[Cite as *Fanger & Assocs., L.L.C. v. Abuaun*, 2018-Ohio-4795.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106805

FANGER & ASSOCIATES L.L.C.

PLAINTIFF-APPELLEE

vs.

AMEN ABUAUN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED; REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-16-869136

BEFORE: E.A. Gallagher, A.J., E.T. Gallagher, J., and Jones, J.

RELEASED AND JOURNALIZED: November 29, 2018

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EILEEN A. GALLAGHER, A.J.:

{¶1} Defendant-appellant Amen Abuaun appeals from the judgment of the Cuyahoga County Common Pleas Court awarding plaintiff-appellee Fanger & Associates, L.L.C. ("Fanger") $102,881.45 (consisting of $65,189.00 of unpaid legal fees and expenses and $37,692.45 in interest) on its claim against Abuaun for breach of a legal services contract related to its representation of Abuaun in a divorce proceeding. Abuaun contends that the legal fees and interest charged by Fanger were excessive and unreasonable and that he was entitled to a setoff based on Fanger's negligent representation of his interests in the divorce proceeding. For the reasons that follow, we reverse the trial court's judgment only to the extent it includes an award of $37,692.45 in prejudgment interest on unpaid balances.

Factual Background and Procedural History

The Legal Services Agreement

{¶2} In May 2013, Abuaun retained Fanger to represent him in a divorce action his wife had filed in the Cuyahoga County Court of Common Pleas, Domestic Relations Division.

Fanger forwarded an hourly fee letter of representation to Abuaun, which Abuaun executed on May 13, 2013 (the "agreement").[1] As stated in the agreement, the scope of the representation was for "General Representation of Domestic Relations issues either leading to dissolution or divorce and representation of defamation by spouse and/or mother in law." Pursuant to the terms of the agreement, Abuaun was to pay a $1,000 retainer and would be charged for "all legal services based upon the amount of time involved to do the service" as follows:

> This is an hourly rate Agreement, which means you will be charged for all legal services based upon the amount of time involved to do the service. * * * Fees are determined by the scheduled hourly rates for the attorney or legal assistant providing the services. Attorney rates range from $200 - $375 per hour, depending on the attorney providing the service. Legal assistants, law clerks and paralegals are billed at $125 - $135 per hour depending on their experience. A copy of our current rate schedule is attached for your reference and is available upon request and is subject to change from time to time due to new staff and/or attorneys joining the firm. No change in scheduled hourly rates for a particular matter is made without prior notice to the client. Work is billed in minimum of six-minute increments for the first six minutes and quarter hour increments for all time spent on a matter after the first six-minute increment. Attorneys, associates, paralegals and legal assistants will bill you at their hourly rate for both telephone calls they make and those they receive as well as for emails they write and those they receive as well as all other time spent on your legal matter.

{¶3} Abuaun was also responsible for paying all expenses and filing fees.

{¶4} The agreement provided that all invoices must be paid "in full each month" and that "[a]ll past due accounts will be charged 1.5% interest per month." There was no agreement as to number of hours Fanger would spend representing Abuaun in the divorce action.

{¶5} Abuaun paid the $1,000 retainer and Fanger proceeded to represent Abuaun in the divorce proceeding.

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[1]Although the agreement states that a copy of the firm's current rate schedule was attached to the agreement, the copies of the agreement that are in the record (including the copy of the agreement that was admitted as evidence at trial) do not have a rate schedule attached. Because Abuaun has not challenged the hourly rates he was charged, we do not further address the issue here.

The Divorce Proceeding

{¶6} The divorce was contentious. Fanger filed a counterclaim for intentional infliction of emotional distress based on the mother's failure to allow Abuaun to attend his son's birth, whisper a prayer to the child upon birth and name the child. He also filed a motion for an order awarding shared parenting and a shared parenting plan. It appears to be undisputed that Abuaun's primary objectives in the divorce proceeding were (1) to give his child the name he had chosen and (2) to be granted shared parenting on an "equal time" basis with his child.

{¶7} Following a ten-day trial, the domestic relations court entered final judgment in the divorce proceeding on December 18, 2014. The domestic relations court denied Abuaun's counterclaim, stating that it was "not the proper forum in which to litigate a tort claim." However, it held that resolution of the child's name was within the court's equitable powers and ordered that the child's legal name be the name Abuaun had requested for the child. With respect to Abuaun's request for shared parenting, the domestic relations court noted that "[n]either party submitted proposed appropriate changes to the plan submitted by the Father as ordered by the Court," and determined that, due to the couple's inability to communicate with one another, it was not in the child's best interest to be shared on an equal time basis. The court, therefore, denied Abuaun's request for shared parenting. Determining that it was in the child's best interest to allocate the parental rights and responsibilities for his care primarily to his mother, the court designated the mother as the residential parent and legal custodian of the child.

Litigation Over Legal Fees and Expenses

{¶8} On September 16, 2016, Fanger filed a complaint in the Cuyahoga County Common Pleas Court asserting claims of breach of contract and unjust enrichment against Abuaun.

