

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NOS. 2015-SC-000204; 2015-SC-000635; 2015-SC-000636

ON APPEAL FROM COURT OF APPEALS NOS. 2012-CA-000440; 2012-CA-000495;  
2012-CA-000441; 2012-CA-000494  
AND KENTON CIRCUIT COURT NO. 07-CI-03886

SUPERIOR STEEL, INC.

AND

BEN HUR CONSTRUCTION COMPANY, INC.                      APPELLANTS/CROSS-APPELLEES

v.

THE ASCENT AT ROEBLING'S BRIDGE, LLC,  
CORPOREX DEVELOPMENT & CONSTRUCTION MANAGEMENT, LLC,  
DUGAN & MEYERS CONSTRUCTION COMPANY

AND

WESTCHESTER FIRE INSURANCE COMPANY                      APPELLEES/CROSS-APPELLANTS

**BRIEF OF AMICUS CURIAE**  
**THE AMERICAN INSTITUTE OF STEEL CONSTRUCTION**

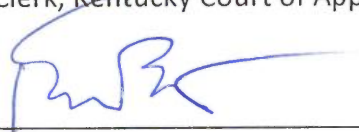
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## CERTIFICATE OF SERVICE

It is hereby certified that copies of this Brief of *Amicus Curiae* Brief were forwarded by regular U.S. Mail postage prepaid on this 12<sup>th</sup> day of July 2016 to Griffin Terry Sumner, J. Kendrick Wells IV, Frost Brown Todd LLC, 400 West Market Street, 32<sup>nd</sup> Floor, Louisville, KY 40202; D. Scott Gurney, Frost Brown Todd LLC, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, OH 45202; Thomas J. Kirkwood, Kimberly E. Ramundo, Heather M. Hawkins, Thompson Hine LLP, 312 Walnut Street, 14<sup>th</sup> Floor, Cincinnati, OH 45202-4029; Gerald F. Dusing, Adams Stepner Woltermann & Dusing PLLC, 40 W. Pike Street, P.O. Box 861, Covington, KY 41011; Mark T. Hayden, Taft Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, OH 45202; Hon. Gregory M. Bartlett, Kenton Circuit Court, Justice Center, 230 Madison Avenue, 7<sup>th</sup> Floor, Covington, KY 41011; Clerk, Kenton Circuit Court, Kenton County Justice Center, 230 Madison Avenue, Covington, KY 41011; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



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Kenneth A. Bohnert

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## STATEMENT OF THE CASE

This case arises out of a claim for the cost of additional structural steel fabrication and erection services required at a construction project known as The Ascent at Roebling's Bridge (the "Ascent project"). These services – like most structural steel fabrication and erection services on large construction projects – were provided pursuant to a certain Contract Specification 05120 – known both here and generally in the industry as the "Structural Steel Specification" – issued on behalf of the construction owner and design builder.<sup>1,2</sup> The project construction manager, a separate entity, selected a steel contractor through a competitive bid process to fabricate and erect the structural steel frame required by the initial project design.<sup>3</sup> The steel contractor, in turn, retained a steel erector to lift, place, weld, and bolt together the fabricated structural steel members at the project site.<sup>4</sup> In all, four separate contracts connect the five separate parties involved in specifying, coordinating, fabricating, and ultimately erecting the steel frame at the Ascent project.

After execution of the steel contract, and after work had begun on the project site, modifications were issued to the initial structural design. These modifications required the steel contractor and erector to provide additional material and labor. The steel contractor and erector were not paid for this additional material and labor, giving

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<sup>1</sup> Joint Trial Exhibit ("JX") 6.

<sup>2</sup> The Ascent hired Corporex as developer to design and build the project. (JX 2). They are related entities.

<sup>3</sup> JX 226.

<sup>4</sup> JX 131.

rise to this litigation.<sup>5</sup> After a trial, a jury determined that the steel contractor and its erector were entitled to additional compensation for the additional material and labor they provided.<sup>6</sup> The Court of Appeals vacated the judgment and remanded the case for a new trial, essentially directing the trial court to treat each of the four contracts as though they created separate and independent rights and obligations between the two parties to each of the contracts, divorced from the interrelated, functional contracting relationship that was affirmatively created by all five parties to enable the Owner to obtain the steel structure it requested - resultant of the labor and materials provided by the steel contractor and erector. Left unaddressed, the “form over function” analysis of the Court of Appeals would create unintended conflicts and outcomes, potentially leaving the parties that did the work they were contracted to do with no recourse for payment from the party that asked for and benefited from the work.

The primary focus of the this *amicus* brief is to respectfully invite the Court’s attention to the American Institute of Steel Construction<sup>7</sup> *Code of Standard Practice*

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<sup>5</sup> VR No. 5: 5/17/11; 11:15:20-38; 11:20:20-11:22:12; JX 72.

<sup>6</sup> R. 4778-82 and R. 1-9 (No. 07-CI-03886), Judgment 2/3/12.

<sup>7</sup> *Amicus curiae* American Institute of Steel Construction (“AISC”), a non-profit technical institute headquartered in Chicago, Illinois, was established in 1921 to serve the construction industry in the United States. AISC membership includes more than 900 of the major domestic steel fabrication firms, all the U.S. based structural steel producers, the dozen leading U.S. steel service centers, 2,500 general contractors, 10,000 engineering students and professors, and 27,000 professional engineers. Annually AISC responds to in excess of 5,000 technical inquiries involving fabricated steel construction from around the world. AISC develops non-biased technical Codes and Standards as well as research, educational, quality certification, and technical assistance programs. AISC Codes and Standards are incorporated into the International Building Code and nearly every state and local building code (including the Kentucky Building Code). AISC Codes and Standards are also incorporated into construction specifications issued by agencies of the United States government, nearly every state and local building and transportation agency, and nearly all private construction contracts in the United States, including the contracts for construction of The Ascent at Roebling’s Bridge.



("COSP"),<sup>8</sup> which is incorporated into all of the individual contracts made by the parties to this dispute, and clarifies the functional analysis applicable to contracts for structural steel. The COSP is especially helpful when the issue in dispute, as in this case, involves entitlement and payment for additional steel fabrication and erection services made necessary by late changes to structural steel design documents. As is set out in more detail below, specific provisions in the COSP address these circumstances, and provide clear guidance to courts for resolving potentially conflicting provisions contained in individual contracts to determine whether a steel contractor and its subcontracted erector are entitled to payment for additional material and labor they provided; and, if so, which of the parties bears responsibility to pay for that additional material and labor.

On the Ascent project, the Structural Steel Specification, Section 05120, is incorporated into all of the contracts among all of the parties. In turn, the Structural Steel Specification incorporates the 2002 Kentucky Building Code, the 2000 edition of the COSP, and engineering design specifications issued by AISC (currently identified as AISC Specification for Structural Steel Buildings: AISC 360). The Kentucky Building Code also incorporates AISC 360, which, in turn, incorporates relevant provisions of the COSP.<sup>9</sup>

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<sup>8</sup> The first edition of the COSP was published in 1924. Since that time AISC has continuously surveyed the structural steel design community and construction industry to determine standard trade practices, periodically updating the COSP to reflect new and changing technologies and industry practices. The COSP has undergone five complete revisions in that time period. The COSP is edited and updated (and, where necessary, revised) by a balanced committee of industry professionals that has included structural engineers, architects, steel fabricators, general contractors, steel erectors, steel detailers, building code officials and attorneys. The COSP deals with all aspects of the industry from materials, design drawings and specifications, shop fabrication and delivery, erection procedures, quality control and contracts. American National Standards Institute (ANSI) consensus standards-setting protocol is applied to develop, ballot, and reach consensus on the statements of standard practice contained in the COSP.

<sup>9</sup> See footnote 31 and accompanying text, *infra.*; Updated editions of the COSP were issued in 2000 and 2005, prior to issuance of Specification 05120 on this project. The provisions of the COSP relevant to this project are identical in both editions. All AISC publications are posted on AISC's website, [www.aisc.org](http://www.aisc.org) at <http://www.aisc.org/content.aspx?id=42278>; Select provisions of the 2000 COSP are at JX 1.