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Monticello

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.

Inside This Issue

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

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

Send his or her name to President Tim Twomey at ttwomey@RTKL.com and we will reach out to them. Must have dual degrees in architecture and law.

AUTHORS WANTED

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

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WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:
By Timothy R. Twomey, FAIA, Esq.
RTKL Associates, Inc.

Welcome to all as we embark on our fourth year of The Jefferson Society! The Annual Meeting in Atlanta on May 13th, just before the AIA Convention, was quite successful. It was a wonderful dinner, a beautiful view of the City of Atlanta, and a great opportunity to connect with folks who share our unique journeys through law and architecture. Almost 20 TJS members attended, plus our dinner sponsors. The variety of experiences and the current activities of our members is a rich source of knowledge and expertise that we hope to share with each other and our professions. We are grateful to Julia Donoho, AIA, Esq. for her efforts to arrange our event. Thank you, Julia.

I would like to thank Chuck Heuer, FAIA, Esq., who chaired the Annual Meeting after dinner, for his successful year as president of The Jefferson Society. As some of you may know, Chuck and a few others worked since the mid 1980's to bring The Jefferson Society into being. It's a great accomplishment and I want to very publicly thank Chuck for "sticking with it" through all these years. I also want to thank Suzanne Harness for again serving as Treasurer for the 2014-2015 year. While it's been a bit of a challenge to get some of our members to pay their dues, small as they are, Suzanne reported that we are nonetheless financially sound going into our fourth year.

I also want to express my gratitude for being elected president for the 2015-2016 year. It's an extraordinary honor that I will cherish. At our Annual Meeting, it was also voted that Suzanne continue as Treasurer for the 2015-2016 years, and that Mehrdad Farivar be Secretary for 2015-2016 and President-elect for 2016-2017. You will see on page 3 of the newsletter a list of the eleven directors who will help give vision to the organization in the coming year. All present at the Annual Meeting offered a brief outline of their careers and interests and upcoming plans. A couple of items: Jeffrey Hamlett is the interim Executive Director of the Seattle Chapter of the AIA and offered his advice/assistance to anyone wishing to conn-

(Continued on page 2)

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

ect with the state chapters for State Govt. Affairs; there is a move afoot to have a group induction into the U.S. Supreme Court (see pp. 8-9); and a 2016 trip to Turkey is also being planned for TJS members by Joyce Raspa-Gore.

There was a discussion of pairing TJS with the AIA's Large Firm Roundtable's Legal Subcommittee on matters of mutual interest.

In addition, the AIA Documents Committee is gearing up for their 2017 release of their major families of core documents.

It may be that TJS, alone or in concert with the LFRT, may wish to have input into the content of those documents. There are, of course, many other potential issues. Your thoughts on these possible initiatives would be appreciated.

Several members mentioned their desire to "be involved" but weren't sure just how to do so. Your thoughts on "how to engage," in addition to "what should be engaged" will be very useful. Harnessing our collective wisdom, knowledge and experience is, itself, an interesting challenge, and I look forward very much to hearing your thoughts and ideas.

Dinner in Atlanta (Left to right): Outgoing TJS President Chuck Heuer is joined by TJS members Josh Flowers and Tim Burrow at the dinner held prior to the Third Annual Meeting of The Jefferson Society. (More pics on pp. 4-5)

Third Annual Meeting Minutes.

The Third Annual Meeting of the Members of The Jefferson Society, Inc., a Virginia non-profit corporation (the "Society"), was held at the Hilton Atlanta (Nickolai's Roof restaurant) beginning at 7:00 pm on May 13, 2015. Mr. Twomey served as secretary of the meeting. Also attending were two guests from Rimkus Consulting which had graciously agreed to underwrite part of the cost of the Meeting. President Chuck Heuer opened the meeting, determined that a quorum was present, and called the meeting to order as the annual meeting of the Members.

PRIOR MINUTES: The minutes of the June 25, 2014 annual meeting were approved by motion of Mr. Twomey, seconded by Mr. Williams, as printed in the Society's newsletter in July 2014.

PRESIDENT'S REPORT: Mr. Heuer reported on the previous actions since the last annual meeting in June 2014. Mr. Heuer thanked Suzanne Harness for her work as Treasurer and Mr. Quatman for his work on the quarterly newsletter. Mr. Heuer then thanked Julia Donoho for her excellent work in planning the annual meeting.

TREASURER'S REPORT: Ms. Harness reported on the finances of the Society. Ms. Harness also mentioned, as has been previously reported, that the Society has been approved by the IRS for 501(c)(3) status.

ELECTION OF OFFICERS AND DIRECTORS: President Heuer then announced that the next item of business was the election of officers. It was announced that the following candidates had been nominated as officers of the Society for the coming year 2015-2016:

President: Timothy R. Twomey, FAIA, Esq.;

Treasurer: Suzanne H. Harness, AIA, Esq.; and,

President-Elect/Secretary: Merhdad Farivar, FAIA,Esq.

Mr. Heuer asked for any other nominations from the floor. There being none, it was moved by Mr. Williams and seconded by Mr. Flowers, that the slate of officers be adopted as presented. The slate was adopted by unanimous vote of the Members attending. The newly elected officers were congratulated in person. Mr. Heuer then announced that the By Laws provide for eleven (11) positions on the Board of Directors. Four directors were originally elected to serve 3-year terms, with seven directors elected for 2-year terms. Those seven directors' terms were about to expire, so seven positions were to be filled this year. The following directors will remain on the Board:

Remaining 1-year terms, 2015-16:

- Charles R. Heuer, FAIA, Esq. (The Heuer Law Group)
- G. William Quatman, FAIA, Esq. (Burns & McDonnell Eng. Co., Inc.)
- Timothy R. Twomey, FAIA, Esq. (RTKL Assoc., Inc.)
- R. Craig Williams, AIA, Esq. (HKS Architects)

Of the directors whose terms were expiring, Messrs. Inabnet and Cole declined to run again. However, Eric O. Pempus, AIA, Esq. and Scott M. Vaughn, AIA, Esq. expressed their interest. Therefore, the slate of candidates for **2-year terms, 2015-17,** was:

- D. Wilkes Alexander, AIA, Esq. (Fisk Alexander)
- Timothy W. Burrow, Esq. (Burrow & Cravens, P.C.)
- Julia A. Donoho, AIA, Esq. (Legal Constructs)
- Mehrdad Farivar, FAIA, Esq. (Morris, Povich &

(continued on p. 4)

2015-16 Jefferson Society's Officers and Directors

Officers (1-year term, 2015-16)
President: Timothy R. Twomey, FAIA, Esq. (RTKL Associates, Inc.)
Treasurer: Suzanne H. Harness, AIA, Esq. (Harness Law, LLC)
President-Elect/Secretary: Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy)

Directors
(Remaining 1-year terms, 2015-16)
1. Charles R. Heuer, FAIA, Esq. (The Heuer Law Group)
2. G. William Quatman, FAIA, Esq. (Burns & McDonnell Engineering Co.)
3. Timothy R. Twomey, FAIA, Esq. (RTKL Associates, Inc.)
4. R. Craig Williams, AIA, Esq. (HKS Architects)

(Remaining 2-year terms, 2015-17)
5. D. Wilkes Alexander, AIA, Esq. (Fisk Alexander)
6. Timothy W. Burrow, Esq. (Burrow & Cravens, P.C.)
7. Julia A. Donoho, AIA, Esq. (Legal Constructs)
8. Mehrdad Farivar, FAIA, Esq. (Morris, Povich & Purdy, LLP)
9. Donna Hunt, AIA, Esq. (Ironshore)
10. Eric O. Pempus, AIA, Esq. (Oswald Companies)
11. Scott M. Vaughn, AIA, Esq. (Vaughn Associates)

Annual Meeting (cont'd)

Purdy, LLP)
- Donna Hunt, AIA, Esq. (Ironshore)
- Eric O. Pempus, AIA, Esq. (Oswald Companies)
- Scott M. Vaughn, AIA, Esq. (Vaughn Associates)

Mr. Heuer asked for any other nominations from the floor. There being none, it was moved by Mr. Williams and seconded by Mr. Flowers, that the slate of directors be adopted as presented. The slate was adopted by unanimous vote of the Members attending. The newly elected directors were congratulated in person.

OLD BUSINESS: None.

NEW BUSINESS: Outgoing president Chuck Heuer then presented newly - elected President Tim Twomey with his president's gavel, and Mr. Heuer and Mr. Twomey then led a discussion of the Members on their ideas and goals for the Society. In particular, there was discussion about the lack of interest by certain publications on our offer to provide articles of interest to their publications. It was also discussed that TJS may want to coordinate with the AIA's Large Firm Roundtable Legal Subcommittee on matters of mutual interest.

Next Meeting. President Heuer stated that the dates for future Board meetings would be established.

There was brief discussion of moving the date of the 2016 Annual Meeting from the night before the AIA Convention, but in the end it was decided to continue with that point in time. Since the 2016 AIA Convention will be held on May 19-21, 2016, the TJS Annual Meeting will he held on **May 18, 2016** at a place yet to be determined. There being no further business, on Motion duly made and seconded, the meeting was adjourned.

