ORIGINAL

Supreme Court of Ohio

CASE NO. 2013-1794

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-12-99167

KRISTEL WILKINS,

Appellant,

v.

SHA'STE INCORPORATED, *et al.*,

Defendants,

and

PROCESS TO CLOSING, LLC,

Appellee.

MERIT BRIEF OF APPELLANT KRISTEL WILKINS

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I. INTRODUCTION

Plaintiff-Appellant Kristel Wilkins asks the Court to hold—in keeping with the federal courts and almost every state jurisdiction that has ruled on the question—that a trial court may award attorney fees as a discovery sanction under Civ.R. 37 whether or not the party seeking the fee award is obligated to pay for the legal services her attorney provides.[1] Otherwise an opposing party

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[1] *See Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 680 (10th Cir.2012); *Krone v. Dept. of Health & Social Servs.*, 222 P.3d 250, 257-258 (Alaska 2009); *Do v. Super. Ct.*, 109 Cal.App.4th 1210, 1218, 135 Cal.Rptr.2d 855 (2003); *In re D.T.*, 292 P.3d 1120, 1124 (Colo.App.2012); *Loney v. District of Columbia Rental Hous. Comm.*, 11 A.3d 753, 760 (D.C.App.2010); *Lee v. Green*, 574 A.2d 857, 860 (Del.1990); *Altman v. Altman*, 873 So.2d 523 (Fla.App.2004); *Jones v. Unified Govt. of Athens-Clarke Cty.*, 312 Ga.App. 214, 221, 718 S.E.2d 74 (2011); *In re Marriage of Putzler*, 2013 Ill.App.2d 12055, 368 Ill.Dec. 795, 985 N.E.2d 602, ¶ 40-42 (2013); *Payday Today, Inc. v. Hamilton*, 911 N.E.2d 26, 35-36 (Ind.App.2009); *In re Cariaso*, Iowa App. No. 03-1174, 2004 WL 360546, *4 (Feb. 27, 2004); *Henriquez v. Henriquez*, 185 Md.App. 465, 486, 971 A.2d 345 (2009); *Robbins v. Krock*, 73 Mass.App.Ct. 134, 136-137, 896 N.E.2d 633 (2008); *Moody v. Lawson*, Mich.App. No. 287686, 2010 WL 989220, *4 (Mar. 18, 2010); *Whalen v. Taylor*, 278 Mont. 293, 304, 925 P.2d 462 (1996); *Black v. Brooks*, 285 Neb. 440, 455, 827 N.W.2d 256 (2013); *In re New Hampshire Dept. of Transp.*, 143 N.H. 358, 360-361, 724 A.2d 1284 (1999); *Abbate v. Ahmetaj*, N.J.App. No. CV-02-1061-08, 2009 WL 222785, *5-6 (Feb. 2, 2009); *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, Inc.*, 115 N.M. 152, 158, 848 P.2d 1079 (1993); *Entertainment Partners Group, Inc. v. Davis*, 155 Misc.2d 894, 906-907, 590 N.Y.S.2d 979 (1992); *Pezold, Richey, Caruso & Barker v. Cherokee Nation Indus., Inc.*, 52 P.3d 430, 432 (Okla.App.2001); *Colby v. Gunson*, 349 Or. 1, 5-6, 238 P.3d 374 (2010) (en banc); *Krikorian v. Rhode Island Dept. of Human Servs.*, 606 A.2d 671, 674-675 (R.I.1992); *Amezcua v. Amezcua*, Tenn.App. No. M2011-00459-COA-R3-CV, 2012 WL 1049240, *5 (Mar. 26, 2012); *Gluck v. Hadlock*, Tex.App. No. 02-09-

[footnote continued on next page]

can ignore its discovery obligations with impunity—which is precisely the unfair result of the Eighth District's decision in this case.

II. STATEMENT OF FACTS

The attorney-fee sanction at issue here arose in a civil case that Ms. Wilkins filed against a home contractor and related parties. The various defendants conspired to divert loan proceeds that Ms. Wilkins intended to use to fund renovations on her newly purchased home. As explained below, the scheme depended upon the negotiation of two checks payable to Ms. Wilkins—checks that she never received and that were negotiated with forged endorsements. So proof of the forgeries was critical to Ms. Wilkins' case.

But the defendant that negotiated the checks—Defendant-Appellant Process to Closing LLC ("PTC")—ignored Ms. Wilkins' discovery requests directed to the forgery question. Facing an impending discovery deadline, Ms. Wilkins moved the trial court under Civ.R. 37(A) to order PTC to comply

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[footnote continued from previous page]
00411-CV, 2011 WL 944439, *5 (Mar. 17, 2011); *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13, 17 (Utah App.2009); *Human Rights Comm. v. LaBrie, Inc.*, 164 Vt. 237, 249-250, 668 A.2d 659 (1995); *Hussein v. Glisic*, Wash.App. No. 66656-8-I, 2012 WL 1920841, *3 (May 29, 2012); *Pearson v. Pearson*, 200 W.Va. 139, 150-151, 488 S.E.2d 414 (1997); *Mendez v. Din*, Wis.App. No. 2009AP2344, 2010 WL 4151977, *3 (Oct. 10, 2010).

with its discovery obligations and to award reasonable attorney fees of $1,000. (Motion to Compel [Supp. 24]). PTC filed no opposition. The trial court granted the unopposed motion to compel and awarded the requested attorney fees for the work in preparing it. (11/22/11 Journal Entry [Appx. 17]). But the Eighth District Court of Appeals, constrained to follow this Court's decision in *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 24, "reluctantly" reversed that award in a 2-1 decision. *Wilkins v. Sha'ste, Inc.*, 8th Dist. Cuyahoga No. 2013-Ohio-3527, ¶ 13 (the "Eighth Dist. Op." [Appx. 5, 11]).

Though the trial court's power to render an attorney-fee award is at the heart of this appeal, the factual context helps illustrate the importance of that power. What follows, then, is a brief recounting of the underlying litigation and its discovery phase.[2]

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[2] Ms. Wilkins recites the underlying facts as she believes they unfolded, which the cited evidentiary materials support. She nevertheless recognizes that other parties to the litigation offered conflicting versions of the facts. Although there was never a trial to resolve the fact disputes, the procedural aspects of this case, including the discovery dispute that led to the attorney-fee award, are undisputed.

A. The Underlying Facts.

In 2008, Ms. Wilkins contracted with Defendant Sha'ste Incorporated ("Sha'ste") to renovate her new home. Sha'ste then purported to assign William Mason, Jr. to serve as the project manager. Yet Sha'ste and Mason knew all along that Sha'ste would never perform any work on the home. (Mason Dep. at 109 [Supp. 96]). Instead, as explained below, Sha'ste and Mason conspired with Ms. Wilkins' estranged husband, Andre Wilkins, to funnel the renovation money to him—all without Ms. Wilkins' knowledge. PTC facilitated the sham by cashing two checks for Andre Wilkins that were payable to Ms. Wilkins—even though the endorsements on the back of the checks, purporting to be Ms. Wilkins' signature, were forged.

1. Ms. Wilkins Purchases a Home and Hires Sha'ste to Renovate It.

On January 22, 2008, Ms. Wilkins purchased a distressed home in Cleveland and sought to renovate the property so that she could live in it with her young son. To finance the home and the necessary renovations, Ms. Wilkins took out a loan from Wells Fargo Bank in excess of the property's purchase price through the Department of Housing and Urban Development's 203(k) program. This "purchase/rehab" program provides government-insured financing for both

the acquisition and rehabilitation of distressed homes.[3] (Davis Dep. at 21, 156 [Supp. 101, 108]).

Ms. Wilkins entered into a Homeowner-Contractor Agreement with Sha'ste on March 27, 2008. (Homeowner-Contractor Agreement; Davis Dep. at 159, 162 [Supp. 14, 109-110]). Sha'ste agreed to renovate the home under the 203(k) program for a total cost of $30,900. Sha'ste had participated in the program before, and its owner, Steve Davis, knew that 203(k) contractors must be licensed and bonded. (Davis Dep. at 42 [Supp. 102]). Sha'ste purported to appoint Mason as the "independent construction manager" for the job. (Mason Dep. at 33-34, 85; Davis Dep. at 7, 152 [Supp. 75-76, 82, 100, 107]).

But neither Sha'ste nor Mason had any intention of actually performing the renovations. Contrary to the documentation submitted for the 203(k) program and what they told Ms. Wilkins, Sha'ste and Mason intended their roles in the renovation to be a front for Andre Wilkins to do all the renovations and earn all the money. Andre Wilkins needed Sha'ste to serve as the official contractor, because he could not have satisfied the 203(k) program's license and

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[3] *See* United States Department of Housing and Urban Development, *203(k) Rehab Mortgage Insurance*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/203k/203k--df (accessed May 15, 2014).

bond requirements. (Davis Dep. at 42 [Supp. 102]). In effect, Sha'ste functioned only as a licensed and bonded conduit for securing the 203(k) financing for Andre Wilkins' benefit—all without Ms. Wilkins' knowledge. Mason and Davis participated in this scheme as a favor to Andre Wilkins, who was Mason's friend. (Mason Dep. at 17-18, 50, 64, 70 [Supp. 73-74, 77-79]).

