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Inside This Issue

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 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@callisonrtkl.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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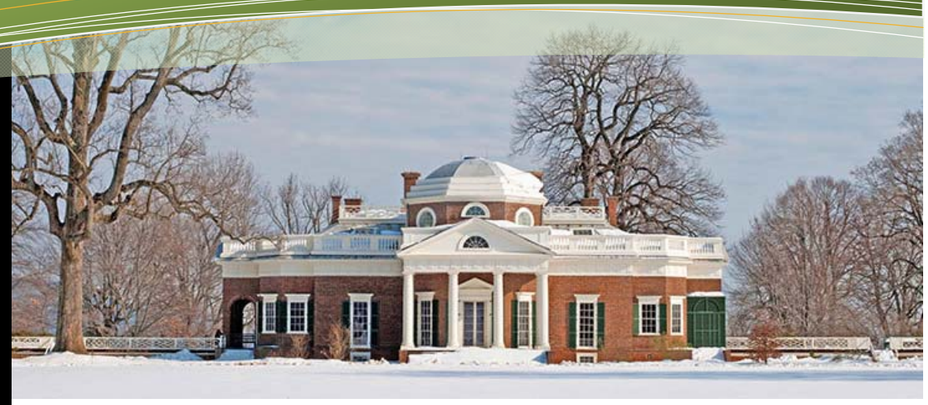

The Supremes!

By Timothy R. Twomey, FAIA, Esq.
CallisonRTKL, Inc.

To start, I'd like to say congratulations to Julia Donoho, Josh Flowers, Suzanne Harness, Jason Phillips and Craig Williams for becoming the newest TJS Members to also become members of the Bar of the United States Supreme Court! They were sworn in on Dec. 2, 2015 before Mr. Chief Justice Roberts and the rest of the members of the Supreme Court. It's a very impressive ceremony, run like clockwork, leaving one feeling uplifted and having experienced something quite unique and exciting. Smiles and handshakes and hugs and pictures all around afterward.

Having been sworn in "in absentia" forty years ago, I originally missed that opportunity but was now able to personally experience it as well.

At precisely 10:00 a.m., the clerk called the court to order and all stood in the packed courtroom. The Justices all filed in, quiet and somber in their black robes. The first order of business was the swearing in ceremony for the new members of the Bar. I was honored to approach the rostrum, be recognized by name by the Chief Justice, and moved for the admission of our TJS brothers and sisters. The motion was unanimously accepted and then the candidates were requested to stand and take the oath of admission. It was all over in the blink of an eye, but it left a lasting impression. The Court immediately moved to the business at hand and heard arguments in the case before it, from very effective advocates on both sides of the matter. The Justices were engaged, at least eight of them visibly so. We all sat in silence and watched events unfold. At precisely 11:00 a.m., arguments were concluded, the clerk asked all to stand, and the Justices filed out, not so quietly, a few chatting as they recessed, while Justice Ginsberg slowly, methodically, trailed behind. It was over and we all filed out of the courtroom.

I want to thank Julia for arranging for this wonderful opportunity. I understand there will be no more group swearing in ceremonies at the Supreme Court until 2017, so Julia snuck us in and pulled off a memorable event! TJS member Donna Hunt is organizing the 2017 event, so contract Donna if interested at donna.hunt@ironshore.com.

I want to also congratulate TJS member Rebecca McWilliams for her Dec. 11,

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The Supremes!
(continued from page 1)

The Supremes. TJS Members sworn in at the United States Supreme Court on Dec. 2, 2015 were: (from left to right) Jason Phillips, Craig Williams, Suzanne Harness, Josh Flowers, Julia Donoho, and Tim Twomey.

2015 presentation to the Practicing Law Institute (PLI) at their headquarters in Mid-town, Manhattan, on legal issues raised by use of Building Information Modeling and the Cloud, areas of particular interest to and a specialty of Rebecca.

I also subbed for Craig Williams at the PLI presentation on the McGraw Hill published report entitled "Managing Uncertainty and Expectations" discussed in the previous issue of *Monticello*. It's becoming widely distributed in the industry. In fact, I attended a Willis A&E risk management web program recently in which it was mentioned. It's an important document addressing the industry's expectations of perfection and the reality of imperfection in the design industry. It's a free download at www.globalconstructionsummit.com/images/pdf/Managing-Uncertainty-Building-Design-Construction-SMR.pdf

As a Co-Chair of PLI's annual construction law program, I'm thinking that this might be a great opportunity for more TJS members to speak as part of the nation's oldest continuing legal education program in the country. If you are a principal or partner in your firm (a PLI requirement), you might contact me at: ttwomey@callisonrtkl.com .

On a broader note, I know that TJS members are active in many venues and forums and speak and write on a wide variety of matters. Perhaps we could include in each quarterly issue of *Monticello* a listing of who have written and spoken in the previous quarter, to create a resource for TJS members. Let me know your thoughts on this.

In the last issue of *Monticello* I mentioned that I hoped that you would reflect on ways in which you can contribute to TJS as well as what other initiatives you think TJS should undertake. I asked you to let me know your thoughts. I know you're thinking hard, but I haven't heard from any of you yet. So, perhaps as a New Year's resolution, you could take a moment to reflect and let me know you are thinking. We have such a diverse and talented membership, surely there is more that we can contribute to the industry.

With that, I will close and hope that you all have a wonderful holiday season and will enjoy a happy and prosperous New Year!

Cheers!

Tim

Connecticut: No Duty Owed for Purely Economic Harm

Anthony Natale, Esq.
Natale & Wolinetz
Glastonbury, CT

On Nov. 19, 2015, the Connecticut Supreme Court issued a decision in the case captioned *Lawrence v. O&G Ind., Inc.*, 2015 WL 7294470 (Conn.) concerning the duty of care owed by the defendants, several construction companies, whose alleged negligence caused an explosion at a power plant, to the plaintiffs, who were employees that sustained only economic losses as a result of the explosion. In affirming the trial court's decision to grant the defendants' motion to strike, the Court held that the defendants did not owe a duty of care to the plaintiffs who suffered only economic loss.

The plaintiffs were employed in various trades at a power plant construction site in Middletown, Conn., known as the Kleen Energy Project. Each defendant was a contractor or subcontractor involved in the construction and start-up of the plant. On Feb. 7, 2010, a gas explosion occurred. The plaintiffs sued, alleging that the defendants' negligence caused the explosion, which resulted in the termination of the plaintiffs' employment at the power plant site and economic losses in the form of past and future lost wages. The defendants moved to strike the economic loss counts and the trial court granted the motions, concluding that the plaintiffs failed to sufficiently allege that the defendants owed them a duty of care necessary to sustain their negligence claims. The trial court determined whether recovery should be permitted as a matter of public policy under the four factor test articulated in *Jarmie v. Troncale*, 306 Conn. 578, 603 (2012), discussed below.

The trial court stated that "[f]or more than 150 years the law in Connecticut, and elsewhere, has limited tort liability to cases involving physical harm to person or property. Departing from this requirement would undermine reasonable expectations built on this long held understanding of the law, and would create an endless ripple of liabilities arising from the defendants' conduct. Public policy is not served by so expanding the defendants' liability to purely economic claims such as those asserted by the plaintiff[s]."

On appeal, the Connecticut Supreme Court held that the defendants did not owe a duty of care to the plaintiffs for their purely economic losses. The Court found that all four public policy factors relating to whether the defendants owed a duty to the plaintiffs favored the defendants.

First, the normal expectations of the participants in the activity under review. The Court looked to the seminal Connecticut case in the area of pure economic loss, *Connecticut Mutual Life Ins. Co. v. New Haven Railroad Co.*, 25 Conn. 265 (1856), which held that a life insurance company could not recover insurance benefits that it had paid by bringing a direct action against a railroad company whose negligence had caused the death of its insured in the absence of privity of contract between the plaintiff and the defendants. Next, the Court discussed *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381 (1994), which concluded that a general contractor did not owe a duty of care to the plaintiff, a construction company, for economic loss in the form of increased workers' compensation premiums and lost dividends arising out of the contractor's negligence.

Second, the public policy of encouraging participation in the activity, while weighing the safety of the participants; and Third, the avoidance of increased litigation (the Court considered these two factors together).

The Court found that expanding the defendants' liability to include the purely economic damages suffered by other workers on site appears likely to greatly increase the pool of potential claimants, but at the same time there would be no corresponding increase in safety. Last, the decisions of other jurisdictions showed that federal and state court decisions similarly rejected nearly all claims like those in the present case. The underlying rationale was that a defendant should be shielded from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable.

Jefferson's Bourbon.

Looking to warm yourself on a cold winter night? Here's a tip.

Founded in 1997, Jefferson's Bourbon is the brainchild of Trey Zoeller and his father Chet, a famed bourbon historian. They were continuing a family tradition that goes back to Trey's 8th generation grandmother who was arrested in 1799 for the "production and sales of spirituous liquors." To personify the brand, they chose Thomas Jefferson — known for his curiosity and experimental spirit. Upholding tradition, yet always discovering new possibilities, "We make our bourbon in small batches, ridiculously small batches," says Trey. "This enables us to showcase the different flavors that result from the wood in each barrel, as in the case of single barrel bourbons." The company claims they maintain the consistency that is found in small batch bottling.

Zoellers bottle 7 different varieties of bourbon and rye and are always experimenting with new blends and processes. Balance and complexity are made approachable and affordable in this offering created from 4 styles of bourbon that they blend together in small batches. The result is a slightly fruitier and surprisingly sophisticated flavor profile, finishing - as always - with a smooth, vanilla-infused elegance that demands another round. Here are the 7 variations:

Jefferson's Reserve. Like the accomplished third president, this bourbon is complex, elegant and sophisticated. Jefferson's Reserve is allowed to age slowly and reach maturity naturally. This results in a rich bouquet and flavor as well as a soft, round finish.

Jefferson's Chef's Collaboration. A late night spent tasting some of chef Edward Lee's culinary creations led Trey Zoeller to the idea that someone should blend a bourbon that would pair well with the bold flavors in Chef Lee's cookbook and other modern cuisine. The result is a blend with a spicy upfront and fruity finish, enhanced by the addition of rye whiskey into the mix. Perfect with meals, for mixing cocktails or simply drinking neat.

Jefferson's Ocean: Aged at Sea. Inspired by the original Jefferson's Ocean, "Aged at Sea" takes older bourbon barrels and brings them around the world. Stopping in 5 different continents and crossing the equator 4 times, this truly is a bourbon of the world, exceptionally hand-crafted.

Jefferson's Reserve Groth Cask Finish. A unique and excellent spirit in which Jefferson's Reserve Bourbon is finished for 9 months in the legendary Groth Reserve Cabernet Sauvignon barrels. The end result is a subtle bourbon with heavy cherry and vanilla notes and a light kick at the end.

Jefferson's Barrel Finished Manhattan. The Manhattan is a full strength "perfect" Manhattan, made with superior Jefferson's Bourbon, sweet and dry vermouth and barrel - aged spiced black cherry bitters. The ingredients are blended together in original Jefferson's American Oak casks and barrel finished for 3 to 4 months.

Presidential Select 25 Year Old and Presidential Select 30 Year Old. Both of these bourbons are aged in new oak barrels and bottled at 94 proof. Inspired by its namesake, these mature and exceptionally full-bodied aged bourbons were released nationally in Nov. 2013. "Keeping in line with our mantra, Very Uncommon Bourbon, we wanted to push the envelope and create bourbons with ages that the market hasn't seen before," said Jefferson's founder and whiskey maker Trey Zoeller. Applying the "Ridiculously Small Batch" process developed exclusively for his successful line of whiskies and ryes, Zoeller combed through barrels of aged whiskey in his library before settling on the right components for both bourbons. Jefferson's Presidential Select 25 Year Old Straight Bourbon Whiskey has an amber to burnt orange hue with scents of caramel, maple and toffee. On the palate, upfront notes of soft honey and vanilla are followed by a rich, buttery mouth feel, finishing with spice and leather. In contrast, Jefferson's Presidential Select 30 Year Old Straight Bourbon Whiskey has a deep dark color with thick legs and rich scents of vanilla and butterscotch. It is surprisingly refreshing on the palate offering first a mix of sweet and spicy followed by caramel and finishing with notes of blackberry. Whether enjoyed in a classic Manhattan, on the rocks, or neat, these offerings embody a presidential combination of age, purity and strength. Jefferson's Presidential Select 25 Year Old Straight Bourbon Whiskey ($199.99) and Jefferson's Presidential Select 30 Year Old Straight Bourbon Whiskey ($249.99) are pricey. The bourbons are made and distributed by Castle Brands Inc. www.jeffersonsbourbon.com

How To Sue A/E's! Trial Magazine Offers a "How To" Article

The October 2015 issue of *Trial* magazine, published by the American Association for Justice, featured a cover with the words: "Professional Negligence." Inside was a feature article by David L. Kwass titled "Building Your Case Against Architects and Engineers." Mr. Kwass is a Philadelphia plaintiff's personal injury lawyer who focuses on cases involving construction accidents. His article advises plaintiff lawyers on how to address the various defenses put forth by lawyers defending architects and engineers. "The foremost discovery goal is establishing the existence of a duty that extends to an injured worker or member of the public," Mr. Kwass advises. He notes that many projects use AIA forms that "tend to insulate these professionals from liability," and urges lawyers to seek the entire correspondence file. Once on a job site, he says that A/E's may see hazards and have an obligation to raise those to the attention of site management.

Kwass even gives sample questions to ask at a deposition, such as: "Can we agree that an architect or engineer should never needlessly endanger the workers who construct his or her design?" He advises lawyers to expose the witness' lack of OSHA training, in hopes that the design professional will attempt to "puff up his or her credentials."

The article mentions troublesome defenses like Statutes of Repose, Certificates of Merit, and the need for an expert witness to establish the standard of care.

As you prepare your next A/E witness for a deposition, you might read this article found at: http://trial.justice.org/publication/?i=272965&p=&l=&m=&ver=&pp=

The American Association for Justice is a national plaintiffs bar organization, "the world's largest trial bar."

Welcome to Our New Jefferson Society Members!

We welcome the following:

NEW MEMBER:

108. Ross C. Eberlein, Esq.
Thompson Hine, LLP
Cleveland, OH

MEMBER PROFILE: Edward “Ted” Ewing, Esq.

CNA Insurance
Chicago, Illinois

TJS Member Ted Ewing works in insurance claims at CNA in Chicago. “My naive idea that I could serve as a liaison between the architectural and legal communities has, somewhat amazingly, come to pass,” he says, “I just never would have put it together that the natural point for connecting those two worlds was at the insurance carrier.”

Ted got his architectural degree from the Illinois Institute of Technology. He chose this school due to its location in Chicago, together with Mies van der Rohe’s minimalism and the focus on engineering at IIT. While still in school, he worked at Murphy Jahn’s office in the model shop. “Helmut Jahn was a character who demanded a lot of those around him. It was a great experience at a young age,” Ted recalled.

Two things inspired him to seek a law degree. “First, as a boy, my father, who is also an architect, was once sued in a situation where virtually all architects could readily

Ted Ewing’s twins, Max and Nora, at Park Guell in Barcelona, Spain.

determine was not a breach in his standard of care. I recall that there was a real failure to communicate between the legal and architectural worlds. Second, I was inspired by a professor at IIT who emphasized that same need and encouraged me to seek to bridge that communication gap.” With that motivation, Ted chose The University of Illinois College of Law, which he says was a great value in the days before Illinois’ financial woes prevented generous State funding.

His first law job was in private practice with a boutique construction litigation A&E defense firm in Chicago. When asked what is the best part of your job, Ted said “I lead the Strategic Claims group at CNA – or SCU. We get to work on the most challenging claims not just in the A&E world but also in law, accounting, medicine and many other professional liability areas. I love the challenge of working closely with our insured professionals providing empathy to their challenges and then working tirelessly to improve the outcome of each matter in which we engage.”

In addition to his role in the Strategic Claims Unit, Ted enjoys working with architects through CNA and Victor O. Schinnerer. “It has been a great experience to get to broaden my interaction with architect-lawyers outside of the organizations where I play a direct role.”

Ted and his wife Blair, a practicing attorney, have been married for 20 years and have 14 year-old twins, Max and Nora. “The teenage years, thus far, have been far better than what folks previously warned!” Ted said, with relief, adding, “My daughter loves dance and my son soccer.”

Outside of work, Ted says that most of his time is taken up with his children. “I take my car to the track and do ‘track days,’ racing a couple of times a year.” Apropos to TJS, Ted also recently began working with some simple CAD software and tinkering with 3D printing, which he calls “a nice outlet for some under-expressed creative needs.”

Ted loves his hometown of Chicago, “A great town that demonstrates the value of good city planning, alleyways, cleanliness and landscaping.” He also enjoys seeing how some of the Windy City’s “famous” buildings have aged.

He is most inspired by the Inland Steel Building in Chicago, in which Ted finds the execution, including details, proportion and colors of the brushed stainless steel next to the green glass to be lovely. He also feels that this building has aged well.

His favorite architect? I’ll cop out,” he says, “and go with a Chicago local, Frank Lloyd Wright.”

If asked to give advice for a young architect thinking about law school, Ted said: “I think most of us would give the same starting advice: follow what you love to do. The challenge I’m finding with my own children is that it is really difficult to define what you love at the age you’re supposed to be choosing a direction.” Ted adds that his father gave him one insightful piece of advice: “If you work as an architect you’ll work with businesses and individuals when things are going well and they want to build something for their family or business. If you go into law, you’re probably going to be working with someone when they are dealing with a crisis. Both can be fascinating and rewarding but be aware of that difference.”

This was sound advice then, and still is today. Thanks, Dad!

(Above) Max and Nora Ewing pose with their mom on a bridge in Paris; (Below) Ted joined the family for this photo op at the Palace of Versailles.

MEMBER PROFILE: Donna Marie Hunt, AIA, Esq.

Boston, MA

Donna cannot say exactly when she knew she wanted to be an architect, “because I always wanted to be an architect,” she told us. “I have always been less of a sketcher and more of a builder. When I received a handmade doll house from my grandfather, I ditched the dolls and asked if I could move some walls.” She was four years old at the time. Whenever she passed a house in her neighborhood that intrigued her, Donna somehow found a way to get inside to check it out. Building and renovating always intrigued her and luckily her mother was very hands on and encouraged her interests. “My mother told me I could be whatever I wanted to be as I grew up.”

Donna attended Pratt Institute in Brooklyn, NY to study her passion. Like many TJS members, when she applied to colleges, there were no “road trips” during junior year spring break. “You applied to a few selected schools and if you got in, you went see your top choice and made a decision (all the while hoping that they looked like the picture in the brochure),” she said. Donna applied to three schools, with Cornell as her first choice, followed by Syracuse and Pratt. After being accepted to all three schools, with the added bonus of scholarships at Cornell and Syracuse to swim, Donna went on a “marathon drive” with her supportive mother. Cornell was the first stop. “We stayed for about 15 minutes. I could not fathom how I would survive in the woods. Syracuse was the same.” Her adventure continued on to Pratt. “As soon as I walked into the School of Architecture, I felt completely at home,” Donna recalls. The diversity of the student body and the work being produced made it the school for her, though she adds, “the school and surroundings looked nothing like the brochure pictures!”

“When I graduated from architecture school and became licensed I never thought I would go on to law school,” Donna said. “As an architect I focused on the construction documents, document coordination, specification writing and contract administration.” Her years working on job sites with contractors and owners was the catalyst that eventually swung her into law school. “I felt that in order to do my job better I needed additional education in business or law. I decided law would be more interesting and hopefully a little more intimidating to contractors!” In addition, Donna had an experience where a legal associate was in her office preparing an answer to a document subpoena. “Before I knew it, I was up to my elbows in files while he sat with his feet up on the conference room table, chatting about his weekend in Newport. I asked him to either go back to his office or dig in!” At that point, Donna realized that there were probably not a lot of attorneys with the technical background, or at least the passion for architecture, required to provide the service to design professionals that they needed. Donna chose the New England School of Law in Boston to continue her education because its evening program allowed her to continue to work full time as an architect.

The combining of the degrees flowed pretty naturally for Donna, “one just lead me to the other. I can’t say I really thought that much about it,” she admitted.

During her first year out, at the end of a recession, she worked for Queens College in the planning department during the day and also worked for a small firm in SoHo named Bone and Levine, at night. After about a year, she started full time at the Eherenkrantz Group in New York. She continued to work as an architect for three years before going to a law firm. “I loved architecture and construction and found it hard to leave. I decided I had to leave to get some real legal experience so I went to work at a small firm in Cambridge doing real estate and defense of general contractors.” About two years later, David Hatem opened his own office and Donna went to work at Donovan Hatem.

35 Years. The photo on page 8 shows Donna and Dick Perez in Germany in 2013; the picture above is Donna and Dick at their high school prom in 1978. Nice tuxedo!

She enjoyed every minute and every experience given to her at the law firm. Half of her time was spent for Lexington Insurance A&E insureds, either providing risk management or defense services. After a few years, Lexington hired Donna to run the A&E claims unit. From there, she moved into managing Lexington’s A&E risk management program and working with underwriters on policy material and new products.

Today, Donna works for Ironshore in the Designers and Contractors Professional Liability group. “Our focus is to provide professional liability insurance to design-builders and contractors who contract for design services.” In addition, she continues to work on the A&E PL insurance side providing new products for practice and project-specific polices.

When asked “What’s the best part of your job?” Donna said, “being able to participate in the development of innovative ways to insure the new risks facing design professionals, one at a time. I am also enjoying being able to structure a comprehensive risk management product for our DCPL and A&E insureds.” At present, she is enjoying soliciting input from design and construction professionals on what is important to them and what services do they perceive as being the most beneficial to their business.

Donna is married to Richard (Dick) Perez and have two wonderful stepsons, Sam, 27 and Ben, 24. Dick and Donna have known each other since they were 9 years old. “We hung out together with a group of about 10 other kids in our town, Brookline, MA. We dated in high school and went to the senior prom together.” (See photo to the left). Twenty years after they graduated from high school, Dick got in touch with her to catch up. They were married two and a half years later. “I married my best friend and couldn’t be happier,” Donna said.

Even though she travels about half of each month, Dick and Donna enjoy traveling for relaxation and exploring new places. Still an architect, she also enjoys making miniature houses around the holidays for gifts for family and friends.

Her favorite building is the iconic Chrysler Building, but she has no single favorite architect.

When asked what advice she would give to a young architect considering law school, Donna said: “Go. The education will not be wasted even if you never practice law a day in your life. It is also a good (while time consuming and expensive) tool to help in the day-to-day practice of architecture, particularly if you focus on the production and construction side of the business.”

PHILAIADELPHIA!

AIA Convention 2016 in Philly! May 19-21 Philadelphia Convention Center

This year's AIA Convention boasts nearly 300 sessions (seminars, workshops, expo credit, tours) and 40+ events. AIA's advance promotional material claims that they will turn the Pennsylvania Convention Center Expo floor into a temporary built environment with dynamic visuals, theaters, and lounges. AIA encourages attendees to check out Philly outside of convention doors, with insider tours and Design + Dining events that turn city highlights into a moveable feast. Plus, the city offers plenty of downtime fun—sports strongholds, charming history, spectacular architecture, and an amazing food scene.

See more information at: http://convention.aia.org/event/youre-invited/rsvp-philadelphia.aspx#sthash.DcqhwGXt.dpuf

TJS's Annual Membership Meeting in Philly on May 18, 2016!

Mark your calendars and plan to join us in Philadelphia on Wed., May 18th, the day before the AIA Convention opens here. As we did last year, we will host a Member-only reception, followed by dinner and then Annual Meeting. Julia Donoho, AIA, Esq. has agreed to coordinate the dinner meeting again this year for us (thank you!). We will have the election of officers for 2016-17, followed by an opportunity to discuss the future of TJS and anything on your mind. Philadelphia has some wonderful architecture, plus a rich history of our nation.

Watch for the April issue of *Monticello* for the list of candidates for officers and directors. If you have an interest in serving on the Board, or as an officer, contact Tim Twomey at: ttwomey@callisonrtkl.com

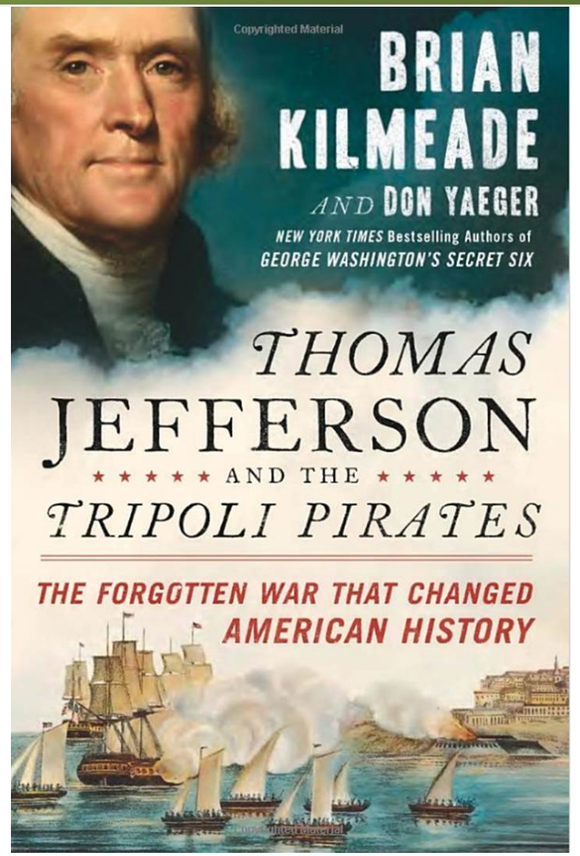
To help plan the Annual Meeting, contact Julia at jdonoho@legalconstructs.com or (707) 849-4116.

See you in the City of Brotherly Love!

Thomas Jefferson and The Tripoli Pirates Makes NY Times Best Seller List

Just in time for the holidays, this new book by Brian Kilmeade and Don Yaeger (Sentinel, 2015), is a deep dive into the 1801 war against the Barbary pirates. Kilmeade, the co-host of "Fox & Friends" on Fox News and the national radio show "Kilmeade & Friends," has written a fascinating historical narrative, co-written with Don Yaeger. Like their acclaimed bestseller *George Washington's Secret Six*, this book sheds new light on a vitally important episode that has been forgotten by most Americans.

Only weeks after President Jefferson's inauguration in 1801, he decided to confront the Tripoli pirates who had been kidnapping American ships and sailors, among other outrageous acts. Though inclined toward diplomacy, Jefferson sent warships to blockade Tripoli and protect American shipping, and then escalated to all-out war against the Barbary states. The tiny American flotilla,



with three frigates representing half of the U.S. Navy's top-of-the-line ships, had some success in blockading the Barbary coast. But that success came to an end when the *USS Philadelphia* ran aground in Tripoli harbor and was captured. Kilmeade and Yaeger recount the dramatic story of a young American sailor, Stephen Decatur, who snuck into the harbor, boarded the *Philadelphia*, and set her on fire before escaping amid a torrent of enemy gunfire.

Another amazing story is that of William Eaton's daring attack on the port City of Derna. He led a detachment of Marines on a 500-mile trek across the desert to surprise the port. His strategy worked, and an American flag was raised in victory on foreign soil for the first time. Gen. Stanley McChrystal (retired) said the book "reads like a fast-paced thriller."

The book is available on Kindle for $13.99 and Hardcover for $16.77 at www.amazon.com .

Colorado's Two Largest Cities Join the Movement for Construction Defect Reform

(reprinted with permission of Hall & Evans law firm)

Contractors, designers and insurers have long been alarmed by Colorado's construction defect litigation climate. Multifamily condominium and townhome projects, which provide access to home ownership for more people, are viewed as extremely risky due to the likelihood of future claims by homeowners' associations (HOAs).

State law-makers' efforts to stimulate condo development by enacting new laws and strengthening old ones have long been blocked by activist groups backed by plaintiff's attorneys and consumer rights advocates. Indeed, all substantive reforms proposed at the state level since 2003 to deal with these issues have significantly watered down.

Now, frustrated by gridlock at the state capital, local municipalities are taking construction defect reform into their own hands. Denver and Colorado Springs, the state's two largest cities, have joined the growing number of local governments (ten total) who have addressed HOA construction defect lawsuits through city ordinances.

Denver's new ordinance (Nov. 23, 2015) adopted several popular reform provisions, including: (1) the HOA must provide notice and obtain majority consent before bringing construction defect claims; and, (2) amendments to remove arbitration provisions in the HOA declarations are void. Notably, the Denver ordinance goes a bit further and also bars claims for purely technical building code violations if there is no personal injury, property damage or loss of use. The ordinance further cuts off strict liability claims for "negligence *per se*" due to code violations, while also establishing that if an improvement *does* comply with the building code, it is not "defective."

On Nov. 24, Colorado Springs followed Denver's lead and adopted its own construction defect reform ordinance. This sends a strong message to the state legislature (which next convenes in January 2016) to implement statewide solutions to condo defect litigation.