(above) Joyce Raspa-Gore, Jacquie Pons-Bunney and Donna Hunt enjoying a salad; (below) TJS Members Suzanne Harness and Tim Gibbons.

TJS Members at the 2015 Annual Meeting:

Dennis Bolazina
(St. Louis, MO)

Jacquie Pons-Bunney
(Laguna Hills, CA)

Tim Burrow
(Nashville, TN)

Julia Donoho
(Windsor, CA)

Merdad Farivar
(Los Angeles, CA)

Josh Flowers
(Memphis, TN)

Tim Gibbons
(Chattanooga, TN)

Jeffrey Hamlett
(Mukileto, WA)

Suzanne Harness
(Arlington, VA)

Chuck Heuer
(Charlottesville, VA)

Donna Hunt
(Boston, MA)

Mike Koger
(Washington, D.C.)

Rebecca McWilliams
(Quincy, MA)

Eric Pempus
(Cleveland, OH)

Joyce Raspa-Gore
(Leonia, NJ)

Gracia Schiffrin
(Chicago, IL)

Tim Twomey
(Baltimore, MD)

Craig Williams
(Dallas, TX)

(clockwise from above left) TJS Members Merdad Farivar, Gracia Schiffrin and Eric Pempus enjoying the rooftop view at the Nickolai's Roof restaurant on the 30th floor of the Hilton Atlanta; (below) Jeffrey Hamlett, Rebecca McWilliams, Dennis Bolazina and Craig Williams (past president TJS).

Membership Update!

The Jefferson Society has 103 Members, which includes: 12 Founders, 89 Regular Members, and 2 Associate Members.

Please Welcome Our 2 Newest Members!

The following have joined since our last Newsletter:

MEMBERS:

Joseph E. Flynn, AIA, Esq.
Joseph E. Flynn Architect, LLC
River Rouge, LA

John W. Hofmeyer, IV, Esq.
Law Office of John Hofmeyer
Iowa City, IA

Do you know of someone we've overlooked? Please help us to recruit those potential members who hold dual degrees in both architecture and law.

Send their names to:

Tim Twomey, FAIA, Esq.
President
The Jefferson Society, Inc.
ttwomey@RTKL.com

Tennessee: Statute of Repose Ran Despite Possible Concealed Defect.

A plaintiff sued the owner, its engineer and architect claiming that the absence of lead shielding in a portion of the radiology facilities in the new emergency department at Methodist Hospital caused him to suffer physical damages from excessive radiation exposure. Apparently one panel of lead-lined Sheetrock was left out of the x-ray room. The defendants filed motions for summary judgment based on the Tennessee **four-year** statute of repose. The trial court granted the motions and the plaintiff appealed arguing that the statute of repose did not run because the absence of the required shielding in the radiology facilities meant the project was not "substantially completed" on the date found by the trial court. The Court of Appeals ruled, however, that even if the radiology facilities were defective, they were substantially complete if used for their intended purpose. The summary judgment was affirmed.

The project was substantially completed and opened in February of 2006, and was substantially complete to the point of making it available for its intended use as an emergency room no later than March, 2006, but suit was not filed until January 2013, close to **seven years** later. There was no allegation of fraud or wrongful concealment.

Under the Tennessee statute of repose, "Substantial completion means that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended." Substantial completion may be established by written agreement between the contractor and owner. The trial court found that from March 2006 till Dec. 2013, the facility was used for the purpose for which it was intended. "It was an x-ray room, it was a CT room, and that's what it was used for," said the judge.

The Court of Appeals held that, "The fact that a construction defect exists and goes unnoticed does not in itself constitute fraud or wrongful concealment. To hold otherwise would mean that most every construction defect could be considered a species of fraud which would, once again, vitiate the intention and purpose of the construction statute of repose." *Phillips v. Covenant Health*, 2015 WL 3563108 (Tenn. App. 2015).

Minnesota: Engineer Protected by "Official Immunity" When Functioning as City Official.

A city hired a developer to build townhomes, with the city agreeing to design and construct various improvements, including storm sewers, ditches, water-retention ponds, erosion-control measures, and street grading. The city engineer was to determine when the improvements had been satisfactorily completed, "subject to review and approval of the City Engineer." The city outsourced the "city engineer" role to a private engineering firm that designed and approved the storm-drainage improvements for the development to adequately handle a "once-every-ten-years" rain event. Plaintiffs lived on property adjacent to the development, and their property flooded after a rainstorm, resulting in damage to their home. They sued the city, alleging that the city had been negligent by designing, approving, and constructing an inadequate storm-drainage system. The trial court granted the city's motion for summary judgment on the negligence claims, holding that the city was immune from suit for its regulatory approval of the storm-drainage design under Minn. Stat. § 466.03 (6). It also ruled that the city was vicariously immune to the negligent - design claim because the engineer was immune under the common-law doctrine of official immunity for its design work while acting as the city engineer. The trial court also ruled, however, that neither statutory nor common-law official immunity barred the claim for negligent construction.

On appeal, it was held that the common law doctrine of official immunity provides that "a public official who is charged by law with duties calling for the exercise of judgment or discretion is not personally liable to an individual for damages unless the official is guilty of a willful or malicious act." Plaintiffs did not dispute that, but argued that, as a contractor, the engineering firm did not qualify as "a public official" eligible for the protections of official immunity. The question was one of first impression in Minnesota.

The Court of Appeals noted that, "an architect prepares blue-prints," [sic] and a builder executes the "specific duty arising from the design specified by those blueprints * * * Although the role of builder undoubtedly involves application of considerable skill and expertise, it cannot be said to be the same kind of discretion vested in the architect. The architect's role is professional, the builder's ministerial. Accordingly, armoring the architect with official immunity does not require also armoring the builder." The court affirmed summary judgment to the city on the negligence claims and extended that ruling to the nuisance claims as well. See, *Kariniemi v. City of Rockford*, 2015 WL 2341138 (Minn. App. 2015).

New York: Contractor Sues Designer Whose Spec (Wrongfully) Excluded Its Product!

In this 2015 New York case, an artificial-turf installer sued a landscape architect for tortious interference with contract and tortious interference with prospective business over a public college athletic fields projects. The contractor argued that the architect used narrowly drafted specifications to favor a competitor's product. The trial court dismissed the lawsuit and the contractor appealed. In a surprising ruling, the Supreme Court, Appellate Division, reversed! On the face of the lawsuit, the Court held that the installer adequately stated causes of action for tortious interference with contract and prospective business.

The plaintiff in this case installs artificial turf on athletic fields using "FieldTurf," a competitor to "A–Turf." The State University of New York ("SUNY") hired a landscape architect to prepare bid specifications for an artificial turf field at the university. The bid specs required A–Turf "or an approved equal." The architect rejected samples of plaintiff's FieldTurf submitted as not meeting the specs. When the contract was awarded to the A-Turf supplier, the same architect was hired as a consultant on two other projects involving installation of artificial turf, one at SUNY Brockport and another at the City School District of the City of Niagara Falls. The defendant allegedly again used specifications that were narrowly drafted to specifically favor A–Turf and did so despite protests from the plaintiff. A–Turf was ultimately installed at these projects. The FieldTurf installer then sued, alleging tortious interference with contract as to the SUNY Cortland project and tortious interference with prospective business as to the other projects. In reversing the dismissal of the lawsuit, the appellate court held that, "the laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders." However, a narrow exception to the limited remedy may exist where a plaintiff does not seek relief from the public entity, but brings an action against someone working on behalf of the public entity in the competitive bidding process who allegedly engaged in egregious conduct unknown to the public entity aimed at intentionally subverting a fair process. The court found that the allegations of restricting competition to artificial turf manufactured by A–Turf could be part of a cognizable claim under that narrow exception. See, *Chenango Contracting, Inc. v. Hughes Assoc., Landscape Architects PLLC,* 2015 WL 2095815 (N.Y.A.D. 3 Dept.).

TJS Member Donna Hunt (third from left) with Justice Ruth Bader Ginsburg

My Day at the United States Supreme Court.

By Donna Hunt, AIA, Esq.
Ironshore
Boston, MA

Like many members of the Jefferson Society, I sometimes look back and think to myself, "Wow, did I really do that?" May 4, 2015 was one of those times. On that day, I was admitted to the United States Supreme Judicial Court and I have to say that it was a truly memorable and surprisingly enjoyable experience. I was a part of a large group admission made up of members of ACEC's (American Council of Engineering Companies) Legal Counsel Forum. Twenty-two attorneys participated and all felt that the experience far exceeded anything they imagined. The morning began at 8:00 AM with entry into the Court through a series of metal detectors and a formal escort down a column-lined entry hall that ended at an enormous sitting statute of Thurgood Marshall. U.S. Supreme Court marshalls stood post every few feet asking that people speak in a whisper (a feat very difficult for most attorneys). After the four groups scheduled for admission were assembled in the hall, we were escorted up to the floor that housed the courtroom. To the left and right of the courtroom were several large beautiful anterooms with walls lined with original portraits of former justices. The Court clerk informed the group on Court protocol, instructing all to remain silent as soon as we crossed the threshold into the courtroom. All of the guests were lined up and given a pass to present to the U.S. Supreme Court marshalls upon entry into the Court, which was through yet another set of metal detectors.