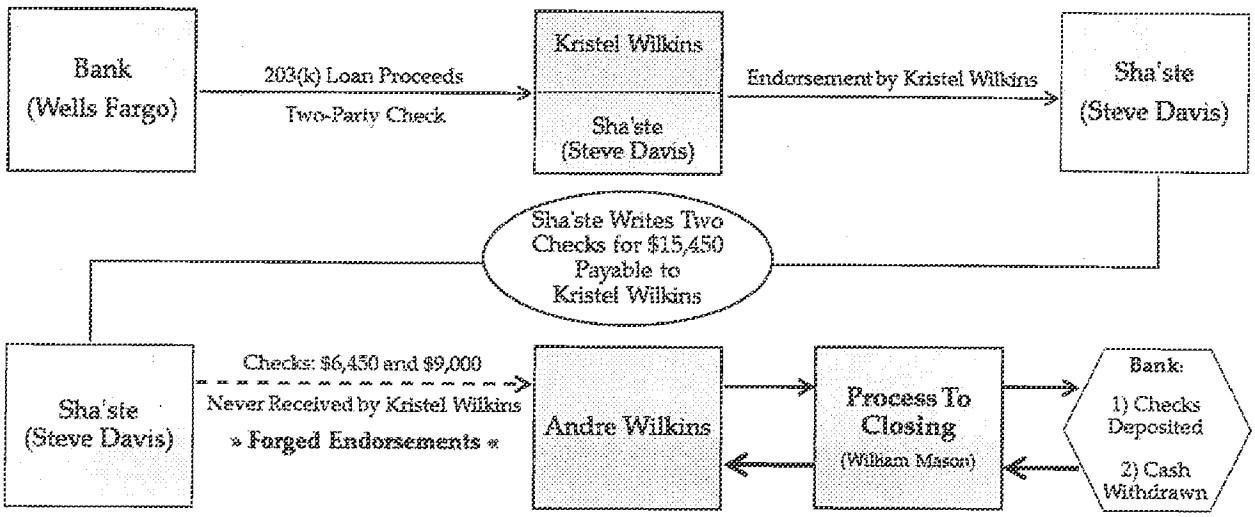
2. PTC Negotiates Checks Bearing Ms. Wilkins' Forged Endorsements.

With the deal in place, Wells Fargo issued a two-party check for half of the contract price—$15,450—payable to Ms. Wilkins and Sha'ste, which Ms. Wilkins endorsed and which Sha'ste ultimately deposited into its checking account in April 2008. (Davis Dep. at 174, 179-180 [Supp. 111-113]). But before even depositing the check, Davis wrote two checks totaling the same amount—one for $6,450 and one for $9,000—ostensibly payable back to Ms. Wilkins. (Sha'ste Checks; Davis Dep. at 181-183 [Supp. 22-23, 114-116]). The disposition of these checks is pivotal to the claims Ms. Wilkins raised against PTC.

Davis claimed in his deposition that he wrote the checks to refund the money to Ms. Wilkins after she abruptly canceled the contract. (Davis Dep. at 49-50 [Supp. 103-104]). But Ms. Wilkins did not cancel the contract in April; in fact, she did not do so until October 13, 2008. (Mason Dep. at 105; Davis Dep. at

219-220 [Supp. 95, 118-119]). Davis fabricated the story about the April cancelation to justify writing the purported refund checks. Then, instead of actually delivering the refund checks to Ms. Wilkins, Sha'ste gave the checks to *Andre* Wilkins. Andre Wilkins then took the checks to Mason—a part-owner of PTC. PTC, in turn, cashed the checks for him (Mason Dep. at 90 [Supp. 87]), even though the endorsements purporting to be Ms. Wilkins' signature were forged. PTC then deposited the checks, bearing the forged endorsements, into its bank account at RBS Citizens, National Association ("RBS"). (*See* Mason Dep. at 83-89, 91-94 [Supp. 80-86, 88-91]).

Mason admitted that PTC did not communicate with Ms. Wilkins about cashing the checks or attempt to verify the authenticity of the endorsements. (Mason Dep. at 97 [Supp. 92]). Ms. Wilkins, for her part, never saw the checks and certainly never endorsed them. In sum, and as depicted below, this Sha'ste-PTC-Andre Wilkins scheme funneled the 203(k) proceeds to Andre Wilkins—who would not have qualified to serve as a 203(k) contractor—all behind Ms. Wilkins' back.



3. Ms. Wilkins Eventually Cancels the Unperformed Contract.

By September 2008, Ms. Wilkins realized something was wrong, because the work had not been completed. She called Davis and Mason to the house; both recounted visiting a home in disrepair, describing it as "undone" and a "mess" (Mason Dep. at 103-104; Davis Dep. at 213 [Supp. 93-94, 117]), yet neither of them disclosed to Ms. Wilkins their scheme to funnel the money to Andre Wilkins and that he was the one who had created the mess. (Mason Dep. at 113 [Supp. 97]). Sha'ste, however, refused to do the work properly, and at that point Ms. Wilkins *did* cancel the renovation contract. (Mason Dep. at 105; Davis Dep. at 219-220 [Supp. 95, 118-119]).

B. The Proceedings Below.

1. Ms. Wilkins' Retention of the Milton A. Kramer Law Clinic.

In April 2010, Ms. Wilkins retained the Milton A. Kramer Law Clinic at

Case Western Reserve University School of Law (the "Clinic") to represent her in connection with her home-repair dispute. Students in the Clinic are certified legal interns under Gov.Bar R. II. They represent low-income clients with supervision by licensed attorneys. Though the Clinic does not charge its clients attorney fees, Ms. Wilkins entered into a retainer agreement that specifically contemplated attorney-fee awards and obligated her to pay certain litigation expenses. (Eighth Dist. Op. at ¶ 3 [Appx. 7]; Wilkins' Retainer Agreement [Supp. 64]).

The Clinic, on Ms. Wilkins' behalf, filed suit against Sha'ste and Davis (Cuyahoga County Court of Common Pleas Case No. CV-10-740106), alleging damages arising out of the home-repair contract. (Original Complaint [Supp. 1]). When facts surrounding the forged endorsements came to light, the Clinic filed a second action against PTC and RBS (Cuyahoga County Court of Common Pleas Case No. CV-11-753315). (Second Amended Complaint [Supp. 17]). The trial court consolidated the two actions. (6/2/11 Journal Entry [Appx. 20]).

2. PTC's Discovery Abuses and Resulting Damages.

Ms. Wilkins' claim against PTC was for conversion—for negotiating two checks payable to her but bearing forged endorsements. (Second Amended Complaint at ¶ 10-17 [Supp. 18-19]). To establish her claims, Ms. Wilkins needed

to demonstrate the events surrounding the drafting of the two checks, their chain of custody, and—most importantly—the fact of the forged endorsements. To that end, on August 19, 2011, Ms. Wilkins served PTC with a set of written discovery requests. (Discovery Requests to PTC [Supp. 35]). The discovery requests included requests for admissions asking PTC to admit that "the endorsement[s] on the back of the [checks]" were not hers. (*Id.* at RFAs Nos. 9-10 [Supp. 39]). She also sought information about PTC's employees so she could determine whom to depose. PTC's responses were due September 19, 2011. Ms. Wilkins needed the discovery responses in advance of deadlines for completing discovery and serving expert-witness reports: November 7, 2011, and October 15, 2011, respectively. (8/18/11 Journal Entry [Appx. 19]).

As of September 30, 2011, PTC had not responded to the document requests, interrogatories, or requests for admissions. Nor did PTC seek an extension. In response to an inquiry from Ms. Wilkins' counsel on that day, PTC's counsel promised to respond to the discovery requests by October 5, 2011, and argued that he still had the right to deny the requests for admissions notwithstanding the provisions of Civ.R. 36(A)(1); he insisted that it was Ms. Wilkins' burden to challenge those admissions if she disagreed. (Pollis Aff.

at ¶ 4-5 [Supp. 33-34]). The uncertainty as to the status of the admissions left Ms. Wilkins' counsel with no choice but to obtain a handwriting expert, at a cost of $750, to substantiate her forgery allegations before the trial court's expert-report deadline. (*Id.* at ¶ 5; Exhibit C to Brief in Opposition to PTC's Motion to Vacate [Supp. 33-34, 69]). And PTC did not honor its promise to respond to the discovery requests by October 5, 2011. (Pollis Aff. at ¶ 4 [Supp. 33]).

3. Ms. Wilkins' Discovery Motion and the Trial Court's Attorney-Fee Award.

On October 13, 2011, the Clinic moved for an order compelling discovery, precluding PTC from denying any of the requested admissions, and granting an extension of the discovery deadlines. The motion also sought an attorney-fee award of $1,000 under Civ.R. 37(A)(4). (Motion to Compel [Supp. 24]; *see also* Eighth Dist. Op. at ¶ 5 [Appx. 8]). Although Ms. Wilkins could have requested reimbursement of the $750 she spent on the handwriting expert due to PTC's intransigence, she chose to request only the attorney fees. The Clinic supported the fee request with an affidavit from Andrew S. Pollis, the Clinic attorney supervising the legal interns' work on Ms. Wilkins' case. Mr. Pollis' affidavit substantiated the time spent preparing the discovery motion and the reasonable hourly rates of the attorney and legal interns involved. It stated in relevant part:

> 6. I have been an active member of the Ohio bar since 1990; when I was in private practice in 2008, my billing rate was in excess of $400 per hour. As a supervising attorney at the Milton A. Kramer Law Clinic Center, I reasonably estimate my hourly billing rate to be $200 per hour for the purpose of attorneys' fee awards.
>
> 7. I am familiar with the billing rates for new lawyers in the Cleveland legal community; those rates typically exceed $100 per hour.
>
> 8. I represent that the legal interns on this case expended at least eight hours of time in preparing the motion to compel and for sanctions against PTC, and I expended at least one hour reviewing and revising it.

(Pollis Aff. at ¶ 6-8 [Supp. 34]).

PTC filed no opposition to the discovery motion. And, on November 22, 2011—39 days after Ms. Wilkins filed her motion—Presiding Judge Nancy A. Fuerst issued an order deeming the motion "UNOPPOSED AND GRANTED" and awarding Ms. Wilkins $1,000 in attorney fees. (*See* 11/22/11 Journal Entry [Appx. 17]; *see also* Eighth Dist. Op. at ¶ 5 [Appx. 8]). Only after the trial court

issued its order did PTC challenge the award, in the form of a motion for reconsideration (styled as a "motion to vacate"). (Motion to Vacate [Supp. 49]). PTC's motion raised, for the first time, its objection to the attorney-fee award on the basis of this Court's decision in *Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913. The trial court denied that motion. (12/23/11 Journal Entry [Appx. 18]; *see also* Eighth Dist. Op. at ¶ 6 [Appx. 8]).