EDITORIAL

The Shrinking Role of the Architect: *What Would Brunelleschi Do?*

G. William Quatman, FAIA, Esq., Editor

"A great matter is architecture, nor can everyone undertake it. He must be of the greatest ability, the keenest enthusiasm, the highest learning, the widest experience, and, above all, serious, of sound judgment and counsel, who would presume to call himself an architect."

So wrote Leon Battista Alberti in 1450 A.D. in his book titled *On the Art of Building in Ten Books*, MIT Press (1988). We would all agree that architecture is a noble profession, one that requires skill, talent and management skills, as Alberti noted some 566 years ago. But is that role changing?

More recently, in 1894, Boston architect Theodore M. Clark, FAIA, wrote, "Among all the business relations which men enter into, there are none, perhaps, more complex than those which are involved in the construction of a building, by the cooperation of a multitude of contractors, journeymen, and dealers in materials, under the supervision of an architect, for the owner of the land on which the building is erected, who is also the employer of the architect; and it speaks more for the general honesty and good faith with which such operations are carried on than for the prudence of the persons who engage in them that there are hardly any two classes of men whose legal status, in regard to other people, is so undefined as that of architects and builders." T.M.Clark, FAIA, *Architect, Owner and Builder Before the Law*, Macmillan & Co. (1894).

(See inset for Clark's bio)

That was written 122 years ago to describe the complexity of the architect's role. Has that role changed in the past century? Are they still the field generals, directing the action? Or more of a quartermaster, supplying plans to be implemented by others? This battlefield analogy is not so far off. In *Blake Const. Co. v. C. J. Coakley Co.,* 431 A.2d 569, 575 (D.C. 1981), the court stated: "We note parenthetically and at the outset that, except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield."

Theodore Minot Clark, FAIA (1845-1909) was a Boston architect who graduated from Harvard at the age of 20. He worked in the office of **Henry Hobson Richardson** and then had his own practice until 1880, when he became a Professor of Architecture at M.I.T., where he remained on the faculty for 8 years. He wrote several books and was editor of American Architect and Building News from 1888 until 1909. He was active in the Boston Society of Architects and in the AIA. [Source: Henry Withey, *AIA's Biographical Dictionary of American Architects (Deceased),* New Age Publishing Co. (1956)]

The role of the architect has certainly changed since Mr. Clark's description in 1894. Partially due to the "liability crisis" in the 1970s and 1980s, architects began to pull back from certain construction phase services deemed too risky, and the AIA replaced "supervise" with "observe" to describe the architect's role. As one New York court stated, "In an effort to avoid liability..., the American Institute of Architects revised its standard form contract with the owners to delete the troublesome words of supervision and inspection." *Welch v. Grant Dev. Co.,* 466 N.Y.S.2d 112, 114 (Sup. Ct. 1983). After citing to the clauses of the 1977 edition of the former B141, the court concluded: "It is evident from reading the aforesaid contractual provisions that the architect has been completely stripped of all supervisory powers and duties." *Id*., at pp. 114-115.

In the vacuum created by this contractual change, construction managers came on the scene to handle that role, followed by program managers and then design-builders, who assumed total project responsibility. In hindsight, many architects lament that their role has been diminished. The AIA issued a white paper in November 2014 entitled, "*The Diminishing Scope of Practice*," which describes the erosion of the architect's role. One reason, per the AIA white paper, is exemptions granted to non-architects under licensing laws, such as a 2011 Texas statute that grandfathered engineers who could demonstrate that they could practice architecture competently, Tex. Occ. Code Ann. § 1051.607. A few recent court cases have also upheld the right of engineers to practice architecture. See, e.g. *Rosen v. State Architects Licensure Bd.,* 763 A.2d 962 (Pa. Commw. Ct. 2000); *Bird v. Mo. Bd. of Architects*, 259 S.W.3d 516 (Mo. 2008). The AIA's white paper also contends that the rapid growth of design-build and P3 have diminished the architect's role.

Long gone are the days when architects could truly be called "master builders." The Italian Renaissance master-builder (or "Capomaestro") Filippo Brunelleschi (1377-1446) was not only the project designer for the Santa Maria del Fiore cathedral in Florence, but he was appointed as the project superintendent to oversee the construction and interpret the design for the masons. His responsibility was to, "provide, arrange, compose or cause to have arranged and composed, all and everything necessary and desirable for building, continuing and completing the dome." See, R. King, *Brunelleschi's Dome*, Penguin Books (2000). The 143-foot diameter dome eclipsed even the Roman Pantheon, which for more than 1,000 years had been the world's largest dome. Brunelleschi designed not only the dome and its top lantern, but the machinery to hoist the 1,700 lb. beams from the ground to the cupola.

Another famous Florence architect, Leon Battista Alberti (1404-1472), stayed away from superintending construction. In Anthony Grafton's book, ironically titled: *Leon Battista Alberti: Master Builder of the Italian Renaissance,* Harvard Univ. Press (2000), he notes that, *"Alberti did not supervise the construction of his buildings on site. A builder always intervened between the design and its execution." Id.*, at p. 321.His reason? Liability! "[I]n fact, Alberti recommended that the architect avoid taking sole responsibility for the construction of his projects, lest he incur all the blame for errors and delays." *Id*., at p. 288. This risk-avoidance mindset has remained with the architectural profession for over 560 years.

While other professions have taken bites out of the architect's "traditional" scope, perhaps architects have to ask themselves if they are to blame, by retreating from the master-builder role while others crept in to fill that space. The hand-wringing over a diminished scope is legitimate. But the answer seems to be to recognize that the industry has changed, with engineers, interior designers, program managers and construction managers, design-builders and developers playing a larger role. Architects who want to regain lost ground will have to expand their scope, move outside of their comfort zone, take on more risk, and compete head-on with this expanding pool of service-providers. The alternative is to accept a reduced role and make the best of the current market for architects providing pure design services with a limited construction phase role.

What would Brunelleschi do?

REVIEW: The KPMG Report on the Root Causes of Major Project Failures

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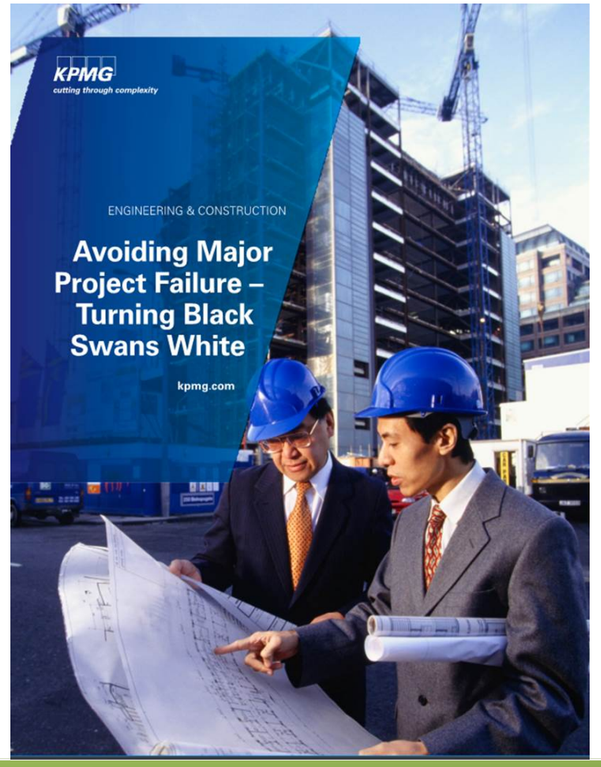
HKS/Dallas

In 2013, the accounting firm of KPMG published a white paper titled: "Avoiding Major Project Failure – Turning Black Swans White." We asked TJS member Craig Williams to review it, given his role in the more recent paper by the AIA Large Firm Roundtable (See Oct. 2014 issue of *Monticello*, pp. 8-9). Craig wrote:

As most, no all, of us with significant design, construction, or construction law experience know, all construction projects have some measure of risk for all parties involved in the process. Each member of the traditional project triumvirate, Owner – Designer - Builder, manages a risk profile that is well known to each of them, yet, as KPMG explains, many times those risk profiles are not well managed. For major projects, the results of mismanaged risks can be financially severe or catastrophic. In this paper, KPMG relates such events to the "black swan theory," a 16th century concept recently further developed by Nassim Nicholas Taleb in his 2004 book, "Fooled by Randomness," and his 2007 book, "The Black Swan."

