

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.)	

**MEMORANDUM OF AMICI CURIAE OHIO ATTORNEYS, OHIO LAW
FIRMS, AND OHIO EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF APPELLANT KRISTEL WILKINS'S
MOTION FOR RECONSIDERATION**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are the following ten law firms, four private attorneys, and one legal association, each with Ohio operations and origins: (1) BakerHostetler; (2) Bolek Besser Glesius LLC; (3) Calfee Halter & Griswold LLP; (4) The Chandra Law Firm LLC; (5) Frantz Ward LLP; (6) Nancy Grim; (7) Hahn Loeser & Parks LLP; (8) Denise J. Knecht; (9) Margolius, Margolius & Associates; (10) Anand N. Misra; (11) the Ohio Employment Lawyers Association; (12) Roetzel & Andress LPA; (13) Ivan L. Tamarkin; (14) Thompson Hine LLP; and (15) Ulmer & Berne LLP.

Each Amicus Curiae has a longstanding, demonstrated commitment to providing legal services to Ohioans unable to afford counsel, whether on a *pro bono* basis or through a contingency arrangement. The decision below places these firms, in their work representing Ohioans of limited means, 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.

ARGUMENT

Under S.Ct.Prac.R. 18.02(C), Amici Curiae urge the Court to reconsider its decision dismissing this cause as improvidently accepted.

In the lower court's decision, 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. As a practical matter, the ruling means that clients represented by *pro bono* and contingent counsel are subject to possible sanctions for discovery misconduct while their counterparts are not. As Justice Pfeifer recognized in his dissent, the holding "allows parties to commit discovery violations with some level of impunity." *Wilkins v. Sha-ste, Inc.*, --- Ohio St.3d ---, 2015-Ohio-477, --- N.E.3d ---, ¶ 4 (Pfeifer, J., dissenting).

Leaving the lower court's ruling intact leads to harmful consequences. For example, in cases with *pro bono* or contingent-fee lawyers, the decision opens the door to more discovery disputes. 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.* Without a meaningful threat of sanctions, lawyers opposite *pro bono* and contingent-fee counsel have less incentive to behave appropriately. The corresponding rise

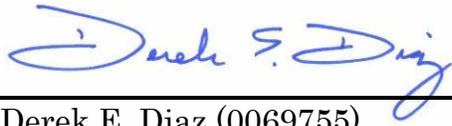
in discovery misconduct will only consume scarce judicial resources and bog cases down.

Also, the ruling below undermines this Court's repeated efforts to encourage *pro bono* work. Lawyers thinking about representing the indigent must now factor in the possibility that the effort might require them to face an increased level of discovery abuse. Of course, dissuading would-be volunteers is completely contrary to what this Court has tried to do.

Moreover, as the dissent in the lower court recognized, the majority's opinion amounts to "bad public policy." *Wilkins v. Sha'ste Inc.*, 8th Dist. No. 99167, 2013-Ohio-3527, ¶ 17 (Stewart, J., dissenting). The most critical tool for curbing discovery misconduct—monetary sanctions—has been withheld from the neediest of citizens, while that option remains at the disposal of those who are sufficiently well-off to pay for legal representation. That sort of arbitrary disparity does nothing to serve the interests of justice. The public would be better off if volunteer lawyers could turn over sanction awards to their sponsoring agencies.

The reasons for this Court's decision to dismiss this cause are unclear. Whatever those reasons may be, by letting the lower court's decision remain in place, the Court has passed on a crucial opportunity to correct an existing imbalance that unfairly favors opponents of *pro bono* and contingent-fee clients. Accordingly, Amici Curiae urge the Court to reconsider its decision and then to reverse the ruling of the court below.

Respectfully submitted,



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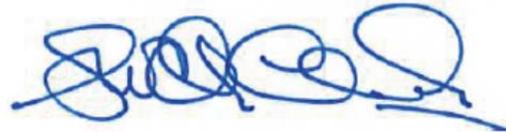
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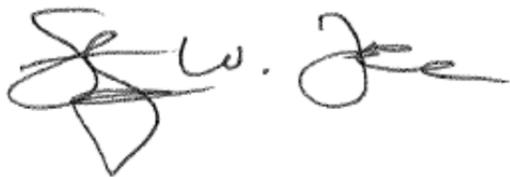
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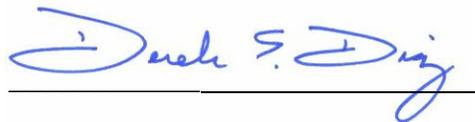
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