[Cite as ***Hikmet v. Turkoglu*, 2009-Ohio-6477.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Neset Hikmet et al.,	:	
Plaintiffs-Appellants/ [Cross-Appellees],	:	
	:	No. 08AP-1021
v.		(C.P.C. No. 05CVH07-7146)
	:	
Mehmet Turkoglu et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellees/ [Cross-Appellants].	:	

D E C I S I O N

Rendered on December 10, 2009

The Copley Law Firm, *LLC*, *Michael F. Copley* and *Kenley S. Maddux*, for appellants/cross-appellees.

The Brunner Firm Co., L.P.A., *Rick L. Brunner*, *Patrick M. Quinn* and *Michael E. Carleton*, for appellees/cross-appellants.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiffs-appellants/cross-appellees, Neset and Hatice Hikmet ("appellants" or "the Hikmets"), appeal from the judgments of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees/cross-appellants, Mehmet Turkoglu, Dr. Aziz Alasyali, and Aziz Alasyali as Trustee of the Dr. Aziz Alasyali and Ulker Alasyali Foundation ("appellees" collectively), and also granting an award of attorneys' fees in appellees' favor.[1] Appellees also filed a cross-appeal regarding the attorneys' fees and costs award.[2] For the reasons that follow, we affirm the judgments of the trial court.

{¶2} On or about July 28, 1998, appellee Dr. Aziz Alasyali ("Dr. Alasyali") created the Dr. Aziz Alasyali and Ulker Alasyali Foundation ("the Foundation"). The Foundation was established as a charitable trust foundation. Dr. Alasyali made an initial cash contribution of $200,000 to the Foundation and later also donated real estate. As a result of the creation of the Foundation, Dr. Alasyali recognized positive personal tax consequences, due to his contributions and donations to the Foundation. Upon the initial creation of the Foundation, appellant Neset Hikmet ("Neset") was established as the co-trustee.

{¶3} As trustee, Neset was responsible for the administration of the Foundation funds. Dr. Alasyali also gave Neset full authority over his personal finances. On September 26, 2000, Dr. Alasyali signed a power-of-attorney authorizing Advest, Inc. to follow all instructions from Neset regarding Dr. Alasyali's personal finances.

{¶4} In January 2004, Dr. Alasyali signed an amendment to the Foundation's Trust Agreement. The amendment revoked Neset as the co-trustee and established Dr. Alasyali as the sole trustee. Appellee Mehmet Turkoglu ("Turkoglu"), the brother of appellant Hatice Hikmet, was named as the successor trustee.

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[1] After the notice of appeal was filed in this action, appellee, Dr. Aziz Alasyali, passed away. Appellee, Mehmet Turkoglu, as Executor of the Estate of Aziz Alasyali, has been substituted for the decedent.

[2] Although appellees have also filed a cross-appeal, for ease in discussion, we will refer to Mehmet Turkoglu, Dr. Aziz Alasyali, and Aziz Alasyali as Trustee of the Dr. Aziz Alasyali and Ulker Alasyali Foundation collectively as "appellees" and refer to Neset and Hatice Hikmet collectively as "appellants" throughout this decision.

{¶5} On February 10, 2004, Dr. Alasyali filed suit against appellants in the state of Florida ("the Florida action"). Dr. Alasyali alleged Neset breached his fiduciary duty as the Foundation's trustee and embezzled Foundation funds and also misappropriated Dr. Alasyali's personal finances.

{¶6} On May 14, 2004, appellees filed suit against appellants in Franklin County, Ohio. The allegations in the 2004 Franklin County action were the same as those asserted in Florida. Neset denied the allegations and the Hikmets filed a counterclaim asserting causes of action such as defamation, breach of an obligation to pay, and an accounting.

{¶7} On January 24, 2005, appellants and appellees mediated the Florida action with their attorneys. Both parties acknowledged improper use of the trust for personal expenses over the course of its existence. The mediation resulted in an agreement to resolve both the Florida action and the suit filed in Franklin County. The parties entered into a settlement agreement on January 25, 2005, whereby appellants were to transfer ownership and control of certain E-Trade investment accounts to the Foundation. Said transfer occurred on March 7, 2005. As part of the settlement agreement, appellants also agreed to convey title in certain real estate located in Columbus, Ohio and Sarasota, Florida to Dr. Alasyali. Said conveyances occurred on March 2 and 3, 2005, respectively. Appellants assert these transferred assets were worth at least $785,000. The assets were accumulated as a result of the questionable handling of the trust.

{¶8} In turn, the settlement agreement required Dr. Alasyali to "take all reasonable steps necessary to request the Internal Revenue Service to retroactively void the Foundation *ab initio*[.]" Furthermore, the settlement agreement required the parties to refrain from making any "disparaging remarks" about one another and from "instituting, initiating, commencing, or maintain[ing] (either directly or indirectly) any investigation or suit, whether civil, criminal, or administrative against or involving one another."

{¶9} As a result of the settlement agreement, the Florida action and the Franklin County action filed in 2004 were dismissed. However, the settlement agreement also provided that if one party sought to enforce the settlement agreement, the prevailing party would be entitled to an award of attorneys' fees and costs.

{¶10} The underlying dispute concerns the interpretation and enforcement of the January 25, 2005 settlement agreement. On July 1, 2005, appellants filed the instant action in Franklin County, Ohio. Appellants then filed an Amended Complaint on September 9, 2005. Based upon the January 25, 2005 settlement agreement, they alleged causes of action for breach of contract, declaratory judgment, fraud in the inducement, tortious interference, accounting, specific performance, rescission, defamation, breach of fiduciary duty, conversion, and attorneys' fees, among other causes of action. In response, appellees filed a counterclaim for attorneys' fees.

{¶11} Specifically, and relevant to the instant appeal, appellants alleged that Dr. Alasyali failed to perform his duties under the settlement agreement, including his duty to file "any and all tax returns and other governmental filings" and his duty to take "all reasonable steps necessary to request the Internal Revenue Service to retroactively void the Foundation *ab initio*[.]" Appellants also alleged the appellees made various "disparaging remarks" against them and violated the settlement agreement by instituting, initiating, commencing, or maintaining an investigation by informing the Internal Revenue Service ("IRS"), that unauthorized withdrawals were made from the Foundation, which allegedly prompted an IRS audit of the Hikmets. Appellants further alleged Dr. Alasyali only agreed to void the Foundation ab initio in order to fraudulently induce the appellants to transfer the funds in the E-Trade investment accounts and the titles to the two properties to him. They allege Dr. Alasyali never actually intended to use those assets to restore the Foundation or to void the Foundation ab initio.