Fanger alleged that Abuaun had failed to pay for legal services Fanger had provided on Abuaun's behalf pursuant to their agreement. Fanger sought judgment in the amount of $90,813.40 (representing $64,570.29 in unpaid attorney fees and expenses and $26,243.11 in unpaid interest charges) plus interest at the rate of 1.5 percent per month from August 1, 2016 and additional attorney fees and costs. Fanger attached to its complaint a copy of the agreement and a redacted "statement of account"[2] that listed the fees, expenses and interest charged Abuaun as of August 10, 2016. Abuaun filed an answer in which he denied the material allegations of the complaint and asserted various affirmative defenses, including that the agreement was invalid, unconscionable and unenforceable, that Fanger was not entitled to the relief requested because it failed to fulfill its obligations to Abuaun under the agreement, that Fanger's fees and expenses were excessive or unreasonable under Prof.Cond.R. 1.5, that the interest charged did not comply with applicable statutory requirements and because of the application of the doctrines of waiver and estoppel, accord and satisfaction and setoff.

{¶9} In March 2017, Fanger filed a motion for summary judgment. Fanger asserted that there was no genuine issue of material fact that Abuaun had failed to pay all amounts due under the agreement entitling Fanger to relief for breach of contract or, alternatively, unjust enrichment. Abuaun opposed the motion, asserting that the hours and legal fees billed were excessive and unreasonable and that Fanger had failed to present "independent expert testimony" establishing the reasonableness of its fees. The trial court denied the motion, concluding that a genuine issue of material fact existed regarding "the reasonableness of plaintiff's hours and fees from the underlying case" and the case proceeded to a bench trial.

[2] The statement of account attached to the complaint omitted the "activity detail" in order to "preserve attorney client privilege."

{¶10} Before opening statements, Fanger announced that it was planning on calling two witnesses in its case-in-chief and was "holding back" its expert "as a rebuttal witness" to testify after Abuaun's witnesses testified. Abuaun raised no objection to this proposed course of action.

{¶11} At trial, Fanger argued that it was entitled to judgment in the amount of the unpaid legal fees, expenses and interest due on Abuaun's account. Abuaun argued that Fanger's fees and interest charges were excessive and that, based on its "defense of setoff," Abuaun did not owe Fanger anything and had already paid Fanger more than it was entitled to for the legal work it had performed on his behalf. Specifically, Abuaun challenged Fanger's practice of block billing, its charges for the filing of the counterclaim, its interest charges and Fanger's failure to file a modified shared parenting plan.

{¶12} Abuaun (who testified upon cross-examination) and Attorney Jeffrey Fanger testified in Fanger's case-in-chief. Abuaun acknowledged that he had signed the agreement and that Fanger had represented him in the divorce proceeding. He further acknowledged that he had received invoices each month from Fanger itemizing the legal services performed and the legal fees and expenses incurred in connection with the divorce proceeding. He admitted that he never sent a letter or email disputing any item listed on the invoices.

{¶13} Attorney Fanger testified that Abuaun's divorce was "highly unusual" and "complicated." He indicated that there were significant disputes over issues such as the Muslim traditions involved in the birth and naming of the couple's child and the wife's pursuit of gold — i.e., a headdress of gold coins her mother had made for her and gold jewelry that had been given to her at the wedding ceremony — which resulted in several home searches for "hidden gold." Attorney Fanger testified that the divorce was further complicated by the fact that "it was

essentially two families feuding," that "a tremendous amount of time and effort was spent fighting" over these issues and that a translator was required for a number of the witnesses and documents, including the marriage contract, which was in Arabic. Fanger testified that after his prior payments had been credited, Abuaun owed Fanger $65,198.00 in legal fees and expenses and $50,780.74 in interest compounded monthly at a rate of 1.5% — a total of $115,969.74 — as of December 31, 2017.

{¶14} In further support of its claims, Fanger offered into evidence copies of the agreement, the final judgment entry of divorce and itemized time and expense reports that listed (1) each of the fees and expenses for which Abuaun had been billed from May 13, 2013 to May 11, 2015 related to Fanger's representation of Abuaun in the divorce (totaling $64,570.29) and (2) a collection filing fee, docket fee, docket service fees[3] and parking expenses Fanger had incurred from September 16, 2016 to October 31, 2017 (totaling $618.71) related to the instant collection matter. He also introduced a "client interest report" that listed each of the interest charges, compounded at a rate of 1.5% monthly, that had been assessed against Abuaun's account. The client interest report listed the invoice date, invoice id, interest rate,[4] interest charged and "running total" of interest assessed, but did not identify the monthly balances against which the interest was assessed. The monthly invoices that were sent to Abuaun, upon which the interest calculations were based, were not offered into evidence at trial and no other evidence was offered at trial regarding Abuaun's monthly balances of unpaid legal fees and expenses.

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[3] Attorney Fanger could not explain what these fees related to other than that they were "expenses" related to the collections matter "that our bookkeeper put on."

[4] The client interest report listed an interest rate of "0.02." Attorney Fanger testified that this was because the software used to generate the report limited the "interest rate" charged to two decimal places. Regardless of what the report indicated, he testified that Abuaun was actually charged 1.5% compounded monthly interest – not 2% interest.

