

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2013- 1794

KRISTEL WILKINS,  
Plaintiff-Appellant,

-vs-

SHA'STE INCORPORATED; PROCESS TO CLOSING, L.L.C.  
Defendant-Appellees.

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY, CASE NO. 99167

MERIT BRIEF OF AMICI, CLEVELAND ACADEMY OF TRIAL ATTORNEYS  
AND THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLANT

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## IDENTIFICATION OF AMICI AND INTRODUCTION

*Amicus Curiae*, Cleveland Academy of Trial Attorneys (CATA), is an organization comprised of approximately 250 attorneys that has been in active operation since 1959. These lawyers practice in Cuyahoga County and primarily represent individuals and families who have suffered injuries as a result of automobile accidents, workplace incidents, dangerous consumer products, and other tortious conduct. Because nearly all their clients can only afford legal representation through contingency fee agreements, they are extremely concerned with the decision that was rendered by a majority of the Eighth Judicial District in the proceedings below.

These sentiments are shared by the Ohio Association for Justice ("OAJ"), which has joined this Merit Brief. Founded in 1954, the OAJ is a statewide organization that is also comprised of approximately 1400 attorneys focused upon personal injury, workers' compensation, and products liability law. Just like CATA, their membership fears that the *Wilkins* ruling will have deleterious consequences for every litigant who is not paying an attorney at an hourly rate.

The potential implications of the Eighth District's opinion are difficult to overstate. In overturning the trial judge's imposition of sanctions for an undisputed discovery rule violation, the majority held that only a litigant who has "actually paid or was obligated to pay" legal fees can ever secure such a recovery under Civ. R. 37(A)(4). *Wilkins v. Sha'ste Inc.*, 8th Dist. No. 99167, 2013-Ohio-3527, ¶12-13. Under contingency fee arrangements, the client's obligation to pay only arises (if at all) once there has been a successful recovery, and the amount due is determined solely from the outcome that has been achieved. Establishing that specific fees were actually incurred as a result of the opponent's misconduct is thus impossible, particularly when the defendant ultimately prevails on the merits. As Judge Melody J. Stewart observed in

her compelling dissent, this troubling result is not required by the established precedents and effectively precludes Ohio trial courts from awarding fees as a sanction in countless situations. *Id.*, ¶17-25. In those judicial districts that have adopted this illogical construction of the Civil Rules, including Cuyahoga County, unscrupulous litigants can commit one discovery abuse after another with virtual impunity so long as their opponent is not actually incurring legal fees at an hourly rate.

There is every reason to believe that the unduly expansive interpretation of *State ex rel. Citizens for Open, Responsive & Accountable Govt.*, supra, 116 Ohio St.3d 88, will ooze into related fee shifting contexts. The right to recover fees for commencing an action in an improper venue that is afforded by Civ. R. 3(C)(2) will then hinge upon how the moving party's attorney happens to be compensated. Those who deliberately abuse the judicial system can still argue that under *Wilkins*, trial judges can only punish frivolous conduct through Civ. R. 11 or their inherent authority when the victim is paying an attorney by the clock. That will also be the case when sanctions are sought under Civ. R. 45(E) for failure to comply with a subpoena. Given that most litigants cannot, or do not, enter pay-as-you-go agreements with their attorneys, including those that employ in-house counsel, governmental agencies, and indigent citizens, the *Wilkins* rule threatens to restrict the availability of many types of sanctions to only a narrow class of relatively affluent clients.

## ARGUMENT

**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 instant appeal presents a perfect example of how continued misapplication of *Register*, 116 Ohio St. 3d 88, will quickly strip Ohio trial courts of their authority to respond forcefully to frivolous and abusive misconduct. There has never been any dispute that Plaintiff-Appellant, Kristel Wilkins, was forced to prepare and file a Motion to Compel before Defendant-Appellee, Process to Closing, L.L.C. ("PTC"), would produce discovery that was owed. No plausible justification was ever furnished for this recalcitrance, and the request for sanctions was not even opposed. With fifteen years of legal experience on the bench, Administrative Judge Nancy A. Fuerst determined in her sound exercise of discretion that \$1,000.00 was an appropriate sanction. *See Journal Entry dated November 22, 2011.*

But now the Eighth District has reversed this seemingly unquestionable ruling and held that there is little that can be done to punish discovery abuses when the victimized party has not "actually incurred" any legal fees. *Wilkins*, 2013-Ohio-3527, ¶12-13. By misconstruing *Register* in the same manner, at least one other court has also reached this puzzling conclusion. *See e.g., Yeager v. Carpenter*, 3<sup>rd</sup> Dist. No. 14-08-15, 2008-Ohio-4646 (reversing fee award for discovery violation because the plaintiff could not establish that they were actually incurred through a fee agreement).

As acknowledged by Judge Stewart in her dissent, this Court's precedent is being stretched too far. In *Register*, 116 Ohio St. 3d 88, a mandamus action had been brought by an non-profit organization created to promote open governments. The request for

sanctions arising from the failure of a township officer to appear at a deposition was purely a side-issue. *Id.*, ¶23-24. Although the organization recovered a number of expenses that had been incurred, this Court observed that it had “introduced no evidence or argument that it had actually paid or is obligated to pay” any fees in the case. *Id.*, ¶24. In remarking that fees “must actually be incurred by the party seeking the award[,]” this Court referenced only Civ. R. 37(D) and *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶62. *Register*, 116 Ohio St. 3d at 93-94, ¶24.