{¶12} On January 31, 2006, appellees filed a motion for summary judgment. On February 17, 2006, appellants filed a Civ.R. 56(F) motion requesting additional time to file their memorandum contra to the summary judgment motion, arguing that additional discovery was needed to respond and appellees had refused to produce said discovery. The trial court granted the Civ.R. 56(F) request for additional time over the opposition of appellees. Appellees then refused to produce the discovery requested by appellants, who subsequently filed a motion to compel. The trial court granted the motion to compel and ordered appellees to produce the additional discovery. Throughout this dispute, multiple status conferences were held with the trial court and the deposition of Dr. Alasyali was also taken at the courthouse.

{¶13} On September 5, 2006, appellants filed their memorandum contra to appellees' motion for summary judgment. On November 1, 2006, appellees filed a reply brief. On January 18, 2007, the trial court granted summary judgment in favor of appellees, which included awarding attorneys' fees and costs to appellees as the prevailing party, in an amount to be determined at a hearing.

{¶14} Additional discovery disputes continued at length regarding appellees' billing invoices. The trial court subsequently referred the issue of whether the attorneys' fees sought by appellees were reasonable to one of its magistrates for a hearing. The hearing was held on May 22, 2008. During the hearing, appellees claimed the total amount of attorneys' fees owed was $133,419.22, plus fees incurred after June 19, 2008, plus the full, final invoice amount of their expert. Appellants claimed the total award should be $10,000.

{¶15} The magistrate issued a decision on July 2, 2008, awarding attorneys' fees to appellees at a reduced rate and in a reduced amount totaling $63,549.50. The magistrate also awarded some costs ($8,245.52) and some expert expenses ($10,203.58).

{¶16} Both parties filed objections to the magistrate's decision. In their objections, appellees claimed that, at a minimum, they should be awarded attorneys' fees of $110,000 and the full amount of their expert fee of $15,660.86. Appellants continued to argue the award should be no more than $10,000. The trial court adopted the magistrate's decision on October 21, 2008.

{¶17} Appellants filed a timely appeal and advance the following assignments of error for our review:

> First Assignment of Error: The trial court erred by finding no genuine issue of material fact that Defendants-Appellees "took all reasonable steps necessary to request the Internal Revenue Service to retroactively void the Foundation *ab initio*" as mandated by the Settlement Agreement and the agreement of the parties as they negotiated the particulars of the filings with the Internal Revenue Service.
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> Second Assignment of Error: The trial court erred in finding no genuine issue of material fact that Defendants-Appellees filed "any and all tax returns and other governmental filings" as mandated by the settlement agreement when they failed to file an amended return for 1998 withdrawing the deduction for deposits to the trust funds deposited by Defendant [Dr.]

> Alasyali and failed to amend his personal return to report the original deduction as income.
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> Third Assignment of Error: The trial court erred in finding no genuine issue of material fact that Defendants-Appellees did not make "disparaging remarks" about Plaintiff-Appellants in violation of the Settlement Agreement when it alleged that funds were embezzled from the Trust in documents filed with the Internal Revenue Service.
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> Fourth Assignment of Error: The trial court erred in finding no genuine issue of material fact that Defendants-Appellees did not "institute, initiate, commence, or maintain (either directly or indirectly) any investigation" against Plaintiff-Appellee in violation of the Settlement Agreement when they alleged that funds were embezzled from the Trust in documents filed with the Internal Revenue Service.
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> Fifth Assignment of Error: The trial court erred in failing to find a genuine issue of material fact that the Settlement Agreement was entered into based upon the mutual mistake of the parties or unilateral mistake of Plaintiff that the Foundation could file returns unwinding the trust *ab initio as agreed*.
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> Sixth Assignment of Error: The trial court erred in concluding that the Appellee was the "prevailing party" as a matter of law, because genuine issues of material fact existed as to whether, under all of the facts and circumstances of the case, the Appellee was the prevailing party.
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> Seventh Assignment of Error: The trial court award of attorneys fees [is] not supported by the evidence.

{¶18} Appellees filed a notice of cross-appeal and advance one assignment of error as follows:

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO AWARD CROSS APPELLANTS ALL OF THEIR REASONABLE ATTORNEY'S FEES AND EXPENSES TO WHICH THEY ARE ENTITLED PURSUANT TO THE PARTIES CONTRACTUAL AGREEMENT[.]

{¶19} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶20} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶21} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶22} Appellants' first and second assignments of error are interrelated, and therefore, the court shall address them jointly.

{¶23} In their first assignment of error, appellants argue Dr. Alasyali has failed to take "all reasonable steps necessary to request the Internal Revenue Service to retroactively void the Foundation *ab initio*" as set forth under paragraph 5 of the settlement agreement. In their second assignment of error, appellants argue that Dr. Alasyali failed to file "any and all tax returns and other governmental filings" as required by paragraph 5 of the settlement agreement by refusing to file an amended 1998 tax return for the Foundation and by refusing to file an amended 1998 personal return. Appellants submit that the trial court erred in granting summary judgment on these claims, as genuine issues of material fact still remain. We disagree.

{¶24} Paragraph 5 of the settlement agreement reads as follows:

> Aziz Alasyali and Neset Hikmet, individually and as trustees (present and former) of the Dr. Aziz Alasyali and Ulker Alasyali Foundation (the "Foundation") agree to cooperate with one another and with said Foundation to file any and all tax returns and other governmental filings and to minimize any Foundation and/or individual tax liabilities arising from or related to their dealings with the Foundation. Aziz Alasyali will forthwith take all reasonable steps necessary to request the Internal Revenue Service to retroactively void the Foundation *ab initio* and Neset Hikmet will cooperate fully in those efforts.

{¶25} In these combined assignments of error, appellants argue that the three-sentence statement attached to the tax returns that were filed is insufficient to meet the requirement to void the Foundation ab initio because it does not "request" the IRS to do anything. Appellants argue that Dr. Alasyali has "intentionally thwarted" the IRS' ability to void the Foundation ab initio by refusing to file amended tax returns for 1998. Without the filing of "any and all tax returns," including the amended 1998 tax returns, appellants argue the Foundation cannot possibly be voided ab initio because Dr. Alasyali still retains the benefit of a very sizable deduction. Appellants submit that failure to file "any and all tax returns and other governmental filings" is a breach of the settlement agreement. Additionally, appellants submit there are several "reasonable steps" which Dr. Alasyali could have and should have taken to request that the Foundation be void ab initio, such as contacting the IRS via telephone to determine the proper procedures to be followed in making his request, or actually making a "request" that the Foundation be void.

