



Issue No. 45

Fall Issue – Oct. 2023

PRESIDENT'S MESSAGE

By Laura Jo Lieffers, Esq.
Perkins & Will
St. Petersburg, FL

Members of The Jefferson Society,

I hope this note finds each of you doing well and perhaps even enjoying “sweater weather,” as unaccustomed to that as I am in Florida. The temperatures have at least dropped from the 90s to the 80s, so I call that a win! I am always so proud of our members and all they continue to accomplish throughout our industries. Looking through our “Members on the Move” section, you will see our members’ promotions, presentations, podcasts, accolades, and so much more. Congratulations to each of you!

Speaking of presentations, earlier this month our membership enjoyed our first remote continuing education presentation. TJS member Russell Weisbard was gracious to share his presentation “*Architectural Copyrights: Don’t Steal That Design!*” with us. We enjoyed a well-attended primer on intellectual property law and how we can help our owner and architect clients alike protect themselves from infringement. There was a lively conversation as our members shared their experiences from past copyright infringement litigation. As you will see throughout our case law updates, infringement is a timely and relevant topic for our group, so we are grateful for Russell to have shared his insight. It was also a great opportunity for our members to connect. Thank you to all who attended.

The AIA has approved Russell’s presentation for 1 LU and it is available to all of our members to use and present as they wish. Our hope is that you can use the presentation to further marketing and networking efforts in your individual practices. Simply send me, or any other TJS board member, an email and we will share the presentation with you. My email address is: Laura.Lieffers@perkinswill.com. After you present, send us the attendance report and we can log attendance with the AIA through our CES Provider portal. We hope to continue to grow this member resource. If you have a presentation you want to share with our membership, let us know!

Don’t miss our next remote continuing education session on *Alternative Dispute Resolution* scheduled for Thursday, Dec. 7, 2023 at 1 p.m. EST. Our panel includes four of our mem-

(continued on p. 2)

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

Send his or her name to TJS President Laura Jo Lieffers, Esq. at:
Laura.Lieffers@perkinswill.com and we will reach out to them. Candidates must have
dual degrees in architecture and law.

Inside This Issue:

Pg. 1, Our President’s Message

Pg. 2, Architects Speak Out on the War
in Palestine and Israel

Pg. 3, Thomas Jefferson Introduced the
U.S. to Broccoli!

Pg. 3-4, Making Malt Liquor at Monticello

Pg. 4-5, Virginia’s Jefferson Vineyards

Pg. 6-7, TJS Members on the Move!

Pg. 9-17 and 23-25, Case Summaries

Pg. 17-20, Minutes of Two TJS 2023
Board Meetings

Pg. 20-21, Thomas Jefferson & Bourbon

Pg. 22-23, Remembering TJS Member
Wilkes D. Alexander (1957-2023)



(President’s Message, continued)

bers who are the “best of the best” in ADR: Craig Williams, Bruce Waugh, Dennis Bolazina, and Bill Quatman. Mark your calendars now!

Thanks,

Laura Jo

Laura Jo Lieffers, President

ARCHITECTS RESPOND TO THE WAR IN PALESTINE AND ISRAEL. THE AIA AND OTHERS SPEAK OUT.

(Washington, D.C.) Oct. 10, 2023.

Since October 7, protests over the war in Palestine and Israel have erupted in public spaces and universities in the U.S. and around the world, gathering millions. A number of architects and human rights groups have responded in public statements and on social media. The American Institute of Architects (AIA) released the following statement denouncing the violence and listing a number of humanitarian and aid resources for helping the region:

“Israel - Gaza Conflict

As architects, we shape the spaces where life unfolds. Today, our attention is drawn to a region where life and space are embroiled in a devastating conflict in Israel and Gaza. The war is causing unimaginable suffering for civilians on both sides, destroying homes, infrastructure, and lives.

We believe that architecture is about more than just buildings; it’s about building communities, fostering understanding, and promoting peace. With this in mind, we encourage you to extend your compassion and donate to reputable organizations working tirelessly to secure peace and offer relief in this region.”

The full AIA Statement and list of 9 relief organizations can be found [here](#). The AIA added: *“Each of these organizations provides a unique and critical service in this time of crisis. We urge you to consider donating to one or more of these causes and help make a difference in the lives of those affected by this conflict. Together, we can contribute to building a future where peace and understanding shape the spaces we inhabit.”*

The Royal Architecture Institute of Canada (“RAIC”) issued this statement on Oct. 17, 2023:



“We strongly condemn the recent Hamas attack against Israel and the resulting violence that has inflicted suffering and devastation on innocent Israeli and Palestinian civilians. It is horrifying to watch this violence continue to unfold in Israel and Gaza. Our thoughts and prayers go out to all our colleagues and members affected by the conflict, especially those who have lost friends and family.”

“We Design Beirut” is a program in Beirut, Lebanon that showcases Lebanese art, architecture, and design. The organization was set to have a four-day long event in late October which has been postponed to March 2024. The program issued this statement: *“In light of the ongoing tragic events across the region, We Design Beirut’s founder ... [has] made the decision to delay the launch of the 4-day design event till March 2024. A profound sense of accountability for the safety of all persons involved in We Design Beirut, has forced us to make the painful decision to postpone the event, There is also the moral responsibility towards humanity and the innocent lives lost, and also an acknowledgement of the pain and suffering of everyone affected by this tragedy. If the current climate has taught us anything, it is the importance of We Design Beirut in creating a design network across the globe that can augment the currently vulnerable design eco-system of the region.”*

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.

HOW THOMAS JEFFERSON INTRODUCED BROCCOLI TO THE U.S.

(reprinted from yahoo! news Oct. 1, 2023).

When you think of the contributions that the founding fathers have made to our country, you probably don't immediately consider the vegetables you can find at the grocery store. But these famous American statesmen did more than just draft the Constitution and the Declaration of Independence. Interestingly enough, one of the most famous veggies out there, **broccoli**, was first brought over to the U.S. in the luggage of our third president, Thomas Jefferson.

Among his many interests, Jefferson was an avid gardener and his farm at Monticello in Virginia often reflected a worldly perspective. There were peppers from Mexico, figs from France, and plenty of peas from England. In one special section, he even showcased his Italian favorites, including squash and green, white, and purple varieties of an edible flower the Italians called "broccolo" and the English called "Italian Asparagus." Jefferson first planted these cabbage offshoots in 1767 — years before America had even declared its independence.

Though Jefferson and other gentlemen gardeners of the 18th century may have grown broccoli, the vegetable had its detractors. Many outside Italy decried the sulfur smell that occasionally accompanied the cooking of broccoli. Some criticism was faintly xenophobic as well, with some deeming the ingre-

dient too "foreign," rejecting both the vegetable and the Italian people they were associated with.

Instead, broccoli really didn't gain steam until the 1920s, when a surplus of Southern Italian immigrants came to America. These new Americans brought over their cuisine and fondness for broccoli, leading to its popularity. Funnily enough, the most common broccoli found in America up until that point was a *purple variety* rather than the popular *green* we see today. Once farmers realized they could grow plenty of broccoli in California and had a huge market among Italian immigrants, the vegetable was quickly adopted as an American vegetable. Still, you'd do well to remember Jefferson as a veggie trendsetter who saw the potential of broccoli way ahead of time.

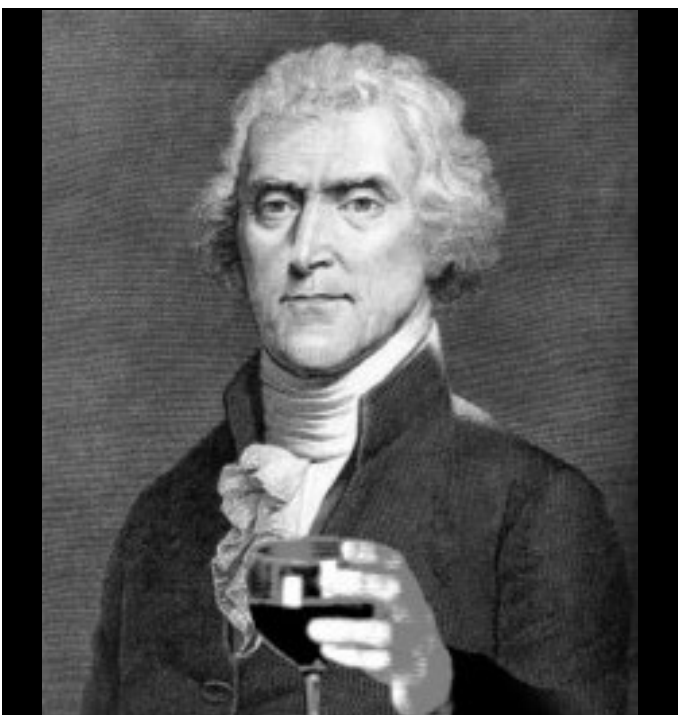
MAKING MALT LIQUOR AT MONTICELLO

(reprinted from JSTOR, Sept. 26, 2023)

Thomas Jefferson thought whiskey (or "whisky") was harmful to the country. Together with enslaved brewer Peter Hemings, he experimented with making less potent drinks.

When he wasn't busy being president or gallivanting around France, Thomas Jefferson was obsessed with agricultural experimentation. He — or, more accurately, the men and women he enslaved — grew a variety of European and native crops and prepared them to serve to visitors at his Monticello estate. As historian Gaye Wilson writes, one of Jefferson's greatest culinary quests was the development of alcoholic drinks. The idea, Wilson writes, was not simply to produce nice drinks for the Monticello tables but to model a new approach to alcohol for regular people. Jefferson despised whiskey for its "loathsome and fatal effects," which he argued were "destroying the fortunes, the bodies, the minds, and morals of our citizens." He hoped that less potent drinks could replace the hard liquor. Most of all, Jefferson wanted to replicate the European wines he adored. He wrote that "No nation is drunken where wine is cheap, and none sober, where the dearness of wine substitutes ardent spirits as the common beverage."

In 1774, a winemaker named Phillip Mazzei of Italy arrived in Virginia with eleven indentured Italians in an attempt to set up vineyards in the colony. Jefferson gave him a parcel of land next to Monticello, where the workmen planted a mixture of European and native grape varieties. Jefferson carefully observed and recorded their methods and attempted to repli-



cate them, but with little success. (*Winemaking in Virginia wouldn't really take off until the 1970s.*)

Jefferson's wife, Martha, achieved a better record brewing "small beer," presumably with a low alcohol content. She, and later other members of the estate, apparently purchased hops from people enslaved at Monticello and other nearby plantations, possibly grown in kitchen gardens or gathered from the wild. In one case she recorded the purchase of "7 lbs. of hops with an old shirt."

Jefferson's political career left him limited time for fiddling with fermentation, but after leaving the presidency in 1809, he returned to his experiments. In 1813, he happened to meet an English brewer named Joseph Miller who was living in Virginia. Miller taught his craft to Peter Hemings, the enslaved head chef of the estate. Together, Jefferson and Hemings experimented with making malt liquor, ale, and cider. For the malt liquor, the plantation diverted some of its main cash crop, wheat, to the brewing process. Jefferson also tried using corn at one point, but quickly gave up on that idea. He was also closely engaged in the process of making hard cider, giving highly specific instructions about the preparation of apples for the process. The apple most commonly used for cider was the Hewes crab, but Jefferson preferred a variety known as the Taliaferro. While his initial dreams of grape-based fermentation had been dashed, he pronounced the Taliaferro capable of making a cider "more like wine than any liquor I have ever tasted which was not wine."

