ORIGINAL

In the
Supreme Court of Ohio

KRISTEL WILKINS,	:	Case No. 2013-1794
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
SHA'STE INC., ET AL.,	:	
	:	Court of Appeals
Appellees.	:	Case No. CA-12-99167

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF APPELLANT KRISTEL WILKINS

ANDREW S. POLLIS* (0046392)
**Counsel of Record*
YELENA GRINBERG, Legal Intern
PATRICK HANEY, Legal Intern
JOSHUAH LISK, Legal Intern
Milton A. Kramer Law Clinic
Case Western Reserve University
School of Law
11075 East Boulevard
Cleveland, Ohio 44106
216-368-2766
216-368-5137 fax
andrew.pollis@case.edu

Counsel for Appellant
Kristel Wilkins

WILLIAM D. MOORE* (0024303)
**Counsel of Record*
815 Superior Avenue, East
Suite 1717, Superior Building
Cleveland, Ohio 44114
216-771-6776
216-771-6778 fax
wmoore1864@sbcglobal.net

Counsel for Appellee
Process to Closing, LLC

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL HENDERSHOT (0081842)
Chief Deputy Solicitor
JEFFREY JAROSCH (0091250)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

FILED
MAY 23 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF *AMICUS* INTEREST 2

STATEMENT OF THE CASE AND FACTS 2

A. Wilkins sought reasonable expenses incurred in obtaining a motion to compel discovery and the trial court granted attorney's fees. 2

B. The Eighth District reversed the grant of attorney's fees because Wilkins was not obligated to pay her pro bono attorneys. 3

ARGUMENT 4

***Amicus Curiae* State of Ohio's Proposition of Law:**

A trial court may award "reasonable expenses incurred . . . including attorney's fees" to parties represented by pro-bono attorneys who are not paid based on an hourly rate for each particular service performed. 4

A. Following a successful motion to compel discovery, attorney's fees are recoverable if an attorney performed legal work to obtain the order to compel, even if the client was not required to pay an hourly fee for that work. 4

B. Nearly every other court to interpret the same or similar language has reached the opposite conclusion from the Eighth District. 6

C. The decision below undercuts basic fairness and this Court's support of pro bono work. 8

D. The harmful results of the Eighth District's decision extend far beyond the facts of this particular case. 10

E. This Court's prior decisions do not require a different result, and are consistent with an award of attorney's fees to an attorney not paid based on an hourly rate. 11

CONCLUSION 14

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Black v. Brooks,
827 N.W.2d 256 (Neb. 2013).....7

Blum v. Stenson,
465 U.S. 886 (1984).....6

Centennial Archaeology, Inc. v. AECOM, Inc.,
688 F.3d 673 (10th Cir. 2012).....6, 7

City of Wheat Ridge v. Cerveny,
913 P.2d 1110 (Colo. 1996).....7

Lee v. Green,
574 A.2d 857 (Del. 1990).....7

Miller v. Wilfong,
119 P.3d 727 (Nev. 2005).....7

State ex rel. Beacon J. Pub. Co. v. Akron,
104 Ohio St. 3d 399, 2004-Ohio-6557.....13

State ex rel. Besser v. Ohio State Univ.,
87 Ohio St. 3d 535 (2000).....12

State ex rel. Citizens for Open, Responsive & Accountable Government v. Register,
116 Ohio St. 3d 88, 2007-Ohio-5542.....*passim*

State ex rel. Freeman v. Wilkinson,
64 Ohio St. 3d 516 (1992).....13

State ex rel. O'Shea & Assocs. Co. v. Cuyahoga Metro. Hous. Auth.,
131 Ohio St. 3d 149, 2012-Ohio-115.....13

