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 REPLY TO APPELLEE'S OPPOSITION
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 for its reply to *Appellee's Opposition to Appellant's Motion for Reconsideration*, states as follows:

The standard for reviewing an application for reconsideration is whether the application calls to the attention of the court a legally unsupportable holding or an obvious error in its decision or points to an issue that should have been but was not fully considered. *Hamilton Mut. Ins. Co. v. Perry*, 6th Dist. No. OT-97-010, 1997 Ohio App. LEXIS 5824, *2; *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987), paragraph one of syllabus. An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusion reached and the logic used by an appellate court.

Niki D'Atri Enters. v. Hines, 7th Dist. No. 13 MA 57, 2014-Ohio-803, ¶2.

Appellant, Village of Swanton, submits that the April 3, 2014 decision of this appellate court is a legally unsupportable holding and/or an obvious error concerning the issues of permanent injunction and attorney fees. Appellant submits that neither the parties nor the trial court ever considered that the judgment entry filed on August 20, 2013, was a final, appealable order.

1. Permanent Injunction

In its opposition brief at page 2, Appellee contends that, even though the trial court did not say "injunction granted," the trial court granted his request for a permanent injunction because the trial 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[.]" The trial court's findings were clearly fact-specific to Wodtke. (Aug. 20, 2013 J.E. p. 7) Wodtke's request for permanent injunction, however, was to enjoin the enforcement of any Swanton ordinance "that does not reasonably accommodate amateur radio communications." (Am.Compl., at ¶e of prayer). Appellant submits that the August 20, 2013 Judgment Entry applied only to Wodtke. As such, the August 20th Judgment Entry did not resolve the issue of whether Swanton was permanently enjoined from enforcing its ordinances against other ham radio operators. The August 20th Judgment Entry is not a final, appealable order.

2. Attorney Fees

Both this appellate court and Appellee Wodtke took the position that the issue of an award of attorney fees may only be raised by a special claim for an award of attorney fees. Punitive damages and relief under 42 U.S.C. §1983 do not have to be

specially pleaded or claimed. See *Lopez v. Quezada*, 10th Dist. Nos. 13AP-389, 13AP-664, 2014-Ohio-367, ¶22, and *Thomas v. Cleveland*, 176 Ohio App. 3d 401, 2008-Ohio-1720, ¶20. An award of attorney fees may be made pursuant to an award of punitive damages and/or a §1983 violation. *Touhey v. Ed's Tree & Turf, LLC*, 194 Ohio App.3d 800, 2011-Ohio-3432 (12th Dist.), ¶17, and 42 U.S.C. §1988. Therefore, a court's consideration of an award of attorney fees is not dependent upon an overt request for attorney fees. For example, where a trial court specifically raised the issue of attorney fees in the judgment entry, deferred the determination of fees, and did not include Civ. R. 54(B) language, the Fifth District, Court of Appeals, applied the reasoning in *Internatl. Bd. 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, paragraph 2 of the syllabus, and found that the judgment appealed from was not a final, appealable order. *Bank of New York Mellon Trust Co. v. Zeigler*, 5th Dist. No. 11-CA-25, 2011-Ohio-4748, ¶32.

In the present case, the Common Pleas Court of Fulton County, Ohio, did not say, "Wodtke's pleadings and evidence are sufficient to raise the issue of an award of attorney fees pursuant to punitive damages and/or §1983." However, the Fulton County trial court, like the trial court in *Zeigler*, did specifically raise the issue of attorney fees, deferred the determination of fees to a separate hearing, and did not include Civ. R. 54(B) language in the judgment. (Aug. 20, 2013 J.E.) As a result, the August 20th Judgment Entry is not a final, appealable order.

In its opposition brief at pages 2 and 3, Appellee contends that: "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

interest at any given time." Appellant submits that it has consistently argued that the August 20th Judgment Entry was not a final, appealable order, and that the common pleas court needed to issue a different judgment to resolve the issue of attorney fees. (Def. Village of Swanton's Memo. in Opp. to Award of Attorney Fees, filed Sept. 13, 2013, p. 2) Appellant's argument below was that Wodtke's Amended Complaint and "Plaintiff's Amended Complaint" superseded Wodtke's original complaint. Appellant's position below was an argument; it was *not* an admission or stipulation of fact that the initial complaint had been totally abandoned by Wodtke.

In fact, the record shows that Wodtke and the trial court did not consider the initial complaint to be totally abandoned by Wodtke. See Judgment Entry of September 13, 2011 ("Coming on before the Court is Plaintiff [Wodtke]'s Request for Leave to Amend his ***Initial*** Complaint, in order to authorize him to make a legitimate 'Request' for a "'Judicial Review Hearing.' Plaintiff's Motion is GRANTED.") (Emphasis added.) See also Final Judgment Entry of January 17, 2014, which states at page 2:

> The Court further finds that Plaintiff Gary Wodtke has withdrawn his claim for an award of attorney fees.

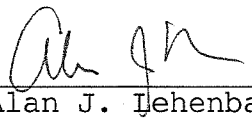
Implicit within this finding are admissions by Wodtke and the trial court that Wodtke's pleadings and evidence were sufficient to raise a claim for attorney fees and that the issue of attorney fees was not resolved in the August 20, 2013 Judgment Entry. Otherwise, there would have been no need to include in the ***Final*** Judgment Entry a special withdraw of Wodtke's claim for attorney fees. Also, it is clear that plaintiff Wodtke continued to pursue the attorney fee issue until January 17, 2014. Plaintiff Wodtke acknowledged in its brief filed on January 16, 2014, that the parties exchanged entries for the purpose of obtaining a final,

appealable order so Swanton could perfect its appeal. In that same pleading, plaintiff Wodtke withdrew his request for attorney fees. Appellant submits that this January 16, 2014 filing by Wodtke reflects that Wodtke believed the August 20, 2013 order was not a final appealable order, and constitutes an admission on Appellee's part that the attorney fee issue was pending.

Moreover, Appellant's position below was based merely on procedure, i.e., Civ. R. 15 on amended and supplemental pleadings. In contrast, the trial court's judgment on August 20, 2013, was substantive, i.e., that Wodtke's pleadings and evidence were sufficient to raise the issue of attorney fees. Appellant gave deference to the trial court's discretion on the issue of attorney fees and to the law which indicated that such deference was owed to the trial court. See *Zeigler*, *Quezada*, and *Thomas*, supra. Appellant respectfully asks that this appellate court do the same.

For these reasons and the reasons stated in its initial brief in support of the reconsideration application, Appellant asks that this Court grant Appellant's Application for Reconsideration.

Respectfully submitted,



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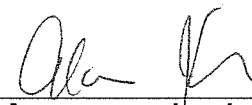
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply, was sent by ordinary U.S. mail service this 8th day of May, 2014, to: Cary Rodman Cooper, COOPER & KOWALSKI, L.P.A., 900 Adams Street, Toledo, OH 43604; Fred Hopengarten, Six Willarch Road, Lincoln, MA 01773.



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