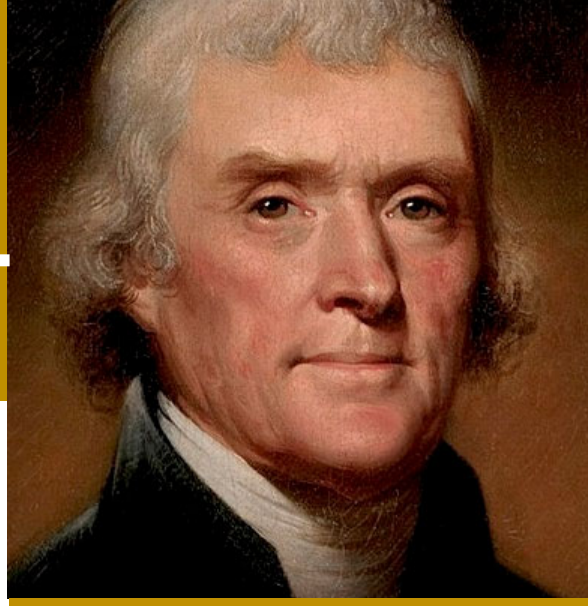
Monticello

THE QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

A Non-Profit Organization for Architect-Lawyers

Issue No. 44 Summer Issue - July 2023



PRESIDENTS' MESSAGE

Laura Jo Lieffers, Assoc. AIA, Esq., B.C.S.
President

We are in the throes of the dog days of summer here in sunny Saint Petersburg and it is very hot. I hope you are each staying cool and enjoying some sweet summertime in your various locations throughout our great country. Summer is a busy time for many of us, as well as a time of transition. Personally, our kindergartener is over halfway through her summer break, so we are updating our school uniforms and supplies to get ready to start 1st grade, while still juggling summer camps, activities and travel. My family is working toward a week off of work at the end of July for a family vacation before the beginning of a new school year.

It is also a time of transition here at The Jefferson Society as we kick off our new year. I want to extend my heartfelt gratitude to our Immediate Past President, Josh Flowers, FAIA, Esq. for his service to this organization. It was Josh who personally called me several years ago and invited me to become a Board member. That made it that much more special when he passed the gavel to me at our Annual Meeting in San Francisco last month. All in attendance at the meeting applauded his leadership and commitment to our group. He still has one year left in his Board term, as Past-President, so don't worry – he is not going anywhere yet! As I begin my two-year journey as President, I cannot help but to look back over the last decade at the legacy of great presidents and Board members who came before me and how each one moved the organization forward in various ways. I have big shoes to fill. During my presidency, I hope to further the mission of our organization, "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 other organizations, schools, universities, and similar organizations who have shared interests; and to provide a resource for architects in their professional and business development."

Looking ahead, I am also cognizant of the importance of a healthy succession plan. We have been lucky to have many passionate past and current Board members. As we plan for the future of our organization, it is never too early (or late) to become involved!

(continued 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 Laura Jo Lieffers, Esq. at: Laura.Lieffers@perkinswill.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

Inside This Issue:

Check us out on Facebook and Linkedin

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

Do you have special interests or talents you would be willing to share with our group? This is a rhetorical question, as I know you do! A brief read of our Members "In The News" section of the past *Monticello* issues confirms this. Please reach out to me and let's discuss how you can make an impact on our great organization.

We are busy planning our upcoming 2023-2024 TJS year. If you have any ideas for networking events or continuing education, do not hesitate to reach out. Please save the date for the following in-person networking opportunities: April (TBD) 2024 in New Orleans in conjunction with the ABA Forum on Construction Law; and June 5, 2024, for the TJS Annual Meeting in Washington, D.C.

A friendly reminder, if you have not yet paid your dues for this year (or any past dues), please do so online through our website. If you are interested in getting more involved with TJS and helping in a committee, please contact us. The time involved is nominal and you surely will make priceless new friends and business connections through your involvement.

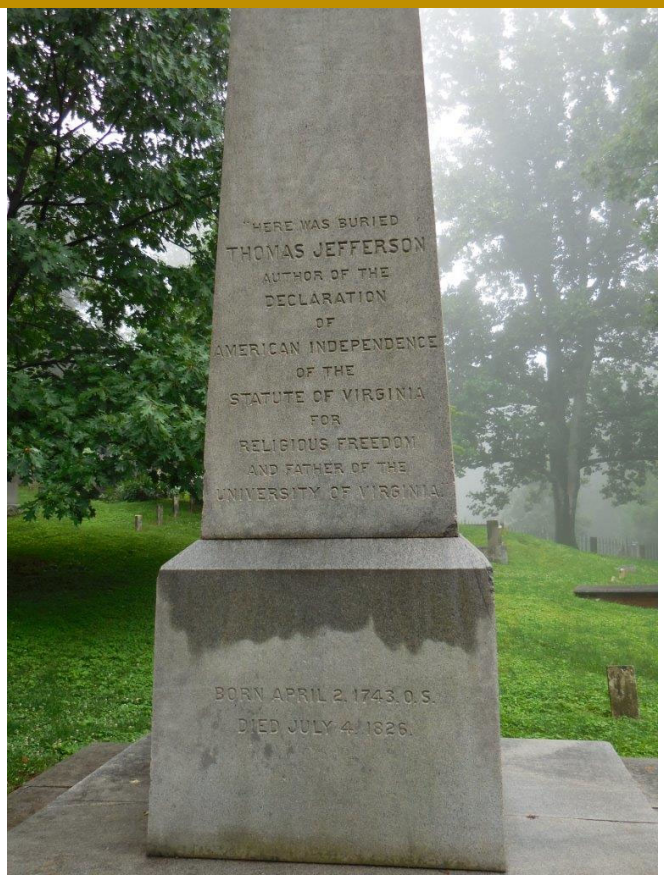
Sincerely,

Laura Jo Lieffers

President

AIA SUPPORTS ADOPTION OF NEW ZERO BUILING ENERGY CODE.

On April 20, 2023, the AIA wrote a letter to the U.S. Department of Energy ("DOE") supporting its proposed "Zero Building Energy Code." The AIA's letter said, in part, that central to AIA's mission is its "commitment to advancing climate action and equity in the built environment." The Institute said that "buildings currently account for roughly 39 percent of carbon emissions. *** Building codes and standards are foundational to the practice of architecture, setting minimum prerequisites for our industry and sending clear signals to clients about what they should come to expect from their buildings. The adoption and enforcement of the latest building energy codes (ideally, zero building energy codes) will improve building performance in communities across the country while simultaneously hastening market trends toward building decarbonization."



(Above) Thomas Jefferson's Gravesite, Monticello, Virginia. He died on July 4, 1826 – 50 Years to the day of our independence, July 4, 1776!

As for "metrics for emissions reductions," the AIA said that: "DOE guidance should also encourage metrics for broader decarbonization efforts. Energy efficiency and energy sourcing are not replacements for one another." AIA urged promoting lower-carbon in all buildings by 2040 to limit global warming to below 1.5 degrees C." For the full letter, see this link.

Did you know?

That three U.S. presidents died on July 4? It's true!

- Thomas Jefferson died on July 4, 1826.
- John Adams also died on July 4, 1826.
- James Monroe died on July 4, 1831.

MINUTES OF THE MAY 2, 2023 MEETING OF THE JEFFERSON SOCIETY BOARD OF DIRECTORS

Attending the meeting were directors, Josh Flowers, Mark Ryan, Michael Bell, Laura Jo Lieffers, Alex van Gaalen, Donna Hunt, Joyce Raspa, Jessyca Henderson, and Craig Williams (founder). Absent was director Peggy Landry.

The Spring Board Meeting of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held via electronic meeting, beginning at 1:00 p.m. Eastern Daylight Time on May 2, 2023. President Josh Flowers opened the meeting, determined that a quorum of the Board of Directors was present, and called the meeting to order. Michael Bell served as Secretary of the meeting.

Continuing Business:

Treasurer's Report:

Mr. Ryan reported that we have a balance of over $19,000 in our bank account.

We have received 12 reservations for the Annual Dinner to be held June 7 in San Francisco.

Only 25 members have paid dues for the calendar year 2023. By this time last year 44 members had paid their 2022 dues. Mr. Ryan raised the issue of dues forgiveness. Extensive discussion ensued, including as to the impact of COVID on our members' engagement with our organization. It was agreed that we will waive any outstanding dues from 2020 and prior years, and that we will request that members pay dues for 2021, 2022, and 2023. We will have the option to waive dues for 2021 and 2022 for members who request this. Ms. Lieffers consulted the Bylaws and determined that the Board has the authority to take this action. It was agreed that we should personalize our communications to those in arrears. Ms. Hunt offered to develop three template emails for those owing one, two or all three years.

Mr. Ryan noted that our online Member Directory includes payment information for each member and for each year, and should be consulted to determine which email should be sent. Ms. Hunt said that she will send out these emails. Ms. Lieffers offered to help.

Nominating Committee Report:

Current members of the Nominating Committee are President Flowers, Ms. Lieffers and Ms. Raspa.

President Flowers announced the proposed slate of Officers and Directors of the Board for the 2023-2024 Year as follows: Executive Committee and Directors for 2023-24. President: Laura Jo Lieffers (3-year term completed – 3-year extension. She will serve as president 2023-2025, and Vice President/Past President 2025-2026); Treasurer: Mark Ryan (3-year term completed – in 2020, his term was extended to end in 2022 with intended extension to serve as Treasurer through 2024); Vice President/ Past President: Josh Flowers (3-year term completed – in 2021, his term was extended to end in 2024); Secretary: Michael Bell (3-year term, second year); Treasurer-Elect: Alexander van Gaalen (3-year term, first year); Directors: 1 open position (3-year term, first year), Donna Hunt (3-year term, second year), Jessyca Henderson (3-year term, third year), Peggy Landry (3-year term, third year).

President Flowers called for a Motion to approve the proposed slate for 2023-2024 and to recommend the slate to the Membership. A Motion was made by Mr. Ryan and seconded by Ms. Raspa. President Flowers called for a voice vote. The slate was unanimously approved and will be presented at the May 23 annual business meeting for approval by the membership.

The Monticello:

President Flowers noted that Bill Quatman has written and created the Monticello for its entire history, and that it was decided at the last Board meeting that it would be better to spread the work between at least two members. The transition is slated to take place in the second half of 2023, with the goal of having Mr. Quatman completely retired by the beginning of 2024. Mr. Bell will take on part of this role. We still need one or more of our practicing attorneys to handle the legal updates and case law briefs. It was noted that Mr. Quatman has said that when he asks attorneys for permission to re-publish an article they wrote, they are usually eager to say yes. Ms. Henderson offered to help with the legal side of the Monticello although she prefers to not take the lead on this. We need someone to coordinate the legal side of the Monticello. Ken Collins' Construction Risk website and Donovan Hatem LLP were cited as sources for legal material.

Web Site and Other Technology:

Mr. van Gaalen had no report.

(continued on p. 4)

Membership Committee:

President Flowers reminded us of Mr. Quatman's speculation last year that our pool of possible new members is tapped out. Ms. Lieffers reported that she, Ms. Henderson, and Ms. Hunt make up the membership committee. Mr. Quatman has officially stepped down from his former role as chair. Ms. Lieffers asked that others email her with names of possible new members, and with any suggestions as to ways we may improve member retention. It was suggested that we need to bring value to members. One idea is to qualify the Annual Business Meeting as continuing education. Laura Jo volunteered to apply for AIA CEU credit.

TJS as AIA Continuing Education Provider:

Ms. Lieffers will make our role as an AIA Continuing Education Service (CES) a topic at the Annual Business Meeting.

2023 Annual Business Meeting:

President Flowers reported that the meeting will be virtual and at 1:00 p.m. EDT on Tuesday, May 23, 2023. Board members are asked to be prepared to present to the membership relative to their responsibilities, and to call for volunteers for committees as necessary.

2023 Annual Dinner:

President Flowers reported that the dinner will be held in San Francisco on Wednesday, June 7, 2023, in connection with the AIA Annual Conference. President Flowers thanked Ms. Raspa for her work on the arrangements and sponsorship. Jackie Pons' firm in the Los Angeles area will be asked to sponsor the dinner. The ask will be $2,000, and they will be invited to include two participants to the dinner.

Minutes:

The minutes of the May 17, 2022 meeting of the Board of Directors were approved as circulated with one correction: The payment for the Annual Dinner was in the amount of $1,250.00. The minutes of the January 19, 2023 meeting of the Board of Directors were approved as circulated.

New Business: none.

Motion to Adjourn:

Motion was made and seconded to adjourn. The meeting was adjourned at 2:02 p.m. EDT.

