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INTRODUCTION

This case warrants review because the opinion below portends a categorical rule that prohibits parties who retain attorneys on a pro bono basis from recouping attorney's fees for the costs imposed in filing a motion seeking discovery under Civ.R. 37(A)(4). Such a rule would have cascading negative consequences. It would decrease deterrence for discovery abuses, increase litigation costs for the State of Ohio and, ultimately, taxpayers, and burden courts with additional meritless discovery disputes. A common purpose of rules granting attorney's fees in this and similar contexts is to create an even playing field by discouraging certain types of abusive litigation tactics on threat of penalty. Yet the rule set forth by the Eighth District below would have just the opposite effect, creating an uneven playing field and a barrier to legal recourse for parties represented not just by pro bono attorneys but also by, among others, government lawyers who do not charge government clients a fixed hourly fee.

In reaching its decision, the Eighth District misread this Court's precedent, and imposed a new limitation on the receipt of attorney's fees. The Eighth District's decision would bar an award of attorney's fees to any party that is not obligated to pay its attorney, even if the party is obligated to cooperate in the pursuit of available attorney's fees. By correcting the Eighth District's misinterpretation, this Court will promote the fair administration of justice in Ohio courts, provide clarity to this important issue, and reaffirm its historical support of pro bono work, all of which have been undercut by the opinion below.

The Eighth District's logic could unnecessarily limit recovery under a large number of rules and statutes that provide for attorney's fees in related contexts. To be sure, a proposed amendment to the specific rule involved here would fix the issue for motions to compel discovery going forward, but it would not solve the systematic problems that the Eighth District's novel limitation will herald. *See Proposed Amendments to the Rules of Practice and*

Procedure in Ohio Courts, Comment Period Ending Oct. 16, 2013. This Court's review thus remains necessary whether or not the amendment passes.

STATEMENT OF AMICUS INTEREST

The opinion below blocks parties from receiving attorney's fees if they are represented by a law clinic on a pro bono basis. The State of Ohio has an interest in this decision. As a specific matter, the State has a strong interest in correcting the Eighth District's holding because several public law schools sponsor similar legal clinics that would be negatively affected by the Eighth District's refusal to award attorney's fees. More broadly, the State and its many agencies are frequent litigators in Ohio courts, and it thus has a substantial interest in ensuring that these varied public entities may recover attorney's fees under the laws and rules that allow for litigants to recover "reasonable expenses incurred." Though many of these public entities do not pay the Attorney General or his staff an hourly rate for the legal services that they perform, the State does at times seek attorney's fees in similar discovery-related circumstances. The Eighth District's opinion suggests that these public entities might not be able to recover reasonable attorney's fees for the efforts that their attorneys undertake to resolve discovery-related abuses because the public entities do not pay an identifiable, fixed fee to those attorneys. That result would unnecessarily waste taxpayer dollars. For these reasons, the State has a strong interest in ensuring a balanced rule for the award of attorney's fees.

STATEMENT OF THE CASE AND FACTS

A. Wilkins sought reasonable expenses incurred in obtaining a motion to compel discovery and the trial court granted attorney's fees.

Kristel Wilkins retained the Milton A. Kramer Law Clinic Center at Case Western Reserve University School of Law to represent her pro bono and pursue claims related to a home-repair contract. The retainer agreement anticipated the possibility of attorney's fees: "If

permitted under law the Law Clinic may seek an award of attorneys' fees against one or more adverse [parties] but will not seek attorney's fees directly from the Client. Such a fee award will not decrease the client's monetary award, if any. The Client agrees to assist and cooperate with the Law Clinic as appropriate in its effort to obtain attorneys' fees from adverse parties." Retainer Agreement at 2. Represented by the clinic, Wilkins sued defendants Sha'ste Inc. and Process to Closing, LLC in the Cuyahoga County Court of Common Pleas. During the litigation, Wilkins moved to compel discovery against defendant Process to Closing for failure to respond to discovery requests. Wilkins's motion sought reasonable expenses incurred in obtaining the order, including attorney's fees, pursuant to Civ.R. 37(A)(4). The common pleas court granted the unopposed motion and awarded Wilkins \$1,000 in fees.

B. The Eighth District reversed the grant of attorney's fees because Wilkins was not obligated to pay her pro bono attorneys.

Process to Closing appealed the fee award, arguing that because Wilkins was not obligated to pay her attorneys, she was not entitled to attorney's fees under Rule 37(A)(4). Over a dissent, the Eighth District "reluctantly" agreed, holding that attorney's fees are not available under Rule 37(A)(4) where the movant cannot "produce evidence that she actually incurred attorney fees as a result of the legal interns obtaining the order compelling discovery in this matter." *Wilkins v. Sha'ste Inc.* 8th Dist. No. 99167, 2013-Ohio-3527, ¶ 13. The court specifically held that "there must be some evidence of a fee agreement or payment by the aggrieved party to his or her attorney." *Id.* In reaching this conclusion, the Eighth District relied on *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St. 3d 88, 2007-Ohio-5542. In *Register*, this Court denied attorney's fees under Rule 37(D) because the movant "introduced no evidence or argument that it ha[d] actually paid or is obligated to pay [its counsel] attorney fees in this case." *Id.* ¶ 24.

Judge Stewart dissented, noting that *Register* was decided on evidentiary grounds—the moving party had simply not provided evidence from which the court could conclude it had incurred attorney’s fees. *Wilkins*, 2013-Ohio-3527, ¶¶ 18-19. In contrast, the dissent explained, “Wilkins did introduce evidence of her fee arrangement with the law clinic that required her to assist and cooperate with efforts to obtain attorney fees from adverse parties. This should suffice for a client who is being represented pro bono.” *Id.* ¶ 19. The dissent highlighted that the majority’s denial of fees was “in complete derogation of the Supreme Court Rules for the Government of the Bar of Ohio and bad public policy.” *Id.* ¶ 17. And it concluded that the majority’s rule “gives fee-for-service lawyers an unfair, and surely unintended, advantage over opposing counsel who are working pro bono, and is inconsistent with the Supreme Court’s encouragement to provide pro bono legal services and to ensure access to the courts.” *Id.* ¶ 25.

**THIS CASE INVOLVES A QUESTION OF PUBLIC
AND GREAT GENERAL INTEREST**

A. The Eighth District’s holding undermines the purposes of attorney’s fees and creates an uneven playing field.

The Eighth District held that a party may not recover attorney’s fees without “some evidence of a fee agreement or payment by the aggrieved party to his or her attorney,” and that because Wilkins “was not obligated to pay attorney fees,” she could not provide evidence of such an obligation. *Id.* ¶¶ 12, 13. This holding is one of great public interest for numerous reasons.

The Eighth District’s holding creates a series of cascading negative effects. To begin with, it is unfair to litigants represented by pro bono attorneys and other attorneys not using a traditional fee arrangement. This unfairness, in turn, undermines a major purpose of attorney’s fees and eliminates their deterrent effect for discovery abuses. Some attorneys could take advantage of this situation, burdening their opponents and, ultimately, increasing the burden on courts to respond to motions to compel and to manage discovery.

The Eighth District's holding will disadvantage pro bono representations. Parties, like Wilkins, often cannot afford an attorney and thus do not engage an attorney in a traditional fee relationship. By denying attorney's fees for these parties or their lawyers, the Eighth District imposes a barrier to pro bono representation. Law clinics at Ohio's public law schools are a major source of pro bono representation for parties who might be unable to seek legal recourse. *See* Clinics, University of Akron School of Law, <http://www.uakron.edu/law/clinical/index.dot> (last visited Nov. 14, 2013); Clinics, Cleveland-Marshall College of Law, <https://www.law.csuohio.edu/academics/clinics> (last visited Nov. 14, 2013); Moritz College of Law, Clinics, <http://moritzlaw.osu.edu/clinics/> (last visited Nov. 14, 2013); Clinics, University of Cincinnati College of Law, <http://www.law.uc.edu/clinics> (last visited Nov. 14, 2013); Legal Clinics, The University of Toledo College of Law, <http://law.utoledo.edu/students/clinics/index.htm> (last visited Nov. 14, 2013). The decision affects all of these public law clinics equally.

