

[Cite as *Ruffian, L.L.C. v. Hayes*, 2011-Ohio-831.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ruffian, LLC,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-948
	:	(C.P.C. No. 06CVC-05-6238)
D. Thomas Hayes,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 24, 2011

Vorys, Sater, Seymour and Pease LLP, Joseph R. Miller and Daren S. Garcia, for appellee.

Wesp/Barwell, LLC Attorneys at Law, E. Joel Wesp and Gregory P. Barwell, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, D. Thomas Hayes ("Hayes" or "appellant"), appeals the judgment granted by the Franklin County Court of Common Pleas in favor of plaintiff-appellee, Ruffian, LLC ("Ruffian" or "appellee"), enforcing a settlement agreement and awarding attorney fees and expenses for frivolous conduct in accordance with R.C. 2323.51. For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court.

{¶2} The facts of this matter stem from a video production services agreement between Ruffian and Hayes. Under the agreement, Hayes was to travel to Middleburg, South Africa to film, edit and create a documentary on the AIDS virus. Hayes was a member of the limited liability company of Ruffian and traveled with other members to produce the film. In the midst of production, however, there arose a divergence of opinions regarding how to proceed with the production. This dispute continued after the members returned to the United States.

{¶3} As a result, on May 11, 2006, Ruffian filed a verified complaint for emergency replevin, injunctive relief, monetary damages, indemnification, and declaratory judgment. This same date, Ruffian filed a motion for emergency order of possession and a motion for preliminary injunction. With these filings, Ruffian generally sought the return of any and all of the footage filmed in South Africa in addition to its tangible property. It also sought to enjoin Hayes from using Ruffian's property or the South Africa footage in any way. The trial court granted an emergency order of possession and scheduled the matter for a preliminary injunction hearing.

{¶4} On May 12, 2006, Ruffian filed a motion for expedited discovery, which the trial court granted. Depositions of Ruffian's members were scheduled for May 25 and May 26, 2006. Hayes was deposed on May 25, 2006. At the conclusion of his deposition, his counsel, Leon Bass ("Bass"), approached Ruffian's counsel to negotiate a settlement. Ruffian rejected Hayes's initial offer at settlement. The next morning, the parties met to conduct the remaining depositions. In lieu of conducting the depositions, however, the parties engaged in further settlement negotiations. Eventually, the parties reached an agreement on the terms of a settlement. The terms were read into the record

and were transcribed by a court reporter. The parties agreed to reduce the terms to a formal, executed writing on or before May 30, 2006. They chose this deadline because of the impending preliminary injunction hearing, which was scheduled for May 31, 2006.

{¶5} As was agreed, Ruffian's counsel composed the first draft of the agreement and sent it to Bass. According to Bass, this draft did not reflect the parties' agreement. He therefore drafted his own version of the agreement, which he conceded included additional terms upon which the parties had never previously agreed. After Bass forwarded his draft to Ruffian's counsel, Ruffian sent a response questioning whether Hayes was abandoning the settlement altogether. Ruffian's counsel provided another draft and imposed a deadline of 1:00 p.m. on May 30, 2006 for Hayes to execute the agreement. Ruffian indicated that if the deadline was not met, it would be forced to prepare for the preliminary injunction hearing. Hayes did not execute the document by the deadline, and the parties therefore presented to the trial court for the preliminary injunction hearing on May 31, 2006.

{¶6} On that morning, Ruffian filed a motion to enforce the settlement agreement. Instead of presiding over a preliminary injunction hearing, the trial court heard arguments from each side regarding the settlement. The court instructed the parties to refrain from prosecuting or defending the action while it decided Ruffian's motion to enforce the settlement agreement. In response, however, Hayes indicated he had already filed an answer, counterclaims, a third-party complaint, and a motion to disqualify Ruffian's counsel. The court indicated it would stay those matters in addition to the remainder of the case while it decided Ruffian's motion to enforce the settlement agreement. The court then asked the parties to submit proposed entries reflecting their

positions on the terms of the settlement. The court also ordered the parties to temporarily comply with the terms that were read into the record on May 26, 2006.

