsuit.

Before entering the deposition, Yanez expressed concern about his job security because he thought his testimony would be unfavorable to his employer. Plummer responded: "Yanez was a Union Pacific employee and Plummer was his attorney for the deposition; as long as Yanez told the truth in the deposition, Yanez's job would not be affected". Later, during the deposition Plummer highlighted an inconsistency between one of Yanez' two written statements and his testimony. After the deposition, Yanez was fired for dishonesty. He sued for wrongful termination and malpractice. The trial court granted Plummer summary judgment and Yanez appealed. The Court of Appeals reversed, noting that Mr. Yanez had presented evidence that Plummer had not informed him of possible conflicts or obtained his written consent in violation of State Bar Rules Prof. Conduct, Rule 3-310(C). According to the Court of Appeals, breach of this rule "constitutes evidence of malpractice liability and breach of fiduciary duty but does not, standing alone, prove the malpractice or the fiduciary breach." Nonetheless, court found that there was a triable issue of fact that, but for Plummer's alleged malpractice, breach of fiduciary duty, and fraud Yanez would not have been terminated. This doesn't mean that the Court of Appeals found the in-house lawyer guilty of malpractice, but it does mean that the case will have to go to trial.

www.allenmatkins.com

## ILLINOIS: CLAIMS BARRED AGAINST ARCHITECT BY STATUTE OF LIMITATIONS WHEN OLD COAL MINE COLLAPSES.

In 1998, the board of education decided to investigate sites for a new elementary school. The architect was hired, in part, to perform a "site mine investigation," including analysis of the proposed building site for suitability of construction and implications on proposed structural systems. The architect hired an engineer who produced a report in March 2000 describing the history of coal mining in that area, with a general presentation regarding subsidence and its risk of occurrence. Under the heading "Risk of Coal Mine Subsidence," the report warned "it is nearly impossible to quantify the risk involved in building on an undermined site . . . [and] there is no economically feasible corrective action that can be taken to guarantee against future subsidence."

The school district decided to construct the new school at the proposed site and entered into a standard AIA contract, which contained Art. 1.3.7.3, which provided: "Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed."

Construction of the school building was completed in the fall of 2002. In March 2009, a coal mine subsided beneath the school building, causing extensive structural damage. In August 2009, the school district sued the architect for professional negligence and breach of implied warranty and, later, for fraudulent misrepresentation.

Illinois has a 4-year statute of limitations for negligence and implied warranty, and a 5-year statute on fraudulent misrepresentation. Because more than 6 years had passed since the date of substantial completion, the architect argued that the claims were contractually barred. The trial court denied a motion to dismiss, but later granted the same arguments in a motion for summary judgment and the school district appealed. The court of appeals affirmed and the case went to the state Supreme Court. On appeal, the school district did not challenge the enforcement of the accrual provision set forth in Article 1.3.7.3 of the AIA contract to its fraudulent misrepresentation cause of action. The court made it clear that, as a result, it was, "expressing no opinion concerning the extent to which accrual provisions such as that in Article 1.3.7.3 of the Standard Agreement may or may not be enforceable with regard to fraud-based claims, as that issue is not before us." Nonetheless, the trial court ruling was upheld in favor of the architect. See *Gillespie Community School Dist. No. 7 v. Wight & Co.,* 2014 WL 271652 (Ill. 2014).

## RENEWED YOUR DUES YET?

You should have received a letter from Craig Williams, earlier this month asking you to continue to support The Thomas Jefferson Society, Inc. with payment of annual 2014 dues in the modest sum of $50.00.

Our growing organization needs your support to continue fulfilling our mission to organize and utilize the dual professional education and experience of our members to be a resource for architects, attorneys and the public on legal aspects of the practice of architecture; to promote activities and educational programs that further that purpose; to support with intellectual capital schools, universities, and similar organizations who have shared interests; and to provide a resource for architects in their professional and business development. To renew, please mail your dues $50.00 check to: Wilkes Alexander, AIA, Esq., Treasurer, c/o Fisk Fielder & Alexander, 2720 North Stemmons Freeway, 400 South Tower, Dallas, TX 75207.

## HELP US TO RECRUIT.

While we have had a remarkable response to join the TJS, we need your help. The 19 names below have been invited as qualified lawyers who also hold accredited degrees in architecture. Sometimes a "nudge" from a class-mate, colleague or friend will help. Please reach out to any names you recognize. For contact information, email Craig Williams.

Frank Crittenden, Esq.
Jones Lang LaSalle
Atlanta, GA

John M. Devaney, Esq.
Quackenbush & Assoc
Olathe, KS

Douglas DuCharme, Esq.
BLRB Architects
Portland, OR

Alan Fleishacker, Esq.
Houston, TX

Wyatt A. Hoch, Esq.
Foulston Siefkin, LLP
Wichita, KS

Gregg E. Hutt, Esq.
Trenam Kemker
Tampa, FL

Henry J. Lawrence, Jr.,Esq.
Eagle Point, OR

George Mazzarantani, Esq.
Sarasota, FL

James R. Newland, Jr.,Esq.
Seyfarth Shaw LLP
Washington, D.C.

Michael E. Peters, Esq.
M.E. Pre.Construction, LLC
Swathmore, PA

Jed Prest, Esq.
Baker Barrios Architects
Orlando, FL

William L. Rawn III, FAIA
William Rawn Associates
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Paul E. Ridley, AIA, Esq.
Ridley Law Firm, P.C.
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Gary A. Schafersman, Esq.
Schafersman Law Office
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Joseph Smith, Esq.
Pie Forensic Consultants
Golden, CO

J. Norman Stark, Esq.
Cleveland, OH

Cynthia A. Tari, Esq.
Plano, TX

Tat-yeung Shiu, Esq.
Duane Morris
Chicago, IL

Philip Teller, Esq.
New York, NY

## TJS Membership Reaches 80 Members !

We welcome the following:

**NEW MEMBERS:**

John R. Hawkins, Esq.
Porter Hedges, LLP
Houston, TX

Mark A. Ryan, AIA, Esq.
Ryan Patents
Henderson, NV

Joshua Flowers, AIA, Esq.
Hnedak Bobo Group
Memphis, TN

Joyce Raspa-Gore, AIA, Esq.
Attorney at Law
Leonia, NJ

Richard M. Shapiro, Esq.
Farella Braun + Martel, LLP
San Francisco, CA

## AIA GRANTS 2014 YOUNG ARCHITECTS AWARD TO TJS MEMBER JOSH FLOWERS !

In January 2014, the AIA honored Memphis architect/lawyer Josh Flowers, AIA, Esq. with the Young Architects Award. Josh is a leader at the national, regional, state and local levels and dedicated to promoting and advancing the next generation of the profession through knowledge sharing, advocacy, and community engagement. Josh is an active member of AIA Memphis who served as its chapter president in 2012 and founded the Emerging Professionals Leadership program connecting young architects with Institute Fellows. The Young Architects Award is given to individuals who have shown exceptional leadership and made significant contributions to the profession in an early stage of their architectural career. Josh serves as in-house legal counsel to the Memphis architectural firm of Hnedak Bobo Group, which specializes in hospitality and mixed-use projects. An invitation has been extended to Josh to join The Thomas Jefferson Society, Inc. We hope he accepts!

Joshua Flowers, AIA, Esq.
Memphis, TN
2014 AIA National Young Architect Award Winner

## WASHINGTON COURT SPLIT 5 TO 4 IN CONTROVERSY: HOTLY DIVIDED SUPREME COURT SAYS DEVELOPER CAN SUE ENGINEER IN NEGLIGENCE FOR ECONOMIC LOSS.

In this late 2013 case, plaintiffs hired an engineering firm to help develop commercial property. Before the project was completed, the developers went broke and lost the property in foreclosure. The developers then sued their engineer for over $1.5 million alleging negligence, negligent misrepresentation, breach of contract and violation of the Consumer Protection Act. The engineer moved for summary judgment on the negligence and negligent misrepresentation claims based on economic loss doctrine, which was denied by the trial court. The Court of Appeals affirmed, holding that Washington's "independent duty doctrine" did not bar a client from bringing negligence claims because "professional engineers owe duties to their client independent of any contractual relationship." *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.,* 261 P.3d 664 (Wash.App.2013).

The Washington Supreme Court narrowly affirmed that ruling in a rather hotly contested 5 to 4 decision.

The engineer's contract contained a well-drafted limitation of liability to $2,500 or the fee, whichever was greater, for "*any* injury or loss on account of *any* error, omission, or other professional negligence." The clause stated, "In the event the Client does not wish to limit our professional liability to this sum, we shall waive this limitation upon the Client's written request made at the time of the initial authorization on a given project, provided that the Client agrees to pay for this waiver an additional 5% of our total fee or $500, whichever is greater." The engineer ultimately charged about $120,000. The developer later claimed that he did not know what he was signing.

Writing for the dissent, the Chief Justice opined that the engineer should have won summary judgment on the negligence claims. "The [plaintiffs] do not assert property damage or personal injury, the kind of harm that should be remedied outside the contractual arrangement." The limitation of liability clause in the contract (limited to the $120,000 fee) should have barred the tort claims of $1.5 million, she wrote. "This liability limitation applies to *all* professional services regardless of whether they are set out in the written agreement . . . Giving effect to the parties' express contractual agreement to limit [engineer's] liability resolves the negligence and negligent misrepresentation claims."

Historically, the state of Washington has applied the economic loss rule to bar a plaintiff from recovering tort damages when the defendant's duty to the plaintiff was governed by contract and the plaintiff suffered only economic damages. However, in a 2010 case, the state's Supreme Court held that the term "economic loss rule" was a misnomer - renaming the rule the "independent duty doctrine" to more accurately describe how the court determines whether one contracting party can seek tort remedies against another party to the contract. *Eastwood v. Horse Harbor Found., Inc.*, 241 P.3d 1256 (Wash. 2010).

Under the independent duty doctrine, "an injury is remediable in tort if it traces back to the breach of a tort duty arising *independently* of the terms of the contract." To determine whether a duty arises *independently* of the contract, the court must ascertain what duties were assumed by the parties *within* the contract. In a rather sweeping statement, the court added that, "Engineers may also assume additional professional obligations by their *affirmative conduct*."

Regarding the negligent misrepresentation claim, the Supreme Court held that, "the duty to avoid misrepresentations that induce a party to enter into a contract arise *independently* of the contract.

Because [engineer's] duty to avoid negligent misrepresentation arose independently of the contract, the independent duty doctrine does not bar the [plaintiffs'] negligent misrepresentation claim."

In this case, the engineer's contract scope was vague, and there were oral promises alleged. The court noted that there was no merger or integration clause providing that the written contract supersedes any prior agreements between the parties. "Such a clause would tend to diminish the likelihood of the [plaintiffs] establishing the existence of an oral contract." In closing, the court held that, "[b]ecause we do not know the scope of [engineer's] contractual obligations, we cannot determine if any of [its] duties to the [plaintiffs] arose independently of the contract. We affirm the Court of Appeals."

The very strongly worded minority opinion concluded that, "Ultimately, this case involves a straightforward claim of breach of contract . . . The remedies for this breach are contractual . . . [t]he court can decide this case by giving effect to the professional liability limitation in the contract. Whether the claims here sound in contract or tort, they fall within this liability provision. A limitation of liability is a permissible allocation of risk of negligent acts or omissions; there is no requirement that it apply to contractually based liability alone."

In scolding the majority judges, the Chief Justice wrote: "Litigation is time consuming and costly, and this is certainly true when professional design and construction contract matters are at issue. It is not fair to extend this litigation on a basis so fraught with pitfalls when there are other grounds to resolve the propriety of the trial court's order denying summary judgment. The negligence and negligent misrepresentation claims should have been dismissed as a matter of law."

The case is *Donatelli v. D.R. Strong Consulting Engineers, Inc.,* 312 P.3d 620 (Wash. 2013).

## TJS To Provide Input on AIA Model P3 Bill.

Jefferson Society member, Yvonne Castillo, Esq., is the Director of State & Local Government Relations for the American Institute of Architects and she has solicited input from several industry organizations on the AIA's proposed model legislation entitled "Social Infrastructure Planning and Partnership Act." The Act is intended to be used for public-private partnerships (P3). The Thomas Jefferson Society has formed a subcommittee consisting of Suzanne Harness, Bill Quatman, Ashley Inabnet, Julia Donoho, Gary Cole, Mehrdad Farivar, and Donna Hunt. For a copy or more information, contact Yvonne Castillo, Esq. at: YvonneCastillo@aia.org


***Have You Seen This Car?*** If you drive in the Boston area, you might have noticed the license plate of TJS member, Donna M. Hunt, Esq., AIA, the director of risk management services for Lexington Insurance Company. Donna tells her husband: "You can't be cutting people off and driving fast in my car – they will recognize the plate!" Busted!

## TEXAS: ARCHITECT WINS DAMAGES FOR KNOCK-OFF OF ITS COPYRIGHTED DESIGNS.

In a November 2013 ruling, the U.S. Fifth Circuit Court of Appeals upheld a judgment in favor of an architectural firm for a bankrupt builder's unauthorized use of the firm's plans. The plaintiff-architect ("KFA") had registered numerous of its works with the U.S. Copyright Office. Under a written license agreement, a builder ("Hallmark") had obtained copies of KFA's copyrighted works. Thereafter, KFA alleged that Hallmark infringed on its rights by making copies and derivatives of KFA's designs, constructing buildings based on those designs, and selling structures based on KFA's designs. KFA showed the jury a side-by-side comparison of its design plans along with copies of the designs used by Hallmark. KFA asked the jury to determine whether the designs were so similar that any minor changes made by Hallmark made the new designs nothing more than derivatives. The licensing agreement made clear that Hallmark was required to pay for each use of KFA's designs. The first license was purchased at a rate of $1,000, while all subsequent licenses could be purchased at a reduced rate. The trial court ruled that, the terms of the parties' licensing agreement, as well as KFA's evidence that Hallmark was not allowed to re-use the designs without paying re-use fees, "is sufficient evidence that Plaintiff did not authorize Hallmark's re-re-use of its plans." KFA also showed evidence regarding the gross revenue earned by Hallmark from the sale of the structures at issue. This was sufficient to demonstrate Hallmark was profiting from utilizing KFA's protected designs. In a short, two-sentence ruling, the Fifth Circuit said, "We have reviewed the briefs, the applicable law, and the pertinent portions of the record and have heard the arguments of counsel. The case was well tried by the magistrate judge sitting by consent. There is no error, and the judgment is affirmed." The case is *Kipp Flores Architects, L.L.C. v, Hallmark Design Homes, L.P.*, 2013 WL 5945783 (5th Cir. 2013).

*Editor's Note: Since 1990, the U.S. Copyright Law has been expanded to protect not only copying of architectural plans and drawings, but reproducing a building from a mere drive-by, photograph or re-drawing. See the Architectural Works Copyright Protection Act, which amended the Copyright Act to specifically include "architectural works" among the list of protected works. 17 U.S.C. §§ 102 and 120.*

## NORTH CAROLINA: NO BASIS FOR INDEMNITY OR CONTRIBUTION CLAIM BY SUB AGAINST A-Es.

In a 2013 North Carolina case, a medical services company built a new laboratory which included remodeling of existing space and the existing "wet" fire sprinkler system. The water was not shut off before the work began and the new lab flooded when the pipes were cut, damaging the building and delaying the project. The fire protection subcontractor filed a third-party claim for contribution against the architect and engineer, claiming claimed that they "knew or should have known that before the pipes could be cut and moved, the water to the pipe system had to be shut off and the pipes drained, otherwise when the pipes were cut, water would flood the building and the new lab." The third-party complaint contained claims of negligence, breach of contract, indemnity, and contribution. The trial court dismissed claims against the architect for contribution and indemnity, but allowed the claim against the engineer for contribution to remain. On appeal, the Court of Appeals held that, "a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." There are four exceptions in North Carolina, none of which applied here. The court concluded that, "The foregoing allegations support the well-established rule that the law of contract, not the law of negligence, defines the obligations and remedies of the parties." Therefore, since the sub could not recover from the design professionals in tort, they could not be deemed "joint tort-feasors" and there was no contribution claim.

