

Issue No. 27

Spring Issue - April 2019

PRESIDENT'S MESSAGE:

By **Suzanne Harness, AIA, Esq.**
Harness Law, PLLC

I can hardly believe that this is my last President's message, but it's true. My two-year term as President will end at the Annual Meeting of the Members on Weds., June 5, 2019 in Las Vegas, and our Vice-President, Donna Hunt, will pick up the gavel as our new 2019-21 President. I hope you will all be there with us.

If you are coming, be sure to arrive on Tues., June 4 so that you can also attend our TJS half-day workshop at A'19, which starts at 8:00 am on Weds., June 5. Chuck Heuer, Donna Hunt, Craig Williams, and I are looking forward to presenting *WE 103 Legal Best Practices for Architects*. If you have not signed up for it yet, please do so right away, and tell all of your friends to do the same. We need, and appreciate, your support.

After the workshop, you can make your way over the Mob Museum (the National Museum of Organized Crime and Law Enforcement) for a leisurely afternoon tour, and then stick around for our Annual Meeting of the Members, which starts there at 6:00 p.m. Insider tip: if you sign up for our cocktail party and dinner, which starts at 6:45 p.m. (\$95 each), your museum tour will be free! Also, for the first time this year, you may bring your significant other or guest with you to the cocktail party and dinner. After the dinner ends at 9:00 p.m., you can join us for an after-party in the museum's Speakeasy. Be sure to see our Official Notice on page 11 — check out that beautiful photo of the museum — and look in your email for an invitation that we will send you later this week.

The Mob Museum has such an interesting past! Although it opened in 2012, it is housed in a historic federal courthouse and post office that is listed on the National Register of Historic Places. Its second floor courtroom served as the venue for some of the 1950 Kefauver Crime Commission hearings. In 2001, the city of Las Vegas bought the then-abandoned courthouse for \$1, and TJS Director Mark Ryan was on site for over two years overseeing the construction management team that completely transformed the building from a remediated shell to a fully functioning museum with LEED Silver certification. Mark took the lead in planning our Annual Meeting, and he will be there to share some of his construction stories with you.

But before cocktails, we have some serious business to conduct. Attendees will elect two new Directors, and two new Officers—see the slate of nominees on page 2 recommended by our Nominating Committee of Donna Hunt, Jose Rodriguez, and Josh Flowers. Members will
(cont'd on p. 2)

Know of Another Architect-Lawyer Who Has Not Yet
Joined The Jefferson Society, Inc.?

Send his or her name to TJS President Suzanne Harness, AIA, Esq. at:
sharness@harnessprojects.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

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(President's Message

Cont'd from page 1)

also vote on some needed revisions to the Bylaws, hear the results of our first Member Survey, learn how the Web site is coming along, sign up for the next Supreme Court admission, join the new Membership Committee, and more. I know you will want to be there. Please come a few minutes early so that we can say our fond hello's to colleagues we have not seen all year, and still get started on time.

Speaking of serious business, we have some of that right here in the pages of *Monticello*: Editor Bill Quatman's thoughtful *Opinion: Prevention Through Design*, starting on page 21. Bill's opinion surveys the context and raises questions about this important topic, which may ultimately lead to changes in the construction industry's long-held understanding of the architect's responsibility for job site safety. PtD sits squarely at the intersection of architecture and the law. I believe that TJS members throughout the country can do a great service to both professions by becoming better informed about PtD and local PtD legislation that may be proposed. If the need arises, our members can speak about PtD in local forums and write persuasively in state bar journals and industry publications, using our unique status as architect-attorneys to educate the public, other architects and attorneys, and our elected leaders. Although I hope that all of you will attend the Annual Meeting in Las Vegas, I know that, sadly, many of our over 100 members will not be able to attend for one reason or another, and will also miss out on the AIA convention. Even if you are not attending, you will certainly be impressed to see how many of your TJS colleagues are speaking at A'19 — (see list on this page). TJS members are speaking on each day of the convention. Wow!

It has been an honor, and fun, to serve as the sixth TJS President. My sincere thanks to all of you, and the Officers, Directors, and Founders of TJS who inspired me, and helped me over the past two years to get things done for the Society. See you June 5 in Las Vegas!

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.

MEMBERS SPEAK AT AIA CONFERENCE.

Several TJS members are speaking on liability and contract issues at the upcoming AIA Conference in Las Vegas. Among the presenters are:

- Members **Chuck Heuer, Suzanne Harness, Craig Williams** and **Donna Hunt** are presenting a half-day pre-convention workshop on Legal Best Practices for Architects (WE103) on Weds., June 5, 8 a.m. to noon.
- **Joelle Jefcoat**, who will speak on Risk Management Essentials: Part Two, the Construction Project (WE308) on Weds., June 5 at 1:00 - 5:00 pm.
- **Michael Koger** will speak on Interiors & Furniture - Understanding the Risks & Opportunities (EL101a) on Thurs., June 6 at 10:30 - 11:30 pm. Mike will repeat this program (EL101b) on Fri., June 7 at 12:15 - 1:15 pm. Mr. Koger will also be presenting on Understanding the General Conditions of a Construction Contract (SA109) on Sat., June 8 from 10:00 - 11:00 am.
- **Donovan Olliff** will speak on Joint Ventures with Other Design Professionals: What You Should Know (EL102a) on Thurs., June 6 at 12:15 - 1:15 pm. This program will also be repeated on Fri., June 7 (EL102b) at 2:00 - 3:00 pm.
- **Michael Bell** will present on Aligning Expectations: Risk Management With Custom Residential Clients (EL103a) on Thurs., June 6 at 2:00 - 3:00 pm; repeating this program on Fri., June 7, (EL103b) 10:30-11:30 am. Michael is also presenting on The Small Firm's Guide to AIA Contract Documents (SA302), held on Sat., June 8, 1:30 - 2:30 pm.
- TJS Members **Timothy R. Twomey** and **R. Craig Williams** are co-presenting on Condos Happen: How is Your Multi-Family Practice at Risk? (SA409). This program is held on Sat., June 8 from 3:00 - 4:30 pm.

CANDIDATES FOR OFFICE ANNOUNCED.

The Nominating Committee has identified the following candidates, to be voted on at the Annual Meeting on June 5, 2019 in Las Vegas. For the position of Director: **Michael J. Bell, FAIA, Esq.** and **Laura Jo Loeffers, Assoc. AIA, Esq.**; For the position of Secretary: **Joshua Flowers, FAIA, Esq.**; For the position of Treasurer-Elect: **Jeffrey M. Hamlett, AIA, Esq.**

MINUTES OF THE BOARD MEETING

Date: Jan. 22, 2019. Attendees. Directors: Suzanne Harness (Pres./Chair), Donna Hunt (VP/Pres.-Elect), Jose Rodriguez (Treas.), Chuck Heuer, Jeffrey Hamlett, Jacqueline Pons-Bunney, Mark Ryan, Joshua Flowers. Rebecca McWilliams was absent. Secretary: Joyce Raspa. Founders: Tim Twomey, Craig Williams, and Bill Quatman.

The meeting was called to order by Chair Harness at 12:00 noon EST.

Treasurer's Report:

Board Chair Suzanne Harness called on Jose Rodriguez to give the Treasurer's Report. Mr. Rodriguez reported that the current bank balance is \$16,809.92. The number of members paid through Dec. 21, 2018 was 103. There are five members who did not pay 2018 dues. He issued two (2) letters to members terminating their membership for non-payment of dues for three years. Those were: Joseph E. Flynn; and Prof. Casius Pealer. A question was asked how would we know if someone has died, and that is why dues were not paid? The treasurer will attempt to call members prior to termination.

Old Business:

- C. AIA Convention Education Program. Chuck Heuer reported that although TJS was not selected for the 1.5 hour seminar, individual TJS members have been approved for a presentation entitled "Legal Best Practices for Architects" from 8:00am - 12:00 Noon on Weds. June 5. The program is not approved for HSW credits, but registration is open and it is a good opportunity to promote TJS.
- D. Annual Meeting. Mark Ryan and Joyce Raspa reported that the annual meeting and dinner will be held on Wed., June 5, 2019, in Las Vegas, at a venue yet to be chosen. The schedule will be: 5:30 p.m. gather/networking; 6:00-7:00 p.m. business meeting; 7:00 p.m. social time, with a 7:30 p.m. dinner. The social and dinner portion will be open to guests. Our annual sponsor, Rimkus, has advised that it will not be our 2019 dinner sponsor. Outreach is under way to obtain new sponsor(s). The annual dinner cost last year was \$150/person, part of which was offset by the sponsor. There was discussion about raising the price for the dinner from \$75 to \$100 which was generally considered not to be unreasonable as any

restaurant would charge that amount. Discussion of how the dues are used ensued. Mr. Hamlett mentioned that AIA/Washington State events are underpriced and the difference is incurred by the organization to encourage attendance and to demonstrate gratitude to their volunteers. It was agreed that keeping a lower cost will increase attendance. It was decided to first secure the venue and then determine the costs at that time. Mr. Ryan reported that he is awaiting proposals from three venues, with the Renaissance Hotel as the closest. Ms. Harness brought up the idea of having a speaker at the annual dinner, but it was generally agreed that it was too challenging to have a speaker, and that networking was favored given the time constraints and allowed table conversation. It was suggested to hold a second yearly meeting with a speaker or Thomas Jefferson impersonator at the social hour, but generally recognized to be difficult in Las Vegas.

- A. Member Survey. Jeffrey Hamlett, Donna Hunt reported that they have put together 13 questions; Mehrdad may have some additional ones. The optimal number of questions was discussed. Members were generally in agreement for 15 - 20 questions, which shows TJS is engaging the membership. Some objectives are to determine why members drop out; inquire of desired objectives and activities for the Society; to obtain better input from the membership. Suggestion was made to state the number of questions in the survey opening paragraph, so that members know generally the time commitment in responding. The goal is to have the questions finalized and obtain the results of the survey for the Annual Meeting.
- B. Proposed Changes to By Laws. Chuck Heuer and Jeffrey Hamlett reported that changes are being contemplated on the following seven (7) topics: 1) Elimination of the dual licensure requirement for the Director position would open the slate up to more members; 2) Timing of the required annual Board Meeting (immediately after the Annual Meeting); 3) Election of Officers by the Board following the Annual Meeting; 4) The \$2-bill Initial Dues Requirement;

5) Honorary Membership; 6) Art IX, Sec. 1, Committees; and, 7) Art VII, Sec 1, Officers. There was also discussion about Associate Members serving as Officers and Directors, as we currently only have two (2) Associate Members. There was no opposition to allowing Associate Members to serve in those roles so long as the criteria for membership was not diminished.

- E. Web Site. Suzanne Harness reported that Alex van Gaalen has volunteered to set up a new website for TJS. The new web site will allow for online payments by members for dues and events, will be self-managing, have a TJS email address, among other advantages. Alex presented many ideas including starting a list serve amongst members, and secure online storage of our records. It was estimated that \$600.00 will be needed to facilitate the new website. Ms. Harness appointed a committee of the current Officers, Secretary and Bill Quatman to work with Alex to develop the new web site and explore the ideas presented.
- F. Next SCOTUS Admission. This is set for Nov. 16, 2020. Donna Hunt, reported for Jessyca Henderson and Jessica Hardy that, to date, five members have replied with interest in Admission. Marketing to be increased roughly one year prior to the Admission date.

New Business:

- A. Nominating Committee. Suzanne Harness reported that the Bylaws state that the Chair shall appoint a Nominating Committee which will consist of at least three (3) Directors whose terms do not expire during the coming year. The Nominating Committee shall confer prior to the Annual Meeting of the Members to nominate candidates for Directors and for the office of President.
- B. The 2018 Nominating Committee was Jeffrey Hamlett, Jose Rodriguez, and Jacqueline Pons-Bunney. The 2019 Nominating Committee will be Donna Hunt, Jose Rodriguez, Josh Flowers, and Suzanne Harness. The work of the 2019 Nominating Committee will be to identify two (2) new Directors, a Secretary, and an Assistant Treasurer, with the goal to identify nominees by the time of the April board meeting so that their names can be published in the April newsletter.
- C. Other New Business: None.

Next Board Meeting:

Suzanne Harness stated the next meeting will be in April 2019. Joyce Raspa, Secretary, will set up the meeting in mid-March. On motion duly made and seconded, the meeting was adjourned at 1:05 p.m.

MASSACHUSETTS. CONTRACTOR DENIED COVERAGE UNDER CGL POLICY WHERE LIABILITY WAS BASED SOLELY ON CONTRACT.

In 2013, a private school hired Lee Kennedy Co., Inc. (“LKC”), a construction contractor, to construct a new gymnasium. LKC hired a subcontractor (“Kenvo”) to construct the gym floor. After project completion, the architect reported a series of flooring system deficiencies. LKC withheld \$192,383 from Kenvo to correct the defects. LKC ultimately corrected the defects and then filed a claim against its own general liability insurer under the Contractor Controlled Insurance Program (“CCIP”) for the costs it incurred to fix the deficiencies. The insurer denied the claim, based an exclusion for “Contractual Liability,” under which the policy did not provide coverage for “bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” The exclusion did not apply, however, to liability for damages: 1) That the insured would have in the absence of the contract or agreement; or 2) Assumed in a contract or agreement that is an “insured contract,” provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Based on this exclusion, the insurer argued that LKC's claimed payments and losses are not “sums that the insured becomes legally obligated to pay as damages because of ... ‘property damage’ to which this insurance applies,” but, rather solely due to LKC’s contract with the school.

