

RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS'
MOTION FOR JUDGMENT ON PLEADINGS

INTRODUCTION

I. With Their Motion, Respondents Seek To Negate Relators' Fundamental Right Of Property.

Relators own land that Erie MetroParks took from them nearly a decade ago to create a public bike and leisure path through their private property. Relators – and their predecessor in title – have obtained final judgments from the Court of Appeals in *Key Trust* and also from this Court in *Coles* which vindicated their rights. This action was filed in furtherance of Relators' property rights firmly established by these prior decisions. Relators, as a matter of clear legal right, seek the issuance of a peremptory writ on the basis of the allegations in the Complaint. If there is any dispute of material fact which would preclude the issuance of a preemprory writ, which relators deny, then an alternative writ should be issued. In this way, the parties may submit evidence and briefs for resolution of this dispute. However, in no event should the Respondents' Motion for Judgment on the Pleadings be granted. The material allegations of the Mandamus Complaint establish, at a minimum, the Relators' right to a writ. To grant Respondents' Motion would prematurely strip Relators of clear legal rights previously and unanimously recognized by this Court as well as other courts, following nearly a decade of litigation. To grant this Motion would negate the fundamental right of property and the right to just compensation for seizure of private property guaranteed by the Ohio Constitution.

All allegations and inferences are to be construed in favor of the Relators. Upon a Civ.R. 12(C) motion for judgment on the pleadings, the party against whom the motion is made is entitled to have all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in his or her favor as true. *Peterson v. Teodosio* (1973), 34 Ohio

St.2d 161, 165-66, 297 N.E.2d 113. A motion for judgment on the pleadings is disfavored and generally improper in a mandamus action because it calls for a decision on the merits of the controversy. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591, 592, 635 N.E.2d 26 (citing *State ex rel. Yiamouyiannis v. Taft* (1992), 65 Ohio St.3d 205, 206, 602 N.E.2d 644). For any or all of the reasons below, and applying the standards for Rule 12(C) in the mandamus action context, Respondents' Motion should be denied in its entirety.

II. The *Nickoli* Relators Seek Only To Enforce *Key Trust* And This Court's Mandate In *Coles*.

All that the Relators in this action (the "*Nickoli* Relators") seek is to enforce the judgment in the *Key Trust* litigation and this Court's **unanimous** 6-0 decision in *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968 ("*Coles*"). The *Key Trust* judgment affirmed that the *Key Trust* Defendants, including the *Nickoli* Relators as well as the relators in *Coles* ("*Coles* Relators") had a valid ownership interest in the sections of the property adjacent to the Huron River formerly owned by the Milan Canal Company ("canal corridor") that they acquired directly or indirectly from Key Trust Company of Ohio ("Key Trust"); and that the Respondents' interest in the canal corridor was limited to the Ebeneser Merry and Kneeland Townsend tracts. In *Coles*, this Court unanimously held that *Key Trust* preclusively decided the claim of ownership of the canal corridor and, since the *Coles* Relators' sections of the canal corridor lay outside of the Merry and Townsend tracts, had been decided in their favor. Accordingly, this Court found that the Erie MetroParks had taken "[the *Coles* Relators] private property for public use as a recreational trail" and that by doing so, Erie MetroParks "has taken their property." Based on this conclusion, this Court found that the *Coles* Relators had a clear legal right to a writ of mandamus to "compel the board to commence an appropriation proceeding to compensate them for the taking."

Respondents admit that, like the *Coles* Relators, each of the *Nickoli* Relators (except Cheryl Lyons¹) were defendants in the *Key Trust* litigation. Likewise, they admit that the *Nickoli* Relators claim to have acquired ownership of their sections of the canal corridor in the same manner as the *Coles* Relators. Yet, as the *Nickoli* Relators allege, Respondents have refused to initiate appropriation proceedings as to their sections of the canal corridor.

Respondents' Motion reveals the continued mentality of Erie MetroParks ("Erie MetroParks") and its Board of Park Commissioners that they are above the mandates of the courts of Ohio – even this Court. Respondents refuse to accept the holdings in *Key Trust* and *Coles* and, instead, continue to deprive the *Nickoli* Relators of their right to just compensation for the Respondents' invasion of their property. Indeed, Respondents attempt to rewrite and eviscerate this Court's conclusions in *Coles* by claiming all this Court did was decide that the 1881 lease between the Milan Canal Company and Wheeling & Lake Erie Railway Company ("1881 Lease") did not apply to "the real estate allegedly owned by the Relators in *Coles* because the alleged property was not within the boundaries of the Merry/Townsend Tracts." Resps. Mot., at 12. In their Answer, Respondents even deny the holding in *Coles* that "MetroParks' construction and use of a recreational trail over their property resulted in a physical invasion of the *Coles* relators' property and constituted an involuntary taking entitling the *Coles* relators to the requested appropriation proceeding." *Compare Compl.*, ¶ 28 with *Ans.*, ¶ 28. Respondents'

¹ Cheryl Lyons is in privity with Michael Meyers (a *Key Trust* Defendant and *Nickoli* Relator) as to the canal corridor section he acquired from Buffalo Prairie. See Affidavits of Michael Meyer and Cheryl Lyons attached to Complaint. This privity is also evidenced by Mr. Meyer and Ms. Lyons sharing the same residential address listed on the Complaint's caption. Accordingly, she is bound as Michael Meyer by the judgment of *Key Trust* and mandate of *Coles*.

rewrite is an improper attack on this Court's authority as Ohio's highest court and its final and binding decision in *Coles*.²

Likewise, Respondents invert the res judicata effect of *Key Trust* by claiming it establishes that neither the *Coles* Relators nor the *Nickoli* Relators own any interest in the canal corridor. *Key Trust*, as this Court unanimously held in *Coles*, preclusively established that the *Key Trust* defendants owned their respective sections of the canal corridor (outside the Merry and Townsend tracts), either directly from Key Trust or through Buffalo Prairie (via Key Trust).

Similarly, Respondents invert the res judicata effect of the 1904 Milan Canal Company dissolution court action ("Dissolution Action"). The final adjudication of the canal company's ownership of real estate was that it owned the entire canal corridor, subject to the 1881 Lease. As the *Key Trust* action conclusively determined, the 1881 Lease was limited to the Merry and Townsend tracts. Accordingly, the land the canal company owned as of 1904, and that Key Trust ultimately received, *encompassed the entire canal corridor* subject only to the 1881 lease rights to the land within the Merry and Townsend tracts.

III. Respondents' Motion Lacks Merit And Instead Supports Issuing To The *Nickoli* Relators The Requested Peremptory Writ.

Respondents' actions as alleged in the Complaint and as evidenced by their arguments in their Motion clearly reveal Respondents' mission: ignore this Court's mandate. For several reasons, this Court should deny Respondents' Motion and issue the peremptory writ Relators request.

² The absurdity of Respondents' position is made clear by this Court's unequivocal holding in *Coles* that Erie MetroParks had taken "[the *Coles* Relators] private property for public use as a recreational trail" and that by doing so, Erie MetroParks "has taken their property." 2007-Ohio-6057, ¶ 59. Yet, Respondents brazenly and falsely inform this Court that there was "no decision in the *Coles* opinion that Relators therein had good title to the real estate they claimed to own." Resps. Mot., at 25.

First, the Motion is based on res judicata. Res judicata is not a Civil Rule 12 defense that can be raised through a Civil Rule 12(C) Motion. Respondents' Motion is procedurally defective and should be denied.

Moreover, the *Coles* decision that the *Coles* Relators have a clear legal right to their sections of the canal corridor and that Erie MetroParks is required to compensate them for its decade-long physical invasion of that property is res judicata as to the identical claim posed by the *Nickoli* Relators. The *Coles* Relators and *Nickoli* Relators are in privity as they all acquired portions of the canal corridor from Key Trust directly or from Key Trust through Buffalo Prairie, a *Coles* Relator as well. Indeed, had the *Coles* Relators claim of ownership been denied, the *Nickoli* Relators would have been bound by that decision. The application of offensive claim preclusion is appropriate here because nothing would be gained by requiring the relitigation of the same claims previously litigated. Given that, established principles of claim preclusion mandate the conclusion that the *Nickoli* Relators own sections of the canal corridor outside the Merry and Townsend tracts and they have a clear legal right to their requested writ. Thus, Respondents' Motion lacks any merit.

In addition, the *Nickoli* Relators agree with Respondents that *Key Trust* has a res judicata effect upon the Relators' request for a writ of mandamus. However, Respondents misrepresent the *Key Trust* decision. As this Court unanimously held, *Key Trust* established that the *Key Trust* defendants hold the valid ownership interest in all sections of the canal corridor that lie outside the Merry and Townsend tracts. *Key Trust* therefore is claim preclusion as to the ownership of the *Nickoli* Relators and prevents Respondents from relitigating the claim. For this additional reason, Respondents' Motion should be denied.

