IN THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
FULTON COUNTY, OHIO

Gary Wodtke)	App. Ct. Case No. 14FU000001
Appellee-Plaintiff,)	Trial Ct. Case No. 09CV000322
vs.)	APPELLANT'S APPLICATION FOR RECONSIDERATION
Village of Swanton)	
Appellant-Defendant.)	Alan J. Lehenbauer (0023941) Attorney for Appellant The McQuades Co., L.P.A. PO Box 237 Swanton, Ohio 43558 Phone: (419)826-0055 Fax: (419)825-3871 E-mail: mcquadelaw@embarqmail.com

Now comes Appellant, Village of Swanton, by and through counsel, and requests a reconsideration of the decision announced on April 3, 2014, and in support thereof, respectfully submits the following:

I.

The Court, in its opinion of dismissing this appeal based on the Judgment Entry of August 20, 2013, being final and appealable, failed to acknowledge that although Appellee requested a permanent injunction in paragraph e of the prayers of both the Complaint filed on September 14, 2009, and the Amended Complaint filed on January 22, 2010, the trial court did not issue a final decision on the merits of this claim in the Judgment Entry of August 20,

2013. Since the issue of a permanent injunction was pending, the Judgment Entry of August 20, 2013 is not a final appealable order.

II.

The Court, in its opinion of dismissing this appeal, was not aware of certain facts which reinstated the issues raised in the original complaint, including demands for declaratory relief and attorney fees. See Judgment Entry of September 13, 2011, Plaintiff's Amended Complaint filed on September 29, 2011, and the record.

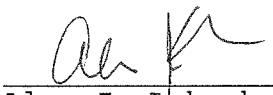
III.

In the alternative, if the Court continues to view the allegations in the Amended Compliant as controlling, the case of *Internatl. Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, which the Court regarded as dispositive in its opinion of dismissal, should be considered and applied based on the particular facts of that case and on those particular statutes allowing for an award of attorney fees in that case. The *Vaughn* case is clearly distinguishable from the case at bar in that the statutes at issue are 42 U.S.C. 1983 ("§1983") and R.C. 2315.21 on punitive damages. A failure to specifically plead these statutes is not fatal to an award of attorney fees if the pleadings and evidence support a remedy under §1983 and/or R.C. 2315.21.

WHEREFORE, on the foregoing grounds, and as more fully set forth in the attached Appellant's Brief in Support of the Application for Reconsideration, it is respectfully urged that this application for reconsideration be granted and that the Judgment Entry of the Court of Common Pleas, Fulton County, filed

on August 20, 2013, upon further consideration, be determined to be not a final appealable order, that the case be returned to the appeal docket and a new date be assigned for filing the Brief of Appellant.

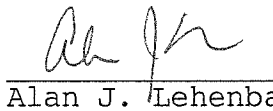
Respectfully submitted,



Alan J. Lehenbauer
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Application for Reconsideration, with attachments, was sent by ordinary U.S. mail service this 11th day of April, 2014, to: Cary Rodman Cooper, COOPER & KOWALSKI, L.P.A., 900 Adams Street, Toledo, OH 43604; Fred Hopengarten, Six Willarch Road, Lincoln, MA 01773; and Ohio Attorney General, c/o Constitutional Offices Section, 30 East Broad Street, 16th Floor, Columbus, OH 43215-3428.



Alan J. Lehenbauer
Attorney for Appellant

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Gary Wodtke	)	App. Ct. Case No. 14FU000001
Appellee-Plaintiff,	)	Trial Ct. Case No. 09CV000322
vs.	)	APPELLANT'S BRIEF IN SUPPORT OF APPLICATION
Village of Swanton	)	FOR RECONSIDERATION
Appellant-Defendant.	)	Alan J. Lehenbauer (0023941) Attorney for Appellant The McQuades Co., L.P.A. PO Box 237 Swanton, Ohio 43558 Phone: (419)826-0055 Fax: (419)825-3871 E-mail: mcquadelaw@embarqmail.com

Now comes Appellant-Defendant, Village of Swanton, by and through counsel, and for its brief in support of the application for reconsideration of the decision issued on April 3, 2014, states as follows:

FACTS

The record in this case is complicated by the fact that Plaintiff-Appellee, Gary Wodtke ("Wodtke") filed three separate complaints with the third implicitly incorporating the first and nullifying the second.

