MEMORANDUM IN SUPPORT OF JURISDICTION
IN THE SUPREME COURT OF OHIO

WAVERLY CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*	:	On Appeal from the Pike County Court of Appeals, Fourth Appellate District
Plaintiffs-Appellees,	:	
v.	:	CASE NO.: 17CA885
TRIAD AR, INC., *et al.*	:	
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION SUBMITTED BY *AMICUS CURIAE*, THE AMERICAN SUBCONTRACTORS ASSOCIATON AND THE SURETY & FIDELITY ASSOCIATION OF AMERICA

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TABLE OF CONTENTS

STATEMENT OF THE INTEREST OF AMICUS CURIAE......................................1-2

JURSIDICITONAL STATEMENT..2-4

STATEMENT OF THE CASE AND FACTS..4

ARGUMENT...4-9

PROPOSITION OF LAW NO. I: In a breach of contract case, Ohio law requires a plaintiff to prove, to a reasonable degree of certainty, that a defendant's breach resulted in damages. Where there are multiple contracts and multiple breaches resulting in a single damage, the plaintiff must apportion responsibility between the defendants it claims are responsible, or it does not meet its burden...4-7

PROPOSITION OF LAW NO. II: In a breach of contract case, Ohio law prohibits the plaintiff from receiving a windfall, and a plaintiff's recovery is limited to the amount that will make it whole. After a plaintiff has been made whole it may no longer sue or collect damages for the same alleged injury...8-9

CONCLUSION...9

CERTIFICATE OF SERVICE...10

TABLE OF AUTHORITIES

CASES

Textron Financial Corp. v. Nationwide Mut. Ins. Co.,
115 Ohio App. 3d 137,144; 684 N.E. 2d 1261, 1266 (8th Dist. 1996)......................4

Agricultural Services Ass'n v. Ferry-Morse Seed Co.,
551 F.2d 1057 (6th Cir. 1977)..4

MCI Worldcom Network Servs. v. W.M. Brode Co.,
413 F.Supp.2d 868, 871 (N.D. Ohio 2005)..5, 8

Landis v. William Fannin Builders, Inc.,
2011-Ohio 1489, 951 N.E.2d 1078 (10th Dist.)...5

Claris v. Hotel Dev. Servs., LLC,
10th Dist. Nos. 16AP-685, 16AP-727, 2018-Ohio-2602.......................................6-7

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The American Subcontractors Association ("ASA") is a national voluntary non-profit corporation supported by membership dues paid by commercial construction subcontractors, material suppliers, and service companies in 34 chapters throughout the country in 24 states, including Ohio. ASA members are both union and non-union companies, ranging in size from the smallest private firms to some of the nation's largest specialty contractors.

ASA of Ohio was founded as the American Subcontractors Association of Cincinnati, Inc., in 1965. Then, ASA of Ohio officially became a part of ASA when it completed its formation in 1966. In 2008, ASA of Ohio was formed to combine the Ohio chapters into a single chapter. ASA of Ohio's member companies are now served by ASA of Ohio and its three Council offices in northeast, central, and southwestern Ohio.

The Surety & Fidelity Association of America ("SFAA") is a national voluntary, non-profit trade Association of 413 member companies. Collectively, these companies write the overwhelming majority of performance and payment bonds furnished on public works projects in Ohio and in the United States. SFAA gathers statistics on premiums and losses for surety bonds and fidelity insurance and files those statistics with state insurance departments. SFAA is licensed by the Ohio Department of Insurance as a Rating Bureau and/or Organization. SFAA also represents the interests of its members before Congress, state legislatures and the Courts.

The issues in the appeal in *Waverly City School Dist. Bod. of Educ. v. Triad AR, Inc.* profoundly affect ASA and SFAA's member companies, and the thousands of other construction subcontractors and material suppliers—both union and non-union—working on construction projects of all sizes throughout Ohio and a multitude of Ohioans gainfully employed by these companies. The ASA and SFAA are especially interested in this Honorable Court's interpretation of breach of contract claims involving multiple contractors, subcontractors, and

material suppliers. This Amicus Brief filed on behalf of ASA and SFAA focuses on the possible legal consequences on hardworking subcontractors and suppliers in Ohio if the Court does not intervene.