After resolving her claims against all other defendants, Ms. Wilkins voluntarily dismissed her claims against PTC. Though PTC did not timely oppose the attorney-fee award in the trial court, it appealed the award to the Eighth District. The appellate court issued its split decision reversing the attorney-fee award on August 15, 2014, with the majority "reluctantly" premising its decision entirely on the *Register* decision and one judge lamenting the decision as "bad public policy." (Eighth Dist. Op. at ¶ 13; *id.* at ¶ 17 (Stewart, J., dissenting) [Appx. 11, 12]). The appellate court denied Ms. Wilkins' unopposed motion for reconsideration on October 1, 2014. (10/1/13 Journal Entry [Appx. 16]).

Ms. Wilkins appealed to this court on November 14, 2013. (Notice of Appeal [Appx. 1]). PTC filed no response to Ms. Wilkins' memorandum in

support of jurisdiction (just as it filed no response to her discovery motion in the trial court or her motion for reconsideration in the court of appeals). This Court accepted the case on March 12, 2014, on a single proposition of law.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

> PROPOSITION OF LAW: A trial court may award reasonable attorney fees to a prevailing party under Civ.R. 37 regardless of the party's fee arrangement with counsel. (*State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, overruled in part.)

The Eighth District's divided decision below severely restricts a trial court's power to sanction litigants who violate their discovery obligations and does so in a way that unfairly burdens attorneys and parties in pro bono matters or with non-hourly fee arrangements. The Eighth District "reluctantly" reversed Judge Fuerst's attorney-fee award, solely because a law-school clinic provided Ms. Wilkins with pro bono representation. (Eighth Dist. Op. at ¶ 13 [Appx. 10-11]). The appellate court explained that under *Register*, "there must be some evidence of a fee agreement or payment by the aggrieved party to his or her attorney." (*Id.* at ¶ 12, citing *Register* at ¶ 24 [Appx. 10]).

Register, in turn, based its holding on the language of Civ.R. 37(D), particularly on the rule's reference to "attorney's fees[] '*caused* by' " the discovery violation. (Emphasis sic.) *Register* at ¶ 24, quoting Civ.R. 37(D). The Court

found that the phrase "caused by" authorizes a fee award only where there is a payment obligation between the party and her counsel. The Court also grounded its holding on case law dealing with attorney-fee recovery in the context of the public-records statute, R.C. 149.43. *Id.*, citing *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 62.

As Ms. Wilkins demonstrates below, the attorney-fee holding in *Register* is wrong for three reasons. First, the language of Civ.R. 37 supports a trial court's power to award attorney fees in discovery disputes, regardless of the client's actual obligation to pay. Second, public-policy considerations strongly support a construction of the rule that permits attorney-fee awards irrespective of the fee arrangement between the lawyer and the client. Third, the Court's reliance on *Beacon Journal* was misplaced. Ms. Wilkins also explains below that overruling the attorney-fee holding in *Register* will not offend principles of stare decisis.

A. Civ.R. 37 Authorizes Attorney-Fee Awards Regardless of a Client's Payment Obligation.

1. The Plain Language of Civ.R. 37 Requires No Payment Obligation As a Predicate to an Attorney-Fee Award.

Civ.R. 37 governs discovery disputes in civil cases and authorizes attorney-fee sanctions in certain circumstances. The rule includes four separate

attorney-fee provisions. Two of them appear in Civ.R. 37(A)(4), the subsection that governs motions to compel discovery and under which Ms. Wilkins moved for attorney fees:

> If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party *the reasonable expenses incurred in obtaining the order, including attorney's fees,* unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion *the reasonable expenses incurred in opposing the motion, including attorney's fees,* unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. (Emphasis added.)

The other two attorney-fee provisions in Civ.R. 37 appear in subsection (B), which addresses a party's failure to obey an order compelling discovery, and subsection (D), which addresses a party's total disregard of discovery requests. These rules are identical in relevant part. They provide that a trial court "shall" order the recalcitrant party "or the attorney advising him or both to pay *the reasonable expenses, including attorney's fees, caused by the failure*" unless "the failure was substantially justified or * * * other circumstances make an award of expenses unjust." (Emphasis added.) Civ.R. 37(B); Civ.R. 37(D).

The italicized language above highlights a wording difference in the rule provisions authorizing fee awards. Civ.R. 37(A)(4) authorizes an award of attorney fees "incurred in obtaining" an order to compel discovery, while Civ.R. 37(B) and (D) authorize fees "caused by the failure" to provide discovery. But these differences are substantively immaterial; indeed, the Court in *Register* equated them, holding that the "caused by" language of Civ.R. 37(D) required that attorney fees "must actually be *incurred* by the party seeking the award." (Emphasis added.) *Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, at ¶ 24. In other words, the Court treated the phrase "caused by" as synonymous with "incurred." And equating those terms was reasonable.

Where the Court erred, however, was in holding that the language of the rule requires an actual payment obligation. As explained below, the phrases "attorney's fees," "incurred," and "caused by" permit attorney-fee awards based on the *value* of the attorney's services rendered in pursuing a discovery dispute, whether or not the client has an actual payment obligation.

a. The Phrase "Attorney's Fees" Means the Market Value of the Attorney's Services.

The phrase "attorney's fees" in Civ.R. 37 authorizes a party to recover attorney fees based on the value of the attorney's services, regardless of the client's fee arrangement with her counsel. The United States Supreme Court has held that the plain meaning of the phrase "reasonable attorney's fee" contemplates "reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney." *Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (interpreting the Civil Rights Attorney's Fees Award Act, 42 U.S.C. 1988). Justice Scalia, interpreting the fee-shifting statute at issue in *Blanchard*, explained that allowing attorney-fee awards based on the *value* of the attorney's services—rather than the amount owed—is "reasonable, consistent, and faithful to its apparent purpose." *Id.* at 99-100 (Scalia, J., concurring).

Because the phrase "attorney's fees" means the value of the attorney's services, the market rate for attorney services, rather than the amount actually paid, determines the amount of a fee award; the amount actually paid "is no more than a guidepost." *Textor v. Bd. of Regents of N. Illinois Univ.*, 711 F.2d 1387, 1396 (7th Cir.1983) (discussing attorney fees for in-house counsel under the former version of Fed.R.Civ.P. 11). Thus, in *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), another case interpreting fees under 42 U.S.C. 1988, the United States Supreme Court held that courts may calculate attorney-fee awards "by multiplying the number of hours reasonably expended on the litigation times a *reasonable* hourly rate"—not necessarily the actual rate. (Emphasis added.) *Id.* at 888. Even if counsel represents a client pro bono, courts can assess attorney fees using prevailing market rates. *Id.* at 895.[4]

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[4] *See also Ctr. for Biological Diversity v. Cty. of San Bernardino*, 188 Cal.App.4th 603, 619, 115 Cal.Rptr.3d 762 (2010) (interpreting *Blum* to require that the application of the market rate "regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel."); *Robbins*, 73 Mass.App.Ct. at 137, 896 N.E.2d 633 ("The amount of the fee to be awarded is based on the reasonable value of the services rendered, not whether or how much the prevailing party actually paid."); *Jordan v. U.S. Dept. of Justice*, 691 F.2d 514, 523 (D.C.Cir.1982) ("[F]ee allowances are basically to be measured by the market value of the services rendered, not the amount actually received by the

[footnote continued on next page]

Attorneys must simply demonstrate the number of hours spent on the relevant work, together with a basis for the court to determine the applicable hourly rate. Here, Ms. Wilkins met this burden by submitting an affidavit from her attorney showing the number of hours spent obtaining opposing counsel's compliance with discovery rules. (Pollis Aff. at ¶ 6-8 [Supp. 34]).

The Tenth Circuit, in *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673 (10th Cir.2012), applied the United States Supreme Court's definition of "attorney's fees" specifically to the attorney-fee provision of Fed.R.Civ.P. 37(a)(5)(A).[5] The *Centennial* court held that since an attorney-fee award in connection with a discovery motion is based on the value of the attorney's services, it can be awarded whenever "a party uses an attorney, regardless of whether the attorney charges the party a fee." *Centennial* at 679. A

[footnote continued from previous page]
attorney nor the amount that would have been received absent an award of fees.").

[5] Guidance from federal courts construing Fed.R.Civ.P. 37 is useful here. This Court recently reaffirmed that where, as here, a state rule text is "virtually identical" to the federal rule, " 'federal authority is an appropriate aid to interpretation of the Ohio rule.' " *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 14, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

client's payment obligation is therefore "irrelevant to the value of the services performed." *Id.* at 681-682. While the amount that an attorney charges may help determine the value of the services provided, "[w]hat a client pays or owes the attorney may not accurately reflect the reasonable value of the services." *Id.* at 679. Determining attorney-fee awards based on the reasonable value of the attorney's services considers the variety of payment arrangements between clients and attorneys—hourly, fixed, contingent or pro bono—while staying true to the plain meaning of "attorney's fees." *Id.*

Numerous other courts recognize this value-based definition of "attorney's fees." The Federal Circuit noted that "[i]t is well-settled that an award of attorney fees is not necessarily contingent upon an obligation to pay counsel." *Ed A. Wilson, Inc. v. Gen. Servs. Admin.*, 126 F.3d 1406, 1409 (Fed.Cir.1997). In general, attorney fees " 'are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel.' " *Id.*, quoting *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir.1977). Thus, in the context of court-awarded fees, the correct definition of " 'attorney's fee' " is " 'an allowance' " to enforce court rules. *Black*, 285 Neb. at 453, 827 N.W.2d 256, quoting Ballentine's Law Dictionary 109 (3d Ed.1969). An " 'attorney's fee' " is not a " 'charge to the client.' " *Id.*, quoting

Black's Law Dictionary 148 (9th Ed.2009). And under the former definition, attorneys for litigants like Ms. Wilkins are entitled to fees under Civ.R. 37, whether or not their clients actually pay them for time spent addressing discovery deficiencies.

b. The Words "Incurred" and "Caused by" in Civ.R. 37 Impose No Payment Obligation.

The words "incurred" and "caused by" in Civ.R. 37 also impose no requirement that the client actually pay her attorney in order to demonstrate eligibility for a fee award. Instead, as used in Civ.R. 37, they merely circumscribe the work for which a trial court may award attorney fees. Specifically, the word "incurred" in Civ.R. 37(A)(4) instructs courts to confine attorney-fee awards to the time spent preparing the motion to compel. And, for an award under Civ.R. 37(B) or (D), the phrase "caused by" requires that attorney-fee awards relate to the failure to abide by an order to compel or the failure to provide discovery. These limitations are necessary in order to distinguish the issue-specific nature of attorney-fee awards under Civ.R. 37 from other fee-shifting scenarios, in which a trial court may award attorney fees for all the work an attorney performs over the entire length of the case. *Cf., e.g.*, 42 U.S.C. 1988(b) (authorizing attorney-fee awards in actions to enforce certain civil rights);

R.C. 1345.09(F) (authorizing attorney fees in cases under Ohio's Consumer Sales Practices Act). In other words, these words limit the scope of the work for which an attorney-fee award is available. But they do not require any particular financial relationship between attorney and client.

Indeed, where "incurred" appears in other rules and statutes, courts almost universally allow fee awards even when the prevailing party was represented by a pro bono legal-service organization or by other counsel who did not charge the client. The operative provision in Fed.R.Civ.P. 37(a)(5)(A), for example, authorizes an award of attorney fees "incurred in obtaining the order," language that is virtually identical to the language in Civ.R. 37(A)(4). Construing that language, the Tenth Circuit in *Centennial* noted that "incurred" does not restrict the recoverability of attorney fees. *Centennial*, 688 F.3d at 681. Rather, the word naturally attaches itself to "attorney's fees" to connect it to the basis for the fee. *Id.*

Federal courts in other contexts have consistently held that the word "incurred" does not require an actual payment or debt. *See, e.g., Raney v. Fed. Bur. of Prisons*, 222 F.3d 927, 934 (Fed.Cir.2000) (en banc) (allowing, under Back Pay Act, 5 U.S.C. 7701(g)(1), attorney fees based on market rate for union

attorneys); *Dixon v. C.I.R.*, 132 T.C. 55, 101 (2009) (Internal Revenue Code's sanctions provision, 26 U.S.C. 6673(a)(2)(A), allows award to pro bono counsel for "attorney fees reasonably incurred" due to opposing party's unreasonable conduct); *United States v. Claro*, 579 F.3d 452, 466 (5th Cir.2009) (Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), allows award to prevailing pro bono counsel for attorney fees "incurred by that party in any civil action"); *Natl. Treasury Emps. Union v. U.S. Dept. of the Treasury*, 656 F.2d 848, 853-854 (D.C.Cir.1981) (under Federal Privacy Act, 5 U.S.C. 552(a), courts may award fees to a legal-service organization as attorney fees "incurred"); *Crooker v. U.S. Dept. of Justice*, 632 F.2d 916, 921 (1st Cir.1980), fn. 7 ("[W]here we have held that attorney fees may be granted to litigants represented by public interest firms or legal services, we have done so on the understanding that a legal representative did in fact *incur* time and effort in litigating the cause." [Emphasis added.]).

The federal court of claims went a step further, holding that even the phrase "actually incurred" in statutory language imposes no actual payment requirement. *Preseault v. United States*, 52 Fed.Cl. 667, 674-677 (2002). The *Preseault* court allowed attorney fees awarded to a party represented pro bono and stated that the "addition of the word 'actually,' * * * appears to do little to

qualify" the meaning of incurred—which simply limits the amount of the award to one based on prevailing market rates. *Id.* at 674 (awarding fees under the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, 42 U.S.C. 4654(c)).

* * * *

It follows from the plain-language definitions of "attorney fees," "caused by," and "incurred" that Ohio trial courts, in resolving motions under Civ.R. 37, have the power to award attorney fees based on the reasonable market value of the attorney's services, rather than by the amount that a client is actually obligated to pay. In this case, Ms. Wilkins fulfilled her obligation to demonstrate the basis for the attorney fees the trial court awarded. The Clinic was successful on its discovery motion and supported its fee request with an affidavit substantiating the time spent preparing the discovery motion and the reasonable hourly rates of the attorney and legal interns involved. (Pollis Aff. at ¶ 6-8 [Supp. 34]). The plain meaning of Civ.R. 37 required nothing more.[6]

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[6] The fact that a large portion of the attorney-fee award in this case was for work performed by legal interns does not counsel otherwise. Under Gov.Bar R. II(6), a "law school clinic * * * may be awarded attorney fees for services rendered by the legal intern consistent with the Ohio Rules of Professional Conduct and as provided by law."

2. Requiring a Payment Obligation Frustrates Public Policy.

If the Court finds a need to look beyond the plain language of Civ.R. 37, it will find that public-policy considerations lend further support to the result Ms. Wilkins advocates here. The Civil Rules must be "construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." *See* Civ.R. 1(B). "[L]iberal construction rather than technical interpretation is to be emphasized." *Schwering v. TRW Vehicle Safety Sys., Inc.*, 132 Ohio St.3d 129, 2012-Ohio-1481, 970 N.E.2d 865, ¶ 21. To that end, this Court has repeatedly held that "courts have broad discretion over discovery matters." *Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, at ¶ 18.

With these principles in mind, two overarching public-policy arguments compel a rule that permits trial courts to exercise their discretion in awarding attorney fees to pro bono counsel under Civ.R. 37. First, requiring a payment obligation undermines an important purpose of Civ.R. 37—to prevent and deter discovery abuse. Second, requiring a payment obligation denies low-income litigants equal access to justice.

a. Requiring a Payment Obligation Undermines the Purpose of Discovery Sanctions.

i. Immunizing Certain Litigants from Attorney-Fee Sanctions Undermines the Punitive Purpose of Attorney-Fee Sanctions.

The *Register* rule thwarts the objective of discovery sanctions and actually provides an incentive for parties to violate discovery rules whenever the recalcitrant party faces an adversary who does not pay her attorney on an hourly or per-project basis. Insulating discovery abusers from attorney-fee sanctions under Civ.R. 37 runs directly counter to the purposes and spirit of the rules governing the discovery.

Discovery rules exist to "prevent surprise to either party at the trial or to avoid hampering either party in preparing its claim or defense for trial." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 86, 482 N.E.2d 1248 (1985); *see also Transamerica Title Ins. Co. v. United Res., Inc.*, 24 Utah 2d 346, 348-349, 471 P.2d 165 (1970) ("The purpose of the discovery * * * procedures * * * is to furnish a method for * * * settling the rights of the parties without the time, trouble and expense of a trial."). These goals are accomplished "by way of a discovery procedure [that] mandates a free flow of accessible information between the parties upon request, and [that] imposes sanctions for failure to timely respond to reasonable

inquiries." *Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984). The discovery phase "is intended to operate via the parties' voluntary cooperation with a minimum of judicial oversight, and consequently, it is vulnerable to parties who choose to employ obstructive tactics in bad faith." *Jung v. Jung*, 791 A.2d 46, 48 (D.C.App.2002).

The discovery process functions efficiently only when parties comply with their obligation to follow procedural rules. To that end, Civ.R. 37 encourages compliance by imposing sanctions to "prevent abuse of the discovery process." *See Do*, 109 Cal.App.4th at 1213, 135 Cal.Rptr.2d 855 (interpreting analogous California rule). Thus, discovery sanctions designed to discourage abusive litigation conduct necessarily have a "punitive" component. *See Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App.3d 694, 2008-Ohio-2952, 893 N.E.2d 542, ¶ 23 (10th Dist.). Attorney fees, in turn, are "the most important available sanction to deter abusive resort to the judiciary." 1970 Advisory Committee Note, Fed.R.Civ.P. 37(a)(4); *see also Cryder v. Cryder*, 10th Dist. Franklin No. 07AP-546, 2008-Ohio-26, ¶ 33 (stating that "an award of attorney's fees under Civ.R. 37(A)(4) serves as a sanction for failure to cooperate in discovery matters" and is not meant to be "equitable"); *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-

2419, 828 N.E.2d 994, ¶ 21 ("The power to sanction attorneys * * * is the power to punish and deter.").

But *Register*'s interpretation of Civ.R. 37 removes the sting of attorney-fee sanctions from any case in which the aggrieved party does not pay her lawyer by the hour or by the project. An adversary in that situation knows that under *Register* it runs *absolutely no risk* of incurring an attorney-fee award. Discovery abusers can simply "escape the sanction whenever opposing counsel's compensation is unaffected by the abuse, as when the fee arrangement is a contingency fee, * * * a flat rate," or—as here—pro bono. *See Centennial*, 688 F.3d at 680. *Register's* holding, then, encourages litigants like PTC to ignore their discovery obligations, because they know they can do so with impunity. It also "seriously harms the administration of justice" by depriving the trial court of the power and discretion to enforce its rules. *See Jung* at 49.

Worse yet, the impact runs only in one direction, creating an intolerable disparity between two classes of litigants, all based on whether a party pays her attorney. Other courts have rejected this type of disparity, noting that the "award of fees to legal aid offices and other groups furnishing *pro bono publico* representation promotes the enforcement of proper conduct as much as an

award to privately retained counsel." *See, e.g., Lee*, 574 A.2d at 860. Similarly, the Appellate Court of Connecticut concluded that two tiers of litigants would be "unreasonable" since a "party should not be encouraged to litigate under the assumption that no counsel fee will be awarded in favor of the indigent party represented by public legal services." *Benavides v. Benavides*, 11 Conn.App. 150, 154, 526 A.2d 536 (1987); *see also Do* at 1213-1214 (it "would ill serve the objectives of the discovery statutes were we to conclude that, where a lawyer represents a party free of charge, the opponent may engage in discovery abuses with impunity.").

ii. The Other Available Sanctions Are Either Unavailable or Are Often Too Extreme.

It is true that Civ.R. 37 authorizes a variety of sanctions beyond attorney-fee awards. They range from the preclusion of claims or defenses and to outright dismissal of an action or the entry of default judgment. *See* Civ.R. 37(B)(2); Civ.R. 37(D). But resort to these other sanctions is no substitute for attorney-fee awards, which are "the most important available sanction." 1970 Advisory Committee Note, Fed.R.Civ.P. 37(a)(4).

As a threshold matter, the more-extreme sanctions are unavailable in the ordinary discovery dispute where the parties disagree over the discoverability of

certain information. The first step in the resolution of that dispute will be a motion to compel under Civ.R. 37(A). And, under that subsection, attorney fees are the *only* available sanction.

Only after a party violates an order to compel or fails outright to provide or object to discovery may a trial court resort to the more-extreme sanctions under Civ.R. 37(B) or (D). But trial courts are understandably reluctant to resort to these extreme sanctions. This Court, for example, has admonished that "dismissal or default judgment" are "severe sanctions" trial courts should impose only when the non-complying party has acted willfully or in bad faith. *Ward v. Hester*, 36 Ohio St.2d 38, 44, 303 N.E.2d 861 (1973); *see also Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *Utah Dept. of Transp. v. Osguthorpe*, 892 P.2d 4, 7 (Utah 1995) (stating that the "striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party.") Given the gravity of dismissal as a sanction and "the oft-stated preference for trial on the merits," courts should turn to dismissal only after considering lesser sanctions. *Wolfe v. Fine*, 618 A.2d 169, 173

(D.C.App.1992). Attorney-fee sanctions, then, remain the most important tool in providing adequate redress for discovery violations that do not rise to the level appropriate for outright dismissal or default judgment.

But *Register* took that tool away from trial courts whenever the aggrieved party does not pay her attorney by the hour or by the project. Trial judges must either turn to the more drastic sanctions or simply ignore discovery violations altogether—to the great detriment of the party seeking to enforce the discovery rules. That is precisely the result here, where the Eighth District's decision effectively immunized PTC from any sanction at all. That result is not consonant with the purpose of the discovery rules. And it is not consonant with a justice system that depends upon parties' compliance with those rules and on trial courts' power to enforce them.

b. Requiring a Payment Obligation Compromises Low-Income Litigants' Equal Access to Justice.

"[I]n order to provide equal access to justice for all, the award of attorney fees to individuals represented by legal services or pro bono attorneys is required." *Whalen*, 278 Mont. at 304, 925 P.2d 462. By restricting Civ.R. 37 attorney-fee awards to litigants who can afford to pay their attorneys, *Register* hinders low-income litigants' ability to seek the full protection of Ohio's civil-

litigation system. This effect derides the ideal that wealth should not be a prerequisite for asserting one's legal rights.

Register's attorney-fee holding afflicts low-income litigants on two levels. On an individual level, requiring a payment obligation as a prerequisite for an attorney-fee award necessarily creates a disadvantage to low-income individuals who find themselves parties to a civil lawsuit—and, correspondingly, unduly heightens the already-existing advantage to their opponents. And on an aggregate level, imposing the prerequisite sends the wrong message to lawyers about the value of pro bono work and the importance of representing clients who cannot afford to pay. We discuss each of these in turn.

i. The Attorney-Fee Holding in *Register* Unfairly Burdens Low-Income Litigants.

Foreclosing lawyers who represent clients pro bono from recovering Civ.R. 37 attorney fees, as *Register* does, inherently aggravates the disadvantages that low-income individuals already face in civil litigation. It encourages their adversaries to withhold discovery, as PTC did here. The unfair playing field in discovery then has inevitable impact on settlement or resolution on the merits. These effects are at odds with the important principle of affording all citizens equal access to justice.

But the disparity does not end there. The same litigants who cannot recover attorney fees under *Register* may still be required to *pay* attorney fees for their own discovery violations. They "could be required to pay expenses and attorney fees as a discovery sanction, yet be precluded from recovering the same." (Eighth Dist. Op. at ¶ 24 (Stewart, J., dissenting) [Appx. 15]). That double standard "gives fee-for-service lawyers an unfair, and surely unintended, advantage over opposing counsel who are working pro bono." (*Id.* at ¶ 25 (Stewart, J., dissenting) [Appx. 15]).

ii. *Register*'s Civ.R. 37 Interpretation Contravenes this Court's Policy of Encouraging Pro Bono Work.

On the aggregate level, precluding Civ.R. 37 attorney-fee awards for pro bono litigants defies this Court's own policy of encouraging pro bono work. The Court openly promotes pro bono representations for sound reasons. But *Register*'s attorney-fee holding undercuts that policy.

This Court "strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities." The Supreme Court of Ohio, *Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers* (Sept. 20, 2007), http://www.supremecourt.ohio.gov/AttySvcs/officeAttySvcs/proBono.pdf (accessed May 15, 2014). Further, the preamble to the Rules of

Professional Conduct implores lawyers to recognize "that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance." Prof.Cond.R. Preamble ¶ 6. Legal-service organizations simply have inadequate resources to meet the demand. "[T]oday, 75% of the need for civil legal aid is unmet, with legal aid forced to turn away 3 people for every 1 person it serves. In Ohio, there is 1 civil legal aid lawyer for every 8,660 people who qualify for services." Resolution from the Access to Justice Committee, Ohio State Bar Association Council of Delegates Meeting, available at https://www.ohiobar.org/General%20Resources/pubs/councilfiles/2013/Full_Council_of_Delegates_Book_11_13.pdf, p. 18 (accessed May 15, 2014); *see also* William Dowling, *Legal Aid Funding Crisis: Is There Still "Justice for All"?*, Ohio Lawyer (Mar.-Apr. 2014) 7-9.

The need is great, and the Court and bar organizations have promoted it. But private attorneys have limited resources to dedicate to pro bono work and are under pressure from their firms to focus their time on fee-generating matters. A discovery system that encourages adversaries to withhold discovery—thus increasing the time and resources that pro bono representation can require—creates yet another obstacle that can discourage lawyers from accepting pro bono

cases. It compounds the existing problem. And even for attorneys who are not dissuaded, the increased time it takes to deal with adversaries who violate discovery rules—and who can do so with impunity under *Register*—leave them with less time and fewer resources to accept other pro bono work.

The net result, then, is inevitably to decrease Ohio lawyers' already-inadequate capacity to help our State's neediest citizens find adequate legal representation. By contrast, allowing attorney fees under Civ.R. 37 regardless of a client's payment obligation would facilitate the representation of needy individuals by a competent private attorney. It would "expand * * * services to the needy." *See Hale v. Hale*, 772 S.W.2d 628, 630 (Ky.1989); *see also Krassnoski v. Rosey*, 454 Pa. Super. 78, 84, 684 A.2d 635 (1996) (discussing that "[a]wards of fees to counsel * * * helps to support legal services agencies which are chronically short of funds").

Leaving the *Register* holding intact—especially now that the Eighth District has applied it squarely to a pro bono representation—would send a clear message to the Ohio bar that contravenes the Court's stated goal of encouraging pro bono representation. But overturning the attorney-fee holding in *Register*—and thereby expanding the availability of attorney fees for discovery violations—

would harmonize this Court's interpretation of Civ.R. 37 with that stated goal. The Court should now clarify that trial courts have the power to impose Civ.R. 37 attorney-fee sanctions whenever a party violates its discovery obligations, regardless of the movant's fee arrangement with her counsel.

3. *Beacon Journal* Does Not Counsel a Different Result.

The *Register* Court also noted that under *Beacon Journal*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, there is "no entitlement to attorney fees for prevailing party in R.C. 149.43 public-records mandamus action when there is no evidence that the party actually paid or is obligated to pay attorney fees." *Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913 at ¶ 24, citing *Beacon Journal* at ¶ 62. *Beacon Journal*, in turn, refused attorney fees in a public-records mandamus action to a party using in-house counsel, because the party did not pay additional fees to the attorney beyond her regular salary. *Beacon Journal* at ¶ 62. But the *Beacon Journal* decision does not support the *Register* holding.

As a threshold matter, *Beacon Journal* is no longer good law. R.C. 149.43 has been amended since *Beacon Journal* to make attorney fees "mandatory rather than discretionary" in specific situations. *State ex rel. DiFranco v. S. Euclid*, —— Ohio St.3d ——, 2014-Ohio-538, —— N.E.3d ——, ¶ 17. Therefore, the premise of *Beacon Journal's* holding—that an "award of attorney fees under R.C. 149.43 is not

mandatory," *see Beacon Journal* at ¶ 59—has been abrogated. *See also DiFranco* at ¶ 16.

But even if R.C. 149.43 had not been amended, *Beacon Journal* would not counsel against an award of attorney fees under Civ.R. 37 to litigants who do not pay their lawyers. Attorney fees under the public-records statute serve a different purpose from fees awarded under Civ.R. 37. The General Assembly explicitly provided that attorney fees under the statute are "remedial and not punitive." *See* R.C. 149.43(C)(2)(c). By contrast, attorney fees under Civ.R. 37 are "generally punitive." *Bank One*, 176 Ohio App.3d 694, 2008-Ohio-2952, 893 N.E.2d 542, ¶ 23; *see also supra* pp. 27-30. Even if requiring an actual payment obligation was appropriate for a remedial award, such an award necessarily conflicts with the behavior-adjusting purpose of attorney-fee awards in the discovery context.