The Court has historically supported such pro bono work. "A Lawyer's Aspirational Ideals," issued by this Court, specifically encourages attorneys "[t]o help provide the pro bono representation that is necessary to make our system of justice available to all." In its "Statement Regarding the Provision of Pro Bono Legal Services By Ohio Lawyers" this Court "strongly encourage[d] each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities." The Supreme Court of Ohio, Professional Ideals for Ohio Lawyers and Judges, at 14. By systematically putting parties represented pro bono at a disadvantage, the Eighth District's ruling undercuts this Court's longstanding support of pro bono representation.

Additionally, the uneven playing field that the Eighth District's ruling could create undermines the very reasons that Rule 37 (and other fee-shifting rules and statutes) exist. A

principal purpose of such rules is to create an even playing field and promote fair litigation tactics by discouraging discovery abuses. *Cf.* Fed. R. Civ. P. 37, Notes to 1970 Amendment, Subdivision (a)(4) (discovery sanctions “should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.”). Yet, the Eighth District’s holding distinguishes the availability of sanctions for discovery-related abuses based on the type of attorney representing the sanctioned party’s opponent, rather than on the seriousness of the improper conduct or on the time and effort that the opposing attorney actually incurred to respond to that conduct. These costs are real whether or not a party pays an identifiable sum of money to the attorney for them. Thus, Rule 37 directs that discovery malfeasance should result in sanctions including attorney’s fees reasonably incurred; it does not distinguish among the many different fee arrangements. The Eighth District’s rule undermines that purpose by determining the availability of attorney’s fees and the ability of the court to effectively manage discovery based on the fee arrangements of the attorneys seeking the sanction. As the dissent noted, the Eighth District’s decision gives an “advantage” to parties represented by attorneys on the traditional fee-for-service model. *Wilkins*, 2013-Ohio-3527, ¶ 25.

B. The Eighth District’s holding could reach many types of attorneys—including government lawyers—seeking attorney’s fees under many rules and statutes.

More broadly, the Eighth District’s holding could systematically advantage opponents of state-government entities, which typically do not engage the Attorney General using a traditional fee arrangement like the one required by the Eighth District. The Attorney General is statutorily required to represent these entities, *see* R.C. 109.02, and this representation is routinely funded by Ohio taxpayers rather than by the public entities themselves. When additional expenses are incurred by the Attorney General due to discovery-related abuses, the Attorney General (and

ultimately the taxpayer) should not suffer simply because the client, typically a government entity, does not pay an hourly rate to the lawyers representing that entity.

Nor is this harmful effect limited to government and pro-bono attorneys. By requiring parties seeking sanctions to demonstrate that they directly compensate their attorney for the time for which they seek compensation, the Eighth District's holding could put parties using a number of other common fee arrangements at a distinct disadvantage. For example, parties represented by attorneys in a contingency-fee or a flat-fee agreement need not pay their attorneys additional compensation for time spent seeking to compel discovery, yet nothing in the rule suggests that attorney's fees should not be available when such attorneys respond to discovery abuse.

These consequences broadly reach not only across client type, but also across various rules and statutes. This case arose from Rule 37(A)(4) (sanctions following a motion to compel discovery), but many other rules and statutes provide for attorney's fees using similar "reasonable expenses incurred" language. Though the proposed amendment to Rule 37(A)(4) would clarify the issue for motions to compel discovery, it would not solve the systematic problem created by the opinion below. *See Proposed Amendments to the Rules of Practice and Procedure in Ohio Courts, Comment Period Ending Oct. 16, 2013.* For example, "expenses incurred" are available under several discovery rules. *See, e.g.,* Civ.R. 26(C) ("expenses incurred in relation to [a] motion" for a protective order); Civ.R. 30(D) (motion to terminate or limit examinations); Civ.R. 30(G) (failure to attend a deposition); Civ.R. 36(A)(3) (motion related to request for admissions).