JEFFERSON VINEYARDS FULFILLS THOMAS JEFFERSON'S DREAM OF MAKING EUROPEAN-STYLE WINES IN VIRGINIA

(Reprinted from the *Pittsburgh Post-Gazette*, Sept. 29, 2003)

CHARLOTTESVILLE, Va. — You can't tell the story of Virginia wine without also telling the tale of our nation's first oenophile, Thomas Jefferson — or tasting the fruits of the winery that bears his name just a few miles from of this picturesque college town. Many remember our third president as the primary author of the Declaration of Independence. But he also was a self-taught architect and serial entrepreneur who grew tobacco and wheat as a cash crop at his mountaintop estate, Monticello. He also oversaw several cottage industries, including a small textile factory in which a team of enslaved women and children made rough cloth to clothe those on the plantation.

A fine wine connoisseur, Jefferson also was passionate about trying to make his native Virginia a great wine-growing state. Two centuries later, his dream is realized at Jefferson Vineyards, the 400-acre vineyard he started before the Revolutionary War with an Italian neighbor that's considered America's first wine company. Today, it makes award-winning Bordeaux-style reds and other wines bearing his name and signature under the careful eye of winemaker Chris Ritzcovan. But first, a little history.

Like many colonists, Jefferson made *scuppernon wine* from homegrown indigenous grapes. In 1773, he decided to also experiment with *vitis vinifera* brought over from Europe after befriending Italian viticulturist Filippo Mazzei. Jefferson would later give Mazzei 193 acres south of Monticello on which to grow a combination of vines from Tuscany, Piedmont and Burgundy. By 1778, Mazzei had purchased an additional 700 acres and was planting on both farms to see what would work. It was a miserable failure. A severe frost destroyed the baby vines in 1774. And following the Revolutionary War, during which soldiers allegedly trampled on the replanted vines, *phylloxera*, a microscopic pest that lays eggs on the roots of grapevines and eventually kills them, did the vines in.

After he became president in 1801, Jefferson tried again in two vineyards in Monticello's south orchard, with rooted vines and cuttings of 24 German and French cultivars — some of which had never been grown in America. That failed as well, and so Jefferson replanted with native grapes in 1811. Eventually, the land was converted to other agricultural uses. It wasn't until many decades later, when viticulturists started grafting *vinifera*



grapes onto native American rootstock, that winemakers were able to grow hearty, weather- and pest-resistant grapes with the desired varietal characteristics of European wine. Many French hybrids grow successfully in Virginia now, along with Italian and Spanish varieties. Still, it wouldn't be until 1981 that Jefferson's optimistic dream of making "as great a variety of wines as are made in Europe, not exactly of the same kinds, but doubtless as good" would be realized. That's when the Woodward family — who in 1939 purchased the property Jefferson and Mazzei originally attempted to grow on — hired Gabriele Rausse to replant the grounds with Chardonnay, Cabernet Sauvignon and other varieties. By 1984, two vineyards were producing enough grapes for their Simeon Vineyards to make wine. After passing to the third generation in 2013, the vineyard — renamed Jefferson Vineyards in 1996 — changed hands again this spring when the family sold the winery and around 400 acres to the Thomas Jefferson Foundation, which owns and operates Monticello for tours.

"We couldn't ask for a better partner," says its 40-year-old winemaker, Ritzcovan, who grew up in a family of farmers and home wine makers. He joined the vineyard's wine team in 2007 as the assistant winemaker to "do something fun" after graduating from the University of Virginia with a degree in environmental science and urban planning, and took the top job in 2013. There are more than 40 wineries on a wine trail within the Monticello American Viticultural Area, and "everyone does such a fantastic job making incredible wines, you can't pigeon us into one varietal or wine," says winemaker and trail president Stephen Barnard.

Jefferson Vineyards is located in the shadow of Monticello, just 2 miles down the road from the historic estate. The president's northeast and southwest vineyards were replanted in 1985 and 1993, respectively, and has produced several vintages. There are currently 22 acres under vine, including some of the best Viognier in the state, according to Ritzcovavn. The vineyard's unique terroir along Virginia's Blue Ridge Mountains also makes it a great place to grow *Chardonnay*, *Riesling* and *Petit Manseng*, a white variety grown primarily in southwest France. Visitors also will find bottles filled with *Cabernet Franc*, *Merlot* and *Petit Verdot*, a full-bodied red wine that's become a star varietal in Virginia. Unlike some of its competitors, Jefferson Vineyards dry farms everything, meaning it relies only on natural rainfall for growing the grapes in its four vineyards. Then again, less water is usually your friend when it comes to grapes, says



(Above, the entry to Jefferson Vineyards in Charlottesville, not far from Monticello).

Ritzcovan, and Virginia's clay soil is good at retaining necessary moisture. Its oldest and most storied vineyard was planted with eight varieties in 1981 and sits on 12 acres purchased by Philip Mazzei in 1774. Its 5-acre Sunnyfields vineyard near the base of Montalto was planted with Petit Manseng, Merlot, Cabernet Franc and Petit Verdot vines in 2003. Just a little over an acre of Pinot Gris and Chardonnay planted in 1983 greet you at the entrance.

In all, they produce about 100 tons of fruit a year, or enough to make upwards of 7,000 cases of wine — boutique by California standards, but medium range for Virginia, where most wineries are family owned. Everything from the planting to the fermenting to the bottling is done in a holistic nature. "It's tangible production, not just a cog in a set of gears," says Ritzcovan. Ritzcovan concedes Virginia wines didn't have a great reputation when they first came out in the early '80s, but that's because it was a new business. The state's landscape and climate is diverse "and it can take 10 year to make a great wine," he says.

[Editor's Note: Jefferson Vineyards offers a diverse portfolio of wines, which they say are "best suited to our unique terroir along Virginia's Blue Ridge Mountains. Our hand crafted wines are the product of the land and represent the stewardship of this most precious resource." Among the wines offered at <https://www.jeffersonvineyards.com/> are:



(Above, the beautiful grounds of Jefferson Vineyards in Charlottesville, Virginia).

the Viognier 2021 “Our flagship wine” (\$31.95), Chardonnay Reserve 2021 (\$29.95), Riesling 2021 (\$25.95), Cabernet Franc 2022 (\$29.95), Merlot 2021 (\$28.95), and Meritage 2021 (\$34.95). I have yet to try a bottle, so let me know if you do!

Members on the Move!

Ted Ewing is now Senior Vice President and Chief Claims Officer at Berkley Human Services (a Berkley Company).

Denis G. Ducran, of Peckar & Abramson, P.C., recently taught another semester of Construction Law & Ethics at the University of Houston’s Cullen College of Engineering.

Kelli E. Goss, AIA, Esq. is now the General Counsel for MBP (McDonough Bolyard Peck) in Raleigh, N.C. Congratulations!

Robyn Baker, Esq., LEED AP, is presenting a workshop for the ICSC+Law conference in Desert Ridge in October 2023. Robyn is the Associate Legal Director at Arcadis Inc., fka CallisonRTKL.

Timothy Gibbons, of Chambliss Bahner & Stophel PC, was named by *Best Lawyers®* as the “Chattanooga Construction Lawyer of the Year” in 2017, 2019 and 2022.

Scott R. Fradin, co-chair of Much’s Construction group, presented to the Society of Illinois Construction Attorneys (SOICA) on Aug. 15, 2023. His presentation, gave a legal analysis of the case law underlying the decision in *The Board of Trustees of Oakton Community College vs. Legat Architects, Inc.* Scott also led a general discussion on exceptions to standard builder’s risk insurance as well as possible revisions to the insurance provision in standard AIA documents.

David N. Garst, of Lewis Thomason was named by *Best Lawyers®* as the 2022 Litigation-Construction “Lawyer of the Year” in Nashville.

Don Gray is now with the Boise law firm of Givens Pursley.

Steven E. Kennedy, of the Dallas firm of McGuire Craddock & Strother PC, has been named a “Texas Super Lawyer” by *Texas Monthly*, 2013 – 2023.

Lawrence “Larry” Prosen, of the Cozen O’Connor firm, was named one of the “Top 10 Most Influential Construction Lawyers in District of Columbia” (2023) by *Business Today*. Larry will be presenting at the 2023 Construction Super Conference in Hollywood, Fla. on Weds., Nov. 29, 2023. His topic will be: “There’s Never Time To Plan Up Front, But There’s Always Time To Litigate Later – Speak now or forever hold your peace?”



Members on the Move (cont'd).

Joseph H. Jones, Jr., with Travelers (above), hosted a podcast for insureds in Travelers professional liability programs on the topic of "Why Risk Management is Important to Underwriting... and to You." His guest was Lee Genecki, V.P. of Professional Liability at Travelers. [Many of us remember Lee's father, Paul L. Genecki (now deceased), formerly a senior vice president with Victor O. Schinnerer & Co.]

John Hawkins's law firm, Porter Hedges, was named by Construction Executive magazine among the "Top 50 Construction Law Firms" (June 2023 issue). This is the third year in a row the firm's construction practice has been recognized. John was among twenty-seven lawyers from Porter Hedges recently selected by their peers for inclusion in *The Best Lawyers in America* 2024.

Wyatt Hoch, of Foulston Siefkin LLP, was named by *Best Lawyers*® as the "Lawyer of the Year" for Construction Law (2011, 2016, 2019, 2021, 2024) and Construction Litigation (2013, 2017, 2020, 2022, 2024) in Wichita, Kansas. In 2023, Wyatt wrote "Consideration of Mediation and Arbitration Provisions in Wills and Trusts," published by The Journal of the Kansas Bar Association.

The Government Contracts & Disputes practice group of **Laura B. LoBue's** firm, Pillsbury Winthrop Shaw Pittman LLP, was selected as a Practice Group of the Year for 2022 by *Law360*.

Bill Quatman presented on Oct. 17 in Detroit at Schoolcraft College on "Legal Doctrines" at AIA Detroit's annual Building En-

closure Council ("BEC") symposium. Bill was also a co-presenter a few days later, on Oct. 19, at the annual recap of Kansas & Missouri Construction Law for the Kansas City Metropolitan Bar Association's Construction Law Committee.

Kenneth R. Michael, of the firm of Womble Bond Dickinson, was named by *Best Lawyers*® in its 2024 edition, as one of *The Best Lawyers in America*®.

Barry J. Miller, of the Benesch law firm, has been named to Chambers USA Leading Lawyers, Construction, 2003-2023, to *The Best Lawyers in America*®, Construction Law; Litigation - Construction, 2005-2023, as *The Best Lawyers in America*®, Cleveland Litigation-Construction Lawyer of the Year for 2013, 2014, 2016, 2017, 2018, 2021, and 2024. Finally, Barry has been listed in Ohio Super Lawyers, 2003-2023.

Mark Kalar, General Counsel at Cunningham in Minneapolis, was honored by Minnesota Lawyer with a 2023 In-House Counsel Award.

Troy Miller, of the Bose McKinney & Evans law firm, has been named as one of *The Best Lawyers in America*® 2013-2024.

Sara Miller is now the Director of Legal Operations at Baker Electric in Escondido, California.