Vazquez v. Campbell,
146 P.3d 1 (Alaska 2006).....7

Wilkins v. Sha'ste Inc.
8th Dist. No. 99167, 2013-Ohio-3527.....3, 4, 9, 12

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1988.....6

Civ. R. 26(C).....10

Civ. R. 30(D) 10

Civ. R. 30(G) 10

Civ. R. 36(A)(3) 10

Civ. R. 37 ..... 1, 5, 6, 8

Civ. R. 37(A)(2) 4

Civ. R. 37(A)(4) ..... *passim*

Civ. R. 37(D) 3, 11, 12

Fed. R. Civ. P. 37 9

Fed. R. Civ. P. 37, Notes to 1970 Amendment, Subdivision (a)(4) 5

Gov. Bar. R. II(6) 5, 6

R.C. 109.02 10

R.C. 149.42(C)(2)(c) 13

R.C. 149.43(C)(1) 13

R.C. 1331.16(J) 11

R.C. 2307.62 11

R.C. 2307.70 11

R.C. 2323.51 11

R.C. 3115.24 11

R.C. 3127.42 11

R.C. 3734.43 11

R.C. 5321.16 11

OTHER AUTHORITIES

Clinics, Cleveland-Marshall College of Law,
https://www.law.csuohio.edu/academics/clinics (last visited May 22, 2014) 8

Clinics, University of Akron School of Law,
http://www.uakron.edu/law/clinical/index.dot (last visited May 22, 2014) 8

Clinics, University of Cincinnati College of Law, http://www.law.uc.edu/clinics (last visited May 22, 2014) 8

Legal Clinics, The University of Toledo College of Law, http://www.utoledo.edu/law/academics/clinics/index.html (last visited May 22, 2014) 8

Moritz College of Law, Clinics, http://moritzlaw.osu.edu/clinics/ (last visited May 22, 2014) 8

The Supreme Court of Ohio, Professional Ideals for Ohio Lawyers and Judges 9

INTRODUCTION

This case presents the Court with the opportunity to remedy a basic unfairness by treating parties to a lawsuit in the same way whether or not they are required to pay their attorneys traditional legal fees. The opinion below portends a categorical rule that prohibits parties who retain attorneys on a pro bono basis from recouping attorney's fees for the costs imposed in filing a motion seeking discovery under Civil Rule 37(A)(4). This Court should reaffirm that when a statute or rule grants "expenses incurred" as a deterrent to discovery or other abuse, recoverable expenses are incurred when an attorney performs legal work, not only when the client pays the attorney for that legal work. In reaching the opposite conclusion, the Eighth District misread this Court's precedent and imposed a new limitation on the receipt of attorney's fees. Unlike nearly every court to consider identical or similar language, the opinion below erred by interpreting this Court's precedent to reach the opposite, unfair result.

The Eighth District's opinion misreads Civil Rule 37, undercuts its purpose, and is inconsistent with prior decisions of this Court. The rule announced by the Eighth District would have cascading negative consequences. It would decrease deterrence of discovery abuses, increase litigation costs for the State of Ohio (and, ultimately, taxpayers), and burden courts with additional meritless discovery disputes. A common purpose of rules granting attorney's fees in this and similar contexts is to create an even playing field by discouraging certain types of abusive litigation tactics on threat of penalty. Yet the rule announced by the Eighth District below would have just the opposite effect, creating an uneven playing field and a barrier to legal recourse for parties represented not just by pro bono attorneys but also by, among others, government lawyers who do not charge government clients a fixed hourly fee.

STATEMENT OF *AMICUS* INTEREST

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

STATEMENT OF THE CASE AND FACTS

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

Kristel Wilkins retained the Milton A. Kramer Law Clinic Center at Case Western Reserve University School of Law to represent her pro bono and pursue claims related to a home-repair contract. The retainer agreement anticipated the possibility of attorney's fees: "If permitted under law the Law Clinic may seek an award of attorneys' fees against one or more adverse [parties] but will not seek attorneys' fees directly from the Client. Such a fee award will

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

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

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

Judge Stewart dissented, noting that *Register* was decided on evidentiary grounds—the moving party had simply not provided evidence from which the court could conclude it had

incurred attorney's fees. *Wilkins*, 2013-Ohio-3527 ¶¶ 18-19. In contrast, the dissent explained, "Wilkins did introduce evidence of her fee arrangement with the law clinic that required her to assist and cooperate with efforts to obtain attorney fees from adverse parties. This should suffice for a client who is being represented pro bono." *Id.* ¶ 19. The dissent highlighted that the majority's denial of fees was "in complete derogation of the Supreme Court Rules for the Government of the Bar of Ohio and bad public policy." *Id.* ¶ 17. And it concluded that the majority's rule "gives fee-for-service lawyers an unfair, and surely unintended, advantage over opposing counsel who are working pro bono, and is inconsistent with the Supreme Court's encouragement to provide pro bono legal services and to ensure access to the courts." *Id.* ¶ 25.