Even amendments to all of these rules that allow awards of attorney's fees would not solve the systemic problem because the General Assembly has enacted many statutes that also allow the recovery of attorney's fees incurred using language similar to Rule 37(A)(4). *See, e.g.,*

R.C. 1331.16(J) (Attorney General may recover “reasonable expenses incurred in obtaining [an order to comply with an investigative demand], including attorney’s fees . . .”); R.C. 2307.62 (attorney’s fees available in civil action by cable television owner or operator); R.C. 2307.70 (attorney’s fees available for “reasonable expenses incurred” in civil action for damages for vandalism, desecration or ethnic intimidation); R.C. 2323.51 (reasonable expenses incurred including attorney’s fees available for frivolous conduct in filing claims); R.C. 3115.24 (attorney’s fees for reasonable expenses incurred available under Uniform Interstate Family Support Act); R.C. 3127.42 (attorney’s fees for reasonable expenses incurred available in action to enforce a child custody determination); R.C. 3734.43 (attorney’s fees to landowner in suit over accumulation of scrap tires); R.C. 5321.16 (attorney’s fees in suit against landlord for return of security deposit). The Eighth District’s ruling could require the General Assembly to amend all of these statutes simply to return to a sensible state of affairs in which parties subjected to opponent malfeasance may seek attorney’s fees regardless of their fee arrangement. Because the Eighth District’s decision could upend the law in these areas, it raises a question of public and great general interest.

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law:

A trial court may award “reasonable expenses incurred . . . including attorney’s fees” to parties represented by pro-bono attorneys who are not paid based on an hourly rate for each particular service performed.

The Eighth District’s holding needlessly disadvantages all clients who retain attorneys outside of the hourly fee model, misinterprets this Court’s precedents, and undermines this Court’s longstanding commitment to pro bono services.

At bottom, the Eighth District’s holding means that all clients who retain an attorney other than through an hourly billing arrangement cannot use the protections of Civil Rule 37 and

other similar rules that compensate parties for unjustified expenses related to discovery and other litigation abuses. None of those fee-shifting rules is as cramped as to be available only to certain types of client-attorney relationships. Indeed, a federal appeals court recently confronted language parallel to the many Ohio instances of “expenses incurred.” The federal court considered a fee awarded to a client who had a fixed-fee arrangement, but its reasoning shows the obvious error of the Eighth District’s holding for all instances where fees may be awarded for “expenses incurred.” The sanctioned party argued that “it should not have to pay an attorney-fee award because none of the actions for which it was sanctioned increased the amount that [the movant] had to pay its attorney.” *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 78 (10th Cir. 2012). The appeals court reviewed various federal statutes that allow for awards of attorney’s fees, finding, for example, that under 42 U.S.C. § 1988, the United States Supreme Court had determined that “Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.” *Id.* at 679 (quoting *Blum v. Stenson*, 465 U.S. 886, 894 (1984)). The court noted “countless examples that the courts construe the term *attorney fees* to mean, not the amount actually paid or owed by the party to its attorney, but the value of attorney services provided to the party. . . . In other words, an ‘attorney fee’ arises when a party uses an attorney, regardless of whether the attorney charges the party a fee” *Id.* The federal court’s reasoning shows the heart of the Eighth District’s misstep—“expenses incurred” refer to the value of the attorney time, not whether the attorney billed the client directly for the discrete time related to the discovery abuse.