{¶26} The notes attached to the tax returns and amended tax returns filed by Dr. Alasyali state as follows:

> Dr. Aziz Alasyali created a trust on July 24, 1998. Since its inception, the Trust has not operated nor has it qualified as a tax-exempt charitable entity and as such the Trust was void ab initio. The Trust operated as a "grantor-type trust" and all income, losses and/or deductions will be reported by Aziz Alasyali on his personal income tax returns, SS# 276-38-[xxxx].

{¶27} Because Dr. Alasyali has not filed amended tax returns for 1998, appellant argues there is, at a minimum, a genuine issue of material fact as to whether the settlement agreement was breached. Appellant also argues there is a question of fact as to whether or not Dr. Alasyali took all reasonable steps to void the Foundation ab initio.

{¶28} Based upon the language contained in the settlement agreement, it is apparent the parties intended to request that the IRS declare that the Foundation was not a valid charitable foundation and that it had never operated as such, and therefore it should be void ab initio. Through the terms of the settlement agreement, the parties agreed to work towards this goal by filing "any and all tax returns and other governmental filings" and by requiring Dr. Alasyali to "take all reasonable steps necessary to request the [IRS] to retroactively void the Foundation *ab initio*."

{¶29} However, the settlement agreement provides no detail as to which specific "tax returns" and "governmental filings" must be filed to accomplish this goal. Despite appellants' contentions that the settlement agreement requires the tax returns to be filed "from the beginning," we find the plain language of the settlement agreement simply requires that "any and all tax returns and other governmental filings" be filed, without further specificity.

{¶30} Dr. Alasyali filed original returns for 2000, 2001, and 2005, and amended returns for 2002, 2003, and 2004. While appellants assert that the 1998 tax returns must be amended and that, without it, the Foundation cannot possibly be voided ab initio, appellants have cited to absolutely no authority to back up this assertion. Appellants have failed to point this court to any statute or regulation or case law or correspondence from the IRS which indicates that the filing of an amended 1998 tax return is a prerequisite to having the Foundation voided ab initio. Appellants' mere contention that the 1998 amended returns are indispensable to voiding the Foundation ab initio is not sufficient. If the filing of the amended 1998 tax return is really the critical linchpin upon which the voiding of the Foundation turns, appellants would have been better served by including such a requirement in the settlement agreement. Furthermore, the settlement agreement simply references "any and all tax returns" and "other governmental filings," without making any specific reference to any *amended* tax returns or to tax returns for specific years.

{¶31} Moreover, the IRS has been sufficiently notified of the parties' intention to request that the Foundation be declared void ab initio because it has never operated as a valid charitable organization. This has been accomplished via the three-sentence note attached to the returns and amended returns filed by Dr. Alasyali. Neither party has the authority to compel the IRS, a federal government agency, to actually void the Foundation ab initio. The filing of multiple tax returns and amended tax returns with the language set forth above, which clearly indicates that the Foundation has not operated or qualified as a tax exempt charitable entity, is more than enough notice to alert the IRS as to the true status and character of the Foundation.

{¶32} The "long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominial, trifling, or technical departures are not sufficient to breach the contract." *U.S. Bank, N.A., v. Stewart*, 2nd Dist. No. 21775, 2007-Ohio-5669, ¶42, quoting *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, paragraph 2 of the syllabus.

{¶33} If there has been substantial compliance, there is no breach of contract. *King Thompson v. Executive Transport Serv.*, 6th Dist. No. E-03-018, 2004-Ohio-686, citing *Bumbera v. Hollensen* (Mar. 17, 2000), 6th Dist. No. OT-99-064. "Substantial performance of a contract is interpreted to mean * * * that slight departures, omissions and inadvertences should be disregarded." *Kichler's, Inc. v. Persinger* (1970), 24 Ohio App.2d 124, 126. See also *King Thompson*. "For the doctrine of substantial performance to apply, the part unperformed must not destroy the value or purpose of the contract." *Hansel v. Creative Concrete & Masonry Constr. Co*., 148 Ohio App.3d 53, 2002-Ohio-198, citing *F.C. Machine Tool & Design, Inc. v. Custom Design Technologies, Inc*., 5th Dist. No. 2001CA00019, 2001-Ohio-7047.

{¶34} Appellants have pointed to no authority which demonstrates that the filing of amended tax returns for 1998 is required in order to have the IRS declare the Foundation void ab initio. Nor have appellants produced any witnesses or experts to testify to this. We have not been pointed to any authority which urges us to find that the filing of the 1998 amended tax returns would affect the ability of the IRS to declare the Foundation void ab initio or that without such a filing, the Foundation cannot be declared void ab initio by the IRS.

{¶35} It is also significant to note that, during the pendency of this action in the trial court, the IRS began an inquiry into the Foundation. Notification of the inquiry was made via letter dated February 13, 2006 by the IRS and addressed to the CPA of the Dr. Aziz and Ulker Alasyali Foundation. (R. 98 at exhibit No. A-3.) The letter indicates the Foundation's tax returns will be examined "to verify the correctness of income or gross receipts, deductions and credits, and to determine that the organization is operating in the manner stated and for the purpose set forth in its application for recognition of exemption." (R. 98 at exhibit No. A-3.) The outcome of said examination is not contained in the record and is unknown to this court. However, it is apparent that Dr. Alasyali's actions were sufficient in requesting that the IRS void the Foundation ab initio, as an investigation was commenced. The settlement agreement does not require him to actually guarantee that the request will be granted.

{¶36} Despite this, appellants continue to assert that there remains a genuine issue of material fact as to whether appellees took "all reasonable steps" to request that the Foundation be void ab initio. Appellants further argue that Dr. Alasyali could have and should have attempted efforts such as: writing a letter to the appropriate person at the IRS to explain the circumstances and requesting the Foundation be void ab initio, trying to work with the IRS via telephone to determine the procedures to make a request to void the Foundation or making such a request orally over the telephone, or making an actual "request" in the notes attached to his tax returns, rather than simply making a declarative statement. Yet, there is nothing in the settlement agreement that specifically requires them to take any of these actions. This issue is not a genuine issue of material fact because once appellees informed the IRS that the Foundation had never operated as a charitable organization and that it was void ab initio, no reasonable jury could possibly find that appellees had failed to take all reasonable steps to request the IRS to retroactively void the Foundation ab initio.