The theory focuses on the extreme impact of certain kinds of rare and unpredictable events and the tendency to find simplistic explanations for these events after the event occurs. Taleb's main idea is not to attempt to predict "black swan" events, but to build robustness to negative events that occur and being able to exploit positive ones. His position is that a black swan event depends on the observer—using a simple example, what may be a black swan surprise for a turkey is not a black swan surprise for its butcher—hence the objective should be to "avoid being the turkey" by identifying areas of vulnerability in order to "turn the black swans white," or, be the butcher. KPMG notes that in its review of troubled and failed projects for which its clients have engaged KPMG to recover, all of the issues and failures were attributed to avoidable and sometimes predictable root causes. Yet, its clients didn't see or recognize warning signs that would have alerted them to the avoidable and disastrous results, so they became the turkey. The question posed by KPMG is: Why then do so many project participants attribute the cause of major failures to unforseen events?

KPMG makes the point that "almost all project failures, even catastrophic failures, are really not black swan events, but a series of failures that alone may have a negative impact on project outcomes, but combined, lead to catastrophic failure". KPMG then sets forth characteristics of major projects that often lead to such failures for owners and contractors, highlights alternative approaches for screening projects, and discusses red flags and triggers for early identification of troubled projects. The point is that although project participants feel as though their troubled projects are victims to black swan events, those events could have been avoided, and spending valuable resources and energy trying to predict them will not be productive. Instead, one must first understand how and why projects fail in order to better understand how certain events may be misinterpreted as random black swan events, as opposed to a series of avoidable failures. The lesson learned is the importance of incorporating tools and techniques designed to prevent such failures, and of recognizing triggers to alert the parties early if these failures are starting to happen. Then, they may be avoided.



As a key part of this awareness, KPMG stresses the importance of ensuring the flow of independent and transparent information between management and project level participants. In other words, while many project stakeholders can tell when something is not going well on their own projects, many do not notify management because they believe the problems are temporary and will eventually be resolved. The reality is that "troubled projects almost never recover without dramatic intervention." What follows is that if management is not aware of project issues until they are catastrophic, it is almost impossible for management to take any action that will rescue the project. Therefore, it is critical for project management, project team, and stakeholders to not isolate themselves.

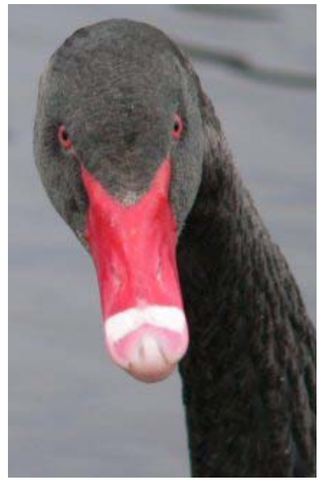
KPMG's white paper lists eight primary causes of project failure for owners, and eight for contractors. They include, for example, lack of proactive project management, fluid design, and unrealistic schedules in the owner's column; and, poor estimating, design issues, and overly aggressive schedules in the contractor's column. KPMG offers a smart list of tools and techniques that serve as "canaries in the coal mine" to detect and prevent project failure, or, back to the black swan theory, put in place robust precautions to prevent black swan events, without attempting to predict them. As the article makes clear, the key then will be not only to identify new processes and practices, but implement and sustain them. The complete article can be found at this link:

https://www.kpmg.com/BE/en/IssuesAndInsights/ArticlesPublications/Documents/avoiding-major-project-failure.pdf.

Causes of Project Failure

Owners
Scoping issues – Project scope does not fully address organizational business requirements
Inexperienced or unqualified project team – Project team lacks appropriate skills and expertise to manage the project
Poor estimating – Project estimates are incomplete or insufficiently detailed for budgeting
Lack of integrated budgeting & planning – Project business requirements are not aligned with budget and execution plan
Incomplete & fluid design – Construction commences based on an incomplete design and project scope is continually in flux
Lack of proactive risk management – Project risks are not fully understood or vetted prior to project approval
Unrealistic schedules – Project delays during planning and approval result in compressed schedule milestones and unrealistic completion targets set by management
Insufficient tools & project management infrastructure – Project tools and infrastructure are not set up to effectively plan, deliver, track, and report performance

Contractors
Poor estimating – Overly optimistic bids, poor or outdated cost data, missed scope items, flawed assumptions regarding regulatory issues, constructability or labor and material price escalation
Resource shortages and inexperienced or unqualified project team – Lack of available craft or staff labor, inexperienced field supervisory personnel, or lack of qualified and experienced project management team members
Unfavorable contract – Construction contract favors the owner in areas such as payment terms, change order pricing, reimbursement of general conditions, overhead and profit/fee, and penalties for nonperformance
Lack of senior management support – The project lacks support from senior management to address project issues and challenges in a timely manner, and manage key communications and negotiations with the owner
Design issues – Project design issues lead to inefficiencies, unrecoverable cost overruns, and schedule delays
Overly aggressive schedule – Overly aggressive schedules lead to inefficiencies in the field and unrecoverable overtime and premium time
Lack of risk management to address unforeseen conditions – Lack of proactive risk management techniques to identify and address project issues and risks
Lack of project coordination and integration – Projects are managed in silos with limited integration among the owner, architect/engineer, contractor and its subcontractors, and other project stakeholders



A Black Swan, or "Cygnus Atratus"

Historic Chemistry Lab With Links To Thomas Jefferson Discovered Behind Wall

On Oct. 18, 2015, National Public Radio (NPR) broke this fascinating story, reprinted in full here:

A hidden chemistry lab was unearthed by a worker doing renovations to the iconic Rotunda at the University of Virginia, and school officials say the room is directly linked to the third U.S. president, Thomas Jefferson, who helped design the building.

The "chemical hearth," which dates back to the 1820s, is thought to be one of the few remaining in the world. It featured two sources of heat for conducting experiments and a system for pulling out fumes.

According to the University of Virginia press release, the room, described as "a semi-circular niche in the north end of the Lower East Oval Room," was preserved because the walls of the hearth were sealed shut in the mid-1800s:

"The University of Virginia's Rotunda still has its secrets, as conservators are discovering amid the building's ongoing two-year renovation. One of them is a chemical hearth, part of an early science classroom. It had been sealed in one of the lower-floor walls of the Rotunda since the 1850s, and thus was protected from the 1895 fire that destroyed much of the building's interior.

"Two small fireboxes of the hearth were uncovered in a 1970s renovation, but the hearth itself remained hidden until the current round of renovations. When preparing for the current renovations, workers examined some of the cavities in the walls and found the rest of the chemistry hearth."