As to the implied indemnity claims, state law permits such an action where "a passively negligent tort-feasor has discharged an obligation for which the actively negligent tortfeasor was primarily liable." However, the two must be jointly and severally liable to the plaintiff. Again, since there is no tort where an underlying contract governs the rights and the duties between the parties, there is no "active-passive tort-feasor framework required to support an equitable right to indemnity." The dismissal was upheld. See, *Frye Regional Medical Center, Inc. v. Hostetter & Keach, Inc.,* 2013 WL 6235328 (N.C. App. 2013).

## LAWYER FALLS TO #51 ON LIST OF TOP JOBS IN AMERICA.

*What do lawyers and Dick Butkus have in common?* They are both #51, at least according to a U.S. News and World Report survey of The 100 Best Jobs. Both flexibility and upward mobility for lawyers were considered below average, according to the survey, while the job's stress level was categorized as "high." The top 5 jobs? Software developer, computer systems analyst, dentist, nurse practitioner and pharmacist. Massage therapist, maintenance and repair worker, middle and high school teacher, and manicurist all ranked as more desirable jobs than lawyer in the 2014 survey. The Bureau of Labor Statistics (BLS) projects job growth of 9.8% for the legal profession between 2012 and 2022, which is slightly lower than the average for all occupations. During that time period, an additional 74,800 lawyer jobs will be filled. Paralegals, once one of the fastest growing professions, came in at #87, with the BLS predicting a need for 46,200 more paras by 2022.

***How About Architects?*** Architects barely made the top 100 list, coming in at #92, just a few notches above "Plumber" and "Auto Mechanic." The BLS predicted a need for just 18,600 new architects in the next decade. Civil engineer and mechanical engineer came in at #18 and #19 respectively, construction manager at #37, cost estimator at #59, and taxi driver at #74, all better prospects than graduating from architectural school in the next decade. *Tell your kids!*

***Salaries by Profession.*** Lawyers earned a median salary of $113,530 in 2012, per the BLS. The best-paid attorneys earned over $188,000, while the lowest-paid made about $54,000. For architects, the median wage dipped in 2012 to $73,090. The best-paid 10% made just over $118,000, while the bottom 10% made about $44,600.

**NEW YORK: ENGINEER CAN BE SUED BY GENERAL CONTRACTOR AS THIRD-PARTY BENEFICIARY.**

A general contractor was hired to build a hotel in New York. The contractor hired a sub to design and install the fire protection system. That sub hired a sub-sub to design the system, who then hired an engineer to design the system. The third-tier engineer was licensed in New York and sealed plans by the sub-sub even though the plans did not comply with relevant codes nor the specifications. The faulty design eventually caused property damage to the hotel and the contractor sued the engineer as an "intended third-party beneficiary," and in tort for negligence. The engineer moved to dismiss both claims. The court noted that, "In general, a tort claim for negligence does not arise when the duty that a defendant owes to a plaintiff arises solely out of a contractual relationship."

In order to state a claim for negligence in a case of economic loss, the court said, "there must generally be some non-contractual duty of an engineer, contracting with a sub-contractor, to the general contractor." The court held that the engineer clearly knew that the plans he stamped would be used by the contractor. However, engineer claimed that his negligence could not have caused the plaintiff's injury "because all fire prevention plans must be submitted to the local Fire Marshal for approval under applicable building codes prior to commencement of con-struction." The court could find no precedent to show that approval by a fire marshal would absolve the engineer of negligence. Therefore, the contractor could pursue a claim for negligent misrepresentation against the engineer.

As to the third-party bene-ficiary claim, the court said that, "A professional engin-eer or architect that provides services to pro-duce construction plans is liable to the owner that undertakes such construct-ion under a third-party beneficiary theory," and that status flows down to a party in contractual privity with a contractor." See, *Granger Const.Co., Inc. v. G.C. Fire Protection Systems, Inc.,* 2014 WL 202020 (N.D.N.Y. 2014).