{¶15} Attorney Fanger testified that the itemized billing statements accurately reflected the work that was performed and expenses that were incurred on Abuaun's behalf in connection with his divorce. Attorney Fanger testified that he explained his billing practices to Abuaun and that Abuaun never raised any issues with respect to the firm's billings until after Fanger filed suit against him.

{¶16} With respect to the shared parenting plan, Attorney Fanger testified that he filed a proposed shared parenting plan early on in the divorce case. He indicated that although the domestic relations court requested that the parties file a new or different shared parenting plan, he did not file a revised shared parenting plan because he did not believe the mother was going to file a shared parenting plan and "it would have been essentially [bidding] against ourselves." He testified that, instead, he identified certain modifications to the proposed shared parenting plan that would be acceptable to Abuaun (regarding which Abuaun had previously testified) in the written closing argument and proposed findings of fact he filed with the court. Fanger explained that he filed a counterclaim for intentional infliction of emotional distress in the divorce cases because he "couldn't think of any other way to raise the issue of the child's name" in the divorce.

{¶17} At the conclusion of Fanger's case-in-chief, Abuaun filed a motion for involuntary dismissal pursuant to Civ.R. 41(B)(2). Abuaun argued that the trial court should dismiss Fanger's unjust enrichment claim because it could not coexist with a breach of contract claim and that the trial court should dismiss Fanger's breach of contract claim and request for attorney fees because Fanger had failed to present expert testimony establishing the reasonableness of its fees. The trial court denied the motion.

{¶18} Abuaun then proceeded with his defense. Abuaun testified that he had signed the agreement after spending "[a]bout five minutes reviewing the document." He stated that he was not aware that he would be charged interest on past due balances.

{¶19} Abuaun acknowledged receiving invoices from Fanger and indicated that he had reviewed "[s]ome of them, not all of them." He testified that he spoke with Attorney Fanger twice regarding the invoices he had received. He testified that before trial he told Attorney Fanger that "the fees are kind of high" and that Attorney Fanger responded, "Don't worry about it right now." He testified that he raised the issue of Fanger's fees a second time during trial. He stated that he asked Attorney Fanger whether he "really need[ed] [his] assistant here to pass out papers." He indicated that Attorney Fanger replied, "Don't worry about it. * * * We'll take care of it."

{¶20} Abuaun stated that he did not believe Fanger's billing statements accurately reflected work performed on his behalf. He indicated that he did not understand the abbreviations Fanger used in its time entries and that he often could not determine how much time was spent on any given task because multiple tasks were billed in a single time entry. He testified that he mentioned his concerns regarding the way he was being billed to Attorney Fanger and that Attorney Fanger said, once again, "Don't worry about it. We'll take care of it." Abuaun also claimed that he was being charged interest for past due balances that exceeded the 1.5% monthly interest rate specified in the agreement.

{¶21} Abuaun testified that he had hired Attorney Fanger "to achieve a shared parenting plan" and that Attorney Fanger represented to him in an email that the domestic relations judge

had "executed [their] shared parenting plan."[5] Abuaun testified that it was not until he went to see another attorney to seek a modification of his child support obligation that he learned that he did not, in fact, have shared parenting.

{¶22} Attorney John Heutsche testified on Abuaun's behalf as an expert witness. He opined that the legal fees Fanger charged were unreasonable and Abuaun had significantly overpaid for the legal services provided by Fanger in the divorce proceeding. He testified that the total charge "for this type of a trial should have been in the neighborhood of 10 or $12,000" — well less than the $22,000 Abuaun had already paid Fanger.[6] He opined that Fanger's practice of block billing was improper, that the time spent preparing the shared parenting plan, i.e., over 20 hours "to prepare a fairly generic shared parenting plan," was excessive and that Fanger had violated Prof.Cond.R. 1.5 by charging compound interest rather than simple interest on unpaid balances without disclosing that fact to Abuaun.

{¶23} Attorney Heutsche further opined that Attorney Fanger's representation of Abuaun "fell below the standard of the community" in two ways: (1) by failing to file a modified shared parenting plan when directed by the court to do so and (2) by filing an improper counterclaim for intentional infliction of emotional distress. He claimed that Attorney Fanger's negligence would have a lasting impact on Abuaun because not only did the domestic relations court fail to grant Abuaun shared parenting as part of the divorce, Abuaun would face a higher standard if he were to seek custody of his son or shared parenting in the future. Attorney Heutsche also stated that

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[5] At trial, Abuaun's counsel showed Abuaun an email communication from Attorney Fanger dated December 18, 2014. Abuaun testified that he believed parenting had been granted based on the following statement by Attorney Fanger: "The judge executed our parenting plan but — and she told us, 'I awarded primary custody to the mother,' but gave you more time, more vacation time, a step-up in time for when he's in school. All of this is a win." That email communication was not offered into evidence and is not part of the record on appeal.

[6] Based on the itemized billing statements Fanger introduced at trial, it appears that Abuaun actually paid Fanger $23,000.

he did not think Abuaun should have been billed for the time associated with the counterclaim — which he estimated at $5,000 — since the domestic relations court lacked jurisdiction to hear it.

{¶24} After the defense rested, Fanger called Attorney Jacob Kronenberg as an expert witness to rebut the testimony offered by Abuaun. Abuaun did not object to this "rebuttal" testimony. Attorney Kronenberg acknowledged that Fanger's fees were "large" but stated that, "[i]n the context of a case of this kind," where both parties were "inclined to engage in this major battle," he believed the fees Fanger charged were reasonable and that the legal services its had performed were necessary given the circumstances.

{¶25} Attorney Kronenberg indicated that it is not uncommon to use abbreviations in fee billing statements and stated that although block billing is "not optimal," it is, at times, "appropriate" when "dealing with the kind of cases that [d]omestic relations comprehends." With respect to the shared parenting plan, Attorney Kronenberg stated that there was no court order on the docket directing the parties to file a modified shared parenting plan in the divorce case and that, based on his reading of the domestic relation court's final judgment entry, he did not believe there was any "causative effect" between Attorney Fanger's failure to file a modified shared parenting plan and the court's decision to deny his request for shared parenting. He noted that the guardian ad litem had recommended that the mother be granted "primary possession" of the child and that the domestic relations court had detailed a number of reasons why it believed shared parenting would not be in the child's best interest in the judgment entry.

{¶26} Attorney Kronenberg stated that he could not address the reasonableness of the counterclaim Fanger filed in the divorce proceeding. He stated that he did not know the purpose of the counterclaim and had not spoken to Attorney Fanger about it. Likewise, he declined to opine on the reasonableness of Fanger's compound interest charges. He stated that he is aware

that "there is a dispute among various people as to whether [compound interest] is appropriate," but that he personally believes, "with reasonable disclosure and discretion," it could be appropriate. He testified that, as to his own clients, he retains the option to charge simple interest on unpaid balances in the letter of representation but that he had enforced it "less than 10 times probably in 42 years."

{¶27} The parties waived closing arguments. After the conclusion of all the evidence, the trial court requested that Fanger "re-calculate [its] bill using simple interest." Abuaun did not object to the trial court's request. On January 31, 2018, Fanger filed a "Submission of Plaintiff's Exhibit 10 Per Order of Court." The document consisted of a revised "statement of account using simple interest" and calculated the accrued simple interest allegedly due on Abuaun's as follows:

> Time and Expenses: $65,189.00
> Simple Interest Thru 1/31/18: $37,692.45
> Total Due as of 1/31/18: $102,881.45

{¶28} That same day, the trial court issued its decision. The trial court found that the parties had "a meeting of the minds in regard to the essential terms of the letter of representation" and that Abuaun had breached that contract by failing to pay Fanger's outstanding attorney fees. The trial court further found that Fanger "performed the services for which it was contracted," that those services had benefitted Abuaun, that Abuaun had been unjustly enriched by Fanger's legal services and that Abuaun was not entitled to any set-off. Although the trial court acknowledged that the fees sought by Fanger were "high," it nevertheless found them to be reasonable "given the type of case" and the length of the underlying trial. However, the court found that there was no "meeting of the minds" that the interest charged on late payments would be compounded. The trial court entered judgment in favor of Fanger and against Abuaun for

$102,881.45 (representing $65,189.00 as the "princip[al] balance" and $37,692.45 in "accrued simple interest") plus interest at the statutory rate from the date of judgment and costs.

{¶29} Abuaun appealed the trial court's judgment, raising the following five assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
> The trial court erred and abused its discretion in denying appellant's motion for involuntary dismissal when the appellee failed to present in his case in chief expert testimony concerning the reasonableness of his attorney fees and expenses.
>
> SECOND ASSIGNMENT OF ERROR:
> The trial court erred and abused its discretion in finding appellee's attorney fees and expenses to be reasonable within the meaning of Rule 1.5 of the Ohio Rules of Professional Conduct when the appellee engaged in block billing that precluded a determination of the reasonableness of the fees.
>
> THIRD ASSIGNMENT OF ERROR:
> The trial court erred and abused its discretion in finding that appellant was not entitled to a set-off when appellant presented expert testimony that appellee's attorney fees are unreasonable and/or unnecessary and that the appellee was negligent.
>
> FOURTH ASSIGNMENT OF ERROR:
> The trial court erred and abused its discretion in awarding interest on the attorney fees and expenses.
>
> FIFTH ASSIGNMENT OF ERROR:
> The trial court erred and abused its discretion in permitting appellee's expert to testify as a rebuttal witness.

{¶30} For ease of discussion, we address Abuaun's assignments of error out of order and together where appropriate.

Law and Analysis

Motion for Involuntary Dismissal

{¶31} In his first assignment of error, Abuaun contends that the trial court erred and abused its discretion in denying his motion for involuntary dismissal under Civ.R. 41(B)(2)

because Fanger failed to present independent expert testimony in his case-in-chief establishing that the amounts billed were reasonable and necessary.