It was truly an overwhelming experience to walk into the courtroom and file into the seats reserved only for those admitted to the United States Supreme Court Bar. At exactly 10:00 AM a gavel banged and the clerk cried "All Stand". The drapes behind the bench parted and six justices walked in and took their seats. Chief Justice Roberts began by reading an opinion and then the Court Clerk announced that the Court would now hear the motions of admission to the United States Supreme Court. The ceremony was brief but very formal. Every justice paid attention as each name was announced, (not a single justice was checking of emails or doodling).

When the ceremony ended we went back to the anteroom. I happened to be standing near the door and felt the presence of someone coming up behind me; I turned and was looking right at Justice Ruth Bader Ginsburg who was inches away. She said, "I came to congratulate you and your group". Luckily I did not pass out and was able to smile and say, "Thank you, we are honored that you have come here with your wishes." Luckily others saw what was going on and gathered around Justice Ginsburg. She asked if we would like a picture taken with her and, of course, we did. After a group picture and a separate picture with just the women, Justice Ginsburg turned and asked Beverly Tompkins from Simpson Gumpertz & Hegar if she could have a muffin. Beverly eagerly produced a plate of muffins for Justice Ginsburg and was very sad when Justice Ginsburg gestured for her assistant to carry the muffins. I think the plate had to be pried out of Beverly's hand!

This was such a wonderful experience that I have arranged for a group of up to 50 to be admitted in a large group ceremony **on November 13, 2017**. Yes, seems like a very long time away but, believe me, it goes by quickly. TJS member Julia Donohue has arranged for herself and fellow TJS members Yvonne Castillo, Josh Flowers, Jason Philips and Craig Williams to be admitted on December 2, 2015. I am sure they will have wonderful stories to tell at our next TJS Annual Meeting.

There are currently 22 people signed up for the November 2017 Admission Day. If anyone else is interested please send me an email and I will add your name to the list. Approximately 8 months prior to the admission day I will send detailed instructions on what is required to everyone interested. I anticipate submitting all applications in one package in August 2017.

ARE YOU INTERESTED IN BEING ADMITTED TO THE UNITED STATES SUPREME COURT?

Anyone interested in being admitted on Nov. 13, 2017, please send an email to Donna at: donna.hunt@ironshore.com.

Details to follow.

Indiana: AIA Waiver of Subrogation Clause Upheld to Bar Claim Against Contractor.

The county entered into an AIA construction contract with a general contractor for courthouse renovations. A fire destroyed much of the courthouse when a roofing subcontractor was soldering copper downspouts near the wood frame of the courthouse. The damages far exceeded the remodeling costs, but were fully covered by the county's property insurer, which paid the county under its policy after the fire. The county filed a subrogation claim (presumably on behalf of its insurer, St. Paul) against the general contractor and subcontractors, alleging negligence, breach of implied warranties, and breach of contract, claiming that a subcontractor's negligence was the primary cause of the fire that occurred during the renovation, damaging the courthouse. The defendants filed motions for summary judgment, arguing that the county had agreed to provide property insurance for the project, and that the county had waived its subrogation rights against them and, thus, was not entitled to recover damages. The county argued that it had waived subrogation rights only for damages to "the work"—not non-work property. The trial court granted summary judgment to defendants, upheld on appeal. The county petitioned to transfer to the Indiana Supreme Court, which affirmed, holding that as a matter of first impression, under the standard form AIA agreement (oddly, the 1987 edition), the waiver of subrogation extended to all damages, even to "non-work property."

The Supreme Court explained that the parties waived subrogation rights by incorporating an AIA standard form into their contract for the repair of the county courthouse. The AIA contract waives subrogation rights for all "damages caused by fire or other perils to the extent covered by property insurance." Because the contractors showed that the county's insurance covered all damages, the subrogation waiver applied to bar the claim.

The Court stated, "The AIA subrogation waiver is well-known in the construction industry and it plays a critical role in the AIA contract's scheme of remedying construction losses through insurance claims, not lawsuits." The Court adopted the "any insurance" approach to the AIA waiver, stating that, "it reflects the plain and unambiguous meaning . . . the waiver applies to all damages." *Board of Com'rs of County of Jefferson v. Teton Corp.*, 30 N.E.3d 711 (Ind. 2015).

MEMBER PROFILE: HOLLYE C. FISK, FAIA, ESQ.

TJS Member Hollye C. Fisk, FAIA, Esq. grew up in a family of electrical contractors and from at least age twelve he decided he wanted to be an architect. Hollye attended architecture school at the University of Texas at Austin from 1965 to 1970, graduating with a B. Arch. with honors. While working for an architect in Houston summers and holidays, he developed an interest in real estate development and decided that he would go to law school after architecture school to get a real estate law background and then return to Houston to practice as a real estate developer.

"I attended law school at the University of Texas from 1970 to 1972," Hollye said, "and when I graduated, the economy destroyed my real estate development plan. I got married, moved to Dallas and continued my career in architecture with the firm of Jarvis, Putty, Jarvis." He became licensed as an attorney in April of 1973 and as an architect in February of 1974. While working as a project architect, Hollye became more interested in the legal aspects of architectural practice and eventually decided that he would switch over to the practice of law. "I made that switch over in 1976 and worked to develop a reputation in the architectural community as an attorney representing the interest of architects and engineers. My big break-through came unexpectedly in the early 1980's when I represented a large chemical corporation, as a plaintiff's attorney in relation to defects and deficiencies at their new corporate headquarters in Dallas, Texas." After doing discovery in that litigation for approximately a year, the case was called to trial and ended up settling at jury selection. Approximately six months after that, Hollye received a phone call from the risk manager of the architectural firm involved who indicated that he did not want Hollye on the other side of one of their cases again! "He transferred a file to me for representation," Hollye recalled, "and that was my introduction to one of the major professional liability insurance carriers and launched my career as a trial lawyer defending A-E malpractice claims." Today, defending such claims is essentially 100% of his law practice and his firm works with 18 professional liability insurance carriers defending architects and engineers.

The best part of his job? Hollye said, "That must be answered on several levels. In the broad picture, the best part is helping design professionals manage risk and resolve claims. From a personal enjoyment standpoint, it is being in the courtroom presenting evidence and argument to a jury and/or to an arbitration panel. In my 40 year career, I have tried over 150 disputes in jury trial and/or arbitration and I remain active as a trial lawyer throughout the State of Texas and in other states, on occasion."

Hollye Fisk has remained active with the professional societies in architecture and law, primarily in presenting educational programs focused on the education of design professionals regarding their legal responsibilities and the education of others about architects and engineers. That was the category for his submission, and ultimate acceptance, as a Fellow in the American Institute of Architects in 1991. Hollye has also, for many years, served as special counsel and advisor to the Texas Society of Architects and the Dallas Chapter of the American Institute of Architects.

Hollye has been married to his wife Susan for 42 years (see photo on p. 11) and the couple has two sons, who are both trial lawyers and who, on occasion, Hollye opposes in the courtroom! His sons are both married to lawyers so Susan Fisk, his wife, the English major, has to contend with five lawyers in the immediate family! One of their sons has three boys, Brennan age 4, and twins Owen and Conner, age 2 (see photo, below right). "Our older son and his wife have given us the first girl in the family in two generations, Scarlett, age 5 months. We are currently looking forward to a family vacation (all 10 of us) in Santa Fe, New Mexico - should be an experience!" he said with a broad smile.

"My wife and I met at the University of Texas when I was in architecture school and married when I was in law school, though at that time I was continuing to work, near full time, for an architecture firm in Austin. Accordingly, for the most part, she knew me as an architect rather than a lawyer in those early days of marriage. Her favorite quote looking back is: I married a sensitive architect and ended up with an asshole lawyer!"

Hollye's favorite building/ favorite architect? "There are many, however, I would have to list the Kimbell Art Museum in Fort Worth, Texas by Louis Kahn."

As far as advice for a young lawyer thinking about law school, Hollye said, "Think out of the box. Both the practice of architecture and the practice of law should not be considered within the confines of usual definitions. While most people think of me as a trial lawyer, I would argue that I practice architecture every day, and enjoy every minute of it!"

(above) Hollye and Susan (his wife of 42 years); (below) twin grandsons Owen & Conner (age 2).

DBIA Releases New Set of Surety Bonds.

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

In 1998 the Design-Build Institute of America (DBIA) began publishing its family of contract forms. Not having the century of history that the AIA had in publishing forms, DBIA eventually recognized that there were gaps in its menu of available documents. Project owners and DBIA members were using surety bond forms produced by other organizations, and not necessarily appropriate for design-build. This gap needed to be closed, and so an effort began over two years ago as the DBIA Contract Documents Task Force identified forms missing from its family of documents and forms missing in the industry overall. That analysis led to the development of 14 new surety forms listed in the table (above-right), all of which were published in early 2015. The new forms include eight new bond forms, covering various stages of a design-build project and several contract arrangements, as well as six "consent of surety" forms related to partial release of retainage and final payment.

The New DBIA Bond Forms	
DBIA Form Name	**Doc. No.**
Proposal Bond	610
Warranty Bond	615
D-B Performance Bond	620
D-B Payment Bond	625
Sub-Performance Bond	630
Sub-Payment Bond	635
GC Performance Bond	640
GC Payment Bond	645
Surety Consent/Partial Retainage to D-B	500D6
Surety Consent /Final Payment to D-B	500D7
Surety Consent/Partial Retainage to Sub	500D6S
Surety Consent/Final Payment to Sub	500D7S
Surety Consent/Partial Retainage to GC	500D6GC
Surety Consent/Final Payment to GC	500D7GC

Early in the drafting of these bonds, DBIA reached out to NASBP and SFAA for input. "We want these bonds to be used in the industry and knew that we needed input from those who sold and underwrote surety bonds. So we reached out to NASBP and SFAA," said Lisa Washington, Executive Director of DBIA. Both organizations were eager to assist, lending assistance in drafting and "brain-storming" about the unique aspects of design-build and the concerns of sureties, owners, design-build firms and design professionals. It was not always easy, and in fact a few times negotiations broke down. But in the end, the drafters reached a consensus on language that serves all parties' interests and will benefit the industry. All of the above forms have been endorsed by both NASBP and SFAA for use by their members.

DBIA Performance Bond.

Starting with the new DBIA Performance Bond, Document No. 620 (2015 ed.), we see there are many important differences from other existing form families. AIA does not yet publish any bond forms specifically for design-build, so we only have the AIA A312 (2010 ed.) Performance Bond for comparison. EJCDC publishes its D-610 (2009 ed.) and Consensus DOCS publishes two forms, the 470 and 471 (2007 ed., revised 2011). Here are some of the major differences:

Design Liability. The difference in the two ConsensusDOCS performance bonds is found in one paragraph. The 471 bond is subtitled "Where the Surety is NOT Liable for Design Services" and contains a paragraph that reads as follows: "NO LIABILITY FOR DESIGN. Pursuant to Article 2 of the Bond, the Surety shall be liable for all construction costs of the Work, up to the Bond Sum, but shall not be liable for any costs or damages arising from design services provided pursuant to the Contract." The 470 bond, on the other hand, is subtitled "Where the Surety is Liable for the Design Costs of the Work" and includes Section 3, which states as follows: "LIMITED LIABILITY FOR DESIGN. This Bond shall cover the costs to complete the Work, but shall not cover any damages of the type specified to be covered by the Design - Builder's Liability or by the Professional Liability Insurance required pursuant to the Contract, whether or not such insurance is provided or in an amount sufficient to cover such damages."

EJCDC's bond form D-610 contains a similar Section 12, stating as follows: "Surety's performance obligation includes completion of the design responsibilities of Design/Builder. However, Surety shall not be liable for damages of the type specified to be covered by design/builder's liability insurance required by the Contract Documents even if such insurance was not obtained or is not sufficient to cover the damages." AIA's A312 contains no similar language but, again, it is not intended specifically for design-build projects.

What do these statements really mean? Both ConsensusDOCS 470 and EJCDC D-610 bonds are clear that, if the bonded design-builder defaults, the surety will step in and complete the work, including any remaining design services. However, if there are bonded obligations to indemnify or pay for damages caused by design errors or omissions, these bonds exclude that coverage if they are the types of damages normally covered by professional liability insurance. EJCDC's disclaimer is even broader, excluding damages covered by any insurance the design-builder is required to carry. Faced with this same question, DBIA took a more holistic approach to the performance bond, with no exclusion or limitation for design errors or omission. In practice, this means that the DBIA bond covers all of the bonded design-builder's obligations, whatever those are, including payment for damages caused by design errors or omissions.

Of course, most design-builders require their design subconsultants to carry professional liability insurance; and most owners require this as well in the prime design-build contract. There are few design firms operating in the design-build market today that are uninsured. This does not mean the surety is now the insurer for the design firm, and the parties will still look to the E&O coverage of the design firm. But if that coverage is insufficient, contains exclusions, or is depleted by other claims, the surety (like the design-builder) is liable to the owner, subject to any requirements of the bond.

DBIA Payment Bond.

Comparing again the AIA, EJCDC and Consensus DOCS payment bonds to the new DBIA form 625 (2015 ed.), we see that there is a difference in whether a design subconsultant to a design-builder can make a valid claim on the bond. With traditional design-bid-build construction projects, certain subs and suppliers have payment protection under the contractor's payment bond. On design-build projects the same is true, however, not necessarily for design consultants. We see that most design-build teams are led by a contractor (design-builder) that subcontracts with architects and engineers who provide design "services." The average labor and material payment bond covers only that, "labor and material." In a 1994 Arizona case, an architectural firm was denied recovery of over $14,000 in fees under the contractor's bond because the payment bond covered only "labor, materials, or construction equipment." The court held that professional architectural services are not "labor or material." *Fields Hartwick Architects v. Capitol Indem.,* 884 P.2d 198 (Ariz. App. 1994). Consensus DOCS publishes two forms, the 472 and 473 (2007 ed., revised 2011), one where the surety "is liable" for design costs and the other where the surety "is NOT liable" for such costs. The difference lies solely in the addition of the word "services" to the list of "labor, materials or equipment" furnished by a claimant. The new DBIA payment bond not only includes "services" within the scope of things a claimant may furnish, but also adds in Section 10.1 the following: "A Claimant may include amounts owed by the Design-Builder for design and other professional services furnished or performed by Claimant regardless of whether such services might form the basis for a mechanic's lien under applicable State law."

DBIA Warranty Bond.

Renewing bonds, such as a long-term warranty bond, has created considerable litigation for decades. Courts find the bonds are either "cumulative" (where you add the penal sum for each renewal together) or "continuous" (where it is one penal sum for the duration). Legal comment-

(continued on p. 14)

(DBIA Bonds, cont'd)

ators opine that the language of the bond is key to solving the issue in each case. A recent Ohio case addressed this topic and held as follows regarding a continuous bond: "If there is a three year bond and violations during each of those years, for example, the aggregate liability under that single bond is still limited to the penal sum of the bond." The court in this case found that the bond was continuous, not cumulative. *Murray v. Fidelity and Deposit Co. of Maryland,* 2013 WL 4431242 (N.D. Ohio 2013).

Without clarification, however, each renewal may be seen as a new bond, with fresh penal limits. This suggested to DBIA, NASBP and SFAA that we need a clarification and that silence is not enough for this long-term warranty bond. Taking a cue from a 1973 Illinois case, the new DBIA Warranty Bond contains a paragraph that states: "If this Bond is renewed by the Surety, it shall be considered one continuous bond and in no event shall the total amount of the Surety's liability exceed the penal sum set forth herein. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Surety under this Bond with respect to any Claim or Claims shall not be cumulative in amounts from year to year or from period to period." *See Santa Fe General Office Credit Union v. Gilberts*, 299 N.E.2d 65 (Ill. App. Ct. 1973) (bond was held to be a continuous bond, not cumulative). This should give sureties more comfort in issuing long-term, renewing warranty bonds using the DBIA form.

Bankruptcy Proceedings.

If a design-builder declares bankruptcy and a bond claimant is compelled to sue a surety, there can be a dilemma if the state law requires a judgment against the bonded principal before the surety can be found liable. This requires seeking leave of the automatic stay in bankruptcy to sue the bonded contractor or subcontractor solely to pursue the surety bond. DBIA proposed that the surety agree that such a procedure is not required, and NASBP and SFAA agreed. Thus, we find in the DBIA bonds a provision not found in the AIA, EJCDC or ConsensusDOCS, which states as follows: "In the event of bankruptcy of the Design-Builder, the Surety agrees that the Design-Builder is not a necessary or indispensable party to any legal action by any party against Surety to enforce the Surety's obligations under this Bond."

How To Get The Bonds?

To obtain the new bond forms, visit www.dbia.org and click on the tab "Books & Contracts." NASBP and SFAA members are entitled to complimentary copies of the 14 bond forms, courtesy of DBIA, by contacting their respective member services.

Florida: What?! Statute of Repose Runs at "Contract Completion," i.e. When Payment is Made!

This odd 2015 case answered the question whether the statute of repose commences to run when construction is completed or when the contract is completed, which, in this case, was the date on which payment was made. Relying on the language of the preamble to the statute, the trial court concluded that the former was the correct interpretation, and dismissed the lawsuit. However, the Florida Court of Appeals reversed, holding that the correct interpretation of the statute is discerned from its unambiguous text, rather than the preamble: "that the statute of repose commenced to run when the contract was completed."

This was a $15 million condo defect case, in which the condo association sued various defendants who had been involved in the original construction of the condominium buildings and/or the subsequent conversion of the buildings from apartments to condos. Only one defendant ("Da Pau") remained after all others settled. Da Pau moved to dismiss or for summary judgment, primarily arguing that the ten-year statute of repose barred the suit. Da Pau argued that the contract was completed on Jan. 31, 2001, the date on which the Final Application for Payment was made. The condo association argued that the contract was not completed, and that the statute of repose period did not commence to run, until Feb. 2, 2001, when final payment was actually made.

This 3-day difference is critical here because the claims against Da Pau were not filed until Feb. 2, 2011.

The appellate court held that, "Completion of the contract means completion of performance *by both sides of the contract, not merely performance by the contractor.* Had the legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated. It is not our function to alter plain and unambiguous language under the guise of interpreting a statute." Accordingly, it concluded that the statute of repose commenced to run on the date of completion of the contract, which, in this case, was the date on which final payment was made under the terms of the contract. The case was reversed. See, *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.,* 2015 WL 2129473 (Fla. App. 5 Dist. 2015).

Editor's Note:

This is a bizarre ruling. It is the intent of a repose statute that claims for defects are cut off a set number of years after the work is finished. This ruling would allow a payment dispute, or a delinquent owner, to postpone the start of the statute indefinitely. What does payment have to do with the completion of construction work? It seems that our friends in Florida need to go to the state legislature to change the wording from "when the contract was completed" to "when the work was completed." Agreed?

Piercing the Corporate Veil: Architect Held Personally Liable!

This 2015 Michigan case should send a chilling message to small architectural firms about the importance of following corporate formalities. In this case, an individual architect and his firm were found jointly liable for over $156,000 to a developer on a $19.5 million light industrial office space project. The architect appealed, claiming the court erred when it disregarded the company's separate existence from its owner, and held the firm's owner *personally liable* for an earlier judgment against the firm. The ruling was upheld on appeal.

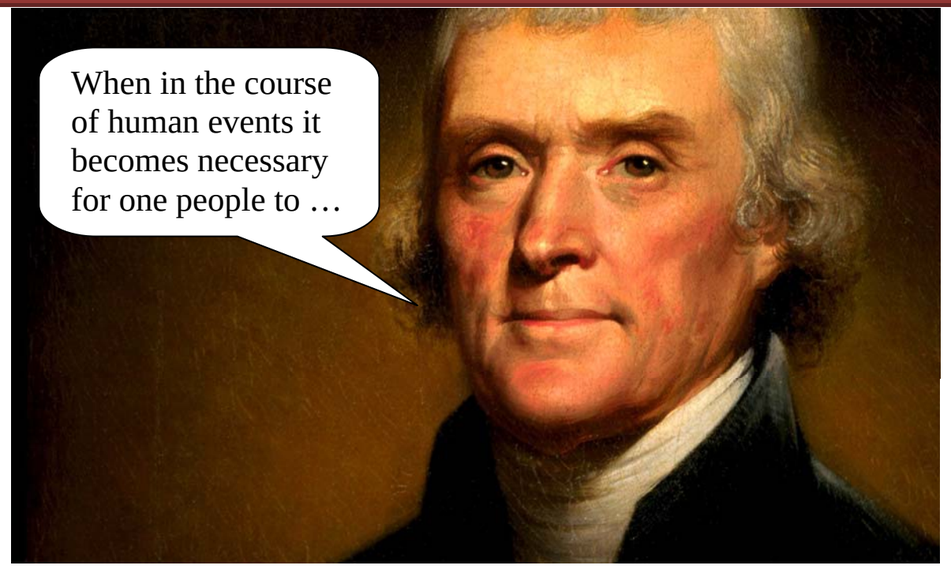
The sad story began when the developers met with the architect to discuss using his company as the architectural firm, and using his affiliated construction firm to build the project. The architectural firm was hired for a fee of about $1.4 million. When disputes broke out among the developer's partners and the architect, all agreed to submit all their claims, including the dispute with the architectural firm, to arbitration. The arbitrator entered an award against the firm for $156,313. After judgment was entered on the award, a creditor's examination of the architect proved that the firm had no assets and only $400 in accounts receivable; that, with the exception of a small project for a relative, the firm had not done any architectural work in so many years that he could not remember how long it had been. The firm's owner was also the sole director, and officer. The architect had loaned $391,000 to the firm, which was not evidenced by a promissory note and was not repaid, yet the firm paid his automobile leases, auto insurance premiums, and his cell phone and travel expenses. He filed losses on his personal income for the expenses incurred by the firm and in a 3-year span, deducted $151,000. After the judgment, the architect formed a new firm that bought all of the assets of the old firm (filing cabinets, drafting boards, tables and other officer equipment) for $3,900. The equipment, he stated, was properly valued despite the fact that it was listed as worth $89,690 on a tax return two years earlier.

The developers argued that the firm was a "sham corporation," which existed solely to meet the architect's personal needs and shield him from liability. The trial court agreed that the architect abused the corporate form by using the firm "as a mere instrumentality or as his alter ego" and used the firm to "commit a fraud or illegality" and resulted in an unjust loss.

The Court of Appeals concurred, saying, "The trial court did not err when it disregarded [the firm's] separate existence and made [the architect] personally liable for the judgment."

The case is *Green v. Ziegelman*, 2015 WL 2142690 (Mich. App. 2015).

The Courts Continue to Quote Thomas Jefferson.



We thought it would be interesting to see how often President Jefferson is still quoted by courts today. So, we ran a Westlaw search just for the first six months of 2015. To nobody's surprise, Thomas Jefferson is quoted often by judges in the majority and minority. Here are a few of those quotes from cases in early 2015:

- In a Texas Supreme Court inverse condemnation case, Justice Lehrmann quoted the 3rd U.S. president in his dissenting opinion, writing: "[A]ware of the tendency of power to degenerate into abuse," Thomas Jefferson said that "our own country [has] secured its independence by the establishment of a constitution and form of government for our nation, calculated to prevent as well as to correct abuse." Justice Lehrmann went on to observe, "Recognizing the same need to set in stone the limits on government's capacity to invade certain essential rights, Texans have adopted state constitutions to restrict governmental power. In that sense, the constitutional bedrock underlying and supporting Texas' legal system assumes both the possibility that the government will abuse its authority and the wisdom of curtailing that abuse from the outset." *Harris County Flood Control Dist. v. Kerr*, 2015 WL 3641517 (Tex. 2015).

- In a Massachusetts case decided on Thomas Jefferson's birthday (April 13, 2015), the court stated that courts should exercise restraint in becoming involved in disputes between other branches of government. "In this regard, we ought be reminded of the words of Thomas Jefferson, who wrote: 'An elective despotism was not the government we fought for, but one which should not only be founded on true free principles, but in which the powers of government should be so divided and balanced among general bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others.' " *Graves v. Hawke*, 2015 WL 2062188 (Mass. Super. 2015).

- In a 2015 New Jersey case, when parents of an atheist student sued a school district, alleging the district violated the student's equal protection rights under the state constitution by following mandates of state statute requiring school students to recite pledge of allegiance to United States flag, the trial court granted summary judgment to the district. In holding that the statute did not implicate religious freedom, as could support equal protection challenge, the court quoted President Jefferson, saying, "In no way is religious freedom implicated in the recitation of the pledge of allegiance from either a historical or practical perspective. The founding fathers embraced the then novel concept that a person could worship as he or she pleased without fear of prosecution, or persecution; but that freedom, as Thomas Jefferson wrote in his Notes on the State of Virginia, could not 'be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God.' " *See*, *American Humanist Ass'n v. Matawan Aberdeen Regional School Dist.*, 2015 WL 2223536 (N.J. Super. 2015).

- In a 2015 Massachusetts case dealing with suppression of evidence, the Court paraphrased Thomas Jefferson, saying, "the First Amendment is intended to allow democracy to thrive. When a court considers suppression of evidence under the Constitution, just as when it engages in judicial review and strikes down legislation, a court's decision is, by its nature, insulated from the immediate crucible of the democratic process." In that case, a criminal defendant moved to impound a video recording and corresponding transcript of his interview with police. After balancing the defendant's Sixth Amendment right to a fair trial with the public's First Amendment right to view the criminal proceedings, the defendant's motion for impoundment was denied. *Com. v. Chism*, 2015 WL 291328 (Mass. Super. 2015).

- A strong dissent in an Ohio Supreme Court case quoted Thomas Jefferson as saying, *"Our printers raven on the agonies of their victims, as wolves do on the blood of the lamb,"* quoting Thomas Jefferson's letter to James Monroe of May 5, 1811. This provocative statement by Justice Pfeifer was made in a suit filed by a newspaper seeking to compel a prosecutor and judge to release an audio recording of a telephone conversation between a 911 operator and a murder suspect in which the suspect said, *"I'm a murderer, and you need to arrest me."* The Ohio Supreme Court ruled that the recording of the 911 operator's return call to the murder suspect was a public record and was not an exempt trial-preparation record. The dissent argued that the public's right to scrutinize the workings of the government should be balanced against an individual citizen's right to privacy. "A person should be able to summon the help of police officers or firefighters without having his plea broadcast on the evening news," the dissenter argued, stating that the recording of the call in question was not a public record. *State ex rel. Cincinnati Enquirer v. Sage*, 2015 WL 1244536 (Ohio 2015).

