

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)
GERALD O.E. NICKOLI, et al.,)
)
Relators,)
)
ERIE METROPARKS, et al.,)
)
Respondents.)

CASE NO. 2009-0026

Original Action in Mandamus

RESPONDENTS' MOTION TO STRIKE

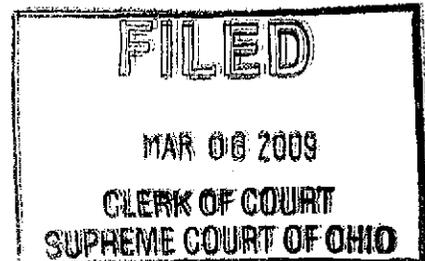
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RESPONDENTS' MOTION TO STRIKE

Pursuant to this Court's inherent power to strike statements which are contained in documents filed with it and which are false in fact, Respondents respectfully request that this Court strike the following statements contained Relators' Memorandum in Opposition to Respondents' Motion for Judgment on the Pleadings:¹

1. Statements that Relators own Relators' Claimed Real Estate pursuant to the 1904 dissolution of the Milan Canal Company;² and
2. The statement that *Key Trust* rejected Respondents' argument that it may be entitled to possession of certain portions of the Canal Corridor by adverse possession.³

This Motion is supported by the attached Memorandum in Support of Motion, the contents of which are incorporated into this Motion.

Respectfully submitted,



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¹ Hereinafter such Memorandum in Opposition will be referred to as the "Memo in Opposition"; and such Motion for Judgment on the Pleadings will be referred to as the "Motion for Judgment on the Pleadings".

² The phrase "Relators' Claimed Real Estate" and other words and phrase are defined in the Motion for Judgment on the Pleadings, and those definitions are used herein.

³ The Canal Corridor is the entire length of the Milan Canal, from Milan, Ohio north to Lake Erie in Huron, Ohio. See Motion for Judgment on the Pleadings, page 5, footnote 3.

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MEMORANDUM IN SUPPORT OF MOTION

Respondents are aware that this Court's rules do not allow them to file a Reply to the Memo in Opposition, and consequently this Motion does not address the numerous erroneous legal arguments contained in the Memo in Opposition. However, the Memo in Opposition also contains several statements which are clearly and unarguably factually false. Respondents cannot respond to such false statements through a Civ. R. 12(F) motion to strike, because that Rule is limited to pleadings. However, courts have inherent power to strike a document filed in court which, although proper in form, is false in fact. *See White v. Calhoun* (1911), 83 Ohio St. 401, 194 N.E. 743, paragraph 1 of the syllabus. Respondents respectfully request that this Court use such inherent power to strike the below-described false statements contained in the Memo in Opposition.

I. The Statement That Relators Own Relators' Claimed Real Estate Pursuant To The 1904 Dissolution Of The Milan Canal Company Is False

Relators' Claimed Real Estate consists of portions of the Canal Corridor. Assuming for purposes of the Motion for Judgment on the Pleadings that the Greenway is located entirely on

the Canal Corridor and consequently occupies part of Relators' Claimed Real Estate, it is undisputed that Respondents and their railroad predecessors-in-possession have been in possession of the Canal Corridor, including Relators' Claimed Real Estate, for the past 130 years. As pointed out on page 16 of the Motion for Judgment on the Pleadings, it is therefore incumbent on Relators to prove that they have a better legal right to such Real Estate than Respondents do to retain possession of such Real Estate. In the Memo in Opposition Relators make the statement that they have shown such better legal right through the 1904 dissolution of their ultimate grantor, the Milan Canal Company. Memo in Opposition, pages 4, 6, 18-19. This statement is totally unfounded in fact and law and is precluded by *Key Trust*.

A. *Key Trust Found That The Only Real Estate Ever Owned By The Milan Canal Company Was The Merry And Townsend Tracts, And Relators Are Bound By That Finding*

The 1881 Lease purported to cover the entire Canal Corridor, but obviously the Lease could only actually pertain to real estate owned by the Milan Canal Company. One of the major purposes of *Key Trust* was to determine exactly what real estate was owned by the Canal Company and therefore was encumbered by the Lease.