{¶32} Civil Rule 41(B)(2) permits a defendant in nonjury action to move for dismissal of the action after the close of the plaintiff's case. That rule provides, in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. * * *

{¶33} Thus, Civ.R. 41(B)(2), expressly allows the trial court sitting as the trier of fact, in its discretion, to "decline to render any judgment until the close of all the evidence." We will not reverse such a determination absent an abuse of that discretion. *See, e.g., ID Agency v. Community Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 65298, 1994 Ohio App. LEXIS 3110, *11 (July 14, 1994) ("standard of review on an appeal from the denial of a motion to dismiss under Civ.R. 41(B)(2) is abuse of discretion"); *O'Bryon v. Poff*, 9th Dist. Wayne No. 02CA0061, 2003-Ohio-3405, ¶ 6; *Froehlich v. State Dept. of Mental Health*, 10th Dist. Franklin No. 05AP-129, 2005-Ohio-7026, ¶ 11; *see also Hayes v. Carrigan*, 2017-Ohio-5867, 94 N.E.3d 1091,¶ 22 (1st Dist.) (observing that because Civ.R. 41(B)(2) expressly allows the trial court sitting as the trier of fact to hear all evidence before rendering judgment, "we cannot determine that the trial court erred in denying [defendant's] motion at the close of [plaintiff's] case and hearing additional evidence on his trespass claim"), citing *Tillman v. Watson*, 2d Dist.

Champaign No. 06-CA-10, 2007-Ohio-2429, ¶ 12-14 (trial court's initial decision to deny the defendant's motion to dismiss under Civ.R. 41(B)(2) at the close of the plaintiff's evidence was not erroneous because the rule expressly allows the trial court to proceed with further evidence).

{¶34} On the record before us, we cannot say that the trial court abused its discretion when it denied Abuaun's motion to dismiss at the close of Fanger's case-in-chief and chose to hear additional evidence on its claims. Abuaun has not demonstrated that it was clear "upon the facts and the law," at the conclusion of Fanger's case-in-chief, that Fanger had "no right to relief."

{¶35} Where an attorney brings an action to recover attorney fees based on a fee agreement that specifies the hourly rate, the attorney has the burden of proving (1) that "'the time was fairly and properly used'" and (2) "'the reasonableness of [the] work hours devoted to the case.'" *Koblentz & Koblentz v. Ferrante*, 8th Dist. Cuyahoga No. 86969, 2006-Ohio-1740, ¶ 24, quoting *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323, 653 N.E.2d 1245 (10th Dist.1995); *see also Reminger & Reminger Co., L.P.A. v. Fred Siegel Co., L.P.A.*, 8th Dist. Cuyahoga No. 77712, 2001 Ohio App. LEXIS 760, *16 (Mar. 1, 2001) ("'where a fee agreement exists, that contains the hourly rate as well as a retainer fee, the attorney seeking to recover fees must also demonstrate that the time spent was fairly and properly used, and that the work hours devoted to the case were reasonable'"), quoting *Thompson, Hine & Flory v. Pingue Properties, Inc.*, 10th Dist. Franklin No. 95APE 07-881, 1996 Ohio App. LEXIS 1346, *4 (Mar. 29, 1996). "'[A]ttorney fees are not justified merely because the lawyer has charged his professional time and expenses at reasonable rates; a legitimate purpose must also explain why the lawyer spent that time and incurred those costs.'" *Lillie & Holderman v.*

Dimora, 8th Dist. Cuyahoga No. 99271, 2013-Ohio-3431, ¶ 12, quoting *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074, 865 N.E.2d 873, ¶ 71.

{¶36} Abuaun claims that, because there is a dispute between the parties as to the amount of fees billed, Fanger was required to support its claim for attorney fees with independent expert testimony. However, where "the client did not make any attempt to contact the attorney during the tenure of the attorney-client relationship to express dissatisfaction with the legal services rendered or the amount being charged for those services, and the attorney kept the client apprised of the status of the client's legal matter," this court has held that no expert testimony is required and that the attorney can testify to the reasonableness of his own fees. *See, e.g., Koblentz & Koblentz v. Summers*, 8th Dist. Cuyahoga No. 94806, 2011-Ohio-1064, ¶ 13; *Lillie & Holderman* at ¶ 10-11; *Reminger* at *21-22; *see also Cleveland v. CapitalSource Bank*, 8th Dist. Cuyahoga No. 103231, 2016-Ohio-3172, ¶ 13 ("[I]n Ohio there is no steadfast rule that the 'reasonableness' of attorney fees must be proved by expert testimony. * * * [E]vidence of reasonableness 'may take the form of testimony, affidavits, answers or other forms of sworn evidence. As long as sufficient evidence is presented to allow the trial court to arrive at a reasonable attorney fee award, the amount of the award will not be disturbed absent an abuse of discretion.'"), quoting *R.C.H. Co. v. 3-J Machining Serv.*, 8th Dist. Cuyahoga No. 82671, 2004-Ohio-57, ¶ 25.

