NOTICE OF FILING
STATE OF OHIO, FULTON COUNTY
APPELLATE COURT

Case No. 14FU000001

GARY WODTKE
214 CYPRESS DRIVE
SWANTON, OH 43558

PLAINTIFF - APPELLEE

Vs.

PENDING IN THE SIXTH DISTRICT COURT OF APPEALS

VILLAGE OF SWANTON
219 CHESTNUT ST
SWANTON, OH 43558

DEFENDANT - APPELLANT

To: **FRED HOPENGARTEN**
SIX WILLARCH ROAD
LINCOLN, MA 01773

YOU ARE HEREBY NOTIFIED THAT ON 08/13/14, COURT OF APPEALS FILED DECISION AND JUDGMENT (A COPY OF WHICH IS ENCLOSED)

DATED: AUGUST 13, 2014

PAUL E. MACDONALD
CLERK OF COURTS
BY: Jen Johnson
DEPUTY

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

Gary Wodtke — Court of Appeals No. F-14-001

Appellee — Trial Court No. 09CV000322

v.

Village of Swanton — **DECISION AND JUDGMENT**

Appellant — Decided: AUG 13 2014

* * * * *

This case is before the court on appellant's, Village of Swanton, timely motion for reconsideration of this court's April 3, 2014 decision, in which we dismissed the appeal as untimely. Appellee, Gary Wodtke, has filed a memorandum in opposition.

In ruling on a motion to reconsider, this court follows *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981), where paragraph two of the syllabus states:

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the

attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App.R. 26, construed.) The facts of this case, as set forth in our April 3, 2014 judgment are as follows:

In this administrative appeal, plaintiff-appellant, Gary Wodtke ("Wodtke"), initially filed an appeal from the Swanton Village Planning Commission's decision denying Wodtke's application for a building permit to construct and use an amateur radio antenna structure on his property. Following the commission's July 14, 2009 decision, Wodtke appealed to the Swanton Village Council's "committee of zoning appeals" on August 11, 2009. Wodtke's application for a variance was again denied. Wodtke then appealed to the Fulton County Court of Common Pleas. In a decision and judgment dated August 20, 2013, the trial court reversed the decisions of the committee and the commission, granted Wodtke's complaint for a declaratory judgment, and denied the counterclaim of defendant-appellee, the Village of Swanton ("Swanton"), for a declaratory judgment. The trial court then continued the hearing on the issue of attorney fees. For the following reasons, the August 20, 2013 judgment was a final and appealable order at the time it was journalized on August 20, 2013, and this appeal is dismissed as untimely.

In its August 20, 2013 decision, the trial court stated that Wodtke demanded an award of attorney fees as part of his complaint, filed on September 14, 2009, and his amended complaint, filed on January 22, 2010. A review of the record reveals that Wodtke did not file a claim for attorney fees in his amended complaint. A separate motion for attorney fees was not made part of the record. Ordinarily, when an award of attorney fees is asked for in a complaint but not ruled on, an order disposing of the rest of the case is not final and appealable, even with a Civ.R. 54(B) determination that there is no just cause for delay. *Internatl. Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Indust., L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph two of the syllabus. However, in the instant case, a claim for attorney fees was not pending once the court entered the August 20, 2013 judgment. Therefore, the order was final and appealable on August 20, 2013. *Wodtke v. Swanton*, 6th Dist. Fulton No. F-14-001, 2014-Ohio-1456, ¶ 2-3.

Because the claim for attorney fees was not pending before the trial court after the August 20, 2013 judgment, we determined that the trial court's order dated January 21, 2014, following a motion for reconsideration was a nullity and that the final order which should have been appealed was entered on the court's journal on August 20, 2013. Because Swanton's notice of appeal was filed on February 4, 2014, well past the 30 day

time limit in App.R. 4, we dismissed the appeal for lack of jurisdiction under App.R. 14(B).

In its instant motion for reconsideration, Swanton gives two alternative theories as to why it believes the August 20, 2013 judgment was not a final and appealable order. First, Swanton argues that the issue of attorney fees was not determined until the trial court's January 21, 2014 judgment was entered. Second, Swanton now argues that the August 20, 2013 judgment is still not final as the trial court has not determined whether the injunction sought by Wodtke applies to all residents of Swanton.

Attorney Fees

Swanton argues that the issue of attorney fees was pending in the trial court following the August 20, 2013 judgment, pursuant to Civ.R. 15(B), which states, in part,

> *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.* (Emphasis added.)