{¶37} We further note that, in a contract action, parol evidence is admissible only where the terms of the contract are ambiguous and then, only to interpret the express contractual language. *Yoder v. Thorpe*, 10th Dist. No. 07AP-225, 2007-Ohio-5866, citing *Grange Life Ins. Co. v. Bics* (Sept. 12, 2001), 9th Dist. No. 01CA007807. While we do not find the settlement agreement here to be ambiguous, we feel compelled to note that the record contains an e-mail exchange between counsel for appellants and counsel for appellees that occurred between May 27 and May 31, 2005, which suggests that appellants' counsel proposed the method by which Dr. Alasyali should approach the termination of the Foundation with the IRS. (R. 98 at exhibit No. A-1.) This proposal provided that tax returns must be filed for all open years and must reflect that the Foundation was void, and that all previously filed returns must be amended to reflect that the Foundation was ab initio.[3] It is difficult, if not impossible, for appellants' to now argue that additional "reasonable steps" should have been taken.

{¶38} Based upon the reasoning set forth above, we overrule appellants' first and second assignments of error.

{¶39} In their third assignment of error, appellants argue the trial court erred in finding appellees did not make "disparaging remarks" in violation of the settlement agreement when they filed documents with the IRS alleging that funds were embezzled from the Foundation. We disagree.

{¶40} Paragraph 8 of the settlement agreement at issue states in relevant part: "[t]he parties hereto will refrain from making any disparaging remarks about one another." "Disparage" is defined as "to bring reproach or discredit upon," and "to speak of or treat slightingly; depreciate; belittle." Webster's Encyclopedic Unabridged Dictionary (Random House 1997).

{¶41} Appellants argue that an untrue accusation of embezzlement is a "disparaging remark" on its face. While the tax returns did not specifically name Neset as the perpetrator, appellants argue the trial court ignored the fact that there were only two

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[3] The referenced e-mail mistakenly refers to the voiding of the Foundation as "void abs initial," rather than void ab initio.

trustees during that time period who were authorized to make withdrawals from the Foundation: Dr. Alasyali and Neset Hikmet. Because Dr. Alasyali was the person making the accusations on the tax returns, that left only Neset as the alleged perpetrator. Appellants contend the IRS obviously knew the accusations were directed at Neset because it subsequently audited the Hikmets. Additionally, the Hikmets submit Dr. Alasyali continued to make disparaging remarks by repeating the accusations regarding the unauthorized withdrawals throughout the underlying proceedings.

{¶42} Appellants further point out that, along with his memorandum contra the motion for summary judgment filed in the trial court, Neset attached an affidavit wherein he swears that he did not make any unauthorized withdrawals from the Foundation and attempts to account for all of the funds. Appellants submit that the affidavit raises genuine issues of material fact as to the truth of Dr. Alasyali's accusations.

{¶43} We find this assignment of error to be without merit for several reasons. First, we have not been pointed to any documents which accuse the Hikmets of "embezzling." The Foundation's tax returns only indicate that "unauthorized withdrawals" were made from the assets of the Foundation. It is undisputed by everyone involved that the assets of the Foundation were in fact used for unauthorized purposes which were not in line with the terms of the Foundation's governing documents, given that the parties admitted the Foundation's funds were used for personal trips to Turkey and for paying Dr. Alasyali's personal taxes, among other uses. Thus, the characterization of the funds at issue as "unauthorized withdrawals" is not inaccurate.

{¶44} Second, the Foundation tax documents which reference "unauthorized withdrawals" do not implicate anyone by name, let alone implicate Neset Hikmet by name. Additionally, even if they did implicate a particular individual, which they do not, "unauthorized withdrawals" are not the same as "embezzlement."

{¶45} Third, while Dr. Alasyali's personal tax returns reflect cash embezzlements, again, there is nothing to implicate Neset. These documents do not identify who embezzled from Dr. Alasyali or provide any details regarding the embezzlement. Furthermore, appellants' claim that the IRS must have known Dr. Alasyali was implicating Neset as the embezzler regarding the funds in his personal accounts because Neset was the trustee for the Foundation is not based upon any evidence in the record but upon pure speculation.

{¶46} Finally, appellants' claim that appellees breached the non-disparagement provision of the settlement agreement based upon their conduct throughout this litigation is also meritless.

{¶47} "[U]nder the doctrine of absolute privilege in a judicial proceeding, a claim alleging that a defamatory statement was made in a written pleading does not state a cause of action where the allegedly defamatory statement bears some reasonable relation to the judicial proceeding in which it appears." *Surace v. Wuliger* (1986), 25 Ohio St.3d 229, 233. See also *Hecht v. Levin*, 66 Ohio St.3d 458, 1993-Ohio-110. This privilege also extends to certain extrajudicial communications involving attorneys and parties in a case. *Michaels v. Berliner* (1997), 119 Ohio App.3d 82, 88. See also *Morrison v. Gugle* (2001), 142 Ohio App.3d 244. Here, appellants claim the statements at issue were made in the course of the litigation.

{¶48} Moreover, rather than simply asserting that defamatory statements were made, appellants are also asserting that disparaging remarks were made throughout the course of this litigation and in breach of the settlement agreement. However, where claims of disparagement are based upon statements that are qualifiedly privileged under defamation law, the protection afforded those statements also applies to a derivative claim like disparagement. In order to succeed on a disparagement claim, appellants must prove by clear and convincing evidence that the communication was made with actual malice, which they have failed to do. See *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. Constr. Trades Council*, 73 Ohio St.3d 1, 15, 1995-Ohio-66.

{¶49} For these reasons, we overrule appellants' third assignment of error.

{¶50} In their fourth assignment of error, appellants argue the trial court erred in finding there was no genuine issue of material fact that appellees did not "institute, initiate, commence, or maintain (either directly or indirectly) any investigation" against appellants, in violation of the settlement agreement.

{¶51} Paragraph 8 of the settlement agreement reads as follows: "The parties hereto will refrain from making any disparaging remarks about one another and from instituting, initiating, commencing, or maintain[ing] (either directly or indirectly) any investigation or suit, whether civil, criminal, or administrative against or involving one another."

{¶52} Appellants contend that, as a result of Dr. Alasyali's allegations that "unauthorized withdrawals" were made from the Foundation, the IRS audited the Hikmets, forcing them to spend considerable time proving to the IRS that Neset had not made any unauthorized withdrawals. Appellants argue that Dr. Alasyali initiated or commenced this IRS investigation, or that, at a minimum, there is a genuine issue of material fact as to whether or not Dr. Alasyali's actions initiated or commenced the IRS investigation, either directly or indirectly, in violation of the settlement agreement. Appellants further argue that, but for Dr. Alasyali's statement that "unauthorized withdrawals" were made, the audit would not likely have occurred.

{¶53} Neset swears in his affidavit, which was also before the trial court, that the allegations set forth on Dr. Alasyali's personal tax returns asserting that he was the victim of embezzlement are what prompted the IRS to conduct an audit of the Hikmets' personal tax returns. However, other than this self-serving, personal affirmation, the Hikmets have produced absolutely no evidence to support this claim. In fact, it is purely speculation on the part of the appellants. There is no testimony or documentation from anyone affiliated with the IRS stating that the cause of the audit is in fact the allegations set forth by Dr. Alasyali on his tax returns. Additionally, Neset is not employed by the IRS, nor has he sworn that he has received documentation from the IRS stating that the audit was "prompted" by Dr. Alasyali's statements on his tax returns. Neset himself has no personal knowledge as to what "prompted" him to be audited.

{¶54} Pursuant to Civ.R. 56(E), affidavits submitted in support of and opposition to summary judgment must be "made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated in the affidavit." Information in affidavits that is not based upon such personal knowledge and which does not fall within any of the permissible exceptions to the hearsay rule may be properly disregarded by the trial court. *Cincinnati Ins. Co. v. Thompson & Ward Leasing Co*., 158 Ohio App.3d 369, 374, 2004-Ohio-3972, ¶13, citing *Pond v. Carey Corp*. (1986), 34 Ohio App.3d 109, 111.

{¶55} Without personal knowledge regarding the inner-workings of the IRS and the cause of the audit, Neset's affidavit cannot be considered admissible evidence to prove this claim. Furthermore, as the trial court properly concluded, the mere fact that an audit occurred is not enough. Despite appellants' assertion to the contrary, no reasonable fact finder could easily conclude that Neset, as the subject of the audit, but without more, was in a good position to obtain personal knowledge of the subject of the audit. Therefore, we find appellants have failed to meet their burden and overrule their fourth assignment of error.

{¶56} In their fifth assignment of error, appellants argue the trial court erred in failing to find a genuine issue of material fact as to whether the settlement agreement was entered into based upon a mutual or unilateral mistake.

{¶57} Appellants contend that the settlement agreement should be rescinded under the equitable doctrines of mutual mistake or unilateral mistake because the parties entered into the settlement agreement based upon the mistaken belief that the Foundation could be voided ab initio. If the tax code, specifically 26 U.S.C. 6501, prohibits appellees from filing amended 1998 tax returns, appellants submit that the settlement agreement should be rescinded because the primary purpose of the agreement, which was to void the Foundation ab initio, has been frustrated. Appellants further argue that if appellees were aware of this at the time the agreement was signed, or if appellees had no intention of filing the amended 1998 tax returns at the time the agreement was executed, then the agreement should be rescinded due to a unilateral mistake or fraud.

{¶58} "A mutual mistake of fact is present when a mistake by both parties as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances." *Motorists Mut. Ins. Co. v. Columbus Fin., Inc*., 168 Ohio App.3d 691, 696, 2006-Ohio-5090, ¶10, citing *Reilley v. Richards* (1994), 69 Ohio St.3d 352, citing Restatement of the Law (Second), Contracts (1981), Section 152(1). "The rule of mutual mistake is applicable in those situations in which the parties are mistaken as to a vital existing fact at the time of contracting." *Motorists Mut. Ins. Co. at* ¶10, citing *Mollenkopf v. Weller*, 10th Dist. No. 03AP-1267, 2004-Ohio-5539. The intention of the parties must be frustrated by the mutual mistake. *Reilley* at 353.

{¶59} We find there are no genuine issues of material fact remaining as to appellants' claim for rescission of the settlement agreement on the grounds of mutual mistake. As appellants have conceded, and as appellees have noted, there is no evidence in the record to demonstrate the existence of a mutual mistake, as it is unknown whether appellees shared the same purported "mistaken belief" at the time the settlement agreement was executed. Furthermore, despite making such an argument in the trial court, appellees have not continued to advance the argument that they are precluded from filing an amended 1998 tax return based upon the tax code and the expiration of more than three years since the filing of the original return. Although appellees made that argument in the trial court, there is no indication that the trial court based its determination upon that argument, as it did not attempt to interpret the federal tax code.

{¶60} As to a unilateral mistake, we find this claim also fails to support a basis for rescission and the trial court properly found no genuine issues of material fact as to whether or not the agreement was valid.

{¶61} The settlement agreement clearly states Dr. Alasyali will "take all reasonable steps necessary to request the [IRS] to retroactively void the Foundation ab initio[.]" Appellants appear to be asserting that the entire rationale behind the settlement agreement was to have the IRS declare the Foundation to be void ab initio and if voiding the Foundation ab initio was actually impossible at the time the settlement agreement was executed because the tax code did not allow for the filing of amended tax returns for 1998, then the settlement agreement should be rescinded. Stated another way, appellants are now asserting that their belief that the Foundation was capable of being voided ab initio was in fact wrong if the IRS tax code does not allow appellees to file amended 1998 tax returns. Since the most significant component of the settlement agreement was an agreement to void the Foundation ab initio, appellants submit that the agreement should be rescinded, based upon a unilateral mistake, because it would not be possible to accomplish the primary goal of the agreement.

{¶62} " 'A unilateral mistake occurs when only one party has an erroneous belief as to the facts.' " *L.B. Trucking Co., Inc. v. C.J. Mahan Constr. Co*., 10th Dist. No. 01AP-1240, 2002-Ohio-4394, ¶46, quoting 2 Farnsworth on Contracts (2d ed.1998) 585-86, Section 9.4. "A unilateral mistake occurs when one party recognizes the true effect of an agreement while the other does not." *Gen. Tire, Inc. v. Mehlfeldt* (1997), 118 Ohio App.3d 109, 115 ("*Mehlfeldt I*"). "[R]elief for a unilateral mistake of material fact will not be provided where such mistake is the result of the negligence of the party seeking relief." *Marshall v. Beach* (2001), 143 Ohio App.3d 432, 437. A court may grant rescission of a contract based upon a unilateral mistake. *Faivre v. DEX Corp. Northeast*, 182 Ohio App.3d 563, 2009-Ohio-2660, ¶24, citing *Gen. Tire, Inc. v. Mehlfedlt* (June 23, 1999), 9th

Dist. No. 19269 ("*Mehlfeldt II"*). Ohio courts apply Section 153 of the Second Restatement of Contracts in determining whether or not to rescind a contract based on one party's mistake. See Id.

{¶63} Specifically, unilateral mistakes are addressed in the Restatement of the Law (Second), Contracts (1981) at Section 153 as follows:

> § 153. When Mistake of One Party Makes a Contract Voidable.
>
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

{¶64} Therefore, unless the mistaken party bears the risk of the mistake, the court may rescind the contract if: (1) one party made a mistake at the time of the execution of the contract; (2) the mistake had a material effect upon the agreed exchange of performances that was adverse to the mistaken party; and (3) the other party had reason to know of the mistake. See Restatement (Second) of Contracts (1981), Section 153; *Faivre* at ¶24; *Aviation Sales, Inc. v. Select Mobile Homes* (1988), 48 Ohio App.3d 90, 93-94.

{¶65} Section 154 of the Second Restatement of Contracts sets forth when a party bears the risk of a mistake as follows:

> A party bears the risk of a mistake when

> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

{¶66} For several reasons, we find there are no genuine issues of material fact remaining with respect to the claim for rescission on the grounds of a unilateral mistake.

{¶67} First, assuming for the sake of argument that appellants do not bear the risk of the mistake, there is nothing in the record to indicate that 26 U.S.C. 6501 does in fact prevent appellees from amending the 1998 tax returns and, as a result, appellants were mistaken in their belief that the Foundation could be voided ab initio. Whether or not 26 U.S.C. 6501 does prevent such amended filings is not set forth in the record established in the trial court, as the trial court did not specifically address or interpret this provision of the tax code. However, we need not specifically address this issue either, as it is not determinative here. We have already found that appellants have failed to point to any authority which demonstrates that the filing of amended tax returns for 1998 is required in order to have the IRS declare the Foundation void ab initio and that without those amended filings, the Foundation cannot be declared void ab initio. In the absence of such authority, there is nothing to indicate that the Foundation cannot be voided ab initio. Therefore, even if appellants were mistaken in their belief that the 1998 amended tax returns could be filed, such a mistake does not have a material effect on the exchange of performances if the Foundation can still be voided ab initio. In turn, enforcement of the contract is not such that it would be unconscionable.

{¶68} Second, appellants have not produced any evidence to demonstrate that appellees knew of the purported mistake or that they acted fraudulently. "A person has reason to know a fact * * * if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist." Restatement (Second) of Contracts (1981), Section 19, Comment *b*. There is nothing in the record that would even indicate that appellees might have been aware of this purported mistaken belief.

{¶69} Additionally, aside from their allegations, appellants have failed to produce any evidence to demonstrate that appellees fraudulently executed the settlement agreement in order to induce cooperation and/or the return of various assets from appellants without any intent to follow through with the terms of the agreement.

{¶70} Furthermore, while it may have been the ultimate goal of the parties to obtain a declaration from the IRS that the Foundation was void ab initio, the settlement agreement only requires appellees to take all reasonable steps necessary to *request* that the IRS declare the Foundation void ab initio. The settlement agreement does not mandate that appellees actually guarantee a declaration from the IRS that the Foundation is void ab initio and it is evident that an examination by the IRS was in fact commenced.

{¶71} For these reasons, we overrule appellants' fifth assignment of error.

{¶72} In their sixth assignment of error, appellants argue that the trial court erred in determining that appellees were the "prevailing party" as a matter of law. Appellants contend that, under all of the facts and circumstances of the case, genuine issues of material fact exist on this issue. Appellants argue that in fact, appellants themselves were the ones who won every motion leading up to the granting of summary judgment and that it was appellees' failure to cooperate and their dilatory tactics that created the numerous and pointless discovery disputes over which appellants subsequently prevailed. Appellants submit that appellees should not be rewarded for these sorts of tactics with "prevailing party" status and an award for attorneys' fees and costs.

{¶73} Black's Law Dictionary (9th ed. 2009) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>. – Also termed *successful party*." (Emphasis sic.)

{¶74} A "prevailing party" is generally the party " 'in whose favor the decision or verdict is rendered and judgment entered.' " *Hagemeyer v. Sadowski* (1993), 86 Ohio App.3d 563, 566, quoting *Yetzer v. Henderson* (June 4, 1981), 5th Dist. No. CA-1967, 1981 Ohio App. LEXIS 12353, at *4, 1981 WL 6293, at *2.

{¶75} Furthermore, "prevailing party" has also been defined as:

> The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. * * * To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other, has successfully maintained it.

Moga v. Crawford, 9th Dist. No. 23965, 2008-Ohio-2155, ¶6, quoting *Woodfork v. Jones* (Feb. 21, 1997), 2nd Dist. No. 15841, 1997 Ohio App. LEXIS 568, at *17, 1997 WL 71820, at *6. See also *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552; *Leaman v. Coles* (1996), 115 Ohio App.3d 627; *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 177 Ohio App.3d 7, 24, 2008-Ohio-148, ¶40; and *Keal v. Day*, 164 Ohio App.3d 21, 2005-Ohio-5551.

{¶76} Based upon these definitions of "prevailing party," we find appellant's sixth assignment of error is without merit and overrule that assignment of error.

{¶77} In appellants' seventh assignment of error, they argue the trial court's award of attorneys' fees is not supported by the evidence. However, before addressing this assignment of error, we shall first address appellees' single cross-assignment of error, as they advance a related assignment of error. Addressing the assignments of error in this manner will allow a clearer and more simplified discussion of the remaining issues.

{¶78} In appellees' cross-assignment of error, they argue the trial court abused its discretion in failing to award them all of their reasonable attorneys' fees and expenses, to which they are entitled under the settlement agreement. They argue that the adjustments and reductions made by the trial court with respect to their hourly rates and time spent on the case were unreasonable, arbitrary, and unwarranted by the Rules of Professional Conduct. As a result, appellees argue the trial court abused its discretion. Additionally, they argue the trial court abused its discretion in failing to grant the full cost of their expert expenses.

{¶79} Under the "American Rule," each party involved in litigation is required to pay its own attorney fees in most circumstances. *Sorin v. Bd. of Edn*. *of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177, 179. However, one exception to that rule is a contractual agreement between the parties to shift fees. *McConnell v. Hunt Sports Ent*. (1999), 132 Ohio App.3d 657, 699. This is the case here.

{¶80} Paragraph 7 of the settlement agreement reads as follows: "In the event that any party hereto seeks to enforce the terms and conditions of this Settlement

Agreement in a court of law or equity, the prevailing party will be entitled to its attorneys fees and costs."

{¶81} Agreements to pay another party's attorneys' fees are typically "enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." *Wilborn v. Bank One Corp*., 121 Ohio St.3d 546, 549, 2009-Ohio-306, ¶8, quoting *Nottingdale Homeowner's Assn. v. Darby* (1987), 33 Ohio St.3d 32, syllabus.

{¶82} A party seeking an award of attorneys' fees has the burden of demonstrating the reasonable value of such services. *DeHoff v. Veterinary Hosp. Operations of Cent. Ohio*, 10th Dist. No. 02AP-454, 2003-Ohio-3334, ¶145. See also *Enyart v. Columbus Metro. Area Community Action Org*. (1996), 115 Ohio App.3d 348, 358 (the burden of demonstrating the reasonableness of the work hours devoted to the case rests with the attorney seeking the award). A trial court's determination regarding attorneys' fees should not be reversed, absent a showing of an abuse of discretion. Id., citing *Bittner v. Tri-County Toyota, Inc*. (1991), 58 Ohio St.3d 143, 146. " 'Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere.' " *Bittner* at 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc*. (1985), 23 Ohio App.3d 85, 91. An award for attorney fees will not be overturned on appeal absent an abuse of discretion. See *Waddell v. Roxane Laboratories, Inc.*, 10th Dist. No. 03AP-558, 2004-Ohio-2499, citing *Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 160, 1995-Ohio-281.

{¶83} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151. The Ohio Supreme Court has also defined an "abuse of discretion" as " 'a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.' " See *State v. Hancock*, 108 Ohio St.3d 57, 77, 2006-Ohio-160, quoting Bouvier's Law Dictionary.

{¶84} We have already determined that appellees are the prevailing party in this matter. Based upon the clear terms of the contractual agreement here, appellees are entitled to attorneys' fees and costs as the prevailing party. Therefore, all that remains is to determine whether or not the trial court abused its discretion in awarding attorneys' fees and costs to appellees in an amount less than what was requested.

{¶85} During the hearing on the reasonableness of the attorneys' fees requested, the assigned magistrate heard several hours of testimony. Both parties introduced expert testimony regarding the attorneys' fees and both experts provided an opinion as to whether or not the fees requested in this case were reasonable. A magistrate has the ability to evaluate the credibility of an attorney's testimony on the reasonableness of attorneys' fees and to make an award of reasonable attorneys' fees based upon his or her own discretion. *Parks v. Kanani*, 10th Dist. No. 01AP-905, 2002-Ohio-1316, citing *Chapman v. Adkins* (Sept. 20, 2001), 10th Dist. No. 00AP-1419.[4]

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[4] We note that on October 21, 2008, after both parties filed objections to the magistrate's July 2, 2008 decision, the common pleas judge adopted the magistrate's decision, in its entirety, as its own.

{¶86} In *Bittner*, the Ohio Supreme Court discussed the calculation of attorneys' fees. The court stated that in determining a "reasonable" award of attorneys' fees a "trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in [former] DR 2-106(B)."[5] *Bittner* at 145. The trial court has the discretion to determine which factors to apply and in what manner such application will affect the initial calculation. *Parks* at *6-7, citing *Bittner* at 145-46. "A fee is not reasonable merely because it was paid by the client." *B-Right Trucking Co. v. Interstate Plaza Consulting*, 154 Ohio App.3d 545, 567, 2003-Ohio-5156.

{¶87} Attorneys' fees in all matters are governed by Ohio Prof.Con.R. 1.5. The factors set forth under Ohio Prof.Con.R. 1.5 govern a court's discretion relating to attorney fees. *In re Estate of Keytack*, 11th Dist. No. 2008-T-0039, 2008-Ohio-6563. Ohio Prof.Con.R. 1.5(a) reads as follows:

> a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer;

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[5] Ohio now follows the Ohio Rules of Professional Conduct. Therefore, DR 2-106 and DR 2-107 have been replaced by Ohio Prof.Con.R. 1.5. Many of the provisions under the new rule are similar to the provisions set forth under the code formerly used in Ohio. Therefore, case law analyzing DR 2-106 and DR 2-107 is still useful.

> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

{¶88} After evaluating the testimony of the expert witnesses and reviewing the post-trial briefs, the trial court conducted its own analysis under Ohio Prof.Con.R. 1.5 by applying those factors to the relevant facts and circumstances and determining whether each individual factor should be subject to an upward or downward adjustment or whether it was a neutral factor.

{¶89} In doing so, the trial court determined the instant case was not a complex matter nor was it so difficult that it warranted an upward adjustment in legal fees. This finding is supported by the testimony of appellants' expert, Attorney Timothy S. Rankin. Based upon the testimony of appellants' expert, the trial court found the legal rates charged by appellees' counsel to be high for this community. Therefore, a downward adjustment was made for this factor. The trial court did acknowledge that an upward adjustment was appropriate for the clear victory that was achieved and for the high risks involved. The trial court also found that the factor relating to the experience, reputation, and ability of the lawyers was a neutral factor, given that there was only limited information provided with respect to the qualifications of counsel, and given that the reputation of the law firm itself was not a factor in the analysis.

{¶90} With respect to the factors regarding the relationship between client and counsel, financial harm to counsel, and time limitations imposed, the trial court found these factors to be neutral. The final factor, which applies only to fixed or contingent fees, was determined to be inapplicable.

{¶91} The trial court next analyzed the billing invoices. Our own review of the billing invoices submitted by appellees raises some of the same concerns as those discussed by the trial court.

{¶92} As invoiced, appellees requested fees at the hearing in the amount of $133,419.22. Reductions were then made for courtesy discounts of approximately $15,000 and for charges which were redacted as "not litigation related" in the amount of approximately $7,000.

{¶93} The trial court determined the number of hours expended in this matter, specifically with respect to the hours related to discovery and Civ.R. 56(F) issues, was excessive and far surpassed what was necessary under typical circumstances. Given that there were multiple opportunities to reduce the time associated with the unnecessary discovery battle, and given that Civ.R. 56(F) motions are rarely opposed and even more rarely denied, the trial court determined that less time was needed. Furthermore, appellees' expert, while opining that the manner in which this case was handled was reasonable, admitted that he did not do a line-by-line analysis of the invoices, nor did he review the trial court's decision regarding the discovery dispute which ultimately granted the motion to compel. Appellants' expert, on the other hand, described the approach to the discovery dispute as "untenable." (Expert report of Attorney Timothy S. Rankin dated January 28, 2008, at 3.) As a result, the trial court reduced the number of hours invoiced on these issues from more than 70 hours to 35 hours. It was not an abuse of discretion for the trial court to reduce the number of hours reasonably expended here.

{¶94} The trial court also found that a reduction in the number of hours invoiced was warranted in other areas as well. We agree.

{¶95} The trial court criticized the fact that two attorneys, one of whom drove down from Cleveland, attended numerous status conferences, many of which were scheduled as a result of the protracted discovery battle. Both attorneys billed their time and the travel time was typically billed as well. Countless hours were spent attending and preparing for these status conferences. Appellants' expert testified that 86.7 hours were invoiced related to status conferences. (Tr. 184.)

{¶96} Additionally, the trial court questioned the amount of time spent by the associate and the partner discussing this non-complex matter, as well as their invoices for the writing and filing of two sur-replies, which are not recognized pleadings under the civil rules of procedure. While appellees argue they should not be penalized for being prepared and attending court proceedings or for properly addressing issues initiated by appellants or for choosing out-of-town counsel, we do not find merit in this argument when the amount of time spent on these tasks is unreasonable.

{¶97} The trial court also expressed serious concern with the billing practices of appellees' counsel as a result of the block billing that was used in this matter, finding that this practice made it impossible to determine how much time was devoted to each individual task within the "block" and therefore making it difficult to determine if the time spent on the task was reasonable. This concern is supported by the testimony of appellants' expert, Attorney Timothy S. Rankin. The trial court found this had a negative effect on the general credibility of appellees' evidence with respect to reasonableness.

{¶98} Additionally, the trial court found the block billing practice was further complicated by the fact that over $7,000 in fees and costs were redacted from the original invoices as being "not litigation related" and over $15,000 in "courtesy discounts" were made without further explanation of the basis of these reductions. While appellees now attempt to explain the "courtesy discounts" and argue that they should not be penalized for such practices, we find the lack of such explanation in the record does raise legitimate concerns regarding the reasonableness of some of the invoices.

{¶99} With respect to the hourly rate, appellees argue the trial court abused its discretion by slashing their hourly rates without providing a reason for such action other than a "firm conviction that the rates are in excess of the reasonable rates for this community." (R. 150, at 33.) Appellees argue these rates are at or below the lowest rates put forth by either expert. We find this argument to be without merit.

{¶100} The trial court provided a detailed analysis as to why it felt the hourly rates were too high and its findings are supported by the testimony of appellants' expert, Attorney Timothy S. Rankin. While the partner rate established by the trial court is at the low end of the spectrum and the associate rate is just below the range set forth by Attorney Timothy S. Rankin in 2008, the trial court did note that the rates took into account the fact that this litigation has been ongoing since 2005 and the adjusted rate reflected the passage of time through the course of the litigation. The trial court also noted the evidence presented failed to establish the qualifications of some of the billing timekeepers, such as the paralegal. Without some demonstration of why such a shockingly high rate was justified, such as evidence of numerous years of experience or specific expertise, the trial court found appellees had failed to meet their burden to demonstrate that such a rate was reasonable. Therefore, these reductions do not constitute an abuse of discretion.

{¶101} Appellees have also argued that the trial court abused its discretion in failing to award the full cost of their expert witness, Attorney C. Craig Woods. We disagree.

{¶102} Following the presentation of evidence, the parties agreed to submit post-hearing briefs within 30 days. Within their post-hearing brief, appellees noted that they still had not received the most recent invoice from their expert witness and therefore requested to re-open or re-apply for those costs at a later date. The trial court declined this request, but did award costs for the expert's time spent testifying in court at the hearing at the expert's current rate.

{¶103} Approximately nine days after the magistrate's order was filed, appellees filed a motion to modify the magistrate's decision and included an invoice from their expert requesting costs and fees in the total amount of $15,660.86, which included the expert's time spent preparing for and testifying at the hearing. The amount the magistrate had ordered was $10,203.58. This was based upon the invoices submitted as exhibits at the hearing in the amount of $8,156.08, plus $2,047.50 for the time the expert spent in court at the hearing.

{¶104} There was testimony at the hearing which suggested the final invoice of the expert had not yet been submitted and was not available to be placed into evidence. The witness did not establish the number of hours, or even an estimate of the number of hours yet to be invoiced, and counsel did not request that the matter remain open to supplementation at a later time. Even at the time of the filing of the post-hearing briefs, appellees did not have this evidence to submit to the court, despite the fact that it was their burden to do so. Therefore, we find no abuse of discretion by the trial court in declining to grant the motion to modify and in declining to award the full fee of the expert.

{¶105} Based upon the foregoing, we find no abuse of discretion on the part of the trial court in not awarding the full amount of the attorneys' fees requested and we find there was no abuse of discretion in reducing the number of hours reasonably expended in this matter from 440.4 hours to 311.4 hours. We further find no abuse of discretion in reducing the hourly rate and using hourly rates of $225, $180, and $65, as reasonable rates for partners, associates, and paralegals, respectively. In addition, we find the trial court considered and discussed the proper factors in making its determination. The trial court properly provided detailed reasoning as to how it arrived at the amount awarded and its reasons for a reduction in the amount of the award. The award is not arbitrary or unreasonable, nor is it so low as to shock the conscience. Accordingly, we overrule appellees' sole cross-assignment of error.

{¶106} In their seventh assignment of error, appellants argue the trial court's award of attorneys' fees is not supported by the evidence. Appellants argue that appellees' unreasonable actions, such as fighting every discovery request and adamantly refusing to cooperate or share their tax filings, caused this protracted dispute and caused appellees' attorneys' fees to multiply unnecessarily. Appellants submit that appellees should not be permitted to recover their attorneys' fees for those portions of the case where the appellees pointlessly opposed discovery and eventually were ordered to produce the requested information or made immaterial or irrelevant arguments. Appellants further contend appellees' expert ignored various issues impacting the reasonableness of the attorneys' fees and therefore, appellees failed to meet their burden of proof to demonstrate that the fees were reasonable. On these grounds, appellants argue the trial court's award of attorneys' fees was improper. We disagree.

{¶107} Based upon the foregoing discussion regarding appellees' cross-assignment of error set forth above, we find appellants' seventh assignment of error to be without merit. The trial court properly determined a reasonable fee and took into account the issues regarding the discovery battles and even reduced the number of hours invoiced to those particular issues in order to reach a reasonable award. Furthermore, the trial court was well within its discretion to find certain expert testimony to be unpersuasive. See *Parks*, supra.

{¶108} Accordingly, we overrule appellants' seventh assignment of error.

{¶109} In conclusion, we overrule appellants' seven assignments of error. We also overrule appellees' single cross-assignment of error. The judgments of the trial court are hereby affirmed.

Judgments affirmed.

BROWN and KLATT, JJ., concur.