{¶37} At the conclusion of Fanger's case in chief-in-chief, there was no evidence in the record to suggest that Abuaun had ever expressed dissatisfaction with the fees charged during the tenure of their attorney-client relationship or that Attorney Fanger was not keeping Abuaun apprised of the status of the case so as to require independent expert testimony establishing the reasonableness of Fanger's fees. To the contrary, Abuaun had testified upon cross-examination that he received invoices each month itemizing the work performed in connection with the

divorce proceeding and that he never sent a letter or email disputing any item listed on the invoices. Attorney Fanger likewise testified that Abuaun never raised any issues with the firm's invoices until after Fanger filed suit against him. It was not until Abuaun presented his case and testified that he had verbally raised concerns regarding the amount he was being charged to Attorney Fanger that the potential need for expert testimony establishing the reasonableness of Fanger's fees arose. Accordingly, we overrule Abuaun's first assignment of error.

Rebuttal Witness

{¶38} In his fifth assignment of error Abuaun contends that the trial court erred and abused its discretion by allowing Attorney Kronenberg to testify as a rebuttal expert witness.

{¶39} Even if the trial court had erred in allowing Attorney Kronenberg to testify as a rebuttal witness, we need not consider that error here. Before the trial began, Fanger announced that it was planning on calling two witnesses in its case-in-chief and was "holding Mr. Kronenberg back as a rebuttal witness" to testify after Abuaun's witnesses testified. Abuaun raised no objection to this proposed course of action at that time. Nor did he object to Attorney Kronenberg's testimony once he began testifying or at any other point during the trial. An appellate court need not consider an error during trial which could have been called, but was not called, to the trial court's attention when the error could have been corrected by the trial court. *See* Evid.R. 103(A)(1); *see also Sanderfer v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 104720, 2017-Ohio-1552, ¶ 8, citing *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982), and *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121-123, 679 N.E.2d 1099 (1997). Because Abuaun did not object to Attorney Kronenberg's testimony at trial, he has forfeited all but plain error — which he does not claim exists here. *See, e.g., Sanderfer* at ¶ 8;

Selbee v. Van Buskirk, 4th Dist. Scioto Nos. 16CA3777 and 16CA3780, 2018-Ohio-1262, ¶ 51-57. Accordingly, we overrule Abuaun's fifth assignment of error.

Attorney Fees, Interest and Right to Setoff

{¶40} In his second, third and fourth assignments of error, Abuaun challenges the trial court's award of $65,189 in unpaid attorney fees and legal expenses and $37,692.45 in accrued simple interest to Fanger for Abuaun's breach of the agreement.

Standard of Review

{¶41} When reviewing an appeal from a bench trial, we generally apply a manifest weight standard of review. *Revilo Tyluka, LLC v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 5 (8th Dist.), citing App.R. 12(C) and *Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). App.R. 12(C). Under this standard, we are "guided by a presumption that the findings of the trier-of-fact were indeed correct." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.'" *Id.*, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978).

{¶42} The party seeking damages on a breach of contract claim bears the burden of proving that claim by a preponderance of the evidence. *Shelly Co. v. Karas Props.*, 8th Dist. Cuyahoga No. 98039, 2012-Ohio-5416, ¶ 28. We review a trial court's determination of the amount of damages for an abuse of discretion. *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015-Ohio-1193, 35 N.E.3d 508, ¶ 9, quoting *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 665 N.E.2d 664 (1996) ("Reviewing courts 'will not disturb

a decision of the trial court as to a determination of damages absent an abuse of discretion.'"). We likewise review a trial court's determination of the reasonableness of attorney fees for abuse of discretion. *See, e.g., Cleveland Town Ctr., L.L.C. v. Fin. Exchange Co. of Ohio, Inc.*, 2017-Ohio-384, 83 N.E.3d 383, ¶ 25 (8th Dist.), citing *Buck v. Pine Crest Condominium Assn. Group D-E-F*, 8th Dist. Cuyahoga No. 97861, 2012-Ohio-5722, ¶ 26. An abuse of discretion is "far more than a difference of opinion." *Cleveland Town Ctr.* at ¶ 26, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). A trial court abuses its discretion where its decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Reasonableness of Hours Billed for Services Performed

{¶43} In his second assignment of error, Abuaun asserts that Fanger failed to meet its burden of establishing the reasonableness of its fees because Fanger's practice of "block billing" precluded the trial court from evaluating the reasonableness of its time entries. In his third assignment of error, Abuaun claims that the trial court abused its discretion by awarding Fanger the full amount of legal fees it requested because his expert testified that Fanger's fees were "excessive" and "unreasonable." He also claims that he was "entitled to a set off on fees" because Attorney Fanger was negligent in failing to file a modified shared parenting plan and because he filed a counterclaim that was not within the jurisdiction of the domestic relations court.

{¶44} In determining the reasonableness of attorney fees, courts consider numerous factors, including the time and labor involved in litigation, the novelty and difficulty of the legal questions involved and the results of the legal services. *See, e.g., Blisswood Village Home Owners Assn. v. Cleveland Community Reinvestment, LLC*, 8th Dist. Cuyahoga No. 105450,

2018-Ohio-2299, ¶ 22, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991); Prof.Cond.R. 1.5.

