

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E.
NICKOLI AND ROBIN L.B. NICKOLI,
et al.,

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

RELATORS' MERIT BRIEF

Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6480
Fax: (614)719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com

Attorneys for Relators

Thomas A. Young (0023070)
(Counsel of Record)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Tel.: (614) 227-2137
Fax: (614) 227-2100
tyoung@porterwright.com

John D. Latchney (0046539)
Tomino & Latchney, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
Tel.: (330) 723-4656
Fax: (330) 723-5445
jlatchney@brightdsl.net

*Attorneys for Respondents Erie MetroParks
and Board of Park Commissioners, Erie
MetroParks*

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MERIT BRIEF OF RELATORS IN SUPPORT OF WRIT OF MANDAMUS

This is an original action in mandamus to compel respondents (collectively, “MetroParks”) to commence appropriation proceedings to compensate Ohio landowners for property unlawfully seized from them and occupied by MetroParks. This Court has issued an alternative writ and the evidence has been submitted by the parties.¹

Relators in this case (collectively “*Nickoli* Relators” or “Relators”) are in privity with the Relators in *State ex rel. Coles v. Granville, et al.*, Supreme Court of Ohio, No. 2006-1259 (“*Coles*”). They are identically situated as owners of canal lands physically invaded by MetroParks. Relators in this case are entitled to a writ compelling MetroParks to compensate them for their property, just like the Relators in *Coles* (“*Coles* Relators”) received from this Court in its unanimous 6-0 decision in 2007.

However, mere issuance of the writ will not bring relief to the *Nickoli* relators. Relators further request that this Court order MetroParks to commence appropriation proceedings within 60 days of the date of the final order in this case. This additional relief is required because MetroParks has refused to file any of the appropriation actions it was ordered to file in the *Coles* case, despite over eighteen (18) months having elapsed from this Court’s issuance of the writ of mandamus against MetroParks.

STATEMENT OF CASE

“There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.” *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E. 2d 1115, ¶ 38. “Though the Ohio Constitution may bestow on the sovereign a magnificent

¹ Relators are submitting contemporaneously with this Merit Brief a motion for leave to supplement the presentation of evidence with one additional affidavit.

power to take property against the will of the individual who owns it, it also confers an ‘inviolable’ right of property on people. When the state elects to take private property without the owner’s consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting.” *Id.*, ¶ 68. This Court’s role “is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure . . . that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination or improper purpose.” *Id.*, ¶ 69. Here, a straightforward application of these fundamental principles compels granting the requested writ.

The present action is virtually identical to the previous mandamus action decided by this Court in *Coles* – a case in which this Court protected the venerable property rights of the *Coles* Relators. The *Nickoli* Relators are identically situated to their neighbors, the *Coles* Relators. Like the *Coles* Relators, the *Nickoli* Relators are owners of land acquired from Key Trust Company of Ohio (“Key Trust”) that encompasses the former Milan canal corridor running from the village of Milan, Ohio to the mouth of the Huron River at Lake Erie, in the Village of Huron. MetroParks has occupied and uses the entire corridor for a recreational trail.

Like the *Coles* Relators, the *Nickoli* Relators (with only one exception) were adverse parties to MetroParks in a case brought by MetroParks in an attempt to establish its claim to the canal corridor. In that case, the “*Key Trust*” case (“*Key Trust*” or “*Key Trust* Litigation”), Relators’ ownership of the canal corridor was finally and preclusively adjudicated in favor of Relators and adversely to MetroParks.

Despite resolution of these landowners’ rights to the canal corridor seven years ago in *Key Trust*, MetroParks continued its occupation of the canal corridor. In 2006, certain of the *Key Trust* Defendants then brought the *Coles* mandamus action to force MetroParks to initiate

condemnation actions. In *Coles*, this Court confirmed the result of the *Key Trust* litigation and granted an alternative writ ordering MetroParks to commence condemnation actions. Yet, to date, MetroParks has not filed any appropriation actions against the *Coles* Relators.

MetroParks is a public agency that has broad powers of eminent domain. MetroParks chose not to exercise this power when it began seizing the canal lands from Relators. Even though MetroParks was conclusively adjudicated to have wrongfully seized these lands, and has even been ordered to commence eminent domain proceedings against the five *Coles* Relators, it still refuses to do so.

The Orwellian behavior of MetroParks notwithstanding, these Relators, the defendants in *Key Trust* who were not parties to the *Coles* case, are entitled to the same writ -- ordering MetroParks to commence appropriation proceedings.

STATEMENT OF FACTS

A. Nickoli Relators.

The *Nickoli* Relators all own property along the Huron River in Erie County on which the former Milan canal was built. See generally, Relators' Presentation of Evidence, Nos. 1-20.² Like their neighbors, *Coles* Relators Robert Bickley, Warren Jones, Edwin and Lisa Coles, and prior to his passing, Vincent Otrusina, all have had their property seized by MetroParks for a public use without payment of one penny in compensation. *Id.*

² Citations to Relators' Presentation of Evidence are hereafter noted as "Rel. Evid., No. ___," followed by a description of the evidence being cited.

B. History Of The Milan Canal Corridor.

The history of the Milan Canal corridor was set out in detail by this Court in *Coles. State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 2-3.³ In 1827, the State of Ohio chartered the Milan Canal Company (“canal company”) to construct and operate a canal from Milan, Ohio north to where the river flows into Lake Erie in the Village of Huron, Ohio. *Id.* The canal company acquired noncontiguous tracts of land from Ebeneser Merry and Kneeland Townsend (“Merry and Townsend tracts”). *Id.* The Merry tract is a small parcel of 1.5 acres located near the Milan Canal Basin in the heart of the village of Milan. *Rel. Evid. No. 20, Affidavit of Daniel Hartung*, ¶ 5-7. The Townsend tract lies several miles north of the Milan Canal Basin. *Id.* The canal system operated from the heart of the village of Milan to the mouth of the Huron River (“canal corridor”). This corridor became a railway right of way where the Wheeling and Lake Erie Railroad and successor entities (hereafter the “railroad” or “Wheeling and Lake Erie”) operated a railroad. *Rel. Evid., No. 21, Second Affidavit of Edwin M. Coles (“2nd Coles Aff.”), Exh. H, pg. 2.*

In 1881, the canal company entered into a 99-year lease for the Merry and Townsend tracts with Wheeling and Lake Erie for a 150-foot wide right of way to construct and operate a rail line (“1881 Lease”). *Stipulations, SE-3, 1881 Lease.*⁴ Ultimately, the railroad built a rail line, with a railroad bed 66 feet wide, from the village of Milan to the village of Huron all within the canal corridor. *Rel Evid., No. 20, Hartung Aff., ¶ 15 & Exhs. C, D; see also Second*

³ The *Coles* Decision has been submitted as a stipulated exhibit in this case. (See *Stipulations, SE-43.*) For clarity, Relators will hereafter simply cite to the electronic citation, 2007-Ohio-6057.

⁴ Citations to the Parties’ *Stipulations* are hereafter noted as “SE- __,” followed by a description of the evidence being cited.

Affidavit of Daniel Hartung attached to Motion for Leave to Supplement Presentation of Evidence.

In 1904, the canal company commenced a dissolution action (“Dissolution Action”). SE-25, Dissolution Action Journal Entry. That year, the court in that action ordered a receiver for the canal company to “advertise” and sell the canal company’s property. *Id.* The property of the canal company to be sold 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.*

Pursuant to the Order of Sale, the receiver held a public sale of the canal company’s property. SE-4, Deed, Vol. 78, pgs. 239-241. On February 27, 1905, the court confirmed the sale of the canal company’s property interests by a Receiver’s Deed to Stephen Lockwood. *Id.* In 1906, Stephen Lockwood transferred those interests by a Warranty Deed to Emma Lockwood. SE-5, Deed, Vol. 80, pg. 453. Ultimately, these interests in the canal devolved to a testamentary trust administered by Key Trust. See SE-6, Lease Records Vol. 17, pgs. 307-310; *Coles*, 2007-Ohio-6057, ¶ 3. Among the interests acquired by Key Trust was the canal company’s property ownership rights in the 150 feet wide canal corridor from Milan to the mouth of the Huron River. SE-6, Lease Records Vol. 17, pgs. 307-310.