LKC sued the insurer and both parties filed cross-motions for summary judgment. The federal district court held that coverage was barred by the contractual liability exclusion in the policy and ruled for the insurer, denying coverage. The court found that the exclusion is consistent with the general rule that the phrase “legally obligated to pay as damages” in a commercial general liability insurance policy provision applies only to tort liability, and not contractual liability. In ruling for

the insurer, the court stated that LKC could not show that in the absence of the contract it was legally obligated to pay these costs as damages. As a result, the insurer was granted summary judgment. See, *Lee Kennedy Co., Inc. v. Arch Ins. Co.*, 2019 WL 108883 (D. Mass. 2019).

TEXAS. DISPUTE OVER ARCHITECT'S INSURANCE COVERAGE WAS SUBJECT TO ARBITRATION.

Another gymnasium case involving a dispute over insurance, only this one dealt with issues of arbitrability of disputed coverage. The project architects, Lamarr Womack & Associates, LP ("LWA"), and three individual architects, were sued for negligence, breach of contract, and fraud. The architects filed a claim against LWA's professional liability carrier ("Lexington"), seeking a defense and indemnity. Lexington tendered a defense under a reservation of rights to dispute coverage, claiming that the architects had notice of the claim prior to purchasing the insurance policy and failed to disclose it in their application. Lexington then initiated an arbitration proceeding against the architects, seeking a declaration that it did not owe the architects a defense or indemnity for the underlying claim. The architects then filed a lawsuit for declaratory judgment and for breach of contract. Lexington responded by filing a motion to dismiss, challenging the court's jurisdiction and, alternatively, a motion to stay pending the outcome of arbitration and an order directing the parties to proceed with the pending arbitration. The federal district court granted Lexington's motion to stay the lawsuit.

The court embarked on a two-step analysis. First, the court addressed whether there was a valid agreement to arbitrate between the parties. Second, if so, does the claim fall within the scope of the arbitration agreement? The first question was answered in the affirmative, since the architects did not challenge the existence of the agreement, but only its scope. "Thus, the fact that there is an agreement to arbitrate is undisputed," the court said. Next, the court found that, "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."

If the parties have clearly and unmistakably agreed "to arbitrate arbitrability," then the question of whether a particular claim is subject to arbitration is for the arbitrator, and not a

court, to decide, the court held.

The district court cited to the Jan. 8, 2019 U.S. Supreme Court case of *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019), in which the high court ruled that, "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.*, at p. 529. [Note: See p. 30 of this issue]. Here, the arbitration agreement incorporated the AAA's Commercial Arbitration Rules, which provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." As a result, the district court ruled that the parties had entered into an arbitration agreement, "[a]nd whether the claim made in this case is included in the scope of the agreement is a matter for the arbitrator(s) to decide." Therefore, the issue of whether the claims fall within the scope of the arbitration agreement was to be determined by the arbitrator(s). The court added, "In light of the fact that the arbitrators could reject jurisdiction based on the scope of the arbitration agreement, the Court stays this action pending completion of the arbitration proceeding." *Lamarr Womack & Assoc. L.P. v. Lexington Ins. Co.*, 2019 WL 414522 (S.D. Tex. 2019).

ALABAMA. SEAL OF LICENSED ARCHITECT WAS REQUIRED FOR TEN ATTACHED TOWNHOMES.

When a homebuilder ("Stoneridge Homes") submitted an application to a city inspection department seeking a permit to build two buildings, each consisting of ten attached townhouses, the city's chief building inspector denied the application because, among other things, the plans had not been "stamped" or prepared by a registered architect. Stoneridge filed a petition for a declaratory ruling with the State Board for Registration of Architects ("the board"). In its decision, the board concluded that an architect was required under applicable statutes and regulations. The homebuilder sought review of the board's decision in state court, arguing that pursuant to § 34-2-32(b), Ala. Code, townhouses were exempt from the requirement that a registered architect prepare plans and specifications for buildings construct-

ed in Alabama. That statute provides, in pertinent part: “No person shall be required to register as an architect in order to make plans and specifications for or administer the erection, enlargement, or alteration of any building upon any farm for the use of any farmer, irrespective of the cost of such building, or any single family residence building”. However, the circuit court rejected that argument and ruled for the board. Stoneridge Homes the Home Builders Association of Alabama, Inc. then appealed that ruling. In affirming, the Court of Appeals held that state regulation 100-X-4-.10, Ala. Admin. Code, states that “[a]n architect is not required for design of a detached single-family residence” (Emphasis added.) Stoneridge argued that the statute was in conflict, since it exempted any single-family residence building, “whether detached or not.” The Court of Appeals held that, under Alabama law, “Neither this court nor the trial court may substitute its judgment for that of the administrative agency,” citing case precedent. Since the statutes do not define the term “single family residence building,” the plain meaning of the phrase contemplates a structure in which one family would reside, that is, a single-family dwelling. The Court said that Stoneridge submitted plans for two buildings, each consisting of ten attached townhouses. “A single ten-unit building contemplates ten families dwelling in that single building. We agree with the board's conclusion that, if two or more dwellings are joined in a building, the building becomes a multifamily dwelling.” As a result, the seal of a licensed architect was required. The judgment of the circuit court upholding that decision was affirmed. See, *Stoneridge Homes, Inc. v. Ala. State Board*, 2019 WL 989304 (Ala. Civ.App. 2019).

NEW YORK. ARCHITECT’S EFFORTS TO REMEDY DESIGN ERRORS TOLLED THE STATUTE OF LIMITATIONS.

This breach of contract action arose from a contract in which the plaintiff (Berman) agreed to provide architectural services for the construction of an ambulatory surgery center in Brooklyn. The defendant (Kodsi) asserted two counterclaims against Berman for professional malpractice on the failure of the constructed surgery center to obtain accreditation from the Accreditation Association for Ambulatory Health Care because the design did not meet applicable design and construction

standards. The architect moved for summary judgment, arguing that it fell outside of the one-year statute of limitations provided for in the contract. The trial court denied the motion, finding that a triable issue of fact existed as to whether “the continuous representation doctrine” tolled the statute of limitations based on work the plaintiff had done within the limitations period in an attempt to remedy the accreditation problem.

On appeal, the court held that New York law recognizes that “the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems.” Under the circumstances presented, there was evidence of continuing communications between the parties and evidence of the architect's efforts to remedy the alleged errors or deficiencies in the plans. In affirming, the court held that these facts supported denying the plaintiff's motion for summary judgment on the professional malpractice claim. *Jeffrey Berman Architect v. Kodsi*, 92 N.Y.S.3d 909, 2019 WL 944396 (N.Y.A.D. 2 Dept. 2019).

FLORIDA. ARCHITECT SUES REPLACEMENT ARCHITECT AND DEVELOPER FOR COPYRIGHT INFRINGEMENT.

This case involves an alleged copyright infringement by plans for a residential project. Plaintiff Swedroe is an architectural firm that was hired by developer CALM Properties, LLC, to prepare plans and specifications for a new residential building in Broward County, Florida. The contract between Swedroe and CALM Properties was based on a standard AIA B141 form of agreement. Phase I of the project was successfully completed and approved by the local planning board. CALM Properties then sold the property to Milton. As part of the sale, Milton was provided a copy of the Swedroe plans. Rather than retain Swedroe to complete the project, however, Milton hired a new architect, Caymares. Swedroe filed its drawings with the U.S. Copyright Office, obtained a certificate of registration and then sued Milton, Caymares and CALM Properties for copyright infringement. The suit alleged that CALM Properties had access to Swedroe's architectural plans for the project, and that the plans were also available in the public record. Swedroe further

alleged that Defendant Caymares copied original elements of Swedroe's plans and designs and that Caymares' design was "substantially similar, if not strikingly similar," to Swedroe's design, both as to the exterior and interior portions of the building. Swedroe denied that it expressly or impliedly authorized either Milton or Caymares to copy or derive any portion of its plans and designs.

The defendants filed a motion to dismiss the suit for failure to state a claim, specifically arguing that the plaintiff failed to state claims for copyright infringement because a copyright for pictorial, graphic or sculptural work does not protect "against the construction of the [building], even if they were copied from [that] design," citing to an 11th Circuit case, *Oravec v. Sunny Isles Luxury Ventures L.C.*, 527 F.3d 1218 (11th Cir. 2008) holding that the plaintiff's copyright did not protect "against the construction of the buildings, even if they were copied from [the plaintiff's] designs. Rather, the copyright only protects that material as graphic designs (i.e., photos, models and similar graphic work) and prevents others from copying his work to create similar pictures or models without his consent." *Id.* at 1152. Here, Swedroe asserted that it held a copyright for its plans, which *Oravec* would only grant protection from its plans from being copied by someone else without prior authorization.



The district court noted, "This is the precise activity of which Plaintiff has alleged Defendants engaged." As a result, the court found that Swedroe had sufficiently alleged claims of copyright against the defendants. The court denied the motion to dismiss other than one of the five counts, which was found to be duplicative of another count. See, *Robert Swedroe Architect Planners, A.I.A., P.A. v. J. Milton & Assoc., Inc.*, 2019 WL 1059836 (S.D. Fla. 2019).

ILLINOIS. ARCHITECT IS SUED FOR WILLFUL VIOLATION OF COPYRIGHT ACT FOR REMOVING ORIGINAL ARCHITECT'S COPYRIGHT NOTICE.

In yet another copyright case, two architectural firms that create home plans and sell design licenses, discovered infringing home plans on another architect's and homebuilders' websites that appeared to copy those of the plaintiffs. The case gave an interesting insight into the "plans-for-sale" industry. The two plaintiffs claimed to have created over 350 new home design plans since 2009, with an inventory of over 2,800 plans, which they have registered with the U.S. Copyright Office. They sell single-build licenses for their home designs for a fee ranging from \$700 to \$6,000, and claim to have generated over \$6 million in licensing revenue from over 8,000 construction licenses since 2009. The plaintiffs claimed that each design takes between 55 and 90 hours to complete and involves creating a preliminary sketch, a redline, and a plan, and then drafting construction drawings. While doing some research, the plaintiffs came across the defendant homebuilder's website's "Floor Plan" section, which directed the viewer to another webpage run by the defendant architect. There, the plaintiffs found several designs that appeared to copy from plaintiffs' designs, including the look and feel of the designs, the sizes and shapes of rooms and individual features such as walls and windows, the elevations of the plan, arrangements of appliances and other features, and the layout and location of rooms. The plaintiffs filed suit against the infringing architectural firm, the homebuilder and their individual controlling shareholders for willful and non-willful copyright infringement under the Copyright Act, as well as violations of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202. The defendants moved to dismiss for failure to state a claim. The court held that a plaintiff may demonstrate copying of constituent elements in two ways: 1) through direct evidence, such

as an admission of copying by the defendant; or, 2) by showing that the defendant had an opportunity to copy the original, referred to as “access,” and that the works in question are “substantially similar” to each other, or, in other words, that the two works share enough unique features to give rise to a breach of the duty not to copy another’s work. To determine “substantial similarity,” the court considers whether the two works share enough unique features to give rise to a breach of such a duty.

“There are only so many ways to arrange a few bedrooms, a kitchen, some common areas, and an attached garage, so not every nook and cranny of an architectural floor plan enjoys copyright protection.”

Citing to a Seventh Circuit case, the plaintiffs argued that a plaintiff claiming copyright infringement of a home design or architectural plan will have difficulty satisfying the substantial similarity requirement because “opportunities for originality are tightly constrained by functional requirements, consumer demands, and the vast body of similar designs already available.” *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1100–01 (7th Cir. 2017). As the Seventh Circuit noted, “there are only so many ways to arrange a few bedrooms, a kitchen, some common areas, and an attached garage, so ‘not every nook and cranny of an architectural floor plan enjoys copyright protection.’” *Id.*, at 1102–03. The trial court agreed that, at least at this stage, the court could not determine as a matter of law that plaintiffs have not alleged elements of their plans or a combination of elements entitled to copyright protection.

In addition, the plaintiffs sufficiently alleged “access” by the defendant architect, noting that “access” can be alleged through direct receipt of the copyrighted work or such wide dissemination that the defendant can be presumed to have seen it. *Id.* at 1100. The plaintiffs here extensively marketed their plans, including by mailing plan catalogs and other publications with the plans at issue directly to the defendant architect. The court found this was sufficient to show access, at this stage of the case. As to the allegations of willful infringement, under which a plaintiff can recover an increased statutory damage award, the court held that “[w]illful infringe-

ment occurs where a defendant knows that its conduct is an infringement or if the infringer has acted in reckless disregard of the copyright owner’s right.” Here, the two plaintiffs did more than just add the word “willfully” to support an award of increased statutory damages; they alleged that the defendant architect knew of plaintiffs’ copyright “and removed the copyright indications from Plaintiffs’ plans in an effort to conceal the infringement.” These allegations were sufficient at this stage to suggest willful infringement.