James Newland, of the Seyfarth Shaw law firm, will give a presentation titled "Construction Contracts: Anticipating Suspension or Termination," at the ICSC+U.S. LAW Conference, in Phoenix, AZ on Oct. 26, 2023.

Julia Donoho, AIA, Esq., recently took a trip to Antelope Canyon, a "slot canyon" in the American Southwest, on Navajo land east of Lechee, AZ. (See p. 8, below, for Julia's photos).

Don't miss the next Continuing Education Session:

"Alternative Dispute Resolution"

Date: Thursday, Dec. 7, 2023

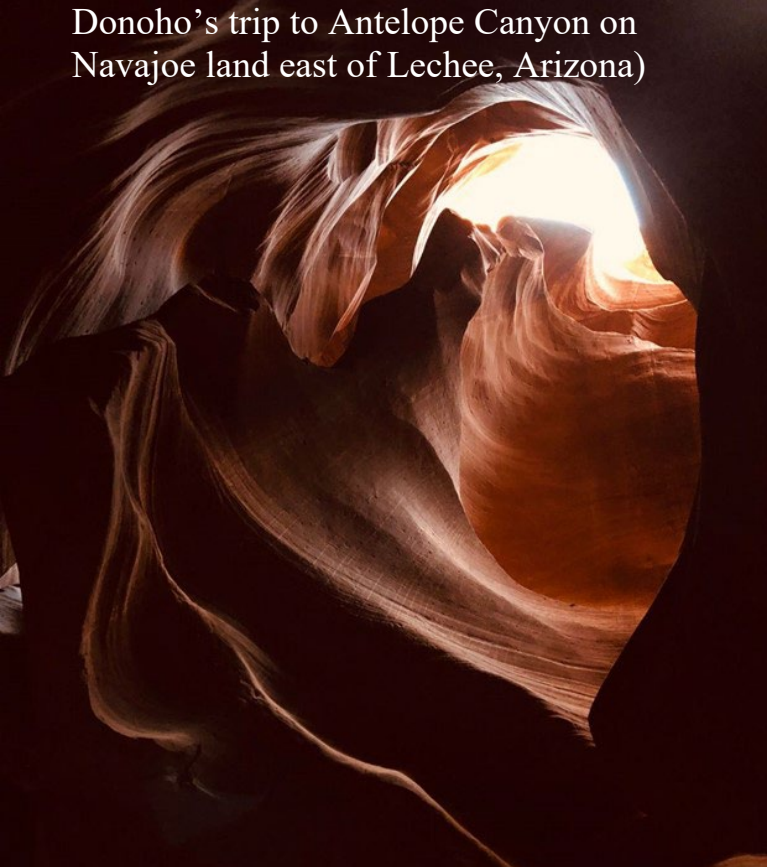
Time: 1 p.m. EST

Speakers: Craig Williams, Bruce Waugh, Dennis Bolazina, and Bill Quatman.

Watch for an email with more details!



(On this page are some photos from Julia Donoho's trip to Antelope Canyon on Navajoe land east of Lechee, Arizona)



TEXAS. ARCHITECT'S COPYRIGHT INFRINGEMENT SUIT IS REJECTED DUE TO LICENSE SHE GRANTED TO A DEVELOPER.

In 2010, a Developer wanted to build a senior living facility in Conroe, Texas. The Developer was referred to an Architect and requested a proposal from her for architectural services. The Developer and Architect entered into two limited-service contracts which provided that the Architect would complete the first two of seven phases of the Project. Under these phases, she agreed to provide the Developer with “[o]ne set of schematic site plan, floor plan, and exterior front elevation, drawn, colored/rendered and ready for Client to reproduce, scan, and/or dry mount and laminate as desired.” However, the contracts also included an important limitation: the schematics could not be used “*on other projects or extensions to [the Project] except by agreement in writing and with appropriate indemnification and compensation to*” the Architect in return for a fee of \$10,800.

After the Architect performed her contractual obligations, her relationship with the Developer “faltered” (per the court) and another architect was hired to complete the remaining phases of the Project. Although the second architect was provided the Architect’s preliminary design schematics as a “starting point” for further development, it allegedly redesigned and delivered a new set of architectural plans in late 2013. Around this time, the first Architect learned that her schematics were allegedly being used in later stages of the Project.

Shortly thereafter, she registered her original designs with the U.S. Copyright Office as “Architectural Works.” In 2015, construction commenced on the project and, once completed, the operator of the facility began marketing the facilities by posting copies of the second architect's floor plans on a website. The property went through a series of ownership changes and the ultimate owner (“CPF”) put copies of the unit floor plans in brochures and posted them on a website.

Nearly five years after she became aware that her schematics were allegedly being used in the Project, the first Architect and her firm sued the Developer and others (the “Defendants”) for copyright infringement and other claims. For the copyright infringement claims, she alleged that certain Defendants were liable for direct infringement because they used the schematics to create and subsequently market, rent, and sell the

derivative works. She sued under the Digital Millennium Copyright Act (“DMCA”).

As for the DMCA claims, she alleged certain Defendants were liable for removing her firm name from the infringing plans and either: 1) including a different title block and copyright notice on the plans, and/or 2) distributing them through brochures and posting them on the project website. She also alleged that other Defendants and the Developer were “secondarily” liable under the DMCA because they induced or encouraged the alleged infringing conduct. Finally, she alleged that the Developer breached the two contracts by failing to: 1) consult with her before using the designs in advertisements; 2) inform her of all information known about the site that might have affected her contractual performance; 3) acknowledge her professional services in advertisements; and 4) furnish and coordinate the services of consultants “not included in the [contracts] Scope of Services.”

Defendants and the Developer moved for summary judgment on the copyright infringement and DMCA claims, arguing that: 1) the contracts granted them an express, nonexclusive license to use the preliminary design schematics in connection with the Project, including to make derivative works; 2) the DMCA does not apply to derivative works; and 3) the Plaintiffs failed to show there was a genuine dispute of material fact regarding scienter for their DMCA claims. The Developer separately moved for summary judgment on breach of contract claims. The federal trial court granted both motions and the Plaintiffs appealed.

The Scope of the Express, Nonexclusive License & Derivative Works. It was undisputed that Plaintiffs granted the Developer an express, nonexclusive license to use the preliminary design schematics in connection with the Project. What was disputed, however, was the scope of this license. The Architect contended that she only granted “a limited license” to use the preliminary design schematics to obtain financing for the Project. By contrast, the Developer contended that the license allowed it and the other Defendants, to use the schematics to create derivative works — “such as to develop construction plans and build facilities — as well as market, rent, and sell the facilities.” The court held that: “A nonexclusive license can be express or implied and is generally construed under state contract law.” Applying Texas law, the federal court ruled that it had to “ascertain the intentions of the parties as expressed in the document.”

Two provisions in the contracts were reviewed. First, Plaintiffs agreed to provide the Developer with schematics that the Developer could “reproduce, scan, and/or dry mount and laminate as desired.” Second, it was agreed that the “drawings and specifications” were the property of Plaintiffs and prohibited their use “on other projects or extensions to this project” absent certain conditions. Reading these two provisions together, the trial court concluded that the contracts granted the Developer “a nonexclusive license” to use the schematics to create derivative works in connection with the Project so long as they were not used on “other projects or extensions to the project.” The Fifth Circuit Court of Appeals agreed, finding that the verb “reproduce” in the first provision suggested the license granted to the Defendants the right to create derivative works. “Cumulatively, these provisions suggest [the Developer] had largely unfettered discretion to distribute and use the schematics throughout the Project’s development,” the Court said. The second provision reinforced this point, implying that the Defendants were permitted to use the preliminary design schematics in subsequent phases of the Project. “The parties clearly contemplated this use because otherwise, [the Developer] would have entered into contracts that effectively prevented it from completing the Project and paid \$10,800 for useless schematics,” citing to what is called the “Absurdity Doctrine.” Therefore, the Developer was found to have a license to use the schematics in connection with the Project, including to create derivative works.

Anti-Assignment Clause was Irrelevant. The Architect next claimed that the Developer could not assign her contracts to other Defendants because the contracts contained an “anti-assignment clause” and that under Texas law, the provision of architectural services are “non-assignable personal services.” The Fifth Circuit held, however, that any prohibition on assignments was “irrelevant” because the Architect’s license granted the Developer the right to work with third parties to effectuate the Project. The contracts gave the Developer express authorization to use third parties to implement the license and this authorization included the right to market, rent, and sell the facilities, which was the very purpose for which they were built. Therefore, the Defendants’ use of the schematics to create derivative works and subsequent marketing, rental, and sale of the facilities was found not outside the scope of the license.

The DMCA Claims. As to the Architect’s DMCA claims, the Court found that the DMCA prohibits distribution of false copyright management information as well as the unauthorized removal of copyright management information. To recover under these provisions, however, that Architect had to show that the Defendants engaged in the prohibited conduct with the intent or knowledge that such conduct would, “induce, enable, facilitate, or conceal an infringement.” Here, however, the Defendants “could not have intended or even known that their conduct would ‘induce, enable, facilitate, or conceal an infringement’ when they were not infringing Plaintiffs’ copyright in the first place because they held a license,” the Court of Appeals rules. As such, the Defendants were entitled to summary judgment on Plaintiffs’ DMCA claims.

The Breach of Contract Claims. As to the Architect’s breach of contract claims, the Court of Appeals affirmed summary judgment because the Developer “had no contractual obligation to retain Plaintiffs beyond the first two phases.” Therefore, the Developer was properly granted summary judgment for these claims as well. *Loeb-Defever v. Mako, L.L.C.*, 2023 WL 5611042 (5th Cir. Aug. 30, 2023).

PENNSYLVANIA. 12-YEAR STATUTE OF REPOSE DID NOT BAR CLAIM ON CONTRACTOR’S 20-YEAR WARRANTY.

In April 2023, a School District sued a design-build contractor (“Tremco”) in state court for breach of contract and breach of a 20-year warranty after the 2019 collapse of a bus canopy that Tremco designed and installed. Tremco removed the suit to federal court based on diversity and then moved to dismiss the Complaint as “time-barred” based on Pennsylvania’s statute of repose, 42 Pa. C.S. § 5536. The federal trial court granted that motion with respect to Count I (breach of contract) but denied the motion with respect to Count II (breach of warranty).

The canopy was completed in 2005 and it partially failed in Sept. 2019. After which the School District notified Tremco who responded with a \$76,600 quote for its replacement. In July 2020, the canopy system failed completely. The School District claimed that the canopy was not properly designed, installed or anchored. Applying Pennsylvania law, the federal court held that while the state supreme court had not yet addressed the issue, the court needed to predict what the state supreme court would

do based on “all available data, including the decisional law of the state’s lower courts, restatements of law, law review commentaries, and decisions from other jurisdictions on the ‘majority’ rule.”