{¶7} On June 6, 2006, the trial court issued an order memorializing the verbal, interim orders set forth in the May 31, 2006 transcript. In response, appellant requested a status conference before the court, which occurred on June 9, 2006.

{¶8} On June 14, 2006, Hayes filed his memorandum contra Ruffian's motion to enforce the settlement agreement. In his brief, Hayes argued that the parties had merely reached an agreement to agree. He argued that the terms were too indefinite to constitute a meeting of the minds, and thus there was no enforceable agreement. This same date, Hayes also filed a motion to reconsider the trial court's order temporarily enforcing the terms of the May 26, 2006 settlement. He argued that the trial court had no authority to issue such an order. The trial court denied this motion in a decision filed on August 31, 2006, but refrained from reaching a decision on Ruffian's motion to enforce.

{¶9} On October 19, 2006, the trial court presided over an evidentiary hearing on Ruffian's motion to enforce.¹ The parties presented testimony and advanced their positions regarding the terms of the settlement. Ruffian then filed a motion for expenses based upon the argument that Hayes acted frivolously in denying the existence of the settlement.

{¶10} On February 22, 2007, the trial court issued its decision granting Ruffian's motion to enforce. In its decision, the court rejected Hayes's argument that there was no meeting of the minds. It further held that the terms read into the record on May 26, 2006

¹ The record contains discrepancies over when this hearing occurred. Some record references refer to the hearing as having occurred on October 16, 2006, while others refer to October 19, 2006.

were clear and capable of being understood. The court then analyzed terms that Hayes disputed, including: the no contact provision, the provision regarding the filing of Hayes's deposition, and the allegation that Hayes was entitled to receive credit for the production. Specifically, the court held that the no contact provision was undisputed because Hayes's concerns were contrary to the common sense implicit in every agreement. Next, the court held that there was no dispute regarding the filing of Hayes's deposition because the parties had expressly agreed that it would not be filed barring any subsequent breach by Hayes. Finally, the court held that the parties had not agreed upon a credit. As a result, there could be no dispute regarding this term.

{¶11} After conducting this analysis, the court granted Ruffian's motion to enforce and referred the frivolous conduct issue to a magistrate. The frivolous conduct issue was scheduled to be heard by a magistrate on November 29, 2007. At this point, Hayes had also filed a motion for expenses arguing that Ruffian acted frivolously in filing a motion for fees when the matter had previously been stayed. Therefore, on November 29, 2007, the magistrate presided over an evidentiary hearing on each party's motion for expenses.

{¶12} On May 8, 2008, the magistrate issued a decision and found that the conduct of Hayes in repudiating the agreement and filing a series of documents served merely to harass Ruffian, unnecessarily and unreasonably prolonged the litigation, and increased Ruffian's litigation costs. The magistrate therefore found the conduct of Hayes and Bass to be frivolous under R.C. 2323.51(A)(2)(a)(i). Finally, the magistrate found that Ruffian was adversely affected by Hayes's conduct because it incurred reasonable and necessary attorney fees in the amount of \$47,834.09 as a direct and proximate result.

Hayes filed objections to the magistrate's decision. On September 29, 2009, the trial court overruled the objections and adopted the magistrate's decision as its own.

{¶13} Hayes is the only party who has appealed the trial court's decision. In his appeal, he presents the following 13 assignments of error:

ASSIGNMENT OF ERROR NO. 1:

The court erred to the prejudice of Plaintiff-Appellee [sic] when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that Defendant was improperly denied the opportunity to fully develop the record in the frivolous conduct hearing, including a full review of what Defendant's counsel perceived as material omissions of May 26 terms in the Plaintiff's first and second drafts of the written agreement and material terms which Plaintiff's counsel added to their drafts of the written agreement.

ASSIGNMENT OF ERROR NO. 2:

The Common Pleas Court erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that The Magistrate refused to permit attorney Leon Bass to fully and completely present defendant's evidence as it pertained to the question of frivolous conduct (as opposed to the question of what decision the court rendered regarding the sorting out of the issues in dispute over the embodiment of the May 26, 2006 terms in the various written drafts that were exchanged immediately following that transcribed meeting).