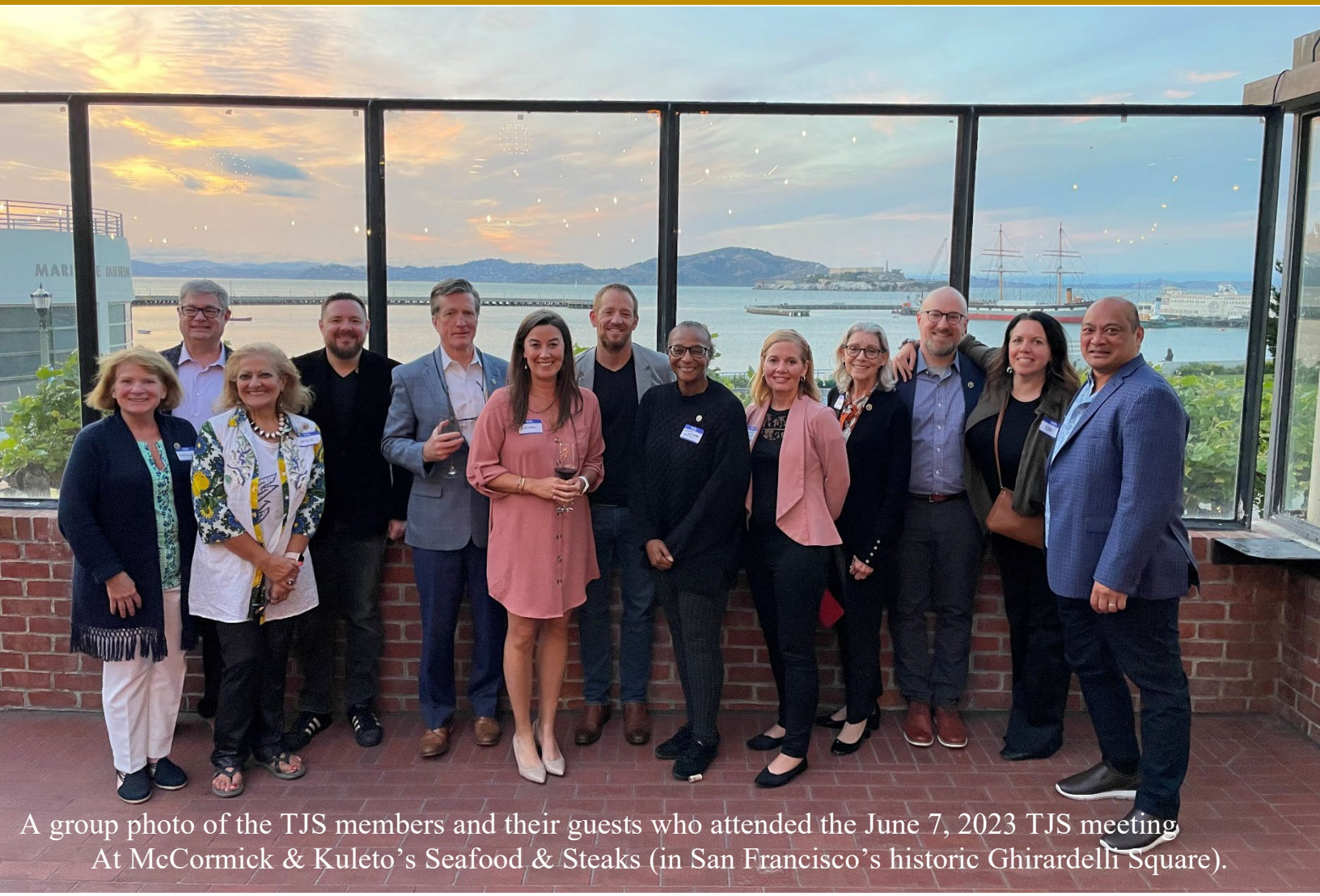
Next Board Meeting: Fall 2023, date to be determined.

Respectfully submitted,
Michael J. Bell, Secretary

NEW YORK. CONTRACTOR CAN SEEK CONTRIBUTION (NOT INDEMNITY) FROM A/E FIRM.

A building Owner sued a Design-Build Contractor hired by a Tenant and its design subconsultant (an A/E firm) for damages arising from gas leak that occurred during renovation by the Tenant of an apartment. According to an earlier ruling, during renovation of that apartment, a Sub-contractor removed a gas line and gas meter from the kitchen area which was converted into a bathroom. This led to a gas leak. *See, 176 West 87th Street Owners Corp. v. Guerico*, 2022 WL 2316705 (N.Y. Sup. Ct. June 28, 2022). The property Owner alleged that removal of the gas line and meter in the apartment was done at the direction of the Contractor, but with the "construction oversight" of the A/E firm. Due to the gas leak, the Owner claimed that it had to replace the entire gas delivery system for the apartment building. The Owner sued the Tenant as well as the Contractor and the A/E firm. The Design-Build Contractor sought leave to amend its Answer and assert a cross-claim against the A/E firm for common law indemnification and contribution. The A/E firm moved for summary judgment on the Owner's lawsuit and objected to the Contractor's request for leave to assert cross-claims.

As to the Owner's claims of negligence and negligent super-vision claims, the A/E firm argued that it was entitled to summary judgment because there was no dispute of material facts that the A/E firm did not owe a duty to the Owner. Under New York law (and generally in all other U.S. states), *"In the absence of a duty, as a matter of law, there can be no liability"* in negligence. The A/E firm maintained that it was retained only to prepare structural details for a staircase, perform project and special inspections of the staircase, and to provide permitting assistance with respect to structural filings, but that it did not perform any work related to the gas or plumbing systems. The trial court found, however, that there were material issues of fact with respect to the A/E firm's role in overseeing the work on the gas system. The A/E firm submitted an affidavit from its structural engineer that it did not participate in work on the apartments' gas system. But the Owner produced invoices from the A/E firm that mention-ed "Special inspection and construction oversight (Not part of original scope -- requested by Client)" performed by the firm.



A group photo of the TJS members and their guests who attended the June 7, 2023 TJS meeting At McCormick & Kuleto's Seafood & Steaks (in San Francisco's historic Ghirardelli Square).

While these invoices did not specify the scope of the firm's additional inspection and oversight work, the Owner also claimed that the A/E firm's agreement with the Contractor "included matters related to work on the apartments' gas system." The Owner stated that the demolition plan provided by the A/E firm included the area in which the gas meter and piping was removed, which caused the gas leak. The trial court said that, "Read together, these documents show the existence of questions of material fact relating to the scope of [the A/E firm's] construction oversight and whether its demolition plan address-ed work on the gas system." The trial court, therefore, denied the A/E firm's motion for summary judgment.

As to the Contractor, the trial court denied its motion to assert crossclaims for "common law indemnification" against the A/E firm. But the court allowed the Contractor to seek contribution from the A/E firm, saying: "A defendant found jointly liable for an injury may seek contribution against other parties that contributed to or augmented the injury." The design firm appealed and the Appellate Court affirmed both rulings.

As to the Owner's lawsuit, the Court said there were "triable issues of fact" as to whether the A/E firm assumed a duty to perform work related to the demolition of the kitchen, from where the gas pipe was removed, and whether the A/E firm was, in fact, involved in such work or the supervision thereof.

As to the Contractor's crossclaim, the Court said that the common law indemnity part should have been dismissed as the Contractor was not being held "vicariously liable." (citing to a 2011 New York case that: *"a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part."* The Court affirmed granting the Contractor leave to assert a crossclaim for "contribution" against the A/E firm. *176 W. 87th St. Owners Corp. v. Guercio*, 216 A.D.3d 401, 189 N.Y.S.3d 84 (2023).

(Above) The June 7, 2023 TJS Dinner Meeting was held at McCormick & Kuleto's Seafood & Steaks (in San Francisco's historic Ghirardelli Square). Here, outgoing President Josh Flowers passes his gavel to incoming President Laura Jo Lieffers.

ILLINOIS. CHICAGO CUBS BASEBALL CLUB WINS LAWSUIT OVER ALLEGED DISCRIMINATION AT WRIGLEY FIELD.

This lawsuit dealt with alleged ADA violations during renovation of historic Wrigley Field in Chicago, a ballpark that opened in 1914. It is the second oldest ballpark in the major leagues and the grandstand represents the last surviving design of Zachary Taylor Davis, who the Court called "one of the nation's best-known ballpark architects in the early 20th century." Wrigley Field is designated as both a Chicago Landmark and a National Historic Landmark. This lawsuit stems from a renovation project (the "Renovation Project") commenced following the 2014 baseball season. A disabled long-time fan (with muscular dystrophy) who attended games in his motorized wheelchair sued the Cubs for discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. The plaintiff claimed that the Cubs discriminated against him by failing to have the minimum number of accessible seats at Wrigley Field and by failing to horizontally disperse accessible seating around the stadium.

In December 2017, as the multi-phase Renovation Project was in progress, Plaintiff filed his lawsuit because, after the Renovation Project, the accessible seating area behind home plate no longer existed as it once did. Also, he claimed that the Budweiser Patio seating area has been sold exclusively to groups since at least 2012, meaning an individual patron (regardless of their need for accessible or standard seating) can no longer buy an individual ticket there.

In a 5-day bench trial fact witnesses for both sides and one expert witness (for the Cubs) testified. The trial judge also conducted a site visit of the stadium during trial to view the accessible seating locations and the views therefrom. The trial judge found that, "the site visit impressed upon the Court the variety of locations and views on offer for patrons who require accessible seating, as well as that 'friendly confines' feeling that is unique to Wrigley Field." In ruling in favor of the team, the Court held that Wrigley Field had 39,510 total seats, including 225 designated as accessible. There was no

dispute that the 2010 ADA Standards require a minimum of 209 accessible seats. Therefore, the Court found that the Cubs exceeded the minimum by 16 seats. The Court also found that accessible seating at Wrigley Field provided a variety of perspectives of the field, including from the left, center, and right field bleachers, as well as from behind home and on the first and third-base sides of the grandstand. The Court also found that the seats complied with the ADA. In sum, the Court concluded that the plaintiff failed to prove each element of his ADA case by a preponderance of the evidence. Therefore, the Court entered judgment for the baseball team.

Felimon-Cerda v. Chicago Cubs Baseball Club, LLC, 2023 WL 4105740 (N.D. Ill. June 21, 2023).

TEXAS. AFTER ENDURING THREE LAWSUITS, AN ARCHITECT WINS ON A STATUTE OF LIMITATIONS DEFENSE.

This case involved three lawsuits and multiple appeals to the Court of Appeals and to the Texas Supreme Court over a span of 13 years, none of which ever got to the merits of the plaintiff's claims. This began in June 2010, when an Owner filed its **first lawsuit** against its Architect for breach of contract and negligence over allegedly defective design of a commercial property. But the Owner failed to include a Certificate of Merit as required by Texas statutes and the Architect moved to dismiss that initial lawsuit. In response to the Architect's motion to dismiss, the Owner merely dismissed ("nonsuited its claims") that suit and refiled a **second lawsuit** in November 2010, but this time with a Certificate of Merit. The Architect again moved to dismiss, this time challenging the sufficiency of the certificate. The trial court denied that motion to dismiss, but the Architect appealed.

In 2015, the Texas Court of Appeals reversed, finding that the Certificate of Merit was deficient as to the breach of contract claim, but complied with respect to the negligence claim. In 2017, the Texas Supreme Court reversed, finding that the Certificate of Merit also failed to satisfy the statute's requirements as to Owner's negligence claim. *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 500 S.W.3d 431, 438 (Tex. App. — Corpus Christi – Edinburg 2015), *rev'd on other grounds*, 513 S.W.3d 487 (Tex. 2017). The case was remanded to the trial court solely to determine whether the statutorily mandated dismissal should be with or without prejudice. Undeterred, while on remand, and before the trial court dismissed the second suit "without prejudice," the Owner filed a **third lawsuit** in May 2018, with the same material allegations, but with yet a revised Certificate of Merit. The Owner also alleged that any applicable statutes of limitations for its claims were "equitably tolled" during the pendency of its second suit and the subsequent appeals.

The Architect filed a motion for summary judgment of the third lawsuit based – this time - on the relevant statutes of limitations, claiming that the accrual date was June 7, 2010 (the date of the first lawsuit) and that both the 2-year (negligence) and 4-year (contract) limitations periods had expired by May 24, 2018, when the Owner filed its third suit (almost eight years later). The Owner replied that its third suit was timely filed because it had maintained an active lawsuit ever since filing the first suit in 2010 and, therefore, the "equitable tolling doctrine" served to toll the limitations period during the pendency of the second suit. The trial court agreed with the Architect and granted summary judgment. But the Owner was not done yet – and appealed again. The Court of Appeals reversed in 2021, finding that the statutes of limitations had not expired because the lawsuit was

(Below) 2017-19 TJS president Suzanne Harness, AIA, Esq. (of Harness Project Solutions LLC) and her husband, Ray Kogan (also an architect), chat before the dinner.

"equitably tolled." (627 S.W.3d 494). The Architect appealed that ruling to the Texas Supreme Court. The key question this time around for the state supreme court was whether the relevant limitations periods had expired while the second suit was on appeal, barring the plaintiff from refiling the third lawsuit with a new Certificate of Merit.