The Court noted that, “Statutes of repose differ from statutes of limitation in that statutes of repose potentially bar a plaintiff’s suit before the cause of action arises, whereas statutes of limitation limit the time in which a plaintiff may bring suit after the cause of action accrues.” The Pennsylvania statute of repose provided that a civil action brought against any person furnishing “the design, planning, supervision or observation of construction, or construction of any improvement to real property” must be commenced **within 12 years** after completion of construction. Here, the work was completed in 2005, but suit was not filed until 2023 – a span of **more than 18 years!**

The Nullum Tempus Doctrine. Tremco claimed that the statute of repose barred not only “tort” actions but also actions for “breach of contract.” The federal court agreed, citing to Pennsylvania precedent. However, the School District argued that the statute of repose was not even applicable because of the Doctrine of *Nullum Tempus Occurrit Regi* (“*nullum tempus*”), usually translated as “Time does not run against the King.” In rejecting that argument, the court held that the doctrine of *nullum tempus* applied to the statute of limitations - but not to the statute of repose. The court held that, “Because no clear authority from a Pennsylvania court authorizes the use of *nullum tempus* to defeat a statute of repose defense *** and the only case to explicitly address the issue rejects it, this Court predicts that the Pennsylvania Supreme Court, if presented with this question, would not apply *nullum tempus* in this case.” Therefore, because Tremco’s construction work was performed was **more than 12 years** before the suit was filed, the statute of repose barred the School District’s breach of contract claim in Count I.

On the 20-year warranty, the District said that if a contractor could avoid liability after 12 years based on the statute of repose, a 20-year warranty “would be wholly illusory.” The court agreed, noting that “Tremco promised that its bus canopy would remain free from failure for twenty years from the date it was installed in 2005. Tremco has failed to establish that despite the existence of this warranty, the statute of repose bars the School District’s breach of warranty claim.” Therefore, the suit could go forward based on the warranty claim. *Belle Vernon Area Sch. Dist. v. Tremco Inc.*, 2023 WL 5337286 (W.D. Pa. Aug. 18, 2023).



8TH CIRCUIT. ARCHITECT’S “SECOND BITE” AT THE COPYRIGHT APPLE WAS BARRED BY ISSUE PRECLUSION.

This is another copyright-infringement suit by an Architect, but this time it was against the Purchaser of a building that the Architect had designed - which was sold in an unfinished state (90% completed) by the bankrupt Prior Owner in a sale approved by the federal bankruptcy court. The Purchaser completed construction without the Architect’s permission - drawing a suit by the Architect for declaratory judgment that future rental or sale of the building without the Architect’s permission would infringe its copyrights and alleging that Defendants had infringed the Architect’s copyrights in plans and technical drawings by using them to complete building. The federal trial court dismissed the Architect’s claims and granted summary judgment to Defendants. The Architect appealed but an unsympathetic Eighth Circuit Court of Appeals affirmed.

The Eighth Circuit noted that the Architectural Works Copyright Protection Act of 1990 (“AWCPA”) extended copyright protection to “Architectural Works,” defined in 17 U.S.C. § 101 as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.” In March 2020, the U.S. Trustee moved to sell the Building to the Purchaser as the high bidder. The bankruptcy court approved the sale, “So long as the Purchaser, or its assignee, or its architect or agents

do not use the Plans or Drawings or any work in which [the Architect] holds a valid copyright ***, the Purchaser, or its assignee, may use and occupy the Property, develop the Property, and complete the existing interior and exterior of the Property, free and clear of existing and future claims of [the Architect] whether for copyright infringement or otherwise.”

The Architect promptly filed a motion to reconsider, arguing that the bankruptcy court could not authorize completion of the Building due to the Architect’s “exclusive right of reproduction.” However, the bankruptcy court denied the motion to reconsider. Not yet ready to give up, the Architect appealed that ruling and filed a lawsuit for copyright infringement against the bank and others that engaged in construction to complete the building. The copyright suit was dismissed by the trial court and the Architect appealed again.

The Eighth Circuit said that the principal question raised by this appeal was whether the Purchaser (a bank), which purchased an uncompleted building in a sale approved by the bankruptcy court in the Prior Owner’s Chapter 7 liquidation proceeding, infringed the Architect’s copyright in the building by *completing* the building without the permission of the Architect.

The Appellate Court held that the issue that the Architect sought to “relitigate” was the scope of its intellectual property rights in the Building, an issue that was already litigated in the bankruptcy court. As a result, the Architect was barred by the Doctrine of Issue Preclusion and the bankruptcy court’s order precluded the Architect’s claims. *Cornice & Rose Int’l, LLC v. Four Keys, LLC*, 76 F.4th 1116 (8th Cir. 2023).

FLORIDA. OWNER HAD TO ARBITRATE ITS WARRANTY CLAIM AGAINST A TILE MANUFACTURER – DESPITE NOT BEING SIGNATORY TO THAT CONTRACT!

A contractor installed tile in and around the exterior swimming pool, hot tub, pool deck water feature, and balcony of a residence in Florida. However, after construction was completed, the owner allegedly discovered several construction defects. The owner sued the general contractor, the architect, the tile manufacturer, and a door and window company claiming breach of contract, negligence/products liability, breach of express warranty, breach of implied warranty, negligence, building code violations, and others.

MEMBERS ON THE MOVE:

Kelli Goss has had an address change. She can now be reached at:

MBP

4700 Falls of Neuse Road, Suite 370
Raleigh, NC 27609
kgoss@mbpce.com

Her new title is “General Counsel”

The tile manufacturer had a contract with the general contractor which contained the warranty, but it also required arbitration. In its breach of express warranty claim, the owner alleged that the manufacturer made warranties to the owner, as a *third-party beneficiary* - including that its products would be free from defects. The clause said that the warranty extended to “Buyer and to *** those persons who, under applicable state law, are entitled to rely hereon as third party beneficiaries (each a ‘Subsequent Purchaser’).” The manufacturer tried to split off from the lawsuit by filing a motion to compel arbitration, which was denied, and the manufacturer appealed. The Fla. Court of Appeals reversed, in part, finding that the owner was bound to arbitrate with the manufacturer – despite having no direct contract by virtue of its “agency relationship” with contractor.

The manufacturer claimed that the owner was bound by the arbitration provision that its contractor agreed to when purchasing the tiles because the owner based its claims upon the manufacturer’s warranty and the contractor was acting “as the owner’s agent” when it purchased the tiles. The Court of Appeals agreed since the owner asserted a claim upon the written warranty – despite no privity with the manufacturer. “Under the Federal Arbitration Act as well as the Florida Arbitration Code, the three elements for courts to consider in ruling on a motion to compel arbitration are: 1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitrate was waived,” the Court said. As to the first element, despite no direct contract, the Court said that because the owner was suing the manufacturer based upon the written warranty, “it was bound by the arbitration provision contained in” the contractor’s contract with the manufacturer. As the Florida

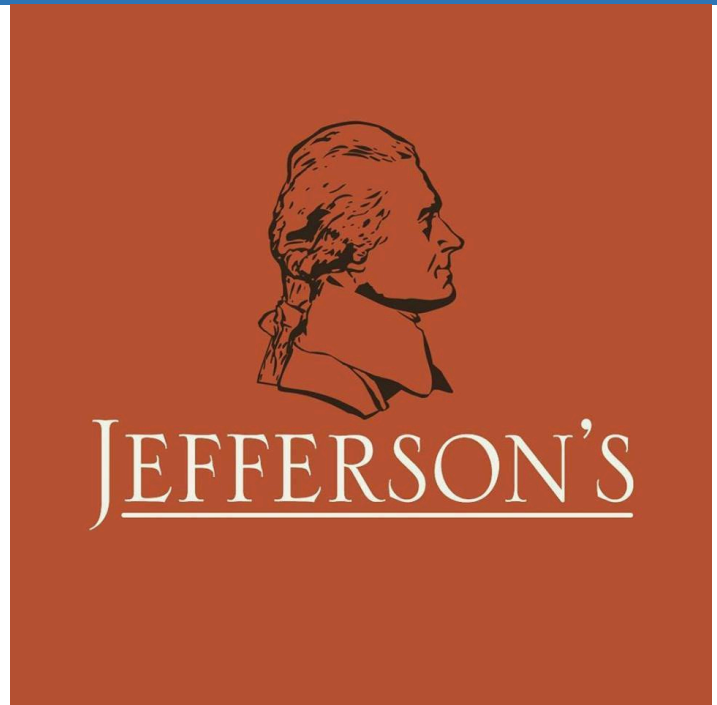
Supreme Court explained in a 2016 case, “When a plaintiff sues under a contract to which the plaintiff is not a party ... we will ordinarily enforce an arbitration clause contained in that contract, absent some other valid defense....” The owner had no valid defense against arbitration, which caused it to voluntarily dismiss its express warranty claim after the notice of appeal was filed. Regardless of the dismissal, the Court ruled in favor of the manufacturer on its motion to compel.

Also, the Court found that the contractor bought the tile as the owner’s “agent.” It stated that the essential elements of an actual agency relationship in Florida are: 1) acknowledgement by the principal that the agent will act for him; 2) the agent’s acceptance of the undertaking; and 3) control by the principal over the actions of the agent. Here, all three elements were met, thereby binding the owner to the agreement “by virtue of its agency relationship” with the contractor. *SICIS N. Am., Inc. v. Sadie’s Hideaway, LLC*, 2023 WL 5089631 (Fla. Dist. Ct. App. Aug. 9, 2023).

VIRGINIA. ARCHITECTURAL FIRM COULD SUE CONTRACTOR WHO ALTERED PLANS WITHOUT PERMISSION – EVEN WITH ARCHITECT’S SEAL AND FIRM LOGO!

Yet another copyright case – which arose after an Architect (through his firm) was hired by an owner to prepare drawings for a new brewery and tasting room in colonial Williamsburg, Virginia. The Architect had no contractual relationship with the owner’s contractor. However, without the Architect’s knowledge, the contractor prepared an altered set of plans by duplicating the Architect’s work and making digital changes to the copies. The altered drawings contained not only mistakes and inaccurate information, but new designs and content that had not been generated by or in consultation with the Architect. Worse yet – the contractor also attached the Architect’s seal, signature and license number, as well as the firm’s title block and logo, on each page of the unauthorized plans! The contractor then filed these altered drawings with the city in support of its application for a building permit. The Architect discovered the sham when the city plan review office contacted him regarding an incorrect building use classification in the new plans. We know what happened next!

The Architect and his firm sued the contractor (and its owner)



(Above, the logo for Jefferson’s Bourbon. See Michael Bell’s article on pp.20-21).

alleging copyright infringement, violation of “rights to attribution and integrity,” trespass to chattels and indemnification.

The Architect’s contract with the owner stated that, “Ownership of copyright in all Works remains the property of Architect” — with “Architect” defined as the firm – not the individual architect. The court held, as such, the official copyright registration named the firm as the author and claimant of the work. Therefore, the individual architect had no standing to claim copyrights.

The firm later filed an application for supplementary registration with the Copyright Office to amend its registration to add the firm’s owner as a co-claimant on the registration. But the Copyright Office suspended the application for supplementary registration due to the pending litigation, declining to take further action absent contrary direction from the court. The Architect filed a Motion for Direction to Copyright Office asking the federal trial court to direct the U.S. Copyright Office to process its application for supplementary registration in order to add the individual architect as a co-author of the plans.

The contractor filed a Motion to Dismiss the lawsuit. The trial court denied the Architect’s Motion for Direction but granted (in part) the contractor’s motion, dismissing the copyright infringement claim and indemnification claims. Only the firm’s claim to copyright infringement, plus infringement of rights to attribution

and integrity, and trespass to chattels, were allowed to proceed. As to the Architect's Motion for Direction, the court held that there was "no good cause" to direct the Copyright Office to revise the copyright registration while this litigation was pending. The firm admitted that it filed the supplemental registration in order to give the firm owner "standing and claims prosecution purposes." The court said that to order the amendment "would permit an inequitable use of the supplementary registration system."