ASSIGNMENT OF ERROR NO. 3:

The Common Pleas Court erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error in sustaining Plaintiff's objections to defendant's counsel's attempt to fully develop the record on the frivolous conduct [motion], improperly basing the repeated sustaining of Plaintiff's relevance objections on the grounds that the court had previously heard testimony on the issue of what constituted the contract of settlement and on the grounds that the court had made findings of fact and conclusions of law

which the Magistrate stated would be incorporated into the magistrate's decision on the frivolous conduct issue.

ASSIGNMENT OF ERROR NO. 4:

The Common Pleas Court erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that carrying on post-May 26 discussions over the competing draft versions of the written agreement violates Ohio Rev. Code §2323.51(A)(2)(a)(i) as an obvious act merely to harass the other party or to maliciously injure the other party or needlessly delay or increase the cost of litigation because the Common Pleas court never made a determination that Defendant had repudiated or abandoned the essential terms of the May 26 agreement. In its August 31, 2006 interim order the Court stated: "Therefore, it appears what is disputed is not the existence of an agreement but rather the draft versions of the written agreement memorializing the terms thereof." (August 31, 2006 Order at p. 6). The Court again noted in its February 22, 2007 decision that the gravamen of the parties dispute was not over agreement on the May 26, 2006 terms themselves but a dispute over the versions of the settlement agreement embodied in the written drafts exchanged between the parties between May 28, 2006 and May 30, 2006 when [Plaintiff's] counsel announced that there would be "no more negotiation."

ASSIGNMENT OF ERROR NO. 5:

The Common Pleas Court erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that the filing of any or all of the pleadings referenced in the Magistrate's Findings of Fact No. 3 would never have been filed by any reasonable attorney to protect the client's interests in the face of ongoing litigation. There is not any credible evidence that the filing of these pleadings was done solely for the purpose of harassing or needlessly extending the litigation because given the Common Pleas court's decision to schedule a full-blown evidentiary hearing on the motion to enforce settlement as mandated by *Rulli [v. Fan Co.]*, 79 Ohio St.3d 374, 1997-Ohio-380], there is no evidence

that these pleadings, particularly those which dealt with the terms of the settlement, in any way prolonged or extended the course of litigation once the Common Pleas court ordered the evidentiary hearing on the motion to enforce settlement.

ASSIGNMENT OF ERROR NO. 6:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding a proximate cause relationship between the fees allegedly incurred by Plaintiff and any conduct on the part of Defendant which satisfies the specific requirements of Ohio Rev. Code §2323.51 because the Magistrate proceeded under the erroneous premise that prior rulings by the Common Pleas Court during the lead up to the November 29, 2007 hearing had already found "frivolous conduct" on the part of the defendant.

ASSIGNMENT OF ERROR NO. 7:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that Defendant's conduct amounted to that which "*obviously serves merely* to harass or maliciously injure another party to the civil action ' or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation" is without foundation and is erroneous.

ASSIGNMENT OF ERROR NO. 8:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that Defendant was guilty of Ohio Rev. Code §2323.51(A)(2)(a)(i) frivolous conduct merely because the Defendant was proceeding with the motion for reconsideration and the defense of the motion to enforce because the Common Pleas the [sic] Court proceeded from its June 6, 2006 interim order to convene a full-blown evidentiary hearing on the Plaintiff's

Motion to Enforce premised on the Common Pleas Court's expressed need to resolve the dispute which arose over the parties' competing versions of the written embodiment of the May 26, 2006 transcribed settlement points just as the Supreme Court in *Rulli* prescribed.

ASSIGNMENT OF ERROR NO. 9:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that Plaintiff should receive an award of fees caused by Plaintiff's own failure to mitigate the effects of any alleged frivolous conduct.