However, as to plaintiffs’ DMCA claim, the DMCA makes it illegal for a person to knowingly falsify, remove, or alter copyright management information (“CMI”). 17 U.S.C. § 1202. The statute defines CMI as the information conveyed in connection with copies of a work, such as its title, author, copyright owner, the terms and conditions for use of the work, and identifying numbers or symbols referring to the work’s copyright information. Plaintiffs claim that the defendant architect violated § 1202 by removing or omitting plaintiffs’ CMI from the allegedly infringing plans. The court held, however, that, “basing a drawing on another’s work is not the same as removing copyright management information.” Therefore, the plaintiffs had not alleged a DMCA violation, and the court dismissed the DMCA claim with prejudice “because further amendment of the claim would be futile.” *Design Basics, LLC v. WK Olson Architects, Inc.*, 2019 WL 527535 (N.D. Ill. 2019).

TEXAS. SUIT AGAINST ARCHITECT AND ENGINEERS DISMISSED WITH PREJUDICE FOR FAILURE TO FILE A CERTIFICATE OF MERIT.

Texas Southern University (“TSU”) sued its architect and engineers for allegedly defective design and construction of a campus building, but the school failed to file a certificate of merit as required by Texas statutes governing suits against certain licensed professionals. Tex. Civ. Prac. & Rem. Code §§ 150.001-.004. The university moved for a discretionary extension of time to file the certificate of merit, and the architects and engineers moved to dismiss university’s claims. The trial court denied the university’s motion and dismissed its claims *with prejudice!* The university appealed and lost.

The defendants included Kirksey, the architect of record; Paradigm, the geotechnical engineer; and NKA and Haynes Whaley, structural engineers. Six months after substantial com-

pletion, the university notified the design professionals of various material cracks in the building's masonry. The architect responded for the design team that the moisture content under the building was greater than expected, and was the root cause of the building's distress. However, the source of the moisture could not be identified without "destructive demolition and additional testing." After some minor repairs, problems persisted until, another structural engineering firm, Walter P. Moore and Assoc., Inc., drafted a report which concluded that the most likely cause of the observed distress was differential movement of the structure caused by heaving of subgrade soils due to increased moisture. The university retained another expert who estimated that the cost of correcting all defects in the building would be nearly \$5 million. The university apparently had a difficult time finding an expert to sign a certificate of merit, so the university's counsel sent a letter to the design firms offering to postpone filing suit if they agreed that the written notice extended the Texas ten-year statute of repose. The offer was flatly rejected, so the university filed suit without the certificates of merit required by Texas law, arguing that the statute was not applicable to this case. The defendants moved to dismiss, which the trial court granted. On appeal, the university argued that it was entitled to an extension of time to file the certificate under section 150.002(c) of the statute, which allows a court to consider matters outside the pleadings, including evidence bearing on

whether good cause supports an extension to file the necessary affidavits. The Court of Appeals reviewed the record, including the timeline of events, and concluded that the university failed to show "good cause" for the extension (such as a soon expiring statute of limitations or repose). Thus, the trial court did not abuse its discretion by refusing to grant an extension of time to file the certificates of merit. In affirming, the Court of Appeals held, "In sum, on the present record and considering the facts and circumstances of this case, we conclude the trial court's decision to dismiss with prejudice was neither unreasonable nor arbitrary, nor did the trial court fail to analyze or apply the law correctly. Accordingly, the trial court did not abuse its discretion in dismissing TSU's claims with prejudice." *Texas Southern University v. Kirksey Architects, Inc.*, 2019 WL 922296 (Tex. App.-Hous. (14 Dist.) 2019).

MINNESOTA. CONDO HOA SUES MORE THAN 10-YRS AFTER SUBSTANTIAL COMPLETION, BARRING NEGLIGENCE AND CONTRACT CLAIMS; BUT NOT STATUTORY WARRANTY.

This case concerns a condominium project that consisted of two buildings, one six-stories (Building A) and one seven-stories (Building B). Alleged defects were discovered and the homeowners' association ("HOA") sued the developer, the architect, the contractor, and three subcontractors. In Jan. 2014, a resident in Building A noticed the first sign of defects which, eventually,



Aerial view of Monticello, Jefferson's plantation, showing the house, Mulberry Row, and the Vegetable Garden.

led to repairs in every condo unit in both buildings, at a cost of \$842,585. The HOA then sued the developer, architect, contractor, and subcontractors alleging negligence, breach of contract, and breach of statutory warranties. The contractor moved for summary judgment on the ground that the HOA's claims were barred by Minnesota's 10-year statute of repose. Other defendants joined in the motion.

The trial court filed a 45-page order in which it granted summary judgment in favor of all defendants. However, while the summary judgment motions were pending, the HOA and the developer negotiated a settlement agreement, signed by the HOA president one day before the district court filed its summary judgment order. The agreement required the developer to pay \$675,000 in exchange for a release of the HOA's claims. The agreement also provided that, because the developer (which had ceased doing business) had insufficient funds to pay the entire settlement amount, it was obligated to make immediate payment to the HOA of only \$10,000. The agreement further provided that the developer would execute a promissory note in the amount of \$665,000, which may be satisfied only from the proceeds of its cross-claims against the co-defendants. The agreement further allowed the HOA the right to "step into the shoes" of the developer to pursue those cross-claims.

After the court filed its summary judgment order, the HOA notified the court and the other parties of the settlement agreement, and sought leave for court approval. The surprised contractor sought leave to conduct discovery concerning the proposed settlement and, later, filed a motion to declare the settlement agreement invalid. The trial court agreed and denied the HOA's motion for approval of the settlement agreement and entered a partial final judgment. The HOA appealed that ruling raising two issues: 1) Were the HOA's common-law claims and statutory claims against the defendants barred by the statute of repose? and, 2) Did the trial court err by denying the HOA's motion for approval of the settlement agreement?

On the HOA claims of negligence and breach of contract, except where fraud is involved, the claims are governed by a two-year statute of limitations and a 10-year statute of repose, running from substantial completion. Even though Building A and Building B are two independent "improvement[s] to real property" for purposes of the statute of repose, the HOA argued that the two buildings collectively are a single "improvement to real property," i.e. the two were intended to be parts of a single project. Since the relevant statute is focused on "substantial completion of *the construction*," the court looked to determine whether the construction-related activities involving Building A were intertwined with the construction-related activities involving Building

People On The Move.

Russ Weisbard has changed law firms and is now with Macdonald Devin, P.C., in Dallas. His new contact info is:

Russell N. Weisbard
Macdonald Devin P.C.
3800 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
rweisbard@macdonalddevin.com

Hollye C. Fisk announced changes in his firm name and address. Also, long-time partner **D. Wilkes Alexander**, also a TJS member, announced his retirement from the firm, effective March 29, 2019.

Fisk Attorneys, P.C.
2711 N. Haskell Ave., Suite 1550-LB 10
Dallas, TX 75204
hfisk@fiskattorneys.com

John Livengood has announced that his division of Navigant is now called Ankura Consulting, and he has moved to:

John Livengood
Ankura Consulting
1200 Nineteenth Street NW, Suite 700
Washington, DC 20036
John.Livengood@Ankura.com

Ross Eberlein has changed law firms. New firm and address are:

Ross C. Eberlein, R.A., Esq.
Dorsey & Whitney LLP
Millennium Building 125 Bank Street, Suite 600
Missoula, Montana 59802-4407
eberlein.ross@dorsey.com

Have you changed firms or moved? Let us know by emailing TJS Secretary Joyce Raspa at: joyceraspa@gmail.com

B. Finding that the construction contracts were executed 25 months apart, and the city issued the first certificate of occupancy for Building A approximately two years before it issued a certificate of occupancy for Building B, the court ruled that these were, indeed, two separate projects. Building A was substantially completed on Sept. 5, 2002 while Building B was substantially completed on Oct. 14, 2004. Even though the alleged defect in Building A was not discovered until, at the earliest, Jan. 30, 2014, the 10-year statute of repose had run by that date. The alleged defect in Building B was discovered in June 2015, again more than 10-years after substantial completion of that project. As a result, the trial court rulings were affirmed.

As to claims for breach of a statutory warranty for newly constructed dwellings, which has a 10-year period to be free from major construction defects due to noncompliance with building standards, Minn. Stat. § 327A.02, the court held that actions based on breach of statutory warranties must be brought within two years of the discovery of the breach. For each condominium unit,

the “warranty date” is the earlier of the date of the initial vendee’s first occupancy of his or her unit or the date on which the initial vendee takes legal or equitable title to his or her unit.

Since a “unit-by-unit analysis” may lead to different conclusions with respect to the warranty on different condominium units, the Court of Appeals reversed and remanded the case to the trial court for a determination of the extent to which the HOA’s statutory-warranty claim is barred by the applicable statutes.

With regard to denial of the HOA’s motion for approval of its settlement agreement, the Court of Appeals held that it would apply an “abuse-of-discretion standard” of review. The Court concluded that the trial court did not err in determining that the settlement agreement was unreasonable and collusive. Finding “an ample basis in the record to support the district court’s reasons,” the Court of Appeals affirmed the trial court’s ruling on that point. See, *Village Lofts at St. Anthony Falls Assoc. v. Housing Partners III-Lofts LLC*, 2019 WL 418521 (Minn. App. 2019).

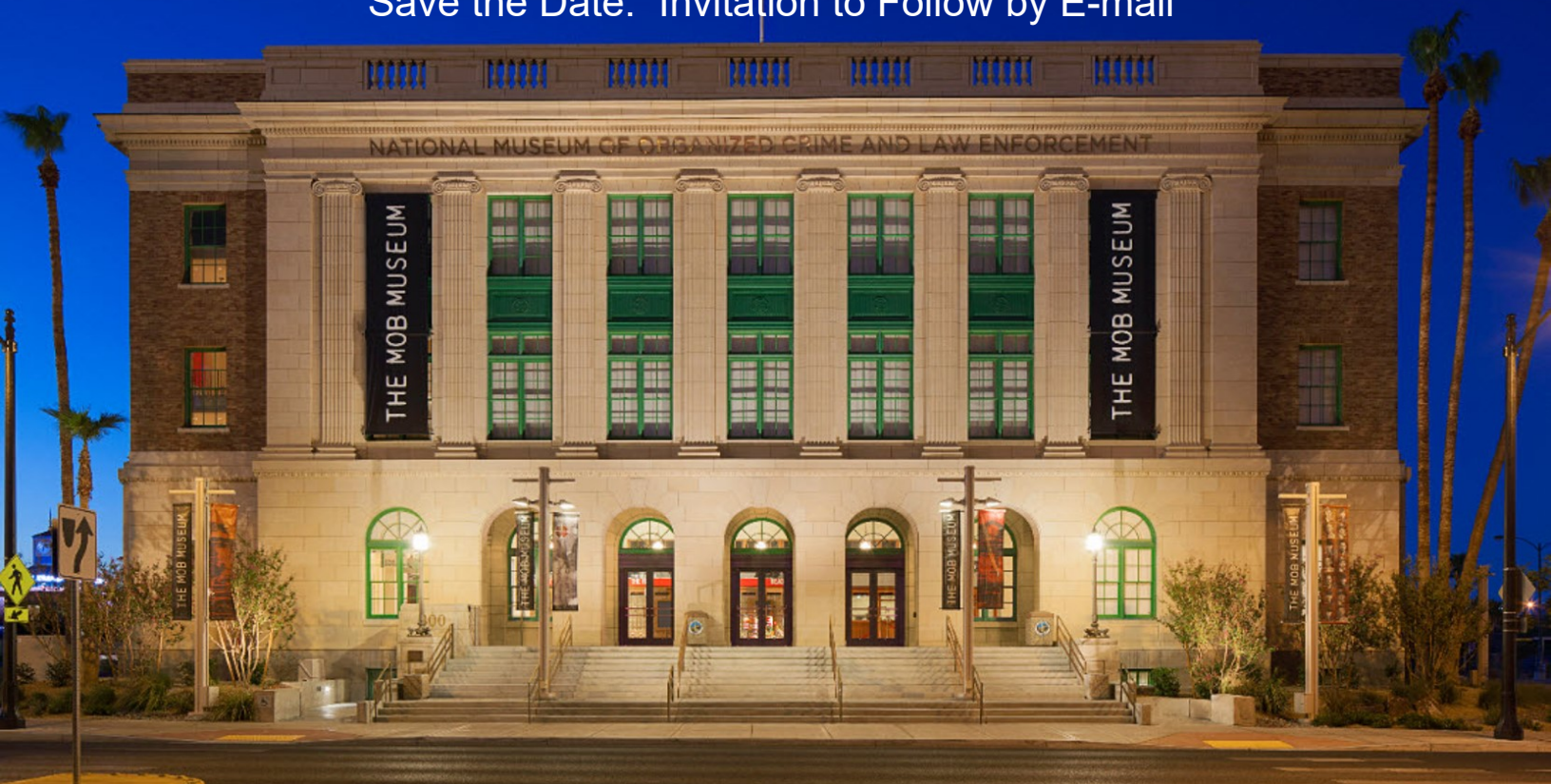
Official Notice: The Jefferson Society Annual Meeting

Weds., June 5, 2019 at The Mob Museum, Las Vegas, NV

6:00 P.M. Annual Meeting (Members Only) Elect Officers,
Vote on Bylaws’ Revisions

6:45 P.M. Cocktails & Dinner (Members & Guests Welcome)

Save the Date. Invitation to Follow by E-mail



PENNSYLVANIA. ENFORCEMENT OF TEAMING AGREEMENTS, ECONOMIC LOSS DOCTRINE, ORAL CONTRACTS, CONFLICTS OF INTEREST, IT'S ALL HERE!!