Turning next to the contractor's Motion to Dismiss, the court held that the firm's owner lacked standing to sue for copyright infringement, because he did not personally own any copyright to the work per the Architect's contract. Therefore, the Motion to Dismiss was granted only as to the individual architect's claims.

The contractor next argued that the firm was precluded from seeking statutory damages under the Copyright Act because the alleged infringement commenced before the effective date of registration. Under the Copyright Act, an infringer can be held liable for either actual damages and profits or statutory damages (in cases of willful infringement, the court may award as much as \$150,000 in statutory damages). But no award of statutory damages or attorney's fees shall be made if any infringement of copyright commenced before the effective date of its registration. Here, there was still a question of fact as to the "actual date of publication" of the plans, so the contractor's motion was denied as to the firm's claim to statutory damages for infringement.

The contractor also challenged the firm's claim that the architectural plans and drawings constituted a "work of visual art." The court rejected this argument, finding that the Visual Artists Rights Act of 1990 ("VARA") protected the "moral rights" of certain artists, which includes "the right of integrity allows artists to protect their works against intentional distortions, mutilations or other modifications that would be prejudicial to their honor or reputations." The court noted that if Congress meant to exclude architectural works from VARA, "it would have done so more explicitly" which it did not. Therefore, the firm's claim to the drawings under VARA was allowed to stand.

As to the claim of "trespass to chattels," the court said that the lawsuit alleged that the contractor created and filed the unauthorized plans with the Architect's name, signature and seal, as well as the firm name title block and logo. "A trespass to chattels occurs when a person has illegally seized the personal property of another and converted it to his own use," under Vir-

ginia law. The court held that, at this early stage, it could infer that associating faulty architectural work with the architect's and his firm's materials may damage or diminish their value sufficiently to state a claim for trespass to chattels – therefore declining to dismiss that claim.

However, the claim for indemnification was held not to be "ripe" for adjudication because the Architect's claim of potential "future uninsured liability" was "wholly speculative at this point." Michael Pellis Architecture, PLC v. M.L. Bell Construction, LLC, et al., 2023 WL 6222623 (E.D. Va. Sept. 22, 2023).

COLORADO. PARTIES CAN CONTRACT TO CHANGE THE STATUTORY "ACCRUAL DATE."

Colorado has a two-year statute of limitations for negligence, C.R.S. 13-80-102(1), that runs from the "accrual date." A School District's contract for architectural services stated that "any action against [the Architect] brought to recover damages for deficiency in the design, planning, supervision, inspection, construction or observation of construction or for injury to person or property shall be brought within two years after the claim for relief arises and is discovered by [the District]." The term "discovered" was defined as "*detection and knowledge by [the District] of the defect* in the improvement that ultimately causes the injury, when such defect is of a substantial or significant nature." However, under Colorado statutes, "a claim for relief arises ... at the time the claimant ... discovers or in the exercise of reasonable diligence *should have discovered the physical manifestations* of a defect in the improvement which ultimately causes the injury." C.R.S. § 13-80-104(1)(b)(I).

After flood damage to a grade school, the School District sued its contractor, architect, and various others involved in the project. The School District settled with most of the defendants, leaving only its claims against the Architect - who was hired to design the school and provide construction administration and observation services.

The Architect filed a motion for summary judgment arguing that the claims were "time-barred" - which the trial court denied, citing to the contract clause. The trial court acknowledged that no Colorado appellate court had yet addressed whether the parties could agree to something different in their

contract than in the statute of limitations, or whether such an agreement was void because it conflicted with the statute. The Architect appealed claiming that the trial court erred by accepting the “accrual provision” in the contract rather than the statutory definition, making the clause void as against public policy. But the Colorado Court of Appeals affirmed in favor of the School District, concluding “that sophisticated contracting parties may agree to extend the accrual period without violating public policy.” As a result, the extended contractual accrual provision was valid and enforceable.

In Colorado, a statute of limitations can be waived or shortened, therefore the Court observed: “it is difficult to see why, absent a contrary legislative direction, it cannot be extended.” Therefore, the Court concluded that: “Parties to a contract may agree on whatever terms they see fit so long as those terms do not violate statutory prohibitions or public policy *** and the operative statute does not prohibit extending the accrual date.” The Architect raised public policy arguments which the Court said, “simply do not outweigh Colorado’s significant interest in enforcing the agreement between two sophisticated parties.” *S. Conejos Sch. Dist. RE-10 v. Wold Architects Inc.*, 2023 WL 6152563 (Colo. App., Div. 1).

ILLINOIS. COUNTY’S STATE LAW CLAIMS AGAINST ITS ARCHITECT WERE NOT PREEMPTED BY TITLE II OF THE ADA.

In 2009, a County hired an Architect (as the design-builder) for a new County Law & Justice Center, which was substantially completed on Sept. 27, 2011. On Dec. 5, 2011, however, the County was notified by the Illinois Attorney General that the Project violated certain provisions of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, *et seq.* (“ADA”), and Illinois state law. In response, the County asked the Architect to investigate and remedy the alleged violations - and the firm agreed to do so. However, to preserve their rights and avoid litigation expenses while allowing time for the Architect to investigate and remedy the violations, the parties entered into a series of agreements tolling the statutes of limitation and repose. The County later entered into a settlement agreement with the AG in 2017, which outlined the County’s obligation to bring the Project into compliance with

the ADA and state law. In 2019, the parties failed to enter into an additional tolling agreement, and so the final tolling agreement expired on Sept. 15, 2019. In response, the County filed suit on Sept. 13, 2019 against the Architect for breach of contract and negligence. The Architect removed the lawsuit to federal court and then filed a Motion to Dismiss claiming that the County’s state law breach of contract and negligence claims were preempted by Title II of the ADA.

A Case of First Impression. Under the Preemption Doctrine, the Seventh Circuit Court of Appeals held that normally “Where state and federal law directly conflict, state law must give way.” The question of whether state law breach of contract and negligence claims are preempted by Title II of the ADA was “an issue of first impression” in the Seventh Circuit, so the Court looked at other jurisdictions. Citing federal cases from other circuits, the Court held that “if the County had sought full indemnification for its liability under Title II of the ADA, then, such claims would be subject to dismissal under the doctrine of conflict preemption. Less settled, however, is whether [the County’s] claims would be preempted by the ADA if they are to be characterized as claims *for contribution*.” Citing to a Ninth Circuit ruling, the Court ruled that the ADA did not preempt the County’s state-law claims for breach of contract and *de facto contribution*.” Adding that, “Here, there is no affirmative indication whereby the ADA should be presumed to preempt state law,” the Court concluded that the County’s state law claims for breach of contract and negligence were not preempted by Title II of the ADA, “as they constituted permissible claims for *de facto contribution*.” The Architect’s Motion to Dismiss was denied. *Cnty. of Livingston & Livingston Cnty. Bd. v. PSA-Dewberry, Inc.*, 2023 WL 5962079 (C.D. Ill. Sept. 13, 2023).

FLORIDA. ARCHITECT DENIED COVERAGE FOR FAILURE TO IDENTIFY A POTENTIAL LAWSUIT AT THE TIME OF ITS POLICY APPLICATION.

Under Florida insurance statutes, “a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy.” Fla. Stat. Ann. § 627.409. Here an Architect was hired by a developer for a project in Puerto Rico, which included preparing a “demolition set of drawings.” In June 2019, during demolition, a worker fell to his

death when the floor underneath his bobcat collapsed. That same month, a lawyer for the worker's estate sent a "Legal Hold Notice" to the Architect. In early 2020, the Architect's broker submitted an application for insurance to several professional liability insurers but did not identify the accident as a circumstance "may possibly result" in a claim being made against the applicant.

The Architect was later insured by RLI in a policy effective March 18, 2020. The policy contained the following provision: "Representations. *The Insureds represent and acknowledge that the statements and information contained in the Application are true, accurate and are the basis of this Policy and are incorporated into and constitute a part of this Policy; and shall be deemed material to the acceptance of this risk or the hazard assumed by the Insurer under this Policy.*"

The estate sued the Architect and others in July 2020 for "willful, intentional, reckless, quasi-criminal and grossly negligent" conduct. The Architect was served in Sept. 2020 and tendered its defense to its professional liability insurer, RLI, which agreed to defend under a reservation of rights. However, RLI thereafter failed to provide a defense. Instead, RLI filed suit for declaratory judgment the next month, in October 2020, claiming that it had no duty to defend or indemnify the Architect in the underlying lawsuit for four reasons: 1) the claim was first made before the policy period, under the "related claims" provision; 2) the "prior knowledge" provision precludes coverage; 3) the "prior notice" exclusion applied; and, 4) the policy was void under the Rescission Doctrine because of material misrepresentations in the application. The Architect filed a counterclaim for breach of contract. Both parties moved for summary judgment.

The court granted summary judgment to the insurer on the basis of the insured/Architect's failure to disclose the accident on its application for insurance – finding that the Architect made "material misrepresentations on the policy application that voided the policy under the Rescission Doctrine." Accordingly, the insurer had no duty to defend or indemnify the Architect in the underlying lawsuit. The court noted "There is no question that [the Architect] knew about the event of [worker's] death at the time the policy began."

Rescission Doctrine Carries the Day. The insurer argued that the policy was void under the Rescission Doctrine, because of the Architect's "material misrepresentations in its



(Above, variations of Jefferson's Bourbon. See Micheal Bell's article on pp. 20-21).

application." The Florida Court of Appeals held that "Under Florida law, a misrepresentation in an insurance application may prevent recovery if it is material to the acceptance of the risk or to the hazard assumed by the insurer, meaning that the insurer in good faith would not have issued the policy, would not have issued it at the same premium rate, or would not have provided the same level of coverage, if the true facts had been known to the insurer," citing to Fla. Stat. § 627.409(1).

The Court then added that a misrepresentation need not be intentional to void an insurance policy, but that here - there was "no dispute" that the Architect was aware of the worker's death, and that the death qualified as a "circumstance." The Court said that the phrase "may possibly result" in a claim "is a low bar: it does not call for a probability, but for any possibility that [the insured] would be named in a suit or other demand. To answer 'no' therefore denies awareness of any possibility of that outcome." Finding the insured's answers on the application to be inaccurate, the court held that the Architect "had an objective basis to believe there was a possibility it would be subject to a claim" from the death - despite the Architect's personal belief that it could not be liable and that a lawsuit against it would not be successful. Accordingly, the Court found that the policy was void under Fla. Stat. § 627.409. As a result, the insurer was entitled to a declaration that it has no duty to defend or indemnify the Architect in the underlying lawsuit. *RLI Ins. Co. v. OutsiderIn Architecture, LLC*, 2023 WL 5840590 (M.D. Fla. Sept. 11, 2023).

VIRGINIA. CONSULTING ENGINEER CAN SUE FOR COPYRIGHT INFRINGEMENT.