C. Railroad Abandonment Of The Canal Corridor.

Rail traffic on the corridor ceased in the 1980s. *Coles*, 2007-Ohio-6057, ¶ 3. In 1988, the railroad filed an application with the Interstate Commerce Commission (“ICC”) to abandon rail service over the corridor. Rel. Evid., No. 21, Affidavit of Angela Consuelo Stimpert, Exh. A. The ICC approved the application in 1989. Rel. Evid., No. 21, Stimpert Aff., Exh. B.

The railroad then tore up the tracks, removing rails and ties. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9-11 & Exhs. G, H. In 1995, the railroad quitclaimed its interests to MetroParks, which used the railroad bed on the canal corridor to construct a recreational trail from Milan to Lake Erie. *Coles*, 2007-Ohio-6057, ¶ 3.

D. MetroParks Engages In Various Lawsuits Over Its Purported Right To Construct The Recreational Trail Over The Entire 6.5 Mile Canal Corridor.

Starting in 1997, a series of lawsuits began between MetroParks and landowners over MetroParks' use of the canal corridor for a recreational trail.

1. *Coles v. Wheeling & Lake Erie Ry. Co., et al.*, Erie C.P. No. 97-CV-296.

First, Edwin and Lisa Coles (Relators in the *Coles* mandamus action) filed an action in the Erie County Court of Common Pleas for a declaratory judgment that they had title to the property described in their 1986 deed through which they obtained a portion of the property upon which MetroParks intended to build the recreational trail. *Coles*, 2007-Ohio-6057, ¶ 4. This deed specifically accepted a "66 foot wide parcel... 'now or formerly owned'" by one of the successors in interest to the lessee of the railroad lease. *Id.* The Common Pleas Court dismissed the action on the grounds that the Coleses were not real parties in interest because the parcel was specifically carved out from the deed. *Id.* at ¶ 5.

2. *The Key Trust Litigation.*

a. MetroParks' Claims Based On Its Acquisition Of The Railroad Lease.

In 1999, MetroParks initiated the *Key Trust* Litigation in Erie County Court of Common Pleas against Key Trust. In the Complaint in *Key Trust*, MetroParks alleged that it was improving the canal company property for use as a recreational trail and that it was entitled to sole and exclusive occupancy of the canal property. SE-26, Amended Complaint, ¶ 11. On September 8, 1999, Key Trust conveyed its interest in the sections of canal property adjacent to

two parcels (“home” and “farm” parcels) owned by Edwin and Lisa Coles to the Coleses. Rel. Evid., No. 21, 2nd Coles Aff., Exh. C. Shortly after this conveyance, MetroParks, recognizing that the Coleses had now acquired the canal and railroad corridor previously excepted from their 1986 deed, sent a letter to the Coleses stating that it was interested in acquiring the Coleses’ ownership interests in the canal and railroad corridor for its recreational trail. SE-37, *Coles Relators’ Reply*, Affidavit of Edwin M. Coles, ¶ 8 & Exh. App. 10. Further, MetroParks adopted two resolutions in 2000 to authorize eminent domain proceedings to acquire fee-simple title to the Coleses’ sections of the canal and railroad corridor acquired from Key Trust. SE-37, *Coles Relators’ Reply*, Coles Aff., ¶ 14 & Exh. App. 20.

On February 24, 2000, Key Trust conveyed to *Nickoli* Relators Rick and Carol Rinella its interest in the section of canal property adjacent to them. Rel. Evid., Nos. 14, Affidavit of Richard Rinella, ¶ 3 & Exh. A; Rel. Evid., No. 15, Affidavit of Carol Rinella, ¶ 3 & Exh. A. On April 11, 2000, Key Trust conveyed its remaining interests in the canal property to Buffalo Prairie, Ltd., an entity owned by Edwin and Lisa Coles. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 8 & Exh. D. On April 26, 2000, Buffalo Prairie conveyed some sections of the canal property it acquired to the other *Coles* Relators (Robert Bickley, Warren Jones and Vincent Otrusina) and the *Nickoli* Relators.⁵ See e.g., Rel. Evid., No. 1, Affidavit of Gerald O.E. Nickoli, ¶ 3 & Exh. A; Rel. Evid. No. 3, Affidavit of Patricia A. Sipp, ¶ 3 & Exh. A; Rel. Evid., No. 6, Affidavit of Doug Hildebrand, ¶ 2 & Exh. A; Rel. Evid. No. 7, Affidavit of Theresa Johnston, ¶ 3 & Exh. A; Rel. Evid., No. 9, Affidavit of John Landoll, ¶ 3 & Exh. A; Rel. Evid., No. 11, Affidavit of Michael P. Meyer, ¶ 3 & Exh. A; Rel. Evid., No. 13, Affidavit of Donna Rasnick, ¶ 2 & Exh. A; Rel. Evid., No.16, Affidavit of Maria Sperling, ¶ 2 & Exh. A; Rel. Evid., No. 17, Affidavit of

⁵ Buffalo Prairie also conveyed a section to Alice Fowler. See Rel. Evid., No.12, Affidavit of Cheryl Lyons, ¶ 3 & Exh. C.

Gary Steiner, ¶ 2 & Exh. A; Rel. Evid., No. 19, Affidavit of Rita Beverick, ¶ 3 & Exh. A.

Buffalo Prairie retained ownership of the remainder of the canal corridor it acquired from Key Trust. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 8.

b. MetroParks Sues All Relators Claiming Ownership Of The Canal Corridor And Obtains A Restraining Order Against Them.

In July, 2000, MetroParks added as defendants to its lawsuit all the landowners who derived title from Key Trust, either directly or through Buffalo Prairie, including the *Nickoli* Relators (with the exception of only Cheryl Lyons) and *Coles* Relators (the “Key Trust Defendants”).⁶ SE-26, Amended Complaint. In its Amended Complaint in *Key Trust*, MetroParks specifically pled that the canal company owned the entire canal corridor in fee simple 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. *Id.* at ¶ 8-10; see also Resp. Mot. for Judgment on Pleadings, n. 6.

MetroParks then moved for and obtained a temporary restraining order against all of the landowners to prohibit them from using the canal corridor and interfering with MetroParks’ operation of the recreational trail. SE-27, Motion for Temporary Restraining Order and Preliminary Injunction (“Motion for TRO”). The motion was granted based in part on the affidavit of an MetroParks ranger describing what he observed on the park trail adjacent to Vincent Otrusina’s property and the property adjacent to the premises owned by Edwin and Lisa Coles, see SE-28, Order; SE-27, Affidavit of Robert J. Davis, ¶ 3, both properties north of Mason Road. *Coles*, 2007-Ohio-6057, ¶ 54. Thus, MetroParks received a restraining order

⁶ In 2003 and 2008, *Key Trust* Defendant Michael Meyer and Cheryl Lyons acquired the real estate of *Key Trust* Defendant Alice Fowler. Rel. Evid., No. 11, Meyer Aff., ¶ 3 & Exh. D; Rel. Evid., No. 12, Lyons Aff., ¶ 3 & Exh. D. Thus, Cheryl Lyons is in privity with the *Key Trust* Defendants.

against all landowners, north and south of Mason Road (and outside of the Merry and Townsend tracts). SE-28, Order.

c. MetroPark's Claim Of Ownership To The Entire 6.5 mile Canal Corridor, North And South Of Mason Road.

