[Cite as *Wodtke v. Swanton*, 2014-Ohio-1456.]

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: April 3, 2014

* * * * *

Cary Rodman Cooper and Fred Hopengarten, for appellee.

Alan J. Lehenbauer, for appellant.

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PER CURIAM.

{¶ 1} This case is before the court sua sponte. It has come the court's attention that the appeal in this case was not timely filed.

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} Furthermore, the motions for reconsideration filed by both parties following the August 20, 2013 judgment did not extend the time to appeal. Once a final appealable judgment entry is entered on the court's journal, it cannot be vacated by the trial court by any means other than a Civ.R. 60 motion for relief from judgment. That rule states, "the procedure for obtaining any relief from a judgment shall be by motion proscribed by this rule." It has been held that, "Civil Rule 60 provides the *exclusive grounds* which must be present and the procedure which must be followed in order for a court to vacate its own judgment." *McCue v. Ins. Co*., 61 Ohio App.2d 101, 104, 399 N.E.2d 127 (8th Dist.1979). (Emphasis added.)

{¶ 5} Swanton filed a motion to reconsider the August 20, 2013 judgment on September 13, 2013. Wodtke filed a motion for reconsideration on January 17, 2014. The trial court denied Swanton's motion for reconsideration and granted Wodtke's motion for reconsideration on January 21, 2014. Swanton filed a notice of appeal from the January 21, 2014 judgment.

{¶ 6} It is well settled that a motion to reconsider does not stay the time to file a notice of appeal. *See Pitts v. Ohio Dept. of Trans*., 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981), paragraph one of the syllabus, where the court states, "The Ohio Rules of Civil

Procedure do not prescribe motions for reconsideration after a final judgment in the trial court." The court further explained this syllabus as follows:

> Without a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity. Furthermore, App. R. 4(A) expressly provides that a notice of appeal must be filed within 30 days of the filing of the entry of judgment appealed from.
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> There is no mention [in the Civil Rules] of a motion for reconsideration after a final judgment, and none should be inferred.
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> Practical considerations also mandate and support our determination herein. Once again, this court as well as the lower courts are left in a procedural quagmire of trying to elevate a motion for reconsideration after a final judgment to the status of a motion for a new trial or as a motion for a directed verdict or the like. The courts have had the arduous task of trying to inspect each and every motion for reconsideration which is filed in the trial court after a final judgment, and try to decipher form over substance. This is a costly procedure, both financially and in manual labor, which, as in the present cause, results in a procedural morass which clouds the merits. Complications concerning the timeliness of appeal and whether the Court of Appeals is vested with jurisdiction when a motion for reconsideration is

filed after a final judgment can and should be avoided. See Judge Krenzler's concurring opinion in *North Royalton Edn. Assn. v. Bd. of Edn.* (1974), 41 Ohio App. 2d 209, at 251.

The application for a motion for reconsideration after a final judgment is simply a legal fiction created by counsel, which has transcended into a confusing, clumsy and "informal local practice." See Kauder, supra, and Kent, Odds & Ends, 49 Cleve. Bar J. 280.

Therefore, based upon the foregoing, we hold that the motion for reconsideration of the May 24 ruling will not lie and *all judgments or final orders from said motion are a nullity. Id.* at 380. (Emphasis added.)

{¶ 7} Therefore, we find that the trial court's order dated January 21, 2014, is a nullity. The final order which should have been appealed was entered on the court's journal on August 20, 2013. Swanton's notice of appeal was filed on February 4, 2014, well past the 30 day time limit in App.R. 4. The time for filing a notice of appeal is jurisdictional. *See* App.R. 14(B). This appeal is ordered dismissed at appellant's costs pursuant to App.R. 24.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE