[Cite as *Whitt v. Vindicator*, 2018-Ohio-2760.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

TIMOTHY WHITT,

Plaintiff-Appellant/Cross-Appellee,

v.

THE VINDICATOR PRINTING CP.,

Defendant-Appellee/Cross-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 15 MA 0168

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2014-CV-1383.

BEFORE:
Gene Donofrio, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed in Part.
Reversed and Remanded in Part.

Atty. Scott Essad, 721 Boardman-Poland Road, Suite 201, Youngstown, Ohio 44512, for Plaintiff-Appellant/Cross-Appellee.
Atty. Edwin Romero, Atty. Thomas Hull II, Manchester Newman & Bennett, LPA, The Commerce Building, Atrium Level Two, 201 East Commerce Street, Youngstown, Ohio 44503, for Defendant-Appellee/Cross-Appellant.

Dated:
June 29, 2018

Donofrio, J.

{¶1} Plaintiff-appellant/cross-appellee, Timothy Whitt, appeals from Mahoning County Common Pleas Court judgments granting partial summary judgment to defendant-appellee/cross-appellant, the Vindicator Printing Company (the Vindicator), on Whitt's claim that the Vindicator wrongfully terminated his contract and limiting Whitt's damages. The Vindicator cross-appeals from the same judgment, which denied its motion for summary judgment in part, and also appeals from the court's judgment overruling its cross-motion for sanctions.

{¶2} Whitt executed an independent distribution contract with the Vindicator on June 14, 2012, with a term of three years (the Contract). Per its terms, the Contract terminated immediately upon "a determination by the Company that Contractor has committed or is committing any acts amounting to * * * malfeasance * * * in connection with either the performance of this Agreement or the inducement to execute the Agreement, or at the will of either party for any reason or no reason upon not less than thirty (30) days written notice of such termination to the other party." (Independent Distribution Agreement, ¶17, Exhibit A attached to Def.'s Motion for Summary Judgment).

{¶3} Pursuant to the Contract, Whitt paid wholesale prices for various newspapers (the Vindicator, USA Today, etc.), which he retrieved from a warehouse each morning, and resold to various vendors.

{¶4} On the morning of January 8, 2013, Whitt arrived at the warehouse accompanied by Donna Harman. The events that followed are the subject of considerable dispute between the participants and witnesses.

{¶5} According to Richard Weaver, who worked for the Vindicator through a temporary staffing agency, Whitt "got in his face" because the papers were late. Whitt pushed Weaver, which caused him to trip over a cart and hit his elbow on a van, then Whitt punched him. Weaver defended himself until coworkers intervened and told Weaver to be the "better man." Then, Harman grabbed Weaver by the chest and started hitting him, so he pushed her, and Whitt came at him a second time. The same coworker told Weaver to "let it go, just leave" so he went into the warehouse to retrieve

his coat. Weaver then spoke on the telephone to his boss, Bernie Weigand, who told him to immediately leave the warehouse. When he exited the warehouse, Whitt followed him with a fire extinguisher that he removed from the warehouse and tried to hit Weaver with it, but a coworker intervened and Weaver left the job site. (Def.'s Mot. for SJ, Exhibit 1-B).

{¶6} According to Whitt, he was summoned to the office by Shannon Jones, and was confronted by Weaver in the office and told to leave. However, Whitt remained in the office and discussed the "returns of [his] papers" with Jones. When the day's papers arrived, Whitt overheard Weaver making threatening remarks to people in the warehouse, so he approached him and said, "Richard, if you would stop snitching on everyone this would be a better place to work." Weaver denied being a snitch, then accused Whitt of snitching. Whitt then called Weaver a "pussy," prompting Weaver to "[swing] on [Whitt]." Whitt pushed him back, but Weaver managed to punch Whitt in the mouth. Whitt hit Weaver three times, then Weaver walked over to Whitt's truck. Harman exited the truck and told Weaver to "stop the fight," but Weaver punched Harman in the chest and pushed her to the ground. Then Whitt "really went after him," but Weaver broke Whitt's ring finger. Jones intervened to check on Harman and the fight ended. (Def.'s Mot. for SJ, Exhibit 1-D).

{¶7} According to Jones, he heard Whitt and Weaver arguing as the day's papers were being unloaded from the Vindicator trucks. He then saw Weaver shove Whitt and "the fight was on." (Def.'s Mot. for SJ, Exhibit 1-C).

{¶8} According to Andre Carter, Ricky Keener and Whitt were in the office shortly before the day's papers arrived. Weaver entered the office and told them they should not be there. Ricky and Whitt exited the office calling Weaver "a B and a snitch." When the papers arrived, Carter heard Weaver and Whitt began to "verbally argue and walk toward one another." It then appeared to Carter that Whitt pushed Weaver. He then saw Harman go over to Weaver and Weaver pushed her away. Carter stated that Weaver and Whitt were then throwing punches. (Def.'s Mot. for SJ, Exhibit 1-E).

{¶9} The Vindicator subsequently terminated the Contract without providing Whitt the required 30 days' notice.

{¶10} According to an undated and unsigned letter sent to Whitt's counsel from

the Vindicator's counsel, Whitt's contract was terminated solely for fighting on Vindicator property. The letter reads, in pertinent part: "The Vindicator does not tolerate fighting on its property. As a result, the temporary services agency removed Mr. Weaver from the Vindicator, and the Vindicator cancelled Mr. Whitt's independent contractor agreement." (Plaintiff's Ex. 9 attached to Schuette Depo.).

{¶11} At his deposition, Lawrence Schuette, the Vindicator's single copy district manager, conceded that the letter written by the Vindicator's counsel identifies the physical altercation as the sole reason that Whitt's contract was terminated. (Schuette Depo. 56).

{¶12} Approximately two weeks after his deposition, Schuette executed an affidavit in which he attested that he had to address performance and behavioral problems with Whitt prior to the January 8, 2013 altercation. More specifically, Schuette stated that he confronted Whitt about discrepancies in his reported "returns" for corporate accounts on his routes, which were at odds with internal audits performed by the Vindicator. Additionally, following a verbal disagreement between Whitt and contractor David Reash, Reash reported that Whitt said that "if anyone got in his face, he'd punch their lights out." Schuette informed Whitt that physical violence was "never appropriate" and if he had any further issues he should report them and not engage in any verbal altercations.

{¶13} Based on the witness statements summarized above, and Whitt's previous performance and behavior problems detailed in the Schuette affidavit, Schuette attested that the decision was made to terminate Whitt's contract. (Schuette Aff., Def.'s Mot. for SJ, Exhibit 1-A, ¶¶ 2, 4-5, 7-10).

{¶14} Two additional affidavits are attached to the Vindicator's motion for summary judgment. First, Derrick Davis, a home carrier for the Vindicator, attested that he witnessed the altercation between Whitt and Weaver and that he "believe[s] Whitt started the fight, because he saw Whitt go after Weaver grab Weaver and dare Weaver to hit him." Davis further stated that Whitt picked fights with Weaver daily and called Weaver a "ni**er" on multiple occasions, including the day of the altercation. (Davis Aff., Def.'s Mot for SJ, Exhibit 5, ¶¶ 3-4). Also attached to the Vindicator's motion for summary judgment is the affidavit of Ricky Keener, an assistant to an independent

distributor. According to Ricky's affidavit, he witnessed Whitt use offensive racial slurs toward Weaver. (Keener Aff., ¶¶2-4, Def.'s Mot. for SJ, Exhibit 7).

{¶15} At her deposition, Sue Keener, a supervisor at the time, acknowledged that she reported two verbal altercations between Whitt and Weaver where they exchanged racial slurs ("monkey," "white trash"). (Keener Depo. 17-26). Keener believed that both Whitt and Weaver were equally responsible for the brawl. (Keener Depo. 62).

{¶16} At his deposition, Whitt denied using any racial epithet towards Weaver. But admitted that he called Weaver a "pussy" and a "bitch" prior to the physical altercation. He stated that Weaver called him "white trash" and a "redneck." Whitt claimed that he took the fire extinguisher from the wall because he feared that Weaver might have a gun or other weapon in his car. (Whitt Depo. 33-35, 38-40).

{¶17} Whitt filed a complaint against the Vindicator raising claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) tortious interference with business relationships, (4) unjust enrichment, (5) fraud, and (6) spoliation of evidence.

{¶18} Both the Vindicator and Whitt filed motions for summary judgment.

{¶19} The trial court noted that counts one, two, and four all dealt with Whitt's allegation that the Vindicator wrongfully terminated his contract short of its three-year term. It made the following findings. The Contract contained a valid termination clause whereby either party could terminate the Contract for any reason or no reason. The Vindicator admitted that it did not provide written notice to Whitt prior to terminating the Contract. Per the terms of the contract, this lack of written notice limited Whitt's potential damages to 30 days' profits. The court found the Vindicator validly terminated the Contract. It found that Whitt did not present any evidence that the Vindicator acted in bad faith.

{¶20} On counts three and five, the court found the claims were contravened by the plain terms of the Contract. And as to count six, the court found Whitt admitted at his deposition that he had no evidence to support the claim.

{¶21} Therefore, the trial court entered summary judgment on counts three, five, and six in favor of the Vindicator. As to counts one, two, and four, the trial court granted

summary judgment in part to the Vindicator insofar as it limited Whitt's potential damages, should he succeed on these claims, to 30 days' lost profits. The court found genuine issues of material fact remained as to whether the Vindicator breached the Contract when it terminated Whitt for malfeasance.

{¶22} Whitt filed a timely notice of appeal on September 23, 2015, and the Vindicator subsequently filed a timely cross-appeal. The appeal was subsequently held in abeyance so that the trial court could determine damages and issue a final appealable order. The trial court did not enter its final order until December 15, 2016.

{¶23} In its December 15, 2016 judgment entry, the trial court determined that the maximum amount of Whitt's damages would be $515.23 if he was victorious on counts one, two, and four. The court then stated there was no just cause for delay.

{¶24} This appeal was returned to the active docket on January 5, 2017.

{¶25} Whitt now raises two assignments of error both related to the trial court's application of constructive termination for convenience pursuant to the termination for convenience clause in the Contract. Therefore, we will address Whitt's two assignments of error together.

{¶26} Whitt's first assignment of error states:

> THE TRIAL COURT ERRED BY LIMITING TIM WHITT'S DAMAGES TO 30 DAYS WHEN HIS CONTRACT WAS WRONGFULLY TERMINATED ONLY SEVEN MONTHS INTO A THREE-YEAR TERM. THE MEASURE OF DAMAGES SHOULD HAVE BEEN THE BALANCE OF THE CONTRACT TERM ON ACCOUNT OF THE VINDICATOR'S BAD FAITH. ONE CANNOT ILLEGALLY TERMINATE A CONTRACT AND THEN HIDE BEHIND THE PROVISIONS THAT ARE HELPFUL TO IT.

{¶27} Whitt's second assignment of error states:

> THE TRIAL COURT ERRED WHEN IT FOUND THAT THE APPELLAND [sic.] HAD "NOT PRESENTED ANY COMPETENT

EVIDENCE TO SUGGEST ANY BAD FAITH IS INVOLVED IN THIS ACTION."

{¶28} The Contract in this case terminates "at the will of either party for any reason or no reason upon not less than thirty (30) days' written notice of such termination to the other party." Consequently, based upon the unambiguous contract language, either party for any reason and at any time during the three-year term had the right to terminate the Contract with 30-days' written notice to the other party.

{¶29} Nonetheless, Whitt asserts that every contract in Ohio is subject to an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract. *Summitcrest, Inc. v. Eric Petroleum Corp.*, 7th Dist. No. 12 CO 0055, 2016-Ohio-888, 60 N.E.3d 807, ¶ 58, reconsideration denied, 7th Dist. No. 12 CO 0055, 2016-Ohio-3381. Based upon this reasonableness standard, Whitt asserts that the Vindicator's characterization of a criminal assault as a fight is bad faith, and, therefore, the doctrine of constructive termination of convenience should not apply. He claims Weaver was ultimately charged with and found guilty of assault. Thus, Whitt asserts the Vindicator terminated the Contract even though he was a victim of assault, which it asserts demonstrates bad faith.

{¶30} "A contract is defined by the words written within the four corners of the document." *Cleveland Mack Leasing, Ltd. v. Chef's Classics, Inc.*, 7th Dist. No. 05 MA 59, 2006-Ohio-888, 2006 WL 459269, ¶ 19. When contract language is clear and unambiguous, and not subject to multiple interpretations, a court will not consider extrinsic evidence to interpret the contract's terms. *Love v. Beck Energy Corp.*, 7th Dist. No. 14 NO 415, 2015-Ohio-1283, ¶ 21, citing *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992), syllabus

{¶31} In Ohio, it is well-established that there can be no covenant implied to any matter that is specifically addressed by the written terms of the contract itself. *Kachelmacher v. Laird*, 92 Ohio St. 324, 110 N.E. 933 (1915), paragraph one of the syllabus. In other words, the terms of a written contract are to be ascertained from the language of the agreement, and no implication inconsistent with the express terms therein may be inferred. *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph one of the syllabus.

{¶32} This Court has acknowledged in a commercial context that "[g]ood faith is not an invitation for a court to decide whether one party ought to have exercised privileges expressly reserved in the document." *Summitcrest, Inc.* at ¶ 60, quoting *McClure v. Northwest Ohio Cardiology Consultants, Inc.,* 6th Dist. No. L-11-1074, 2012-Ohio-1106, ¶ 27. And, as a consequence, "merely realizing the benefit of its bargain * * * does not constitute 'bad faith.'" *Id.* See also *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 443, 662 N.E.2d 1074 (1996).

{¶33} More specifically, the Ohio Supreme Court has held that an implied covenant of good faith cannot be invoked to impute a "termination only for just cause" limitation where the contract expressly provides that it can be terminated without justification because the parties' agreement to a written contract is to be ascertained from the language of the instrument itself. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 714 N.E.2d 898 (1999). "In fact, the implied duty of good faith has been limited to 'situations where one of the parties lacked good faith at the time he or she bargained for the termination right.' " *Belfrance v. Standard Oil*, 9th Dist. No. 14688, 1990 WL 203173 at *4 (Dec. 12, 1990). Thus, if properly bargained for, the right is given full effect and may be exercised for any reason. *Id.*

{¶34} Even in the employment context, Ohio law recognizes that an at-will employee may be terminated for any reason, with or without cause, in good faith or bad faith. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105, 483 N.E.2d 150 (1985); *Lake Land Empl. Group of Akron, L.L.C. v. Columber*, 101 Ohio St.3d 242, 247, 2004-Ohio-786, 804 N.E.2d 27.

{¶35} Based on the above, we find that the plain language of the Contract forecloses any implied covenant that would prevent either party from terminating the contract for any reason with 30 days' notice. To find otherwise would deny the parties of one of their contractual rights. Whitt offered no evidence that the Vindicator lacked good faith when it executed the Contract. Therefore, the Vindicator had the power pursuant to the Contract to terminate it for any reason, with or without cause, in good or bad faith.

{¶36} Accordingly, Whitt's first and second assignments of error are without merit and are overruled.

{¶37} We turn now to the Vindicator's cross-appeal.

{¶38} The Vindicator raises two assignments of error. It's first assignment of error states:

> THE TRIAL COURT ERRED IN FAILING TO GRANT THE VINDICATOR SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE VINDICATOR BREACHED WHITT'S CONTRACT BY TERMINATING WHITT FOLLOWING THE JANUARY 8, 2013 FIGHT FOR MALFEASANCE.

{¶39} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶40} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist., 2015-Ohio-4167, 44, 44 N.E.3d 1011 N.E.3d 1011, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶41} The Vindicator argues that a racially-charged fight on its premises, including the use of racial epithets by Whitt, was an act of malfeasance. The relevant Contract language reads, "this Agreement shall terminate immediately on the date on which any of the following events may occur . . . a determination by the [Vindicator] that [the contractor] has committed or is committing any acts amounting to * * * malfeasance * * * in connection with either the performance of this Agreement or the inducement to

execute the Agreement." "Malfeasance" is not defined in the contract, but the Vindicator interprets the phrase "a determination by the [Vindicator]" as vesting the Vindicator with the contractual authority to define the term.

{¶42} The actual reason for the termination of the Contract has evolved over time. First, according to the undated, unsigned letter from the Vindicator's legal counsel, the Contract was terminated solely for Whitt fighting on Vindicator property. But Whitt was never charged with assault, and, in fact, he was adjudged to be a victim of an assault in criminal court.

{¶43} Then at Schuette's deposition, he conceded that he did not know the actual reason Whitt's contract was terminated. Yet, a few days later in his affidavit, Schuette attested that Whitt was terminated based upon previous performance and behavioral problems in addition to the physical altercation.

{¶44} On summary judgment, the Vindicator asserted that the Contract was terminated for engaging in a "racially charged fight." But it is not clear from the record when the Contract was officially terminated. That is relevant because none of the witness statements gathered within the 24 or so hours after the brawl indicated that racial epithets were made by Whitt or Weaver. Although Whitt conceded that he called Weaver a "pussy" and a "bitch," he denied using racial slurs and accused Weaver of using racial slurs. Moreover, witnesses provided conflicting stories as to the cause of the fight.

{¶45} When ruling on a motion for summary judgment, the trial court must consider the facts in a light most favorable to the non-moving party. None of the witness statements, including the statements provided by Weaver and Carter, revealed that any racial epithets were made immediately prior to the brawl. Therefore, the fact finder may conclude that the actual reason Whitt's contract was terminated was the physical altercation. The fact finder may also conclude that Whitt was a victim of an assault rather than an active participant in the brawl, and, therefore, did not commit malfeasance.

{¶46} Based upon the Vindicator's evolving explanation for the termination of the contract and the conflicting accounts of the events, we find that the trial court did not err in denying the Vindicator's motion for summary judgment on the remaining claims.

{¶47} Accordingly, the Vindicator's first assignment of error is without merit and is overruled.

{¶48} The Vindicator's second assignment of error states:

> THE TRIAL COURT ERRED IN FAILING TO GRANT THE VINDICATOR'S MOTION FOR SANCTIONS AGAINST WHITT FOR HIS FILING A BAD FAITH MOTION FOR DISCOVERY SANCTIONS.

{¶49} During discovery, Whitt filed a motion for sanctions alleging the Vindicator acted in bad faith in responding to his request for admissions. The request for admission reads, "Do you admit that as a result of the incident on January 11, 2013 [sic], Richard Weaver was charged with two counts of assault (one of which was an assault on Timothy Whitt)?" The Vindicator responded:

> Upon reasonable search and inquiry, Defendant can only state that it believes [Weaver] was charged with something as a result of events taking place on January 11, 2013 [sic]. But Defendant was not a party to this action nor were any representatives of Defendant witnesses at any trials or hearings related to this action. Defendant has no further knowledge about the status of [Weaver's] criminal charges.

{¶50} In response, the Vindicator filed a cross-motion for sanctions asserting that it should be awarded sanctions for having to respond to Whitt's motion for sanctions, which also compared the Vindicator to a Nazi officer.

{¶51} The trial court did not rule on Whitt's motion.

{¶52} Civ.R. 37 authorizes a party to file a motion to compel discovery, which must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action. An evasive or incomplete answer or response to a request for discovery is treated as a failure to respond. Civ.R. 37(A)(4). Whitt's motion accused the Vindicator of feigning ignorance regarding Weaver's pending criminal charges.

{¶53} It is important to note that the motion did not include the required certification, and, according to the cross-motion for sanctions, that is because Whitt

made no good faith effort to resolve the issues without court intervention. According to subsection Civ.R. 37(A)(5)(a)(i), the trial court is prohibited from imposing sanctions where the movant files a motion prior to any good faith effort to resolve the matter with the opposing party.

{¶54} The Vindicator requested sanctions prior to the resolution of Whitt's motion by the trial court. The Vindicator's cross-motion was predicated upon Civ.R. 37(A)(5)(b), which provides:

> If the motion is denied, the court may issue any protective order authorized under Civ.R. 26(C) and shall, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court shall not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

{¶55} In the cross-motion, the Vindicator asserted that Whitt's accusations were baseless and that he failed to comply with the prerequisites of Civ.R. 37. The Vindicator relied on the fact that the information sought by Whitt was available through the public domain. But this argument ignores the fact that Whitt was not seeking to discover facts, but, instead, to establish that the Vindicator was aware that Weaver had been charged with assault. The trial court did not rule on the cross-motion for sanctions.

{¶56} The Vindicator's motion put the cart before the horse, because it requested sanctions prior to the trial court's decision to deny Whitt's motion for sanctions. It is clear from the plain language of Civ.R. 37(A)(5)(b) that the trial court may not impose sanctions until the movant has the opportunity to be heard.

{¶57} A trial court has broad discretion to impose sanctions against a party who violates the discovery rules, and this court shall not reverse the trial court's determination on this issue absent an abuse of discretion. *Linert v. Foutz*, 7th Dist. No. 11 MA 189, 2014-Ohio-4431, 20 N.E.3d 1047, ¶ 16, rev'd on other grounds 149 Ohio St.3d 469, 75 N.E.3d 1218, citing *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

{¶58} When the trial court does not rule on a pretrial motion, it may ordinarily be presumed that the trial court overruled the motion. *Schmidt v. Koval*, 7th Dist. No. 00-C.A.-239, 2002-Ohio-1558, ¶ 13, citing *Solon v. Solon Baptist Temple, Inc.*, 8 Ohio App.3d 347, 457 N.E.2d 858 (1982). Thus, we can presume the trial court denied both the motion and the cross-motion.

{¶59} But in denying the cross-motion for sanctions, the trial court failed to comply with Civ.R. 37(A)(5)(b). Pursuant to the Rule, the court "shall, *after giving an opportunity to be heard*, require the movant, the attorney filing the motion, or both to pay the party * * * who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." ((Civ.R. 37(A)(5)(b); Emphasis added). But the court is not to order the payment of expenses if the motion was substantially justified or other circumstances would make an award of expenses unjust. Civ.R. 37(A)(5)(b).

{¶60} In this case, the trial court overruled the cross-motion for sanctions without a hearing. The parties are entitled to a hearing on the matter.

{¶61} Accordingly, the Vindicator's second assignment of error has merit and is sustained.

{¶62} For the reasons stated above, the trial court's judgment is hereby reversed as to its ruling on the cross-motion for sanctions. It is remanded so that the trial court can hold the required hearing on the cross-motion for sanctions. The trial court's judgment is affirmed in all other respects.

Robb, P. J., concurs
Bartlett, J., concurs

For the reasons stated in the Opinion rendered herein, the Appellant's two assignments of error are without merit and are overruled. The Cross-Appellant's first assignment of error is without merit and is overruled. The Cross-Appellant's second assignment of error has merit and is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed and remanded in part. We hereby remand so that the trial court can hold the required hearing on the cross-motion for sanctions. The trial court's judgment is affirmed in all other respects. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.