**BEST U.S. CITIES TO PRACTICE LAW OR ARCHITECTURE? YOU'RE IN FOR A SURPRISE.**

According to salary survey done by the Bureau of Labor Standards, the best-paid attorneys worked in the metropolitan areas of San Jose and San Francisco, California, or in Dothan, Alabama. For architects, the top wage-earners worked in Beaumont, Texas, Santa Cruz, California, and Bridgeport, Connecticut.

I know what you are thinking: *Where is "Dothan, Alabama"?* Well, it's not near anything, but sits just above the Florida pan-handle, a few miles from the border. It derives its name from a Bible verse: "Let us go to Dothan." (Gen. 37:17). It is the "Peanut Capital of the World," with a population of about 60,000. Most of its income is derived from tourists on their way to Florida, who pass through the city. Why then do the town's lawyers do so well? If you know, email the editor of *Monticello* for a prize.

The highest paid civil engineers reportedly live in Naples, Florida, Lafayette, Louisiana, and Midland, Texas. Ah, Naples!

While construction jobs generally dried up after the market crash of 2008, the BLS forecasts 1.6 million new jobs for this sector by 2022, and 79,000 new construction manager jobs specifically. The top-paying metropolitan areas for this occupation include Ocean City and Vineland, New Jersey and Philadelphia.

http://money.usnews.com/careers/best-jobs/rankings

**TJS MEMBER PROFILE: MEHRDAD FARIVAR, FAIA, Esq. Los Angeles, CA**

Asked why he became an architect, Mehrdad replied, "Becoming an architect seemed the right choice to me, as I was very passion-ate about painting and visual arts and wanted to integrate art and aesthetics with a professional/ business career." Mehrdad studied architecture at the Milan Polytechnic, School of Architecture in Milan, Italy and obtained his B.Arch. from University of Manchester, School of Architecture in Manchester, England. He obtained his law degree from South-western University School of Law. Mehrdad started his design career with an internship in Perugia, Italy before beginning his architecture studies at the Milan Polytechnic.

"Because of strikes and political unrest in Italy, I went to England and after finishing architecture school at Manchester University, I worked in Manchester, Boston, London, Tehran and Los Angeles." He became licensed in the UK and joined the RIBA, later becoming licensed in California and joining the AIA. He practiced for about 16 years in both large and small firms, but for the final ten years Mehrdad had his own private practice in Santa Monica, California.

Why become a lawyer? "Parallel with my interest in art and architecture," he said, "I was also interested in politics, research and writing. While working as a young architect in London I got the opportunity to be involved in negotiating a major contract with the mayor of Tehran on a massive urban design project, on which I worked closely with a British lawyer who represented my firm. That experience sparked an interest in pursuing law as a second career." After moving to California, he decided to attend law school at night while working during the day as an architect. After passing the bar exam, he practiced both professions for about a year.

Today, Mehrdad's law practice is focused on design and construction, divided almost evenly between transactional matters and litigation. He won at trial and upheld on appeal on a design lien claim on behalf of an architect client against a major real estate syndicator. "Against all odds, we foreclosed on the property. My client became the owner!" In another matter, Mehrdad was substituted in for another lawyer in a case where an injunction had already been issued against his client, stopping construction of his house because of a dispute with a neighbor over ocean views. "I was able to convince the judge who had issued the injunction to reverse himself and assess damages in favor of my client and against the neighbor. Later, just to be good neighbors, we redesigned the house at the neighbor's expense to maximize his ocean view without compromising what my client wanted."

When not practicing law, Mehrdad still enjoys sketching and watercolor,

**Mehrdad Farivar, Esq., FAIA** is a partner in the Los Angeles law firm of Morris Polich & Purdy, LLP. He is licensed as an architect in California and the UK, a fellow of the American Institute of Architects and a former member of the Royal Institute of British Architects (RIBA). He is also on the TJS Board.

as well as classical music - particularly opera. "I love to travel and explore cities with a rich architectural heritage - on foot. I also like running, hiking and horseback riding and good food and wine." He is the father of two grown sons and the grand-father of a 2-month old baby girl.

Some words to live by? "I heard a quote recently that has resonated with me," he said. ***"There are three things you cannot hide - the sun, the moon and the truth."*** Well said, Mehrdad.