On September 14, 2009, Wodtke filed a Complaint in the Common Pleas Court of Fulton County, Ohio, as "an appeal of a decision of the Swanton Village Planning Commission" denying his request to erect on his residential property in the village a 60-foot tower

for amateur radio service ("ARS"), digital television and satellite television. *Compl., ¶1 and at Exh. A.* In the Complaint, Wodtke made the following factual allegations:

- Swanton was acting under the color of law *[Compl., ¶19]*,
- Wodtke tried to educate Swanton on federal preemption of ARS antenna *[Compl., ¶25]*, and
- "Members of the Village Council have been openly hostile towards the Antenna to the apparent end result of spearheading efforts to disregard the laws and the authority of Village of Swanton to deal with the Antenna, make every effort to crush the variance request and prevent the installation of the Antenna. The Appeal Board was made up of Village members who had personal bias and opposing interest to Mr. Wodtke and as a result a fair hearing could not be achieved. *[Compl., ¶26]*

Wodtke asserted the claim that federal law preempted local rules on ARS structures and that Swanton was precluded from regulating Wodtke's proposed tower within village limits. *Compl. at ¶27-31.* Wodtke also asserted a civil rights claim *[Compl. at ¶16, ¶32-37]*. In the prayer of the Complaint, Wodtke requested various judgments including that no permit be required to erect the tower *[Compl. at Prayer ¶a-h]*, for a declaratory judgment under R.C. 2721.03 *[id., ¶i]*, for attorney fees under 42 U.S.C. 1983 (§1983) *[id., ¶j]*, for exemplary damages "pursuant to §1983 or other applicable authority" *[id., k]*, and for "[a]ll other relief that is just and proper." *Id., ¶1.*

On January 22, 2010, Wodtke filed a second complaint entitled "Amended Complaint." Wodtke removed his claim against Swanton for §1983 civil rights violations, and his demands for a declaratory judgment, attorney fees and exemplary damages. Wodtke, however, retained the same above factual allegations *[Am.Compl., ¶19, 25 and 26]*, the federal preemption claim *[Am.Compl., ¶27-31, Prayer ¶a-e]*, and the request for "All other relief that is just and proper." *Am.Compl. at Prayer ¶1.*

In a Judgment Entry filed on September 13, 2011, the trial court granted "Plaintiff's Request for Leave to Amend his ***Initial*** Complaint." (Emphasis added.) On September 29, 2011, Wodtke filed a third complaint entitled "Plaintiff's Amended Complaint," wherein he "requests that ***his complaint*** be amended. (Emphasis added.) See *Pl's Am.Compl., p. 1.* In the last paragraph of this third complaint, Wodtke states:

> It is our request that the demands for relief in the formerly filed ***complaint*** be amended to include the request for a Rule [*sic*, R.C. Chapter] 2506 appeal as a prerequisite to the declaratory relief previously asked for. (Emphasis added.) *Pl's Am.Compl., p.2*

In the Judgment Entry filed on August 20, 2013, the trial court reviewed the Complaint and the Amended Complaint, "both being couched in terms of an 'Appeal of a Decision of the Swanton Village Planning Commission,' demanding Relief in the nature of a 'Declaratory Judgment,' and for an award of 'Attorney Fees' (pursuant to the provisions of Federal Statute, 42 U.S.C. Sec. 1983)." *J.E. 8-20-13, p. 1.* The trial court ordered that Plaintiff's Complaint for Declaratory Judgment be granted and that Swanton's decisions be reversed. *Id., p. 8.* The trial court further ordered: "Hearing on the issue of Attorney Fees is scheduled for **September 30, 2013 at 3:00 p.m.**" *Id., p. 8.*