ASSIGNMENT OF ERROR NO. 10:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's objections to and adopted in its entirety the Magistrate's Findings of Fact and Conclusions of Law in that the Magistrate committed error as a matter of law and abused discretion in finding that [Plaintiff] was harmed by the actions of the Defendant and that it incurred attorney's fees which should be assessed against Defendant and Defendant's counsel and by failing to find that it was Plaintiff who, on May 26, 2006 elected to shut down further discussions over the form of the final written agreement in favor of plowing ahead with the litigation which represented the overarching proximate cause of the litigation activity which followed through and including the Court's [February] 22, 2007 decision on the motion for enforcement in which the Court refereed between the two competing proposed entries and imposed the terms of the final settlement.

ASSIGNMENT OF ERROR NO. 11:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it overruled Defendant's Motion for Sanctions against Plaintiff.

ASSIGNMENT OF ERROR NO. 12:

The Court of Common Pleas erred to the prejudice of Defendant-Appellant when it granted plaintiff's May 26, 2006 Motion to Enforce Settlement Agreement.

ASSIGNMENT OF ERROR NO. 13:

The findings of fact adopted by the Common Pleas Court are not supported by the evidence, are against the manifest weight of the evidence and the conclusions of law are contrary to law.

{¶14} Initially, we note that a trial court has the statutory authority to find frivolous conduct and award reasonable attorney fees as sanctions against a party, its attorney, or both. R.C. 2323.51(B)(4). As Bass has not appealed the portion of the judgment as it relates to him personally, such issues are not properly before us. See *Orbit Electronics, Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, fn. 6; see also *Harbourtown Properties, Inc. v. Citizens Fed. Bank* (Nov. 10, 1997), 10th Dist. No. 97APE03-328.

{¶15} As a party to this appeal, appellant's assignments of error raise five general challenges and will be addressed in the following order. First, we will address assignment of error twelve, which regards the issue of whether the trial court erred by enforcing the settlement agreement. We will then turn to assignments of error one, two, and three, which regard the extent of the record presented during the frivolous conduct hearing. We will then consider assignments of error four, five, seven, eight, and thirteen, which regard the frivolous conduct findings. Next, we will consider assignments of error six, nine, and ten, which regard the decision awarding attorney fees and expenses as a result of appellant's frivolous conduct. Finally, we will address assignment of error eleven, which regards the decision to deny appellant's motion for sanctions against appellee.

{¶16} The issue presented in the twelfth assignment of error, is whether the trial court erred when it granted appellee's motion to enforce the settlement agreement. The relevant analysis therefore regards the trial court's action on the motion to enforce.

{¶17} "[A] settlement agreement is a contract designed to terminate a claim by preventing or ending litigation[.]" *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158. "An agreement is enforceable if it encompasses the essential elements of the bargain." *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 169, citing *Reck v. Daley* (1943), 72 Ohio App. 307, 315-17. If less essential terms are omitted from an agreement, they may be resolved by "later agreement or judicial resolution." *Id.* "If the court can determine that the parties intended to be bound, it may fashion those less essential terms that were omitted in order to reach a fair and just result." *Imbrogno v. MIMRx.COM, Inc.*, 10th Dist. No. 03AP-345, 2003-Ohio-6108, quoting *Gurich v. Janson* (Nov. 17, 2000), 11th Dist. No. 99-A-0006; see also *Shaffer v. Triple Diamond Excavating*, 11th Dist. No. 2009-T-0104, 2010-Ohio-3808, ¶22; *Keck v. Health Care & Retirement Corp. of Am.* (Dec. 15, 2000), 11th Dist. No. 99-L-105; *Aligood v. Proctor & Gamble Co.* (1991), 72 Ohio App.3d 309, 311, citing *Litsinger Sign Co. v. American Sign Co.* (1967), 11 Ohio St.2d 1.

{¶18} A dispute over a term's meaning does not necessarily equate to an omission of an essential term that renders an agreement unenforceable. *Allen v. Bennett*, 9th Dist. No. 23570, 2007-Ohio-5411, ¶14. This is true because "[a]ll agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 4, 2002-Ohio-2985, ¶17, quoting 1 Corbin on Contracts (Perillo Rev.Ed.1993) 530, Section 4.1.

{¶19} Again, appellant's twelfth assignment of error challenges the trial court's resolution of appellee's motion to enforce the settlement agreement. In support of this assignment of error, appellant argues that appellee's drafts of the settlement agreement constituted offers to amend, or counteroffers to, the parties' original agreement because they contained purported changes, additions and omissions to the terms of the parties' settlement agreement. Appellant cites the "mirror image" rule in support of his argument that there was no offer and acceptance regarding these changes, additions and omissions included in appellee's drafts.

{¶20} Under Ohio App.R. 16(A)(7), an assignment of error must be supported by an argument, which includes citations to legal authority. "If an argument exists supporting an assignment of error, 'it is not this court's duty to root it out.' " *Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶22, quoting *State v. Breckenridge*, 10th Dist. No. 09AP-95, 2009-Ohio-3620, ¶10, citing *Whitehall v. Ruckman*, 10th Dist. No. 07AP-445, 2007-Ohio-6780, ¶20. Appellate courts may not construct legal arguments in support of an appellant's appeal. *Id.* citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶94, appeal not allowed, 110 Ohio St.3d 1439, 2006-Ohio-3862, reconsideration denied, 111 Ohio St.3d 1418, 2006-Ohio-5083.

{¶21} After a careful review of the arguments presented to this court, it is clear that appellant has failed to present an argument challenging the trial court's action on appellee's motion to enforce. Nowhere does appellant challenge the substance of the trial court's February 22, 2007 decision or the entry filed in conjunction therewith. Instead, appellant merely rehashes the back-and-forth amongst counsel after May 26, 2006. He

compares the agreement read into the record on May 26, 2006 to the drafts exchanged amongst counsel in the days thereafter.

{¶22} In the absence of an argument, we are unable to discern whether the trial court erred in enforcing the settlement agreement. As a result, we find that appellant has waived any purported error on the part of the trial court in granting appellee's motion to enforce the settlement agreement. We accordingly overrule the twelfth assignment of error.

{¶23} The first, second, and third assignments of error all regard the extent of the evidence introduced during the November 29, 2007 frivolous conduct hearing before the magistrate. Magistrates clearly have the authority to rule on the admissibility of evidence. Civ.R. 53(C)(2)(b), see also *Conn Constr. Co. v. Ohio Dept. of Transp.* (1983), 14 Ohio App.3d 90, 95. Indeed, in this regard, magistrates enjoy the same authority granted to trial courts. *Id.* at 95. Thus, we review such rulings for an abuse of discretion. *Id.* at 95-96. An " '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, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶24} In these assignments of error, appellant argues that the magistrate erred by limiting the testimony of Bass during the November 29, 2007 hearing. He argues that Bass was not permitted to fully explain the rationale underlying the positions he advanced. He also argues that the magistrate improperly commingled the issue of whether the parties had reached a settlement with the issue of whether appellant engaged in frivolous conduct. We find appellant's arguments to be unpersuasive.

{¶25} During the frivolous conduct hearing, the magistrate invited Bass to testify about the positions appellant advanced through the litigation. At this invitation, Bass testified at great length in the form of a narrative regarding the reasons and rationale underlying the arguments he advanced. It is true that appellee's counsel repeatedly objected to Bass's testimony and argued that the trial court had already found appellant's conduct to be unreasonable. That was simply not the case. The trial court's prior rulings regarded the substantive merit of appellant's positions, rather than the frivolity of his conduct. Nevertheless, based upon the November 29, 2007 transcript, it is clear that the magistrate permitted Bass to fully develop the record. Indeed, he testified that he perceived the changes, additions and omissions in appellee's drafts to be material and one-sided, in favor of appellee. He indicated that he felt compelled to object to these changes in order to advocate on his client's behalf. He explained his belief that neither he nor appellant expressly repudiated the agreement entered on May 26, 2006. Finally, he testified about his belief that appellee acted in bad faith when it imposed a deadline and refused to engage in further negotiations.

{¶26} Therefore, the magistrate generally permitted testimony demonstrating that the parties disputed portions of the drafted settlement, while precluding testimony regarding the specific substance of the dispute. This was proper because the trial court had already rendered a decision on the substance of the dispute, which we have upheld by our resolution of the twelfth assignment of error. Further, there is no indication that the

magistrate improperly relied upon prior rulings when considering and deciding the frivolous conduct issue.²

{¶27} Based upon the record and arguments before this court, it is unclear what more appellant wished to develop. Indeed, appellant fails to explain what any excluded evidence would have shown. Instead, he makes broad, sweeping statements regarding the necessity for evidentiary hearings to resolve disputes in settlement agreements. However, such a hearing occurred in the instant matter.

{¶28} Furthermore, "an appellate court cannot conclude that the trial court abused its discretion in failing to admit evidence, where the party who offered the evidence fails to demonstrate what the additional evidence would show and its potential effect on the matters at issue." *Davis v. Goodwill Industries*, 2d Dist. No. 23238, 2009-Ohio-6133, ¶75, citing *Mills v. Mills*, 11th Dist. No. 2002-T-0102, 2003-Ohio-6676, ¶49. Because Bass was permitted to develop the record, and because appellant has failed to demonstrate what any excluded evidence would have shown, we find no abuse of discretion based upon the record before us. As a result, we overrule the first, second, and third assignments of error.

{¶29} The fourth, fifth, seventh, eighth, and thirteenth assignments of error all challenge the frivolous conduct findings under R.C. 2323.51.³ Relevant to our analysis is the specific type of frivolous conduct found by the magistrate and adopted by the trial

² Appellant essentially concedes this by acknowledging that it is impossible to discern whether the frivolous conduct findings were based upon the trial court's prior substantive findings. (Appellant's brief, at 17.)

³ Although the thirteenth assignment of error generally presents a manifest weight and contrary to law challenge, based upon the substance of appellant's briefs and his failure to separate this assignment of error from any others, we feel it properly regards the frivolous conduct issue.

court. In this regard, the trial court found that appellant engaged in frivolous conduct under R.C. 2323.51(A)(2)(a)(i). According to that section, conduct is frivolous if it "obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation." R.C. 2323.51(A)(2)(a)(i).

{¶30} A frivolous conduct finding under R.C. 2323.51(A)(2)(a)(i) involves a determination of factual issues. *Orbit Electronics, Inc.* at ¶47, citing *Curtis v. Hard Knox Energy, Inc.*, 6th Dist. No. 2005-L-023, 2005-Ohio-6421, ¶15; see also *Burrell Industries, Inc. v. Central Allied Enterprises* (Dec. 15, 1998), 7th Dist. No. 96 BA 18, 1998 Ohio App. LEXIS 6176, *22-23, 1998 WL 896534, *8, citing *Ceol v. Zion Indus., Inc.* (1992), 81 Ohio App.3d 286, 291.

{¶31} While appellant failed to challenge the substance of the trial court's resolution of appellee's motion to enforce, we do recognize his argument with regard to the trial court's subsequent findings on the issue of frivolous conduct. Indeed, in these assignments of error, appellant contends that he had every right to litigate the dispute over the terms of the settlement agreement under *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380. According to *Rulli*, when there is a legitimate dispute over the substance or existence of a settlement agreement, the trial court must conduct an evidentiary hearing to resolve the dispute before enforcing the settlement agreement and entering judgment. *Id.* at 376.

{¶32} The gravamen of appellant's position is that he advanced arguments in support of a legitimate *Rulli* dispute rather than to act frivolously. He contends he was

forced to present such arguments when faced with appellee's drafts of the parties' settlement agreement. Therefore, while the terms of the various drafts were not particularly relevant when analyzing whether the trial court erred in enforcing the settlement agreement, they are relevant to this portion of the appeal. Further, appellant notes that the trial court's February 22, 2007 entry, which set forth the parties' agreement, was an amalgam of the terms set forth in the May 26, 2006 transcript, the testimony from the October 19, 2006 hearing, and the proposed entries submitted by the parties. Accordingly, appellant argues that the positions he advanced must have had some merit. Consequently, he argues that it was error for the trial court to have subsequently found that his conduct in litigating the dispute obviously served merely to harass or maliciously injure appellee or was for another improper purpose.

{¶33} On the other side, appellee argues that appellant merely attempted to fabricate a dispute where a legitimate one did not exist. Further, appellee contends that this fabricated dispute caused the litigation to extend well beyond May 26, 2006, the date when the parties completely settled this matter.

{¶34} Based upon the arguments presented, our review must begin by analyzing appellee's May 31, 2006 motion to enforce the settlement agreement. In support of its motion, appellee attached the three drafts exchanged amongst counsel in the days following the May 26, 2006 settlement. Two of the drafts were prepared by appellee's counsel ("appellee's May 2006 drafts"), while appellant's counsel prepared the other one. In its motion, appellee argued that appellant wrongfully withheld his signature from appellee's May 2006 drafts in order to renegotiate the terms of the agreement. (May 31,

2006 Motion to Enforce, at 8.) Further, appellee specifically requested the trial court adopt the second of appellee's May 2006 drafts. (May 31, 2006 Motion to Enforce, at 8.)

{¶35} After comparing appellee's May 2006 drafts to the May 26, 2006 transcript, it is clear that the drafts omitted at least one essential term to which the parties had previously agreed. For example, based upon the May 26, 2006 transcript, the parties agreed that appellee would have no interest in or claim to the Baker Award and College of Fine Arts ("COFA") Award previously granted to appellant. (May 26, 2006 Tr. 7-8.) Based upon the May 26, 2006 transcript, this term was important enough to require a pause in the proceedings and a discussion off of the record. Nevertheless, conspicuously omitted from both of appellee's May 2006 drafts was any mention of this term. Therefore, according to appellant, he was expected to execute an agreement that omitted essential terms to which the parties had previously agreed. As a result, appellant opposed appellee's motion and argued, inter alia, that appellee neglected to include all of the terms that were agreed upon and transcribed. (June 14, 2006 Memorandum Contra Motion to Enforce, at 7.) The matter was heard on October 19, 2006. During the evidentiary hearing on that date, appellant noted that appellee's May 2006 drafts omitted any reference to the Baker and COFA awards. (Oct. 19, 2006 Tr. 68-69.) Further, appellant testified that he considered that term to be essential and would not have entered the agreement without it. (Oct. 19, 2006 Tr. 70.)

{¶36} On October 30, 2006, appellee filed a proposed entry reflecting what it believed the settlement agreement was. Without question, this October 30, 2006 proposed entry altered what was originally included within appellee's May 2006 drafts.

Further, this October 30, 2006 entry was eventually accepted and filed by the trial court on February 22, 2007.

{¶37} By filing its February 22, 2007 entry, the trial court undoubtedly agreed with some of appellant's arguments. For example, included in the trial court's February 22, 2007 entry was a term that permitted appellant to retain the Baker and COFA awards and acknowledged appellee's waiver of any right to, interest in, or claims for the awards. Therefore, it is clear that the trial court agreed with portions of appellant's substantive positions on the dispute.⁴ We therefore reject any contention that appellant was merely attempting to fabricate a dispute where one otherwise did not exist.

{¶38} As we see it, this matter falls squarely within the confines of *Rulli*, which provided the following analysis:

Though upon first examination, the settlement terms as read into the record on June 23, 1993, appear reasonably clear, the parties were subsequently unable to agree upon the meaning and effect of those terms. * * * The parties instead offered varying interpretations of the terms read into the record, and disputed nearly every major element of the purported agreement. Therefore, the language read into the record at the initial hearing reflects, at best, merely an agreement to make a contract.

Id. at 376-77. The same scenario occurred herein. Indeed, when the parties parted ways on May 26, 2006, they believed they had resolved the matter entirely. However, in the days that followed and based upon the drafts exchanged amongst counsel, it became

⁴ In addition to the term regarding the Baker and COFA awards, appellee's May 2006 drafts included a clause providing that appellant would be liable for appellee's attorney fees in the event appellant breached the settlement agreement. These drafts omitted any reciprocal clause entitling appellant to such fees in the event of a breach by appellee. Through the trial court's proceedings, appellant consistently objected to the inclusion of this clause in the parties' settlement. The February 22, 2007 entry omitted this non-reciprocal attorney fee clause, thereby evidencing the validity of appellant's position regarding this term.

clear that they had different interpretations on what the terms of the agreement were, in addition to their meaning and effect. Stated differently, the substance of the agreement was in dispute. It is immaterial whether appellant referred to the May 26, 2006 transcript as an agreement to agree or an unenforceable agreement altogether. The indisputable fact is that they were unable to agree on the meaning, effect, and extent of the terms of their agreement.