JURISDICTIONAL STATEMENT

This case presents a critical opportunity for this Court to clarify Ohio law regarding proof of damages in breach of contract cases involving multiple defendants, multiple contracts, and multiple alleged breaches.

In the *Waverly* decision, the Fourth District Court of Appeals erroneously held a plaintiff could continue litigation against non-settling defendants to recover breach of contract damages in excess of its total losses in connection with the repair alleged construction defects at four Waverly schools. The Court of Appeals held Appellees could seek additional damages even though they had already recovered millions *more than* Appellees' remediation costs. The Fourth District also held Appellees did not have to prove their damages with "reasonable certainty." Instead, the Court held Appellees could meet their burden by proving Defendants' breaches were a "substantial factor" in causing Appellees' damages.

The *Waverly* decision conflicts with well-established law that in a meritorious breach of contract case a plaintiff is entitled to be made whole, but not recover a windfall. The Court of Appeals' decision disturbs this law by shifting the focus from the plaintiff, and whether it had been made whole for any damages, to each defendant, and whether they paid, with no consideration of whether the plaintiff had been made whole.

This is a substantial and unnecessary departure from existing law with drastic ramifications for Ohio businesses, particularly those in the construction industry, and potentially devastating impact on public policy. By replacing the long-standing requirement that a plaintiff

must prove its damages in a breach of contract case to a "reasonable certainty" with the tort concept of "substantial certainty" and eliminating any consideration of the plaintiff's actual recovery, the Appellate Court admitted its decision could permit the OSFC and School District to recover windfall damages, but then inexplicably endorsed this unjust result.

The *Waverly* decision also opens the door for litigants in contract actions to realize massive windfalls with no relation to actual damages. This will encourage and prolong costly litigation and impact construction contractors, subcontractors, and bonding companies with potentially devastating results. Construction projects by their very nature involve multiple parties and multiple contracts, with architects designing, general contractors self-performing a portion of the work and subcontracting the balance to subcontractors who work side-by-side with other trade contractors, construction managers, designers, and engineers. The Appellate Courts decision makes these participants in construction projects particularly attractive targets in lawsuits, as they are not only more likely to be forced into court, but required to defend breach claims where the new reality would be that plaintiffs will have every incentive *not* to apportion their damages, placing the burden on each of them to prove that to the extent there was an actual loss that is was someone else's responsibility when the Plaintiff should be otherwise required to prove the various claims against each defendant that it draws into the lawsuit.

Adding to the strain litigation imposes on the many small and medium sized construction businesses is the fact that all public projects must be bonded and many large private project are bonded. Where there is a bond it is based on the assets of the business and most often the personallal assets of its owners, and thus the individuals who own those businesses are invariably required, if they wish to get bonding for the work, to personally indemnify the surety. This is exactly what happened in the *Waverly* case, with the very personal nature of the strain of the

litigation apparent as the Plaintiffs included bond claims against the roofer, general trades contractors, and mason, as well as the claims against all the other project participants.

If *Waverly is not revised* stands, any last standing defendants could be forced to pay unsubstantiated damages to plaintiffs who have already been made whole. For these reasons, which are discussed in detail below, the Court should accept jurisdiction, reaffirm the well-established contract law principles that have been thrown into disarray by *Waverly*, and reverse the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopt and incorporate herein the Statement of the Case and Facts set forth in Appellants Crace, Terracon, and OFIC for Crace's respective Memorana in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: In a breach of contract case, Ohio law requires a plaintiff to prove, to a reasonable degree of certainty, that a defendant's breach resulted in damages. Where there are multiple contracts and multiple breaches resulting in a single damage, the plaintiff must apportion responsibility between the defendants it claims are responsible, or it does not meet its burden.

Plaintiffs are required to prove four elements to recover for breach of contract: (i) the existence of a binding contract or agreement; (ii) the nonbreaching party performed its contractual obligations; (iii) the breaching party failed to fulfill its contractual obligations without legal excuse; and (iv) damages. *See, e.g., Textron Financial Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 144; 684 N.E. 2d 1261, 1266 (8th Dist. 1996) (holding plaintiff's breach of contract claim was properly dismissed because plaintiff presented no evidence of actual loss.)

"As a general rule, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally,

courts have required greater certainty in the proof of damages for breach of contract than in tort." *Id.* at 144. Put another way, a plaintiff must present facts from which the loss may be reasonably calculated against each defendant. *Agricultural Services Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072 (6th Cir. 1977) (holding "damages are not permitted which are remote and speculative in nature.").