Grab a large glass of your favorite beverage before you read this lengthy and complex case. It is packed with great legal issues and analysis. As part of a joint venture with Burns & McDonnell, Jacobs Engineering Group ("Jacobs") approached Fleming Steel Co. ("Fleming") to custom design and fabricate hangar doors for two Navy aircraft hangars in Guam. The blast-hardened hangar doors were a "performance specification" item, which had to meet certain operational criteria. During the proposal stage, Fleming told Jacobs it had "reached the end of the financial donation to the project," and asked if they could be a "sole source" vendor, due to this being the first door of its kind and the sensitive nature of the load data. Jacobs supported this stance and Fleming assumed that they had an agreement, although Fleming did not participate in any discussions between Jacobs and the Navy regarding sole sourcing the hangar doors to Fleming. Jacobs allegedly told Fleming they were the sole source vendor when a second hangar project came up. Fleming was asked to start design on that second project, identical to the first one.

Jacobs witnesses testified that they told Fleming that sole sourcing the hangar doors to Fleming was not "a done deal," and the Navy had not yet signed off. In the meantime, however, one of Fleming's competitors, Industrial Door, sent a letter to the Navy protesting Fleming's designation as the sole-source supplier. In response, the Navy issued a correction to the RFP that the sole source designation was an "error." The Navy then announced to potential bidders that, due to Fleming's participation in the design of the hangar doors, "an apparent Organizational Conflict of Interest" existed that would likely preclude Fleming's participation as either a prime or subcontractor. As a result, no general contractors submitted proposals utilizing Fleming. The successful general contractor selected another vendor to design and manufacture the hangar doors for both hangar projects.

In response, Fleming retained a Washington lobbying firm to represent it, asking the Navy and Fleming's Congressional representatives to compensate Fleming for its design work. Despite the effort, the Navy denied Fleming's requests. Fleming filed for bankruptcy and then sued Jacobs for breach

of an oral contract, negligent misrepresentation, and unjust enrichment. Jacobs filed a motion for summary judgment on all three claims, raising a host of defenses.

Breach of Oral Contract/Teaming Agreement.

First, on the breach of contract claim, Jacobs argued that there was no evidence of an oral contract and, alternatively, the doctrine of "judicial estoppel" barred Fleming's claim because it failed to disclose any such contract in its Chapter 11 Disclosure Statement filed in the bankruptcy. Jacobs also claimed its representatives lacked authority to bind it to an oral contract. For breach of contract under Pennsylvania law, a plaintiff must show: 1) the existence of a contract, including its essential terms, 2) a breach of a duty imposed by the contract and 3) resultant damages. With regard to government procurement contracts in particular, when one party claims it has a "teaming agreement"

The question arises whether the teaming agreement itself, absent an executed subcontract, may constitute the basis for contractual liability, since agreements to agree are generally not enforceable.

with another, this is deemed a "preliminary agreement." The question arises whether the teaming agreement itself, absent an executed subcontract, may constitute the basis for contractual liability, since "agreements to agree" are generally not enforceable. Courts have allowed such a cause of action in contract based solely on the teaming agreement, but not without overcoming two major obstacles: 1) the intent of the parties to enter into a binding contractual relationship; and 2) the existence of sufficiently objective criteria to enforce. Pennsylvania courts had not explicitly recognized the validity of teaming agreements as enforceable contracts, but might recognize such an agreement as enforceable provided that the parties intended to be bound by the teaming arrangement and the agreement contains sufficient terms for enforcement. The Court found that the record contained several emails, a telephone memo and deposition testimony from which a reasonable jury could infer that the parties intended to enter into a teaming agreement.

The next question is whether the oral contract, even if formed, was too indefinite to be enforceable. The Court ruled for Fleming on this point too, finding that “the terms of the teaming agreement are sufficiently definite to be enforceable.” Turning next to Jacobs’ argument of the Doctrine of Judicial Estoppel, the Court rejected this defense, holding simply that Fleming was not required to list its oral teaming agreement on its Disclosure Statement in the bankruptcy proceedings.

The last defense raised by Jacobs was that its employees lacked either actual or apparent authority to bind Jacobs. It was held that Jacobs waived this defense by failing to raise it in its Answer and Amended Answer to the lawsuit, thereby prejudicing Fleming.

Economic Loss Doctrine.

As to Fleming’s claim of negligent misrepresentation, Jacobs alleged this was barred under the economic loss doctrine. After an extensive legal analysis of Pennsylvania law on the ELD, including all of its exceptions, the Court agreed with Jacobs that the economic loss doctrine barred Fleming’s negligent misrepresentation claim and granted summary judgment.

Unjust Enrichment.

Finally, turning to Fleming’s claim of unjust enrichment, the Court held that it was premature to conclude at the summary judgment stage that Fleming could not establish the reasonable value of its design services to Jacobs and, therefore, denied Jacobs’ motion for summary judgment on Fleming’s unjust enrichment claim.

This very lengthy case can be read at this citation: *Fleming Steel Co. v. Jacobs Engineering Group, Inc.*, 2019 WL 1227108 (W.D. Pa. 2019).

CALIFORNIA. CONSULTANT’S SUIT WAS BARRED BY STATUTE OF LIMITATIONS, DESPITE CLEVER ARGUMENTS THAT THE STATUTE DID NOT APPLY.

This dispute arose out of what the court deemed “a failed attempt to build a luxury hotel” in Mammoth Lakes. The project owner, Mammoth LLC (“Mammoth”), hired HKS to provide architectural services, and HKS hired Vita to provide landscape architecture design. The HKS-Vita subcontract contained a Texas forum selection clause, and a “pay if paid” clause, both of which are unenforceable in California. Vita performed work and sent HKS invoices until HKS instructed

Vita to cease work on the project because Mammoth stopped paying. Vita sent HKS a final invoice and regularly sent statements showing the amount HKS owed. Ultimately, after more than four years, Vita sued HKS in California state court (despite the forum selection clause) for breach of contract, unjust enrichment, quantum meruit, and breach of the implied covenant of good faith and fair dealing. The trial court granted HKS’s motion to enforce the forum selection clause and dismissed the suit. Vita appealed and won based on Cal. Code of Civil Pro. 410.42, which precludes out-of-state contractors from requiring California subcontractors to litigate certain contract disputes in the contractor’s home state.

HKS then moved for summary judgment, arguing the statute of limitations barred the lawsuit, which motion was denied on the basis that the four-year statute of limitations for written contracts did not, as a matter of law, bar the action; and Vita established a triable issue of fact as to whether HKS was “equitably estopped” from asserting the statute. The case proceeded to a bench trial, in which HKS again raised the statute of limitations. This time, the trial court agreed after hearing all the evidence, and entered judgment for HKS. Vita appealed.

In affirming for HKS, the Court of Appeals held that despite lots of “he said-she said” issues, HKS was not barred by equitable estoppel from raising the statute as a defense, finding that, “Vita knew that HKS had taken the position that it would not pay Vita at least by September 2008.” Even though Vita may have had strategic business reasons to refrain from filing a lawsuit at that time, i.e. to preserve a business relationship with HKS and its belief that HKS might eventually receive payment from Mammoth, the Court held that “those motivations do not mean Vita’s breach of contract claim did not accrue by that date.” Vita’s suit, filed more than four years later, was barred by the statute.

Vita next argued that HKS had sued Mammoth in Texas and, based on the pay if paid clause, Vita’s cause of action did not accrue until it knew the result of the Texas suit, and whether HKS could collect on the judgment. The Court of Appeals was not persuaded, stating: “Vita’s reliance on the pay if paid clause is unavailing [because] pay if paid clauses are unenforceable in California.”

Not done yet, Vita argued that equitable estoppel empowers a court to allow a plaintiff to proceed with a time-barred claim if the defendant has engaged in inequitable conduct. Here, however, equitable estoppel did not apply because HKS did not conceal

information about the Texas litigation. HKS told Vita it had filed a lawsuit against Mammoth and, later, HKS informed Vita it had obtained a judgment but that it could not collect. The Court said, "These statements were not false or misleading," but Vita merely failed "to understand the accurate information [HKS] was providing." The judgment in favor of HKS was not only affirmed, but HKS was found entitled to recover its costs on appeal. See, *Vita Planning and Landscape Architecture, Inc. v. HKS Architects, Inc.*, 2019 WL 988473 (Cal.App. 1 Dist., 2019).

NEW YORK. EXPERT WITNESSES FOR BOTH SIDES ARE DISQUALIFIED (IN PART) IN CASE DEALING WITH ADA ACCESSIBILITY.

In this case, several nonprofit organizations that provide services and advocacy for people with disabilities, along with some city residents with mobility disabilities, filed a class action lawsuit against the City of New York, the police department ("NYPD"), and police commissioner under the ADA and the New York City Human Rights Law, alleging that a majority of city's police stations contained significant architectural barriers to people using wheelchairs, walkers, and other mobility devices. The parties each retained experts to survey the architectural features of a sample of the stationhouses and opine whether those features comply with the ADA. Plaintiffs filed a motion to exclude testimony of the defendants' proposed expert, an architect, and the defendants filed a motion to exclude the testimony of the plaintiffs' proposed expert, an "accessibility inspector." The trial court granted both motions, in part on different grounds. Citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Fed. R.Evid. 702, the said the "district court is the ultimate gatekeeper" when it comes to expert qualifications.

First, as to the defendants' proposed expert, an architect, the plaintiffs raised numerous flaws in his methodology, including: 1) his admission that he did not actually measure various building features on whose ADA compliance he purported to provide exact measurements, instead employing what he called an "eye test"; 2) he and his survey team's apparent failure to adhere to any identifiable and reliable technique for conducting the measurements they in fact undertook; 3) he and his team's arbitrary selection of which architectural measurements to include in their reports; and 4) his admission that he at least occasionally based his compliance determinations on outright speculation! The court found that these disqualified the expert from testifying under the



Portrait of Thomas Jefferson by John Trumbull (1788), oil on wood. Monticello.

Daubert test, noting that the expert's methodology "went off the rails," and that some of his opinions "are concededly based on sheer speculation." Turning next to the plaintiffs' expert, the court granted the defense motion only in part. First, she could offer opinions regarding compliance of the stationhouses with the 1991 and 2010 ADA accessibility standards (the principal subject of her reports and testimony). But, to the extent that she intended to offer any opinion on whether the conditions of stationhouses causes individuals with mobility disabilities to "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination" under the ADA, the court ruled that her opinion must be excluded because she admitted in her deposition that she did not know what "programs, services, and activities that the NYPD offers and/or delivers" and did not "review any documents as to how those programs, services, and activities are offered or delivered." See, *Disabled in Action v. City of New York*, 2019 WL 1017268 (S.D.N.Y. 2019).

MEMBER PROFILE: DAN BOATRIGHT

Littler Mendelson
Kansas City, MO



Like many of us, Dan Boatright had no idea what he wanted to do for a career as a high school student, but then his best friend talked about becoming an architect. “I thought that sounded interesting. We visited a couple of schools, and I really liked Kansas State Univ. in Manhattan, Kansas,” which is where Dan got his architectural degree in 1986. Fresh out of college, Dan landed a job with the Kansas City architectural firm Linscott, Haylett, Wimmer and Wheat. “I enjoyed many aspects of the practice, including working out the details of how building components come together. I was fortunate to work on the American Heartland Theater in the Crown Center area of Kansas City, and a large hotel in a St. Louis suburb. I felt like I could do a good job of helping to bring others’ designs to fruition.” But soon, Dan realized that his brain was wired more for logic and number crunching than for artistic endeavors. “I became aware that my limited artistic ability would likely prove to be an obstacle for a career in architecture. So, I decided a career in law might better suit my skill set. After two years as an architect, I went to law school at the Univ. of Missouri-Kansas City (UMKC).”

Why combine the two studies? “I originally planned to combine my architectural background with the law and focus on construction litigation. I even landed a part-time job at a construction litigation firm during my second year of law school.” In the summer between his second and third years of law school, Dan clerked at two large, Kansas City-based law firms: Stinson Mag (now Stinson Leonard Street) and Spencer Fane. “As luck would have it,” Dan told us, “the office I was assigned was among Spencer Fane’s employment lawyers, so I began receiving a number of employment law assignments. I found that work far more interesting than construction litigation. So, I accepted an offer to join Spencer Fane after graduation, and practiced employment law there for nearly 20 years.”

In 2010, Dan left Spencer Fane with a group of five others to form the Kansas City office of Littler Mendelson, the world’s largest employment law firm, with more than 1,500 attorneys in 80 offices, and with attorneys qualified to practice in 20 countries. There, his practice is devoted solely to representing management with respect to any kind of employment issue. “Most of my time is spent as a litigator, defending individual and class action employment-related lawsuits (discrimination, minimum wage/overtime, breach of contract, etc.). I also routinely work with employers on policy development, training, and day-to-day advice and counseling.”