{¶39} Again, the trial court resolved this *Rulli* dispute on February 22, 2007. The decision and the entry filed on that date set forth the final embodiment of the parties' settlement agreement. Therefore, prior to February 22, 2007, the *Rulli* dispute remained unresolved. As this relates to the frivolous conduct findings, the trial court found that appellant engaged in frivolous conduct by presenting arguments and testimony during hearings and in filings. The arguments and testimony, however, were presented in support of appellant's positions on the *Rulli* dispute. In other words, the trial court found that appellant engaged in frivolous conduct by litigating the *Rulli* dispute. However, as we have previously outlined, appellant was successful in litigating portions of the dispute. Therefore, even though appellant successfully litigated portions of the *Rulli* dispute, the court thereafter found his conduct in litigating the dispute obviously served merely to harass or maliciously injure appellee or was for another improper purpose under R.C. 2323.51(A)(2)(a)(i).

{¶40} Based upon the record before us, the trial court erred in finding that appellant engaged in frivolous conduct before February 22, 2007. Indeed, it is unclear how the trial court found in favor of appellant on portions of the dispute and thereafter found his conduct in litigating the dispute to be frivolous under R.C. 2323.51(A)(2)(a)(i).

Our conclusion solely regards the trial court's finding of frivolous conduct before February 22, 2007, or during the time when the *Rulli* dispute remained unresolved. In no way should our conclusion be interpreted to foreclose a finding of frivolous conduct subsequent to February 22, 2007, if appropriate. However, based upon the November 29, 2007 transcript, no testimony was presented regarding appellant's specific conduct after the *Rulli* dispute was resolved. Therefore, based upon the current record, it is unclear if any of appellant's conduct could be considered frivolous after February 22, 2007.

{¶41} As a result, we sustain appellant's fourth, fifth, seventh, eighth, and thirteenth assignments of error to the extent that they challenge the trial court's finding that appellant engaged in frivolous conduct before February 22, 2007.

{¶42} Our resolution of the frivolous conduct issue necessarily narrows the scope of our analysis of appellant's sixth, ninth, and tenth assignments of error, which regard the decision to award attorney fees and expenses as a result of appellant's frivolous conduct. Clearly, a finding of frivolous conduct is an essential prerequisite to awarding attorney fees for frivolous conduct. R.C. 2323.51(B)(2)(c). To the extent the trial court granted sanctions based upon its finding that appellant engaged in frivolous conduct before February 22, 2007, the award for attorney fees and expenses cannot stand. To this extent, appellant's sixth, ninth, and tenth assignments of error are sustained.

{¶43} With regard to appellant's eleventh assignment of error, appellant has failed to set forth an argument in support of the position that the trial court erred in denying his motion for sanctions. As a result, we find that appellant has waived any purported error on the part of the trial court in this regard. See App.R. 16, see also *Reid* at ¶22, quoting

Breckenridge at ¶10, citing *Whitehall* at ¶20. Accordingly, we overrule appellant's eleventh assignment of error.

{¶44} Based upon the foregoing, we overrule appellant's first, second, third, eleventh, and twelfth assignments of error. We sustain in part appellant's fourth, fifth, sixth, seventh, eighth, ninth, tenth, and thirteenth assignments of error. We therefore affirm in part and reverse in part the judgment rendered by the trial court. We accordingly remand this matter to the Franklin County Court of Common Pleas for further proceedings in accordance with law and consistent with this decision.

*Judgment affirmed in part and reversed in part;
remanded with instructions.*

BRYANT, P.J., and KLATT, J., concur.
