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## Subcontractors Collect \$1.1 Million From Project Owner on Disputed Change Order in Key Kentucky Supreme Court Case

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Recently, Superior Steel, Inc. and Ben Hur Construction Company, Inc. collected a \$1.1 million judgment for extra work related to construction of a luxury condominium building in Covington, Kentucky called The Ascent at Roebling's Bridge owned and developed by related entities The Ascent at Roebling's Bridge LLC and Corporex Development and Construction Management LLC. The payment resulted from a key decision by the Kentucky Supreme Court in *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 2017 Ky. LEXIS 511 (December 14, 2017).

Corporex, the design builder, contracted with Dugan & Meyers Construction Company ("D&M"), the construction manager/general contractor. D&M sub-contracted with Superior for fabrication and erection of the steel, and Superior sub-sub contracted with Ben Hur for the steel erection. The dispute arose because the steel design was not complete at bid and contract execution time, and when the design was subsequently completed, it included significant extra work outside the scope of the original bid documents.

After a 15-day jury trial in 2011, the trial court awarded Superior and Ben Hur their entire \$408,000 extra work claim, \$195,000 retainage, pre-judgment interest, and post-judgment interest at the 12% statutory rate jointly and severally against The Ascent and D&M. The judgment against D&M was based on breach of contract, and the judgment against The Ascent was based on unjust enrichment.

The Kentucky Supreme Court affirmed and reinstated the judgment against The Ascent, which the Court of Appeals of Kentucky had initially vacated and remanded for a new trial. While acknowledging the general rule barring an unjust enrichment award where a party has an adequate legal remedy available through a contract, the Court held that the existence of a contractual relationship between

Superior and D&M did not bar unjust enrichment claims against The Ascent. Because the Court declined to invalidate the “pay-if-paid” clause in the D&M/Superior contract, there was no viable contractual remedy. Thus, the “chain of contracts” linking The Ascent to Superior had been blocked by “contractual gridlock” tracing back to “Ascent/Corporex’s failure to pay for work received.” Under these circumstances, the Court held that unjust enrichment was a proper remedy against The Ascent and reinstated the judgment.

Regarding the “pay-if-paid” clause in the D&M/Superior contract, the Court stated that “[w]hile there are valid policy reasons for disfavoring ‘pay-if-paid’ provisions, any prohibition against this type of contract clause should come from the legislature rather than from this Court.” The Court also determined that although the “pay-if-paid” provision ultimately shielded D&M from final liability, it did not preclude Superior from bringing the breach of contract claim against D&M and indicated Superior’s claim against D&M was necessary to resolve other issues in the case.

The successful trial team for Superior and Ben Hur was led by [Scott Gurney](#) and [Terry Brookie](#) of Frost Brown Todd LLC. The successful appellate team for Superior and Ben Hur was led by [Griffin Terry Sumner](#) and [Kendrick Wells](#) of Frost Brown Todd LLC.

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