Relators claim on page 15 and 16 of the Memo in Opposition that Respondent Board, the plaintiff in *Key Trust*, alleged in its Amended Complaint that the Milan Canal Company owned the entire Canal Corridor, that the 1881 Lease gave Respondent Board rights in the entire Corridor, and that the entire Canal Corridor had been conveyed to Key Trust. This claim is false: all Respondent Board alleged in the Amended Complaint was the existence of the 1881 Lease, that the property **subject to the Lease** had been conveyed to Key Trust, and that Respondent Board had the right to construct and maintain the Greenway on such **leased property**. Respondents' Answer, Exhibit 8. Contrary to Relators' claim, the Amended Complaint did not

assert what specific property was subject to the Lease; that was one of the issues to be determined in *Key Trust*.

In fact, it was Relators, in their capacity as defendants in *Key Trust*, and not Respondent Board, who asserted in that action that the Canal Company owned the entire Canal Corridor. As correctly stated in *Erie MetroParks Bd. of Commrs. v. Key Trust Co.* (2001), 145 Ohio App.3d 782, 785, 764 N.E.2d 509 (the first appellate decision in *Key Trust*):

Alternatively, appellee [plaintiff – Respondent Board] argued that even if it were determined that the 1881 lease was void, not all of the appellants [defendants – Relators in *Coles* and herein] were entitled to a quiet title. This is so, according to appellee, because the Milan Canal Company did not have clear title to the full length of the canal. The 1881 lease described a one-hundred-fifty-foot corridor along the full length of the canal but conveyed only that portion “owned by said Milan Canal Company.” At trial, evidence showed that, in the disputed area, the canal company was deeded land only from Kneeland Townsend and Ebeneser Merry. Since the canal company could lease to the railroad only so much as it owned, appellee asserted that the land at issue should be confined to that portion once owned by Townsend and Merry – a section of land substantially less than which appellants claim.

The first trial court decision held that the only real estate owned by the Milan Canal Company was the Merry and Townsend Tracts. This holding was appealed by defendants in the first appeal in *Key Trust*, who contended on appeal that the trial court erred in failing to hold that the 1881 Lease covered the entire Canal Corridor. *Id.*, 145 Ohio App.3d at 786. The appellate court rejected that contention. *Id.*, at 787-88.

The *Key Trust* defendants could have shown in that case that the Milan Canal Company owned the entire Canal Corridor and that therefore the 1881 Lease covered the entire Corridor not only by showing what part of the Corridor was owned by the Canal Company when it entered into the 1881 Lease, but also by showing that at the time of its 1904 dissolution the

Canal Company owned the entire Corridor. If at the time of entering into a lease a lessor does not own the real estate it purports to lease, but subsequently acquires such real estate, the after-acquired real estate is as a matter of law subject to the lease. *Liberal Savings & Loan Co. v. The Frankel Realty Co.* (1940), 137 Ohio St. 489, 497, 30 N.E.2d 1012; 3 Friedman on Leases (5 Ed. 2008) 29.17 and 29.18, Section 29:2.6. Such a common sense rule law is based on estoppel. Id. The 1881 Lease purported to cover the entire Canal Corridor. If the Milan Canal Company acquired parts of the Canal Corridor after the Company entered into the 1881 Lease but before the Company's 1904 dissolution, such acquired parts would as a matter of law be subject to the Lease.

Relators were defendants in *Key Trust*. They argued in that litigation that the Milan Canal Company owned the entire Canal Corridor and that therefore the 1881 Lease pertained to the entire Corridor. They lost that argument. They are therefore precluded by collateral estoppel from now once again asserting that the Milan Canal Company owned the entire Canal Corridor.

B. Even Assuming *Key Trust* Does Not Preclude Relators From Claiming Herein That The Milan Canal Company Owned The Entire Canal Corridor At The Time Of The Canal Company's 1904 Dissolution, Relators' Claim Of Such Ownership Is Factually Unfounded

If for some reason *Key Trust* does not preclude Relators from once again claiming that the Milan Canal Company owned the entire Canal Corridor, such claim is factually false and should be stricken.

1. The 1904 Dissolution Action Did Not Establish That The Milan Canal Company Owned The Entire Canal Corridor At The Time Of Such Dissolution Action

The Memo in Opposition claims that the 1904 dissolution of the Milan Canal Company establishes that the Coal Company owned the entire Canal Corridor at the time of such dissolution. Such claim is factually false.

The undisputed factual background of the 1904 dissolution of the Milan Canal Company is set forth on pages 6-7 of the Motion for Judgment on the Pleadings. In the petition which initiated the dissolution, the Canal Company described its real estate by using the same description of real estate contained in the 1881 Lease. Respondents' Answer, Exhibit 3. The petition expressly stated that such real estate was subject to the 1881 Lease. An order of sale was entered in the dissolution action, ordering the judicial sale of "the real estate described in the petition," Respondents' Answer, Exhibit 4, page 1. The order of sale then set forth the description of such real estate, which was the same as the description used in the 1881 Lease. *Id.*, pages 1-2. The order of sale recognized that such real estate was subject to the 1881 Lease. *Id.*, page 2. Such real estate was then sold in a judicial sale which culminated in the Receiver's Deed. The Receiver's Deed expressly noted that the real estate being conveyed was subject to the 1881 Lease.

Relators claim that in *Coles* 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." Memo in Opposition, page 19. There simply is no such finding or statement in *Coles*, and for good reason. Neither Respondents nor their predecessor railroad companies nor anyone other than the Milan Canal Company were parties to the 1904 dissolution of the Canal Company, and the issue of what real estate the Canal Company owned at the time of its dissolution was not actually litigated or decided in the dissolution. The order of sale in the dissolution merely authorized the sale of real estate the Canal Company claimed to own in 1904; it did not, however, determine the validity of such ownership. Therefore, such order of sale has no res judicata or collateral estoppel effect on Respondents with respect to the real estate owned by the Canal Company when it dissolved.

2. Relators Have Failed To Present Any Evidence That The Milan Canal Company Owned The Entire Canal Corridor At The Time Of The Canal Company's 1904 Dissolution

At a minimum, *Key Trust* established that the only real estate owned by the Milan Canal Company at the time of the 1881 Lease were the Merry and Townsend Tracts. Consequently, Relators' statement in their Memo in Opposition that when the Canal Company dissolved in 1904 it owned the entire Canal Corridor would be factually correct only if between the time the Canal Company entered into the 1881 Lease and the time it filed for dissolution in 1904, it acquired all of the Canal Corridor outside the Merry and Townsend Tracts. Relators have failed to present any evidence of any such acquisition, and the undisputed facts indicate that no such acquisition ever occurred. In any event, even if such acquisition did occur, the real estate acquired by the Canal Company after the 1881 Lease would as a matter of law be subject to the Lease.

The length of the Canal Corridor is approximately 6.5 miles. The portion of such Corridor located on the Merry and Townsend Tracts is approximately two miles. Therefore, by claiming that the Canal Company owned the entire Canal Corridor at the time of its 1904 dissolution, Relators are representing to this Court that the Canal Company acquired 4.5 miles of the Canal Corridor **after** 1881. Relators have presented absolutely no evidence that any such acquisition occurred, and Relators have recognized that such acquisition most likely never occurred. On page 2 of their Memo in Support of their Complaint, Relators stated that the Canal Company entered into the 1881 Lease after the Canal Company had "ceased operating." Nevertheless, the Memo in Opposition claims that between 1881 and the time that the Canal Company filed for dissolution in 1904, the non-operating Canal Company somehow acquired 4.5 miles of the Canal Corridor, even though in 1881 the Canal Company had already purported to

lease the entire Canal Corridor to the W&LE-Ohio and even though since at least 1881 W&LE-Ohio was in possession of and had constructed and was operating a railroad on the entire Canal Corridor. The factual absurdity of such claim is apparent.