And, in the end, requiring a payment obligation is not appropriate even for a remedial award. As demonstrated above, the meaning of "attorney fees" in rules and statutes authorizing them is the *value* of the attorney's work, not the amount the client actually pays. *See supra* pp. 18-22. *Beacon Journal* thus should

not stand in the way of the Court's adoption of Ms. Wilkins' proposition of law under Civ.R. 37.

B. Overruling *Register*'s Attorney-Fee Holding Comports with the Principles of Stare Decisis.

The doctrine of stare decisis presents no obstacle to overruling *Register*'s attorney-fee holding. This Court "not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 43. As a threshold matter, stare decisis plays a reduced role in determining whether to overrule a procedural holding like the attorney-fee holding in *Register*. And even upon a full stare decisis analysis, *Register*'s attorney-fee holding warrants reconsideration.

1. Stare Decisis Plays a Reduced Role in the Construction of a Procedural Rule Like Civ.R. 37.

Because Civ.R. 37 is a procedural rule, stare decisis poses no bar to reconsidering the *Register* holding. In *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, the Court held that the *Galatis* stare decisis test was inapplicable to an interpretation of Evid.R. 807 because "this matter involves an evidentiary rule, and so stare decisis plays a reduced role." *Id.* at ¶ 33. Procedural and evidentiary rules enjoy less stare decisis consideration because

they do "not serve as a guide to lawful behavior." *Id.* at ¶ 32, quoting *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The Court in *Silverman* relied on the United States Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), which held that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Id.* at 828; *see also Cincinnati v. Taft*, 63 Ohio St. 141, 161, 58 N.E. 63 (1900) (stare decisis "must apply to different cases with varying degrees of force according to the reasons for its application"). More recently, the United States Supreme Court clarified that the stare decisis standards of "badly reasoned" and "unworkable" may be "appropriate when a constitutional or statutory precedent is challenged" but "are out of place" for a challenge to a procedural rule regarding qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 234, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Because Ohioans do not rely on Civ.R. 37 and other procedural rules in their ordinary and daily transactions outside of the litigation process, the rationales for applying stare decisis are diminished. Given the detrimental

impact that *Register's* misinterpretation of a procedural rule has on the litigation process, stare decisis does not constrain this Court's decision to overturn the *Register* holding.

2. In Any Event, Overruling the Attorney-Fee Holding in *Register* Satisfies the *Galatis* Test.

Even if this Court engages in a full stare decisis analysis, overruling *Register*'s attorney-fee holding is still appropriate. Under *Galatis*, the Court may overrule one of its prior decisions "where (1) the decision was wrongly decided at that time, * * * (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at paragraph one of the syllabus. The attorney-fee holding in *Register* satisfies each of these elements.

a. *Register* Was Wrongly Decided at the Time.

Register's attorney-fee holding was wrongly decided at the time, for all the reasons set forth above. In addition, the Court has previously held that a lack of a thorough analysis or a "detailed discussion" in an opinion is evidence that can establish the wrongly decided prong of the *Galatis* test. *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 23. The *Register* opinion devoted

only two out of 44 paragraphs to its attorney-fee holding, and these paragraphs do not mention the policy and practical consequences of limiting attorney-fee awards only to parties who have a payment obligation with their counsel. *Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, at ¶ 23-24. This limited discussion is reflective of the fact that *none* of the briefing addressed the availability of attorney fees in cases where the client has no payment obligation,[7] nor did the Court have the benefit of oral argument.

b. The Decision Defies Practical Workability.

This attorney-fee holding in *Register* also satisfies the second *Galatis* factor, because it defies practical workability. *Register* ignores the practical realities of litigation and the discovery process. That process functions effectively only if all parties follow the rules—or face appropriate sanctions when they do not. *See supra* pp. 27-30 (discussing the purposes of the discovery rules). Preventing

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[7] Only one party briefed the Civ.R. 37(D) issue in *Register* and did so without addressing the availability of fees when the client does not pay them. *See* Relator's Motion for the Imposition of Sanctions Against Respondent or Respondent's Counsel for Failure to Attend a Previously Noticed Deposition, filed May 18, 2007, in *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, No. 2007–0238, available at http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=596822.pdf (accessed May 15, 2014).

non-hourly attorneys from recovering attorney-fee awards encourages their opponents to ignore discovery requests and further disadvantages the clients who could not pay their counsel on an hourly basis. *See supra* pp. 32-34.

Furthermore, *Register*'s attorney-fee holding has been the subject of widespread criticism, which is an indication that the holding defies practical workability. *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 50. Of the many amici curiae who support Ms. Wilkins' construction of Civ.R. 37, one describes *Register*'s analysis as one of "incurable inconsistency." Amici Curiae Legal Aid Societies' Memorandum in Support of Jurisdiction 13-14, filed Nov. 14, 2013, in *Wilkins v. Sha'ste Inc. et al.*, No. 2013-1794, available at http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=736719.pdf (accessed May 15, 2014). In addition, this Court recently published for public comment an amendment to Civ.R. 37 that would have abrogated the attorney-fee holding in *Register*, which drew wide, unanimous public support.[8] That support

[8] After accepting this appeal, the Court withdrew the proposed amendment to Civ.R. 37. Ms. Wilkins believes that the better vehicle for addressing *Register* is through a decision in this case, rather than a rule amendment, for reasons she explained in her memorandum in support of jurisdiction.

also demonstrates that the attorney-fee aspect of the *Register* decision defies practical workability.

c. Abandoning the Attorney-Fee Holding in *Register* Would Create No Undue Hardship.

Overruling the attorney-fee holding *Register* would create no undue hardship. In fact, correcting the misinterpretation of Civ.R. 37 would have the opposite result—it would ***alleviate*** undue hardship. As explained above, *Register* encourages parties to ignore their discovery obligations when they know they will run no risk of attorney-fee sanctions. Overruling *Register* will level the playing field in litigation by subjecting all parties to the possibility of attorney-fee sanctions when they breach the rules—and by allowing all parties to pursue attorney-fee awards when their opponents breach the rules. Surely, if this change is hardship at all, it is not undue.

Moreover, abandoning precedent creates undue hardship only when the prior decision "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Galatis* at ¶ 58, quoting *Robinson v. Detroit*, 462 Mich. 439, 466, 613 N.W.2d 307 (2000). There is no cause for concern here. *Register* is a relatively recent decision, so it has not had time to become

"embedded, accepted, and fundamental law," and overruling it would cause no chaos. *Compare State v. Burton*, 10th Dist. Franklin No. 06AP-690, 2007-Ohio-1941, ¶ 26 (no undue hardship to overrule two decisions that were less than a year old), *with In re Estate of Holycross*, 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805, ¶ 24-27 (finding undue hardship and refusing to overrule a 13-year-old case on which 12 appellate district had relied in subsequent decisions). To date, only two courts have applied *Register's* attorney-fee holding—the Eighth District in its opinion below and the Third District in *Yeager v. Carpenter*, 3d Dist. Union No. 14-08-15, 2008-Ohio-4646, ¶ 9 (relying on *Register* to find that a party cannot collect attorney fees unless he proves that he "actually incurred attorney's fees"). Furthermore, there is certainly no undue hardship to Ohio litigants in aligning Ohio discovery rules with the majority of states that have addressed this issue.[9] Thus, overruling the attorney-fee holding in *Register* would create no undue hardship.

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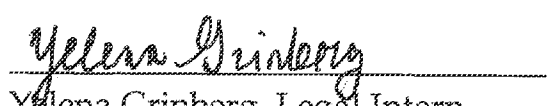
[9] *See supra* note 1.

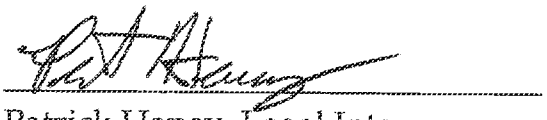
IV. CONCLUSION

For these reasons, Ms. Wilkins requests that the Court reverse the Eighth District's decision and adopt Ms. Wilkins' proposed proposition of law.

Respectfully submitted,



Yelena Grinberg, Legal Intern



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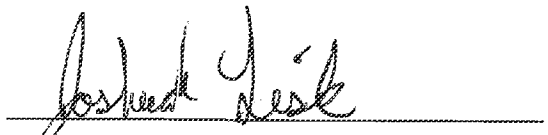

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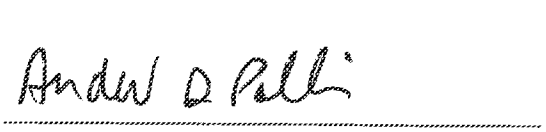

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CERTIFICATE OF SERVICE

A copy of this document has been served by regular mail on this 15th day of May, 2014, upon:

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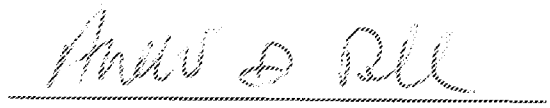

One of the Legal Interns or Attorney
for Appellant

Appendix

In the Supreme Court of Ohio

CASE NO. 13-1794

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-12-99167

KRISTEL WILKINS,

Appellant,

v.

SHA'STE INCORPORATED, *et al.*,

Defendants,

and

PROCESS TO CLOSING, LLC,

Appellee.

NOTICE OF APPEAL OF APPELLANT KRISTEL WILKINS

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Attorney for Appellee

FILED
NOV 14 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

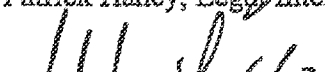
Appellant Kristel Wilkins hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. 99167 on August 15, 2013 (with a subsequent nunc pro tunc opinion issued on September 17, 2013). This case is one of public and great general interest.

An application for reconsideration was timely filed in the Court of Appeals on August 23, 2013, which the Eighth District denied on October 1, 2013.