This court has previously determined that Civ.R. 15(B) applies not only to cases that actually proceed to a trial in the traditional sense, but it also applies to summary judgment proceedings. *Musa v. St. Vincent Mercy Med. Ctr.*, 6th Dist. No. L-00-1283,

2001 WL 366275, *2 (Apr. 13, 2001). *See also Austintown Local School Dist. Bd. of Edn. v. Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities*, 66 Ohio St.3d 355, 365, 613 N.E.2d 167 (1993); *but see Suriano v. NAACP*, 7th Dist. Jefferson No. 05 JE 30, 2006-Ohio-6131, ¶ 2 (Civ.R. 15(B) "[D]eals with amending the complaint to conform to the evidence at trial. There has been no trial in this case, and the use of Civ.R. 15(B) was inappropriate").

We note that once the August 20, 2013 judgment was entered, motions for summary judgment were not filed. Rather, the parties filed opposing motions for reconsideration, which we determined were legal nullities. Furthermore, following the trial court's August 20, 2013 judgment, Swanton filed two contradictory filings on September 13, 2013. In its first filing, titled "Defendant Village of Swanton's Memorandum in Opposition to an Award of Attorney Fees," Swanton made the following argument:

> Plaintiff's original complaint requested attorney fees specifically pursuant to §1983, Title 42, U.S. Code. However, Plaintiff's amended complaint made no request for attorney fees, generally or specifically under §1983. "An amended complaint takes the place of the original, which is then totally abandoned." The allegations of the amended complaint supersede those of the original complaint. (Internal citations omitted.)

In that same filing, Swanton further argued that its denial of a conditional use permit to Wodtke did not support a §1983 cause of action.

In its second filing titled, "Defendant Village of Swanton's Motion for Reconsideration with Memorandum in Support," Swanton made the following opposite argument to the trial court:

> In the present case, the August 20th Judgment Entry left the factual adjudication of §1983 attorney fees unresolved. The entry did not use Rule 54(B) language. The Judgment Entry is therefore not a final, appealable order and is subject to reconsideration.

Appellee, in his motion for reconsideration, stated that he "has withdrawn or hereby does withdraw his motion for recovery of attorneys' fees * * *."

Furthermore, the stipulation and briefs filed by the parties on May 14, June 18, August 1, and August 16, 2013, prior to the August 20, 2013 judgment do not contain any arguments with respect to an award of attorney fees.

Accordingly, with respect to our finding that a claim for attorney fees was not pending following the August 20, 2013 judgment, appellant has not "call[ed] to the attention of the court an obvious error in its decision or raise[d] an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

Permanent Injunction

Appellant argues that Wodtke requested a permanent injunction in paragraph e of his amended complaint, and the trial court has not yet ruled on the permanent injunction.

Accordingly, appellant argues, the January 21, 2014 judgment is final and appealable because it contains a Civ.R. 54(B) determination that there is no just cause for delay.

Paragraph e of the amended complaint, in its prayer for relief states,

> Order that the Defendant be enjoined from in any way enforcing or threatening to enforce its' Zoning Ordinances, or any other ordinance of Defendant, in a way that does not reasonably accommodate amateur radio communications.

Wodtke then amended his complaint on September 29, 2011, to add an administrative appeal in addition to his action for declaratory relief. In the August 20, 2013 judgment, the court made the following findings:

> O.R.C. Sec. 5502.031 is a "General Statute." Duly enacted by the Legislature, and it should not be declared to be "unconstitutional" by this court.
>
> Swanton Zoning Ordinances No. 150.070 and 150.071, et seq., as applicable to the facts and circumstances of the present case, have been "preempted" by Federal and State legislation, and as such, the provisions thereof should not and cannot be enforced against Plaintiff in this instance.
>
> Swanton's Decision denying Plaintiff the right to erect his contemplated tower should be and hereby is reversed, and it should be, and hereby is declared to be not enforceable, so as to prevent Plaintiff from

erecting his tower, all as presented in his plans and specs presented to the Planning Commission and Village Counsel.

The trial court's January 21, 2014 judgment stated, "Swanton's Decision denying Plaintiff the right to erect his contemplated tower and antenna system is reversed and not enforceable, as it prevents the amateur operator from constructing antennas to provide the communications that he desires to engage in."

The trial court's January 21, 2014 judgment makes the same findings as the August 20, 2013 judgment, but rules on the parties opposing motions to reconsider. The August 20, 2013 judgment is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment" under R.C. 2505.02. We find appellant's argument that the trial court failed to rule on all pending claims without merit.

Because the August 20, 2013 judgment entered judgment as to all claims, a Civ.R. 54(B) determination was unnecessary.

Finding that appellant's motion does not call to the attention of the court an obvious error in its decision or raise an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been, appellant's motion is found not well-taken and is denied.

Appellant is ordered to pay any costs associated with this motion under App.R. 24. It is so ordered.

Wodtke v. Village of Swanton
C.A. No. F-14-001

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE