

ORIGINAL

IN THE SUPREME COURT OF OHIO

KRISTEL WILKINS,	)	SUPREME COURT
	)	CASE NO.: 2013-1794
Appellant,	)	
	)	ON APPEAL FROM THE COURT
vs.	)	OF APPEALS FOR THE EIGHTH
	)	APPELLATE DISTRICT
SHA'STE INCORPORATED, <i>et al.</i> ,	)	
	)	COURT OF APPEALS
Defendants,	)	CASE NO. CA-12-99167
	)	
and	)	
	)	
PROCESS TO CLOSING, LLC,	)	
	)	
Appellee.	)	

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BRIEF OF AMICI CURIAE OHIO LAW FIRMS  
IN SUPPORT OF APPELLANT KRISTEL WILKINS

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CLERK OF COURT  
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## STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are the following ten law firms, each with Ohio operations and origins: (1) BakerHostetler; (2) Benesch Friedlander Coplan & Aronoff LLP; (3) Bolek Besser Glesius LLC; (4) Calfee Halter & Griswold LLP; (5) The Chandra Law Firm LLC; (6) Frantz Ward LLP; (7) Hahn Loeser & Parks LLP; (8) Roetzel & Andress LPA; (9) Thompson Hine LLP; and (10) Ulmer & Berne LLP.

Each firm has a longstanding, demonstrated commitment to providing *pro bono* legal services to Ohioans unable to afford counsel. The decision below places these firms, in their *pro bono* cases, at a considerable disadvantage to adversaries that pay their lawyers. Those adversaries, under the lower court's ruling, would be insulated from sanctions for their own discovery misconduct, resulting in unequal access to the courts.

The following descriptions of Amici Curiae and their *pro bono* work help explain their interest in this case.

### BakerHostetler

BakerHostetler was founded in 1916, when its three founding partners each deposited \$500 into a firm account. Today, it has more than 800 partners and associates contributing to the success of its clients. The values they share are the same ideals on which the firm was founded: love and respect for the law, respect for each other, and the courage to make hard decisions on the basis of what they know to be right. One of America's largest law firms, BakerHostetler serves clients through its network of offices in eleven major U.S. business centers.

BakerHostetler's founding partners first served in municipal government, and then brought that commitment to community support into their legal practice. This dedication endures today through the firm's *pro bono* efforts. When the firm accepts a *pro bono* matter, its lawyers are committed to supporting that representation fully, with the same standards of professionalism, excellence, and respect that apply to the work they do for any client.

**Benesch Friedlander Coplan & Aronoff LLP**

Benesch is a business law firm with offices in Cleveland, Columbus, Indianapolis, Philadelphia, Shanghai, White Plains, and Wilmington. Benesch is dedicated to building a deep understanding of its clients, their businesses, and their industries. Its lawyers develop client-focused teams to ensure first-class legal service, view business issues from its clients' perspective, and assist in discovering the best legal services to address its clients' needs, drawing upon the strengths of diverse, knowledgeable, and experienced lawyers. The firm services national and international clients that include public and private, middle market and emerging companies as well as private equity funds, entrepreneurs, non-profit organizations, trusts and estates.

At any given time, lawyers and staff of the Benesch law firm provide *pro bono* litigation representation to individuals and entities throughout Ohio. Often these matters involve the prosecution or defense of lawsuits in the state courts of Ohio. Benesch engages in such representations in

order to assist those who have valid legal positions but cannot afford the services of a competent attorney.

**Bolek Besser Glesius LLC**

Bolek Besser Glesius LLC is a Cleveland, Ohio, law firm that focuses its practice on employment law, representing individuals primarily in the area of discrimination. The firm is dedicated to protecting the rights of workers and professionals who have experienced discrimination, harassment, retaliation, and other forms of unlawful mistreatment in the workplace.

The attorneys of Bolek Besser Glesius LLC have represented numerous *pro bono* clients in a variety of civil rights, housing, and employment matters. They have accepted *pro bono* cases from the United States Court of Appeals for the Sixth Circuit, the United States District Court for the Northern District of Ohio, the Cleveland Metropolitan Bar Association, Legal Aid, and the Case Western Reserve University Milton A. Kramer Law Clinic, among other organizations.