In ruling for the Architect, the Texas Supreme Court held that the facts giving rise to the claims asserted in plaintiff's 2018 lawsuit were the same as those about which the Owner complained when it sued in 2010. Therefore, unless equitably tolled, the Architect would win. The Court held that under Texas law, equitable tolling is invoked "sparingly," and has a limited scope under a 5-factor test. Finding that the Owner did not qualify under any of the equitable-tolling principles cited by the Court of Appeals, the trial court had correctly granted the Architect summary judgment based on the two applicable statutes of limitations. Therefore, the Court of Appeals was reversed, and the Supreme Court reinstated the trial court's summary judgment. *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 2023 WL 4035916 (Tex. June 16, 2023).

NEW YORK. ARCHITECT FACES CLAIMS THAT DESIGNS FAILED TO COMPLY WITH STATE AND FEDERAL HOUSING LAWS.

In March 2022, a group of so-called "Fair Housing Organizations" sued various property owners, managers and contractors alleging violations of accessibility standards in federal and state fair housing laws. Those plaintiffs alleged that several housing complexes did not comply with mandated accessibility requirements. In August 2022, the original defendants settled those claims and agreed to: 1) undertake a number of "alterations to improve accessibility for the exterior of the Properties" (with an estimated value of at least $3 million); 2) provide an "Individual Unit Modification Fund" to be used for individual unit modifications requested by residents or potential residents on account of disability; and, 3) make a settlement payment to the Fair Housing Groups in the amount of $750,000.

The settlement agreement expressly excluded any claims against the project architect, who was not a party to the agreement. The property owners then sued the architectural firm and its principal owner in March 2020 alleging claims for breach of contract, professional malpractice, contribution, violation of the federal Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § 3601, et seq.; as well as violations of New York, Ohio, Indiana and Kentucky discrimination and housing laws. The defendant Architect filed a motion to dismiss the lawsuit based on several theories. The federal trial court granted the Architect's motion to dismiss on only one claim, but largely denied the motion.

After suit was filed, in August 2022, the original plaintiffs in the first suit granted an assignment to the defendant property owners of their claims against the architects "for design and construction-related violations of the FHA" relating to the identified properties. In February 2023, the federal trial judge then granted plaintiffs leave to file an amended complaint to sue on the assigned claims. The amended complaint alleged that the plaintiffs entered into various written contracts with the Architect to "perform certain design services" relating to housing complexes as set forth in each contract. These contracts were "in the form of AIA Document B102-2007 (Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services) and AIA B201-2007 (Standard Form of Architect's Services)." The Architect move to dismiss the amended complaint, arguing that: 1) all of the claims were preempted by the FHA, 2) plaintiffs lack standing to assert the assigned claims; and, 3) alternatively, that certain of plaintiffs' breach of contract and professional negligence claims were time-barred.

As to federal preemption of the various state claims, the trial court held that "The Supremacy Clause of the United States Constitution provides that federal law shall be the supreme Law of the Land." In a lengthy analysis, the federal court concluded that the state claims for contribution were not barred by preemption under the FHA. The court also ruled that the claims for breach of contract were "sufficiently distinct from an indemnification claim for FHA violations" as to not be preempted, but that the claim for professional malpractice was akin to an indemnification claim for FHA violations and, therefore, preempted. Accordingly, the court granted the Architect's motion to dismiss only the professional malpractice claim.

As to the assigned claims, the court said that the parties did not adequately address whether the fact that the FHA claims were purportedly assigned to entities *who themselves* may be liable under the fair housing laws for the same alleged violations and who settled those claims alters the assignability analysis.

Therefore, the court denied the motion to dismiss as to the assigned claims.

As to the issue of standing, the Architect argued that the plaintiffs themselves had "not suffered a concrete and particularized injury from the alleged fair housing violations." However, the Architect failed to address why, assuming the claims at issue were validly assigned, plaintiffs lacked standing to assert the assigned claims based on the *Assignors'* injuries. Therefore, the court denied the motion to dismiss the assigned claims for lack of standing.

Finally, as to whether claims for breach of contract and professional malpractice were time-barred, the court declined to look at various documents relating to the relevant projects (including contracts, closeout letters, certificates of occupancy, certificates of substantial completion, and final invoices) for the reason that a motion to dismiss under Rule 12(b)(6) is limited to consideration "of the complaint itself" (as contrasted with a motion for summary judgment). The parties agreed that New York law governed the breach of contract and professional malpractice claims, and the plaintiffs did not contest that those claims are subject to a 3-year statute of limitations.

Citing to state cases, the federal court noted that under New York law, a cause of action against a design professional, regardless "whether the claim is based upon breach of contract or malpractice," is subject to a 3-year statute of limitations period - but such claims accrue upon the termination of the professional relationship. Since the complaint did not allege the dates on which the parties' professional relationship ended under each contract, the court declined to rule – but left the door open to the Architect "raising the defense at a later time" through a motion for summary judgment when the facts were better established. In short, the Architect's motion to dismiss was granted only on as to one count of professional malpractice. The other claims were allowed to survive. The case is *Clover Communities Beavercreek, LLC v. Mussachio Architects P.C.*, 2023 WL 3864965 (N.D.N.Y. June 7, 2023).

LOUISIANA. OWNER CANNOT COMPEL MEDIATION UNDER AIA CONTRACT WHICH IT DID NOT SIGN!

This case arises out of a contract executed on June 29, 2022, between plaintiff, a contractor, and defendant, the property owner for a project located in Metairie, Louisiana for a cost of about $1.5 million. The contract at issue was a standard form AIA contract, which the contractor sent to the owner, but the owner never signed and returned. (In a July 11, 2022 email, with the subject line "AIA Document A101," from the contractor

(Below) A few members and guests at the 2023 Annual Dinner Meeting. From left to right, Shelli and Mark Ryan, Nolanda Hatcher, Donna Hunt, Alex van Gaalen, and Laura Jo Lieffers.

to the president and CEO of the defendant, the contractor said: "Please review and if all is in order have signed and returned and we will execute a copy once completed.") The contractor sued for breach of contract, asking for $623,474.71 owed, plus attorney's fees and costs. The owner responded with its own counterclaims for breach of contract and negligence, as well as a motion to compel mediation and stay the lawsuit based upon the AIA's mediation clause.

The court noted that, "A court may grant a motion to compel mediation or arbitration when the parties have previously entered into an arbitration or mediation agreement." The issue here, of course, was that the owner never signed the AIA contract which stated that the method of dispute resolution shall be mediation. The contract also incorporated by reference the AIA General Conditions A201 (2017 edition). Article 15, § 15.3.1 of A201-2017 stated that "Claims, disputes, or other matters in controversy arising out of or related to the Contract, ... shall be subject to mediation as a condition precedent to binding dispute resolution." The contractor argued that no agreement to mediate existed because the owner never signed the AIA Agreement.

Citing to state case law, the federal court held that in Louisiana, "it is well-settled jurisprudence that a binding contract does not exist until the written agreement is confected and signed by the parties." Also, under Louisiana's Civil Code Article 1947: "When, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form." Article 1936 of the Civil Code adds that: "A medium or a manner of acceptance is reasonable if it is the one used in making the offer or one customary in similar transactions at the time and place the offer is received, unless circumstances known to the offeree indicate otherwise." However, Louisiana case law holds that, "There is no evidence that it is customary in the construction industry for a contract worth more than [$1,500,000] to be accepted by commencement of performance rather than execution of a written agreement." But, the federal judge noted that, "while ordinarily an act under private signature must be signed by the parties, ... a jurisprudential exception to this statutory requirement exists when only one party has signed an agreement and the non-signing party has availed himself of the agreement or taken actions evidencing his acceptance thereof." The court found that the defendant-owner failed to carry its burden of proving that, prior to its motion to compel mediation, it agreed to be bound by the terms of the AIA Agreement. The court also noted that the defendant-owner indicated a further lack of agreement to be bound by the AIA Agreement's terms by failing to follow the AIA Agreement's requirement that all claims be referred to an Initial Decision Maker ("IDM") (the project architect) as a condition precedent to mediation. AIA Document A201, Par 15.2.1. Therefore, the court ruled denied the motion to compel. *Highland Com. Constr., Inc. v. Educ. Mgmt., Inc.*, 2023 WL 3601568 (E.D. La. May 23, 2023).

(Below) TJS Member Michael Bell and his wife, Aimée, pose with TJS Member Mike Koger at the 2023 Annual Dinner Meeting. Behind them are a few tall ships in the harbor.

MONTANA. OWNER COULD NOT HOLD BACK MOST COMMUNICATIONS WITH ITS ARCHITECT FROM DISCOVERY AS "PRIVILEGED" OR "WORK PRODUCT."

While this case involved a dispute over design and construction of a residence, the novel issue was whether there was an "agency relationship" between a project owner (the plaintiff) and its architect, sufficient to suppress the architect's communications with the owner's attorney. The defendant served the plaintiff with a set of discovery requests that included requests for all communications between the owner and his architect. The owner objected to the discovery requests and withheld cer-

tain communications with the architect on the basis that they were protected by the attorney-client privileged and/or work-product doctrine because the architect "was at all times acting as his agent" in relation to the investigation, design, and eventual construction of a residential home. The court conducted an in-camera review of the documents that were noted in the attorney's privilege log and ordered briefs to be filed on the issue of agency.

Under Montana law, "An agent is one who represents another, called the principal, in dealings with third persons."

The owner stated that he entrusted the architect to act on his behalf in furtherance of these efforts, including by establishing dealings with engineers, and others. Also, when it became apparent that the owner needed legal advice regarding the property, the architect "was instrumental in helping him find an attorney." The defendant did not dispute that the architect was the owner's agent "for the purpose of assisting with the investigation, design, and eventual construction of a residence." But the defendant argued that the architect was identified a fact witness from the outset of this litigation and, therefore, is subject to discovery.

The court noted that the attorney-client privilege generally "extends only to communications between an attorney and a client," but there are certain exceptions "which permit communications involving third parties to receive the same protection" (including "communications with third parties 'acting as agent' of the client.") However, as the party asserting the attorney-client privilege, the owner had to show that: 1) the communications involving the architect were made for the purpose of obtaining legal advice from the owner's counsel; and, 2) the architect's involvement "was nearly indispensable or served some specialized purpose in facilitating the attorney-client communications."

But even assuming the withheld communications were made for the purpose of obtaining legal advice, the court found that the owner had not demonstrated that the architect's presence "was reasonably necessary for effective consultation between [the owner] and his attorney." Having conducted an in-camera review, the court found that the owner had not met his burden of demonstrating that most of these communications identified in the Privilege Log were protected by the attorney-client privilege. Further, most of the architect's communications were not protected as "work product" because those communications were not made "because of litigation, which means they were not made in anticipation of litigation or trial and therefore do not qualify for work product protection." Only a few select Architect communications were deemed to be protected as work product. *Mark R. Kiesel Living Tr. v. Hyde*, 2023 WL 3480142 (D. Mont. May 16, 2023).

TJS Members Joyce Raspa and Jessica Hardy enjoy a dessert with guest Steven Raspa after the Annual TJS Dinner at McCormick & Kuleto's Seafood & Steaks in San Francisco.

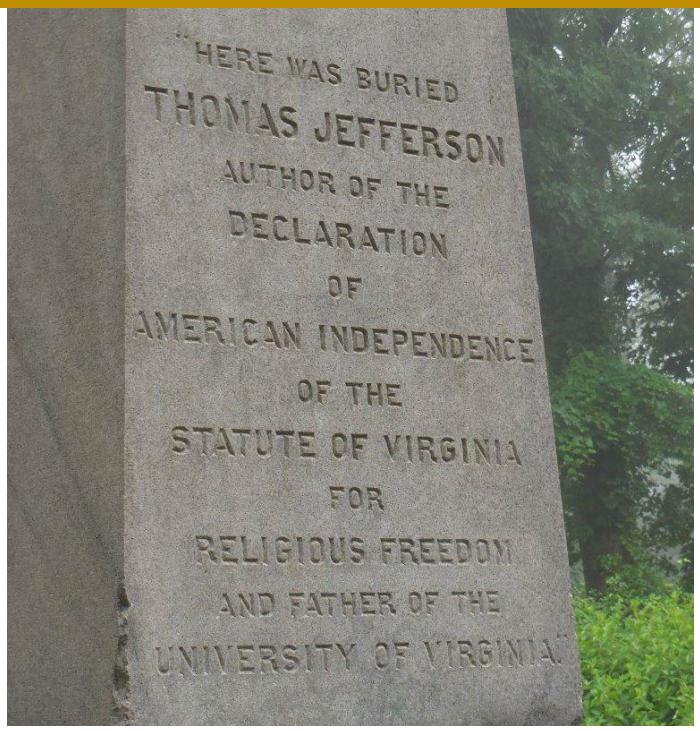
CALIFORNIA. EMPLOYER FIRM MAY BE HELD VICARIOUSLY LIABLE FOR ARCHITECT-EMPLOYEES MISREPRESENTATIONS TO CLIENT.

In October 2019, a homeowner hired architect Jennifer Tulley as an architect to remodel a home. At the time, Ms. Tulley was a principal of Jennifer Tulley Architect, Inc. ("JTA"). Tulley sent the homeowner monthly bills for her services. Combined, the November and December bills totaled $34,781, the bulk of which ($30,656) was for work by an unnamed "Junior Architect." The owner paid the two bills.

In January 2020, Ms. Tulley and another firm, TEF Architecture and Interior Design, Inc., executed an agreement, under which Ms. Tulley agreed to become a TEF employee (as an Associate Principal, a non-equity position). TEF explained to Tulley that "Revenue from JTA projects that we agree you will bring to TEF will be credited towards" your 2020 net revenue goal. In February 2020, Ms. Tulley told the homeowner that her architectural firm was being acquired, but that Tulley and her team would complete the remodeling project while working at the new firm. In each of the first three months of 2020, Ms. Tulley sent the owner a bill for services. The total amount billed during those three months was $43,950, 87% of which was for work performed, again, by an unnamed "Junior Architect." The homeowner did not pay Tulley's 2020 bills this time, but disputed the charges, asking Tulley to provide more detailed invoices. When it became clear that the homeowner wasn't going to pay her outstanding balance, Tulley offset a portion of the balance with a $5,000 retainer that the homeowner had provided to Tulley when the project began.

In 2021, Tilley's old firm, JTA, sued the homeowner to recover the unpaid fees and to enjoin the owner from using Tulley's architectural drawings. During discovery, the homeowner learned that two "Junior Architects" who worked on her project, and who accounted for over 90% of the hours billed, were not licensed architects. These two individuals worked for JTA until February 2020, after which they transitioned to TEF. After learning that the "Junior Architects" were not, in fact, licensed architects, the homeowner filed a counterclaim against JTA and also filed third-party claims against Ms. Tulley personally and against her new employer, TEF, for fraud and unjust enrichment, for violation of two California statutes, and for declaratory relief. All claims arise out of the homeowner's contention that Tulley unlawfully billed her for work that Tulley "falsely represented" was performed by an

Enjoying coffee and a glass of wine after dinner are Donna Hunt's husband, Dick Perez, with Josh Flowers and his wife, Kate.



architect. Tulley and JTA answered the lawsuit, and TEF moved to dismiss. The Court granted TEF's motion to dismiss, explaining that the owner's "allegations against TEF [were] too conclusory to support [the owner's] claims for relief." The owner then filed an amended third-party complaint and TEF again moved to dismiss. The Court granted TEF's motion in part and denied in part.

The homeowner argued that the new firm, TEF, can be held liable for Tulley's misrepresentations about the "Junior Architects" under two theories of liability as to TEF, i.e., the doctrines of successor liability and of vicarious liability. The Court found that the owner's allegations support the second theory but not the first.

Successor Liability. The owner alleged that in early 2020, Ms. Tulley said that her architectural firm was being 'acquired' and that she and her team would complete the owner's project while working at the acquiror firm, *i.e.*, TEF. As a result of the acquisition, the owner maintained that TEF can be held liable for JTA's liabilities, including liabilities stemming from any torts that Tulley committed within the scope of her employment at JTA. The Court, however, rejected this claim, stating that the general rule under California law is that, "When one company purchases another company's assets, the purchasing company, by default, does not assume the seller's liabilities." This general rule can be overcome if either: 1) the purchasing company "expressly or impliedly" agrees to assume the seller's liabilities; 2) the transaction amounts to "a consolidation or merger of the two corporations;" 3) "the purchasing corporation is a mere continuation of the seller;" or 4) "the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts."

The owner invoked the second and third exceptions, claiming that the transaction between JTA and TEF amounted to "a consolidation or merger." She also asserted that the purchasing corporation, TEF, is a "mere continuation" of the seller, JTA. But the Court said that the "allegations don't plausibly support either exception." A merger occurs when one corporation "ceases to exist" and is "absorbed" into another. A consolidation occurs when two or more corporations combine "by dissolving the existing [corporations] and creating a single new corporation or organization." The owner's allegations did not support either a merger or consolidation since the owner didn't allege that JTA ceased to exist, or that JTA and TEF combined "by dissolving" and "creating a single new corporation or organization." Second, the owner did not "plausibly allege" that TEF is a "mere continuation" of JTA. "The default rule," the Court explained, "is that when one company acquires another company's assets, the purchasing company doesn't acquire the seller's liabilities." The owner did not overcome this default rule. Therefore, the claim of successor liability was dismissed.

Vicarious Liability. Alternatively, the owner contended that TEF can be held vicariously liable for the "Junior Architects" misrepresentations that Tulley made when Tulley worked for TEF. The Court explained: "Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment." If, in fact, Tulley committed torts within the scope of her employment at TEF, then the Court felt that the owner's allegations did support a valid cause of action against TEF for vicarious liability "for torts that Tulley committed within the scope of her employment at TEF." But the Court cautioned that "this theory covers only a subset of the misrepresentations that Tulley allegedly made," as Tulley made some misrepresentations before she started working for TEF for which TEF cannot be held vicariously liable. *Jennifer Tulley Architect, Inc. v. Shin*, 2023 WL 3437819 (N.D. Cal. May 11, 2023).

LOUISIANA. ARCHITECT MAY HAVE HAD A DUTY FOR JOBSITE ACCIDENT, EVEN THOUGH ITS CONSULTING ENGINEER DID NOT!

A construction worker was injured in March 2018 while performing demolition work as a subcontractor during renovation of a city building in New Orleans, Louisiana. He sued the City's architectural firm, one of its officers, and the firm's engineering subconsultant for negligence. The trial court granted summary judgment to both the architecture firm and its vice president, as well as the engineering firm based on the relevant contracts (no duty for site safety), and the worker appealed. The Court of Appeals affirmed for the engineer, but not for the architect (in a separate opinion).

At the time of the accident, the worker was directed by his employer to demolish a vault that was located on the second floor of the building (a ten-foot by ten-foot cinderblock room, with a nine-foot high concrete slab ceiling). After demolishing most of one of the side walls of the vault and a smaller section of the front wall, he was instructed to stand on top of the vault's concrete ceiling in order to demolish it with a hydraulic jackhammer. Shortly after beginning that task, the entire vault structure collapsed. The worker was wearing a harness, which he tethered to a pipe above the vault. Although the harness somewhat broke his fall, he suffered neck and back injuries. As a result of the accident, the worker has undergone back surgery and will need surgery on his neck. In his lawsuit, the plaintiff alleged negligence in the preparation and approval of the design plans and specifications, the failure to design and/or require support for the area being demolished, and the failure to monitor and supervise the execution of the plans to ensure safety at the jobsite.

The engineering firm's motion for summary judgment stated that under its contract, the engineer did not owe a duty to oversee, supervise or maintain the construction site. In opposition to that motion for summary judgment, the plaintiff argued that there were outstanding issues of material fact as to whether the engineer owed a duty to provide a safe work environment and whether its design plans were in accordance with industry standards. The engineer provided evidence that its scope did not include any design or engineering related to the demolition of the second-floor vault or any other demolition on the second floor of the Project.

Under the relevant contract documents: 1) the Contractor, not the engineer, was responsible for the means, methods, and safety precautions; 2) site visits and observations by the engineer "shall not be construed as supervision of actual construction" (the firm's site visits began more than a month after the accident); 3) the Contractor was responsible for the "strength and safety of all scaffolding, staging, and hoisting equipment and for temporary shoring, bracing and tying;" and 4) the engineer did not owe a duty to maintain, monitor or ensure the worker's safety.

The Project Manual provided that when cutting or patching, the contractor would "provide temporary support of work to be cut." It also required the contractor to engage its own engineer to perform an engineering survey to determine whether removing any element of the building might result in structural deficiency or unplanned collapse during demolition. However, the plaintiff argued on appeal that the trial court overlooked duties owed by an architect and engineer to the general public, created by Louisiana law and statute, asserting that the trial court did not evaluate La. R.S. 38:2216, which prohibits a limitation on liability on architects and/or engineers in contracts with public bodies. He argued that La. R.S. 38:2216 renders null and void any hold harmless agreement which purports to shelter an architect or engineer from damages. That statute provides in pertinent part:

> "G. It is hereby declared that any provision contained in a public contract, other than a contract of insurance, providing for a hold harmless or indemnity agreement, or both,
>
> (1) From the contractor to the public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body, its employees, or agents, or,
>
> (2) From the contractor to any architect, landscape architect, engineer, or land surveyor engaged by the public body for such damages caused by the negligence of such architect, landscape architect, engineer, or land surveyor
>
> is contrary to the public policy of the state, and any and all such provisions in any and all contracts are null and void."

In response, the engineering firm argued that: 1) the statute was never referenced in the trial court proceedings; 2) the statute is inapplicable because it applies only to nullify indemnification and hold harmless provisions requiring the contractor

to hold harmless an architect or engineer for their own acts of negligence (the relevant contracts on the Project contain no such provisions). The Court of Appeals agreed that La. R.S. 38:2216 was not applicable, saying: "The contracts at issue here contain no provisions that would require [the Contractor] to indemnify or hold harmless [the Engineer] for its own negligence. Rather, the contracts simply delineate the duties and responsibilities of each of the parties involved in the Project. [Plaintiff's] reliance on La. R.S. 38:2216 is misplaced."

Citing Louisiana cases, the Court said: "Whether a duty is owed is a question of law; whether defendant has breached a duty is a question of fact." One case stated: "In determining the duty owed to an employee of a contractor by an engineering firm also involved in the project, the court must consider the express provisions of the contract between the parties."

In ruling for the engineer, the Court said: "there was no evidence introduced to demonstrate that the engineer was aware of any unsafe conditions on the jobsite." The Court found no genuine issues of material fact existed and, therefore, the engineer was entitled to judgment as a matter of law. *Bonilla v. Verges Rome Architects*, 2023 WL 3371562 (La. App. 4 Cir. May 11, 2023).

But, in a related case to the one above, decided on the same day, the Court of Appeals reversed summary judgment in favor of the architectural firm and its officer. The architect relied on essentially the exact same contract language as did the engineer including one clause that said: "The Consultant [architect] shall have no control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Consultant be responsible for the Contractor's failure to perform the Work in accordance with the Construction Documents. The Consultant shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work." However, the plaintiff argued that the architect's Design Contract, also provided, in pertinent part: "On the basis of its on-site observations, the Consultant will keep the Owner informed of the progress and quality of the work performed, and report known deviations from the Contract Documents, deviations from the most recently approved construction schedule, and shall endeavor to protect the Owner against defects and deficiencies observed in the Work."

(Above) Although Thomas Jefferson is buried at Monticello, Virginia, his original tombstone is located in Columbia, Missouri, along the Francis Quadrangle and epitaph in Jesse Hall, at the University of Missouri.

The architect admitted in his deposition that one of his duties as to periodically visit the jobsite to observe the progress of the work, and to "make sure that it's being performed in accordance with the design content and the drawings." However, the architect testified also that according to the Construction Contract, the contractor determines the methods he uses to do the work, and he determines and controls any safety conditions. Relevant were a series of ten photographs the architect took while on site prior to the accident. They showed the plaintiff standing on scaffolding, with his hand on the roof of the vault, while two other workers are shown standing on the floor below him. The photograph also shows the vault with much of the side wall and a smaller portion of the front wall demolished. The door

to the vault is partially open in the photograph. The architect testified that there were no temporary supports in place on the vault at the time he took the photographs, but that he could not see inside the vault to tell if there were temporary supports on the inside. The architect could not say if temporary supports were necessary because he did not know how the contractor proposed to demolish the vault. He did not point out the lack of temporary shoring to anyone at the time, nor did he see "anything wrong or unsafe in what the workers were doing" at the time he took the photographs.

An expert witness for the plaintiff (an engineer and general contractor) testified that: *"It is clear to me that even a layman who is not a trained design professional should have recognized that partially removing the walls without providing substitution supports made the ceiling slab unstable *** It should have been obvious to everyone that it was more dangerous to jackhammer on the ceiling slab after having remove parts of two of its support walls."* Another architect expert stated that the architect "had a contractual obligation to ensure that the contractor's work was being done in accordance with the contract provisions," including the obligation to engage a professional engineer. But the expert found no record that the architect ever notified or cited the contractor for non-compliance with that obligation. While agreeing that the architect was not responsible *by contract* for means or methods, he opined that "as a licensed architect with a master's in architecture, [the project architect] has some basic knowledge of structures and as evidenced by the photographs, if demolition were to continue on the vault with no temporary supports, there was a potential for problems."

The architect acknowledged that it had "a contractual duty to make site visits to make sure the contractor was operating in accordance with the design plans" and it also had a contractual duty "to report any deviations from the contracts." Given the photographs taken by the architect on the day of the accident, showing "clear indications that violations, or deviations from the contract," the Court ruled that the architect "should have observed and reported." The Court of Appeals found that there were genuine issues of material fact that remained. As a result, the trial court's ruling in favor of the architect was reversed. *Bonilla v. Verges Rome Architects*, 2023 WL 3371559 (La. App. 4 Cir. May 11, 2023).

TEXAS. CERTIFICATES OF MERIT CHALLENGED IN SUIT AGAINST DESIGN PROFESSIONALS BY INJURED VALET RUN OVER BY A TRUCK.

A man was working as a valet at a high-rise apartment complex when he attempted to retrieve a set of keys from a storm drain in the center of a driveway connecting the apartment garage to the roadway. While engaged in this task, a pickup truck ran over him causing serious injuries. The injured valet sued the apartment complex, the driver of the truck, and several design professionals allegedly involved in the design and construction of the driveway. The plaintiff filed a Certificate of Merit by licensed professional engineer, who alleged that faulty design of the driveway was a cause of the accident and of plaintiff's injuries. Tex. Civ. Prac. & Rem. § 150.002(a) requires in such lawsuits that the plaintiff file with his petition a Certificate of Merit from a third-party who holds *the same professional license or registration as the defendant.* On the day before the applicable two-year statute of limitations was to expire, the plaintiff filed a Third Amended Petition adding the architect and landscape architect as defendants, including a new affidavit from the engineer (who was not an architect or landscape architect). The architect filed a motion to dismiss based on the lack of a proper Certificate of Merit, which prompted the plaintiff to file a Fourth Amended Petition attaching a Certificate by an architect. At that time, the plaintiff also filed a separate document asserting that he was unable to provide a Certificate of Merit by a licensed architect earlier due to the quickly running limitations period. Later that same day, the plaintiff filed a Fifth Amended Petition and an amended notice of late-filed Certificate of Merit containing substantially similar allegations. The landscape architect filed a motion to dismiss, arguing that the affidavit was insufficient because it was a landscape architect and the third party who prepared the affidavit was an architect. The trial court denied each of the motions to dismiss, and the design firms filed an interlocutory appeal. The Texas Court of Appeals held that the plaintiffs qualified for an extension and, therefore, the Certificate of Merit was filed timely, and that the affidavit was sufficient as to the architect but not as to the landscape architect, affirming in part and reversing in part the trial court's order.

The plaintiff conceded that he did not file a proper Certificate of

Merit before the running of statute of limitations, but argued that he qualified for the automatic 30-day extension for filing a Certificate — set forth in section 150.002(c) —because he filed the Third Amended Petition within 10-days of the running of limitations and filed a separate document within the 30-day extension period asserting that he had been unable to provide a Certificate by a licensed architect earlier due to the quickly approaching limitations deadline.

As to the landscape architect, the Court of Appeals held that section 150.002 requires that in lawsuits such as this against certain design professionals, the plaintiff must file an affidavit by an affiant who *"holds the same professional license or registration as the defendant."* Tex. Civ. Prac. & Rem. § 150.002(a)(2). The two affidavits the plaintiff filed in this case were by a licensed professional engineer and a licensed architect, but no affidavit was filed by a registered landscape architect. The Court of Appeals held that the "statute is unambiguous on this point and clearly requires an affidavit by an affiant who holds the same professional license or registration as the defendant." Because the plaintiff failed to provide an affidavit by a registered landscape architect, the Court ruled that the trial court erred in denying the landscape architect's motion to dismiss.

The architect challenged the affidavit of plaintiff's architect, claiming that while he may be a licensed architect in Texas, he is not actively engaged in the practice of architecture. In fact, the expert's CV indicated that he had not practiced as an architect since 2007 when he was an architect on a project at a refinery. His most recent jobs had not been as a designer, but as "Sr. Project Manager, Master Planner, Program Manager, and Construction Manager," which the architect-defendant claimed did not show experience in "signing and sealing a set of drawings related to a driveway, or any other practice of architecture." But the Court of Appeals looked at the statutory definition of the "practice of architecture," finding that it had a broad meaning. Tex. Occ. Code § 1051.001(7). Paraphrasing another court, the Court of Appeals said: "the umbrella of practicing architecture casts a wide shadow," and that the expert's supervisory or project management duties fell within the statutory definition of the practice of architecture. Therefore, the Certificate was adequate to cover the claims against the architect-defendant. In sum, the Court of Appeals affirmed denial of the architect's motion to dismiss but reversed as to the landscape architect. *Kudela & Weinheimer, L.P. v. Arriaga*, 2023 WL 3372723 (Tex. App. May 11, 2023).

(Above) Benjamin Franklin and John Adams meeting with Thomas Jefferson (standing) to study a draft of the Declaration of Independence in Philadelphia (1776).

SOUTH CAROLINA. CONTRACTOR CANNOT SUE ARCHITECT FOR NEGLIGENCE OR BREACH OF WARRANTY ABSENT INDEPENDENT DAMAGES; BUT IT MAY SUE FOR EQUITABLE INDEMNITY.

A Developer of a 113-acre multi-use project in Myrtle Beach, South Carolina sued its Contractor due to various alleged construction defects and building code violations. The Contractor filed a third-party complaint against the Developer's Architect, asserting claims for contribution, professional negligence, equitable indemnity, and breach of warranty of plans and specifications (specifically related to vinyl windows the Architect specified and the designated wind zone design pressure requirements for the project's location). The Contractor called the Architect's conduct "gross negligence and recklessness." The Contractor sought as damages its costs in settling the Developer's claims, plus the costs associated with investigating those claims and defending the lawsuit, as well as "special and consequential damages," including damage to its business and business reputation.

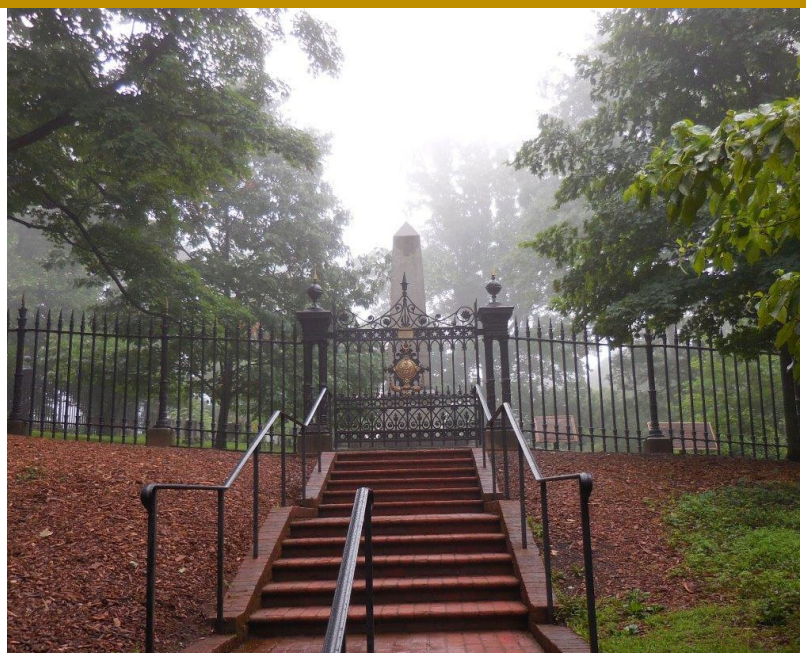
The Architect filed a motion for partial summary judgment regarding Contractor's claims for contribution, negligence, and breach of warranty. Following a hearing, the circuit court granted the Architect's motion, finding that the Contractor's contribution claim was premature and its claims for negligence and breach of warranty were "merely disguised equitable indemnity claims" subject to dismissal under South Carolina law.

In response, the Contractor filed a motion for reconsideration of its negligence and breach of warranty claims (but did not seek reconsideration of the dismissal of its contribution claim). The trial court denied that motion. The Contractor appealed, claiming that the trial court erred in: 1) failing to recognize its independent cause of action for professional negligence against the Architect; 2) failing to recognize the "special relationship" between an Architect and Contractor for purposes of the breach of warranty claim; and, 3) limiting the Contractor's claim of equitable indemnity. The Court of Appeals rejected all three arguments and affirmed.

In ruling in favor of the Architect, the trial court rejected the Contractor's argument that its negligence and breach of warranty claims each alleged damages to its business and business reputation "independent of" the claims the Developer asserted against the Contractor. The trial court also rejected the Contractor's argument that it suffered business reputation damages "separate and distinct" from the damages recoverable through its indemnity claim.

Without using the phrase "Economic Loss Doctrine," the Court of Appeals held that under South Carolina law, "[a] breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty *arising independently* of any contract duties between the parties, however, may support a tort action." (emphasis added). The Court explained that often, this duty arises from "a special relationship between the tortfeasor and the injured party [and when], however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action." But, while a contractor may sue a design professional for negligence, a contractor may not maintain tort claims against a design professional without having suffered "direct damages." Here, the Contractor merely alleged that the Architect provided deficient plans and specifications from which the Contractor's claimed damages flowed. The Court noted that, "[u]nder South Carolina law, a claimant cannot maintain deriv-ative tort or breach of warranty claims arising only from the claimant's *potential liability for another party's damages* and the claimant's need to defend itself in litigation; such contingent claims properly lie in indemnity." (emphasis added). As such, the Contractor's claim for breach of warranty was said to be "nothing more than [a claim] for equitable indemnity." The Contractor failed to show that it suffered "independent damages" due to the Architect's alleged negligence. Therefore, the Court of Appeals ruled that the trial court's granting partial summary judgment was proper because the negligence claims were not independent of the Contractor's indemnity claim.

As to the alleged claim for breach of warranty of the architect's plans and specifications, while the Contractor was correct that the South Carolina Supreme Court "has recognized a duty owed by a design professional to a contractor, independent of contractual duties, with regard to the design or supervision of a project," the Contractor's allegations here failed to set forth a proper "independent claim resulting from any breach of warranty" by the Architect. *BEI-Beach, LLC v. Christman,* 2023 WL 3082503 (S.C. Ct. App. Apr. 26, 2023).



(Above) Thomas Jefferson's Gravesite, at his estate in Monticello, Virginia.

NEW JERSEY. CONDO ASSOCIATION WAS REQUIRED TO ARBITRATE UNDER AIA CONTRACT; DEFAULT JUDGMENT RENDERED BY ARBITRATOR.

A condominium association ("HOA") hired a Contractor to reconstruct two buildings destroyed in a storm, at a cost of over $3 million. The parties used an AIA form contract which stated in section 6.2, "Binding Dispute Resolution," that:

> For any [c]laim subject to, but not resolved by, mediation ... the method of binding dispute resolution shall be as follows:
>
> *(Check the appropriate box.)*
>
> □ Arbitration pursuant to Section 15.4 of [the contract]
>
> □ Litigation in a court of competent jurisdiction
>
> □ Other (Specify)
>
> If the Owner and Contractor do not select a method of binding dispute resolution, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.

The HOA placed an "X" inside the first box, choosing arbitration as the form of dispute resolution. In addition, section 15.4.1 of the contract stated: "Claims subject to, but not resolved by, mediation shall be subject to arbitration[,] which ... shall be administered by the American Arbitration Association [(AAA)] in accordance with its Construction Industry Arbitration Rules...." The agreement further provided arbitration awards are "final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

A dispute arose when the contract completion date passed. The HOA retained an engineering firm which prepared a lengthy report detailing alleged deficiencies in the Contractor's work. The HOA gave the Contractor notice of the deficiencies and then terminated the contract. The Contractor filed a lien against each building, followed by two demands for arbitration filed with the AAA. The HOA did not file a timely answer with the AAA and, as a result, the arbitrator entered two awards in the amount of the liens. The Contractor moved to confirm the arbitration awards (but sought judgments against the HOA on the liens). The HOA moved to dismiss both complaints and filed its own lawsuit against the Contractor. The HOA argued the contract's arbitration provision was unenforceable because it contained multiple "confusing" cross references, "refers to documents that are not necessarily attached to each other[,]" and there was no language in the contract "that states [the HOA was] waiving [its] right to a trial by jury...." Alternatively, the HOA argued if the provision was found valid, the Contractor waived its right to arbitrate when it filed complaints seeking monetary judgments. The Contractor filed a motion compel arbitration and conceded that it mistakenly filed suit to confirm the liens, but did not waive its right to arbitration.

The trial judge entered an order dismissing the Contractor's complaints and consolidating the controversy under the HOA's lawsuit. The judge concluded that the Contractor did not waive arbitration by filing its complaints "inartfully asking" the court to enter monetary judgments pursuant to the liens. Regarding the HOA's argument that it did not intend to waive its right to a jury trial, the judge said: "no prescribed set of words must be included in [an] arbitration clause to accomplish a waiver of rights [but] Whatever words are chosen, they must be clear and unambiguous that [the party] is choosing to arbitrate disputes rather than have ... them resolved in a court of law. * * * In this instance, the ... agreement informed the parties that there was a distinction between resolving the dispute in arbitration and in court.... [The HOA] chose arbitration rather than court as indicated from the markings on the [Section 6.2] waiver." The judge also noted that the HOA "was a sophisticated entity," which had hired a management company, and ent-

ered into agreements "with licensed professionals and contractors who performed construction on the premises pursuant to the responsibilities ... for upkeep and maintenance of the [properties.]" The trial judge found the AIA arbitration clause enforceable. He granted the Contractor's motion to compel and dismissed the HOA's lawsuit.