Furthermore, to the extent *Coles* is not *claim* preclusive, it is *issue* preclusive that the defendants in *Key Trust* acquired a valid and enforceable ownership interest in the canal corridor.

Finally, the 1904 Dissolution Action further establishes that this Court was correct in *Coles*. The Court's Journal Entry and Order of Sale, established that the canal company owned the entire canal corridor in 1904 subject only to the 1881 Lease. The 1904 court rulings were submitted as evidence and considered in *Coles*. Accordingly, the 1904 Dissolution Action vindicates the fact that the *Nickoli* Relators acquired tile to the canal corridor (outside of Merry and Townsend tracts) from or through Key Trust. Accordingly, Respondents' Motion should be denied and this Court should issue a peremptory writ as Respondents concede that the *Nickoli* Relators' sections of the canal corridor are outside the boundaries of the Merry and Townsend tracts. The *Nickoli* Relators are identically situated to the Relators in *Coles*. *Compl.*, ¶ 35; *Ans.*, ¶ 35. The pleadings therefore establish that the Relators are entitled to their requested peremptory writ.

ARGUMENT

I. Res Judicata Is Not A Civ. R.12(B) Defense That Can Be Raised By A Civ. R. 12(C) Motion.

Res judicata is an affirmative defense set forth in Ohio Rule of Civil Procedure 8(C). See Ohio Civ. R. Pro. 8(C); *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109, 579 N.E.2d 702. Res judicata is not one of the defenses listed in Civ. R. 12(B) that can be made by motion. See Ohio Civ. R. Pro. 12(B); *Freeman*, 62 Ohio St.3d at 109. Consequently, this Court has repeatedly held that "the defense of *res judicata* may not be raised by a motion to dismiss under Civ. R. 12(B)." *Freeman*, 62 Ohio St.3d at 109; *Shaper v. Tracy* (1995), 73 Ohio St.3d 1211, 654 N.E.2d 1268.

A Civ. R. 12(C) motion is merely a “vehicle” for raising Civ. R. 12(B) defenses after the close of pleadings. *Burnside v. Leimbach* (1991), 71 Ohio App.3d 399, 402, 594 N.E.2d 60 (case cited extensively in *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 569, 664 N.E.2d 931, for the standard to apply in ruling on a Civ. R. 12(C) Motion). Consequently, this Court’s rule of law established in *Freeman* and *Shaper* applies equally to a motion for judgment on the pleadings under Civ. R. 12(C). *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617-18, 662 N.E.2d 1098, *jurisdictional motion overruled*, 74 Ohio St.3d 1456 (1995); *Marok v. The Ohio State Univ.*, 10th Dist. No. 07AP-921, 2008-Ohio-3170, ¶ 13; *Bus. Data Sys., Inc. v. Figetakis*, 9th Dist. No. 22783, 2006-Ohio-1036, ¶ 11 (“[T]o the extent that the trial court dismissed the claims against Appellee as barred by res judicata, we find error. The doctrine of res judicata is not grounds for dismissal pursuant to Civ. R. 12(C)”). This law, coupled with the principle that Civ. R. 12(C) motions are disfavored and generally improper in mandamus actions, warrants denial of Respondents’ Motion. *State ex rel. Pirman*, 69 Ohio St.3d at 592.

For the above reason alone, Respondents’ Motion should be denied in its entirety. Yet, even if this Court considers the substance³ of Respondents’ Motion, it fails.

II. This Court’s Holding in *Coles* Establishes That As Identically-Situated Neighbors in Privity with the *Coles* Relators, the *Nickoli* Relators Have A Clear Legal Right to Their Requested Writ.

Respondents’ 26 page Motion can be condensed to the following: Respondents claim that *Key Trust* decided that the *Key Trust* defendants did not receive any property from Key Trust

³ Many of the multitude of exhibits attached to the Respondents’ Answer are not appropriate for considering a Civ. R. 12(C) Motion as they amount to evidence, not pleadings. See *Inskeep v. Burton*, 2nd Dist. No. 2007 CA 11, 2008-Ohio-1982, ¶ 1, 17. (“trial court’s opinion in another matter is not the sort of written instrument proper for designation as ‘part of the pleading’ in the context of a motion for judgment on the pleadings”).

either directly or through Buffalo Prairie other than within the Merry and Townsend tracts. Because the *Nickoli* Relators' sections of the canal corridor are outside those tracts, the Respondents' argument goes, the *Nickoli* Relators have no interest in the canal land that runs through and bisects their property. The corollary to Respondents' argument is that this Court in *Coles* ruled only that the *Coles* Relators' property was not within the Merry or Townsend tracts and, thus, not encumbered by the 1881 Lease. Erie MetroParks continues to claim, after ten years of litigation, that land outside of those tracts is encumbered by the 1881 railroad lease because Key Trust did not have any title to convey. Respondents' argument merely reflects their continued refusal to accept the clear dictates of this Court's unanimous *Coles* decision that Key Trust had title to the canal lands which it could and did convey to the property owners along the canal.

A. *This Court Held that the Coles Relators had a Clear Legal Right of Ownership in Their Sections of the Canal Corridor.*

In *Coles*, this Court concluded by finding:

Relators have established that by employing **their private property** for public use as a recreational trail, the board of park commissioners has taken their property. Accordingly, we grant a writ of mandamus to compel the board to commence an appropriation proceeding to compensate them for that taking.

Cole, 2007-Ohio-6057, ¶ 59 (emphasis added). Obviously, this Court found that the *Coles* relators had a valid interest in the canal corridor sections they purchased directly or indirectly from Key Trust and, thus, a clear legal right to a writ.

Further, Respondents' claim that this Court in *Coles* did not decide that the Relators therein had good title to the real estate they claimed is belied by this Court's summary rejection of Erie MetroParks' Motion for Reconsideration. In that Motion, Erie MetroParks asserted that the *Coles* Relators lacked good title and, thus, a clear legal right to a writ of mandamus. Ex. A,

Coles Resps., Mot. for Reconsideration, at pgs. 3-5. Had this Court believed Erie MetroParks' assertion had any merit, it would not have summarily rejected the Motion – after all, the claim in *Coles* concerned whether those Relators had clear legal right to a writ compelling appropriation of their sections of the canal corridor acquired from Key Trust. Moreover, contrary to Respondents' misrepresentation in their current Motion, the Motion for Reconsideration was not the first time in the *Coles* action that Erie MetroParks asserted that the Relators lacked a valid ownership interest through Key Trust. It made that claim on page 7 of its Memorandum in Opposition to Writ of Mandamus. Ex. B, Pertinent Pages of *Coles* Resps., Memo Opp., at pg. 7. Had this Court agreed, it would not have held that the *Coles* Relators had a clear legal right to their requested writ.

Respondents are correct, however, that a relator must demonstrate a clear legal right to have the requested acts performed before a writ of mandamus may issue. Likewise, Respondents are correct that only parties with a valid interest in condemned property in question can obtain a writ of mandamus to compel the appropriation of the property. That Respondents correctly state the law reveals the specious nature of their argument about this Court's actions in *Coles*.

B. This Court's Holding That Coles Relators had a Clear Legal Right of Ownership in Their Canal Corridor Sections is Res Judicata.

1. The *Nickoli* Relators and *Coles* Relators are in privity.

The relators in *Coles* consisted of Edwin and Lisa Coles, Buffalo Prairie, Ltd., Isolated Ventures, Ltd., the Executor of Vincent Otrusina's estate, Warren R. Jones and Robert C. Bickley. Key Trust had conveyed Edwin and Lisa Coles and Buffalo Prairie property formerly owned by the canal company. The Coleses and Buffalo Prairie then conveyed sections of this property to other property owners, including Vincent Otrusina, Warren R. Jones and Robert C.

Bickley. Each of those three Relators received their sections of the property from Buffalo Prairie. It was these sections of the canal corridor for which the *Coles* Relators sought a writ of mandamus in order to compel the Respondents to initiate appropriate proceedings. The *Coles* Relators are the *Nickoli* Relators' neighbors.

All that the *Nickoli* Relators request is the identical writ concerning their sections of the canal corridor outside the Merry and Townsend tracts that their neighbors received in *Coles*.⁴ As established supra, the *Coles* Relators had a clear legal right to a writ of mandamus compelling Erie MetroParks to initiate appropriation proceedings so that the Relators could be compensated for the physical invasion of their sections of the canal corridor. That holding is *res judicata* to the claim of whether the *Nickoli* Relators have an equal right to the same writ. Claim preclusion applies to prevent the relitigating by the same parties or their privies of any claim arising out of a transaction that was the subject matter of a previous action. *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6.

As this Court has determined "privity is a somewhat amorphous concept in the context of claim preclusion." *Id.* at ¶ 9. (citing *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8). Indeed, "[a]s a general matter, privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*.'" *Brown v. City of Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (quoting *Bruszewski v. U.S.* (3rd Cir. 1950), 181 F.2d 419, 423 (Goodrich, J., concurring)). A "[m]utuality of interest" including an "identity of desired result" can support

⁴ The only difference between the two writs is that the *Nickoli* Relators ask the Court to impose a deadline by which Respondents must initiate appropriation proceedings. This request stems from Respondents' total and continuing disregard for this Court's writ of mandamus in *Coles*. Fourteen (14) months have lapsed since this Court's issuance of the writ in *Coles* and the Respondents have yet to file one appropriation action against a *Coles* Relator.

a finding of privity. *O’Nesti*, 2007-Ohio-1102, ¶ 9 (quoting *Brown*, 89 Ohio St.3d at 248). For mutuality to exist the “person taking advantage of the judgment would have been bound by it had the result been the opposite.” *Id.* (quoting *Johnson’s Island, Inc. v. Bd. of Township Trustees of Danbury Township* (1982), 69 Ohio St.2d 241, 244, 431 N.E.2d 672). There can be no question that privity exists between the *Coles* Relators and the *Nickoli* Relators sufficient for the *Nickoli* Relators to rely upon this Court’s holding that the *Coles* Relators had a clear legal right to their requested writ.

Respondents admit the *Nickoli* Relators claim ownership of an interest in the real estate at issue in the same manner as the *Coles* Relators – either through Key Trust directly (Rick and Carol Rinella) or indirectly through Buffalo Prairie (all remaining Relators). The *Coles* Relators and *Nickoli* Relators’ relationship and mutuality of interests establish the *Coles* decision is res judicata in this matter. In fact, the *Coles* Relators and the *Nickoli* Relators have the same legal interests. Respondents cannot dispute that the *Nickoli* Relators have the same legal interest as the *Coles* Relators. In *Coles*, Erie MetroParks argued that Relator Isolated Ventures, a non-party to the *Key Trust* Litigation, was barred by claim preclusion from obtaining the requested writ. Ex. B, Pertinent Pages of *Coles* Resps., Memo Opp., at pgs. 15-18. Erie MetroParks could only have argued that claim preclusion barred Isolated Ventures from its requested writ because Edwin and Lisa Coles had conveyed a portion of the section of the canal corridor they acquired from Key Trust to Isolated Ventures, e.g., the Coles and Isolated Ventures were in privity. In fact, Erie MetroParks explicitly stated under the section of their Memorandum in Opposition in *Coles* titled “Parties in privity” that Isolated Ventures was a “successor in interest” and therefore in privity with Edwin and Lisa Coles and bound by the *Key Trust* Litigation. *Id.* at pg. 5.

Further, had this Court held that the *Coles* Relators lacked a clear legal right because they did not own any interest in the property though their conveyances with Key Trust or Buffalo Prairie, the *Nickoli* Relators would have been bound by that decision. If this Court had held that Robert Bickley lacked an ownership interest to the canal corridor through his deed with Buffalo Prairie, how could the Relators in this action, who have an identical deed for their section of the canal corridor from Buffalo Prairie, have an ownership interest? Equally, if this Court held that Buffalo Prairie lacked a valid ownership interest in the canal corridor, the *Rinellaes* would be bound by that decision. The *Coles* Relators and *Nickoli* Relators are not strangers, but neighbors in privity.

This Court's decision in *Johnson's Island* is instructive. In that case, the plaintiff, Johnson's Island, Inc., purchased an island in Lake Erie which contained an inactive limestone mine. Thereafter, the island was zoned residential and in 1977 the homeowners' association, Johnson's Island Club, Inc., and one of its members brought an action against Johnson Island seeking to enjoin nonconforming use (quarrying). The court granted the requested relief. Then, in a separate action, Johnson's Island sought a declaration that the residential classification was unconstitutional. The defendants argued that the plaintiff's claim was barred by res judicata. The trial court agreed, and granted summary judgment. The decision was affirmed by the court of appeals.

On appeal to this Court, the issue was whether defendants were in privity with the homeowner's association such that Johnson's Island could be precluded from challenging the constitutionality of the statute. *Johnson's Island*, 69 Ohio St.2d at 243. This Court began by noting that "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the

parties and their privies, and is a complete bar to any subsequent action between the parties or those in privity with them.” Id. (quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67, paragraph one of the syllabus). The Court then explained that “[t]he estoppel effect of the judgment operates mutually if the person taking advantage of the judgment would have been bound by it had the result been the opposite.” Id. at 244. This Court then reasoned that because the defendants would have been bound by an adverse decision to the homeowner’s association, there was sufficient privity. Id. at 245. Accordingly, the court found that res judicata applied to bar the constitutional challenge of Johnson’s Island. Id. As demonstrated above, that logic applies equally here.

2. The application of claim preclusion is appropriate.

Further, the application of claim preclusion to grant the *Nickoli* Relators the identical relief as their neighbors in *Coles* is appropriate. Although *Nickoli* Relators recognize that generally this Court disfavors offensive claim preclusion, there are circumstances where offensive claim preclusion is appropriate. See *O’Nesti*, 2007-Ohio-1102, ¶ 17; *Bedgood v. Cleland* (D. Minn. 1982), 554 F. Supp. 513, 518 (cited in *O’Nesti* as an example of when offensive claim preclusion may be appropriate). This action involves the same respondent – the Board of Erie MetroParks – and absolutely identically-situated relators. Nothing could be gained from requiring the relators to relitigate exactly the same claims and issues previously litigated and, thus, claim preclusion is appropriate. Indeed, this Court permitted offensive claim preclusion by the *Coles* Relators. *Coles*, 2007-Ohio-6057, ¶ 34,49, 54-55. The *Coles* Relators argued that their claim of ownership of their sections of the canal corridor and, thus, their right to just compensation had been conclusively established by the *Key Trust* litigation. Id. As set forth below, this Court unanimously agreed. Accordingly, *Nickoli* Relators have the same clear legal

right as the *Coles* Relators and claim preclusion should apply and the *Nickoli* Relators' requested peremptory writ is appropriate.

III. *Key Trust* Preclusively Established The *Nickoli* Relators' Claim to Valid Ownership of Their Sections of the Canal Corridor Outside the Merry and Townsend Tracts.

In deciding whether to grant the *Coles* Relators' petition for writ, this Court focused on the "Res Judicata Effect of *Key Trust* Litigation." *Coles*, 2007-Ohio-6057, ¶ 34, 54. The *Coles* relators sought a writ of mandamus through enforcing the judgment in *Key Trust* that the property owners in that action owned their respective sections of the canal corridor outside the Merry and Townsend tracts. *Id.* The Court examined the res judicata effect of *Key Trust*, first as to South of Mason Road, and then as to the property North of Mason. As to both, it agreed with the position of the *Coles* Relators.

As to South of Mason Road, this Court held that "relators have established that the board's construction and use of a recreational trail over their property south of Mason Road resulted in a physical invasion of their property...." *Id.* at ¶ 49. This Court could have reached that conclusion only by agreeing with the *Coles* Relators that the *Key Trust* Litigation was res judicata concerning the parties' interests South of Mason Road and established the *Coles* relators' valid interest outside of the Merry and Townsend tracts and Erie MetroParks' limited interest in those two named tracts. Since the *Nickoli* Relators were parties to the *Key Trust* lawsuit, *Key Trust* litigation conclusively established their ownership interest in their sections of the canal corridor obtained from *Key Trust* are South of Mason and outside the Merry and Townsend tracts. Consequently, they have the same clear legal right to their sections of the canal corridor outside the Merry and Townsend tracts.

Similarly, this Court's findings in *Coles* as to the preclusive effect of *Key Trust* as to the sections of the canal corridor at issue therein North of Mason Road further defeats Respondents' Motion and warrants a peremptory writ. The *Coles* relators asserted that the *Key Trust* litigation "prevents the board from attempting to relitigate their claimed ownership of the property [North of Mason]." 2007-Ohio-6057, ¶ 54. This Court agreed. *Id.* at ¶ 55. It noted that in *Key Trust*, the Erie MetroParks claimed not only ownership interest in the canal corridor property through the 1881 lease, but also in fee through a quitclaim deed from Wheeling Railroad. *Id.* In fact, in *Key Trust*, Erie MetroParks also claimed an ownership interest in the canal corridor property through adverse possession. The trial court judge rejected this claim, holding that "Plaintiff has not met its burden to establish any interest in the property at issue by adverse possession." *Resps. Ans.*, at Ex. 11, pgs. 1, 5. The entire property at issue was the full length of the canal corridor as that is what Erie MetroParks claimed it had a valid property interest. *Id.* at Ex. 8, ¶¶ 8, 10.