The amount of Appellees' damages is a central issue in this case. Here, the amount to make Appellees whole for the construction damages was undisputed: they paid their design-build contractor less than $6.6 million. That amount included what Appellees admitted was betterment of $863,306.00. Appellees collected in settlements more than $10.5 million. Appellees, however, insisted on the right to continue seeking a further windfall based largely on the misguided argument that their recovery in settlement was irrelevant and the courts should only look to whether the non-settling defendants had paid.

The focus on the defendants and not the plaintiffs is incorrect. It is well-established that "a plaintiff should be made whole for his injuries but should not receive a windfall" and that an injured party should not be placed in a better position than it would been if the allegedly wrongful conduct had not occurred. *MCI Worldcom Network Servs. v. W.M. Brode Co.*, 413 F.Supp.2d 868, 871 (N.D. Ohio 2005). In construction cases, the damages to make the plaintiff whole are the costs to repair the deficient work and place the building in the condition the parties contemplated when they entered into the contract. *See, e.g., Landis v. William Fannin Builders, Inc.*, 2011-Ohio-1489, 951 N.E.2d 1078 (10th Dist.) at P31.

In this case, the trial court properly dismissed Appellees' claims for two basic reasons: (1) it was undisputed that Appellees could not connect with reasonable certainty any defendants' alleged breach and the damages they were seeking from multiple defendants, thereby asking the

jury to speculate as to damages and (2) Appellees could not prove uncompensated damages against the remaining defendants given their recovery of millions more than the entire outlay for the remediation and repair of the project and their actual damages.

Unfortunately, the Fourth District improperly reversed the trial court's judgment. In its decision, it not only lowered, but entirely shifted Appellees' burden of proof regarding damages onto the defendants, holding Appellees only needed to show a defendant's breach was a "substantial factor" in causing the injury. The Court then held the issue of uncompensated damages was irrelevant to the Appellees' right to continue the litigation long past the point of full recovery of damages.

In its decision, the Fourth District relied principally upon *Claris v. Hotel Dev. Servs., LLC*[1] in holding there was a genuine issue of material fact as to whether Appellants' breaches were a "substantial factor contributing to the defects listed in the Damages Matrix." (Decision at 19.)

However, this is a complete misinterpretation of *Claris*. In *Claris,* a hotel owner sued a contractor for breach of contract, alleging that deficient work under the contract resulted in moisture into the building's interior and resulting mold. The owner's expert testified the moisture and mold was the result of multiple deficiencies in the defendant's work, but only one of those deficiencies (the alleged failure to install sheet-metal flashing) was a breach of contract.

Critically, and similar to the facts in this case, the hotel owner's expert "never portioned responsibility for the water damage among the deficiencies." *Id.* at ¶ 41. Thus, "the record lack[ed] evidence regarding the extent to which each particular deficiency contributed to the water damage. Consequently, the evidence does not establish HDS' breach—the failure to install sheet metal flashing—as a substantial factor in causing the water damage." *Id.*

[1] 10th Dist. Nos. 16AP-685, 16AP-727, 2018-Ohio-2602.

The Fourth District erroneously cited *Claris* to support its creation of new damages law, misapplying the holding in that case. *Claris* does not support the Fourth District's conclusions because:

(i) The *Claris* decision did not involve multiple defendants and multiple contracts, like the case at bar. Instead, there was one defendant and one contract.

(ii) The *Claris* court did not contest that it was the plaintiff's burden of proof, but reiterated that it was the plaintiff's burden to prove it suffered a loss resulting from the defendant's actions. *Id.* at ¶ 28.

(iii) The court invoked the "substantial factor" test only to resolve the issue created by plaintiff's testimony that there were multiple deficiencies by the single defendant, of which only one was a breach, that caused the water penetration. *Id.*

(iv) The *Claris* court's decision actually supports the trial court, not the Court of Appeals here. In *Claris*, because the plaintiff's expert "never portioned responsibility for the water damage among the deficiencies," there was no evidence that particular breach by the contractor was a "substantial factor" among all of its other breaches in causing the water damage. *Claris*, supra, at ¶ 41.

Here, Appellees' experts not only cannot apportion damages among what they allege are breaches, more importantly they cannot apportion them between the defendants they are seeking the damages from. The Fourth District's reliance on *Claris* as support for its reversal is simply incorrect. The enormous practical and policy implications of this error cannot be understated.

The Court of Appeals' decision will encourage plaintiffs in contract cases, particularly construction contracts where their very nature tend to have multiple participants – potential defendants to seek many multiples of their actual damages by naming multiple defendants, potentially suing each for 100% of their alleged damages, and making no effort to assign responsibility for the damage among the named defendants. The decision thus will greatly impact the men and women in the construction industry and their bonding companies, as the costs and burden of increased litigation and the risks associated therewith are increased

exponentially. The decision is especially pernicious as it expressly increases the likelihood of a windfall recovery for plaintiffs, which is the case here where the OSFC's published meeting minutes from October 2017 specifically refer to the litigation as a "revenue stream" for the Plaintiffs, while acknowledging full recovery and excess proceeds from the case being used to fund other projects. This is an absurd result. The Fourth District's decision is an affront to logic and justice and must be reviewed and reversed by this Court.

PROPOSITION OF LAW NO. II: In a breach of contract case, Ohio law prohibits the plaintiff from receiving a windfall, and a plaintiff's recovery is limited to the amount that will make it whole. After a plaintiff has been made whole it may no longer sue or collect damages for the same alleged breach.

There is no genuine dispute that Appellees have been fully compensated for the alleged damage allegedly caused by all named defendants' alleged breaches of contract, including both the settling and the non-settling defendants. The long standing precedent of contract damages provides that in such circumstances, when a plaintiff has been made whole, further recovery is precluded.

Here, the Fourth District ignored settled case law and improperly held the focus must be on the Appellants-Defendants (and whether they paid for the damages Appellees alleged they caused) without any consideration of the fact the Appellees could neither allocate the damages they claimed from multiple defendants nor prove uncompensated damages. The decision thus wrongly incentivizes plaintiffs and expressly opens the door to undermining well-established Ohio precedent that the purpose of damages is to make a plaintiff whole, but not to place them in a better position than they would have been if the wrongful conduct had not occurred. *See, MCI Worldcom Network Servs. v. W.M. Brode Co.*, 413 F.Supp.2d 868, 871 (N.D. Ohio 2005).

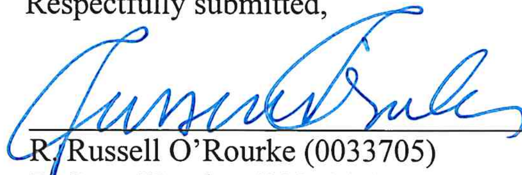
In this case, the record speaks for itself and establishes Appellees have collected settlement payments in an amount almost $5 million more than their actual damages. Yet they still want more. With the Court of Appeals' decision, the clear Ohio law that establishes that double-recovery is impermissible has been called into question.

The record below is bereft of any evidence Appellees suffered damages other than the asserted remediation costs. By shifting the burden to present such evidence to Defendants, and precluding the trial court from considering the question of the settlements on Appellees ability to prove uncompensated damages, the Court of Appeals erred and set a dangerous precedent that will greatly increase the likelihood of the courts being used by plaintiffs to obtain windfall recoveries.

CONCLUSION

This case involves matters of great public and general interest. The Court of Appeals misinterpreted the *Claris* decision and, as a result, changed long-standing Ohio law on proof of damages. The negative implications of the Court of Appeals' decision will reverberate across the State if this Court does not step in. *Amici Curiae*, The American Subcontractors Association, Inc. and The Surety & Fidelity Association of America, are deeply concerned about the potential for lasting and great public harm if the Court of Appeals' decision is not reviewed by this Court and reversed. As such, *Amici Curiae* respectfully asks this Court to accept jurisdiction to review the merits of the important issues set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing *Brief in Support of Jurisdiction Submitted by Amicus Curiae The American Subcontractors Association, Inc. and The Surety & Fidelity Association of America* and was sent by ordinary U.S. Mail, postage prepaid, this 4th day of January, 2019 to:

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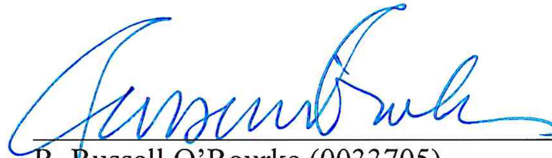

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