{¶45} Although narrative or block billing may not be a "best practice" and use of narrative or block billing may make it more difficult for a court to evaluate the reasonableness of time billed for particular tasks, block billing does not, per se, preclude a finding of the reasonableness of attorney fees. *See, e.g., Van Dress Law Offices Co., L.L.C. v. Dawson*, 8th Dist. Cuyahoga No. 105189, 2017-Ohio-8062, ¶ 31-33. In this case, although certain of the time entries include multiple tasks, many do not. Further, those time entries that do encompass multiple tasks frequently involve interrelated tasks, e.g., attending a pretrial conference and discussions with the client relating to that conference or drafting a letter or email to opposing counsel and communications with the client regarding that correspondence. Based on the record before us, including a review of the time entries, we cannot say that the block billing that occurred in this case precluded the trial court from appropriately evaluating the reasonableness of Fanger's time entries or that the trial court otherwise abused its discretion in awarding Fanger attorney fees, notwithstanding its practice of "block billing" certain tasks.

{¶46} With respect to Abuaun's claim that Fanger's fees were otherwise excessive and unreasonable, the trial court found that while Fanger's "fees alone are high," it had "satisfied its burden of proof that the fees were reasonable given the type of case at hand and the length of the underlying trial." Other than the time Attorney Fanger and a paralegal spent preparing the shared parenting plan, Abuaun does not challenge the reasonableness of the time spent of any particular task in his appellate brief. Likewise, other than its filing of the counterclaim for

intentional infliction of emotional distress, Abuaun does not contend that any particular task or tasks for which he was billed should not have been performed.[7]

{¶47} The trial court heard from Abuaun, Attorney Fanger and both parties' exerts regarding the "complicated" divorce proceeding, the alleged reasonableness (or unreasonableness) of Fanger's attorney fees and the alleged appropriateness (or inappropriateness) of Fanger's strategy with respect to the counterclaim/name issue and shared parenting plan in the divorce proceeding. In its findings of fact, the trial court expressly rejected Abuaun's expert's testimony that Fanger's attorney fees should not have exceeded $12,000 as not credible and "not based in fact" "considering that the trial alone lasted ten business days." The trial court further found that Abuaun had not established that he was entitled to a setoff against the attorney fees he owed Fanger based on Fanger's alleged negligence in filing the counterclaim and failing to file a modified shared parenting plan. The trial court noted that although the domestic relations court lacked jurisdiction to hear tort claims, it ultimately resolved the issue of the child's name — an issue of importance to Abuaun that Fanger raised through the counterclaim — in Abuaun's favor through its equitable powers. The trial court further found that although the domestic relations judge had "requested" that Abuaun file a modified shared parenting plan, that request was not docketed as an order by the domestic relations court, Abuaun had effectively modified his shared parenting plan through his testimony and that, as articulated by the domestic relations court in its judgment entry, the domestic relations court's determination that shared parenting was not in the child's best interest "was not based in any way on [Abuaun's] failure to file a modified shared parenting plan."

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[7] Although we note that a number of the time entries lack a great deal of detail, e.g., charging for "wof" (work on file) or telephone calls, emails or letters without specifying the subject matter, Abuaun has not challenged the reasonableness of Fanger's fees on that basis. Accordingly, we do not address that issue here.

{¶48} The trial court's findings are supported by competent, credible evidence in the record. Based on the record before us, we cannot say that the trial court abused its discretion or otherwise erred in concluding that Fanger was entitled to recover $65,189.00 in attorney fees and expenses on its breach of contract claim. Accordingly, we overrule Abuaun's second and third assignments of error.

Exhibit 10 and the Trial Court's Interest Award

{¶49} Finally, in his fourth assignment of error, Abuaun challenges the evidentiary basis for the trial court's interest award. Abuaun contends that "Exhibit 10" — the document the trial court appears to have relied upon in determining the amount of accrued simple interest to award Fanger — was not properly considered by the trial court because it lacked foundation, failed to identify the preparer, was inadmissible hearsay and because Abuaun had no opportunity to cross-examine whomever prepared the document.

{¶50} In this case, the trial court appropriately concluded that the agreement did not authorize Fanger to charge 1.5% compounded monthly interest on Abuaun's unpaid balances. As the trial court found, under the terms of the agreement, Fanger could charge only 1.5% simple interest on unpaid balances each month. However, to recover the 1.5% monthly simple interest to which it was entitled under the agreement, Fanger needed to present evidence establishing how much interest was due.

{¶51} At trial, Fanger argued for, and presented evidence of, accrued interest calculated only on a compound basis. It presented no evidence establishing the amount of interest that would have accrued had interest on Abuaun's unpaid balances been calculated on a simple interest basis. Accordingly, at the conclusion of the trial, the trial court requested that Fanger submit "evidence" "re-calculating [its] bill using simple interest." In response to the trial court's

request, Fanger filed "Exhibit 10." We agree that Exhibit 10 does not fill the gaps in the evidence Fanger presented at trial regarding the amount of interest to which it was entitled under the agreement.

{¶52} Exhibit 10 is a spreadsheet that lists invoice dates, prior balances, payments applied, interest charges and balances due ranging from June 30, 2013 to January 4, 2018. It shows a series of mathematical calculations — i.e., the sum of each of Abuaun's purported unpaid monthly principal balances identified as "balance[s] subject to interest" multiplied by .015 — resulting in a total "interest balance on this report" of $37,692.45. Although the document is identified as *Exhibit* 10, there is nothing in the record to indicate that the document was admitted into evidence as an exhibit. No one testified regarding Exhibit 10 or the information set forth in Exhibit 10 at trial and Exhibit 10 was not accompanied by any type of affidavit explaining who prepared the document, what information or documents were used to prepare the document or otherwise establishing the accuracy and completeness of the information used to perform the interest calculations set forth in Exhibit 10.

{¶53} Fanger contends that Exhibit 10 represents nothing more than a simple "mathematical calculation" the trial court asked it to perform and that, as such, is not is not subject to the hearsay rule or other evidentiary requirements. However, apart from Exhibit 10, there is no evidence in the record establishing the monthly invoice balances, i.e., the "balance[s] subject to interest," upon which the simple interest calculations set forth in Exhibit 10 are based.[8] Fanger did not introduce the monthly invoices it sent to Abuaun into evidence at trial or present

[8] Further, the spreadsheet purports to calculate 1.5% monthly interest on both the unpaid monthly invoice balances related to Fanger's representation of Abuaun in the divorce proceeding and the "expenses" Fanger incurred in connection with the instant collection matter. Fanger has not identified any basis upon which it would be entitled to charge 1.5% monthly interest on the expenses it incurred in this case. The agreement does not address expenses incurred in collection matters.

any other evidence establishing the monthly unpaid "balances subject to interest at trial." Although Fanger introduced an itemized billing statement listing all of the charges it billed Abuaun by the date the services were performed, the running balances listed on that statement do not correspond with the invoice dates listed on "Exhibit 10." Further, the dates of Abuaun's payments listed on the itemized billing statement do not match the invoice dates associated with those payments set forth in Exhibit 10. Without any testimony or other evidence laying a foundation for and establishing the balances used in calculating simple interest in Exhibit 10, the trial court could not reasonably award interest based on Exhibit 10.

{¶54} Thus, the trial court's award of $37,692.45 in accrued simple interest on Fanger's breach of contract claim is not supported by evidence in the record. The trial court abused its discretion in relying on Exhibit 10 to determine the amount of prejudgment interest to be awarded Fanger under the agreement.

{¶55} Although Fanger is correct that Abuaun did not object to Exhibit 10 and that "there is no objection on the docket following the filing of the Exhibit," there is no indication in the record that he had any opportunity to do so before the trial court issued its decision. The record reflects that Fanger's "Submission of Plaintiff's Exhibit 10 Per Order of Court" was electronically filed and served on January 31, 2018 — the same day the trial court filed its judgment entry. Indeed, as listed on the docket, the trial court's issuance of its judgment entry precedes Fanger's filing of Exhibit 10.

{¶56} Accordingly, Abuaun's fourth assignment of error is sustained. The trial court's judgment is reversed to the extent it includes an award to Fanger for $37,692.45 in prejudgment interest.

{¶57} Judgment reversed; case remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., CONCURS;
EILEEN T. GALLAGHER, J., DISSENTS

EILEEN T. GALLAGHER, J., DISSENTING:

{¶58} I concur with the majority's resolution of Abuaun's first, second, third, and fifth assignments of error. However, I respectfully dissent from the majority's determination that the trial court's award of $37,692.45 in accrued simple interest is not supported by the evidence. Viewing the record in its entirety, I disagree with the position that in order to prove the amount owed in interest, Fanger was required to introduce the monthly invoices sent to Abuaun during the pendency of their attorney-client relationship.

{¶59} In this case, Fanger was unquestionably entitled to simple interest at a rate of 1.5% on the total outstanding balance of unpaid fees pursuant to the clear terms of the fee agreement, marked Plaintiff's exhibit No. 1. Thus, Abuaun's paramount dispute at trial concerned the breadth of the total outstanding balance and the reasonableness of Fanger's itemized time and

expense reports. Throughout trial, Abuaun continuously argued that the total value of the attorney fees charged by Fanger was excessive. Importantly, however, Abuaun never disputed the accuracy of the amount he was billed in each monthly invoice, as reflected in Plaintiff's exhibits Nos. 9 and 10.[9] This is because Abuaun's defense focused on the appropriateness of the fees — not the authenticity or accuracy of the invoices charging the fees. In my view, had there been a question relating to the accuracy of the invoice records, it certainly would have been, or should have been, raised by Abuaun during the trial.

{¶60} Because this court has determined that the outstanding balance of fees in the amount of $65,189 was reasonable and supported by the evidence, I would conclude that Abuaun has waived any challenge to the authenticity or accuracy of the monthly invoices that now serve to calculate the total amount of simple interest owed. Accordingly, I would affirm the trial court's award of simple interest.

[9] Together, the amounts billed each month from June 30, 2013 to January 4, 2018, less payments applied, equates to the outstanding balance of $65,189.