In its Complaint in *Key Trust*, Erie MetroParks itself placed the ownership of the entire canal corridor directly at issue. It specifically pled that the Milan Canal Company owned the entire canal corridor in fee simple title and that interest had been transferred to Key Trust and subsequently to the various other *Key Trust* Defendants, including the *Coles* Relators and *Nickoli* Relators. *Resps. Ans.*, at Ex. 8, ¶¶ 8, 10. Moreover, it specifically pled that it had an ownership interest through the 1881 Lease in the entire canal corridor. *Id.* at Ex. 8, pg. 10; Ex. 10, ¶ 31. The *Key Trust* action ultimately decided that Erie MetroParks' interest in the canal corridor was limited to the Merry and Townsend tracts through the 1881 Lease, *not* that the canal company did not own the entire canal corridor at the time it was dissolved in 1904.

Erie MetroParks is estopped from ignoring the facts it pled as true in its complaint in *Key Trust*. See *Shifflet v. Thomson Newspapers (Ohio), Inc.* (1982), 69 Ohio St.2d 179, 187, 431 N.E.2d 1014 (noting that where a party alleges a matter of fact in a pleading, that pleading is an admission); *Faxon Hills Construction Co. v. United Brotherhood of Carpenters and Joiners of America* (1958), 168 Ohio St. 8, 10, 151 N.E.2d 12 (“a distinct statement of fact which is material and competent and which is contained in a pleading constitutes a judicial admission”).

Erie MetroParks itself put in issue in *Key Trust* its claim that it owned the entire canal corridor. The *Key Trust* court decided otherwise and limited its ownership interest to land only in the Merry and Townsend tracts. Ultimately, as this Court found in *Coles*, the trial court in *Key Trust* held “that the board had no property interest in the land north of Lock No. 1 [north of the Wikel Farms’ property immediately North of Mason Road].” *Coles*, 2007-Ohio-6057, ¶ 55. (emphasis added). The trial court’s judgment “was not modified by the subsequent *Key Trust* proceedings.” *Id.* Thus, *Key Trust* was res judicata on the *Coles* Relators’ claimed ownership of the sections of the canal corridor North of Mason – they owned those sections and Erie MetroParks’ construction and use of a recreational trail on their property also “effected an involuntary taking.” *Id.* at ¶ 55, 58.

If *Key Trust* is res judicata that the *Coles*’ Relators North of Mason Road owned their respective sections of the canal corridor, then the case is equally res judicata that the *Nickoli* Relators North of Mason Road own their respective sections of the canal corridor.

In sum, Respondents’ rewrite of *Key Trust* is unfounded; as is its attempt to ignore this Court’s holding concerning the res judicata effect of *Key Trust*. While Respondents state that they are not challenging the *Coles* decision, they in fact seek to render it meaningless by asking this Court to ignore the preclusive effect of the *Key Trust* litigation. In reality, Respondents want

this Court to declare the canal corridor outside of the Merry and Townsend tracts as no man's land. *Key Trust* establishes that it is not no man's land, but the property of the *Coles and Nickoli* Relators.

IV. *Coles* Conclusively Establishes the Point that the Defendants in *Key Trust* Acquired a Valid Ownership Interest in the Canal Corridor from Key Trust.

Even if *Coles* is not claim preclusion, it is issue preclusion on the critical issues in this action. Issue preclusion serves to prevent the relitigation of a fact or issue that was previously determined by a court of competent jurisdiction in an action between the same parties or their privies. *O'Nesti*, 2007-Ohio-1102, ¶ 7. *Coles* is issue preclusion on the point that the defendants in *Key Trust* that acquired an ownership interest in the canal corridor acquired a valid and enforceable interest. In *Coles*, Erie MetroParks challenged this point by asserting: (1) it had the valid interest to the canal corridor through the 1881 Lease; (2) it had a valid interest to the corridor deriving from an 1882 deed from Oscar Meeker to Wheeling & Lake Erie Railroad Company; and (3) that Key Trust conveyed "nothing" to the *Coles* Relators. *Coles*, 2007-Ohio-6057, ¶ 48, 57; Ex. B, *Coles* Resp., Memo Opp., at pg. 7. Despite these arguments, this Court found that the *Coles* Relators had a valid interest in the canal corridor through their deeds from Key Trust or Buffalo Prairie. Now, evidenced by their Motion, Respondents want to relitigate this point. Issue preclusion applies and bars them from doing so. *O'Nesti*, 2007-Ohio-1102, ¶ 23 ("If the original plaintiff succeeds, the later plaintiff may use the outcome if issue preclusion applies"). Consequently, because the *Nickoli* Relators have alleged that they acquired the same interest to the canal corridor as the *Coles* Relators, Respondents' Motion should be dismissed in its entirety. Given that the Respondents concede in their Motion that the *Nickoli* Relators' property lies outside the Merry and Townsend tracts, the *Nickoli* Relators have a clear legal right to their requested peremptory writ.

V. The 1904 Milan Canal Company Dissolution Action Conclusively Establishes That the *Nickoli* Relators Own Their Sections Of the Canal Corridor.

Respondents' Motion is a direct attack on this Court's decision in *Coles*. Respondents essentially claim that this unanimous Court had no basis to hold that the *Coles* Relators had a clear legal right to a mandamus and there was nothing before the Court to establish that they received their fee interest in the canal corridor from Key Trust. As part of this attempt to negate *Coles*, Respondents claim that the 1904 Canal Company Dissolution Action through which Key Trust ultimately acquired its interests established that the canal company's ownership rights in the canal corridor were limited to the real estate covered by the Merry and Townsend tracts. See *Resps. Mot.*, at 7. However, again, Respondents misread the decision of yet another Ohio court. The 1904 Journal Entry and Order of Sale in the Dissolution Action did not limit the Canal Company's property to the Merry and Townsend tracts that it leased in 1881. *Resps. Ans.*, at Ex. 4. Instead, this Entry states that the canal company's property ran the entire length of the canal corridor from the "southerly end of the canal basin" in the Village of Milan to the "mouth of the Huron River in the Village of Huron" as well as all the "Dry Dock and all of the said canal basin and all of the Upper and Lower Locks of said canal..." *Id. Moreover, in furtherance of this judicial mandate, the Court entered an Order of Sale of this property, which ultimately came to be owned by Key Trust in fee, subject only to the 1881 Lease, which has been held to be limited to the Merry and Townsend tracts.* Accordingly, the title to the canal corridor conveyed through the Dissolution Action has been fixed for 105 years.

The 1904 Journal Entry and the Order of Sale were evidence before this Court in *Coles*. See Ex. C, *Coles* Mot. for Judicial Notice, Exs. H & I. This Court did not find that the 1904 Journal Entry and Order of Sale limited the canal company's and, ultimately, Key Trust's ownership of the canal corridor to the Merry and Townsend tracts. Instead, this Court found that

“[t]he canal company was dissolved in 1904, and its property interests devolved to a testamentary trust and its trustee, Key Trust Company of Ohio.” *Coles*, 2007-Ohio-6057, ¶ 3. Obviously, this Court agreed with the *Coles* Relators that the 1904 dissolution transferred to Key Trust a valid interest in the ownership of the canal corridor. That is how this Court concluded that the *Coles* Relators had a clear legal right to their sections of the canal corridor.

Accordingly, the claim of ownership to the canal corridor outside of the Merry and Townsend tracts was decided in 1904 and conclusively establishes that the *Nickoli* Relators have a clear legal right to their sections of the canal corridor outside the Merry and Townsend tracts. For this reason, Respondents’ Motion should be denied and *Nickoli* Relators’ requested peremptory writ issued.

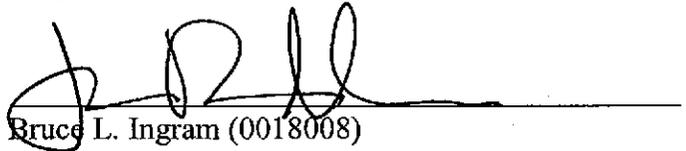
CONCLUSION

Granting Respondents’ Motion does not promote the rule of law in Ohio. How could it be possible that *Coles* Relators Robert Bickley and Warren Jones, for example, have a clear legal right to their sections of the canal corridor, but not their neighbors Gerald and Robin Nickoli or John and Virginia Landoll, who acquired their section of the canal corridor through an identical conveyance from Buffalo Prairie and whose sections of the canal corridor also fall outside the Merry and Townsend tracts? Similarly, the Rinellaes, like the Coleses and Buffalo Prairie, acquired their section of the canal corridor (which is outside the Merry and Townsend tracts) directly from Key Trust. How do the Coleses and Buffalo Prairie have a clear legal right, as this Court unanimously held, but not the Rinellaes? Respondents’ absurd solution for this problem is to eviscerate this Court’s holding in *Coles* ordering Erie MetroParks to initiate appropriation proceedings and compensate the *Coles* Relators by claiming this Court did not conclude that the

Coles Relators had valid title to their sections of the canal corridor. That proposal sanctions the defiance by a governmental entity of the rule of law and should be categorically rejected.