Yes, this is yet another copyright infringement case. Here, an Engineering Firm that provided consulting MEP engineering services to architects and contractors was hired by an architect for a 23-story residential condominium building in Virginia. The Engineer registered its final set of the engineering drawings with the U.S. Copyright Office in June 2020 and in October 2020, it provided the architect with a final set of the Copyrighted Documents. The next month, in November 2020, the contractor and/or the owner posted a copy of the Engineer's Copyrighted Documents on a website to solicit bids from subcontractors. Many subcontractors accessed or downloaded the Copyrighted Documents from the website. The architect failed to pay the Engineer about \$92,000 (*perhaps the reason the Engineer registered its copyrights?*) and the architect hired a different engineering firm to complete engineering services at the project. The Engineer sued everyone involved for copyright infringement as well as suing the architect for breach of contract over the fees owed. The Defendants filed a Motion to Dismiss arguing, in part, that they had a license to use the Copyrighted Documents. The court rejected that motion "at this threshold stage" because there was an unresolved issue of fact concerning whether the Engineer was paid the sums due under its contract.

Equitable Estoppel Rejected. Defendants also argued that because the Engineer provided drawings to the Defendants in October 2020, *six months after the architect allegedly stopped paying the Engineer in April 2020*, the Engineer was "equitably estopped" from asserting copyright infringement. In rejecting that argument, the court said that "the first element to establishing equitable estoppel is that Plaintiff had knowledge that Defendants were infringing Plaintiff's copyrighted materials. Here, Plaintiff alleges ... that Plaintiff provided Defendants with the final set of copyrighted drawings in October 2020. The [Engineer] also alleges that Plaintiff did not learn of Defendants' alleged copyright infringement until November 2020," when a Defendant posted the drawings on the bidding website - a month *after* Plaintiff provided the final set of copyrighted drawings to Defendants in October 2020. Therefore, the equitable estoppel argument was rejected.

A/E Licensing Defense Rejected. The Defendants next argued that the Engineer was not registered to perform the

engineering services in Virginia, as required by Va. Code § 54.1-411(B). While lack of a corporate registration can often be a valid defense, Virginia's licensing law allows a firm to practice engineering without a firm registration so long as the practice "is rendered through its officers, principals or employees who are correspondingly licensed or certified." Since the Engineer used employees who were licensed Virginia professional engineers to perform the services, the court rejected the A/E licensing defense. *Metro. Eng'g, Inc. v. WDG Architecture, PLLC*, 2023 WL 5673117 (E.D. Va. Sept. 1, 2023).

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

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

Present. President: Josh Flowers; Treasurer: Mark Ryan; Secretary: Michael Bell; Vice President/President-Elect: Laura Jo Lieffers; Treasurer-Elect: Alex van Gaalen; Past President: Donna Hunt; Directors: Joyce Raspa, Jessyca Henderson; Founders: Craig Williams; Absent: Peggy Landry.

Continuing Business:

Treasurer's Report: Mr. Ryan reported that we have a balance of over \$19,000 in our bank account. We have received 12 reservations for the Annual Dinner to be held June 7 in San Francisco.

The Monticello: President Flowers noted that Bill Quatman has written and created *the Monticello* for its entire history, and that it was decided at the last Board meeting that it would be better to spread the work between at least two members. The transition is slated to take place in the second half of 2023, with the goal of having Mr. Quatman completely retired by the beginning of 2024. Mr. Bell will take on part of this role. We still need one or more of our practicing attorneys to handle the legal updates and case law briefs. It was noted that Mr. Quatman has said that when he asks attorneys for permission to republish an article they wrote, they are usually eager to say

“yes.” Ms. Henderson offered to help with the legal side of the Monticello although she prefers to not take the lead on this. We need someone to coordinate the legal side of the Monticello. Ken Collins’ Construction Risk website and Donovan Hatem LLP were cited as sources for legal material. Web Site and Other Technology: Mr. Van Gaalen had no report.

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

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

2023 Annual Dinner: President Flowers reported that the dinner will be held in San Francisco on Wednesday, June 7 in connection with the AIA Annual Conference. President Flowers thanked Ms. Raspa for her work on the arrangements and sponsorship. Jackie Pons’ firm in the Los Angeles area will be asked to sponsor the dinner. The ask will be \$2,000, and they will be invited to include two participants to dinner. The payment for the Annual Dinner was in the amount of \$1,250.00.

Minutes: The minutes of the May 17, 2022 meeting of the Board of Directors were approved as circulated with one correction. The minutes of the January 19, 2023 meeting of the Board of Directors were approved as circulated.

Next Board Meeting: Fall 2023

Motion to Adjourn: Motion was made and seconded to adjourn. Adjourned at 2:02 pm EDT.

Respectfully submitted,
Michael J. Bell, Secretary

MINUTES OF THE SEPT. 2023 MEETING OF THE BOARD OF DIRECTORS OF THE JEFFERSON SOCIETY, INC.

The Fall Board Meeting of The Jefferson Society, Inc., a Virginia non-profit corporation (the “Society”), was held via electronic meeting, beginning at 1:00 Eastern Daylight Time on September 6, 2023. President Laura Jo Lieffers opened the meeting, determined that a quorum of the Board of Directors was present, and called the meeting to order. Michael Bell served as secretary of the meeting.

Present. President: Laura Jo Lieffers; Treasurer: Mark Ryan; Vice President/Past President: Josh Flowers; Secretary: Michael Bell; Treasurer-Elect: Alex van Gaalen; Directors: Donna Hunt, Jessyca Henderson; Founders: Charles Heuer, Bill Quatman, Craig Williams; Absent: Peggy Landry, Joyce Raspa.

Minutes. The minutes of the May 23, 2023 meeting of the Board of Directors will be circulated again and submitted for approval by email or at the next Board meeting.

REPORTS:

Treasurer’s Report: Mr. Ryan reported that we have a balance of \$18,113.01 in our bank account. Only Thirty-three (33) members have paid dues for the calendar year 2023. Fifty-two (52) members paid their 2022 dues. Mr. Ryan said that he believes that our amnesty provision helped to bring in some dues. As a reminder, the Board approved in May the waiver of outstanding dues from 2020 and prior years. President Lieffers asked Board members to contact individual members who are delinquent with their dues. She will send Board members the names of members who she would like them to contact. Ms. Hunt will develop template emails for use by Board members. Ms. Henderson suggested that we should emphasize the benefits of membership in these communications. Mr. Ryan noted that our online Member Directory includes payment information for each member and for each year, and that we should consult the directory to determine for which years an individual is delinquent. He said that the directory is very accurate as to dues paid for years after 2019. Mr. Ryan said that we need to make appropriate arrangements for our bank account. He would like to close the current account and open a new one.

It's been difficult to update the list of who is authorized to make transactions on the account. Banks vary in their requirements, and they typically want all three individuals to appear together at the same time in the same bank branch. This is a challenge when our officers are spread across the country. Mr. Ryan said that at the March 3, 2022 Board meeting, a resolution was passed making the authorized person the current president, vice-president, and treasurer. It was agreed that the treasurer-elect would be preferable to the vice-president. Accordingly, a motion was proposed to make the persons authorized to represent the Board as Owners/Key Executives/Signers on financial accounts, to be the current president, treasurer, and treasurer-elect. All three individuals are authorized to open, close, or modify checking, savings, or money market accounts with financial institutions consistent with the Society's Bylaws. They are also authorized to remove other Owners/Key Executives/Signers and obtain and use debit cards for the transactions of the Society. Mr. Bell made the motion; Ms. Hunt seconded; and the Board unanimously approved. Mr. Ryan reported on the cost of the annual dinner in San Francisco. The dinner totaled \$3,576.97, which is \$210.41 for each of the 17 attendees. The attendees paid \$125 each.

Secretary's Report: Mr. Bell reported that we do not have current email addresses for the following members:

- Kevin M Bothwell, Esq.
kbothwell@tbblawfirm.com
- J. Ashley Inabnet, AIA, Esq.
ainabnet@shmlaw.com
- James R Newland, Jr, AIA, Esq.
jnewland@seyfarthshaw.com
- Jason Patrick Phillips, Esq.
jason.phillips@hines.com
- Donald A Bertram, FAIA, Esq.
da@bertramlaw.net
- James Holmberg, III, AIA, NCARB, Esq.
jholmberg4@cox.net

Mr. Bell and Ms. Hunt will attempt to find these individuals.

CONTINUING BUSINESS:

Web Site and Other Technology: President Lieffers reported that she has spoken with Allen Garcia of Eastbound Creative about services related to maintaining our website, managing Square-space, and managing our technology generally.

Mr. Garcia was recommended by Ms. Henderson, who has worked with him in the past. Prior to the meeting President Lieffers circulated a proposal from Mr. Garcia. Board members asked that more specifics be included in the agreement, including limits on fees. Mr. Heuer offered to draft a master agreement to be used in conjunction with specific work orders. President Lieffers will talk further with Mr. Garcia and report back to the Board.

Membership Committee: President Lieffers had no report.

Continuing Education for Architects and Lawyers: President Lieffers said that the Society should provide continuing education as a benefit to our members. She reported that member Russ Weisbard proposed to present on architectural copyrights. We will submit on his behalf for approval of the course by AIA. It was agreed that we will honor his wish to present in the evening, tentatively at 7:00 pm on Tuesday, October 3. The presentation will be virtual. President Lieffers reported on a second potential presentation by TJS neutrals on alternative dispute resolution. This would be sometime in November. Panelists would be Dennis Bolazina, Bill Quatman, Bruce Waugh, and Craig Williams. Peggy Landry will be asked to moderate the panel discussion. The panelists will write Learning Objectives for AIA continuing education credit. President Lieffers noted that she will assist in submitting any potential TJS presentations for AIA credit.

The Monticello: Mr. Bell reported that he and Mr. Quatman have discussed responsibilities for creating the next Monticello. Mr. Quatman will write the legal updates and case law briefs, although it is hoped that a volunteer will step up to take his place. Mr. Bell will write the "soft" articles. Both will work on identifying prospective subjects of the member profiles, and writing them. Mr. Bell, Mr. Quatman, and Mr. Williams will discuss what should be included in the Monticello in acknowledgment of the passing of D. Wilkes Alexander, a TJS member and former member of the Board. Mr. Quatman requested that the Monticello team be notified of new members and employment changes of our members.

Supreme Court Admission: Ms. Hunt reported that she has asked SCOTUS for a date when our members may be admitted to practice. They are generally two years out, but she nevertheless requested a date around our anticipated annual dinner in Washington, DC in June 2024. She awaits a reply.

Nominating Committee Report: No report.

NEW BUSINESS:

D. Wilkes Alexander: President Lieffers noted the passing of TJS member and former Board member David Wilkes Alexander.

2024 Annual Dinner: President Lieffers reported that the annual dinner will be held in Washington, DC on Wednesday, June 5 in connection with the AIA Annual Conference. She asked for ideas for sponsors. Ms. Henderson volunteered to help make the arrangements for the dinner.

ABA Forum on Construction Law Annual Meeting: President Lieffers reported that the 2024 Forum will be held in New Orleans in April 2024. She would like to have an informal meeting in conjunction with the conference. Mr. Bell has volunteered to help with the arrangements, which will be considered after the Forum agenda is published.

Survey Results: President Lieffers noted that she will review the responses to the survey circulated several months ago, and she will report to the Board the results.

Motion to Adjourn: A motion to adjourn was made by Mr. Ryan, seconded by Ms. Henderson, and unanimously approved.

Next Board Meeting: December 6, 2023 from 12:00 to 1:00 EST. Adjourned at 2:02 pm EDT.

Respectfully submitted,
Michael J. Bell, Secretary

THOMAS JEFFERSON AND BOURBON

By Michael J. Bell, FAIA, Esq.
New Orleans, LA

Elsewhere in this issue of *Monticello*, you will read an article about “Jefferson Vineyards,” in which Thomas Jefferson is referred to as “our nation’s first oenophile.” It appears that, for at least four decades, Jefferson was very persistent in his efforts to establish a burgeoning wine industry in his beloved Virginia.

We members of the Jefferson Society like to think that we have much in common with Thomas Jefferson, maybe even beyond our shared passion for architecture and law. However, I am personally not an oenophile and I very much prefer my bourbon to wine. Perhaps you like both wine and whiskey (or “whisky” as Mr. Jefferson spelled it); they are certainly not mutually exclusive. Jefferson’s love of wine and “Jefferson’s Bourbon” on the liquor store shelves left me curious as to whether Jefferson also enjoy-

ed bourbon, and whether “Jefferson’s Bourbon” was in any way connected to Thomas Jefferson. One would think that this definitive American would appreciate this quintessentially American spirit.

Let’s take a look back at the consumption of alcohol in colonial America. Beer and cider were ubiquitous, particularly with the working class. Geography, and what could be produced locally, typically determined which of these was more prevalent. As for liquor, rum was available and popular. The upper classes could sometimes look to Europe for wine and gin.

It was only when the young nation expanded westward that whiskey rose in popularity. After the American Revolution, those distillers who migrated westward necessarily began utilizing locally produced grains. This was of course much more expedient than paying to transport westward the ingredients of rum or gin. Geography put Kentucky in the middle of this growing industry. There it took on many forms. Early on it was sweet mash or sour mash. Fruit was sometimes added to make cordials. The whiskey was not yet known as “bourbon.”

In 1788 the young government ratified the Constitution. Notably, the Constitution provided for nationwide taxes. One of the first was the “whiskey tax” of 1791. Our nation has a long history of quarrels as to the fairness of particular taxes and this tax was no exception! It led to the Whiskey Rebellion of 1791-1794. The insurrection started in Pennsylvania, but soon spread to Kentucky - and beyond - before being deftly put down by the federal government. Notably, Alexander Hamilton was instrumental in establishment and enforcement of the whiskey tax, and the tax proved to be a representative example of his and Jefferson’s ongoing debate as to the character of American federalism.

After Jefferson took the office of the presidency in 1801, he repealed the whiskey tax. It might seem that Mr. Jefferson was at least sympathetic to whiskey. However, Thomas Jefferson was simply a man of principle and, for him, the freedom to drink whiskey trumped the otherwise growing power of centralized government.

Jefferson did not think much of whiskey. He claimed that he did not drink liquor and he thought it to be “the scourge of drunkenness.” In a letter to his friend Jean Guillaume Hyde de Neuville, a French royalist and diplomat, Jefferson applauded a reduction of the duties on wine, because “a pro-



(Above, one of the most popular versions of Jefferson's Bourbon is "Ocean Aged at Sea.")

hibition of [wine's] use to the midling class of our citizens [is] a condemnation of them to the poison of whisky, which is desolating their houses. No nation is drunken where wine is cheap; and none sober, where the dearness of wine substitutes ardent spirits as the common beverage. It is in truth the only antidote to the bane of whisky." Jefferson went on to express his bias for wine over liquor in claiming that when *"we can drink wine here as cheaply as we do grog, ... who will not prefer it? Its extended use will carry health and comfort to a much enlarged circle."*

Nevertheless, records show that Jefferson later purchased liquor for his staff, perhaps indicating his eventual resignation to liquor's place in American society. It was good enough for others, but he was above it. But surely Mr. Jefferson must have experienced whiskey before making a pronouncement as to its evils! Even if this were true, the question remains as to whether Jefferson ever tried true "bourbon whiskey."

The history of bourbon is murky, in terms of both how processes and aging methods were modified to create what is unique about bourbon relative to other whiskeys, and in terms of when these developments took place. About the best we can say is that it appears that this took place in the late 18th century. The first recorded references to "bourbon whiskey" were made in the 1820's. You may recall that Thomas Jefferson died on July 4,

1826. So, it is very possible that even if Jefferson drank what came to be called "bourbon," he did not know to call it that.

It would seem that the currently available brand of "Jefferson's Bourbon," which is manufactured about 20 minutes east of Louisville, is not as connected to Thomas Jefferson as might be "Jefferson Vineyards" (see article on pp. 4-6). This was confirmed by the distillers of Jefferson's Bourbon, who told me that their company was founded in 1997, and that its name was loosely influenced by both Thomas Jefferson and [its founder's] hometown in Jefferson County, KY. They said that "Jefferson's Bourbon was the brainchild of Trey Zoeller and his father Chet, a famed bourbon historian." They went on to say that "Jefferson's Bourbon is a continuation of a family whiskey tradition that goes back to Trey's 8th-generation grandmother," who was arrested in 1799 for the "production and sales of spirituous liquors."

We all know that Thomas Jefferson was a Founding Father and a great American, so it shouldn't be a surprise that the Jefferson's Bourbon distillery would do what so many other businesses, schools, and government jurisdictions have done, which is to honor Mr. Jefferson by appropriating his name. That's fair.

The bourbon industry is comprised of many companies and each one hopes to separate itself from the pack. Trey Zoeller's innovation was to combine his passion for bourbon with another passion, and that is *ocean research*. Some of Jefferson's Bourbon's offerings are "ocean aged at sea" on Oearch ships. Zoeller places barrels on Oearch ships for several months at a time. The theory is that the movement of the ship leads to a more dynamic taste.

My research would not be complete if I didn't taste Jefferson's Bourbon. I am certainly not qualified to review whiskey in a professional way, but I can tell you that the Very Small Batch whiskey that I tried was quite good! It is a blend of four bourbons, and it is Jefferson's most affordable offering. Other bourbon offerings include Jefferson's Reserve, and Ocean, which as you might guess, is the variety that is "aged at sea." I enjoyed it, although a more sophisticated palate than mine would be required to appreciate the subtle differences that might come from months of aging at sea.

Both varieties that I tried were very good, and I suggest that you give Jefferson's Bourbon a try. As a fan of Thomas Jefferson and as a member of the Jefferson Society, I plan to always keep a bottle or two of Jefferson's Bourbon in my bar on an upper shelf - if not on the top shelf!

In Memory of TJS Member: David Wilkes Alexander (1957-2023)

(Fort Worth, TX) Former TJS Member and former TJS Board Member David Wilkes Alexander (March 29, 1957 - July 31, 2023), aged 66 years old, died on July 31, 2023, in Fort Worth, Texas. He was born to Thomas and Bettye Wilkes Alexander on March 29, 1957, in Dallas, Texas. He leaves behind his wife Parinya Treeratanaon, his children Ronni Anthony, Steven Alexander (Monika Mrakavová), and Martin David Alexander, and one grandchild. His family and loved ones pray for his eternal rest and thank God for his life. A Celebration of Life was held for Wilkes at The Tower in downtown Fort Worth on August 25, 2023, from 6:00 p.m. to 9:00 p.m.

[Editor's Note: The Board of The Jefferson Society asked the editors to republish the Member Profile on Wilkes from the Oct. 2016 issue of Monticello. That article follows. Note in Oct. 2016, Wilkes was married to Monica. They subsequently divorced, thus we have edited the original text in part.]

TJS Board Member Wilkes Alexander is a native Texan who attended the University of Texas School of Architecture in Austin, after having spent two wayward years at the University of the South in Sewanee, Tenn. While the Sewanee campus was beautiful, it did not have an architecture program, so Wilkes moved back to his home state of Texas and enrolled in the School of Architecture there. "Austin was a smaller town," he recalls, "but a very vibrant and growing community. The teachers were all fantastic and the program was vibrant and very design oriented. Austin was a lot of fun too! Looking back,

(Below, Wilkes Alexander at his office)



I think I enjoyed studying architecture more than I actually enjoyed the practice." After graduating from architecture school, Wilkes worked in Dallas for the architecture firm of Beran & Shelmire. "Overton Shelmire was a true gentleman architect talented, eloquent and soft-spoken. He was a real class act," Wilkes says of his mentor. However, the economic collapse of the 1980's confirmed that Wilkes really did enjoy studying architecture more than he did the practice. It was about then that law came calling. "After watching my brother deliver closing arguments in a murder trial where he was a prosecutor, I made the critical decision to study law."

Wilkes enrolled at The University of Houston Law Center, which provided an interesting cross-section of studies such as oil and gas, admiralty and maritime law, patent law, as well as construction law, especially areas dealing with heavy industrial engineering projects.

Wilkes's first wife, Monica, was born in Barcelona, Spain, where Wilkes proposed to her in 1985. Not surprisingly, his favorite building is also in Barcelona, the incredible Sagrada Família designed by Antonio Gaudí. "It is probably the structure that affected me the most. I have visited this cathedral several times in the past 30 years and have watched it progress. There is something truly remarkable about Gaudí's use of concrete and stone and even unfinished, this is truly a remarkable structure," he said.

Wilkes and Monica enjoyed traveling and explored various in Europe, as well as in southeast Asia. In his spare time, Wilkes has also become involved in the practice of Kendo, which is a form of Japanese sword fighting much like fencing. Wilkes is quite serious about his martial arts, training with the regional Kendo organizations, as well as serving to support competitions locally and nationally.

The couple had two sons. Steven is in his medical residency at Vanderbilt and married Monika, from the Czech Republic. Their youngest son, David, is in his second year at St. Mary's Law School and his dad would one day like to practice with his son, to "teach him everything I know."

The Alexander family is musical, with a small recording studio in their home. "Almost every weekend, my sons used to invite their friends over for afternoon and late-night jam sessions. Now that they have moved away from home, I think that is one of the things that I miss the most." The family's music studio has almost every instrument imaginable from drums, keyboards, bass, mando-

lin, banjo to a pedal steel guitar. “We once even had the neighbors call the police on us because we were going a little too late and we were a little too loud.”

When asked why he chose to combine architecture and law, Wilkes said, “I felt that both of these studies involved the formulation of detailed concepts, opinions, solutions to problems and then convincing an audience of its validity. In architecture, we use drawings, models and other forms or programming to create spacial solutions to problems, while in the law we organize facts and combine them with the applicable law to create legal solutions to conflicts between various parties.”

Even as he was preparing to go to law school, Wilkes had heard of a gentlemen named Hollye Fisk, FAIA, Esq. who was beginning that specialization and he called Mr. Fisk to introduce himself. About ten years later, after finishing law school and working with a general practice law firm in South Texas, Wilkes returned to work with Hollye to develop this specialized area of practice. Wilkes is a name partner in the law firm of Fisk Alexander, a boutique firm which represents architects and engineers, as well as other design professionals are their only clientele. “I now work with Hollye Fisk who I have been a partner with for the last 15 years. We offer a full service to our clients from initial contract negotiations to ongoing project issues to claim handling and litigation.”

Like many of us, Wilkes is active in the local AIA, giving lectures to the local Dallas Chapter of the AIA as well as attending the Texas State Architects Convention.

His advice for a young architect thinking about law school is simple: *“Go for it! I believe that if you are able to achieve an understanding of how the laws and statutes work both in terms of contractual relationships, as well as regarding the authorities that have jurisdiction over your project, you have really achieved a wonderful thing. To be able to practice architecture with a deeper knowledge of the applicable law would lend a certain freedom to the practice that many architects struggle with. To be an architect practicing law would also allow you to provide an invaluable service to the profession.”*

(Right, Wilkes Alexander enjoying the sights and streets of Lisbon, Portugal)

TJS CONTINUING EDUCATION DEBUT

Our first official Jefferson Society Continuing Education Opportunity, “ARCHITECTURAL COPYRIGHTS,” was presented by TJS Member Russell N. Weisbard, Esq., R.A. on Tuesday, Oct. 3, 2023 at 7:00 pm CDT by webinar.

Russell N. Weisbard of the Law Office of Russell Weisbard, PLLC, practices law in Frisco, Texas. His practice includes construction litigation and transactional work, helping design professionals with their litigation and contract needs. Russ graduated with BS in Architectural Studies and MArch degrees from the University of Illinois at Urbana-Champaign. He earned his Texas architecture license in 2006. His architecture work included commercial, healthcare, higher education, hospitality, institutional, office, and recreational buildings. He graduated from the Dedman School of Law at SMU, and was licensed to practice law in 2017.

Watch for an email about an upcoming TJS Continuing Education Opportunity on Alternative Dispute Resolution.

TEXAS. OWNER’S STATE LAW CONTRIBUTION CLAIMS AGAINST AE FIRMS WERE NOT PREEMPTED BY FEDERAL ACCESSIBILITY LAWS.

This lawsuit was filed by an individual claiming violations by the Owner of an apartment complex of the Fair Housing Act (“FHA”). The Plaintiff claimed that he “observed and encountered accessibility barriers that would interfere with his ability to access and use the facilities” and that “these were a deterrent to a disabled person’s renting an apartment.” Among the complaints



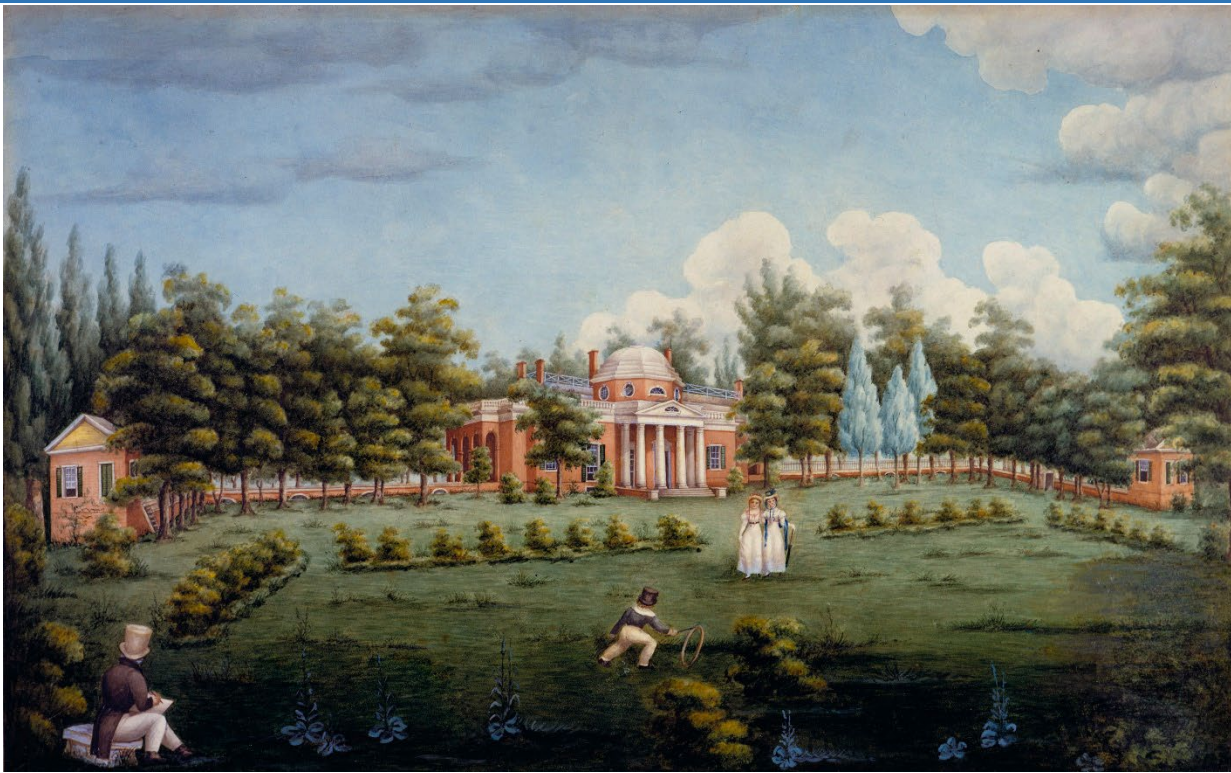
were “excessively high thresholds,” inadequate clearance on interior doors, and light switches that were inaccessible from a wheelchair. Plaintiff claimed that these conditions violated both the FHA and the Americans with Disabilities Act (ADA). He sought damages, injunctive relief, declaratory relief, costs, and attorney’s fees. The Owner filed a third-party complaint against the Architectural and Engineering firms who designed the apartments, claiming that they breached “their contractual and professional obligations to design the apartments consistent with minimum accessibility standards. The AE firms filed a Motion to Dismiss, claiming a lack of subject matter jurisdiction and failure to state a claim. In short, the AE’s claimed that the Owner did not have standing and the claims for negligence and contribution were not ripe because the Owner had not yet suffered any injury and that any injury alleged was speculative. the federal court rejected this argument, noting that Fed.R. Civ.P. 14(a)(1) addresses this very situation and allows a defendant, as a third-party plaintiff, to file a complaint against “a nonparty who is or may be liable to it for all or part of the claim against it.” The Court noted that the “whole point of Rule 14 is to allow a defendant to implead a third party against whom the defendant can state a basis for derivative liability.” Therefore, the Court ruled that it had subject matter jurisdiction over the third-party claims.

As to whether the Owner had properly stated a claim on which relief may be granted, the AEs claimed that the professional negligence claim was “preempted by federal law.” The AEs relied on a 2010 Fourth Circuit opinion which held that compliance with the ADA and FHA is not delegable “in that an owner cannot ‘insulate himself from liability for discrimination in regard to living premises owned by him and managed for his benefit merely by relinquishing the responsibility for preventing such discrimination to another party.’ ” *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010). That court found that “obstacle preemption,” (which is a subset of conflict preemption), applied because “allowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws.” *Id.* at 602. However, that case avoided answering the question of whether a claim for contribution would be preempted. The Fourth Circuit left open the question of whether an owner could seek contribution from

As to whether the Owner had properly stated a claim on which relief may be granted, the AEs claimed that the professional negligence claim was “preempted by federal law.” The AEs relied on a 2010 Fourth Circuit opinion which held that compliance with the ADA and FHA is not delegable “in that an owner cannot ‘insulate himself from liability for ... discrimination in regard to living premises owned by him and managed for his benefit merely by relinquishing the responsibility for preventing such discrimination to another party.’ ” *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010) (quoting *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992)). That court found that “obstacle preemption,” (which is a subset of conflict preemption), applied because “allowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws.” *Id.* at 602. However, that case avoided answering the question of whether a claim for contribution would be preempted. The Fourth Circuit left open the question of whether an owner could seek contribution from a third party for the third party’s own wrongdoing. That question, which was the issue in the present case, was answered by the Ninth Circuit in *City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149 (9th Cir. 2017).

The Ninth Circuit in *AECOM Services* discussed and distinguished the Fourth Circuit’s *Equal Rights Center* opinion. The Ninth Circuit addressed the question whether the anti-discrimination provisions of the ADA and the Rehabilitation Act preempt a defendant’s “state-law claims for breach of contract and *de facto* contribution against contractors who breach their contractual duty to perform services in compliance with federal disability regulations.” *Id.* at 1152. The Ninth Circuit Court of Appeals noted that the City of Los Angeles was not seeking indemnification or contribution for damage caused by its own regulatory failures but, rather, was seeking redress from the construction and design company for their own failures. *Id.* at 1157–58. The court found that contribution claims brought against a third-party for its own wrongdoing did not pose an obstacle to federal disability statutes. Not only did the court conclude that permitting a contribution claim would not be an obstacle to the statutory scheme, but it went further to find that preemption of the third-party claims against the engineers and architects would actually undermine the FHA’s regulatory purpose of eliminating discrimination. *Id.* at 1156.

The federal judge in this case found the holding in *AECOM Services*



(Left, *View of the West Front of Monticello and Garden*, depicting Thomas Jefferson's grandchildren at Monticello, water color on paper by Jane Braddick Peticolas - 1825).

to be “persuasive and applicable to this case,” noting that the Owner was not seeking to pass on any liability it may have for the creation of accessibility barriers, but was “only seeking redress for the third-party defendants' own errors in the plans and specifications that result in the failure to meet federal minimum accessibility requirements.” That claim was not preempted and the AEs Motion to Dismiss was denied. Bowman v. Shadowbriar Apartments, LLC, & Ali Reza., 2023 WL 6798119 (S.D. Tex. Oct. 13, 2023).

[Editor’s Note: The Fourth Circuit Court of Appeals explained that “Obstacle preemption applies where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ ” adding that the U.S. Supreme Court has found state-law claims preempted under obstacle preemption where a state-law claim “interferes with the methods by which the federal statute was designed to reach [its] goal.” Equal Rts. Ctr. v. Niles Bolton Assocs., 602 F.3d 597, 601 (4th Cir. 2010).]

2023-24 Officers:

Laura Jo Lieffers, Assoc. AIA, Esq.
Perkins + Will
President
(St. Petersburg, FL)

Joshua Flowers, FAIA, Esq.
Gresham Smith
Past-President/Vice President
(Nashville, TN)

Mark A. Ryan, AIA, Esq.
Treasurer
Ryan Patents
(Henderson, NV)

Michael Bell, FAIA, Esq.
Secretary
Bell Architecture
(New Orleans, LA)

Alexander van Gaalen
Crest Real Estate
Treasurer-Elect
(Los Angeles, CA)

2023-24 Directors:

Jessyca Henderson, AIA, Esq.
Law Office of Jessyca L. Henderson
(Baltimore, MD)

Margaret “Peggy” Landry
Landry Architecture, LLC
(New Orleans, LA)

Donna Hunt, AIA, Esq.
Ironshore
(Boston, MA)

Joshua Flowers, FAIA, Esq.
Gresham Smith
(Nashville, TN)

Laura Jo Lieffers, Assoc. AIA, Esq.
Perkins + Will
(St. Petersburg, FL)

Joyce Raspa, RA, Esq.
Law Office of Joyce Raspa
(Red Bank, NJ)

Michael Bell, FAIA, Esq.
Bell Architecture
(New Orleans, LA)

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

Alexander van Gaalen
Crest Real Estate
(Los Angeles, CA)

Editors:
G. William Quatman, FAIA, Esq.
Quatman ADR, LLC
(Kansas City, MO)

Michael Bell, FAIA, Esq.
Bell Architecture
(New Orleans, LA)

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



Copyright 2023
The Jefferson Society, Inc