The HOA appealed and argued that the AIA arbitration provision was invalid because it failed to describe the scope of arbitration, did not differentiate between arbitration and a trial, and did not adequately apprise the reader that it was waiving the right to a jury trial. The Court of Appeals merely said: "We are unpersuaded." In affirming, the Court said that there is no requirement to advise a party of all the "component rights" encompassed by the waiver of a jury trial when one agrees to arbitrate. "Requiring more would undermine the preference for arbitration as a means of resolving disputes expeditiously," the Court said. Also, "[a] party's sophistication is relevant to determining whether they knowingly and voluntarily agreed to a contract's terms." Here, the HOA was found to be "a sophisticated party, having entered a multi-million-dollar transaction for restoration of large residential buildings, contracted for managing agents to oversee the association, and retained experts to review defendant's work. The record lacks any evidence of an unequal bargaining power between the parties, a lack of sophistication, or of other evidence supporting plaintiff's claims [that] it did not understand it had to arbitrate its claims against defendant." The Court found that the AIA arbitration provision was "plainly written and expressly advises the reader to select how to resolve their dispute. The agreement sets forth the rules that would apply in arbitration and the finality of an arbitration award."

The Court was equally unpersuaded that the Contractor waived its right to arbitrate by filing complaints in court following arbitration. Waiver of arbitration rights, requires that "a party must know of the right and affirmatively reveal the intent to waive the right," which the Court called a "clear and convincing standard." Here, the Contractor did not delay seeking arbitration and asserted it shortly after the HOA terminated the contract "without delay * * * There was no concomitant prejudice to [the HOA]." Judgment was affirmed. *Arbor Green Condo. Ass'n, Inc. v. Start 2 Finish Restoration & Bldg. Servs., LLC*, 2023 WL 3047459 (N.J. Super. Ct. App. Div. Apr. 24, 2023).

2023 A-E LEGISLATIVE HIGHLIGHTS.

As like any year, it seems, 2023 saw dozens of new laws passed dealing with the architectural profession. Here are just a few that we ran across:

Oregon. The state licensing law for architects was substantially rewritten under S.B. 224. Among the changes were amendments to ORS 671.010 including new definitions of the terms "Practice of architecture," "Architect," "Registered architect" and "Foreign architect" as well as "Architectural firm" and "Foreign architectural firm." The licensing statute has a new definition of "Construction phase services" and deleted the old term "Consulting architect." A new definition says that the term "Responsible control" means "a degree of control over an operation that is consistent with the scope of a registered architect's professional knowledge and the application of a registered architect's professional standard of care." The new law also says that a registered architect's stamp, "when accompanied by the registered architect's signature on any technical submission, constitutes the registered architect's attestation that the registered architect has responsible control over the content of the technical submission. The registered architect is responsible for controlling the custody and use of the stamp."

S.B. 224 also amended ORS 671.025. to state: "An architect shall retain, for a period of not less than 10 years following the completion of the project for which the architect submitted technical submissions, records and documentation that demonstrate the architect's responsible control over the preparation of the technical submissions."

This new law also clarifies what is required of a design-build contractor. Changes to ORS 671.030 state that a construction contractor licensed under ORS chapter 701 may offer services constituting the practice of architecture if the following three things happen:

(A) The construction contractor's offer discloses in writing that

Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

the construction contractor is not an architect and identifies the registered architect or registered architectural firm that will provide the architectural services;

(B) The services are ancillary to construction services the construction contractor will provide; and

(C) A registered architect or registered architectural firm provides the services constituting the practice of architecture.

For out-of-state firms soliciting work in Oregon, changes to ORS 671.041 now state that a "foreign architectural firm" may offer to provide architectural services in Oregon and "may assume or use a name, form of address or other designation within this state that indicates or reasonably could be understood to indicate that the foreign architectural firm is an architectural firm or engages in the practice of architecture," if the foreign architectural firm *"provides a notice in writing to each person that responds to or accepts the offer that states that the foreign architectural firm is not a registered architectural firm."* However, the law makes clear that while an out-of-state firm may solicit work in Oregon, "a foreign architectural firm may not engage in the practice of architecture in this state without a certificate of registration." Similarly, under ORS 671.065 "A foreign architect who does not have a certificate of registration under ORS 671.020 may offer to provide in this state services that constitute the practice of architecture, and may assume or use a title, form of address or other designation within this state that indicates or reasonably could be understood to indicate that the foreign architect is an architect or that the foreign architect engages in the practice of architecture, if the foreign architect provides a notice in writing to each person that responds to or accepts the offer that states that the foreign architect is not a registered architect." But the statute clarifies that, "Notwithstanding the permission given [above], a foreign architect may not engage in the practice of architecture in this state without a certificate of registration." As to firms that use the names of former or deceased owners, ORS 671.041 now states: "A registered architectural firm may not have, use, display or communicate a name or assumed business name that includes the name of an individual who was not previously or is not currently an owner, employee or otherwise in a contractual relationship with the registered architectural firm under which the individual previously engaged in or currently engages in the practice of architecture in this state."

The 2023 Oregon changes were approved on May 8, 2023, and take effect on the 91st day after the date on which the 2023 regular legislative session adjourns "sine die."

Texas. Many of the reported Texas cases in each issue of *Monticello* deal with that state's Certificate of Merit law, Section 150.002 of the Texas Civil Practice and Remedies Code. H.B. 2007 modified that law in 2023. The key change deals with an exemption for public design-build projects. Under new subpart (i), the law states that a Certificate of Merit is not required when: "A third-party plaintiff that is a design-build firm or a design-build team, or an architect, engineer, or other member of a design-build firm or design-build team, is not required to file an affidavit described by Subsection (a) in connection with filing a third-party claim or cross-claim against a licensed or registered professional if the action or arbitration proceeding arises out of a design-build project in which a governmental entity contracts with a single entity to provide both design and construction services for the construction, expansion, extension, rehabilitation, alteration, or repair of a facility, a building or associated structure, a civil works project, or a highway project." H.B. 2007 passed unanimously in both houses, first in the House on April 20, 2023 (146-0); then in the Senate on May 17, 2023 (31-0) and takes effect Sept. 1, 2023.

Florida. Following the tragic collapse of the Surfside Condominiums in the Miami suburb of Surfside, Florida in 2021, the state legislature made many changes to the statute requiring inspections of condo buildings. Under C.S.C.S.S.B. 154 (2023), Fla. Stat. 553.899 was amended to require that "milestone inspections" (i.e. a structural inspection of a building's load-bearing elements and its primary structural members and primary structural systems) now may be provided by "a team of professionals with an architect or engineer acting as a registered design professional in responsible charge with all work and reports signed and sealed by the appropriate qualified team member."

Also, for condos that are "three stories or more in height," if the building reached 30 years of age before July 1, 2022, the building's initial milestone inspection must be performed before December 31, 2024. If a building reaches 30 years of age on or after July 1, 2022, and before December 31, 2024, the building's initial milestone inspection must be performed before December 31, 2025. If the date of issuance for the certificate of occ-

upancy is not available, "the date of issuance of the building's certificate of occupancy shall be the date of occupancy evidenced in any record of the local building official."

Under the new law, the local enforcement agency in a locality may determine that local circumstances, including "environmental conditions such as proximity to salt water" (as defined in Fla. Stat. 379.101) require that a milestone inspection must be performed by December 31 of the year in which the building reaches 25 years of age, based on the date the certificate of occupancy for the building was issued, and every 10 years thereafter. Also, by December 31, 2024, the Florida Building Commission is required to adopt rules to establish a "building safety program" for the implementation of the Existing Building section of the Florida Building Code. The program must, at minimum, include inspection criteria, testing protocols, standardized inspection and reporting forms that are adaptable to an electronic format, and record maintenance requirements for the local authority.

Under changes to Fla. Stat. 718.1255, certain disputes involving the failure of a condo's board of administration, when required by statute or an association document, to: 1) Obtain the required milestone inspection; 2) Obtain a required structural integrity reserve study; 3) Fund reserves required for statutory inspection obligations; or, 4) Make or provide necessary maintenance or repairs of condominium property recommended by a milestone inspection or a structural integrity reserve study are not subject to nonbinding arbitration, but are now subject to mandatory pre-suit mediation.

For anyone buying a condo in Florida and joining the HOA board of a condo, be aware of changes to Fla. Stat. 718.113, which now requires that maintenance of the common elements is the responsibility of the association, "except for any maintenance responsibility for limited common elements assigned to the unit owner by the declaration. The association shall provide for the maintenance, repair, and replacement of the condominium property for which it bears responsibility pursuant to the declaration of condominium. After turnover of control of the association to the unit owners, the association must perform any required maintenance identified by the developer pursuant to [Fla. Stat.] 718.301(4)(p) and (q) until the association obtains new maintenance protocols from a licensed professional engineer or architect or a person certified as a reserve specialist or professional reserve analyst by the Community Associations Institute or the Association of Professional Reserve Analysts." Also, for those buying a condo in Florida, changes to Fla. Stat. 718.503 now require several new disclosures to be made by the Developer prior to sale of a unit, with specific language. If not provided to a condo buyer by the Developer, then the sales contract "is voidable at the option of the purchaser prior to closing."

Arizona. Under S.B. 1103, a city, town or county can now adopt an ordinance which states that adopt "a self-certification program" allowing registered architects and professional engineers to certify and be responsible for compliance with all applicable ordinances and construction standards for projects that the ordinance identifies as being qualified for self-certification. This bill was approved by Gov. Hobbs on March 3, 2023.

South Carolina. Under H.B. 4115, effective May 19, 2023, several changes were made that impact contractors. Under changes to Section 40-11-30, the maximum cost of work that can be performed by an unlicensed contractor was increased from $5,000 to $10,000. The bill passed in the House on April 5, 2023 (90-15) and in the Senate on May 10, 2023 (42-0).

New Mexico. The topic of "incidental practice" normally raises its head each year in some state. This year it was in New Mexico where H.B. 411 passed 55-6 in the House and 37-0 in the Senate and was signed by Gov. Grisham on March 30, 2023. Under N.M. Stat. 61-23-3 "incidental practice" means "the performance of other professional services that are related to a licensee's work as an engineer." Under H.B. 4115, N.M. Stat. 61–23–22, "Engineering; exemptions" a New Mexico licensed architect who has complied with all of the laws of New Mexico relating to the practice of architecture" has the right to engage in "the incidental practice, as defined by regulation, of activities properly classified as engineering; provided that the architect shall not make any representation as being a professional engineer or as performing engineering services; and further provided that the architect shall perform only that part of the work for which the architect is professionally qualified and shall use qualified professional engineers or others for those portions of the work in which the contracting architect is not qualified. Furthermore, the architect shall assume all responsibility for compliance with all laws, codes, regulations and ordinances of the state or its political subdivisions pertaining to all documents bearing the architect's professional seal." This new law became effective on June 16, 2023.

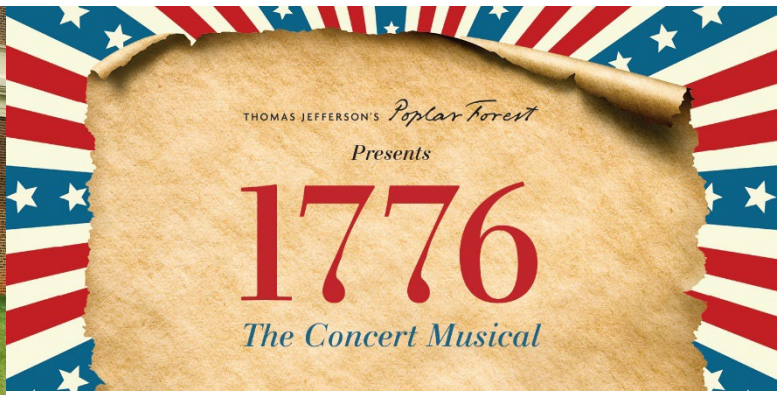
FORMER HOME OF THOMAS JEFFERSON HAS PLENTY OF PATRIOTIC EVENTS GOING ON IN CELEBRATION OF JULY 4

(reprinted from The Altavista Journal, www.altavistajournal.com)

Two hundred forty-seven years ago, Thomas Jefferson gave voice to the declaration that shook the colonial world. Join Poplar Forest on Tuesday, July 4 for an Independence Day party that the Founding Fathers themselves would appreciate. The merrymaking begins with the return of Poplar Forest's annual presentation of 1776, a spirited musical comedy that brings the Founding Fathers to life and captures the spirit of the year that changed the world (June 29-July 1). The festivities continue on July 4th with a grand Federal-era-inspired fair featuring entertainment and activities the entire family will enjoy, including a dramatic reading of the Declaration of Independence by Thomas Jefferson himself.