LAW AND ARGUMENT

This appellate Court did not find a claim for attorney fees in Wodtke's Amended Complaint or in a separate motion. *Decision 4-3-14, ¶3.* This Court then concluded that "a claim for attorney fees was not pending once the court entered the August 20, 2013 judgment[.]" and that "order was final and appealable on August 20, 2013." *Id.* Appellant submits that the Court's Decision is in error for the following reasons:

1. **When a permanent injunction is requested in an amended complaint, an order that does not dispose of the injunctive-relief request and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay, is not a final, appealable order.**

"A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Nationwide Assur. Inc, v. Thompson*, 4th Dist. No. 04CA2960, 2005- Ohio-2339, ¶8; citing *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593, 756 N.E.2d 1241 (2001).

Here, Wodtke requested a permanent injunction in paragraph e of the prayers of both his Complaint and Amended Complaint. The Judgment Entry of August 20, 2013, did not contain the Civ.R. 54(B) language of no just reason for delay. The Final Judgment Entry of January 17, 2014, did include the Civ.R. 54(B) language. As a result, the trial court failed to adjudicate the injunctive relief requested in the August 20, 2013 judgment, and no final appealable order existed on August 20, 2013. With the Civ.R. 54(B) words included in the Final Judgment Entry, the trial court adjudicated the injunctive relief requested and that order was final and appealable when journalized on January 21, 2014.

2. **Plaintiff's Amended Complaint constitutes an amendment of the pleadings, pursuant to Civ.R. 15(B), and raised issues including declaratory judgment relief and attorney fees that had not been raised in the allegations of the prior Amended Complaint.**

Civ.R. 15(B), "Amendments to conform to the evidence," provides in part as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues.

Civ.R. 15(B) "clearly contemplates the granting of relief other than specifically requested in the complaint, and although the pleadings may be amended at any time to conform with the evidence or relief sought, the failure to formally amend pleadings will not jeopardize a judgment based upon competent evidence." *Cook v. Newman Motor Sales*, 6th Dist. No. E-09-028, 2010-Ohio-2000, ¶53, quoting *Murphy v. Koepke Motors*, 8th Dist. No. 47257, 84-LW-1068 (Mar. 29, 1984).

In the present case, the Complaint filed on September 14, 2009, sought a declaratory judgment pursuant to R.C. 2721.03, that a Swanton ordinance was unconstitutional. The Amended Complaint, i.e., the second complaint, filed on January 22, 2010, did not demand declaratory judgment pursuant to R.C. Chapter 2721. In Plaintiff's Amended Complaint, i.e., the third complaint, filed on September 29, 2011, Wodtke requested that his initial complaint be amended. Plaintiff's Amended Complaint filed on September 29, 2011, specifically referred to "declaratory relief previously asked for."

Here, the Amended Complaint filed on January 22, 2010, clearly did not include a request for declaratory relief. Only the original Complaint included a request for declaratory relief. As such, the parties tried the original Complaint and not the first amended complaint as it did not supplant the original Complaint. The parties further effectively consented that the triable issues were those raised in the original Complaint and in Plaintiff's Amended Complaint, including the issues of declaratory relief, §1983, attorney fees, and exemplary or punitive damages. *Id.* The trial court accepted this agreement when it granted Wodtke's request to amend his *initial* complaint. *J.E. 9-13-11.* The Judgment Entry of August 20, 2013 included decisions granting

declaratory judgments and setting a hearing for attorney fees.

3. There is no single standard in Ohio law for raising the issue of an award of attorney fees.

Civ. R. 8(A) requires a pleading to contain "a short and plain statement of the claim showing that the party is entitled to relief and *** a demand for judgment for the relief to which the party claims to be entitled." Furthermore, "all pleadings shall be construed to do substantial justice." Civ. R.8(F). Civ.R. 9 requires greater specificity in certain pleadings, e.g., capacity, fraud, mistake, condition of the mind, conditions precedent. Civ.R. 9 does not require greater specificity in pleading for attorney fees *per se*.

"Occasionally, civil complaints set forth separate and distinct claims for attorney fees. See Civ.R. 8. As a practical matter, however, almost every civil complaint includes in its prayer for relief a pro-forma request for attorney fees. Trial courts generally ignore the requests in the latter category. Appellate courts, in turn, typically treat requests for attorney fees included in a prayer for relief as having been overruled sub silento, unless a trial court specifically (1) raises the attorney fee issue and defers its adjudication, or (2) awards attorney fees and defers the determination of the amount of fees. In either of those events, [appellate courts] have historically dismissed the appeal for lack of a final appealable order." *Jones v. McAlarney Pools, Spas &, Billiards, Inc.*, 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶10 (internal citations omitted).

In *Jones*, the Fourth Appellate District found that the syllabus in *Vaughn Industries* "should be considered and applied in light of the underlying facts in that particular case. (Citations omitted.) *Id., ¶11.* In *Vaughn Industries*, the attorney fee claim

arose out of R.C. 4115.16(D) (which allows such an award to a successful employer in a prevailing wage claim), R.C. 2323.51 and Civ.R. 11. *Id.* None of those statutes and rules had been invoked in *Jones*. *Id.*

"Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶7, 906 N.E.2d 396, quoting *Nottingdale Homeowners' Assn. Inc. v. Darby*, 33 Ohio St. 3d 32, 33, 514 N.E.2d 702 (1987). An exception to this rule exists when punitive damages are awarded in tort cases involving actual malice, oppression, or insult. *Touhey v. Ed's Tree & Turf, LLC*, 194 Ohio App.3d 800, 2011-Ohio-3432 (12th Dist.), ¶17, 958 N.E.2d 212. Punitive damages need not be specially pleaded or claimed. *Lopez v. Quezada*, 10th Dist. Nos. 13AP-389, 13AP-664, 2014-Ohio-367, ¶22; *Lambert v. Shearer*, 84 Ohio App.3d 266, 273, 616 N.E.2d 965 (10th Dist.1992). If punitive damages are warranted based on the pleadings and/or the evidence, reasonable attorney fees may be awarded as an element of compensatory damages. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 35, 2000 Ohio 7, 734 N.E.2d 782 (2000). "Actual malice" is defined as "that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge[.]" *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 1994-Ohio-461, 644 N.E.2d 397. See also *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978) (A trial court's determination of whether the facts of a particular case warrant a finding of actual malice is a factual determination that will only be overturned on appeal if it is not supported by competent and credible evidence.)

Similarly, "the mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and evidence do present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to the plaintiffs' ultimate success." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶20 (8th Dist.), quoting *Berger v. Mayfield Hts.*, 265 F.3d 399, 404 (C.A.6, 2001). The plaintiff does not even have to refer to 42 U.S.C. 1983 in an argument before the court. *Goss v. Little Rock, Ark.*, 151 F.3d 861, 864-866 (C.A.8, 1998).

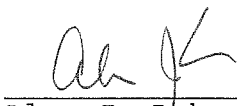
Assuming arguendo that the Amended Complaint filed on January 22, 2010, did supersede the original Complaint, the syllabus law in *Vaughn Industries* would not apply because, as in *Jones*, none of the statutes and rules on attorney fees in *Vaughn Industries* were raised in the present case. The Wodtke case concerned attorney fees awarded pursuant to § 1983 and/or R.C. 2315.21. These statutes and their interpreting caselaw allowed the Common Pleas Court of Fulton County, Ohio, the judicial authority to review the allegations in the Amended Complaint, set an evidentiary hearing, and thereafter determine whether the allegations and the evidence supported an award of attorney fees under these statutes.

C. CONCLUSION

For any or all of these reasons, issues were pending in the trial court on August 20, 2013. The Judgment Entry of August 20, 2013, is therefore not a final, appealable order. The issues of attorney fees and permanent injunction were resolved in the Judgment Entry of January 17, 2014. The Judgment Entry of January 17, 2014, is a final, appealable order. Appellant asks that this case be returned to the appellate docket of the Court. Appellant asks that a new date be assigned for the filing of the Brief of

Appellant, the Village of Swanton.

Respectfully submitted,



Alan J. Lehenbauer
Attorney for Appellant