Massachusetts: CM Held to Have Design Risk

In a case decided last June, the Superior Court (County of Worcester) held in *Coghlin Elec. Contractors, Inc. v. Gilbane Building Co.* that a Construction Manager at Risk (CMR) assumed responsibility for design changes: 1) based on the CM's contractual duty to review design documents during the preconstruction phase of the Project; and, 2) based on the broad indemnification clause in the contract. The case is now on appeal and oral argument was held on March 2, 2015. This case has obvious far-reaching implications if upheld. Gilbane contracted with a public agency for the construction (and for preconstruction services) for a psychiatric facility. The public agency hired an architectural firm as the "Designer" of the project. Gilbane's involvement in the design phase was limited to review of design documents prepared by the Designer. The contract specifically stated that in reviewing the design, Gilbane did not assume the Designer's responsibility for design.

The trial court concluded that: Gilbane as CMR took on "additional duties and responsibilities for the project, including . . . an ongoing duty to 'review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades, coordination between drawings and specifications * * * With these added duties and responsibilities comes additional financial exposure for the Construction Manager in the event that something goes wrong, including. . . a broad obligation to indemnify and defend the Owner from and against 'all claims, damages, losses and expenses, including but not limited to court costs and attorneys' fees arising out of or resulting from the performance of the Work,' regardless of whether 'such claims, damages, losses, or expenses are caused in whole or in part by the actions or inactions of a party indemnified hereunder.' " Gilbane appealed. Amicus briefs were filed by AGC, AIA and ACEC, among others. See http://www.mass.gov/courts/court-info/sjc/sjc-case-information, search on Docket No. SJS-11778.

MEMBER PROFILE: JULIA DONOHO, AIA, ESQ.

Julia Donoho, AIA, Esq. is one very busy member of our group. This *summa cum laude* Princeton grad, who studied under Michael Graves, FAIA, runs a solo law and architectural practice and serves on the AIA National Board of Directors, as well as the Board of The Jefferson Society.

Julia says that she went to architecture school because she excelled in math and science in high school. Originally, she intended to study engineering, but after completing two years, Julia switched to architecture for a broader education, while still desirous of having the math and science foundation be important. "Architecture combined arts and sciences in a way that I thought I would get the best of both worlds," she said. "I was not disappointed." Julia graduated with honors, *summa cum laude.* For her Master of Architecture, Julia returned to Princeton, in part, because "the school was at its height with Graves, Colquhoun, Vidler, Lerner, Colomina, and so forth. I was fortunate to get Michael Graves as my thesis advisor, a distinction that he only granted to two or three people per year. He was the best teacher I ever had, because he was able to help me to see where my strengths were as an architect."

TJS Member Julia Donoho, AIA, Esq. serves on the AIA National Board of Directors

With this strong architecture education, why go to Law School? Julia responded that in the 1990's, she had a small practice in Colorado and served on the Planning Commission. "In my sixth year of meetings, we passed our first Conditional Use Permit (CUP) regulation, and the first project to come through was an unsightly one on the main tourist route to the ski area. That was in 2000. Four hundred people showed up until midnight to argue about the regulation and property rights. I tied the vote, based on my interpretation of our latitude with the CUP, and sent it to the politicians. An attorney came up to me afterwards and argued about what the regulation said we could or could not do. We talked about legislative intent and the four corners of the page. In the end, I decided I needed to go to law school to understand property rights better!"

Life intervened, and Julia had a daughter to raise, so she gave up her private architectural practice to take a job with benefits in construction management. "While working full time, I went back to law school at night at Empire College of Law, because it was right next door to where I worked. I finished school in 2008, passed the bar in February 2009, and started doing things for friends right away," she said.

Julia found the combination of law and architecture fascinating from an historic perspective. "The history of our system of property rights comes from England, but in England, no one actually owned anything, except the monarchy. They have a long history of property being leased from the king. When we brought their laws over the ocean, we acted like two year olds and said this is mine, and don't tell me what to do with it." She found, however, that our land use and property rights system is not democratic at all, "when the issues are mostly driven by landowners talking to their politicians and developers replacing politicians with ones that will support their projects, as needed."

She did not know when she went to law school that she wanted to be an advocate for issues, but it makes sense now. "As an architect, we advocate for planning and design to enhance the built environment, but sometimes we need some extra help." She calls herself an "Architectural Advocate," saying, "I actually want to be an architect and an attorney that advocates for architecture."

Julia's first real job after undergraduate was working for Golemon and Rolfe in Houston Texas, working on the George R. Brown Convention Center and on some large hotels. After graduate school, she went to Barcelona, Spain to work for Ricardo Bofill, Taller de Arquitectura. "Living in Spain, and working with an international staff was an awesome experience," she recalls. When she returned, Julia went to work for Skidmore Owings and Merrill in Los Angeles.

Today, Julia's practice is focused on legal services, advocacy, education, and design/development. "Right now it is mostly me, with occasional help from a legal assistant, a drafter, a graphic designer/editor, and a fluffy dog." For her first big case last fall, Julia got to argue in the Marin Hall of Justice designed by Frank Lloyd Wright.

In addition to her practice, Julia gives lectures and is working on a book about the education of Julia Morgan, FAIA. On the latter, Julia says, "Advocating for Julia Morgan to win the Gold Medal in Architecture was a highlight. In the write ups they said 'It took an attorney to make the case.' I think that speaks well for what we can offer to the world of architecture with our skills as advocates."

Her town of Windsor, CA is a small town that she says was a bedroom community "until some New Urbanists came with a form based code and changed the whole nature of the community." Windsor has made great strides in moving the town in a whole new direction, she says, but the recession shook that foundation and there is backsliding going on. More work to be done!

Her favorite building? "I have always been a fan of the Brasilian capital designed by Oscar Niemeyer. Visiting Brasilia in the 1970's was my first introduction to the City of Tomorrow, up close and personal, and I was only 13. This propelled me (unbeknownst to my family) toward a life in architecture."

Her advice for a young architect thinking about law school? "Participate in some AIA boards, early and often, get involved with contract documents or advocacy. Serve on a planning commission or design review board before you go to law school. Another alternative is to run for political office. Walking door to door and talking with citizens about land use is so interesting."

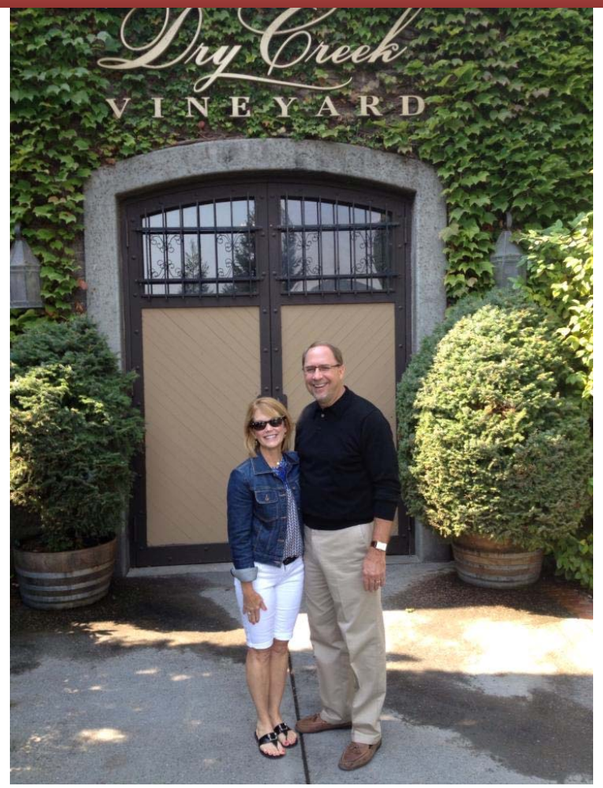
Julia's daughter, Jessica, has just finished 8th grade and is starting in an exceptional girls boarding school, strong in math and science.

Julia with her daughter Jessica during their 71-day cross-country trip; shown here at Frank Lloyd Wright's masterpiece, "Falling Water" (2014).

MEMBER PROFILE: G. William (Bill) Quatman, FAIA, Esq.

TJS Member Bill Quatman comes from a family history in design, construction and law. "My great grandfather was a demolition contractor in Dayton, Ohio, and my grandfather had an engineering degree. My dad graduated from law school at Case Western Reserve, but never practiced law." Like so many of the TJS members, Bill excelled in art and math in high school and looked for a way to combine those talents. "I was going to go into graphic design, but a track coach talked me out of it. My dad suggested architecture and so I interviewed three local architects in my hometown of Lima, Ohio." With the encouragement of those professionals, Bill enrolled at the University of Kansas. Why does an Ohio boy go to college in Kansas? "My sister was married to a linebacker for the Kansas City Chiefs, Jim Lynch. And I grew fond of that city when I worked summers as a waterboy for the Chiefs during training camp." His sister suggested he look at Kansas, which had a fine architecture school. It was there that Bill met his wife (Denise) of 34 years. During summers, Bill worked for a general contractor, an insulation subcontractor, and then for an architectural firm, which hired him after graduation from Kansas.