The appropriate answer is that through the *Coles* decision, the *Key Trust* litigation, and the 1904 Dissolution Action, the *Nickoli* Relators conclusively have a valid ownership interest in their sections of the canal corridor outside the Merry and Townsend tracts and, thus, a clear legal right to their requested peremptory writ. This is the only possible conclusion consistent with the rule of law. Accordingly Respondents' Motion for Judgment on the Pleadings should be denied in its entirety and the Relators' requested peremptory writ issued.

Respectfully submitted,



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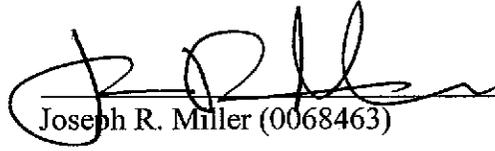
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 20th day of February, 2009 via regular U.S. mail, postage prepaid, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and John D. Latchney, Tomino & Latchney, LPA, 803 East Washington Street, Suite 200, Medina, Ohio 44256, counsel for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks.



Joseph R. Miller (0068463)

EXHIBIT

A

IN THE SUPREME COURT OF OHIO

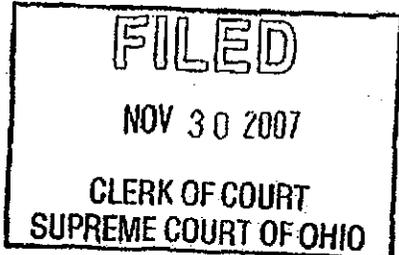
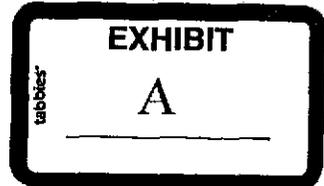
STATE OF OHIO, ex rel.)
EDWIN M. COLES, *et al.*)
)
Relators)
)
v.)
)
JONATHAN GRANVILLE, *et al.*)
)
Respondents)

CASE NO. 06-1259

MOTION FOR RECONSIDERATION

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MOTION

Now comes Respondent Erie MetroParks who, pursuant to SCt R. XI, Section 2(A)(4), hereby moves the Court for reconsideration of its November 20, 2007 decision granting Relators Petition for a Writ of Mandamus and, correlatively, ordering Respondent to commence appropriation proceedings. A Memorandum in Support, which sets forth the relief sought and reasons for same, follows and is incorporated herein by reference.

MEMORANDUM IN SUPPORT

Relative to the property north of Mason Road, since Relators Coles and Ostrusina did not own any land in the 66' wide railroad corridor (and Erie MetroParks makes no claim to property outside that 66' wide strip of land), the Petition should have been denied because there is no clear legal right to same.

In Erie County Common Pleas Court, Case No. 97-CV-296, regarding property which was north of Mason Road, Relators Coles claimed title to the sixty-six feet wide strip of land, *i.e.* 0.80 acres of land, which had formerly been part of the railroad corridor. The court's August 17, 1998 Judgment Entry states, in relevant part, as follows:

This action involves the issue of title to an 0.80 Acre Parcel of land in Huron, Ohio ("the 0.80 Acre Parcel"). ***Plaintiffs claim title*** to the 0.80 Acre Parcel and an additional 9.53 acres pursuant to a deed dated August 5, 1986 from Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development, recorded in Volume 528, page 284 of Erie County Records (the "Coles Deed").***

It is apparent and the Court finds as a matter of law that the 0.80 Acre Parcel is specifically excepted from the property conveyed to Plaintiffs, **that the Plaintiffs are not the owners thereof**, and are therefore not the real parties in interest. (Emphasis added.)

The trial court dismissed the case because the Coles did not own the land. Thus, at least as of August 17, 1998, there had been a judicial determination between the Parties that the Coles did not have title to the property, which should be *res judicata* as to the ownership at that time

based upon issue preclusion¹, *i.e.* the Coles did not own the property because it was never conveyed to them as part of the original grant. The “not the real parties in interest” language in the Judgment Entry was superfluous and nothing more than *dicta*; indeed, the real issue before the Court was ownership of the 0.80 acre parcel of land.

If, subsequent to August 17, 1998, the Coles became owners of the 0.80 acre, issue preclusion obviously would not bar their claim. As owners, they would have standing. However, the Coles did not subsequently acquire that 0.80 acre parcel.

At ¶ 52 of the Slip Opinion, the Court states “Moreover, despite the *somewhat contradictory nature of the evidence*,² the description of the parcel of land that is referred to in relators complaint as the Coleses’ *home parcel*, which is located north of Mason Road, corresponds to *the deed description of the property conveyed by Key Trust to the Coles in 1999*, which was after the 1998 dismissal that the board cites in support of its *res judicata* claim.” (Emphasis added).

What property did Key Trust convey to the Coles in 1999? If one relies upon the common pleas court decision, the court of appeals decision, and this Court’s conclusions in ¶¶ 47 and 48 of the Court’s decision in the case *sub judice*, the answer is: nothing.

¹ In *Thompson v. Wing* (1994), 70 Ohio St.3d 176, the Ohio Supreme Court stated that collateral estoppel (aka issue preclusion) “prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit. Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Id.* at 183.

² It is axiomatic that for a writ of mandamus to issue, there must be a clear legal right to the relief requested and a corresponding clear legal duty for the government to act. It is difficult to imagine how “contradictory evidence” satisfied this legal standard.

In determining what property was purportedly conveyed by Key Trust to the Coles in 1999, one must first answer the threshold question: What did the canal company, and ergo Key Trust, own? “[T]he canal company—predecessor in title to Key Trust and relators—had acquired its real property interests **solely** from the Merry and Townsend deeds[.]” Slip. Op. ¶ 9 (emphasis added). “[T]he **only property** owned by the canal company at the time the railroad lease was executed lay within the boundaries of the Kneeland Townsend and the Ebeneser Merry properties, *neither of which lay north of Lock No. 1.*” *Id.* (emphasis added).

A number of the defendants in the *Key Trust* litigation, including both Relators Coles and Ostrusina, appealed the common pleas court’s decision. Relators Coles and Ostrusina attempted to challenge the trial court’s determination that the canal company (and, ergo Key Trust) owned nothing north of Lock No. 1. Indeed, if Key Trust owned nothing north of Lock No. 1, then in 1999, Relators Coles and Ostrusina received a quit claim deed giving them exactly what Key Trust owned: nothing.

Addressing appellants’ (including Relators Coles and Ostrusina) argument concerning the property description, the court of appeals opined that “The only competent, credible evidence presented at trial was that *the canal company obtained property solely from Townsend and Merry*. On such evidence, we cannot say that the trial court’s decision to limit the lease to such property was unsupported by the evidence.” *Bd. of Park Comm’rs v. Key Trust Co.*, 145 Ohio App.3d at 787-788. In other words, since Key Trust obtained only what the canal company owned, and since the canal company only obtained the Townsend and Merry properties, Key Trust only owned the Townsend and Merry properties. Again, those properties were south of Lock No. 1 and south of Mason Road.

The error in this Court's decision stems from a false premise. The Court correctly observes that "The Coleses' home parcel and the Ostrusina estate's property lie north of Mason Road." Slip Op. at ¶ 15. It is incontrovertible that this property is not within the boundaries of the Merry or Townsend tracts. *Id.*

The problem stems from the factually erroneous statement "Shortly after the Coleses received their *** home parcels from Key Trust in 1999...." *Id.* at ¶ 14. Since it is from this false premise that the Court concludes, at least in part, that *res judicata* (issue preclusion) cannot apply, it is material to the outcome of this case.³

As reflected in the August 17, 1998 Judgment Entry in Case No. 97-CV-296:

This action involves *the issue of title* to an 0.80 Acre Parcel of land in Huron, Ohio ("the 0.80 Acre Parcel"). *Plaintiffs claim title* to the 0.80 Acre Parcel and an additional 9.53 acres *pursuant to a deed dated August 5, 1986* from Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development, recorded in Volume 528, page 284 of Erie County Records (the "Coles Deed").

Given that the Coles acquired their "home parcel" in 1986 from the foregoing grantors, Relators Coles could not have acquired their "home parcel" in 1999 from Key Trust. Indeed, as the common pleas, court of appeals, and this Court's decision establish, there is no evidence whatsoever that Key Trust (or its predecessor the canal company) owned anything north of Mason Road/Lock No. 1, and only owned property south of Mason Road/Lock No.1, *i.e.* the Townsend and Merry tracts. Key Trust could have also included the proverbial "Brooklyn Bridge" in the property description contained in the quit claim deeds Relators Coles and Ostrusina received, but that doesn't mean they would then own the Brooklyn Bridge.

³ Again, this is the statement that "the Coleses' *home parcel*, which is located north of Mason Road, corresponds to *the deed description of the property conveyed by Key Trust to the Coles* in 1999, which was after the 1998 dismissal that the board cites in support of its *res judicata* claim."