1776 The Musical. Three performances only! Thursday, June 29; Friday, June 30; and Saturday, July 1 (Rain date Sunday, July 2) from 7:30 to 10:00 p.m. each evening. After a year's hiatus, Poplar Forest's special presentation of 1776—the Tony Award-winning musical comedy by Sherman Edwards and Peter Stone based on the events leading up to the drafting and signing of the Declaration of Independence—returns to Jefferson's south lawn. Celebrate the audacity of the revolutionary spirit and America's Founding Fathers with Ben (Franklin), Richard Henry (Lee), John (Adams) and Tom (Jefferson) and their brilliant contributions to our country's history. Poplar Forest's 1776 is directed by John Holt with musical direction by Heather Brand and choreography by Ariel Kraje. The production features Chris Shepard as Thomas Jefferson, Jordan Whiley as John Adams, Jay Lynn as Benjamin Franklin and Scott Rankins as Richard Henry Lee, with Sarah Burrows, Katie McCaffrey, Libby Gatzke, Ben Cleaver, Angie Kraje, Claire Hansen, Lyle Smithers, Jennifer Cossman, Dennis Hartman, Matt Bowyer, Timothy McFadden, Ted Kraje, Alexa Rodgers, Gregory Pugh, Kevin Duff, Erin Geiersbach, Steve Allen, John Langston, Billy Hansen and Stevie Holcomb. Bring your friends and family, and a picnic dinner; sample a selection of local libations; and enjoy an evening of theatre under the stars. Tickets are $17.76 for adults (ages 18+); $13 for students (ages 6-17 and college); and $4 for children (ages 5 and under). Online ticket sales turn off at 11:30 p.m. the evening before each show. Tickets will be available through the Museum Shop by calling 434.534.8120 and at the door.

Independence Day Celebration. Tuesday, July 4 from 10:00 a.m. to 4:00 p.m. Celebrate Independence Day in historic style with Thomas Jefferson as your host! Enjoy colonial-style enter-



(Above and left) Jefferson's Poplar Forest retreat hosts the musical concert "1776" each year on Independence Day.

tainment; demonstrations by colonial artisans and crafts-people—including a spinner, weaver, blacksmith and wood-worker; archaeological displays; old-fashioned children's activeities; and more on Jefferson's south lawn. Bring the kids out for a ride on one of Five Blessings Farm's ponies. Take in performances of colonial music by Pete and Ellen Vigour; Jimbo Cary's Traveling Music Museum; and Common Stock's colonial entertainment for kids. Check out David Gilmer's colonial flag display. Hear African American folktales, work songs and stories of the period performed by professional storyteller Dylan Pritchett at the Quarter Site. Watch as interpreter Robert Watson demonstrates the 18th-century art of basket making while weaving stories about the enslaved community. Play some of Handmade History's colonial games; dress up in colonial garb; try quill pen writing and brickmaking with Poplar Forest's own Hands on History interpreters.

New for Independence Day 2023! Returning spinner Dawn Doss and Iron Kilt Forge blacksmith Jay Hatfield will be joined by a host of historic interpreters appearing at Poplar Forest for the first time, including: colonial woodworker and box maker Daniel Hrinko; Greg's 19th Century Photography with tintypes and ambrotypes; Perrin Cottage Perfumery, maker of 17th-,18th- and 19th-century perfumes; and White Historic Art with 18th-century historically themed prints. Check out one of the Tea Notes Press book signings. Sample a variety of local libations and fare from Corny Kettlers, El Cabrito's Mexican Food, Hoof & Feather BBQ and Kona Ice of Lynchburg. Gather around the south portico for a dramatic reading of the Declaration of Independence by Thomas Jefferson himself at 1:30 p.m. with Sarah Dietrich of Bedlam Colonial Music sing-ing the national anthem and an American Legion Honor Guard from Lynchburg Post 16. Grounds admission to Inde-pendence Day festivities is $10 for adults (ages 16+); children 15 and under are free. Guided tours of the octagonal villa are available for an additional fee, day-of only.

About Poplar Forest. One of only two homes Thomas Jefferson designed for his personal use, the Poplar Forest retreat was the place where Jefferson "came to indulge in the life of the mind and renew his personal creativity." Jefferson and his wife, Martha, inherited the Bedford County plantation known as Poplar Forest from her father in 1773. When his presidency ended in 1809, Jefferson visited the retreat three or four times a year, often staying for several months at a time during planting seasons. Designated a National Historic Landmark by the Secretary of the Interior, and nearly lost to development, Thomas Jefferson's Poplar Forest plantation in the foothills of the Blue Ridge Mountains was rescued in 1984 by a group of local citizens who sought to preserve it for the cultural and educational benefit of the public. Poplar Forest was opened to the public for the first time in 1986, in its "before restoration" state. Today, the neoclassical architecture of the octagonal house has been returned to Thomas Jefferson's design. The National Trust for Historic Preservation has recognized the meticulous research and restoration efforts with its highest award, and the plantation has been nominated as a UNESCO World Heritage Site. A visit to Poplar Forest offers a unique opportunity to observe a "live" archaeological dig during periods of active excavations. Visitors can also be among the first to experience the recently completed state-of-the-art restoration of the historic home's interior and portions of the designed landscape, revealing Thomas Jefferson's vision for his personal retreat.

Poplar Forest is open daily from March 15 through December 30 (closed on Easter, Thanksgiving Day, Christmas Eve and Christmas Day) from 10:00 a.m. until 5:00 p.m. Admission includes a guided house tour—by docent or app—and self-guided exploration of exhibits in the lower level of the house, the Wing of Offices, the ornamental grounds, the 1857 Slave Dwelling and the Quarter Site. Docent-guided tours of the octagonal house are offered at 10:30 a.m., 12:00 p.m., 1:00 p.m. and 2:30 p.m. Enslaved community talks are available on Thursdays, Fridays and Saturdays from April through October and are free with regular admission. Poplar Forest is also open for Winter Weekends from mid-January through mid-March from 10:00 a.m. until 4:00 p.m. Admission is $18 for adults; $16 for seniors (ages 65+) and active military (must show ID); $10 for college students (must show ID) and teens ages 12–18; $6 for youth ages 6–11; and free for members and children under age 6. Admission for members of the military and their families is free (with ID) from Armed Forces Day through Labor Day as part of the Blue Star Museums programs. Tours for groups of 20 or more are available by appointment at a discounted rate.

For more information about Thomas Jefferson's Poplar Forest, visit www.poplarforest.org or call 434.525.1806.

TWO PRESIDENTS DIED ON THE SAME JULY 4: COINCIDENCE OR SOMETHING MORE?

(Reprinted from A&E Television Networks, July 3, 2018; Updated June 23, 2023)

On July 4, 1826, America celebrated 50 years of independence as, just a few hours apart, two of its Presidents took their final breaths. At the time of his death, Thomas Jefferson was 83, while John Adams had turned 90 the year before. Though both were unwell, their deaths came as a surprise to many—particularly as they coincided with one another on this very striking date.

In the weeks that followed, Americans offered a variety of explanations for the sudden loss of these two presidents. Though some likely wrote it off as coincidence, many saw evidence of divine design at work. In a eulogy delivered the following month, for instance, Daniel Webster wondered what this "striking and extraordinary" coincidence might suggest. The men's lives had been gifts from Providence to the United States, he said. So too were their length and "happy termination," which he saw as "proofs that our country and its benefactors are objects of His care."

But if it wasn't a coincidence or divine intervention, what other explanations might there be? Modern scholars have sometimes attempted to pinpoint why such a statistically unlikely event might have taken place. After all, Jefferson and Adams didn't only die on the same day, with an already low probability of 1 in 365. They died on the same significant date and historic anniversary. *"When appeals to coincidence are insufficient,"* writes Margaret P. Battin in a 2005 *Bulletin of the Historic Society* report, *"we must look for explanations in common circumstance or common cause, or for causation from one case to the other."*

One possible explanation proposes that Jefferson and Adams deliberately "held on" for the anniversary. The phenomenon of people keeping themselves alive until they've said goodbye to a loved one or experienced a significant anniversary is well-documented: It's entirely possible that Adams and Jefferson's "will to live" kept them going through those final days ahead of July 4th — but wasn't enough to keep them alive after that.

> The deaths of former U.S. Presidents Thomas Jefferson and John Adams on July 4, 1826 - the day of the Jubilee - the 50th anniversary of the adoption of the Declaration of Independence, was an extraordinary and eerie coincidence.

In fact, even contemporary observers thought this might have been a conscious decision. In a eulogy for Jefferson delivered in New York in mid-July, the businessman and politician Churchill C. Cambreleng observed: *"The body had wasted away — but the energies of a powerful mind, struggling with expiring nature, kept the vital spark alive till the meridian sun shone on*

our 50th Anniversary — then content to die —the illustrious Jefferson gave to the world his last declaration." Jefferson is also said to have refused his usual laudanum on the night before he died, which might have affected his ability to cope with the pain. In a separate eulogy, in fact, John Tyler described Jefferson's often-expressed desire to die on the Fourth of July, adding even more credence to the theory that their deaths on that providential date may not have been entirely accidental. Conspiracy theories about their concurrent deaths have also circulated, both at the time and in the centuries since. Battin suggests a possible *"silent conspiracy among physicians, family members and other caregivers to help their patient 'make it' to the 4th,"* where the effort came to an end once the day had been reached. Adams' granddaughter, she observed, reported their doctor giving her grandfather an experimental medicine which he said would either prolong his life by as much as two weeks, or bring it to a close before 24 hours were up. Even those quite unconnected to the deaths wondered if something more sinister, or planned, had been afoot. In a letter, John Randolph, of Roanoke decried Adams' death as *"Euthenasia, indeed."* What's more, he added, *"They have killed Mr. Jefferson, too, on the same day, but I don't believe it."*

Thomas Jefferson died shortly after noon at the age of 83 in Monticello, VA. John Adams retired to his farm in Quincy, MA in 1800 after losing his bid for re-election. Here on July 4, 1826, Adams spoke his last words: *"Thomas Jefferson survives."* But, oddly, Jefferson had died at Monticello only a few hours earlier.

But all of these explanations have limitations of one sort or another, particularly as the historical evidence is so scarce. Whatever the reason behind it, these deaths, and their date, were a remarkable concurrence—and one made even more striking five years later, with the death of James Monroe on that same auspicious date. A few days after Monroe passed away, the *Boston Traveler* was not the only newspaper to observe, *"Again our national anniversary has been marked by one of those events, which it may be scarcely permitted to ascribe the chance."*

Did You Know?
That the present monument at Monticello in Virginia is not the original tombstone designed by Jefferson himself, but a larger one erected by the United States in 1883. The original tombstone is located on the campus of the University of Missouri. (The state capital is named Jefferson City, Missouri!)

11th CIRCUIT. ARBITRATION AWARD SET ASIDE DUE TO "FRAUD" (WITNESS TAMPERING).

While not a design or construction case, there is an important take-away in this June 2023 case. Here, a medical-product manufacturer sued its former distributor, its owner, two of its sales reps and others who began working for a new LLC, asserting claims for breach of an exclusive distribution agree-ment and a noncompetition agreement after the new LLC began selling products for one of the manufacturer's competitors. After two years of litigation, the trial court enforced a dispute reso-lution clause in the agreement, ordering the parties to arbitrate the plaintiff's breach-of-contract claim and staying most of the plaintiff's other claims during arbitration. The arbitration panel issued an award finding the distributor liable for breaching the agreements but denied the manufacturer's claims for lost-profits. Once the litigation resumed, the plaintiff discovered new information of misconduct by two defendants during the arbi-tration. The plaintiff moved to vacate the arbitration award on the ground that the award had been procured by fraud. The federal trial judge granted the plaintiff's motion and denied the defendants' request to remand the case to the arbitration panel for rehearing or a determination of how the new information affected the award. The trial judge stated, candidly that, "After four long years of litigation, it is somewhat ironic that the under-lying facts leading up to the claims in this case are nearly irrel-evant at this point." *Nuvasive, Inc. v. Absolute Med., LLC*, 2022 WL 20179742 (M.D. Fla. Jan. 10, 2022). The trial judge did not order a new arbitration, however, stating: "requiring Plaintiff to participate in a new arbitration proceeding would not be approp-riate when the failure of the first lengthy and costly multi-day arbitration hearing was due solely to Defendants' misconduct."

The judge went on to day, "Further, there is no evidence to demonstrate that Defendants would modify their unacceptable behavior in a new arbitration proceeding, and it would be extremely prejudicial to Plaintiff to require it to go through the time and expense of a new proceeding." Therefore, the trial court took jurisdiction over the arbitrated claims in conjunction with the ongoing litigation and said that it would craft an appropriate sanction." The judge stated, "In the many years that the Undersigned has practiced law and sat on the bench as a state and then federal court judge, never has he witnessed conduct so persistently contrary to the principles of our judicial process as the actions by Defendants in this case. That misconduct must be stopped." The judge scolded defense counsel for attempting "to commit fraud on this Court" and by making legal arguments that the award "that he knew was obtained fraudulently had a binding effect on the claims here." Defense counsel was ordered to show cause "as to why he should not be held jointly and severally liable with Defendants for an award of attorneys' fees and costs."