"In my last year of college, I took Business Law as an elective. It was like a light went on for me! I loved the class and felt this was my calling." During his final year, Bill was also picked for jury duty and served as foreman, watching his first trial from the jury box. Then, while reading an issue of *Architectural Record*, Bill saw an article by architect-lawyer Arthur Kornblut which said, *"Architect-Lawyers: An Important New Breed."* Bill wrote to Art Kornblut and the two engaged in a correspondence (by snail mail back then), in which Art encouraged Bill to take the LSAT. He did, and applied to law schools in Kansas and Missouri. "I was accepted at Kansas, but put on the wait-list at Missouri. I decided to pass on Kansas (after 5 years there already), and took a job as an architect in Kansas City." Bill and Denise were married that summer of 1981 and settled into their careers. "She thought she was



(Above) Denise and Bill Quatman at one of their favorite places, Napa, California (2014).

marrying an architect, but then the phone rang at work on a Friday night in late August. It was the University of Missouri-Kansas City Law School, and they had one opening left. Classes started on Monday, and they wanted to know if I was still interested!" Bill called his wife, took some co-workers out for a beer and mulled over his future. He decided to accept the opening. "I had to go buy my books the next day, read all the assignments and then start classes on Monday!" But it was the best decision he could have made, he says. Bill continued to work for the architectural firm all through law school and each summer except the last one. The summer of 1983, Bill applied for an internship in the Contract Documents department at the AIA in Washington, D.C., where he worked under Dale Ellickson, FAIA, Esq. "Dale was a good mentor and I met a few other architect-lawyers. It was a great education."

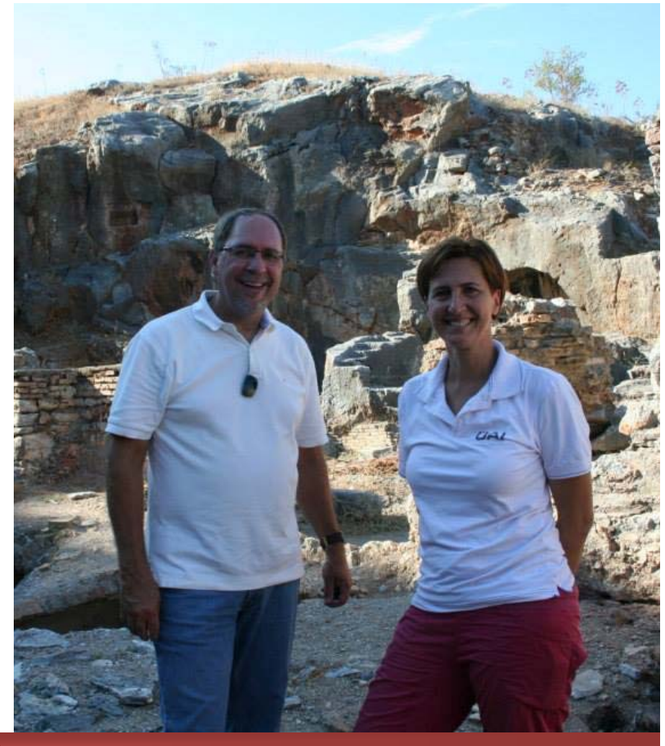
After graduation from law school, Bill took a job with a small boutique law firm that specialized in construction and surety law. He joined the AIA and got active in the local chapter. "Soon, I began to build a client base of architects and contractors. When I found that my small law firm was overlooked by insurance carriers to handle A-E defense, I realized I needed to join a larger firm." After five years with the small firm, Bill joined the law firm of Shughart, Thomson & Kilroy in its Construction Law Group. Eventually made a partner there, Bill represented design professionals, contractors and owners for twenty years. During that time, Bill was legal counsel to the Kansas City Chapter of the AIA, and served as President of AIA/Missouri, and several years on the local AIA board.

As design-build began to emerge in 1989, Bill co-authored an article for the ABA's *Construction Lawyer* on the legality of design-build contracts. This led to a focus on that aspect of law, and eventually to chairing the AIA's Design-Build Knowledge Community in 2007. Bill also joined the DBIA and helped to start the DBIA Mid-America Chapter. Today, Bill serves on the DBIA National Board, and will be the 2016 Chairman.

(Above) The Quatman family at the wedding of Bill's oldest daughter, Cristin (middle), with his wife Denise; son-in-law Tim; grandson Anthony; daughter Emily; and son Kenton. (Below) Bill in Turkey (Sept. 2014) with an Austrian archaeologist.

In 2008, Burns & McDonnell offered Bill the job of General Counsel. Being a large, integrated design-build firm, Bill jumped at the chance and now heads a 15-person law department.

Outside of work and DBIA activities, Bill is president of The American Society of Ephesus, founded by his grandfather in 1955. The foundation restores ancient Christian churches in Ephesus, Turkey, among other projects, and Bill travels to Turkey each year. He also published a civil war biography in 2015. Bill and Denise have 3 children, 1 grandson, + one on the way!



Pope Francis and AIA Take on Environmental Responsibility.

OK, so the pontiff and the AIA are not working together, but they have a similar focus in recent public statements. Overshadowed by Pope Francis' new 184-page encyclical, issued in May 2015 on "Care for Our Common Home," was a release in December 2014 by the AIA of two revised Position Statements on environmental responsibility. For the AIA, its "position statements" are a set of guiding declarations to help clarify which programs, activities, and government policies the Institute will support. The theme is to acknowledge the importance of responsible stewardship of the Earth and carbon neutrality by 2030 while also adding two new sections, to include climate resilience and material health. One of the new statements stresses the potential impact of building materials on human health and the environment and emphasizes that the material life cycle should be part of architects' decision-making.

Adding to the AIA's statement on Sustainable Architectural Practice and the Built Environment is the new statement entitled "Materials and the Built Environment," which states: "The AIA recognizes that building materials impact the environment and human health before, during, and after their use. Knowledge of the life-cycle impacts of building materials is integral to improving the craft, science, and art of architecture. The AIA encourages architects to promote transparency in materials' contents and in their environmental and human health impacts."

"A shorter-term goal, but an important one because of the power of the architect in selecting materials, is influencing the manufacturer world," says Mary Ann Lazarus, FAIA, resident fellow on sustainability at the AIA. "When we start asking the right questions, it forces manufacturers to research their own products. They may not know that there's a potential carcinogen in one of their items, but by asking they might go back and look at reformulating and refreshing their approach."

Also new is an AIA Position Statement on "Resilience," acknowledging that climate change is increasing pressures on the built environment and calling on architects to design buildings that can respond to these pressures. It reads, "Buildings and communities are subjected to destructive forces from fire, storms, earthquakes, flooding, and even intentional attack. The challenges facing the built environment are evolving with climate change, environmental degradation, and population growth. Architects have a responsibility to design a resilient environment that can more successfully adapt to natural conditions and that can more readily absorb and recover from adverse events. The AIA supports policies, programs, and practices that promote adaptable and resilient buildings and communities."

The statement reflects the AIA's growing emphasis on the integration of design and health. The AIA also announced the founding of a Design and Health Research Consortium to fund scientific research on the interplay of architecture and human health. The initial research is quite broad and will include everything from indoor microbial ecosystems to "circadian disruption" and noise to the health impact of urban parks. AIA's website has a link that focuses on building materials. Click on the link below:

www.aia.org/practicing/materials/

Quoting his name-sake, St. Francis of Assisi, Pope Francis began his encyclical with this prayer: "Praise be to you, my Lord, through our Sister, Mother Earth, who sustains and governs us, and who produces various fruit with colored flowers and herbs." For the full text, click on this link: http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html

AIA's Workshop on Product Transparency.

By R. Craig Williams, AIA, Esq. HKS, Inc. (Dallas)

Following up with its new Position Statements, the AIA hosted a Materials Workshop on February 25, 2015 at its national headquarters in Washington D.C., attended by architects, attorneys, and professional liability insurance company representatives to discuss issues arising from "product transparency" and declarations of manufacturers of building materials of the contents of their products. Three TJS members were invited to attend; R. Craig Williams AIA, Esq., Chief Legal Officer of HKS, Inc., Donovan Oliff AIA, Esq., Assistant General Counsel of HOK, and Brodie Stephens, Esq., General Counsel of Perkins + Will. Craig and Brodie spoke about this issue previously at the 2014 Greenbuild Conference, which was held in New Orleans.

A number of architecture firms have established policies regarding product transparency, and have issued letters to product manufacturers requesting the disclosure of the contents of building materials they create. The purpose of this initiative is to provide better information to clients regarding the nature of building materials and products that may be included in their facilities so they can make more informed decisions about the inclusion of those products.