ARGUMENT

***Amicus Curiae* State of Ohio's Proposition of Law:**

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

Where a rule or statute allows a party to recover "expenses incurred" in order to deter litigation abuse and promote fair litigation, such expenses are incurred when an attorney performs legal work, not when the client pays a bill based on an hourly rate for those legal services. The Eighth District erred by interpreting this Court's decision in *Register* to require the opposite, unfair result. Nearly every other court to interpret the same or similar language has reached the opposite conclusion, and reversal is necessary in order to maintain basic fairness in litigation and this Court's longstanding support for pro bono representation.

A. Following a successful motion to compel discovery, attorney's fees are recoverable if an attorney performed legal work to obtain the order to compel, even if the client was not required to pay an hourly fee for that work.

Civil Rule 37(A)(4) allows an award of expenses to a party that successfully moves to compel discovery pursuant to Rule 37(A)(2). In such case, the court shall order the compelled

party "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." Civ. R. 37(A)(4). This rule allows the party that was forced to move to compel discovery to recover "reasonable expenses incurred."

In this context, attorney's fees are incurred when the attorney completes legal work, not when the client is asked to pay for that work based on an hourly rate. The basic purpose of granting attorney's fees following discovery abuses mandates this conclusion. A principal purpose of sanctions under Rule 37 is to create an even playing field, to promote fair litigation tactics, and to deter discovery abuses. *Cf.* Fed. R. Civ. P. 37, Notes to 1970 Amendment, Subdivision (a)(4) (discovery sanctions "should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists."). Expenses are "incurred" when the work is performed, not when the client pays for them. To conclude otherwise would not deter discovery abuses by opponents of parties represented pro bono, but would provide an incentive to engage in abusive litigation tactics. Furthermore, providing an incentive for some parties to abuse the judicial process while punishing others, based only on the way in which attorneys are compensated, undercuts the fair administration of justice.

Governance of the Bar Rule II, Section 6 shows that an award of attorney's fees was proper in this case, and that such fees are "incurred" when legal work is completed, not when the client pays for that work. Pursuant to that rule, legal interns *may not* charge fees, hourly or otherwise, to a financially needy client. Gov. Bar. R. II(6). Yet, a legal services organization "may be awarded attorney fees for services rendered by the legal intern . . . ." *Id.* This rule shows that attorney's fees are incurred when the work is performed, regardless of the attorney's

fee arrangement. Otherwise, it would *never* be possible for an organization to receive fees on behalf of work performed by a student intern, and Gov. Bar. R. II establishes that there is no such categorical rule.

B. Nearly every other court to interpret the same or similar language has reached the opposite conclusion from the Eighth District.

The Eighth District's holding means that all clients who retain an attorney other than through an hourly billing arrangement cannot use the protections of Civil Rule 37 and other similar rules that compensate parties for unjustified expenses related to discovery and other litigation abuses. None of those fee-shifting rules is so cramped as to be available only to certain types of client-attorney relationships. Indeed, a federal appeals court recently confronted language parallel to the many Ohio instances of "expenses incurred." The federal court considered a fee awarded to a client who had a fixed-fee arrangement, but its reasoning shows the obvious error of the Eighth District's holding for all instances where fees may be awarded for "expenses incurred." The sanctioned party argued that "it should not have to pay an attorney-fee award because none of the actions for which it was sanctioned increased the amount that [the movant] had to pay its attorney." *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 78 (10th Cir. 2012). The appeals court reviewed various federal statutes that allow for awards of attorney's fees, finding, for example, that under 42 U.S.C. § 1988, the United States Supreme Court had determined that "'Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.'" *Id.* at 679 (quoting *Blum v. Stenson*, 465 U.S. 886, 894 (1984)). The court noted "countless examples that the courts construe the term *attorney fees* to mean, not the amount actually paid or owed by the party to its attorney, but the value of attorney services provided to the party. . . . In other words, an 'attorney fee' arises when a party uses an attorney,