The Eighth District’s holding also finds no support in this Court’s cases. The Eighth District’s decision that a party must be obligated to pay attorney’s fees to recover those fees does

not follow from *Register*. As Judge Stewart noted in dissent, *Register* was premised on the absence of *evidence* of expenses incurred, not the type of fee arrangement under which they were incurred. See *Wilkins*, 2013-Ohio-3527, ¶ 19. *Register* involved a motion for fees under Rule 37(D) for failure to attend a deposition. See 116 Ohio St. 3d at 93. This Court's opinion in *Register* says nothing regarding the fee relationship between the movant and its counsel. It was not relevant to this Court's decision whether he was retained counsel, in-house counsel, or a pro-bono attorney. Instead, attorney's fees were not warranted because the movant did not provide evidence to support its motion. *Id.* Nothing in *Register* suggests the Eighth District's requirement that an obligation on the part of a party to pay the attorney is necessary to incur fees.

The Eighth District's decision also lacks support in other precedents of the Court. Nearly every case in which this Court has denied or reversed a grant of attorney's fees rests, like *Register*, on a lack of *evidence* of entitlement to such fees. This focus on evidence maintains the reasonable conclusion that a party represented by a government, pro-bono, contingency-fee, or flat-fee attorney may incur fees and be obligated to pay awarded fees to its attorney. For example, in considering attorney's fees granted to a plaintiff law firm that was represented by its principal attorney, the Court did not hold that, as a rule, a partnership may not recover attorney's fees for work done by a principal, but that in that case the firm "introduced no evidence that it either paid or was obligated to pay its own counsel attorney fees." *State ex rel. O'Shea & Assocs. Co. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St. 3d 149, 2012-Ohio-115, ¶ 45. Similarly, in considering an award of attorney's fees for work performed by in-house counsel for a newspaper, this Court confined its holding to the evidence: "There is no evidence or suggestion that the Beacon Journal either paid or was obligated to pay its in-house counsel attorney fees in addition to her regular salary and benefits for the work she did" *State ex rel. Beacon J. Pub.*

Co. v. Akron, 104 Ohio St. 3d 399, 2004-Ohio-6557, ¶ 62. Even in a case where a husband represents a wife, this Court avoided a categorical rule that attorney’s fees are not ever available, but has denied them where “[t]here is . . . no evidence or argument that [the party] actually paid or is obligated to pay attorney fees to her husband for his representation in this case.” *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St. 3d 535, 542, 2000-Ohio-475.

This Court has only identified a single group that is categorically prohibited from receiving attorney’s fees on the basis of the nature of their representation—parties proceeding *pro se*. In such cases this Court has reasoned that there can be no attorney’s fee where there is no attorney. *See, e.g., State ex rel. Freeman v. Wilkinson*, 64 Ohio St. 3d 516, 517 (1992) (the statute “provides for attorney fees, not compensation for *pro se* litigants”). The Eighth District’s reasoning would extend this categorical prohibition on attorney’s fees to government attorneys, *pro-bono* attorneys, and attorneys working in flat-fee and contingency-fee relationships. But there should be no categorical rule that parties in such relationships may not recover attorney’s fees.

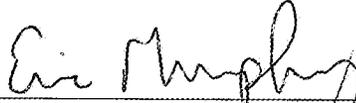
Finally, the Eighth District’s holding creates tension with this Court’s historical support for *pro bono* work because it imposes a categorical disability on parties represented by certain types of attorneys. It puts attorneys doing *pro bono* and some other types of work at a systematic legal disadvantage, contrary to this Court’s commitments to *pro bono* work and access to Ohio’s courts.

CONCLUSION

For the reasons above, the Court should accept jurisdiction and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

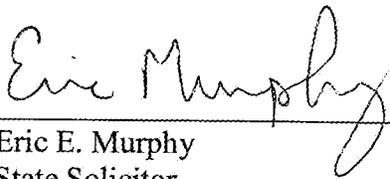
I certify that a copy of the foregoing Memorandum of *Amicus Curiae* State of Ohio in Support of Jurisdiction was served by U.S. mail this 15th day of November, 2013, upon the following counsel:

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