**Calfee Halter & Griswold LLP**

Founded in Cleveland in 1903, Calfee, Halter & Griswold LLP has been an important part of the Northeast Ohio business, legal and political communities for more than 100 years. With additional offices in Columbus and Cincinnati, its 150-plus lawyers counsel public and private clients on a variety of legal matters. As part of its civic commitment, Calfee actively provides *pro bono* legal services to various clients, including not-for-profit organizations

and disadvantaged individuals. These *pro bono* efforts have ranged from participation in law clinics run by the Cleveland Legal Aid Society, Board membership with the Ohio State Legal Services Association, and ongoing *pro bono* work for important community members like the Cleveland Rape Crisis Center.

### The Chandra Law Firm LLC

The Chandra Law Firm LLC focuses on high-profile criminal and civil trial and appellate litigation including advocacy in civil-rights, whistle-blower actions including the federal False Claims Act, white-collar criminal defense, insurance-coverage disputes, and business disputes, in both federal and state courts. The firm also performs internal investigations (including for Fortune 200 companies). Often, the dilemmas confronting the firm's clients have a crisis-communications, public-policy dimension requiring attorneys who understand how to navigate a challenging media environment, and protect reputations under public scrutiny.

The Chandra Law Firm LLC regularly performs *pro bono* civil and criminal-litigation services for clients unable to afford legal services. Among the firm's *pro bono* civil cases include civil-rights work, employment litigation, and foreclosure defense, as well as work for non-profit organizations.

### Frantz Ward LLP

Frantz Ward LLP is a Cleveland, Ohio, law firm providing labor and employment, construction, litigation, creditor's rights, and transactional services

to clients throughout the United States. The firm actively engages in a wide variety of *pro bono* legal work, including handling SSI disability appeals for children in northeast Ohio, landlord-tenant disputes, consumer protection actions, and providing transactional services to non-profits. Frantz Ward and its individual attorneys have been recognized for their commitment to *pro bono* and charitable causes.

#### Hahn Loeser & Parks LLP

Hahn Loeser & Parks LLP is a full-service law firm that, for over 90 years, has provided sophisticated and creative counsel to Fortune 500 corporations, privately-held businesses, non-profit institutions, governmental entities and individuals. The firm has a dominant presence in Ohio, with offices in Cleveland, Columbus, and Akron, as well as four cities outside the state.

Attorneys at Hahn Loeser & Parks have undertaken numerous *pro bono* litigation cases with the Sixth Circuit Court of Appeals, the United States District Court for the Northern District of Ohio, and other entities.

#### Roetzel & Andress LPA

Since its formation in 1876, Roetzel & Andress LPA has been guided by the principles of integrity, innovation, excellence in practice, and service to the community. Roetzel has grown substantially over the years and is now a full-service law firm with more than 200 attorneys in offices located throughout Ohio and Florida, and in Chicago, New York, and Washington, D.C. The firm provides comprehensive legal services to national and international corporations,

closely held and family-run businesses, institutions, charitable organizations and individuals.

The firm supports and encourages its attorneys to provide legal services pro bono to persons and organizations of limited means, and in that capacity, its attorneys have invested hundreds of hours in performing *pro bono* legal work over the past year. Roetzel's *pro bono* legal services have included estate planning, home foreclosures, real estate disputes, landlord/tenant matters, and civil rights cases. In addition, the firm contributes financially to local legal aid societies and provides free or discounted legal services to charitable organizations that are otherwise unable to afford legal counsel.

#### Thompson Hine LLP

Thompson Hine LLP counsels clients across the United States in various practice areas with more than 350 lawyers in seven offices, including offices in Cleveland, Columbus, Cincinnati, and Dayton. Each year, Thompson Hine's lawyers devote thousands of hours to counseling and representing clients who could not otherwise afford representation.

#### Ulmer & Berne LLP

A full-service firm with over 190 attorneys, Ulmer & Berne LLP maintains four offices across the Midwest. The firm represents a diverse client base across the United States and increasingly abroad, in both Asia and Europe. The firm's clients include publicly-traded and privately-held companies, financial institutions, hedge funds, private equity funds, pharmaceutical companies, international joint

ventures and affiliations, investor groups, family offices, start-ups and emerging businesses, public bodies and nonprofit organizations.