II. The Statement That *Key Trust* Held That Respondents Had No Interest In Any Part Of The Canal Corridor By Adverse Possession Is False

Respondents and its railroad predecessors have been in possession of the Canal Corridor for over 130 years. This fact alone would indicate that Respondents' and its railroad predecessors' rights to such possession may be based, at least in part, on adverse possession.⁴ In order to counter such an indication, the Relators on page 15 of the Memo in Opposition Relators state:

[I]n *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.

The quotation in this statement is found on page 5 of the first trial court decision in *Key Trust*. Respondents' Answer, Exhibit 11. Relators' assertion that the phrase "the property at issue" as used in such decision meant the entire Canal Corridor is blatantly false.

The first trial court decision in *Key Trust* initially held that the 1881 Lease covered only the Merry and Townsend Tracts. Respondents' Answer, Exhibit 11, pages 3-4. The court then held that Respondents' railroad predecessor "had a leasehold interest in the **property at issue**,

⁴ Adverse possession is not the only method by which Respondents and its railroad predecessors claim the right to possession of the Canal Corridor. Respondents obtained their interest in the Corridor from W&LE-Delaware (Exhibit 7 to Respondents' Answer), which in turn obtained its interest in the Corridor pursuant to a deed from Norfolk and Western Railway Company. (Exhibit 6 to Respondents' Answer) That part of such deed relating to the Canal Corridor (pages 190 through 194 of such deed) lists numerous recorded documents in addition to the 1881 Lease by which the railway companies were given the right to possession of various portions of the Canal Corridor.

which is evidenced by Exhibit A” (emphasis added). *Id.*, page 4. If Relators’ statement quoted above were accurate, Exhibit A attached to the first trial court decision would be a description of the entire Canal Corridor. Of course, it is not; it is a description of the Merry and Townsend Tracts only.

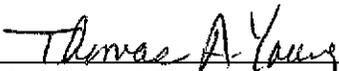
After determining that the 1881 Lease only covered the Merry and Townsend Tracts, the first trial court decision in *Key Trust* held that the 1881 Lease had terminated in 1986 or later (a holding which was reversed on appeal). *Id.*, pages 4, 6. Such a holding meant that Respondents no longer had a right through the 1881 Lease to possess the real estate covered by the Lease. Respondent Board argued in *Key Trust* that if the Lease was terminated, Respondent Board had a right to possess the **leased property** through adverse possession. The court rejected this argument because Respondent Board’s predecessor railroad companies had initially occupied the leased property pursuant to the Lease and hence such possession did not become adverse until the Lease terminated in 1986 or later, which was less than the twenty-one years required for adverse possession. *Id.*, pages 5-6.

In other words, the statement in the first *Key Trust* trial court decision that Respondent Board “has not met its burden to establish any interest in the property at issue by adverse possession” clearly related only to the Merry and Townsend Tracts. That statement did not relate to the remainder of the Canal Corridor, including Relators’ Claimed Real Estate. Relators’ statement to the contrary in the Memo in Opposition is false and should be stricken by this Court.

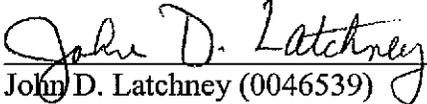
CONCLUSION

A lawyer has wide latitude to argue his or her case in a memorandum in opposition to a motion filed by the adverse party. That latitude does not, however, permit a lawyer to include false statements in such memorandum. The statements from the Memo in Opposition discussed herein are false. Respondents respectfully request that this Court strike such statements.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of March, 2009, he served a copy of the foregoing "Respondents' Motion To Strike" on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus, Ohio 43216-1008, counsel of record for Relators, by mailing said copy to him via ordinary United States mail, postage prepaid.



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