Despite the fact that Case No. 97-CV-296 expressly determined that Relator Coles did not own the land in the railroad corridor (which, again, was north of Mason Road) and despite the fact that the *Key Trust* litigation determined that Relators Coles and Ostrusina essentially received nothing from Key Trust because Townsend and Merry did not own anything north of Mason Road, this Court has determined that Relators Coles and Ostrusina have a clear legal right and Erie MetroParks has a clear legal duty to appropriate 66' wide railroad corridor land north of Mason Road which courts have, up to this point, determined Relators Coles and Ostrusina did not own.

Since the common pleas court in Case No. 97-CV-296 determined that the Relators Coles did not own the 0.80 acre parcel in question (either as a matter of fact or as the legal issue in the case), since the grantors (Thomas G. Reel and Gilbert Hoffman, d.b.a. River Bend Development) never conveyed that the 0.80 and 0.34 acre parcels, respectively, to Coles and Ostrusina in the deeds of conveyance, and since the Meeker deed raises a question whether the railroad owned the property in fee simple or not, at a minimum, there remains a question whether Erie MetroParks is entitled to the 0.80 acre parcel via adverse possession by its predecessor in interest or whether there is right of way by prescriptive easement via adverse use. In other words, this Court should deny the writ relative to Relators Coles and/or Ostrusina because neither has a "clear" legal right to have Erie MetroParks commence an appropriation proceeding.

Although presented at the trial court level, the Erie County Common Pleas Court never reached the issue of whether Erie MetroParks was entitled to the land via adverse possession because it was determined that the use was permissive subject to the Lease.

Adverse possession is established when a party proves by clear and convincing evidence that he has been in open, notorious, continuous, adverse and exclusive possession of the disputed property for at least twenty-one years. *See, e.g., Grace v. Koch* (1998), 81 Ohio St.3d 577, 579,

1998 Ohio 607, 692 N.E.2d 1009. An individual may tack on a prior property owner's adverse use in order to establish the twenty-one year possession. See *Lyman v. Ferrari* (1979), 66 Ohio App.2d 72, 76, 419 N.E.2d 1112, citing *Ziff v. Dalgarn* (1926), 114 Ohio St. 291, 296-151 N.E. 174.

Adverse or hostile use is any use that is inconsistent with the rights of the title owner. *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, 500 N.E.2d 876, citing *Kimball v. Anderson* (1932), 125 Ohio St. 241, 244, 181 N.E. 17. Thus, it is irrelevant if everyone believes the owner of the strip of land in question to be the party claiming adverse possession. *Id.* at 299. As the court explained in *Vanasdal*: "The fact that everyone believed the strip in dispute actually belonged to *Vanasdal* so that no one challenged his use of the land earlier is also immaterial. The doctrine of adverse possession protects one who has honestly entered and held possession in the belief that the land was his own, as well as one who knowingly appropriates the land of others for the purpose of acquiring title. *Yetzer v. Thoman* (1866), 17 Ohio St. 130; *Montieth v. Twin Falls United Methodist Church* (1980), 68 Ohio App.2d 219, 222, 428 N.E.2d 870." *Id.*

Additionally, the title owner need not have "actual knowledge of adverse use." *Id.* Instead, "[t]he owner is charged with knowledge of adverse use when one enters into open and notorious possession of the land under a claim of right." *Id.*

In Case No. 99-CV-492, the trial court's November 7, 2000 Judgment Entry ("JE"), Petition Exhibit 10, the court noted that there were four issues tried to the court:

One issue before the Court is the validity of a lease ("Lease") originally entered into by the predecessors-in-interest to the parties herein, the owner/lessor, Milan Canal Company and the lessee Wheeling & Lake Erie Railroad Company ("Wheeling Railroad").

The second issue before the Court is whether Plaintiff has acquired any ownership interest in the property at issue by virtue of a quitclaim deed from the Wheeling Railroad.

The third issue the Court has been asked to decide is whether Plaintiff has gained any interest in the property at issue by adverse possession.

The fourth issue before the Court has been asked to decide is the extent of the property covered by the Lease. (Emphasis added.)

Since the trial court found that the Lease encompassed the three mile corridor, it was unnecessary for the trial court to make a decision whether either the Milan Canal Company or the various railroads had adversely possessed any non-Leased property for a period of twenty-one years.

The trial court determined that since the "lessee and its successors maintained railroad operations and train traffic and paid rent while maintaining the Leased Property from the inception of the Lease until sometime in the 1980's ***. The Railroad and its predecessors-in-interest did not hold the Leased Property adverse to the lessor's interests until, at the latest, 1989, when it stopped paying rent." In other words, since the Lease was a permissive use of the property, there could not have been adverse possession.

While this Court has characterized Eric MetroParks position as "hypertechnical," that was borne of necessity, *i.e.* the trial court's statement that the Lease encompassed the entirety of the approximately three mile corridor. Stated another way, had the trial court itself believed that the approximately one mile stretch of land between the northern border of Ebeneser Merry and the southern border of the Kneeland Townsend property was not subject to the Lease, then the trial court would have considered and issued a ruling on Eric MetroParks adverse possession claim. Since the trial court never reached that issue, it's reasonable to believe that the trial court had reached the same conclusion as Eric MetroParks concerning the Lease covering the entire three miles.

This Court should modify its decision to expressly indicate that the Court's decision does not preclude the Erie MetroParks from establishing title to portions of the rail corridor through adverse possession or an easement by prescription. The railroad companies clearly satisfied the elements necessary to establish and convey to the Erie MetroParks title through adverse possession or easements by prescription. There are cases currently pending in the Erie Court of Common Pleas addressing just those issues. Because the only issues in the Key Trust case were the validity and geographical extent of the perpetual Lease, the Key Trust courts never considered nor ruled on the Park District's claims of adverse possession or prescription on any property that was not subject to the lease. In fact, no court has ruled on the Park District's claims of an interest through either adverse possession or prescription. Nevertheless, the owners of property adjoining the rail corridor have seized upon this Court's decision in this case to argue that the court of common pleas (in one of these pending cases) must rule as a matter of law that the Erie MetroParks has no interest in any portion of the railroad corridor not subject to the Lease. Such an unintended result would unfairly deprive the Erie MetroParks of its property interest and substantial investment in improving the rail corridor as a recreational parkway for the benefit of the public, and might ultimately deprive the public itself of a valuable asset.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served via regular U.S. Mail on this 30th day of November, 2007 upon:

Nels Ackerson
ACKERSON KAUFFMAN FEX, PC
1250 H Street, NW, Suite 850
Washington, DC 20005

Attorneys for Relators



John D. Latchney (0046539)
TOMINO & LATCHNEY, LLC, LPA

EXHIBIT

B

In other words, the Coles do not own the aforementioned 66 foot wide strip of land. Instead, Erie MetroParks purchased the Railroad's fee simple ownership interest and now owns the property.

Despite the foregoing ruling which was never appealed, Relators Coles persist, as they have in the Petition, that they own the aforementioned land. The case is significant and relevant to the action *sub judice* because the stairs and decking which were removed by Erie MetroParks employees was entirely on property owned in fee simple by the MetroParks. In other words, Relators Coles (and, for that matter, the Ostrusinas) had and have no legal right to construct and maintain structures on the property of another any more than anyone else does. As such, Relators are not entitled to a Petition for a Writ of Mandamus to compensate them for any the loss of any structures which encroach or exist upon property owned by Erie MetroParks. In any event, given the August 17, 1998 ruling, the Coles and Ostrusina Estate cannot establish, as a matter of law, that Erie MetroParks has a clear legal duty to commence appropriation proceedings, nor that they have a clear legal right to same.

C. Erie County Common Pleas Case No. 99-CV-442.

1. Parties in privity.

In 1999, Erie MetroParks filed a declaratory judgment action against the Key Trust Co. of Ohio concerning a dispute over the leasehold interest held by the Lake Erie & Wheeling Railway Company. On July 24, 2000, each of the Relators herein (or their subsequent successors in interest³) were named as defendants in Case No. 99-CV-442,

³ Isolated Ventures, Ltd. was not a party to Case No. 99-CV-442 and appears to be a successor in interest. The Ohio Secretary of State's website search feature provides no registered business by that name.

TR at 319, l. 13-19. However, Flittner, who had performed the title search for Relators, had to agree that north of Lock No. 1, he could not find any deeds of conveyance, easements, or rights-of-way from any owner to the Milan Canal Company. TR at 296. In other words, Relators' own witness did not support their theory that the Milan Canal Company owned anything north of Lock No. 1, which would have been subject to the Lease and owned by Key Trust.