Respectfully submitted,

Yelena Grinberg, Legal Intern

Patrick Haney, Legal Intern



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Legal Interns and Attorney for Appellant Kristel Wilkins

3214-PLDG-131113-Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant Kristel Wilkins was sent by regular U.S. Mail, postage prepaid, this 13th day of November, 2013 to:

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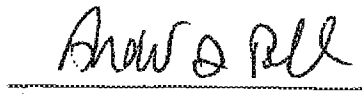
Attorney for Appellee



One of the Attorneys for Appellant

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

KRISTEL WILKINS

Appellee

COA NO. 99167

LOWER COURT NOS. CV-740106 and CV-753315

COMMON PLEAS COURT

-vs-

SHA'STE INCORPORATED, ET AL.

Appellants

MOTION NO. 468379

RECEIVED FOR FILING

SEP 17 2013

CUYAHOGA COUNTY CLERK OF THE COURT OF APPEALS
By _____ Deputy

Date 09/17/2013

Journal Entry

The journal entry and opinion of this court in this case, released on August 15, 2013 (2013-Ohio-3527), contained an error in ¶6, which is corrected to read:

{¶6} On November 30, 2011, appellant moved the trial court to vacate its sanction order. On December 23, 2011, the trial court denied appellant's motion. After resolving her claims against all other defendants, Wilkins voluntarily dismissed her claims against appellant on October 11, 2012.

It is hereby ordered that said journal entry and opinion of August 15, 2013, be amended nunc pro tunc to correct the error in ¶6, as stated above.

It is further ordered that, as so amended, said journal entry and opinion of August 15, 2013, shall stand in full force and effect in all its particulars.

The corrected entry is attached.

MELODY J. STEWART, A.J., AND

LARRY A. JONES, SR., J., CONCUR.

FRANK D. CELEBREZZE, JR.
JUDGE

COPIES MAILED TO COUNSEL FOR ALL PARTIES--COSTS TAXED

AUG 1 6 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99167

KRISTEL WILKINS

PLAINTIFF-APPELLEE

vs.

SHA'STE INCORPORATED, ET AL.

DEFENDANTS-APPELLANTS

[Appeal By: Process to Closing, L.L.C., Defendant-Appellant]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-740106 and CV-753315

BEFORE: Celebrezze, J., Stewart, A.J., and Jones, J.

RELEASED AND JOURNALIZED: August 15, 2013

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FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 15 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

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ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Defendant-appellant, Process to Closing, L.L.C. ("appellant"), appeals the judgment of the trial court ordering it to pay attorney fees in the amount of $1,000 as a discovery sanction pursuant to Civ.R. 37. On appeal, appellant argues that plaintiff-appellee, Kristel Wilkins, failed to meet her burden of proof in showing that attorney fees were necessary. For the reasons set forth herein, we reverse the judgment of the trial court.

I. Factual and Procedural History

{¶3} In April 2010, Wilkins retained the Milton A. Kramer Law Clinic Center ("the Clinic") to represent her in a dispute involving a home repair contract. The Clinic is operated by the Case Western Reserve University Law School. Students in the Clinic are certified legal interns representing low-income clients under the supervision of licensed attorneys. Although the Clinic agreed not to charge Wilkins any fees for her representation, her retainer agreement specifically contemplated the award of attorney fees from adverse parties, and Wilkins agreed to be responsible for paying other costs and expenses related to the case.

{¶4} On October 28, 2010, Wilkins filed her complaint against Sha'ste Incorporated and Steve Davis in Cuyahoga C.P. No. CV-740106, alleging damages arising out of a home-repair contract. On April 15, 2011, Wilkins filed

a related complaint against defendants RBS Citizens National Association in Cuyahoga C.P. No. CV-753315 and later named appellant in an amended complaint. The cases were consolidated by the trial court on May 16, 2011.

{¶5} On August 19, 2011, Wilkins served appellant with discovery demands in the form of interrogatories, requests to produce, and demand for admissions. Appellant's responses were due on September 19, 2011. When appellant failed to timely respond to the discovery demands, Wilkins filed a motion to compel discovery and for sanctions pursuant to Civ.R. 37(A) on October 13, 2011. Wilkins supported her motion with the sworn affidavit of her attorney, Andrew S. Pollis. Appellant did not oppose that motion, and on November 22, 2011, the trial court granted Wilkins's motion, including an award of attorney fees in the sum of $1,000 as a discovery sanction.

{¶6} On November 30, 2011, appellant moved the trial court to vacate its sanction order. On December 23, 2011, the trial court denied appellant's motion. After resolving her claims against all other defendants, Wilkins voluntarily dismissed her claims against appellant on October 11, 2012.

{¶7} Appellant now brings this timely appeal, raising two assignments of error for review:

> I. A party is not entitled to an award of attorney fees as a sanction under Civ.R. 37 if she has not paid, or has no obligation to pay, attorney fees.
>
> II. The trial court did not have sufficient evidence to determine the reasonable amount awarded as attorney fees under the circumstances.

II. Law and Analysis

A. Civ.R. 37

{¶8} In its first assignment of error, appellant argues that a party is not entitled to an award of attorney fees as a sanction under Civ.R. 37 where, as here, the party has not paid, or has no obligation to pay, attorney fees.

{¶9} The decision to impose sanctions pursuant to Civ.R. 37 is within the discretion of the trial court; thus, we will not reverse the trial court's decision absent an abuse of discretion. *Maurer v. Boyd*, 9th Dist. Summit No. 23818, 2008-Ohio-1384, ¶ 5, citing *Millis Transfer, Inc. v. Z & Z Distrib. Co.*, 76 Ohio App.3d 628, 602 N.E.2d 766 (6th Dist.1991).

{¶10} Civ.R. 37(A) provides that parties may file motions for orders compelling discovery. If the motion is granted, Civ.R. 37(A)(4) provides that

> * * * the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party *the reasonable expenses incurred in obtaining the order, including attorney's fees,* unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis added.)

{¶11} Recently, this court determined that legal interns, under the supervision of an attorney-professor, were entitled to an award of attorney fees under R.C. 1345.09(F)(2). *Favors v. Burke*, 8th Dist. Cuyahoga No. 98617, 2013-Ohio-823. In justifying the award, this court relied on Gov.Bar R. II, which states in pertinent part:

> A legal intern shall not ask for or receive any compensation or remuneration of any kind from a financially needy client on whose behalf services are rendered. However, the law school clinic, legal aid bureau, public defender's office, or other legal services organization may be awarded attorney fees for services rendered by the legal intern consistent with the Ohio Rules of Professional Conduct and as provided by law.

Favors at ¶ 26.

{¶12} However, unlike *Favors*, where sanctions were ordered pursuant to R.C. 1345.09(F)(2), the case at hand involves sanctions requested pursuant to Civ.R. 37(A)(4). While we recognize the clear language of Gov.Bar R. II and its directive that legal interns may recover attorney fees as permitted by law, we are unable to ignore the Supreme Court of Ohio's application of Civ.R. 37 in *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913. In *Register*, the Supreme Court of Ohio denied Citizens' requested attorney fees under Civ.R. 37(D) based on Citizens' failure to produce evidence that it had "actually paid or was obligated to pay" its attorney a fee. *Id.* at ¶ 23-24. The court held that in order for a trial court to award attorney fees as a sanction under Civ.R. 37, there must be some evidence of a fee agreement or payment by the aggrieved party to his or her attorney. *Id.* Accordingly, the court concluded that "an award of attorney fees as a sanction for a discovery violation must actually be incurred by the party seeking the award." *Id.*

{¶13} In the case sub judice, Wilkins was not obligated to pay attorney fees. Thus, on the authority of the Ohio Supreme Court, we must sustain the

assignment of error, albeit reluctantly, based on Wilkins's inability to produce evidence that she actually incurred attorney fees as a result of the legal interns obtaining the order compelling discovery in this matter. Moreover, we find no merit to Wilkins's assertion that *Register* is only relevant to cases involving Civ.R. 37(D) and does not apply to a motion for sanctions brought under Civ.R. 37(A)(4). *See Yeager v. Carpenter*, 3d Dist. Union No. 14-08-15, 2008-Ohio-4646, ¶ 9 (applying *Register* to Civ.R. 37 in general); *see also Wrinch v. Miller*, 183 Ohio App.3d 445, 2009-Ohio-3862, 917 N.E.2d 349 (9th Dist.) (applying *Register* to a motion for sanctions brought under Civ.R. 37(A)(4)).

{¶14} Appellant's first assignment of error is sustained.

{¶15} Based on our resolution of appellant's first assignment of error, appellant's second assignment of error is rendered moot.

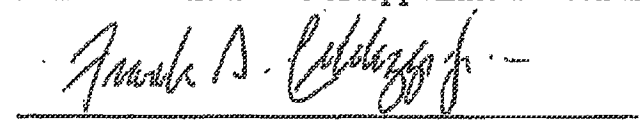
{¶16} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, SR., J., CONCURS;
MELODY J. STEWART, A.J., DISSENTS (WITH SEPARATE OPINION)

MELODY J. STEWART, A.J., DISSENTING:

{¶17} I am not convinced that the Supreme Court's analysis in *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, is dispositive of the issue in this case. Furthermore, a decision that holds that indigent clients are not entitled to an award of attorney fees for their lawyers who provide pro bono representation is in complete derogation of the Supreme Court Rules for the Government of the Bar of Ohio and bad public policy. I would affirm the trial court's decision.

{¶18} *Register* is an original action for a writ of mandamus filed in the Supreme Court of Ohio. In *Register*, the relator moved the court pursuant to Civ.R. 37(D) for an award of expenses and attorney fees against the respondent and her attorney as a discovery sanction for failure to attend a duly noticed deposition. The court awarded an amount for expenses the relator proved it incurred (court reporter fees, copies, etc.), but declined to award attorney fees finding that "Citizens introduced no evidence or argument that it has actually paid or is obligated to pay [the] attorney fees in this case." *Id.* at ¶ 24.

{¶19} Unlike the relator in *Register*, 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. Furthermore, the "caused by" language in Civ.R. 37(D) and the "incurred" language in Civ.R. 37(A)(4) are different. And as Wilkins notes, *Register* does not specifically prohibit an award of attorney fees pursuant to Civ.R. 37(A)(4).