Neither of the authorities cited in this aspect of *Register* establishes an “actually incurred” preconditioned for discovery sanctions. Civ. R. 37(D) provides that once a violation of a specified discovery rule has been demonstrated “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 \*\*\*.” There is no requirement that the fees must “actually” be incurred. *Id.* And *Beacon Journal Pub. Co.*, 104 Ohio St. 3d 399, was a Public Records Act mandamus action that did not involve any meaningful discovery disputes or requests for sanctions. The newspaper was seeking a discretionary fee award as the prevailing party under R.C. 149.43, which this Court concluded was inappropriate for several reasons, one of which was that “the vast majority” of the legal work had been performed by in-house counsel. *Id.*, ¶62.

In order to ensure that trial judges remain fully equipped to respond forcibly to abusive and frivolous misconduct, this Court should limit *Register*, 116 Ohio St. 3d 88, to the circumstances of public records actions. As is the case with most of the other rules and statutes that authorize the imposition of sanctions, Civ. R. 37(A)(4) does not restrict the award to the precise amount of attorney fees that had been “actually” incurred at an established hourly rate. Once a motion to compel is granted the court is

ordinarily required to direct the opposing party “to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees \*\*\*.” *Civ. R. 37(A)(4)*. Since the term “actually” is conspicuously absent from this subsection, trial courts should remain free to impose a fair amount, in their sound exercise of discretion, based upon the time required to be expended multiplied by the prevailing market rate for attorneys of similar skill and experience.

CATA and the OAJ are mindful of this Court’s recent withdrawal of the proposed amendments to *Civ. R. 37(A)(3) & (D)(3)* that would have confirmed that sanctions can be assessed based upon “the reasonable value of the time spent by the attorney, whether or not the party actually paid or is obligated to pay the attorney for such time.” The introductory comments indicated that the revisions were intended to address “the uncertainty over the issue raised by the Court” in *Register*, 116 Ohio St. 3d 88.<sup>1</sup> Rather than alter the terms of the time-tested rule, the more straightforward and less disruptive approach is to simply restrain *Register*.

Attorney fee recoveries should be confined to those that have been “actually incurred” only when the controlling rule or statute so states in unmistakable language. This fundamental principle was recognized in *Raney v. Fed. Bur. of Prisons*, 222 F.3d 927 (Fed.Cir.2000), where a federal employee had successfully secured reinstatement to his position as a result of the effort of his union attorneys. A federal statute authorized the recovery “of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party \*\*\*.” 5 *U.S.C.* 7701(g)(1). Sitting *en banc*, the Federal Circuit rejected the argument that such an award was precluded simply because the union was providing the services to the federal employee without charge. Citing numerous authorities, the majority reasoned that

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<sup>1</sup> Both the introductory comments and the text of the proposed revisions are available at [www.supremecourt.ohio.gov/RuleAmendments](http://www.supremecourt.ohio.gov/RuleAmendments).

“incurred” does not necessarily mean “actually incurred.” *Id.*, 222 F. 3d at 934-935. When the fees only have to be “incurred” to be recoverable, trial judges are entitled to determine the amount due through prevailing market rates. *Id.*

This sound ruling was predicated in substantial part upon the seminal decision that was rendered in *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). At issue was the Civil Rights Act’s allowance to the prevailing party of “a reasonable attorney’s fee as part of the costs \*\*\*.” 42 U.S.C. 1988. The Legal Aid Society of New York had successfully represented a class of Medicaid recipients and eliminated the practice of automatically terminating their benefits in certain inappropriate instances. *Id.*, at 890. When the District Court approved a fee award of \$118,968.00, which was upheld on appeal, the Supreme Court agreed to resolve whether the use of prevailing market rates was appropriate in determining the recovery due to the nonprofit legal services organization. *Id.*, at 891-892. The majority was unimpressed with the Solicitor General’s argument that such practices “confer an unjustified windfall or subsidy upon legal services organizations.” *Id.*, at 893. Writing for the Court, Justice Powell concluded that:

The statute and legislative history establish that “reasonable fees” under §1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. The policy arguments advanced in favor of a cost-based standard should be addressed to Congress rather than to this Court.

*Id.*, at 895-896.

The same sensible conclusion was recently reached in *Holland v. Jachmann*, 85 Mass. App. Ct. 292, 2014 W.L. 1887534 (May 14, 2014). Several commercial plaintiffs had prevailed upon claims that had been brought under the Massachusetts Consumer Protection Act following a lengthy trial. *Id.*, \*1. Similarly to Ohio Civ. R. 37(A)(4), the

statute “authorizes the award of attorney’s fees ‘incurred in connection with said action[.]’” *Id.*, \*3, citing Mass. Gen. Laws c. 93A, §11. On appeal, the defendants argued that the trial judge exceeded his authority by including the plaintiffs’ in-house counsel in the fee award, who was their salaried employee. *Id.*, \*3-4. The panel unanimously disagreed and observed that “every hour spent on the [underlying] litigation was an hour when [his] efforts were directed away from other legal matters[.]” *Id.*, \*4. Furthermore, denying attorney fees to a successful corporate litigant “simply because it chose to utilize its own in-house counsel would undercut the deterrent purposes of c. 93A and would implicitly reward the defendants for their questionable behavior.” *Id.*, \*4.

Here too, it should make no difference how the victim of abusive or frivolous litigation misconduct is compensating his/her lawyer. It is undoubtedly no accident that Civ. R. 37(A)(4) provides that the expenses must be “incurred” and not “actually incurred.” To the extent that *Register*, 116 Ohio St. 3d 88, can be construed as interjecting the term “actually” into the rule, then that view is unprecedented and should be dispelled.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the Eighth District's untenable opinion and reinstate Judge Fuerst's unerring sanctions order.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Merit Brief** has been sent by e-mail, on this 22<sup>nd</sup> day of May, 2014 to:.

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