Dan’s favorite building is the Union Station in his hometown of Kansas City (above). Built in 1914, the rail station served hundreds of thousands of rail passengers in its prime as a crowded, bustling transportation hub. After many years of decline, however, it closed in the 1980s but was saved and restored. Today it houses restaurants and a science center.

Dan has not let his architectural training go to waste, however. “I also maintain at least some ties with my roots in architecture by assisting companies with compliance obligations under the public accommodations provisions of the Americans with Disabilities Act (ADA Title III). I regularly defend ADA Title III lawsuits, and assist companies in identifying and removing barriers to access by individuals with disabilities.” He has presented “Employment Law for Architects” for the local chapter of the AIA. At Littler (as the firm is known), Dan serves in two management roles, both as a member of the firm’s board of directors, and as the Office Managing Shareholder of the Kansas City office.

What’s the best part of his job? Dan says, “Although it can be challenging wearing both a practicing attorney hat and a management hat, I actually enjoy many of the management aspects of my role. I especially appreciate the opportunity to mentor and advocate for junior attorneys as they progress in their careers. On the practice side, I most enjoy providing legal/business advice to clients to help them make sound decisions that further their business interests while minimizing litigation risk.”

Dan has two sons, Jason and David. Jason graduated from the Univ. of Missouri with a degree in journalism and is now a video producer for the [Kansas City Star](#), although he plans to go to law school at UMKC in the fall, like his dad. David is a computer science student at K-State.

A life-long Kansas Citian, Dan’s office is downtown, adjacent to the Sprint Center - the arena that hosts concerts and sporting events, including the Big XII men’s basketball tournament (“I can hear the roars each time either K-State or Iowa State scores,” he said). He enjoys the Country Club Plaza, a wonderful 1920’s-era open-air shopping and entertainment district that spans many city blocks, and is colorfully lit during the holiday season, as well as countless venues for live music and art exhibits. “And some of the finest dining anywhere. Not just barbeque. I swear!” he said. In warmer months, Dan plays in one or two softball leagues, and bicycles on the weekends. Year-round he enjoys baking any sort of sweets, and regularly ruins his colleagues’ diets by bringing pies, cakes, and cookies to the office.

Any advice for a young architect thinking about law school?



(Above) Dan with son Jason enjoying a Royals game during the 2014 playoff run; (below) Dan and son David on a trip to London in 2011.



Dan reflected and told us: “Like most professions, law is a tough business, and bears little resemblance to what we see in movies and TV (or even what we experience in law school). But there are so many paths that one may follow with a law degree. Law can be very rewarding for those seeking a career that is intellectually challenging, and/or for those seeking to help make a difference in the lives of others (individuals or businesses). I find that many lawyers are happy to spend a little time talking to students and prospective students. I would encourage those thinking about law school to think about what they might want to do with their degree after graduation, and then find someone in that field to contact to learn more.”

**MEMBER PROFILE: R. CRAIG WILLIAMS,
FAIA, RIBA, ESQ.**

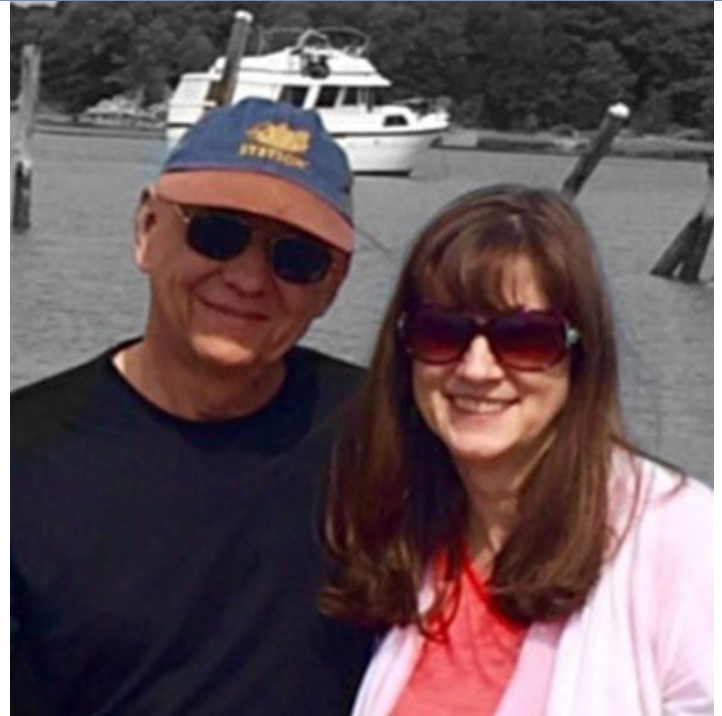
HKS, Inc.
Dallas, TX

Though we all know him as “Craig,” his first name is Robin. “I started going by Craig in the 8th grade because the school thought I was a girl and assigned me girls’ PE and a girl’s locker. I wasn’t smart enough then to actually report to the girls’ PE class, which would have been a lot of fun!” he told us. “However, Craig it has been ever since.” His daughter’s name is Robin and she hates it, he says, because of the famous comedian named Robin Williams. “My poor mother,” Craig says, “she likes that name, so I decided to use it again.”

This founding member of TJS attended architecture school at the Univ. of Texas to fulfill a childhood dream. “I first wanted to design houses when I was five years old, and that desire never left me, to this day. I am first and always, an architect.” He studied law at Southern Methodist Univ. (SMU).

Why the switch to law? “I have no good reason for doing it,” Craig admitted. “At the time it seemed like a good idea. I seemed to be having disagreements with contractors and thought that law school would give me a better background for dealing with those ruffians. So, I took the LSAT (without any studying at all), applied, was accepted, and that was it.” He found law a natural fit, however, and often says, “I had to work to graduate from architecture school. I just had to show up to graduate from law school!”

What intrigued him about combining the two studies? “I don’t recall having any thoughts about combining the studies of architecture and law, except having a better tool to deal with project issues. Of course, that shows how little I knew at the time. I think I just wanted another diploma to hang on the wall.” Craig’s first job after architecture school was with a small architecture firm in Dallas that mainly designed single family and multi-family homes. From there he moved on to restaurants and light commercial projects. After law school, Craig’s first job was in a small boutique law firm, working for fellow TJS member Hollye Fisk, FAIA, Esq. Most of Craig’s time there was devoted to representation of architects and engineers. He became a partner in that firm, and one of his clients was HKS, where he is now the general counsel and chief legal officer for HKS, a position he has held for going on



(Above) Craig and Barbara Williams on the water at Bear Cove in Weymouth, Mass.

21 years. What’s the best part of his job? “The best part of my job is helping our design professionals understand their responsibilities and helping them maneuver through difficulties with very large projects,” Craig said. “Every once in a while, I can give good and helpful advice, and someone appreciates getting it.”

Craig has remained active in the AIA and has served as the chairman of the Dallas AIA Risk Management Committee (about a dozen years or so), and co-chair of the Texas Society of Arch-

(Below) Craig at Beartooth, Montana.



itects Government Affairs Committee. He is now in the middle of a six-year tour with the AIA National Risk Management Committee. Craig has also served as a director of the Dallas Bar Assn. Construction Law Section, served on the Univ. of Texas School of Architecture Dean's Advisory Council, served as an instructor with the Construction Specifications Institute, and as a visiting instructor for the Texas A&M School of Environmental Design. He is also active in the AIA Large Firm Roundtable.

Any hobbies or interests outside of law and architecture? Craig said, "I have worthless hobbies, including the two Harleys I rarely have time to ride, and 22 guitars and one banjo. I do play one or more of those every day." He gave up both scuba diving and golf, but would like to play again. Craig is married to Barbara, and they have four children and six grandchildren. "Barbara and I grew up in Richardson, Texas just a couple of blocks from each other, and we still live in Richardson. Her mother, my parents, and two of our children, live in Richardson, as do three grandchildren." One son left Texas and lives in Chicago, and another lives in New Hampshire. Craig and Barbara have a house at a lake in East Texas,

where he keeps a bass boat. "Once in a while I can catch a one or two pounder to hang on the wall, but I throw them back hoping to catch one when it gets to be three pounds. I do notice that others catch much bigger fish at that lake, but I don't seem to have the same lures or luck they have."

Craig is a bit obsessed with family genealogy. He is the descendent of early 17th century pilgrims to America, of the principal shareholder of the Mayflower Company, of at least seventeen Revolutionary War soldiers, of Edward I of England, five Confederate soldiers, one Union soldier, and soldiers who fought in the War of 1812 and the Mexican War, and other "interesting characters." His love for history shows in his favorite architecture: the structures of the ancient Egyptians, Greeks, and Romans, medieval European churches and Asian temples.

Any advice for a young architect thinking about law school? "Yes, I have advice for a young architect who is thinking about law school: Sell TV's at Best Buy. Or, stay with architecture, if that was your first love. Lawyers don't add to the culture of any race, creed, or ideology. Architects do add to those and more. The world doesn't need any more lawyers, but architects are always welcome."



(Above-left) Craig and a bunch of Harleys at Sturgis, S.D.; (right) daughter "Robin Williams" with her dad, Craig, and Barbara, at his FAIA investiture in Philadelphia (2016).

TEXAS. THIS STATE AIN'T BIG ENOUGH FOR BOTH OF US! TWO COMPANIES WITH THE SAME NAME DUKE IT OUT.

Arch-Con Corp. is a large design-build contractor, with its name coming from the words "Architecture" and "Construction." It was formed in Texas in June 2000. Two years later, the company began doing business as "Arch-Con Construction Co." It has continually used either the mark "Arch • Con" or "Arch-Con" since its formation. Although the company assists with design services, it is not registered with the Texas licensing boards for architects or engineers but, instead, subcontracts the design work. Its projects are mostly in the Houston and Dallas areas, College Station, and San Antonio, and it has over 150 employees, with 2018 revenues of \$375 million, and projects \$550 million in 2019. In 2003, another unrelated company was formed in Texas with a similar name, "Archcon Design Build Ltd.," as a limited partnership between a licensed architect and a contractor to provide in-house architectural and construction services. Just like the first company, the name comes from combining the words "Architecture" and "Construction." It has a spin-off company called "Archcon Architecture, Ltd.," which is an *architecture-only* firm.

The first company (the plaintiff) learned of the latter in early 2018 after its president's father saw a sign for "Archcon Architecture" at a construction site. Subsequently, one of the firm's high-profile clients expressed initial confusion about whether the two companies were related. A few architects also began to ask the same question. In response, in March 2018, more than 18 years after it began using its "Arch-Con" mark in commerce, the plaintiff filed an application for registration of a trade or service mark with the Texas Secretary of State, seeking protection for the mark "Arch-Con." The Secretary of State registered the word-only mark "Arch-Con" that same day. Three months later, plaintiff filed an application in the U.S. Patent and Trademark Office for the mark "Arch-Con," which application is currently pending.

In June 2018, plaintiff demanded that defendants cease using its "Arch-Con" mark. When defendants refused, the plaintiff filed suit for trademark infringement, unfair competition, false advertising, and trademark dilution under the Lanham Act, as well as state law claims for unfair competition, common law trademark infringement, and tortious interference. Defendants

in response sought a declaratory judgment that the term "Arch-Con" is not a legally protectable mark, and requested cancellation of plaintiff's Texas registered trademark.

After an evidentiary hearing, the trial court denied plaintiff's request for a preliminary injunction. The district court explained that the plaintiff failed to establish a likelihood of success on the merits sufficient to warrant the requested preliminary injunction. The court said that the evidence reveals, at least at this juncture, that defendants' use of the mark creates at most a "mere possibility of confusion," as opposed to the required "probability of confusion." The court noted that in Texas there are at least seven entities that currently use, or have used within the past five years the letters "Archcon," "Arcon," or "Archicon" in a corporate name, and there are six other such entities located throughout the country, suggesting that the mark has "been somewhat diluted in the marketplace."

The district court also noted the difference in services offered by the plaintiff and the defendants (i.e. design assist vs. design-build or pure design services), stating, "the evidence reflects that the actual products and services offered by each entity are quite distinct." They also serve different markets, and the parties advertised in different media. As to "intent," and the court found no evidence that the defendants were even aware of the plaintiff when they formed their business. There was no evidence that the defendants sought to "pass off" their services as belonging to plaintiff or capitalize on defendants' popularity or reputation. And, finally, there was "no persuasive evidence of actual confusion" in the marketplace. The preliminary injunction was denied. *Arch-Con Corp. v. Archcon Architecture, Limited*, 2019 WL 422662 (W.D. Tex. 2019).

TEXAS. AGAIN! SPECIFIC PERFORMANCE NOW AVAILABLE AS A REMEDY FOR BREACH OF CONTRACT CLAIMS AGAINST GOVERNMENTAL ENTITIES.