The firm encourages its attorneys to accept a variety of *pro bono* cases as part of their practices, which allows them to pursue cases that serve their own personal values and philanthropic goals, as well as create opportunities to affect change and encourage progress in our communities. As of November 2013, the firm had recorded 1,702 *pro bono* hours for that year, which continues the trend of increasing its *pro bono* hours each year. This equates to an average of nine hours per attorney for the first three quarters of last year.

## STATEMENT OF THE FACTS

Amici Curiae adopt the Statement of the Facts found in the brief on the merits filed by Appellant Kristel Wilkins.

## ARGUMENT

*Proposition of Law: A trial court may award reasonable attorney fees to a prevailing party under Civ. R. 37 regardless of that party's fee arrangement with counsel.*

The decision of the lower court, as the dissent recognized, amounts to “bad public policy.” *Wilkins v. Sha'ste Inc.*, 8th Dist. No. 99167, 2013-Ohio-3527, ¶ 17. The majority found that, under *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, an award of attorneys' fees as a sanction for discovery misconduct is not permitted where those fees are not actually incurred by the aggrieved party.

The lower court's holding undermines the efforts of *pro bono* attorneys to secure access to the legal system for citizens with less means. As a practical matter, the ruling means that clients represented by *pro bono* counsel are subject to possible sanctions for discovery misconduct while their counterparts are not. That tips the scales of justice against *pro bono* clients. After all, “the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.” Fed.R.Civ.P. 37 (advisory committee note)

(1970). Indeed, fee awards are “the most important available sanction to deter abusive resort to the judiciary.” *Id.*

Ohio Civil Rule 37 is modeled after its federal counterpart. *See* 2008 Staff Note, Civ.R. 37. And federal courts have rejected the faulty interpretation of that rule that the lower court embraced here. *See, e.g., Centennial Archaeology, Inc. v. Aecom, Inc.*, 688 F.3d 673, 679-80 (10th Cir. 2012). As one court pointedly observed, “[t]he purpose of Rule 37 attorney-fee sanctions would be thwarted if a party could escape the sanction whenever opposing counsel’s compensation is unaffected by the abuse[.]” *Id.*

*Wilkins* also runs counter to this Court’s perspective on the importance of *pro bono* work. *See* Supreme Court of Ohio, *Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers*, Sept. 20, 2007, <http://www.sconet.state.oh.us/AttySvcs/officeAttySvcs/proBono.pdf> (accessed Nov. 11, 2103). The stated goal of this Court’s effort to encourage more *pro bono* work is “to ensure equal access to our justice system for those who because of economic or social barriers cannot afford or secure legal counsel.” *Id.* By making the discovery playing field unequal, however, *Wilkins* does the opposite.

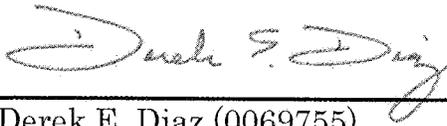
Finally, failing to reverse *Wilkins* could threaten untoward consequences for other rules. Different courts might find that the broad language in *Register*, about a party being unable to receive an award of fees unless that litigant has “actually paid or is obligated to pay” attorneys’ fees, could well apply to other situations. *Register*, 116 Ohio St. 3d at 93-94. For example, numerous rules

and statutes permit recovery of attorneys' fees for an adversary's litigation misconduct. *See, e.g.*, Civ.R. 11; Civ.R. 30(G)(1) (failure to attend scheduled deposition); R.C. 2323.51 (sanctions for litigation misconduct). This Court should reverse *Wilkins* and the related holding in *Register* to better ensure that all litigants are treated equally.

#### CONCLUSION

For these reasons, the Court should reverse the decision of the court below.

Respectfully submitted,



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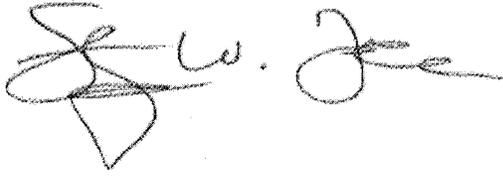
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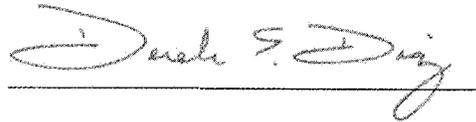
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