The discovery was made by Matt Scheidt, who is a project manager for the company overseeing the renovations to the rotunda, according to the *Charlottesville Newsplex*. Scheidt told the publication he wanted to know how thick the walls were. He added: "I was laying on my back looking up inside this little space. I saw that there was a piece of cut stone which is very unusual to have in this location. You could see that there was a square cut in the stone and that there was a finished space around that with plaster and painted walls."

Scheidt tells *NewsPlex* most chemical hearths from the era have been destroyed, making the new discovery "unique," he says.

According to the university's press release, Jefferson, who was the school's founder, collaborated with the university's first professor of natural history, John Emmet, to equip the space.

In a letter from April 1823, Jefferson requested the class be located on the ground floor so water would not have to be pumped to upper floors, according to the release:

"For the Professor of Chemistry, such experiments as require the use of furnaces, cannot be exhibited in his ordinary lecturing room," Jefferson wrote. "We therefore prepare the rooms under the oval rooms of the ground floor of the Rotunda for furnaces, stoves &c. These rooms are of 1,000 square feet area each."

A chemical hearth recently discovered in the walls of the Rotunda at the University of Virginia dates back to its Jeffersonian origins. This photo from the University of Virginia shows a chemical hearth discovered in the Rotunda at the University of Virginia during renovations at the school in Charlottesville, Va.

The university says the chemical hearth will remain on display once renovations to the rotunda are complete. A barrier will be set up to keep people from entering the alcove, but the inside of the chemical hearth should be visible, according to university officials.

EDITOR'S NOTE:

The Rotunda is a building located on The Lawn in the original grounds of the Univ. of Va. Designed by Thomas Jefferson, it was meant to represent the "authority of nature and power of reason" and was inspired by the Pantheon in Rome. Construction began in 1822 and was completed in 1826, after Jefferson's death. The grounds of the new university were unique in that they surrounded a library housed in the Rotunda rather than a church, as was common at other universities in the English - speaking world. The Rotunda is seen as a lasting symbol of Jefferson's belief in the separation of church and education, as well as his lifelong dedication to both education and architecture.

The collegiate structure, the immediate area around it, and Jefferson's nearby home at Monticello, combine to form one of only three modern man-made sites in the United States to be internationally protected and preserved as a World Heritage Site by UNESCO (the other two are the Statue of Liberty and Independence Hall). The original construction cost of the Rotunda was $57,773.

ARCHITECT HELD LIABLE FOR $6.7 MILLION IN N.M. DESIGN - BUILD CASE

Despite a clear "flow-down" clause, a New Mexico Court of Appeals held that a limitation of liability clause in the prime design-build contract did not apply to the architect. This case involved the design and construction of a resort and casino. An earthen wall designed by the architect failed, and the design-builder sued for $6,766,156 in redesign and repair costs under theories of negligence, negligent misrepresentation, breach of contract, and attorney fees. The prime contract limited the design-builder's liability to the owner for design errors or omissions to $3 million of insurance required to be carried by the architect. The flow-down clause conflicted with another clause in the subcontract saying the architect would be liable, without any limitation, for redesign and constructions costs to correct errors or omissions. The case is *Centex/Worthgroup, v. Worthgroup Architects*, 2015 WL 5316873 (N.M. Ct. App.)

Personal Liability for Fraudulent Pay Applications

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A false-notarized payment application signed by a contractor and submitted to an owner may make both the contractor and the person who signed the false application personally liable for damages suffered by the owner. A recent Texas Court of Appeals opinion holds that a person who signs a notarized payment application is *personally liable* to the owner if the representations to the owner in the application are fraudulent. In *Alexander vs. Kent*, 2015 WL 6759333 (Tex. App.) the contractor went broke while the job was pending and did not pay all of the subcontractors. However, the principal of the contractor continued to sign notarized payment applications that contained the following representation to the owner:

"The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from Owner, and that current payment shown herein is now due."

This representation was signed by Keith Alexander as president of the contractor. The project owner chose not to pursue the bankrupt contractor, but sought to hold Mr. Alexander personally liable. The trial court found that these representations were fraudulent because the subcontractors were not paid as represented and Alexander knew that when he sent them to the owner for payment. Because the owner relied on these misrepresentations in continuing to make payments, Alexander was found personally liable. The Fort Worth Court of Appeals affirmed the judgment against Alexander.

The message is clear. Contractors cannot file false payment applications and expect to receive the normal protection from liability that corporations or other business entities may offer. Attorney's fees were denied, since the claim was for fraud, not breach.

Leveling the Playing Field? California Supreme Court Set to Hear Construction Lawsuit Alleging Cutthroat Bidding Practices on Public Projects

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A divided California Court of Appeal recently increased the risk of potential tort liability for contractors who bid on public construction projects. For the first time ever in California, the court allowed the second-place bidder on a public project to sue the winning bidder for "Intentional Interference with Economic Advantage," in *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 184 Cal.Rptr.3d 279 (2015), simply because the winner allegedly paid its workers less than the required prevailing wage. However, the California Supreme Court is currently reviewing the lower court's highly controversial decision and will likely hear oral arguments in 2016. In order to reduce the potential risk to contractors who bid on public projects while the high court deliberates, this article summarizes this case and provides recommendations to avoid such lawsuits.

Over the course of four years, an asphalt subcontractor (Defendant) successfully outbid two other asphalt subcontractors (Plaintiffs) on 23 public road projects throughout Southern California. The Plaintiffs sued the Defendant for "Intentional Interference with Prospective Economic Advantage" (Intentional Interference), alleging that the defendant only submitted the lowest bid by paying its workers less than California's statutorily mandated prevailing wage. Cal. Lab. Code §§ 1770-71. The Plaintiffs claimed that they had been the second-lowest bidder on those 23 projects and would have won those projects if the Defendant calculated its bid using the prevailing wage labor rate. The Plaintiffs also alleged that each contractor's material costs were the same, and that the only real difference in their bids came from the Defendant's deflated labor costs. The Defendant challenged the complaints with a demurrer, arguing that the Plaintiffs did not have the required existing relationship with the public owners, or a reasonable probability of winning the contracts.

Intentional Interference provides a remedy for one who suffers economic losses at the hands of a malicious third party. To establish Intentional Interference, a plaintiff must allege: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the plaintiff's relationship; (3) wrongful acts by the defendant designed to disrupt the plaintiff's relationship, and the defendant either intended to interfere or acted with the knowledge that interference was certain or substantially certain to occur; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff caused by the defendant.

As a matter of first impression in California, the Court of Appeal held that, based on the facts that the Plaintiffs alleged, they had a reasonably probable economic expectancy that they would be awarded the public works contracts and that they would gain some future economic benefit. Although the Plaintiffs did not submit the lowest bids, it was allegedly because the Defendant violated its obligation to pay its workers the prevailing wage. The court found that the Plaintiffs' complaint was similar to another case, *Korea Supply Co. v. Lockheed Martin Corp*. 29 Cal.4th 1134 (2003), involving allegations that the winning bidder on a military contract gave bribes and sexual favors to Korean officials. The *American Asphalt* court saw little functional difference between the allegations concerning the unsuccessful bidder in *Korea Supply* and the Plaintiffs' allegations. The court noted that, absent the Defendant's alleged misconduct, the Plaintiffs submitted the true and lawful lowest bids. The court also noted that public policy favored allowing Intentional Interference claims on public projects because the prevailing wage laws protect and benefit employees on those projects. If the court did not allow the Intentional Interference claim against the Defendant, it would effectively mean that no losing bidder could ever sue a competitor for interfering with the bidding process — no matter how egregious the misconduct. The dissenting justice disagreed, in part, because no economic relationship existed between the bidder and the public entity at the time of the bid, and because public contract law forbids such relationships during the bidding phase. The dissent also reasoned that no bidders have a "probability" of future economic benefit from the public contracts on which they are bidding.