In a case that not only changes the law on specific performance, but, broadly expands waiver of governmental immunity, the Texas Supreme Court issued a remarkable ruling on March 15, 2019, in *Hays Street Bridge Restoration Group v. City of San Antonio*, 2019 WL 1212578 (Tex. 2019). This case involves an historic wrought-iron truss bridge in San Antonio, built in the 1880s, consisting of two spans of 225-ft and 130-ft, resting on columns made by the Pennsylvania Phoenix Iron Co. The bridge

was transported to San Antonio in 1910 to provide passage over railroad tracks that eventually were operated by Union Pacific Railroad and is viewed by many residents as the gateway to the City's historically black neighborhoods east of downtown. By the early 1980s, the bridge had become unsafe for vehicles or pedestrians.

The City ordered it closed, and Union Pacific made plans to demolish it. But a group of residents (Hays Street Bridge Restoration Group) persuaded the City to preserve and restore the bridge for community use. The group envisioned that the land surrounding the bridge would be acquired and developed to feature the bridge as a cultural attraction by affording space for parking, educational facilities, restrooms, a park, and a hike-and-bike trail. To fund the project, the City obtained a \$2.89 million federal grant administered by Tex. DOT. The agreement required the City to fund 20% of the project's estimated cost.

In 2002, the City and the Restoration Group executed an MOU with respect to funding the project. The Restoration Group promised to raise funds, and the City promised that any funds generated by the Group would go directly to the approved City of San Antonio budget for the Hays Street Bridge project only. Over the next decade, the Group raised about \$189,000 and arranged for significant in-kind donations, including the bridge itself and the adjacent property. The City finished restoring the bridge in 2010 but then decided not to use the property for a park but, instead, sold the land to Alamo Beer Co. for \$295,000 to induce Alamo to construct a microbrewery, restaurant, and event space. The Restoration Group sued the City, alleging that a transfer of the property to Alamo would breach the City's promise in the MOU.

The trial court concluded that the MOU was ambiguous and asked the jury whether the parties intended that it include only donations of money or "donations of money and in-kind contributions," to which the jury answered yes to the latter. The jury found the City in breach of the MOU. For its breach of contract claim, the Restoration Group sought only specific performance. In rendering judgment on the verdict, the trial court found that "specific performance was appropriate" because "the unique purpose and circumstances of the [MOU could not] be adequately remedied by monetary damages." However, the City proceeded to sell the property to Alamo and the Group moved to have the City held in contempt. Before the motion was heard, the City appealed the trial court's judgment, thereby staying its en-

forcement. The Court of Appeals held that the City was immune from suit, reversed the trial court's judgment, and dismissed the case for lack of jurisdiction. The Restoration Group appealed to the Texas Supreme Court, which reversed.

As to immunity, the Court held that "Centuries ago, the justification for the rule was that 'the king can do no wrong.' Modern justifications are more practical." The fundamental question is whether a suit is "against the state." Ruling in the affirmative, the Court held that the City acted in its governmental capacity when it entered the MOU and therefore enjoyed immunity from suit "in the first instance." But it did not end there. The next issue was whether the Local Government Contract Claims Act waives the City's immunity. The Court ruled that while the Act does not waive immunity for "damages," (i.e. money), but explained that "specific performance, by contrast, is not "damages," but an equitable remedy that lies within the court's discretion to award "whenever damages would be inadequate." As a result, the Court concluded that the City was not immune from a claim for specific performance, thus reversing the appellate court.

The decision alters the previously understood scope of the Act's waiver of governmental immunity. It expands remedies available in Texas against a public entity for breach of contract. Under this ruling, contracting parties are not limited to monetary damages, but may seek specific performance.

(Below) Restoration Group stages a protest over the City's sale to Alamo Beer Co.



OPINION: PREVENTION THROUGH DESIGN

By G. William Quatman, FAIA, Esq.

Burns & McDonnell

Kansas City, MO

Parapet Walls For Worker Safety:

- “Parapet wall height is another classic PtD example. Parapet walls are often designed to be 0.5 m high for aesthetic purposes. However, if a parapet wall was designed to be at least 1 m high, it could serve as fall protection throughout the life cycle of the building, thereby eliminating fall hazards during the initial roofing installation as well as whenever workers are on the roof in subsequent years for heating, ventilation, and air conditioning (HVAC) equipment maintenance or reroofing operations.” *Prevention through Design: Promising or Perilous?* ASCE (2018)
- “When you build a new house, make a parapet around your roof so that you may not bring the guilt of bloodshed on your house if someone falls from the roof.” Deuteronomy 22:8 (New International Version)

Now What?

In Nov. 2018, ASCE published a provocative article in the *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, titled, “*Prevention through Design: Promising or Perilous?*” The article was co-authored by the dean of a midwestern college of engineering and the senior vice president (a lawyer) for a large insurance agency. The article discussed the benefits and risks of a movement encouraging design professionals to consider the safety of construction workers and maintenance workers when designing structures and buildings. The theory is called “Prevention through Design,” or “PtD” for short. In the U.K. it is called simply “Safety in Design.” Others call it “Design for Construction Safety” (or “DfCS”). Still others call it “Construction Hazards Prevention through Design” (or “CHPtD”). All mean essentially the same thing: architects and engineers should be considering means and methods of construction when they design things. This, of course, is totally contrary to the current thinking that A/E firms design for the end result, the finished building or structure, and it is up to the contractor to determine how to best build it. So-called “means, methods and techniques” of construction are

left solely up to the contractor. (See, e.g. AIA A201, Par. 3.3.1, 2017 edition). Well, that is about to change if some proponents of PtD have their way.

Is this a new concept? Or does it date to biblical times? The quote at the start of this article from ASCE’s 2018 paper recommends increasing parapet wall height on buildings from 18” to 36” (0.5 meter to 1 meter), which “could serve as fall protection throughout the life cycle of the building, thereby eliminating fall hazards.” The biblical quote from Deuteronomy shows that this concept is not new at all, but has been around for 2,000 years or more. While the Bible did not specify the exact height of the parapet, the concept was the same – accident prevention through design!

It’s A Dangerous Industry.

Nobody can deny the statistics put out each year by the U.S. Dept. of Labor, that construction is one of the nation’s most dangerous industries, and that’s our industry. DOL statistics showed 971 fatalities and 194,300 injuries in construction in 2017, the most recent year reported. And it is not just dangerous in the U.S. There were 9.7 fatalities reported per 100,000 construction workers in Europe in 2006, compared to 9.5 per 100,000 in the U.S. in 2017.

Due to workers’ compensation laws in the U.S. which grant immunity to the employer of the injured or killed worker (despite even OSHA citations for violating safety standards), plaintiffs’ lawyers often sue the design professional (who is not immune) claiming violation of some duty owed to the worker. Insurance claim statistics report that from 1999 to 2008 about 3% of all claims against design professionals came from injured workers. Due to these “third-party over actions” by injured workers, barred from further recovery against their employer, the AIA and EJCDC include requirements that the general contractor indemnify and defend the design professional for such lawsuits. Often, the design firm is also named as an additional insured on the contractor’s CGL insurance, resulting in a complete defense (though sometimes under a reservation of rights).

As the ASCE 2018 article points out, decades of cases decided under the standard AIA and EJCDC contracts have resulted in a fully developed body of case law and precedent upon which design firms have relied. Courts hold, generally, that: “Unless [an engineer] has undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers

or employees of the contractor or subcontractor of hazardous conditions on the construction site.” *McKean v. Yates Engineering Corp.*, 210 So.3d 1037, 1044 (Miss. App. 2015). However, due to a few decisions in the 1980’s and 1990’s indicating that a design professional with knowledge of an unsafe condition might have a duty to an injured worker (despite the clear allocation of responsibility in the contracts), at least ten states enacted legislation that expanded worker’s compensation immunity to the design professional. In these states, design professionals are immune from injured worker claims, with two exceptions: 1) If responsibility for safety practices is specifically assumed by contract; or, 2) If the accident is due to the negligent preparation of design plans or specifications. Adoption of PtD would essentially void this statutory protection in an ironic fashion. Think about it: The contractor, or subcontractor, cited by OSHA for creating an unsafe condition – is immune from suit by the worker and his or her family - but the design firm could be sued for not preventing the accident “through design.”

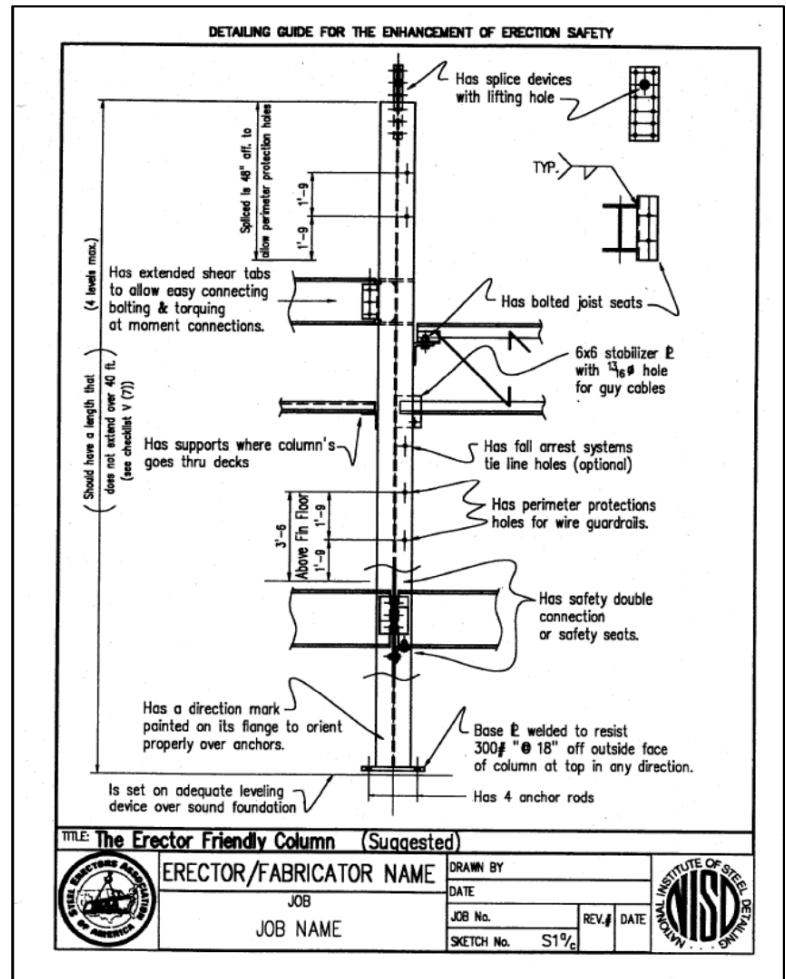
Suits by injured workers led the AIA and EJCDC to clarify responsibility for site safety decades ago in the standard contract documents. For example, the AIA’s A201 General Conditions of the Contract for Construction (2017 edition) clearly states:

- “The Architect will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor’s rights and responsibilities under the Contract Documents.” Par. 4.2.2.
- “The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract.” Par. 3.3.1.

This language has since become standard in most U.S. design and construction contracts, and is accepted by the industry and its sureties and insurers as a fair allocation of risk. Adoption of PtD could turn this allocation on its ear.

PtD Is Gaining Attention.

While the 2018 ASCE white paper is the most recent publication, you may be surprised to learn that the industry has been exploring this concept for years. The U.S. Dept. of Health and Human Services (“HHS”) has published a newsletter call-



(Above) The “Erector Friendly Column” is an example of PtD concepts applied to the design of steel columns.

ed “PtD in Motion” since 2008. In 2007, a PtD Workshop was sponsored by the National Institute for Occupational Safety and Health (“NIOSH”). In 2011, the American National Standards Institute (ANSI) and the American Society of Safety Engineers (ASSE) published a voluntary standard entitled “ANSI/ASSE Z590.3 (2011) Prevention through Design: Guidelines for Addressing Occupational Hazards and Risks in Design and Re-design Processes.” Do a simple Google search and you’ll be amazed how many people are talking or writing about this concept.

So, how long until PtD starts to creep into litigation against design firms? It may already be here. A recent Westlaw search found an expert opinion in a 2017 personal injury case in which the expert stated, “This incident could have been prevented through design.” *Kanouff v. Caterpillar, Inc.*, 2017 WL 4012346 (Pa.Com.Pl.). This case involved a manufacturing defect, but

experts might soon be opining against design professionals.

It's Already Law in The U.K. and Elsewhere.

The ASCE article pointed out that PtD is already adopted by law in some parts of the world, where designers are legally required to eliminate safety hazards which may injure construction or maintenance workers. The U.K.'s Construction Design and Management Regulations of 2007 ("CDM") require designers to minimize the hazards associated with construction at as early a stage as possible. Section 11, Duties of Designers, states:

"(3) **Every designer shall** in preparing or modifying a design which may be used in construction work in Great Britain **avoid foreseeable risks to the health and safety of any person** —

(a) carrying out construction work;

(b) liable to be affected by such construction work;

(c) cleaning any window or any transparent or translucent wall, ceiling or roof in or on a structure;

(d) maintaining the permanent fixtures and fittings of a structure; or

(e) using a structure designed as a workplace.

(4) In discharging the duty in paragraph (3), **the designer shall** —

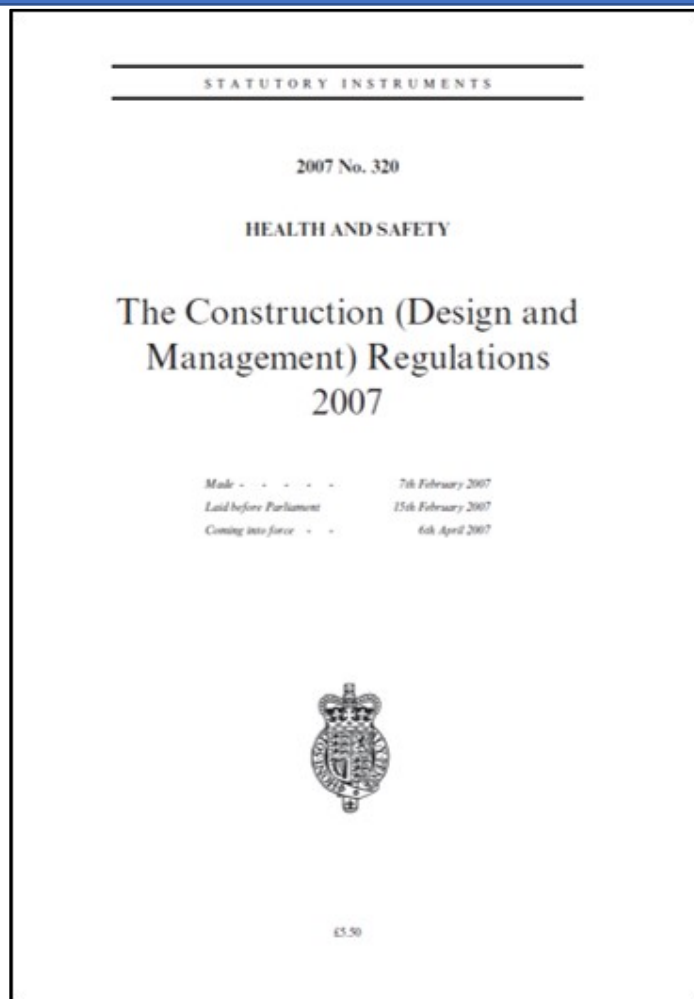
(a) **eliminate hazards** which may give rise to risks; and

(b) **reduce risks** from any remaining hazards, and in so doing shall give collective measures priority over individual measures.

In Australia, the National Standard for Construction Work, NOHSC:1016 (2005) promotes as one of its priorities "eliminate hazards at the design stage." Under the heading, "Responsibilities of designers," it states:

7.4 **Designers must ensure** that hazards associated with the construction work required by the design are identified before the commencement of construction work.

7.5 **Designers must ensure**, to the extent that they have control over the design, **that any risks to the health and safety of any person affected by the construction work**, which includes the construction, repair, cleaning, maintenance or demolition of a structure, that are a result of the design, **are eliminated, or where this is not reasonably practicable, minimised.**"



(Above) The U.K.'s Construction Design and Management Regulations" require PtD efforts by law.

Is PtD Legislation Likely in the U.S.?

Some have suggested PtD as a voluntary act, sort of a "good Samaritan" concept. Many states have passed legislation giving immunity to those who volunteer, especially to design professionals assisting in times of a natural disaster. But, as a 2016 ACEC white paper says, "It seems likely that the plaintiff's bar would vigorously oppose any such 'Safety Samaritan' legislation, not to mention the challenges of having such legislation enacted in all 50 states." Federal legislation would be a challenge as well. Some of us remember the collapse of the L'Ambiance Plaza project in April 1987 when 28 workers were killed and 22 other injured after lift-slabs collapsed on an apartment project in Bridgeport, CT. In response, Sen. Chris Dodd (D-CT) introduced the "Construction Safety, Health, and Education Improvement Act of 1989," followed by similar bills in 1990 and 1991. The Act was strongly opposed by the design community as it attempted

to place responsibility on a “construction safety specialist” (or “CSS”). The industry’s reaction to Dodd’s bills shows that there would be significant opposition should PtD legislation be proposed to place new safety duties on A/E firms.

The legislative movement for “prevention through design” may have already started, in a small way. The numerous and tragic school shootings have resulted in legislation proposed to “prevent crime through design,” a type of PtD. In 2019, the Virginia legislature introduced H.B. 1738 which requires that plans for new or renovated school buildings to be reviewed by a professional trained and experienced in “crime prevention through environmental design.” The law requires that an architect or engineer provide a required statement on all plans and specifications for public school building construction, and that such professional be trained and experienced in “crime prevention through environmental design.” Likewise, in West Virginia, state board of education regulations have been proposed that: “The principles of safe design and Crime Prevention Through Environmental Design (CPTED) should be considered” for new schools or major renovations. How long until “crime prevention through design” becomes “site safety through design”? It may take another L’Ambiance Plaza tragedy, but it could happen.

Who Best to Bear the Risk?

My five-year curriculum in architecture had no course on site safety design. Engineering schools do not teach this topic either. The licensing exams have no section dealing with the subject. So, while professors and pundits may think that shifting safety risk to the design firms is the answer to reducing worker injuries, it is questionable whether designers are ready to handle that task. Large firms might engage a trained safety consultant to review the plans for PtD, but small and medium-sized firms will be at risk of handling a new legal obligation without proper training. Will owners increase fees to compensate for this training and review? Not likely.

An ACEC 2016 white paper observed that, “To the extent design professionals lack this knowledge, training, and experience, they must acquire it for [PtD] to be successful. The potential cost of this training likely would be substantial, and would include a significant investment of employee time as well.” Training architects on PtD will take years, and require seminars, workshops, conventions and, perhaps, even certifi-

ication in “safety by design.” Are design professionals really the best ones to take on this risk?

On design-build projects involving teams between a contractor and a design firm, it seems that the contractor is best suited for, and most knowledgeable about, site safety and means and methods. But in this scenario, the design firm will be relying on the expertise of the construction community to advise on safety. By adopting their recommendations, who will bear the risk? Contractors and subcontractors who enjoy statutory workers comp immunity may resist contract clauses that require them to indemnify and defend the design professional who relies on their input in PtD implementation. But that is where the risk is best placed, on the team member most knowledgeable, and that is the contractor.

Safe Harbor Needed.

When the ADA was enacted in 1990, it provided broad principles for the elimination of discrimination against disabled persons. Congress charged the U.S. Attorney General to issue more specific standards for compliance with Title III. The Dept. of Justice adopted a set of ADA Accessibility Guidelines for Buildings and Facilities (“ADAAG”) which provided a sort of “safe harbor” for design professionals, by scripting out exactly what height and spacing, or slope, was required. As one court stated: “The ADAAG Standards act as a safe harbor. A designer who adheres to the letter of those standards (as interpreted by the courts and DOJ) ordinarily will be in compliance with the ADA regulations, at least with regard to the particular design elements covered by those standards.” *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 727 (D.Or. 1997). If PtD becomes law, it seems logical that the government should provide similar guidance for design professionals on how to best address safety “through design.” See, e.g., the National Institute of Steel Detailing recommendations for fall-arrest systems “tie line” holes and perimeter protection holes for wire guardrails. (p. 22).

Conclusion.

Most design and construction companies take safety very seriously and work hard to train all employees on “safety first.” Can we do better if designs accommodated the worker? Certainly. But, this has to be well thought out, and risks need to be allocated to those best able to handle them. PtD has potential to reduce injuries if those most knowledgeable in construction means and methods are giving the input, and that is not the design professional.



What do you think? Compare the three-unit building (left) to the four-unit building (right). Apparently the plans were copied, but several obvious architectural elements were changed. The trial court granted summary judgment that the two are not “substantially similar”!

MICHIGAN. COPYRIGHT CASE RESULTS IN SPLIT RULING ON COPYING PLANS vs. SUBSTANTIAL SIMILARITY OF TWO BUILDINGS!

Brian Kramer, who owns Remark Home Designs, prepared architectural plans for a three-unit condominium building. Adjacent to the three-unit building, foundations were poured to build a four-unit condominium building, but construction halted due to the recession and the property went into receivership. Later, Oak Street Condo Projects, LLC (owned by Paul Zulewski) purchased the four-unit property and hired Jack Runkle as its architect. They also purchased a set of the three-unit architectural plans from the prior owner of the lot for \$1,000. Zulewski spoke with the City engineer who showed him the site plans they had on file from Remark for the partially-built four-unit building. The engineer told Zulewski that the units would have to be built according to those site plans, or he would need to submit new plans. Zulewski (through Oak Street) then hired Jack Runkle to draft architectural plans for the four-unit site. The Planning Commission required several modifications regarding the exterior of the building before approving the plans.

When Kramer (of Remark) saw that construction had begun on the four-unit site, he looked at the plans and realized they'd been copied. He registered his three-unit drawings for copyright protection, then assigned those rights to his company, Remark, and sent a notice to Zulewski alleging copyright infringement. Remark sued Zulewski, Oak Street and the new architect, Runkle, alleging that all three defend-

ants infringed on its copyright for both the architectural plans and the three-unit building constructed from those plans. The defendants moved for summary judgment. The court granted Oak Street and Zulewski's motion for summary judgment with respect to the constructed building, but denied the motion with respect to the plans. Architect Runkle's motion was also denied. Copyright protection extends to “architectural works,” defined by the Copyright Act as “the as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” 17 U.S.C. § 101. Therefore, the holder of a copyright in an architectural plan has two forms of protection: 1) first, under the provision for an “architectural work;” and, 2) second, another under the provision for a “pictorial, graphical, or sculptural work.” Here, the court found that there were “notable differences” in the plans and other features, like ceiling height, but noted “a copyright defendant need not copy a plaintiff's work in its entirety to infringe that work. It is enough that the defendant appropriated a substantial portion of the plaintiff's work.” While courts are reluctant to grant summary judgment at the “substantial-similarity stage,” the court found that no reasonable jury would could find substantial similarity between the look and feel of the two constructed buildings. As a result, summary judgment was granted to the defendant developer. However, as to the architect, Runkle, the court found that “one could theoretically claim infringement of its plans even if the resulting structure does not infringe.”

Here, Runkle first argued that the architectural plans are a “work for hire,” as Kramer created them in his capacity as an employee of Remark; therefore, Remark owned the plans, not Kramer. The

court concluded, however, that Kramer, as the sole member of Remark Home Designs, LLC, owned the rights to the plans and could assign them to Remark. Runkle did not have a counter to that argument. “Runkle’s second argument does not fare any better,” said the court. Runkle claimed that under Michigan licensing law, a licensed architect must not apply his or her seal to any work that is not prepared by that architect or “under the supervision of [the licensed architect] as the person in responsible charge. Here, another architect, Warren, sealed the plans for the 3-unit building. So, while Runkle claims he is the author, he provided no legal argument for why Warren should be considered the person who actually created the work,” under the licensing law. As a result, Runkle was still potentially liable for copying the copyrighted plans – even if the two buildings were not “substantially similar.” *Remark Home Designs, LLC v. Oak Street Condo Projects, LLC*, 2019 WL 384952 (E.D. Mich. 2019).

LOUISIANA: GENERAL CONTRACTOR CAN BE CITED FOR SUB’S OSHA VIOLATIONS

A judge for the 5th Circuit has ruled that OSHA can cite general contractors — even if their employees are not affected — for subcontractor safety violations. As background, Hensel Phelps subcontracted with Haynes for a public library project, and Haynes, in turn, hired CVI as a sub-sub to perform demolition, excavation and other work. As the excavation at the worksite progressed, a nearly vertical wall of “Type C” soil developed, measuring 12 feet tall by 150 feet wide. OSHA regulations mandate that excavations in this type of soil use protective systems, such as sloping, to protect employees from cave-ins. No such protective systems were used here. On a rainy morning in 2015, CVI was assigned to reinstall rebar at the base of this excavated wall of soil, preliminary to pouring concrete footings. That same day, the OSHA area office received a complaint of hazardous working conditions at the project. A compliance officer conducted an inspection and discovered three CVI employees working at the base of the unprotected wall. OSHA cited CVI and Hensel Phelps for willfully violating OSHA regulations, by exposing employees to a cave-in hazard from an unprotected excavation. Hensel Phelps was cited under the OSHA multi-employer citation policy as a “controlling employer.”

Impossibility of Performance?

While the doctrine of “impossibility” is rarely invoked, once in a while we see a case where the contractor’s performance is truly impossible. For instance in a 1974 Alaska case, the owner insisted on contractual performance by the contractor using a method which proved to be impossible, i.e. hauling rock across a frozen lake. The Alaska Supreme Court deemed the owner to have breached the implied warranty that the contract could be performed, even though the ice haul method was determined by agreement of the parties! *Northern Corp. v. Chugach Elec. Ass’n*, 523 P.2d 1243 (Alaska 1974).

In 2017, a Denver Occupational Safety and Health (OSH) Commission administrative law judge (ALJ) ruled that Hensel Phelps could not be cited for safety hazards created by one of its subcontractors based on precedent in the 5th Circuit that “OSHA regulations protect only an employer’s own employees.” The ALJ concluded that an employer at a worksite within the 5th Circuit cannot be held in violation of the Act when the employees exposed to the hazard were employees of a different employer. The ALJ vacated the OSHA citation. The Secretary of Labor filed a petition for review by the 5th Circuit Court of Appeals, which reversed years of precedent, saying that more recent rulings have rendered the case law on which the ALJ based his decision “obsolete” and that Hensel Phelps could be held responsible for safety on the multi-employer site as a “controlling employer.” The ALJ’s ruling was reversed and the Court held that the Secretary of Labor had authority “to issue citations to controlling employers at multi-employer worksites for violations of the Act’s standards.” *Acosta v. Hensel Phelps Construction Co.*, 909 F.3d 723 (5th Cir. 2018).