The defendants appealed.

In affirming, the Eleventh Circuit Court of Appealsfound that the plaintiff established fraud by "clear and convincing evidence," as required to support vacatur and that the fraud could not have been discovered while it was ongoing. The text messages showed that one defendant influenced a witness, coaching him on answers to questions, which the Court called "shocking conduct." Based on this new information, the plaintiff moved to vacate the arbitration award on the ground that the award had been procured by fraud. While there were other issues on appeal, the important take-away deals with the "coaching" of the witness who testified via video.

The texts showed that one defendant was instructing a witness "in real-time" on how to answer the questions posed to him by plaintiff's counsel. Before the witness began his arbitration testimony, he took an oath affirming that there was no one in the room with him and no one communicating with him. The Court said, "Although the former was true, the latter

was not." Plaintiff showed that while the witness testified, he received text messages from one of the defendants concerning the content of his testimony. The witness denied that he had read the messages while testifying, which the trial judge rejected. By comparing the text messages and their timing with the testimony, the plaintiff showed that the testimony was consistent with the contemporaneous text messages. In at least one instance, the witness revised his answers to comport with the texted suggestions. The defendants did not dispute this fact but argued that the fraud "was not material." The Court of Appeals rejected that defense and agreed with the trial judge that the conduct and the cover-up together constituted "extraordinary circumstances" sufficient to toll the time limit on moving to vacate an award.

Under the Federal Arbitration Act, 9 U.S.C. § 10(a)(1), the Court of Appeals said that vacating an award for fraud requires a three-part test. Finding that the plaintiff met all three prongs, the Court affirmed the trial court's ruling. See *NuVasive, Inc. v. Absolute Med., LLC*, 2023 WL 4096037 (11th Cir. June 21, 2023).

AIA's 2023 25-YEAR AWARD GOES TO GEHRY'S BILBOA MUSEUM.

(reprinted from AIA's website)

Upending preconceived notions of what art museums can be, the Guggenheim Museum Bilbao's revolutionary form was the iconic catalist to redefine and revitalize Spain's Basque region while supporting a wide range of cultural initiatives. Conceived at the pivotal moment between analog and digital practice, the museum has been an integral part of urban life in Bilbao since opening in 1997, persisting as a symbol of the power of good, human-centered design's ability to embolden creativity and fundamentally reshape communities.

The idea for the museum began in 1991, when the director of the Solomon R. Guggenheim Foundation approached Frank O. Gehry and Associates, now Gehry Partners LLP, with the notion of developing a museum in Bilbao's industrial district. The region, which once boasted a potent steel manufacturing sector, had faltered in the midst of socioeconomic challenges. An initial proposal suggested converting a former warehouse, but Frank Gehry, FAIA, proposed building on a site adjacent to the Nervión River, which cuts through Bilbao on its way to the Bay of Biscay. Gehry was later awarded the project because of its strong engagement with the city and the design's potential to forge a new identity for Bilbao.

From its place along the river, the museum stands at the center of a cultural triangle formed by the Museo de Bellas Artes, Deusto university, and the historic town hall. It is directly accessible from the city's business and historic districts, and the Puente de La Salve Bridge passes over the site's eastern edge, positioning the museum as one of Bilbao's central gateways. The museum's exterior features Spanish limestone in its rec-tangular buildings, while its iconic sculpted forms are wrapped in titanium panels that recall Bilbao's former industry. Through-out the design process, the team relied on 3D modeling soft-ware CATIA, which not only kept costs down and minimized material waste but also translated Gehry's experimental forms into reality.

Inside, the team designed three discrete types of exhibition spaces to accommodate the permanent collection, temporary exhibitions, and the work of selected living artists. Galleries for the permanent collection are two sets of three consecutively arranged square galleries, which are stacked at the museum's second and third levels. A dramatic and column-free rectangular space extends to the east of the museum's central atrium to accommodate temporary exhibitions, allowing the museum to accommodate large-scale art installations. The work of selected living artists is shown in a series of 11 distinct galleries, each with their own spatial characteristics.

"Bilbao showed how inventive and challenging architecture could be, and it marked a change in what museums were trying to achieve," Max Hollein, director of New York's Metropolitan Museum of Art, said of the project's impact on cultural institutions. "It was a metamorphosis from the museum as repository to a total concept of the museum." Bilbao felt the substantial economic effect of the museum immediately after opening, enjoying a more than $160 million economic impact and a 28% increase in tourism in its first year of operation, important changes in the small but vital region. The museum continues to attract nearly 1 million visitors annually, nearly half of which travel from other countries to engage with the building and the works of art inside.

Guggenheim Museum Bilbao

Firm: Gehry Partners, LLP

Owner: Solomon R. Guggenheim Museum & Foundation

Location: Bilbao, Spain

MINUTES OF THE 2023 ANNUAL MEETING OF THE MEMBERS OF THE JEFFERSON SOCIETY, INC.

The Eleventh Annual Meeting of the Members of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held via electronic meeting, beginning at 1:00 pm Eastern Daylight Time on May 23, 2023. Members of the Society present at the meeting are identified in the attached List of Attendees. *(See p. 30, below).* Mr. Bell served as Secretary of the meeting.

President Josh Flowers opened the meeting, determined that a quorum was present, and called the meeting to order as the annual meeting of the Members.

INTRODUCTION:

Mr. Flowers noted that this is the third year in a row that we have held our annual meeting online rather than in person. He noted that the agenda for the meeting was emailed to the membership prior to the meeting. Mr. Flowers discussed how this annual business meeting is virtual and our in-person meeting will be held in conjunction with the AIA National Convention in San Francisco.

Continuing Business:

TREASURER'S REPORT:

Treasurer Ryan reported on the finances of the Society. As of the date of the meeting, the Society recorded a total of $20,159.20 in its operating account. Only 28 members have paid their dues this year. Mr. Ryan asked those who have not paid dues to please do so online through our website as soon as possible. He noted that dues may be paid one time or by subscription. He also noted that in light of the disruption by the pandemic over the last three years, the Board is offering a dues amnesty for the year 2020 and years prior, and is requesting that members become current with their dues obligation for the years 2021, 2022, and 2023.

Mr. Ryan reported that thus far we have 16 paid reservations for the Annual Dinner meeting in San Francisco, and we expect 14 of those to attend. There were no comments on Mr. Ryan's report.

ELECTION OF OFFICERS AND DIRECTORS:

Mr. Flowers announced the election of Officers and Directors as the next item of business. Mr. Flowers then provided the report of the Nominating Committee (made up of Mr. Flowers, Ms. Lieffers, and Ms. Raspa) and the proposed slate of Officers/Directors for the 2023-2024 year as follows:

President: Laura Jo Lieffers (3-year term completed – 3-year extension. She will serve as president 2023-2025, and Vice President/Past President 2025-2026; Treasurer: Mark Ryan (3-year term completed – in 2020, his term was extended to end in 2022 with intended extension to serve as Treasurer through 2024); Vice President/Past President: Josh Flowers (3-year term completed – in 2021, his term was extended to end in 2024); Secretary: Michael Bell (3 year term, second year); Treasurer-Elect: Alexander van Gaalen (3-year term, first year); Directors: Joyce Raspa (3-year term, first year), Donna Hunt (3-year term, second year), Jessyca Henderson (3-year term, third year), Peggy Landry (3-year term, third year).

Mr. Flowers called for any further nominations and there were none. Therefore, he declared the nominations closed and asked for a motion to approve the slate. Ms. Raspa made a motion to approve the proposed slate and Ms. Shiffrin seconded. Mr. Flowers called for a voice vote. The slate was unanimously approved. No one opposed.

Mr. Flowers commended Ms. Lieffers for her many years of hard work and dedication to the Society and congratulated her on her presidency. Ms. Lieffers said that she is excited about serving as president and she thanked Mr. Flowers for his successful presidency.

ANNUAL DINNER:

Mr. Flowers reported that the Annual Dinner will be held at McCormick and Kuleto's in San Francisco on Wednesday, June 7, 2023 in conjunction with the AIA Conference on Architecture. The dinner is open to members and their guests. He thanked Ms. Raspa for her work in planning this event. Attendees were encouraged to RSVP by Friday, May 26 if they had not already done so.

WEB SITE AND TECHNOLOGY COMMITTEE REPORT:

Mr. van Gaalen reported on updates to the Society's webpage directory. Mr. Flowers thanked Mr. van Gaalen for his extensive effort to create and improve the online payment portal. Mr. Flowers noted that the Society needs a volunteer to take over Mr. van Gaalen's duties as he steps into his treasurer role. Nobody on the call volunteered.

MEMBERSHIP COMMITTEE REPORT:

The Membership Committee consists of Ms. Hunt, Ms. Lieffers, and Ms. Henderson. Ms. Lieffers noted that previous Committee

members Mr. Quatman and Mr. Williams seem to have fully tapped the pool of potential members who have the requisite dual background. If anyone knows of any potential new members, please contact the Membership Committee. Ms. Lieffers stated that the Committee is shifting their focus to the creation of benefits for members as a means of retention. She asked members to offer suggestions and she asked for volunteers to serve on the Membership Committee.

Ms. Harness suggested that the Society should create a member list-serve to facilitate knowledge seeking and sharing. Mr. Flowers acknowledged that this idea had been considered, but technology upgrades would be required to administer this, and volunteers for such efforts have not be forthcoming. The possibility of a third-party administrator was also considered, but confidentiality issues arose.

Ms. Harness suggested that the Society should have its own email address. Mr. van Gaalen reported that this idea had been rejected by the Board for similar reasons of lack of a volunteer to administer the account.

Ms. Lieffers noted that the possibility of over-communication with members is always an issue to consider. She said that the Committee is very open to hearing ideas about how we might help members connect.

EDUCATION PROGRAMS:

Mr. Flowers noted that the Society is an AIA Continuing Education Service (CES) provider and the primary contacts on our AIA account are Mr. Heuer and Ms. Lieffers. Mr. Flowers encouraged members to submit proposals for CES presentations to Ms. Lieffers for AIA approval. Ms. Lieffers noted that it is difficult to qualify our topics for HSW credit and this has diminished the value of normal Learning Units. She noted that she is available to support members who wish to present continuing education programs.

Mr. Heuer noted that the lack of attendance at a Society-sponsored education program at an AIA Conference a few years ago hindered our efforts. He thinks we should interest members in presenting to local AIA components. We should share our knowledge with architects.

New Business:

Mr. Flowers called on Ms. Lieffers to moderate the introduction of members attending the meeting. Each member provided some professional information about themselves and also some personal information to help members get to know one another.

Mr. Flowers asked if anyone had any further business to be discussed. There being no further business, on motion by Ms. Raspa and seconded by Ms. Hunt, the meeting was adjourned at 2:03 p.m. EST.

Respectfully submitted,

Michael J. Bell

Secretary

ATTENDEES OF THE TENTH ANNUAL MEETING OF THE MEMBERS

1. Laura Jo Lieffers
2. Joelle Jefcoat
3. John Works
4. Mark Ryan
5. Chuck Heuer
6. Sonny Shields
7. Michael Bell
8. Cindy Becker
9. Josh Flowers
10. Richard Elbert
11. Steve Kennedy
12. Jaqueline Pons-Bunney
13. Joyce Raspa
14. Suzanne Harness
15. Tim Twomey
16. Ande McMurtry
17. Ricardo Aparicio
18. Donna Hunt
19. Alexander van Gaalen
20. Gracia Shiffrin
21. Julia Donoho
22. Craig Williams

"We hold these truths to be self-evident: that all men are created equal . . . it is the great parent of science & of virtue: and that a nation will be great in both, always in proportion as it is free."
– Thomas Jefferson
Declaration of Independence
July 4, 1776

(Above) The Jefferson family cemetery at Monticello, 931 Thomas Jefferson Parkway, Charlottesville, Virginia. Behind, this fence is the monument over Jefferson's grave.

AIA ISSUES STATEMENT ON THE SUPREME COURT RULING ON RACE-BASED ADMISSIONS STANDARDS

[Editor's Note: On June 29, 2023, the U.S. Supreme Court issued its decision in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 2023 WL 4239254 (U.S. June 29, 2023) that the college's asserted compelling interests for race-based admissions program did not satisfy the requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation]

(Washington – June 29, 2023). "The American Institute of Architects (AIA) and other allied organizations recognize that even with affirmative action, the number of minorities enrolled in our nation's colleges and universities is disproportionate to our demographics. By removing these protections, we are concerned that the impact of underrepresentation may worsen outcomes for everyone.

Equity, diversity, inclusion, and belonging represent our combined core values. We will continue to advocate for inclusive collegiate admissions because its educational benefits are integral to moving the architecture profession forward. Diverse student perspectives and lived experiences will not only enrich the next generation of architects and design professionals, but also shape our world through the built environment they will design. We are committed to the protection of the health, safety, and welfare of the public, which includes ensuring that our future workforce reflects the population it serves."

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