The California Supreme Court will likely determine once and for all whether second-place bidders can claim Intentional Interference against winning bidders who violate the prevailing wage laws. Because the Supreme Court granted a petition for review, the Court of Appeal's decision cannot currently be cited as binding legal authority in California state proceedings. However, the Supreme Court's interest in the case is a signal that it will make precedent one way or the other, and depending on how the Supreme Court rules, it may transform the public works legal landscape in California for years to come.

To reduce the risk of such lawsuits, California contractors should make sure that they are paying the correct prevailing wage to their laborers when required to do so.

Contractor & Surety Liable for $155 Mil.; No Differing Site Condition Claim

This case involved a dispute between a joint venture/contractor and a county over delays during a wastewater treatment project. The County prepared specifications and two geotechnical reports for the bidders' use, showing that the project would be situated below the water table. The JV defaulted and the County sued the JV and its surety, whose defense was that site conditions were materially different than anticipated. After a 3-month trial, the jury awarded the County over $155 million plus fees. The trial court denied the contractor's claim on summary judgment. The Appeals Court identified four requirements: 1) the contract documents indicated certain conditions; 2) the contractor reasonably relied on those indications when making its bid; 3) actual conditions materially differed from those that were indicated in the contract; and 4) the materially different conditions were not foreseeable. *King Co. v. Vinci Constr. Grands Projects*, 2015 WL 6865706 (Wash.App.).

$5.5 Mil. For Misrepresentations in Design Proposal

The ABA Forum Committee's *Under Construction* (Dec. 21, 2015) reported on the unpublished case of *Community College of Phila. v. Burt Hill, Inc. n/k/a Stantec*, 2015 WL 2437383, in which a Pa. jury ruled in May against two design firms for a total of $5.5 million on a project to reconfigure and construct new facilities for a community college. Although Stantec won the proposal to serve as the project's full-service design-engineering firm in June 2007, no contract was executed between the parties until Sept. 2008. The jury appears to have not only looked at the parties' executed contracts, but also the construction schedules and Stantec's proposal submitted in April 2007 (pre-contract award) as the basis for Stantec's liability.

According to court papers, Stantec represented that it would "staff the project with experienced professionals." However, Stantec is alleged to have instead used unlicensed architects with no higher education or significant project experience, including interns from Drexel University, rather than the "senior level" professionals it had promised.

According to the college, Stantec "assigned new, less experienced employees not only to work on the project, but also to serve in the critical role of project architect." Stantec also allegedly represented in its response to the College's request for proposal ("RFP") that it would utilize in-house mechanical, electrical and plumbing ("MEP") engineers, to save on costs. However, Stantec subcontracted the MEP work to PWI Engineering, whom it joined as a third-party defendant. The jury found PWI liable to Stantec for professional negligence in the amount of $1.5 million in damages (resulting in a molded verdict against Stantec in the amount of $4 million) after a 2.5 week trial. The college's contract with Stantec was for little over $2 million for its services. The college called five experts to support its case.

The ABA article by Shiva S. Hamidinia, Esq. of the Vienna, Va. firm of Briglia McLaughlin, warns that this case sends a message that representations made when responding to RFP's can result in tort liability when others reasonably rely on the information provided.

The Design-Build Institute of America's New Chairman. *TJS Board Member Bill Quatman, FAIA, Esq. was elected by the DBIA membership at the annual convention in Denver in Nov. 4, 2015. He is shown here with DBIA's Executive Director, Lisa Washington, the night the Royals won the World Series. (Bill is from Kansas City, if you cannot tell).*

An Interview With DBIA's New Chairman!

Q. Tell us more about your role at Burns & McDonnell and what you can bring to your role as DBIA's Board Chair?

A. I am general counsel and senior vice president for a 5,000+ person integrated, international design-build firm. I've had this position for seven years, after 24 years in private law practice, where I represented design professionals, contractors, subcontractors and owners. I am also a licensed architect and practiced in that role before and during law school. This broad background gives me a good perspective on issues facing the construction industry as a whole, but especially for those engaged in design-build or EPC projects. My company is in the top ENR lists for both design firms and contractors, so we deal with all the issues you can imagine, including those faced by DBIA members each day. Even though my role would sound solely legal in nature, at least half of my time is spent on business issues and transactions. I feel that I can bring this wide-angle lens to the DBIA board and its members, rather than focus on any one single area of project delivery.

Q. What are your three top priorities for 2016 to help advance DBIA, the A/E/C industry and design-build project delivery?

The DBIA board just completed a long-range planning session aimed at giving strategic direction to the organization through 2018. The top three priorities were: Universalize Design-Build Done Right, Leverage The Existing Strengths of Design-Build, and Deliver High Value to All Members and Customers. Within those categories are sub-sets of many task items for DBIA, including membership growth and financial stability. Those two are very important to me and should be to all our members if we want a strong organization capable of delivering quality programs, education and initiatives like DBIA's "best practices." Those big three will get us there.

Q. What new initiatives are you focused on this year?

A. Aside from the board's long-range plans, I've been active in other organizations during my 35 - year career, including past chair of the AIA's National Design-Build Knowledge Community (which was the second largest at that time, second only to the Design KC). I know that these other organizations deal with many of the same issues DBIA does. So, I've already reached out to the incoming chairs or presidents of several affiliated organizations to solicit their views on the issues facing them and their organizations. While our interests might not always align, I know there is strength in numbers and if we can find our common interests and work on those, we can accomplish so much more together. After all, isn't that what collaboration is all about? The response has been great, and I am excited to engage these leaders in a discussion of how we can work together in 2016 and beyond.

Q. Where would you like to see DBIA by the end of 2016? In five years?

A. Increased membership growth and financial stability, regionally and nationally. We've set some goals at the board level on where we'd like to be. Those include a 6-month reserve over the next five years, plus research into an endowment. In terms of membership growth, we're shooting for a better retention rate for both individual members and industry partners. We have work to do in the regions, where we have some that are thriving and others still building a stable base. We'd like to see all DBIA regions financially self-sufficient by the end of 2018, which is doable.

Q. What new areas do you plan to explore to enhance DBIA member value?

A. I think we can benefit by expanding our reach beyond the United States. Just to our north, the P3 market is exploding and we are reaching out to the Canadian Design-Build Institute to see how we can partner better. There are no other international organizations focused on design-build, but we know our members are doing projects internationally, and I think we can learn from each other on best practices when going abroad. We are also getting ready to publish the often-asked for Model RFP and RFQ, which the legal committee has been working on for some time.

Q. What are your personal leadership goals this year?

A. To attract high quality public and private owners as DBIA members and board members, at the regional and national levels. To reach out to allied organizations and see how we can accomplish more on topics of mutual interest. To grow our membership and stabilize our finances. To make DBIA the organization people want to belong to because it is on the leading edge of project delivery best practices, there is value in being a member, and we have fun by networking and collaborating at this exciting time in our industry.