3. The trial court's decision concerning the scope of the Corridor.

In the trial court's November 7, 2000 Judgment Entry ("JE"), Petition Exhibit 10, the Court notes that there were four issues tried to the court:

One issue before the Court is the validity of a lease ("Lease") originally entered into by the predecessors-in-interest to the parties herein, the owner/lessor, Milan Canal Company and the lessee Wheeling & Lake Erie Railroad Company ("Wheeling Railroad").

The second issue before the Court is whether Plaintiff has acquired any ownership interest in the property at issue by virtue of a quitclaim deed from the Wheeling Railroad.

The third issue the Court has been asked to decide is whether Plaintiff has gained any interest in the property at issue by adverse possession.

The fourth issue before the Court has been asked to decide is the **extent of the property covered by the Lease.** (Emphasis added.)

The Judgment Entry contains "Findings of Fact." Among the Findings were that "The Milan Canal Property consisted of a roughly three mile long corridor of property the northern terminus being known as Lock No. 1, which was located where the Milan Canal joined the Huron River on property now owned by Wikel Farms, Ltd., just north of Mason Road, in Section 2, Milan Township, Erie County, Ohio. Neither Kneeland

Proposition of Law No. I:

Res Judicata Bars Re-Litigation of Claims Concerning The Scope of The Lease Property Description.

Res judicata includes the concept of claim preclusion. “The doctrine of *res judicata*,” the Ohio Supreme Court has explained, “is that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in the first lawsuit.” *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69 (emphasis added). The rationale for this rule was stated by the Ohio Supreme Court in *Anderson v. Richards* (1962), 173 Ohio St. 50:

The reasoning in such cases is that a party should have his day in court, and that day should conclude the matter. A party is bound then to present his entire case and he is foreclosed from later attempting to reopen the cause as to issues which were or could have been presented.

Id. at 53 (emphasis added).

Under the doctrine of claim preclusion, Relators are not entitled to the proverbial second (or third or fourth) bite of the apple simply because they are dissatisfied with the outcome of the prior litigation. Indeed, as explained in *Stromberg v. Bd. of Edn. of Bratenahl* (1980), 64 Ohio St.2d 98:

This court has uniformly adhered to the doctrine of *res judicata* to prevent repeated attacks upon a final judgment. The doctrine applies not only to what was determined, but also to every question which might properly have been litigated.

Id. at 100 (emphasis added). As the Ohio Supreme Court later observed, “The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *National Amusements, Inc. v. City of Springdale* (1990), 53 Ohio St.3d 60, 62.

More recently, the Ohio Supreme Court addressed the doctrine of *res judicata* in *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379. In *Grava*, a property owner requested a variance in 1991. It was denied and no appeal was taken. In 1992, asserting an additional theory of relief, the property owner again sought permission to construct the same building that was the subject of the earlier proceeding. The request was again denied. On appeal, the court of appeals ruled that the second request was barred by the doctrine of *res judicata*.

The court of appeals held that Grava was barred by the doctrine of *res judicata* from asserting an alternative ground for relief...because that claim 'might have been litigated' in his first appeal to the board concerning his 1991 application for a zoning certificate.

Id. at 380.

The Ohio Supreme Court affirmed the court of appeals decision. The Court held that "A valid, final judgment rendered upon the merits bars all subsequent actions based upon *any* claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava*, 73 Ohio St.3d 379, Syllabus (emphasis added).

With the sole exception of Isolated Ventures, Ltd., which status is unclear, all of the Relators herein participated in the state court litigation, the Erie County Common Pleas and Sixth District Court of Appeals are courts of competent jurisdiction, and a final judgment rendered upon the merits. The record establishes that the Erie County Common Pleas Court made a factual and legal determination concerning a description of the Lease Property. The record establishes that Relators attempted to challenge the trial court's description of the Corridor Property in the second court of appeals case because

they felt, in hindsight, that it was overly broad. The record establishes that the court of appeals affirmed the trial court's decision regarding the scope of the Lease Property.

In the trial court's November 7, 2000 Judgment Entry ("JE"), Petition Exhibit 10, the fourth issue before the court was **"the extent of the property covered by the Lease."** (Emphasis added.) The same Judgment Entry contains "Findings of Fact." Among the Findings were that **"The Milan Canal Property consisted of a roughly three mile long corridor of property the northern terminus being known as Lock No. 1, which was located where the Milan Canal joined the Huron River on property now owned by Wikel Farms, Ltd., just north of Mason Road, in Section 2, Milan Township, Erie County, Ohio. Neither Kneeland Townsend nor Ebeneser Merry conveyed to the Milan Canal Company any interest in real property north of Lock No. 1."** JE at 3-4 (emphasis added).

In conjunction with the finding that the Milan Canal Corridor was roughly three miles long, in the Conclusions of Law, the trial court states **"Therefore, *the Leased Property extends from the southern terminus of the old Milan Canal at or near the southerly end of the Milan Canal basin in the Village of Milan to its northerly terminus at the Huron River at the former location of Lock No. 1 on the premises now owned by Wikel Farms, Ltd. immediately north of Mason Road in Section 2, Milan Township, Erie County.*"** *Id.* at 6 (emphasis added). In other words, the trial court decided that the scope of the Lease covered the entire three mile corridor from the Village of Milan to the south to Lock No. 1.

In this Petition, Relators are, in essence, asking this Court to overrule this prior court decision and issue a declaratory judgment that the Lease Property is something

other than what the court below said it was. Respondents submit that the state court decisions are *res judicata* and that should not be done.

The principle of stare decisis dictates this result as well. Why? In concluding that the Lease applied to the entire three mile corridor, the trial court also found that the doctrine of adverse possession did not apply because the Lease would indicate that the possession of the property was voluntary, not adverse.

Had the trial court found that the Lease did not encompass the entire three mile corridor, then it would have been necessary for the trial court to make a decision whether either the Milan Canal Company or the various railroads had adversely possessed any non-leased property for a period of twenty-one years. In other words, the original case would have to be re-opened and tried again. That should not occur in this case.

Counter-Proposition of Law No. II:

FOR THE LAND NORTH OF LOCK NO. 1, ERIE METROPARKS, WHICH PURCHASED THE LAND FROM THE RAILROAD, OWNS THE PROPERTY IN FEE SIMPLE AND, THEREFORE, HAS A RIGHT TO EXCLUDE RELATORS FROM OCCUPYING THE LAND.

- A. As between Erie MetroParks and the Coles Relators, the decision in Erie County Common Pleas Case No. 97-CV-296, which held that the Coles did not own the property, is *res judicata* and may not be re-litigated herein.

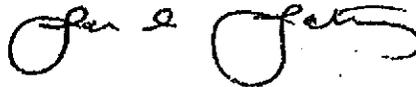
Regarding railroad property north of Lock No. 1 (which generally consists of a sixty-six feet wide strip of land), Erie MetroParks owns the property in fee simple because the grantor railroad owned the property in fee simple. As noted previously, Edwin and Lisa Coles had previously filed a lawsuit against the Wheeling & Lake Erie Railway Company and Erie MetroParks in the Erie County Common Pleas Court, Case No. 97-CV-296, claiming title to the sixty-six feet wide strip of land, *i.e.* 0.80 acres of

As the 1882 deed between Oscar Meeker and the railroad demonstrates, whether deemed the transfer of a parcel, *i.e.* fee simple ownership¹¹, or a right of way/easement, the railroad compensated the original grantor, Meeker, for the property in question. Relators' Brief at 12-13, citing Exhibit C (a certified copy of the deed). Like the property owner in *Fogle*, Relators Coles and/or the Ostrusina Estate are not entitled to additional compensation simply because the use changed from one form of public travel/transportation to another, *i.e.* the recreational trail.

IV. CONCLUSION

Petitioners are not entitled to a writ of mandamus and, therefore, same should and must be denied. Respondents also submit that the Petition should be dismissed because although the form is a petition for a writ of mandamus, the substance represents a quiet title action and request for declaratory relief.

Respectfully submitted,



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¹¹ Again, relative to the Coles, the issue of ownership of the 0.80 acre parcel, which was expressly excluded from the Coles deed, was litigated to a final conclusion in Erie County Common Pleas Court Case No. 97-CV-296. Consistent with the Coles deed, the Ostrusinas were not conveyed the 0.34 acre parcel, which was expressly excluded from the Ostrusinas' deed.

