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

GARY WODTKE,	)	Case No. 14-FU-000001
	)	
Appellee,	)	Trial Court Case No. 09-CV-000322
	)	
v.	)	**APPELLEE'S OPPOSITION TO**
	)	**APPELLANT'S MOTION FOR**
VILLAGE OF SWANTON,	)	**RECONSIDERATION**
	)	
Appellant.	)	Cary Rodman Cooper (0013062) COOPER & KOWALSKI, L.P.A. 900 Adams Street Toledo, Ohio 43604 Telephone: (419) 241-1200 Facsimile: (419) 242-5675 cooper@cklpa.com
	)	
	)	*Counsel for Appellee*

I. INTRODUCTION.

The Village of Swanton claims that this Court erred in holding that the common pleas court's August 20, 2013 Judgment Entry was a final appealable order, and in dismissing Swanton's appeal as being untimely filed.

Swanton makes two contentions in support of its position that the August 20, 2013 Judgment Entry was not a final appealable order: (1) that the common pleas court failed to rule on the Plaintiff's request for a permanent injunction; and (2) that the question of attorneys' fees was before the common pleas court as of August 20, 2013.

Swanton's contentions lack merit. The Court should deny Swanton's Motion for Reconsideration.

II. THE AUGUST 20, 2013 JUDGMENT ENTRY WAS A FINAL APPEALABLE ORDER.

A. The August 20, 2013 Judgment Entry Granted Wodtke All Relief Requested, Including a Declaration That Swanton Cannot Enforce Its Zoning Ordinance, and Must Permit Wodtke to Build the Tower.

Swanton asserts that the common pleas court did not rule on Wodtke's request for a permanent injunction, but Swanton's assertion is merely semantics. Although the common pleas court did not say, "injunction granted," the common pleas court held that Swanton cannot enforce its ordinance against Wodtke, that Wodtke can build the tower, and that Swanton cannot prevent him from building the tower – and under any interpretation, that means Swanton is under a court order to permit Wodtke to build the tower and may not interfere with Wodtke's building the tower. (August 20, 2013 Judgment Entry at 7).

Under Ohio's Declaratory Judgment Act, Rev. Code § 2721.02, a court may declare rights and the declaration may be either affirmative or negative in form and effect. And the declaration has the effect of a final judgment or decree. Wodtke requested declaratory relief respecting the legality of Swanton's ordinance and appropriate relief in the January 22, 2010 Amended Complaint, ¶ 31, et seq.

B. This Court Correctly Held That the Claim for Attorneys' Fees Was Not Before the Common Pleas Court on August 20, 2013.

As this Court noted, Wodtke's Amended Complaint did not include a claim for attorneys' fees. (April 3, 2014 Decision and Judgment at 2). In fact, the Amended Complaint did not reassert the civil rights claim under 42 U.S.C. § 1983, which was the basis for the fee claim in the original Complaint. By challenging this Court's holding that

attorneys' fees were not before the common pleas court on August 20, 2013, Swanton reveals that it is willing to say whatever seems to best suit its interests at any given time.

For example, Swanton argued below that attorneys' fees were not before the common pleas court in August 2013 because Wodtke did not request attorneys' fees in his January 22, 2010 Amended Complaint. (September 13, 2013 Swanton's Memo Opposing Attorney Fees at 1). Swanton also stated that the Amended Complaint abandoned the § 1983 civil rights claim, the lynchpin of a fee award. (*Id.*) Swanton's Opposition to Attorney Fees also cited authority holding that the Amended Complaint superseded the original Complaint. (*Id.*)

Moreover, in its Amended Answer and Counterclaim for Declaratory Judgment filed on August 9, 2012, Swanton specifically directed its Answer to the January 22, 2010 Amended Complaint and to Plaintiff's Second Amended Complaint, filed on September 29, 2011. Swanton made no answer to the original Complaint at that time, leaving the conclusion that Swanton had determined that Wodtke's January 22, 2010 and September 29, 2011 amendments superseded the original Complaint.

Swanton now contends for the first time that Wodtke's September 29, 2011 Amended Complaint somehow resurrected the original Complaint, but that is not the case. Wodtke's September 20, 2011 amendment was in fact merely a supplement, not a total amendment. And as noted above, Swanton took the position below that the original Complaint had been superseded.

Because of Swanton's judicial arguments and admissions before the common pleas court, Swanton is precluded from changing its position and arguments before this Court respecting the attorney-fee issue. As Swanton pointed out below, the Amended

Complaint does not plead a civil rights claim under 42 U.S.C. § 1983, does not make a claim for fees, and the Amended Complaint supersedes the original Complaint.

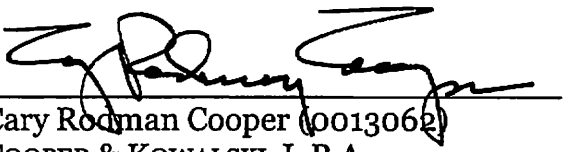
III. CONCLUSION.

This Court correctly decided that the August 20, 2013 Judgment Entry was a final appealable order because it decided all claims that were before the common pleas court at that time. Plaintiff's January 22, 2010 Amended Complaint, as supplemented by the September 29, 2011 amendment, sought declaratory relief which the court granted, and which prohibited Swanton from enforcing the ordinance and required Swanton to issue the building permit. The attorney-fees claim was not before the court; not only was the fee issue not included in the Amended Complaint, but Swanton argued in the common pleas court that the attorney-fee issue had been abandoned in the Amended Complaint.

The Court should deny Swanton's Motion for Reconsideration.

Dated: April 29, 2014

Respectfully submitted,



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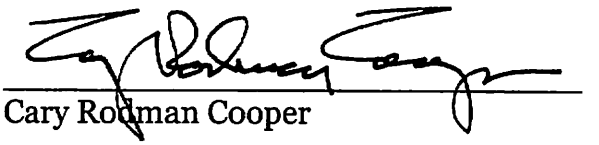
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 29th day of April, 2014, via ordinary U.S. mail, postage prepaid, upon: **Alan J. Lehenbauer**, THE MCQUADES CO., L.P.A., P.O. Box 237, Swanton, Ohio 43558.



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