As the AIA moves forward with the development of a strategy for moving forward with product transparency initiatives, members of The Jefferson Society, Inc. will play a role in shaping the plan for implementation of that strategy.

For more information, or to get involved in this effort, contact Craig Williams, Donovan Oliff or Brodie Stephens, whose contact info is on the TJS website.

AIA National Convention in 2016 in Philadelphia. Want to Speak?

TJS Members continue to ask: *"How can I get involved?"* What better way than to organize a panel discussion or presentation on legal issues affecting the architectural profession? The AIA has issued a call for presentations. The deadline is **August 15, 2015,** so don't delay!

U.S. Supreme Court Delivers a Blow to Licensing Boards!

A February 2015 U.S. Supreme Court ruling in an antitrust case could jeopardize the enforcement role of state licensing boards. The case involved a Federal Trade Commission complaint against the North Carolina Board of Dental Examiners for sending cease-and-desist letters to non-licensed teeth whitening providers. After dentists complained to the Board that non-dentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to non-dentists. The Board claimed to be acting as a state regulatory body, ensuring patient safety. However, the FTC claimed the board (composed mostly of dental professionals competing against non-licensed teeth whitening providers) was violating antitrust law. The Board asserted the "state action doctrine," which provides an exemption from federal antitrust law for certain state-mandated activities. The federal Court of Appeals ruled in favor of the FTC and the case was appealed to the Supreme Court, which affirmed, 6-3.

Justice Anthony Kennedy, writing for the majority, established a new, context-dependent test for determining when a state exercises sufficient supervision over a licensing board to confer automatic antitrust immunity.

Justices Alito, Scalia and Thomas dissented, warning, "As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards."

NSPE released a statement of concern that qualified professionals will be discouraged from serving on boards out of fear of being sued under antitrust laws, a concern that Justice Kennedy brushed off.

N.C. State Bd. v. FTC, 135 S.Ct. 1101 (2015).

Foul Ball! Who's Liable If You Get Hit?

By G. William Quatman,
Editor and Baseball Fan

It's summer, and America's past-time is in full swing (pun intended). Been to a game yet? The smell of the grass, the crack of the bat, the beer, the hot dogs . . . And then somebody hits a line drive into the bleachers. Some lucky guy catches it and is shown on the big screen, smiling. But others aren't so lucky. We've seen it this year already. Fans hit with a broken bat, or a foul ball. Who is a fault? Here are a few cases to give you a sample of the law.

New York. In a suit against the Mets, the plaintiff was 3 to 5 rows back from the field in Shea Stadium when he was struck by a baseball that had been tossed casually to fans as a souvenir by the Mets pitcher after he completed his pre-game warmup routine. He sued the pitcher and the Mets for damages. In ruling for the team, the court said, "The defendants are not insurers of the safety of spectators who occupy unprotected areas of the stadium. Since it is not unusual for a player to toss a ball into the stands, the plaintiff assumed the risk of his injuries." *Pira v. Sterling Equities, Inc.*, 790 N.Y.S.2d 551 (N.Y.A.D. 2 Dept. 2005).

When a child was hit (again at Shea Stadium) by a baseball during batting practice on opening day, the family sued. Again ruling for the Mets, the court held that, "by furnishing sufficient protective screening behind home plate where the danger of being struck by a baseball is the greatest, the defendant fulfilled its duty of care and cannot be held liable in negligence." The fact that the child was in a school marching band invited to play did not change anything. The child "was still a spectator who assumed the risk of his injuries." *Sparks v. Sterling Doubleday Enterprises, LP,* 300 A.D.2d 467 (N.Y.A.D. 2 Dept. 2002).

The outcome was the same in a 1984 New York case where a girl watching a game at Shea Stadium from a box seat behind first base was struck by a foul ball. Her seat was separated from the field by a 3-foot fence. The court held that when a proprietor of a ball park furnishes screening for the area of the field behind home plate where the danger of being struck by a ball is greatest, "the proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence." Though her seat was in an unscreened area, the court declined to "require a baseball field proprietor to operate as an insurer of spectators unless there was a protective screen shielding every seat." *Davidoff v. Metro. Baseball Club,* 463 N.E.2d 1219 (N.Y. 1984).

When a concession vendor fell at Shea Stadium when struck by a fan diving for a shirt launched as a promo activity between innings, he sued the Mets for negligence. The trial court said that, as a matter of law, the Mets did not breach any duty owed to the plaintiff, based upon the doctrine of assumption of risk of an open and obvious condition. The court held that the team's duty was (again) only "to make the conditions as safe as they appear to be," which it had done by providing sufficient screening behind home plate, where the danger of being struck by a ball or bat is the greatest. The court ruled that, "A spectator at a sporting event is deemed to have consented to those risks commonly appreciated which are inherent in and arise out of the nature of the event. Those risks include the fact that objects, like bats, balls, or t-shirts may enter the stands. As a seasoned vendor who had been working at Shea Stadium and other sporting venues for years, . . . the plaintiff fully appreciated the risks that were associated with working in unprotected parts of the stadium." *Cohen v. Sterling Mets, L.P.,* 17 Misc.3d 218, 840 N.Y.S.2d 527 (N.Y.Sup. 2007).

This rule of assumption of risk is found in other states as well.

Pennsylvania. The plaintiff was enjoying a baseball game between the Phillies and Marlins when, at the end of the top of the 7th, the Phillies centerfielder tossed a ball into the stands after catching it. The fan suffered a serious eye and head injury. The trial court granted summary judgment to the player and team, affirmed on appeal. The Court ruled that the defendants owed "no duty" to protect the fan from the risk of being struck by a thrown baseball while sitting in an area where he knew balls could be thrown. The Court said, "Countless Pennsylvania court cases have held that a spectator at a baseball game assumes the risk of being hit by batted balls, wildly thrown balls, foul balls, and in some cases bats." In examining the gambit of risks of attending a baseball game, the Court of Appeals said that, "When determining what is 'customary' part of the game, it is our opinion that we cannot be limited to the rigid standards of the Major League Baseball rule book; we must instead consider the actual everyday goings on that occur both on and off the baseball diamond; we must consider as 'customary' those activities that although not specifically sanctioned by baseball authorities, have become as integral a part of attending a game as hot dogs, cracker jack, and seventh inning stretches. Fans routinely arrive early for batting practice in hopes of retrieving an errant baseball as a souvenir, and fans routinely clamor to retrieve balls landing in the stands via home runs or foul balls. Although not technically part of the game of baseball, those activities have become inextricably intertwined with a fan's baseball experience, and must be considered a customary part of the game. Similarly, both outfielders and infielders routinely toss caught balls to fans at the end of an inning." Therefore, the injuries constituted an inherent risk of the game. *Loughran v. The Phillies*, 888 A.2d 872 (Pa.Super. 2005).

In a similar case involving a Pittsburgh Pirates game, the plaintiff sat in a field box, six rows from the field on the third baseline, where there was no screening, netting, or other barrier. A batted ball struck her in the face and she sued under numerous legal theories for her injuries. The trial court dismissed the suit, upheld on appeal, with the Court of Appeals holding that Pennsylvania courts have formulated the "no-duty" rule which provides that: "operators of a baseball stadium, amusement park, or other such amusement facilities have no duty to protect or to warn spectators from 'common, frequent, and expected' risks inherent in the activity," and that all individuals will be deemed familiar with such "neighborhood knowledge," even a first-time attendee! See, *Romeo v. Pittsburgh Assoc.,* 787 A.2d 1027 (Pa. Super. 2001).

Missouri. It was summer of 2009, the Kansas City Royals were awful, lots of empty seats. The plaintiff moved to empty seats six rows behind the dugout and was hit in the eye with a hot dog thrown by "Sluggerrr," the Royals' mascot. The fan had attended 175 prior Royals games, and frequently watched the mascot toss hot dogs from the roof of the dugout, and he saw the mascot mount the dugout to begin the toss, but turned to look at the scoreboard just as Sluggerrr threw the foil-wrapped hot dog. He sued the Royals for the mascot's negligence. A jury found in favor of the Royals, and he appealed all the way to the Missouri Supreme Court which held that the risk of being injured by a hot dog toss is not one of the "inherent risks" of watching a Royals game. The case was remanded and retried on June 17, 2015 on comparative negligence. The jury found no fault with either party. The case, *Coomer v. Kansas City Royals,* 437 S.W.3d 184 (Mo. 2014), is a good summer read!

California. A fan was hit by a foul ball during a minor league baseball team. The team mascot, a 7-foot tall dinosaur, was performing antics in the stands and his tail touched the plaintiff, distracting him temporarily when a foul ball was hit into the stands. Like the case in Kansas City, the Court held there was a triable issue of fact whether the mascot "cavorting in the stands and distracting plaintiff's attention *while the game was in progress,"* constituted a breach of duty. *Lowe v. Calif. League*, 65 Cal. Rptr. 2d 105 (Cal. App. 4 Dist. 1997).

Take aways! Bring your glove. Keep your eye on the ball. Watch those mascots carefully. Have fun this summer and . . . be safe!