{¶20} Finding no merit to the argument that the holding in *Register* is not dispositive of this case, the majority cites to *Yeager v. Carpenter*, 3d Dist. Union No. 14-08-15, 2008-Ohio-4646, and *Wrinch v. Miller*, 183 Ohio App.3d 445, 2009-Ohio-3862, 917 N.E.2d 349 (9th Dist.), for the proposition that *Register* applies to Civ.R. 37 in general and to a motion for sanctions brought under Civ.R. 37(A)(4) specifically. The majority's reliance on these cases is misplaced.

{¶21} Although the court in *Yeager* referenced Civ.R. 37 in general, the case dealt with a motion for sanctions pursuant to Civ.R. 37(B). That section of the rule, like Civ.R. 37(D), contains the "caused by" language. And the court in *Wrinch* did not apply *Register* to preclude the award of fees. The *Wrinch* court concluded that:

> While the trial court clearly had the authority pursuant to Civ.R.37(A)(4) and Civ. R.37(D) to award reasonable attorney's fees, it is equally apparent from the record that the evidence presented was not sufficient to determine what fees the [moving parties] actually incurred or whether the fees were reasonable under the circumstances. Thus, while it was not error for the trial court to award attorney's fees in this instance, the absence of evidence indicating the actual amount of the fees or that the awarded amount

> was reasonable requires us to reverse and remand so that the trial court can properly determine the appropriate award.

Id. at ¶ 40.

{¶22} The majority's reliance on *Register* and the other cases it cites is also misplaced because none of those cases deal specifically with an award of attorney fees to a legal services organization. As the majority notes, this court has awarded attorney fees, on the authority of Gov.Bar R. II, to a party who is represented pro bono by a legal services organization. *See Favors v. Burke*, 8th Dist. Cuyahoga No. 98617, 2013-Ohio-823. Gov.Bar R. II, section 6 permits an award of attorney fees to law school clinics, legal aid bureaus, the public defender's office, or other legal services organizations for services rendered by a legal intern. These types of legal service organizations serve two very important purposes: providing access to the courts for people who are indigent, and helping to educate law students with practical legal training. The significance of both of these purposes is recognized by the Supreme Court. *See* Gov.Bar R. II and the Supreme Court of Ohio Professional Ideals for Ohio Lawyers and Judges.[1]

{¶23} Finally, unlike other provisions for the award of sanctions under Civ.R. 37, section (A)(4) of the rule is the only provision that serves as a double-edged sword: invoking application of the rule could result in favorable or

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[1] Supreme Court of Ohio, "*Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers*," (Sept. 20, 2007), http://www.supremecourt.ohio.gov/AttySvcs/officeAttySvcs/proBono.pdf (accessed July 31, 2013).

unfavorable consequences. In addition to providing for an award of attorney fees and expenses to a moving party who has her motion granted, section (4)(A) also provides:

> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

{¶24} Under the majority's analysis, an indigent party who is represented pro bono by a legal services organization, and/or the attorney of a legal services organization, could be required to pay expenses and attorney fees as a discovery sanction, yet be precluded from recovering the same.

{¶25} Expanding the holding of *Register* to stand for the proposition that lawyers who provide pro bono legal services are not entitled to attorney fees as a discovery sanction because no expenses were "incurred" 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. For these reasons, I dissent.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

KRISTEL WILKINS

Appellee

COA NO. 99167

LOWER COURT NO.
CP CV-740106
CP CV-753316

COMMON PLEAS COURT

-vs-

SHA'STE INCORPORATED, ET AL.

Appellee

MOTION NO. 467751

Date 10/01/13

Journal Entry

Motion by Appellee for reconsideration is denied. See nunc pro tunc entry (Motion No. 468379) dated 9/17/2013.

COPIES MAILED TO COUNSEL FOR ALL PARTIES-COSTS TAXED

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CUYAHOGA COUNTY CLERK OF THE COURT OF APPEALS
By _____ Deputy

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Adm. Judge, MELODY J. STEWART, Dissents

Judge LARRY A. JONES, SR., Concurs

FRANK D. CELEBREZZE, JR.
Judge

71156129

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KRISTEL WILKINS
Plaintiff

SHA'STE INCORPORATED, ET AL
Defendant

Case No: CV-10-740106

Judge: NANCY A FUERST

JOURNAL ENTRY

PLTF KRISTEL WILKINS' 10/13/11 MOTION TO COMPEL DISCOVERY AND IMPOSE SANCTIONS AGAINST DEFT. PROCESS TO CLOSING, LLC (PTC) IS UNOPPOSED AND GRANTED. DEFT PTC IS HEREBY ORDERED TO PRODUCE ALL REQUESTED DOCUMENTS AND RESPOND TO ALL INTERROGATORIES CONTAINED IN PLTF'S DISCOVERY REQUESTS BY 11/21/11. PLTF IS GRANTED AN EXTENSION UNTIL 12/12/11 TO COMPLETE FACT DISCOVERY. PTC IS ALSO ORDERED TO PAY THE MILTON KRAMER LAW CLINIC THE SUM OF $1,000.00 AS ATTORNEYS' FEES RELATED TO THIS MOTION. SHOULD DEFT PTC FAIL TO COMPLY WITH THIS ORDER THEY MAY BE SUBJECT TO FURTHER SANCTIONS AND FINES.

Nafuerst

Judge Signature 11/22/2011

11/10/2011

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KRISTEL WILKINS
Plaintiff

SHA'STE INCORPORATED, ET AL
Defendant

Case No: CV-10-740106

Judge: NANCY A FUERST

JOURNAL ENTRY

DEFT PROCESS TO CLOSING LLC'S 11/30/11 MOTION TO VACATE ORDER TO PAY ATTORNEY FEES IS DENIED.

Nafuerst
Judge Signature 12/23/2011

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KRISTEL WILKINS
Plaintiff

SHA'STE INCORPORATED, ET AL
Defendant

Case No: CV-10-740106

Judge: NANCY A FUERST

JOURNAL ENTRY

PRE-TRIAL HELD ON 08/18/2011.
FACT DISCOVERY TO BE COMPLETED BY 11/07/2011.
PLAINTIFF'S EXPERT REPORT DUE 10/15/2011.
DEFENDANT'S EXPERT REPORT DUE 11/15/2011.
DISPOSITIVE MOTION TO BE FILED BY 11/15/2011.
RESPONSE DUE PER LOC.R. 11(I)(1). COPIES OF ALL DISPOSITIVE MOTIONS AND BRIEFS ARE TO BE PROVIDED TO THE COURT UPON FILING.
PRETRIAL SET FOR 12/13/2011 AT 09:30 AM. HEARING BY TELEPHONE. PLTF TO INITIATE CONFERENCE CALL AND CONTACT COURT AT 216-443-8692 OR 8699.
FINAL PRETRIAL SET FOR 01/26/2012 AT 02:00 PM. ALL PARTIES SHALL BE PRESENT.
JURY TRIAL SET FOR 02/27/2013 AT 09:00 AM.
ALL PARTIES ARE TO SUBMIT TO THE COURT TRIAL BRIEF, WITNESS LISTS, JURY INSTRUCTIONS, MOTIONS IN LIMINE, AND STIPULATIONS 7 DAYS BEFORE THE TRIAL.
COURTESY COPIES TO BE DELIVERED TO THE COURT UPON FILING.

Nafuerst

Judge Signature 08/18/2011

08/18/2011

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Andrew S. Pollis

From: CLERK_E-NOTICE@CUYAHOGACOUNTY.US
Sent: Friday, June 03, 2011 2:31 PM
To: ANDREW.POLLIS@CASE.EDU
Subject: Cuyahoga County Clerk of Courts Notification [CV-11-753315]

This is an automated notification. Please DO NOT REPLY to this E-Mail.
This E-Mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain private, confidential and/or privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please destroy all copies of this original E-Mail message.

Case: CV-11-753315
Case Caption: KRISTEL WILKINS vs. RBS CITIZENS, NATIONAL ASSOCIATION
Judge: JOHN D SUTULA
Room: 23B JUSTICE CENTER
Docket Date: 06/02/2011
Notice Type: (JEPC) JOURNAL ENTRY NOTICE Notice ID/Batch: 17596622 - 931060

To: ANDREW S POLLIS

THE CAPTIONED CASE IS HEREBY TRANSFERRED TO THE DOCKET OF JUDGE NANCY A FUERST(322) FOR CONSOLIDATION WITH CASE NO. CV-10-740106.

CLDLJ 06/02/2011
NOTICE ISSUED

On Copy:
KAREN L GIFFEN (D1A) - KGIFFEN@THINKGK.COM
KAREN L GIFFEN (D1A) - SWATSON@THINKGK.COM
ANDREW S POLLIS (P1A) - LAWCLINIC@CASE.EDU
JOHN DOE BANK, NAME UNKNOWN (D2) -

RULE 37. Failure to Make Discovery: Sanctions

(A) Motion for order compelling discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

(1) Appropriate court. A motion for an order to a party or a deponent shall be made to the court in which the action is pending.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or an order compelling inspection in accordance with the request. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(B) Failure to comply with order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

(2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) **Expenses on failure to admit.** If a party, after being served with a request for admission under Rule 36, fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

(D) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

(E) Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section.

(F) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The court may consider the following factors in determining whether to impose sanctions under this division:

(1) Whether and when any obligation to preserve the information was triggered;

(2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;

(3) Whether the party intervened in a timely fashion to prevent the loss of information;

(4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;

(5) Any other facts relevant to its determination under this division.

[Effective: July 1, 1970; amended effective July 1, 1994; amended effective July 1, 2008.]

Staff Note (July 1, 2008 Amendment)

Civ. R. 37(F) provides factors for judges to consider when a party seeks sanctions against an opponent who has lost potentially relevant electronically stored information. This rule does not attempt to address the larger question of when the duty to preserve electronically stored information is triggered. That matter is addressed by case law and is generally left to the discretion of the trial judge.