EXHIBIT

C

Pursuant to Ohio Rules of Evidence 201(B), Relators, by and through their counsel, respectfully move this Court to take judicial notice of the judicial decisions and other documents attached hereto which are part of the record in an earlier case in which Respondent Board of Park Commissioners, Erie MetroParks (the "MetroParks") filed a declaratory judgment against certain landowners including Relators, and also to take judicial notice of the entire record of that case before both the trial court and the appeals court, including exhibits introduced at trial, transcripts of testimony, pleadings filed with the courts, and the courts' judgment entries and opinions. In support of this motion, Relators state the following:

1. On September 30, 1999, MetroParks filed a suit in the Erie County Court of Common Pleas a suit against the Key Trust Company of Ohio, NA Trustee of the Testamentary Trust of Verna Lockwood Williams (the "Key Trust Case"), seeking a declaration on certain issues involving their right to use certain land. The case was captioned *Board of Park Commissioners, Erie MetroParks v. Key Trust Company of Ohio, NA Trustee of the Testamentary Trust of Verna Lockwood Williams, et al.*, No. 99 CV 442. Judge Joseph E. Cirigliano presided over the case. During the pendency of the case, the Key Trust sold the pertinent property to adjacent landowners, including Relators in this mandamus action, who were accordingly included as defendants in the case.
2. After trial, an appeal ensued before the Court of Appeals of Ohio, Sixth Appellate District, Erie County. The case was captioned *Board of Park Commissioners, Erie MetroParks v. Key Trust Company of Ohio, NA Trustee of the Testamentary Trust of Verna Lockwood Williams, et al.*, No. E-00-068. In its disposition of the

appeal, the Court of Appeals of Ohio affirmed in part and reversed in part the judgment of the Court of Common Pleas. As a result, the case was remanded.

3. After remand, a second appeal was brought before the Court of Appeals of Ohio, Sixth Appellate District, Erie County. The case was captioned *Board of Park Commissioners, Erie MetroParks v. Key Trust Company of Ohio, NA Trustee of the Testamentary Trust of Verna Lockwood Williams, et al.*, No. E-02-009.
4. Under Ohio Rules of Evidence 201, a court is allowed to take judicial notice of adjudicative facts not subject to reasonable dispute if the facts are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Ohio R. Evid. 201(B). Judicial notice is mandatory if a party makes such a request and supplies the request with the necessary information. Ohio R. Evid. 201(D). Judicial notice may be taken at any stage of the proceeding. Ohio R. Evid. 201(F).
5. Thus, Relators respectfully ask the Court to take judicial notice of the decisions and the record of the Key Trust Case both at trial and on appeal, including but not limited to, the following documents, which are attached hereto as Exs. A-K:
 - A. Amended Complaint MetroParks filed in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co*, No. 99 CV 442, dated July 14, 2000;
 - B. Judgment Entry of the Common Pleas Court in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co*, No. 99 CV 442 (Nov. 7, 2000);
 - C. Opinion of the Court of Appeals in *Board of Park Com'r, Erie MetroParks v. Key Trust Co.*, 145 Ohio App. 3d 782 (September 14, 2001);

- D. Judgment Entry of the Common Pleas Court on remand in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co.*, No. 99 CV 442 (February 22, 2002);
- E. Opinion of the Court of Appeals on appeal after Remand in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co.*, 2002 WL 31054032 (September 13, 2002);
- F. Historic Erie County Map, exhibit submitted to the Court of Common Pleas in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co.*, No. 99 CV 442;
- G. Quitclaim deed from Norfolk and Western Railway Company to Wheeling & Lake Erie Railway Company, exhibit submitted to the Court of Common Pleas in *Board of Park Com'rs, Erie MetroParks v. Key Trust Co.*, No. 99 CV 442;
- H. Journal Entry of the Court of Common Pleas of Erie County in the case of *In the Matter of the Application for the Dissolution of the Milan Canal Company*, Journal 31 (July 27, 1904);
- I. Order of Sale in the case of *In the Matter of the Application for the Dissolution of the Milan Canal Company* (August 10, 1904);
- J. Letter from Dennis M. O'Toole to Keith A. Wilkowski, dated August 30, 1995;
- K. Title report on the Milan Canal, prepared by sandusky Bay Title agency, inc. for Robert Wikel, dated November 16, 1995.

Respectfully submitted,



Nels J. Ackerson (*pro hac vice*)

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Counsel for Relators-Appellants

EXHIBIT
H

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, OHIO.

In the Matter of the Application } Journal Entry.
for the dissolution of the Milan } July 27th, 1904.
Canal Company, a corporation, } Journal 31, Page ____.

The inventory of real and personal property of the Milan Canal Company heretofore dissolved, together with the appraisement thereof by the appraisers heretofore appointed herein, under oath, having been returned, the court being fully advised in the premises, finds said inventory and appraisement in all respects in conformity to law and hereby approves and confirms the same.

And thereupon this cause came on to be heard on the application of the receiver herein for an order to sell the real estate described in the petition, said real estate being described as follows, to wit: Situate in the townships of Milan and Huron, in said County of Erie, and State of Ohio, being all the land with all the rights and appurtenances thereof, owned by said Milan Canal Company, within the bounds of a strip of land one hundred and fifty feet in width, commencing at the southerly end of the canal basin of said Milan Canal Company, near the intersection of Main and Union Streets, in the Village of Milan, in said Erie County, Ohio, and running thence in a northerly direction to the mouth of the Huron River, in the Village of Huron, in said Erie County, and which strip of land is bounded on the west by a line distant fifty feet from and running north parallel with the central line of the railroad of the Wheeling and Lake Erie Railroad

Company, as surveyed, located and in the process of construction on July 12th, ^{a. O.} 1881, between said Villages of Milan and Huron, and which said strip of land is bounded on the east by a line distant one hundred feet from and running north parallel with the said central line of said railroad, as surveyed, located and being constructed as aforesaid, the east and west lines of said strip of land being one hundred and fifty feet apart and running north parallel with each other and with the central line of said railroad, as surveyed, located and being constructed as aforesaid, from the said place of beginning to the said mouth of Huron River. Also all of the so-called Dry Dock and all of the said canal basin and all of the Upper and Lower Locks of said canal, with all the grounds and privileges connected therewith in addition to what is included in said strip of land above described, the said dry dock containing about one and 1/2 acres, and the said Canal Basin containing about five and 45/100 acres of land be the same more or less. The said real estate is subject to a lease to the Wheeling and Lake Erie Railroad Company for a term of 99 years commencing on the 12th day of July, A. D. 1881, and ending on the 12th day of July, A. D. 1980, at an annual rental of fifty dollars per year, renewable forever.

And the Court being fully advised in the premises, finds that it is necessary for the receiver herein to sell said real estate, and it is ordered that said receiver shall advertise and sell said real estate at public sale at the east door of the Court House, in the City of Sandusky, County of Erie and State of Ohio on the nineteenth day of September, A. D. 1904, at two o'clock P. M. for cash and shall give due

notice of the time and place of said sale by advertisement in a newspaper of general circulation in said county for four consecutive weeks and said real estate shall not be sold for less than two-thirds the appraised value, the appraised value being eight hundred dollars.

Said receiver shall make due return of said sale.

EXHIBIT

I

ORDER OF SALE.

Revised Statutes, Secs. 8372-8389 to 8461 Inclusive.

THE STATE OF OHIO,
ERIE COUNTY, ss.

By T. C. Lusk, Sheriff, Receiver
To the Sheriff of said County, GREETING:

WHEREAS, at a term of the Common Pleas Court held at Sandusky, in and for said County, on the 11th day of April 1904, A. D. 1889, in the case of In the Matter of the Application for the Dis-
solution of the Milan Company, a corporation Plaintiff, and

Defendant, it was ordered, adjudged and decreed as follows, to wit:

That you proceed to appraise, advertise and sell the following described real estate as per journal entry hereto attached, to wit:

Situata in the Townships of Milan and Huron, in said County of Erie and State of Ohio, being all the land with all the rights and appurtenances thereof, owned by said Milan Canal Company, within the bounds of a strip of land one hundred and fifty feet in width, commencing at the southerly end of the canal basin of said Milan Canal Company, near the intersection of Main and Union Streets, in the Village of Milan, in said Erie County, Ohio, and running thence in a northerly direction to the mouth of the Huron River, in the Village of Huron in said Erie County, and which strip of land is bounded on the west by a line distant fifty feet from and running north parallel with the central line of the railroad of the Wheeling and Lake Erie Railroad Company, as surveyed, located and in the process of construction on July 12th, A. D. 1881, between said Villages of Milan and Huron, and which said strip of land is bounded on the east by a line distant one hundred feet from and running north parallel with the said central line of said railroad, as surveyed, located and being constructed as aforesaid, the east and west lines of said strip of land being one hundred and fifty feet apart and running north parallel with each other and with the central line of said railroad as surveyed, located and being constructed as aforesaid from the said place of beginning to the ^{said} mouth of Huron River. Also all of the so-called Dry Dock and all of the said Canal Basin and all of the Upper and Lower Locks of said canal, with all the

grounds and privileges connected therewith in addition to what is included in the said strip of land above described, the said dry dock containing about one and $1/2$ acres, and the said Canal Basin containing about five and $45/100$ acres of land be the same more or less.

The said real estate is subject to a lease to the Wheeling and Lake Erie Railroad Company for a term of 99 years commencing on the 18th day of July, A. D. 1881, and ending on the 18th day of July, A. D. 1980, at an annual rental of fifty dollars per year, renewable forever.