regardless of whether the attorney charges the party a fee . . . ." *Id.* The federal court's reasoning shows the heart of the Eighth District's misstep—"expenses incurred" refer to the value of the attorney time, not whether the attorney billed the client directly for the discrete time related to the discovery abuse.

Other state supreme courts, considering the issue in a variety of contexts have overwhelmingly held that parties represented by pro bono attorneys may receive attorney's fees, and that attorney's fees do not depend upon a particular fee arrangement. For example, the Supreme Court of Nebraska held that attorney's fees are available to parties represented pro bono under a statute that provided for such fees. "We have never said a fee agreement or any other agreement showing an obligation of the client to pay the attorney fees to the attorney is part of the proof that must be proffered in order to support an award of statutory attorney fees." *Black v. Brooks*, 827 N.W.2d 256, 264 (Neb. 2013); *see also, e.g.*, *Vazquez v. Campbell*, 146 P.3d 1, 3 (Alaska 2006) ("[W]e have consistently held that clients receiving free legal services may recover attorney's fees."); *Miller v. Wilfong*, 119 P.3d 727, 729 (Nev. 2005) ("[A] party is not precluded from recovering attorney fees solely because his or her counsel served in a pro bono capacity."); *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1117 (Colo. 1996) ("The court's task in assessing reasonable attorney fees under the circumstances of the case is not linked to the nature of compensation negotiated between the party and his or her attorney."); *Lee v. Green*, 574 A.2d 857, 859-60 (Del. 1990) ("As a general matter, awards of attorney fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards.").

C. The decision below undercuts basic fairness and this Court's support of pro bono work.

The decision below misreads Rule 37 and this Court's decision in *Register*. It also creates a series of cascading negative effects. To begin with, it is unfair to litigants represented by pro bono attorneys and other attorneys not using a traditional fee arrangement. This unfairness, in turn, undermines a major purpose of fee awards under the Rule by eliminating their deterrent effect for discovery abuses. Some attorneys could take advantage of this situation, burdening their opponents and, ultimately, increasing the burden on courts to respond to motions to compel and to manage discovery.

The Eighth District's holding will disadvantage and discourage pro bono representations. Parties, like Wilkins, often cannot afford an attorney and thus do not engage an attorney in a traditional fee relationship. By denying attorney's fees for these parties or their lawyers, the Eighth District imposes a barrier to pro bono representation. Law clinics at Ohio's public law schools are a major source of pro bono representation for parties who might be unable to seek legal recourse. *See* Clinics, University of Akron School of Law, http://www.uakron.edu/law/clinical/index.dot (last visited May 22, 2014); Clinics, Cleveland-Marshall College of Law, https://www.law.csuohio.edu/academics/clinics (last visited May 22, 2014); Moritz College of Law, Clinics, http://moritzlaw.osu.edu/clinics/ (last visited May 22, 2014); Clinics, University of Cincinnati College of Law, http://www.law.uc.edu/clinics (last visited May 22, 2014); Legal Clinics, The University of Toledo College of Law, http://www.utoledo.edu/law/academics/clinics/index.html (last visited May 22, 2014). The decision affects all of these public law clinics.

This Court has historically supported such pro bono work. "A Lawyer's Aspirational Ideals" specifically encourages attorneys "[t]o help provide the pro bono representation that is

necessary to make our system of justice available to all." And this Court's "Statement Regarding the Provision of Pro Bono Legal Services By Ohio Lawyers" strongly encourages "each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities." The Supreme Court of Ohio, Professional Ideals for Ohio Lawyers and Judges, at 14. By systematically putting parties represented pro bono at a disadvantage, the Eighth District's ruling undercuts this Court's longstanding support of pro bono representation.

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

D. The harmful results of the Eighth District's decision extend far beyond the facts of this particular case.

This opinion below would create unfairness to litigants in a wide variety of contexts. For example, the opinion below would systematically advantage opponents of state-government entities, which typically do not engage the Attorney General using a traditional fee arrangement like the one required by the Eighth District. The Attorney General is statutorily required to represent these entities, *see* R.C. 109.02, and, where attorney's fees are unavailable, this representation is ultimately funded by Ohio taxpayers. When additional expenses are incurred by the Attorney General due to discovery-related abuses, the Attorney General (and ultimately the taxpayer) should not suffer simply because the client, typically a government entity, does not pay an hourly rate to the lawyers representing that entity.

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

These consequences broadly reach not only across types of legal representation, but also across various rules and statutes. This case arose from Rule 37(A)(4) (sanctions following a motion to compel discovery), but many other rules and statutes provide for attorney's fees using similar "reasonable expenses incurred" language. *See, e.g.*, Civ. R. 26(C) ("expenses incurred in relation to [a] motion" for a protective order); Civ. R. 30(D) (motion to terminate or limit examinations); Civ. R. 30(G) (failure to attend a deposition); Civ. R. 36(A)(3) (motion related to

request for admissions). The General Assembly has enacted many statutes that also allow the recovery of attorney's fees incurred using language similar to Rule 37(A)(4). *See, e.g.*, R.C. 1331.16(J) (Attorney General may recover "reasonable expenses incurred in obtaining [an order to comply with an investigative demand], including attorney's fees . . ."); R.C. 2307.62 (attorney's fees available in civil action by cable television owner or operator); R.C. 2307.70 (attorney's fees available for "reasonable expenses incurred" in civil action for damages for vandalism, desecration or ethnic intimidation); R.C. 2323.51 (reasonable expenses incurred including attorney's fees available for frivolous conduct in filing claims); R.C. 3115.24 (attorney's fees for reasonable expenses incurred available under Uniform Interstate Family Support Act); R.C. 3127.42 (attorney's fees for reasonable expenses incurred available in action to enforce a child custody determination); R.C. 3734.43 (attorney's fees to landowner in suit over accumulation of scrap tires); R.C. 5321.16 (attorney's fees in suit against landlord for return of security deposit). Each of these rules and statutes cannot be intended to systematically favor parties represented by attorneys in a traditional hourly fee arrangement. Yet the opinion below would have just that effect and therefore must be reversed.

E. This Court's prior decisions do not require a different result, and are consistent with an award of attorney's fees to an attorney not paid based on an hourly rate.

The Eighth District erred by interpreting *Register* to mandate the illogical outcome that the availability of attorney's fees for a discovery abuse hinges on a party retaining an attorney using a particular fee arrangement. The Eighth District's decision that a party must be obligated to pay attorney's fees to recover those fees does not follow from *Register*. In that case, this Court considered a motion for fees under Rule 37(D) for failure to attend a deposition. *Register*, 116 Ohio St. 3d at 93. The Court described the standard for a motion for attorney's fees under Rule 37(D): "an award of attorney fees as a sanction for a discovery violation must actually be

incurred by the party seeking the award." *Id.* ¶ 24. The Court denied attorney's fees in *Register* because the movant had failed to produce evidence that those fees had been incurred. *Id.* As Judge Stewart noted in dissent, *Register* was premised on the absence of *evidence* of expenses incurred, not the type of fee arrangement under which they were incurred. *See Wilkins*, 2013-Ohio-3527 ¶ 19. The Court said nothing about what the fee arrangement was between the movant and its attorney, and its logic would apply equally to bar the recovery of attorney's fees by a party represented in a traditional fee relationship, by an in-house attorney, or by a pro-bono attorney. In each case, *Register* holds, it is necessary for the movant to produce *evidence* of the fees incurred. The Court did refer to the absence of *paid* fees rather than *incurred* fees—but in a traditional fee arrangement, these would be the same. *Register*, 2007-Ohio-5542 ¶ 24. The holding, like the Rule it applied is plain—recoverable attorney's fees are those that are *incurred.*

The Eighth District's decision also lacks support in other precedents of this Court. Nearly every case in which this Court has denied or reversed a grant of attorney's fees rests, like *Register*, on a lack of *evidence* of entitlement to such fees. This focus on evidence is consistent with the reasonable conclusion that a party represented by a government, pro-bono, contingency-fee, or flat-fee attorney may incur fees and be obligated to pay awarded fees to its attorney. For example, in a case where a husband represented a wife, this Court did not create a categorical rule that attorney's fees are never available, but has denied them where "[t]here is . . . no evidence or argument that [the party] actually paid or is obligated to pay attorney fees to her husband for his representation in this case." *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St. 3d 535, 542 (2000).

This Court has only identified a single group that is categorically prohibited from receiving attorney's fees on the basis of the nature of their representation—parties proceeding

pro se. In such cases this Court has reasoned that there can be no attorney's fee where there is no attorney. *See, e.g.*, *State ex rel. Freeman v. Wilkinson*, 64 Ohio St. 3d 516, 517 (1992) (the statute "provides for attorney fees, not compensation for *pro se* litigants"). The Eighth District's reasoning would extend this categorical prohibition on attorney's fees to government attorneys, pro-bono attorneys, and attorneys working in flat-fee and contingency-fee relationships. But there should be no categorical rule that parties in such relationships may not recover attorney's fees.

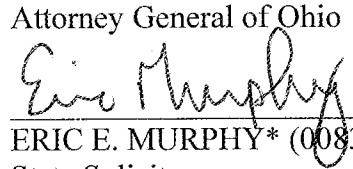
Following that principle, in considering attorney's fees granted to a plaintiff law firm that was represented by its principal attorney, fees were not available because the firm "introduced no evidence that it either paid or was obligated to pay its own counsel attorney fees." *State ex rel. O'Shea & Assocs. Co. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St. 3d 149, 2012-Ohio-115 ¶ 45. The Court did not hold that, as a rule, a partnership may not recover attorney's fees for work done by its own attorney. *Id.* In any event, the movant in that case sought attorney's fees under R.C. 149.43(C)(1), which provides attorney's fees to recoup the expense of compelling compliance with a public records request. Unlike *sanctions* for discovery abuses, attorney's fees in the public records context are explicitly *not* available to deter bad behavior, but are only "remedial and not punitive." R.C. 149.42(C)(2)(c). Similarly, in considering attorney's fees to in-house counsel, this Court has confined its holding to the evidence: "There is no evidence or suggestion that the Beacon Journal either paid or was obligated to pay its in-house counsel attorney fees in addition to her regular salary and benefits for the work she did . . . ." *State ex rel. Beacon J. Pub. Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, ¶ 62.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eighth District.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio



ERIC E. MURPHY* (0083284)
State Solicitor
*Counsel of Record
MICHAEL HENDERSHOT (0081842)
Chief Deputy Solicitor
JEFFREY JAROSCH (0091250)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

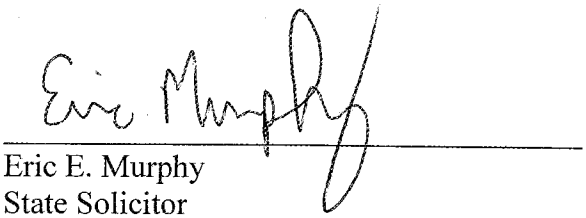
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellant Kristel Wilkins was served by U.S. mail this 23rd day of May, 2014 upon the following counsel:

Andrew S. Pollis
Yelena Grinberg, Legal Intern
Patrick Haney, Legal Intern
Joshuah Lisk, Legal Intern
Milton A. Kramer Law Clinic
Case Western Reserve University
School of Law
11075 East Boulevard
Cleveland, Ohio 44106

Counsel for Appellant
Kristel Wilkins

William D. Moore
815 Superior Avenue, East
Suite 1717, Superior Building
Cleveland, Ohio 44114

Counsel for Appellee
Process to Closing, LLC



Eric E. Murphy
State Solicitor