MEMBER PROFILE: RICHARD ELBERT

The Bjarke Ingels Group
Brooklyn, NY

TJS member Richard Elbert worked for many years as an architect before law school, but he was always intrigued by the thought of practicing law in the construction industry. "At the time, architecture schools did not teach any business or law classes," he said, "and I felt these areas were sorely needed in the profession. All too often, architects seemed to be poor business managers and not aware of the legal pitfalls and risks in contracts and professional liability. I had seen insurance premiums skyrocket to cover all the threats of litigation with many firms 'going bare' because they could not afford it, and I saw how some architects lacked knowledge about their contract rights, or how to negotiate a contract with savvy business people." When a joint venture that Richard was involved with



The Elbert Family: Justin, Katrin, Rich and Kris on a ski trip to Jackson Hole.

had to sue a client for failure to pay fees, and Richard had to hire a lawyer to represent them, a light went on for him. "While the attorney knew the general law, it frustrated me that he did not have a good comprehension of the practice of architecture or construction. A subsequent economic downturn, when architectural firms were shrinking, gave me the opportunity to go back to school and pursue a law degree." He enrolled at Seton Hall Law School and never looked back. "This had the upside that a law degree in combination with architecture would provide better career protection. I began attending night school while working as a project design leader during the day. Being impatient, I switched to full-time law school and added summer classes in order to graduate in two and a half years."

His architectural education began at the Univ. of Wisconsin – Milwaukee. "I started college thinking I'd be an engineer, but in engineering school, I wondered how some of the bland, uninspiring buildings that I was studying in could be improved to encourage learning. I also realized how much architecture could influence our environment, and I soon discovered how much I loved architectural history and visiting structures that have stood the test of time. I started taking a few architecture classes and saw the appeal of adding to the built environment. The idea of being a part of a profession that creates something that others might appreciate and enjoy, something tangible, and knowing it may still exist many years later, took hold." He transferred to the architecture program at UW – Milwaukee, which introduced Richard to design studios and the close group of friends that comes with it. There he developed a broader urban-scale thought process and explored how architecture can influence behavior.

After getting his degree in architecture, Richard began working for a small architectural studio, where he soon realized how little he actually knew of the mechanics of building something, of how to draw and put together a set of construction documents. "My boss was a great mentor, who gave me the chance to design some small structures. I still sometimes like to stop by to visit these buildings when I'm in the area. While architecture school taught design, I didn't have a lot of technical knowledge, so I began taking drafting classes at night at a local technical college, which gave me a better understanding of the many details that were required to make a design a reality. Then, needing a professional degree, I applied to some graduate architecture programs; falling in love with south - western Virginia, the Blue Ridge mountain setting, and the southern accents, I enrolled at



(Above) Rich hiking on a trip to Sweden;
(Below) Rich and Katrin at the Lego House
in Denmark, a “BIG” building.



Virginia Tech. There, I expanded my knowledge of design, with the focus of my studies on energy-efficiency and sustainability in design and construction.” Richard ultimately obtained an M. Arch. from Va. Tech.

After getting his JD from Seton Hall Law School, Richard’s intent was to practice law in-house with an A/E firm or construction company, as he saw the combination of law and architecture as joining creativity with practicality to form that great combination that few lawyers could offer. He wanted to make a difference, noting that, “There are a lot of lawyers in the US, and our society is quick to sue, but there are very few lawyers with the understand-

ing of how design professionals work, nor the ‘nuts and bolts’ of the construction industry. It seems that many lawyers are trained to favor a combative and litigious approach, whereas as an architect-lawyer, I bring a collaborative, creative attitude toward negotiations. My career change allowed me to apply my knowledge and experience to be of real benefit to an A/E firm.” But, alas, his dream of working in-house for an A/E firm did not immediately pan out after graduation, as the jobs available were mainly in litigation. So, he joined a construction law group in a large, international New York law firm, where he learned how to litigate construction defect claims, delay claims, and contract disputes. “I worked on the defense side for A/E’s and construction companies. Because of my background, I very quickly became the ‘expert’s expert,’ by preparing expert witnesses for depositions and trial, and defending and taking expert depositions.”

His dream job finally landed with the Bjarke Ingels Group (BIG Architects or simply, “BIG”), where Richard currently serves as its General Counsel. The firm was founded in Copenhagen, and has rapidly expanded to international fame to “Star-architect” status. BIG has designed buildings around the world, impacting design philosophy through its unique combination of architecture and engineering to expand past conventional boundaries with structures that appeal to their users. BIG’s US presence has undergone multiple expansions, and is now located in Brooklyn, NY, with offices in Copenhagen, London, and Southeast Asia. His role requires him to be involved in all aspects of law as it affects a global design company, helping to guide this inspiring – and aspiring – design firm.

Richard is married to an engineer, Katrin, whom he met while attending Va. Tech. She and Richard live in Westfield, New Jersey, where Katrin works for a major medical company as a research & development engineer. Richard served as an elected town councilman in their hometown. They have two children: daughter Kris, who attends Duke Univ. with computer engineering/computer science majors; and son Justin, who attends his parent’s alma mater, Va. Tech, with a business engineering major. “In March the family rivalries came out in force, when Duke played Va. Tech in the Sweet 16 matchup!” Outside of work, Richard is an outdoor enthusiast, who loves to ski, scuba dive, play tennis, hike, camp and travel. “Our entire family enjoys taking trips together, taking time to slow our pace and appreciate the beauty of nature.”

Book Review: Jefferson's Daughters. Three Sisters, White and Black, in a Young America

By Catherine Kerrison

Illustrated. 425 pp. Ballantine Books. \$28.

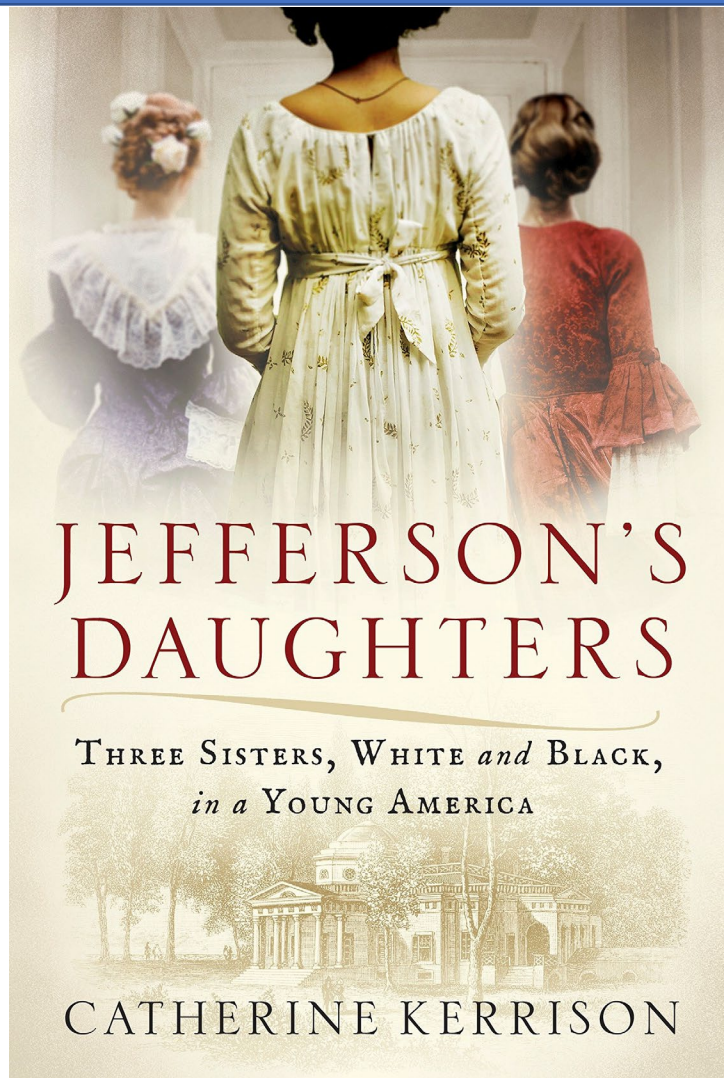
This book review was published in the *New York Times* on Jan. 26, 2019:

Fawn Brodie would be astonished — and gratified. In 1974, her biography “Thomas Jefferson: An Intimate History” contended that the third president had fathered children with his slave Sally Hemings. For this, Catherine Kerrison, a professor of American history at Villanova University, accurately notes, Brodie was “excoriated by a cadre of Jefferson experts.” A lot has changed, and largely because of the work of Annette Gordon-Reed, who took seriously Hemings family stories and, bolstered by a DNA study, convinced nearly all scholars, including Kerrison, that Brodie was correct. “Jefferson’s Daughters,” Kerrison’s beautifully written book, takes the relationship’s existence as a given.

And so, to a nuanced study of Jefferson’s two white daughters, Martha (born 1772) and Maria (born 1778), she innovatively adds a discussion of his only enslaved daughter, Harriet Hemings (born 1801). The result is a stunning if unavoidably imbalanced book, combining detailed treatments of Martha’s and Maria’s experiences with imaginative attempts to reconstruct Harriet’s life.

Kerrison first examines the ill-fated marriage of Thomas Jefferson and the young widow Martha Wayles Skelton. Not ill-fated because of a lack of love or resources, but because of Martha’s repeated problems with childbirth, which caused her death in 1782. Alone of all their children, the two daughters survived into adulthood. Kerrison’s account of the girls’ residence with their father in Paris in the 1780s includes vivid descriptions of the streetscape and architecture they encountered, as well as of the impact of their divergent educational experiences. While the vivacious Martha had five years of rigorous convent education, her sister Maria had less than two. As a result, the older girl, Kerrison contends, later stressed the importance of educating the daughters born to her and her husband, Thomas Mann Randolph, whereas Maria was content to be a conventional wife of the planter Jack Eppes.

The lives of four Virginia families — Jeffersons, Randolphs, Eppeses and Hemingses — were intertwined. Sally Hemings,



daughter of Jefferson’s father-in-law by his mulatto slave Elizabeth Hemings, arrived in the Jefferson household in Paris in 1787 at the age of 14 assigned to be the child Maria’s companion. Following Hemings’s oral history, Kerrison relates how Sally, knowing she could claim freedom by remaining in France when Jefferson returned home in 1789, negotiated a promise of eventual freedom for herself and all her children, who were by parentage seven-eighths white — a promise kept in part by Martha Randolph after her father’s death in 1826. Jefferson listed Beverley, the oldest boy, born 1798, and his younger sister, Harriet, as “run” in 1822, but other sources reveal that he quietly facilitated their departure.

The book’s most innovative chapters’ attempt to reconstruct, from scattered fragments, Harriet’s life in slavery and freedom. At Monticello, she and her mother — along with the Randolph family — lived as adjuncts to the plantation’s master. The house was designed solely for Jefferson’s comfort; Kerrison comments that “family life, however, was architecturally all but

invisible” there; the master’s white and black dependents lived and worked in small, inconvenient or upstairs rooms. By age 14, Harriet was put to work on a spinning jenny, suggesting to Kerrison that Jefferson might have thought he was training her adequately “for her future role as a housewife in a working-class household.”

In 1873, Harriet’s younger brother Madison offered deliberately opaque clues about her, declaring that she was “passing” and had married a prosperous white man in Washington, D.C. Kerrison identified 58 “Harriets” who wed in Washington between 1822 and 1830. She takes readers along on her research journey through disparate records, but ultimately concludes that Harriet Hemings “will keep her secret.”

The last chapter, “Legacies,” ruminates on the fate of each of the women from a contemporary perspective. Maria, who like her mother died young from childbirth, leads Kerrison to point out that current attacks on women’s reproductive health threaten “to return women to the conditions endured by their 19th-century forebears,” making Maria’s fate “both timely and crucial.” Martha and her daughters prompt Kerrison’s musings on women’s education, for “in spite of all their scholarly attainments, they remained, after all, women,” with no obvious way to use their learning in their own day. And Harriet, who passed as white, most likely abandoning her family in the process, prompts Kerrison to wonder about the persistence of racism in American society. Why, she asks, “do the discredited ideologies of gender and race continue to control and separate Americans so powerfully?”

U.S. SUPREME COURT: MAJOR RULING ON ARBITRATION SAYS ARBITRATOR DECIDES QUESTION OF ARBITRABILITY, NOT COURT

On Jan. 8, 2019, the U.S. Supreme Court handed down a major ruling dealing with arbitration cases. Though not a design or construction case, the impact will be felt in our industry. Justice Kavanaugh, writing for a rare 9 to 0 unanimous Court, held that when the parties' contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if it thinks that the argument that the arbitration agreement applies to a dispute is “wholly groundless.” Justice Kavanaugh summarized the issue nicely in his opening: “Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question — that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court’s cases, the question of who decides arbitrability is itself a question of contract. * * * The Act does not contain a “wholly groundless” exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.” *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (U.S. 2019).

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