In *Key Trust*, MetroParks not only asserted ownership rights in the recreational trail it operated across the *Key Trust* Defendants' property through the 1881 Lease, but also through a deed from the Wheeling & Lake Erie Railway Company, through easements acquired by deed, and by adverse possession. See SE-26, Amended Complaint; SE-30, Reply to Counterclaim. See also, *Coles*, 2007-Ohio-6057, ¶ 9. After MetroParks obtained the restraining order, the parties proceeded to a bench trial. The trial court held that the 1881 Lease was limited to two tracts of land obtained by the canal company from Merry and Townsend because those were the only two tracts owned by the canal company in 1881. SE-31, Judgment Entry. It did not find that MetroParks owned any of the sections of the canal corridor by deed, easement or adverse possession. *Id.* In fact, the trial court judge rejected MetroParks' adverse possession claim, holding that "Plaintiff has not met its burden to establish any interest in the property at issue by adverse possession." *Id.*, pgs. 1, 5. As demonstrated by MetroParks' Amended Complaint and Motion for TRO, the property at issue in *Key Trust* was the entire 6.5 miles of the canal corridor upon which MetroParks was constructing and operating its trail. SE-26, Am. Compl.; SE-27, Motion for TRO.

The parties cross-appealed from the trial court's decision. The *Key Trust* Defendants, concerned that trial court in defining the boundaries of the canal corridor encumbered by the 1881 Lease had improperly amended the Lease and expanded its scope, appealed that issue to the Sixth District Court of Appeals. *Coles*, 2007-Ohio-6057, ¶ 43. The Sixth District Court of Appeals affirmed the specific holding of the trial court that the 1881 Lease only gave to

MetroParks property rights in the Merry and Townsend tracts. *Id.*, ¶ 10. The Sixth District, however, reversed the trial court on the issue of whether the railroad had breached the 1881 Lease thereby rendering it void and remanded the action to the trial court to enter a judgment consistent with that reversal. *Id.*

Upon remand, the trial court entered a new judgment in which, pertinent to this case, it reiterated that the leased property was confined to only the Merry and Townsend tracts. *Id.*, ¶ 11. Because the trial court used identically imprecise language about the boundaries of those tracts as it had in its first judgment entry, the *Key Trust* Defendants appealed the second judgment entry. Again, the Sixth District Court of Appeals found that the trial court's language did not "contradict the finding in the previous judgment entries" limiting the leased property only to the Merry and Townsend tracts. *Id.*, ¶ 13.

In sum, after three years of litigation, as this Court concluded in *Coles*:

the Key Trust litigation conclusively determined that the property subject to the board's interests under the railroad lease lay within the boundaries of the Merry and Townsend parcels...and [that] **the ultimate emphasis in that litigation [Key Trust] at both the trial and appellate courts [was] on the interests of the board being limited to the Merry and Townsend parcels as well as the uncontroverted evidence that none of the relators' property is within either of those parcels.**

Id., ¶ 48 (emphasis added).

3. *Buffalo Prairie, Ltd. v. Erie Metro Parks, et al.*, Huron Municipal Court, Case #00-CVG-119 A-L.

Shortly before MetroParks added the Key Trust Defendants to *Key Trust*, Buffalo Prairie, Ltd. sued MetroParks and the railroad in Huron Municipal Court for Forcible Entry, Detainer and Damages ("Forcible Entry Action"). *Rel. Evid.*, No. 21, 2nd *Coles Aff.*, Exh. H, pg. 1. On June 28, 2000, the Municipal Court held an oral hearing at which no testimony was taken

because “all essential facts” and exhibits to the complaint were “stipulated into evidence.” *Id.*

Among the facts stipulated to were:

- MetroParks “has a plan to construct and maintain a bicycle and walking path from Milan to Lake Erie along the former towpath of the Milan Canal Company along the Huron River”;
- “[t]he towpath property became the railway right of way where a railroad was operated for many years”;
- by the late 1980s, the railroad had abandoned the railroad right of way by filing with the Interstate Commerce Commission an application to permit the cessation of use and removed the rails “and most of the ties”.

Id., pg. 2.

These stipulated facts establish that MetroParks constructed its recreational trail on the *Nickoli* Relators’ sections of the canal corridor, and that those sections are part of the abandoned railroad right of way.

E. The Coles Case Before This Court, MetroParks’ Refusal To Obey This Court’s Writ And MetroParks’ Disregard For The *Nickoli* Relators’ Constitutional Right To Just Compensation.

Despite the holdings and ultimate emphasis of *Key Trust*, MetroParks refused to commence appropriation actions against the *Key Trust* Defendants with ownership interests in the trail property outside of the Merry and Townsend tracts. In 2006, several of *Key Trust* Defendants commenced a mandamus action against MetroParks and its then director, Jonathan Granville – the *Coles* action.

1. ***Coles v. Granville, et al. Mandamus Action.***

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. All of the *Coles* Relators except Isolated Ventures were *Key Trust* Defendants.⁷ *Key Trust* had conveyed to Edwin and Lisa Coles and Buffalo Prairie the property formerly owned by the canal company. The Coleses and Buffalo Prairie then conveyed some sections of this property to, among others, Vincent Otrusina, Warren R. Jones and Robert C. Bickley. See Rel. Evid., No. 21, 2nd Coles Aff., Affidavit of Linda Tucker Moir, Affidavit of Warren R. Jones, and Affidavit of Robert C. Bickley. Each of those three Relators received their sections of the property from Buffalo Prairie. Buffalo Prairie retained some sections of the corridor it acquired from *Key Trust*. *Id.*, 2nd Coles Aff. As to each of these sections of the canal corridor, the *Coles* Relators sought a writ of mandamus in order to compel the Respondents to initiate appropriation proceedings. SE-35, Complaint; SE-39, *Coles* Relators' Merit Brief.

MetroParks answered the Complaint in *Coles* and raised affirmative defenses disputing the Relators' ownership interest in their sections of the canal property. SE-36, Answer. Those affirmative defenses included adverse possession, the Relators did not have a "clear legal right" to appropriation proceedings, "[s]ome or all of the Relators lack standing to pursue the claims set out in the Complaint" and finally, that "[s]ome or all of the Relators are not proper parties to this suit because they have no right, title or interest in or to the property which is the subject of this suit." *Id.*

This Court granted an alternative writ and the parties then submitted evidence and briefed the dispute. The *Coles* Relators asserted that *Key Trust* preclusively established their ownership in the sections of the canal corridor and that MetroParks lacked any property rights outside of the Merry and Townsend tracts. SE-39, *Coles* Relators' Merit Brief. In response, MetroParks continued to challenge the *Coles* Relators' valid ownership interest in their sections of the canal

⁷ Isolated Ventures was in privity as to the property it owned with Edwin and Lisa Coles having acquired the property from them. Rel. Evid., No. 21, 2nd Coles Aff., Exh. E.

corridor occupied by MetroParks, claiming that *Key Trust* established that the *Coles* Relators did not own the property upon which MetroParks built its trail and, thus, was res judicata to bar any claim by *Key Trust* Defendants or their privies to assert any claim of ownership to the canal and railroad corridor (outside of the Merry and Townsend tract). SE-40, *Coles* Resp. Memo. Opp. The parties submitted volumes of evidence, including: (a) the *Coles* Relators' deeds with *Key Trust*; (b) pages 1-3 of a five-page 2000 survey completed by professional surveyor and engineer Daniel Hartung establishing the centerline of railway within the canal corridor from Robert Bickley's property through the Coleses' home parcel and ending nine parcels north of the Coleses' home parcel; and (c) the Journal Entry and Order of Sale from the Dissolution Action and subsequent Receiver's Deed. Rel. Evid., No. 21, *Coles* Relators' Presentation of Evidence.

The key issues before this Court in *Coles* were: (1) the preclusive effect of *Key Trust*; and (2) whether the *Coles* Relators' property lay outside the Merry and Townsend tracts. *Coles*, 2007Ohio-6057, ¶ 48. The undisputed evidence established that each of the *Coles* Relators' properties lay outside those two tracts. *Id.* As to *Key Trust*, the Court held that *Key Trust* definitively established that MetroParks had no legal interests in the canal and railroad corridor outside of the Merry and Townsend tracts. *Id.* Correspondingly, this Court unanimously held that *Key Trust* preclusively established that the *Coles* Relators had valid ownership interests in their sections of the canal and railroad corridor physically invaded by MetroParks. *Id.*, ¶ 49, 58-59.

As to properties south of Mason Road, the Court recognized that both sides claimed that the *Key Trust* litigation was "res judicata and establishes their interest in the property south of Mason Road in the canal corridor." *Id.*, ¶ 34. This Court agreed with the *Coles* Relators and 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., ¶ 49. This Court agreed with the *Coles* Relators that *Key Trust* 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 MetroParks’ limited interest in those two named tracts. Id., ¶ 34, 49. Indeed, the Court reasoned that a “contrary ruling would...ignore both the ultimate emphasis in that litigation at both the trial and appellate courts on the interests of the board being limited to the Merry and Townsend parcels as well as the uncontroverted evidence that none of the relators’ property is within either of those parcels.” Id., ¶ 48. Thus, the Court concluded,

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 and constitute an involuntary taking entitling them to the requested appropriation proceeding.

Id., ¶ 49.

As to properties north of Mason Road, 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].” Id., ¶ 54. This Court agreed. Id., ¶ 55. The Court recognized that in *Key Trust*, MetroParks asserted an ownership interest in the “**pertinent canal corridor property** in fee in addition to its interests under the railroad lease.” Id. (emphasis added). The pertinent canal corridor property at issue in *Key Trust* was the entire 6.5 mile corridor, including the sections crossing each of the *Key Trust* Defendants’ property. In fact, in *Key Trust*, MetroParks also claimed an ownership interest in the canal corridor property through adverse possession (which MetroParks raised again as an affirmative defense in the *Coles* action). SE-26, Amended Complaint, ¶ 8-10; SE-30, Reply to Counterclaim. See also, *Coles*, 2007-Ohio-6057, ¶ 9. The trial court judge flatly rejected this claim, holding that “Plaintiff has not met its

burden to establish any interest in the property at issue by adverse possession.” SE-31, Judgment Entry, pgs. 1, 5. As this Court confirmed in *Coles*, the entire “pertinent” property at issue in *Key Trust* was the full length of the canal corridor. *Coles*, 2007-Ohio-6057, ¶ 55.

This Court unanimously held in *Coles* that *Key Trust* preclusively established the ownership interests of the parties to that action. This Court confirmed the trial court’s holding in *Key Trust*: “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]”, and the trial court’s judgment “was not modified by the subsequent *Key Trust* proceedings.” *Coles*, 2007-Ohio-6057, ¶ 55 (emphasis added). As a result, *Key Trust* was res judicata as to the *Key Trust* Defendants’ ownership of their sections of the canal corridor north of Mason and thus, *Coles* Relators’ claimed ownership of their respective sections – they owned those sections and MetroParks’ construction and use of a recreational trail on their property also “effected an involuntary taking.” *Id.* at ¶ 55, 58.

This Court also rejected MetroParks’ contention that the Coleses lacked a valid ownership interest in the section of the canal corridor adjacent to their home parcel, north of Mason Road. *Id.*, ¶ 51-53. MetroParks argued that the 1997 case holding that the Coleses were not real parties in interest because of the carve out of the railroad corridor from the Coleses’ 1986 deed was res judicata. Rejecting this contention, this Court held that the subsequent acquisition by the Coleses of the canal corridor from Key Trust (including the 66-foot-wide parcel) vested title to the property in them. *Id.* at ¶ 51-52.

Therefore, as to all *Coles* Relators, the Court unanimously granted the writ ordering MetroParks to commence appropriation actions in order to compensate the Relators for the involuntary taking of their property:

Relators have established that by employing their private property for public use as a recreational trail, [MetroParks] 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.

Id. at ¶ 59.

MetroParks requested reconsideration of its decision. In its motion requesting reconsideration, MetroParks claimed that the *Coles* Relators had received “nothing” from Key Trust. SE-44, Motion for Reconsideration. Further, MetroParks asked the Court to “modify” its decision to permit MetroParks to assert ownership of sections of the canal corridor upon which it built its trail through adverse possession. Id. This Court denied the motion. SE-46, Reconsideration Entry.

2. MetroParks’ Disregard For This Court’s Writ In *Coles* And The Rights Of The *Nickoli* Relators.

To date, MetroParks has ignored this Court’s writ as to the *Coles* Relators. Needless to say, MetroParks has no intention of filing condemnation actions against the *Nickoli* Relators, who are the *Coles* Relators’ neighbors, were also *Key Trust* Defendants and whose property also lies outside the Merry and Townsend tracts and upon which MetroParks constructed and operates its trail. Notwithstanding MetroParks’ continued contempt of this Court’s decision in *Coles*, the *Nickoli* Relators are identically situated with the *Coles* Relators as each own property outside of the Merry and Townsend tracts upon which MetroParks constructed and operates its trail. See generally, Rel. Evid., Nos. 1-20.⁸

ARGUMENT

In order to obtain the requested writ of mandamus, the *Nickoli* Relators must establish:

(1) clear legal right to have the requested act performed; (2) a clear legal duty on the named

⁸ A sliver (0.9 acres out of 7.8 acres) of the property owned by U/A Patricia Charville dated September 28, 1994 and U/A Leon R. Charville date September 28, 1994 (“Charville Trusts”) upon which MetroParks constructed and operates its trail lies within the Townsend tract. Rel. Evid., No. 20, Hartung Aff., ¶ 14.

respondents to do the requested act; and (3) no adequate remedy through ordinary course of law. *State ex rel. Cody v. Toner* (1983), 8 Ohio St.3d 22, 456 N.E.2d 813. As a matter of law and indisputable evidence, the Nickoli Relators meet those requirements. The *Nickoli* Relators have a clear legal right to the requested writ and MetroParks has a clear legal duty to commence appropriation proceedings to compensate the *Nickoli* Relators for the involuntary taking of their property. Finally, mandamus is the appropriate vehicle to compel a public authority to commence appropriation proceedings. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d. 320, ¶ 13-14.

All of the *Nickoli* Relators (with the exception only of Cheryl Lyons) were defendants in the *Key Trust* litigation and were so because MetroParks was constructing its trail within the canal corridor on their properties. Like the *Coles* Relators, the *Nickoli* Relators' sections of the canal corridor lie outside the Merry and Townsend tracts (except a sliver of one parcel). As a result, MetroParks must initiate appropriation actions in order to compensate the *Nickoli* Relators for the unlawful and continuing taking of their property. Only this Court can finally provide justice for the *Nickoli* Relators and vindicate their long-ignored fundamental and constitutional rights against the tyranny of an unelected body that demonstrates nothing but contempt for those cherished rights. For the above reasons and those more fully described below, the Court should do so.

Proposition of Law No. I:

Key Trust* preclusively established that the *Nickoli* Relators own their respective sections of the canal corridor and MetroParks constructed its recreational trail on their land. See *State ex rel Coles v. Granville, et al.

The *Coles* Relators sought a writ of mandamus based upon 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. *Coles*, 2007-Ohio-6057, ¶ 3, 34, 52, 54. In deciding whether to grant the *Coles* Relators' petition for writ, this Court focused on the "Res Judicata Effect of *Key Trust* Litigation." *Id.*, ¶ 34, 54. As detailed above, this Court agreed with the *Coles* Relators and rejected MetroParks' argument that *Key Trust* somehow preclusively barred the *Coles* Relators' mandamus claim. This Court's conclusion applied to both the properties south of, and north of, Mason Road. As to MetroParks' ownership rights of the canal and railroad corridor, this Court held that *Key Trust* preclusively established that: (1) south of Mason Road, MetroParks' interest is limited to lease rights under the 1881 Lease to the Merry and Townsend tracts; and (2) north of Mason Road, MetroParks has "no" property interest in the former canal and railroad corridor. *Id.*, ¶ 48-49, 55. Moreover, as *Key Trust* preclusively established that MetroParks' property interest in the canal corridor upon which it constructed its trail was limited to the Merry and Townsend tracts, likewise, *Key Trust* preclusively established that by constructing the trail in the canal corridor, MetroParks physically and unlawfully invaded the *Key Trust* Defendants' canal property. *Id.*, ¶ 34, 49, 55-56.

In fact, this holding is consistent with the actions of MetroParks when it first learned that the Coleses had acquired sections of the canal and railroad corridor from Key Trust – it acknowledged the Coleses' ownership interests in the corridor and authorized its agents to acquire the property through eminent domain. SE-37, *Coles* Relators' Reply, *Coles* Aff., ¶ 8, 14 & Exhs. App. 10, App. 20. Apparently, at a later date, MetroParks concluded it might be cheaper to disregard the Coleses' constitutional right to just compensation and continue to unlawfully occupy their property. Still, MetroParks' response demonstrates its recognition of the transfer of a valid ownership interest in the canal corridor from Key Trust.

Because the *Nickoli* Relators were parties to the *Key Trust* litigation – just like the *Coles* Relators, *Key Trust* conclusively established their ownership interest in their sections of the canal corridor as well. The Affidavit of Daniel Hartung establishes that all of the *Nickoli* Relators own sections of the canal corridor outside of the Merry and Townsend tracts. Rel. Evid., No. 20, Hartung Aff., ¶ 12-14. Since the indisputable record establishes the *Nickoli* Relators' sections of the canal corridor lie outside those two tracts, that coupled with the preclusive effect of *Key Trust* confirms that *Nickoli* Relators have the same clear legal right to their sections of the canal corridor outside of the Merry and Townsend tracts as the *Key Trust* Defendants did that were Relators in *Coles*.

Nonetheless, MetroParks has willfully ignored this conclusion by continuing to exercise control over the *Nickoli* Relators' sections of the canal corridor without appropriating the property. See generally, Rel. Evid., Nos. 1-19. MetroParks cannot ignore the res judicata effect of *Key Trust* that MetroParks had no property right to construct its recreational trail north of Mason on the *Key Trust* Defendants' property and that its property right south of Mason Road is limited solely to the lease rights in the Merry and Townsend tracts.

Claim preclusion applies to prevent the same parties or their privies from litigating again any claim arising out of a transaction that was the subject matter of a previous action. *State ex rel. Schachter v. Oh. Pub. Employees Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27; *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. Thus, “[t]he previous action is conclusive for all claims that were or that could have been litigated in the first action.” *Schachter*, 2009-Ohio-1704, ¶27; *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶12. Based on the clear application of claim preclusion, MetroParks is bound by *Key Trust* whether it wants to accept it or not. *Johnson's*

Island, Inc. v. Bd. Township Trustees of Danbury Township (1982), 69 Ohio St.2d 241, 244, 431 N.E.2d, 672 (holding that res judicata bars a party from relitigating the same matters when it failed to “make good his cause of action...by all the proper means within his control” even if he fails in that respect, “purposely or negligently”). MetroParks’ attempt in this action to regurgitate its misinterpretation of *Key Trust* that it presented to this Court in *Coles* in an attempt to re-litigate the same claims yet again should be categorically rejected by this Court.

The conclusive finding in *Key Trust* that MetroParks’ interests were limited to a leasehold interest in the Merry and Townsend tracts combined with the indisputable fact that the *Nickoli* Relators’ property lies outside those tracts (except a sliver of the Charville Trusts’ property) is dispositive; Relators are clearly entitled to a writ ordering MetroParks to commence appropriation actions to compensate the Relators - like the *Coles* Relators before them - for the construction and operation of a recreational trail on their property.

Proposition of Law No. II:

The *Nickoli* Relators, who derived title to former canal property from Key Trust as did the *Coles* Relators, are in privity with *Coles* Relators for purposes of claim preclusion and are entitled to the same relief as a matter of law.

- A. This Court In *Coles* Recognized That The *Coles* Relators Had Title To Sections Of the Canal Corridor Acquired From KeyTrust.

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 us to compel the board to commence an appropriation proceeding to compensate them for that taking.

Coles, 2007-Ohio-6057, ¶ 59 (emphasis added). The private property at issue was the *Coles* Relators’ sections of the canal corridor acquired directly or indirectly from Key Trust upon which MetroParks had construed its recreational trail. *Id.*, ¶ 34, 49, 52, 55, 58-59. Obviously,

this Court found that the *Coles* Relators had a valid interest in the sections of canal property they purchased directly or indirectly from Key Trust and, thus, a clear legal right to a writ.

As evidenced by their improper and baseless Motion for Judgment on the Pleadings in this case, Respondents' claim that *Coles* did not determine that the Relators therein had good title to the real estate they claim. That argument is absurd and implies that this Court disregarded those requirements for obtaining a writ of mandamus in granting one to the *Coles* Relators. This Court did not disregard those requirements. The ownership of the *Coles* Relators in the real estate they claimed was at the heart of the *Coles* case and contested by MetroParks at every turn prior to the *Coles* decision and afterwards. MetroParks readily understood that the issue in *Coles* was the Relators' ownership in the sections of the property they acquired from the canal company and condemned by MetroParks. MetroParks cannot seriously and in good faith dispute that title was hotly contested in *Coles*.

In its Answer in *Coles*, MetroParks raised affirmative defenses (including adverse possession and that the *Coles* Relators had no right, title or interest in the property at issue), disputing the Relators' ownership interest in their sections of the canal property. SE- 36, Answer. MetroParks had the opportunity to raise any defenses to the Relators' claim of valid ownership in their sections of the canal property upon which MetroParks built and operates its recreational trail. This Court rejected those defenses and held that the Relators had a clear legal right.

Moreover, with its briefing in *Coles*, MetroParks again directly attacked the *Coles* Relators' title through Key Trust to the property at issue. SE-40, *Coles* Resps., Memo. Opp., pg. 7. It argued instead that *it* owned the recreational trail through the 1881 Lease as to south of

Mason Road and by fee north of Mason Road. *Id.*, pgs. 15-24. Clearly, this Court in *Coles* rejected their claim.

In its Motion for Reconsideration, MetroParks continued its attack on the *Coles* Relators title through Key Trust. SE-44, *Coles* Resps., Mot. for Reconsideration, pgs. 3-5. Not surprisingly, this Court refused to eviscerate its decision and rejected MetroParks' Motion. SE-46, Reconsideration Entry.

In sum, even if the *Coles*' decision itself were somehow not clear and conclusive on the issue, MetroParks' answer, briefing and Motion for Reconsideration established that this Court held that the *Coles*' Relators owned the condemned property. The *Coles*' decision applies equally here.

B. The Ownership Interest Upon Which This Court Found That The *Coles* Relators Had Good Title To Canal Corridor Is The Interest Conveyed To Them By Key Trust.

The *Coles* Relators acquired ownership of the canal property either directly from Key Trust (Edwin and Lisa Coles, Buffalo Prairie, Ltd.) or from Key Trust through intermediary Buffalo Prairie (Warren R. Jones, Isolated Ventures, Ltd., the Executor of Vincent Otrusina's estate, and Robert C. Bickley). The Coles owned property both south and north of Mason Road. Bickley and Jones owned property south of Mason Road. Otrusina owned property north of Mason Road. Ownership of the canal property both north and south of Mason Road was at issue in *Coles*. See SE-35, *Coles* Relators' Memo. In Support of the Complaint, pgs. 1, 3-4.

As noted supra, this Court unanimously held that the *Coles* Relators, both north and south of Mason Road, had clear ownership to their sections of the canal corridor. *Coles*, 2007-Ohio-6057, ¶ 59. That ownership arose from acquisition of the canal corridor either directly from Key Trust or indirectly through Buffalo Prairie. Key Trust acquired *its* ownership interest from the

1904 dissolution. *Id.*, ¶ 3. This Court’s factual findings about ownership were not made in a vacuum. Volumes of evidence were admitted by this Court concerning respective claims of ownership to the canal corridor. The 1904 Journal Entry and Order of Sale both state that the Milan Canal Company’s property ran 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....” SE-38, *Coles Relators’ Motion To Take Judicial Notice*, Exh. H; SE-25, *Dissolution Action Journal Entry*.

The 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 to the railroad in 1881. *Id.* Moreover, in furtherance of this judicial mandate, the Court issued an Order of Sale ordering the advertising for, and public sale of the entire 6.5 mile canal corridor, 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.

Based upon this evidence, including the 1904 Journal Entry and Order of Sale, this Court concluded: (a) MetroParks’ only interest in the canal property was its leasehold rights in the Merry and Townsend tracts; (b) the Relators acquired ownership in the canal corridor from Key Trust; (c) MetroParks’ physically invaded the canal corridor by constructing the trail on it; and (d) since the Relators’ sections of the canal corridor lay outside the Merry and Townsend tracts, MetroParks’ physical invasion of their sections constituted a taking. *Coles*, 2007-Ohio-6057, ¶ 19-20, 49, 55, 59.

Further, this Court's detailed review and analysis in *Coles* of whether Edwin and Lisa Coles were real parties interests makes it perfectly clear that this Court decided a contested issue of whether the *Coles* Relators owned their sections of the canal corridor through Key Trust – and did so, in favor of the *Coles* Relators. After its detailed review and analysis, this Court held that the subsequent acquisition by the Coleses of the corridor from Key Trust (including the 66-foot-wide parcel) vested title in them to the property, and thus, they were a real party in interest. *Id.*, ¶ 51-52. Nothing could be more clear from this holding than that the Court found that the *Coles* Relators obtained their valid ownership interest in their sections of the canal corridor through Key Trust, which traced its ownership interest to the 1904 Dissolution Action. In essence, this Court concluded that, as between MetroParks, a party that the *Key Trust* litigation conclusively established had *no* interest in the canal corridor outside of the Merry and Townsend tracts (and which raised affirmative defenses in *Coles* asserting its ownership in the entire canal corridor), and the *Coles* Relators, who were direct successors to the canal company through the 1904 sale of the canal company's assets to Key Trust, the *Coles* Relators had the valid ownership interest in the canal corridor. *Id.*, ¶ 3, 49-54-55, 59. Consequently, through the conveyances from Key Trust, and, in some instances, thereafter, Buffalo Prairie, the *Coles* Relators had a clear legal right to the property that required MetroParks to compensate them for its physical taking. *Id.*, ¶ 59.

In sum, *Coles* Relators' ownership interest that was the basis for the Court granting their requested writ derives from their acquisition of canal property from Key Trust either directly or through Buffalo Prairie, a fact acknowledged by MetroParks itself.

C. This Court in *Coles* Held That MetroParks Had A Clear Legal Duty To Appropriate The Relators' Property Upon Which It Built Its Recreational Trail.

As to all of the *Coles* Relators, this Court held that MetroParks had “effected an involuntary taking” of their property by “employing their private property for a public use as a recreational trail.” *Id.*, ¶ 49, 58. The Court ordered MetroParks to “commence an appropriation proceeding to compensate them for that taking.” *Id.*, ¶ 59. This Court could not have been more clear that it found MetroParks had a clear legal duty to appropriate the *Coles* Relators’ sections of the canal land they acquired from Key Trust. In reaching this decision, the Court rejected MetroParks’ affirmative defense that “[t]here is neither a clear legal duty for MetroParks to commence appropriation proceedings...” SE-36, *Coles* Answer, pg. 5; *Coles*, 2007-Ohio-6057, ¶ 59.

D. This Court's Holding That *Coles* Relators Owned Sections Of The Canal Corridor And That MetroParks Had Clear Legal Duty To Appropriate The Relators' Property Upon Which It Built Its Trail Is Res Judicata As To *Nickoli* Relators.

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

The *Coles* Relators are the *Nickoli* Relators’ neighbors. They all acquired their ownership interest in the canal corridor in the exact same manner – either directly or indirectly through Key Trust. The *Rinellaes*, like Edwin and Lisa *Coles* and Buffalo Prairie, acquired their sections of the canal corridor directly from Key Trust. The remaining *Nickoli* Relators acquired their sections of the canal corridor from Buffalo Prairie through similar deeds, and even on the same day as *Coles* Relators Robert Bickley and Warren Jones. All that the *Nickoli* Relators request here is the identical writ concerning their sections of the canal corridor outside the Merry and Townsend tracts that their neighbors received in *Coles*.⁹

⁹ 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

As established supra, the *Coles* Relators had a clear legal right to a writ of mandamus compelling MetroParks to initiate appropriation proceedings so that the Relators could be compensated for the physical invasion of their sections of the canal corridor. Likewise, MetroParks had a clear legal duty to appropriate the *Cole* Relators' property upon which it constructed its recreational trail. These holdings are res judicata to the claim of whether the *Nickoli* Relators have an equal right to the same writ and MetroParks has an equal duty to be compelled to appropriate the property of the *Nickoli* Relators upon which it constructed its recreational trail. As to the parties or their privies, "[t]he previous action is conclusive for all claims that were or that could have been litigated in the first action." *Schachter*, 2009-Ohio-1704, ¶27; *Hughes*, 2002-Ohio-2217, ¶ 12.

As this Court has determined, "privity is a somewhat amorphous concept in the context of claim preclusion." *O'Nesti*, 2007-Ohio-1102, ¶ 9 (citing *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8); *Schachter*, 2009-Ohio-1704, ¶ 32 (quoting *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958). 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*, 89 Ohio St.3d at 248 (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 a finding of privity. *O'Nesti*, 2007-Ohio-1102, ¶ 9 (quoting *Brown*, 89 Ohio St.3d at 248); *Schachter*, 2009-Ohio-1704, ¶ 34 (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

from Respondents' total and continuing disregard for this Court's writ of mandamus in *Coles*. More than eighteen (18) months have lapsed since this Court's issuance of the writ in *Coles* and the Respondents have yet to file even a single appropriation action against any *Coles* Relator.

the opposite.” *O’Nesti*, 2007-Ohio-1102, ¶ 9 (quoting *Johnson’s Island*, 69 Ohio St.2d at 244). 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.

The Nickoli Relators own 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). In fact, other than the Rinellaes, the *Nickoli* Relators acquired their sections of the canal corridor through Buffalo Prairie, on the same day, and through the identical quit-claim deeds with Buffalo Prairie as *Coles* Relators Robert Bickley, Vincent Otrusina and Warren Jones. See generally, Rel. Evid., Nos. 1-19. Further, like the *Coles* Relators, the *Nickoli* Relators’ property has been physically invaded by MetroParks for construction and operation of its trail within the canal corridor. Thus, the *Nickoli* Relators claim the same clear legal duty as the *Coles* Relators – that MetroParks appropriate and compensate the *Nickoli* Relators for the construction of the trail on their respective properties. Consequently, the *Nickoli* Relators have a mutuality of interest with the *Coles* Relators, including an identity of desired result. *O’Nesti*, 2007-Ohio-1102, ¶ 9 (quoting *Brown*, 89 Ohio St.3d at 248); *Schachter*, 2009-Ohio-1704, ¶ 34 (quoting *Brown*, 89 Ohio St.3d at 248). All of them sought or seek to enforce their ownership interests in the canal corridor through the *same common source of title* – Key Trust. Moreover, both the *Coles* Relators and the *Nickoli* Relators had an interest in this Court’s determination as to the res judicata effect of the *Key Trust* litigation. Finally, all of them seek the same relief – an appropriation proceeding to compensate them for MetroParks’ taking of their property upon which it constructed its recreational trail.

Respondents cannot dispute that the *Coles* Relators and *Nickoli* Relators have the same legal interests. Indeed, through its court filings in this action and in *Coles*, MetroParks agrees that the neighbors are all in privity. In their Motion for Judgment on the Pleadings, Respondents, through their tortured and disingenuous reading of this Court's *Coles* decision, argued that *Key Trust* is res judicata as to the *Nickoli* Relators' ownership of their sections of the canal corridor. Further, in *Coles*, MetroParks argued that Relator Isolated Ventures, a non-party to the *Key Trust* Litigation, was barred by claim preclusion from obtaining the requested writ. SE-40, *Coles* Resp. Memo. Opp., pgs. 15-18. 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, i.e., the Coles and Isolated Ventures were in privity. In fact, 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.*, pg. 5.

Accordingly, MetroParks agrees that the *Coles* Relators and *Nickoli* Relators have a mutuality of interest. MetroParks simply misunderstands or misrepresents the obvious import of that mutuality of interest – the application of claim preclusion warranting a writ ordering MetroParks to initiate appropriation actions as to the *Nickoli* Relators.

Had this Court denied the *Coles* Relators their requested alternative writ, the *Nickoli* Relators would have been bound by that decision as the decision would have determined definitively the ownership interest of both sets of relators – since they derived their ownership from a common source of ownership – Key Trust. Thus, had this Court held that the *Coles* Relators lacked a clear legal right because they did not own any interest in the property through

their conveyances with Key Trust or Buffalo Prairie, the *Nickoli* Relators would have been bound by that decision. *O'Nesti*, 2007-Ohio-1102, ¶ 9 (quoting *Johnson's Island*, 69 Ohio St.2d at 244). 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 *Nickoli* Relators' interests and ability to recover just compensation were and are completely aligned with the *Coles* Relators. The *Coles* Relators and *Nickoli* Relators are not strangers, but neighbors in privity. Thus, as the *Nickoli* Relators would have suffered had this Court in *Coles* ruled adversely to the *Coles* Relators, the *Nickoli* Relators should equally benefit from this Court's ruling in favor of the *Coles* Relators.

Finally, 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 that 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 against township trustees, 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, “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 MetroParks – and 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, claim preclusion should apply and warrants granting *Nickoli* Relators' requested writ.

3. Applying the preclusive effect of *Coles* establishes that MetroParks has taken the *Nickoli* Relators' property for its recreational trail.

The Merry and Townsend deeds and historic maps submitted as evidence establish that the *Nickoli* Relators' property does not lie within either the Merry or Townsend tract (except a sliver of the Charville Trusts' property lying within the Townsend tract). SE-1, Deed, Vol. 10, pg. 25; SE-2, Deed, Vol. 10, pg. 23; Rel. Evid., No. 20, Hartung Aff., Exhs. C, D. Further, the affidavit of professional surveyor and engineer, Daniel Hartung, confirms this point. Rel. Evid., No. 20, Hartung Aff., ¶ 12-14. Relators also have submitted to this Court their own deeds and affidavits, each establishing that none of their properties lie within the Merry or Townsend tracts and that they own the canal and railroad corridor on their property. See generally, Rel. Evid., Nos. 1-19. The 1996 map and 2000 survey of Daniel Hartung confirm the location of the canal and railroad corridor on the *Nickoli* Relators' property. Rel. Evid., No. 20, Hartung Aff., Exhs. C, D; Second Hartung Aff., Exhs. A, B. Thus, the Relators have come forward with affirmative evidence of their property rights under the *Coles* mandate.

In addition, the Relators have submitted evidence establishing that Respondents constructed, operate and control the recreational trail across their sections of the canal property they acquired from Buffalo Prairie or Key Trust. First, all of the Relators submitted affidavits identifying that they own property underneath the railroad right of way and that the railroad right of way on their property falls within the canal corridor. See generally, Rel. Evid., Nos. 1-19. Further, based on his professional opinion and experience, and his 1996 map and 2000 survey,

Daniel Hartung attests that the recreational trail lies within the canal corridor on each of the *Nickoli* Relators' property. Rel. Evid., No. 20, Hartung Aff., ¶ 17-18. Thus, the Relators have come forward with affirmative evidence of MetroParks' duty under the *Coles* mandate to appropriate the property that MetroParks took from Relators in order to construct and operate the trail. Accordingly, Relators have met their burden of proof and are entitled to a writ of mandamus requiring MetroParks to initiate an appropriation proceeding to compensate them for MetroParks' taking.

The *Nickoli* Relators are also entitled to the same relief based on claim preclusion from the *Key Trust* litigation.

Proposition of Law No. III:

Even if claim preclusion does not apply, issue preclusion from the *Coles* case applies to prohibit MetroParks from re-litigating whether the *Nickoli* Relators acquired ownership of the canal corridor from Key Trust.

Even if *Coles* were 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. *O'Nesti*, 2007-Ohio-1102, ¶ 7. For issue preclusion to apply, the parties to the second action need not be in privity with the litigants in the first. Instead, issue preclusion applies to not only the parties and those in privity with the litigants in the first action, but "*those who could have entered the proceeding but did not avail themselves of the opportunity.*" *Schachter*, 2009-Ohio-1704, ¶ 35 (quoting *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 367, 544 N.E.2d 878 (emphasis added in *Schachter*)). *Coles* is issue preclusion on the point that the defendants in *Key Trust* that acquired an ownership interest in from Key Trust/Buffalo Prairie that is a valid and enforceable interest.

In *Coles*, MetroParks challenged this point by asserting: (1) it had the valid interest to the canal corridor through the 1881 Lease; (2) it had owned in “fee simple” the corridor deriving from its “purchase” of the land from the “Railroad”; (3) it had the valid interest to the canal corridor through adverse possession; and (4) that since the *Coles* Relators’ parcels were outside the Merry and Townsend tracts, Key Trust conveyed “nothing” to the *Coles* Relators and thus, the Relators did not have any right, title or interest in the canal corridor. *Coles*, 2007-Ohio-6057, ¶ 48, 57; SE-36, Answer; SE-40, *Coles* Resp., Memo Opp., at pg. 7, 18. Despite these arguments, all previously rejected in *Key Trust*, this Court found that the *Coles* Relators had a valid interest in the canal corridor through their deeds. Respondents want to relitigate the above points yet again. However, 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”). Moreover, Respondents do not have any defenses here that had either limited or no applicability to the *Coles* Relators (other than a totally meritless statute of limitations defense).¹⁰ Consequently, because the *Nickoli* Relators have acquired the same interest to the canal corridor as the *Coles* Relators, and other than a sliver of the Charville Trusts’ property, the *Nickoli* Relators’ property lies outside the Merry and Townsend tracts, the *Nickoli* Relators have a clear legal right in their sections of the canal property.

Likewise, *Coles* is issue preclusion on the point of whether MetroParks constructed its recreational trail on the canal property of the Key Trust Defendants. This Court agreed with the *Coles* Relators that the recreational trail north of Mason was built on the “pertinent canal

¹⁰ Respondents have raised a statute of limitations defense, but did so based upon superseded authority. Under current law, Relators had four years from the date of accrual with that date tolled for a continuing or ongoing take. Ohio Revised Code § 2305.09. The indisputable evidence establishes that Respondents had the entire trail open and under their control through the *Coles* decision on November 20, 2007, and continues to exercise control and dominion over the entire trail through today. See generally, Rel. Evid., Nos. 1-19.

corridor property” and constituted a taking of the *Coles* Relators’ property. *Coles*, 2007-Ohio-6057, ¶ 55. Likewise, it held that for construction and operation of its trail, MetroParks physically invaded and condemned without compensation the *Coles* Relators’ property south of Mason Road.

Accordingly, because *Coles* is issue preclusion on the material elements for a writ of mandamus here to issue (clear legal duty and clear legal right), *Nickoli* Relators request that this Court grant them a writ of mandamus ordering MetroParks to initiate appropriation actions to compensate the Relators for MetroParks’ unlawful invasion of their property.

Proposition of Law No. IV:

MetroParks is judicially estopped from claiming that Relators do not own the canal property outside the Merry and Townsend tracts.

In *Key Trust*, MetroParks amended its complaint to add as defendants every landowner that acquired a section of the canal corridor from Key Trust.¹¹ SE-26, Am. Compl. If MetroParks was claiming that the canal company owned less than the entire canal corridor and therefore it was not constructing its recreational trail fully on the canal corridor, it had no basis for adding all of the landowners based on their acquisition of the canal property. Moreover, it had no basis for specifically pleading that the 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. *Id.*, ¶ 8-10; see also Resps. Mot. for Judgment on Pleadings, at n. 6. Finally, MetroParks obtained a restraining order against all *Key Trust* Defendants largely based on alleged activity occurring north of Mason Road. Obviously, when it served MetroParks’ purpose, it claimed broad and

¹¹ Indeed, Respondents concede that in *Key Trust* MetroParks added all persons “who claimed title to any portion of the Canal Corridor through Key Trust or through any grantees from key Trust.” Resps.’ Mot. for Judgment on Pleadings, at n. 6.

exclusive ownership of the entire canal corridor based on the 1881 Lease from the canal company.

The trial court accepted this contention when it immediately granted in its entirety MetroParks' request for a temporary restraining order without limiting the property at issue to south of Mason Road or to the Merry and Townsend tracts. SE-28, Temporary Restraining Order. Respondents cannot run from these judicial admissions – especially when those admissions led to the trial court granting the extraordinary relief of a restraining order. Indeed, such admissions are consistent with the stipulated facts in the related Forcible Entry Action in the Huron Municipal Court, which included a stipulation that the trail would be built on the full canal corridor co-terminus with the railroad right of way.

The *Key Trust* action ultimately decided that 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. That MetroParks does not like the ultimate outcome, does not allow it to disregard its admissions in order to continue to deprive the *Nickoli* Relators of their constitutional right to just compensation.

MetroParks is estopped from ignoring the facts it pled as true in its complaint and amended complaint in *Key Trust*, and its related stipulations in the Forcible Entry Action, let alone from its verified motion for temporary restraining order that was a basis for the trial court granting the restraining order. 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”); *New Hampshire v. Maine* (U.S. 2001), 532 U.S. 742, 749; *Hildreth Mfg., L.L.C. v. Semco, Inc.* (2003), 151 Ohio App.3d 693, 2003-Ohio-714, 785 N.E.2d 774, ¶ 59.

Proposition of Law No. V:

MetroParks cannot defend the title of the canal company in the entire canal corridor in one case and deny title of the canal company in a subsequent case.

Had MetroParks believed that the canal company did not own the entire canal corridor, it should have either not named certain defendants or chosen to assert that the canal company did not own the canal and that the *Key Trust* Defendants lacked title. Instead, because its claim to use of the entire canal corridor through the 1881 Lease was dependent upon the canal company's title, with its Amended Complaint and motion for temporary restraining order, MetroParks defended the canal company's title to the entire canal corridor. In doing so, MetroParks successfully obtained injunctive relief against all *Key Trust* Defendants. Respondents are thus now estopped from claiming that *Nickoli* Relators did not obtain title from the canal company. Where a plaintiff and defendant claim title from a common source, the plaintiff cannot attack the validity of the common source's claim to title to show it is worthless in order to defeat the title claim by the defendant. *Monroe v. Doe* (1835), 7 Ohio 262, 1835 WL 51, *2-3; *Robertson v. Pickrell* (U.S. 1883), 109 U.S. 608, 615-616. In *Key Trust*, Plaintiff MetroParks claimed title to the whole canal through the canal company and certainly used that claim of title to obtain a restraining order against *all* landowners who acquired sections of the corridor from Key Trust, including the *Nickoli* Relators. It cannot now attack the common source of title simply because its claim of ownership was ultimately limited to the Merry and Townsend tracts.

Proposition of Law No. VI:

The stipulations of fact by MetroParks in Forcible Entry Action preclude MetroParks from re-litigating the *Nickoli* Relators' ownership rights in the canal corridor.

Trying to re-litigate ownership rights, MetroParks suggests that the canal corridor and railroad right of way may not be co-terminous on the *Nickoli* Relators' property. *See* Mot. for Judgment on Pleadings, n.1. MetroParks' newfound position stands in stark contrast to its Stipulations in the Forcible Entry Action. Among those Stipulations, MetroParks admitted that it planned to construct and operate the trail on the canal corridor, and admitted that the corridor and the railroad right of way were co-terminous from "Milan to Lake Erie." Now that such agreed facts do not suit MetroParks, it wants to run from them. MetroParks cannot escape the preclusive effect of those Stipulations. As established by those Stipulations and the Judgment Entry in the Forcible Entry Action that resulted from them, the issue of whether the trail was constructed on canal property has been actually and necessarily litigated and determined in a prior action. Accordingly, issue preclusion applies and bars MetroParks from relitigating this issue. *Schachter*, 2009-Ohio-1704, ¶ 28.

Proposition of Law No. VII:

The Railroad abandoned its right of way as a matter of law and MetroParks has no rights to the abandoned right of way (outside of its leasehold interest in the Merry and Townsend tracts).

As established in *Key Trust* and *Coles*, MetroParks lacks any ownership interest of the property at issue in *Key Trust* and upon which it constructed its recreational trail except a lease interest in the Merry and Townsend tracts. Likewise, at a minimum, *Key Trust* and *Coles* combined established that the *Coles* Relators owned their sections of the recreational trail. The Stipulations in the Forcible Entry Action establish that MetroParks constructed its trail on the full canal corridor from Milan to the terminus of the trail north of the *Nickoli* Relators' property.

Despite all this, Respondents seem to suggest that the canal corridor acquired by the *Key Trust* Defendants and the rail corridor are not the same on some Relators' property. Resps' Mot. for Judgment on the Pleadings, n.1. Setting aside clear application of res judicata and that MetroParks' point is contrary to the entire reason MetroParks added the *Coles* Relators and *Nickoli* Relators as Defendants to the *Key Trust* litigation, even if Respondents' newfound position had any credible evidence to support it, Relators still own their sections of the recreational trail. Since MetroParks cannot own the trail on the *Key Trust* Defendants' property (other than through a leasehold interest on the Merry and Townsend tract), the only other possibility as to who may have an ownership interest in the property other than the *Key Trust* Defendants, is the railroad. The railroad, however, does not have a valid interest in the railroad right of way.

As MetroParks and the railroad companies stipulated in the Forcible Entry Action, the railroad had merely a "right of way," rather than any fee interest by deed or adverse possession. Rel. Evid., No. 21, 2nd Coles Aff., Exh. H, pg. 1; see also *McCarley v. O.C. McIntyre Park Dist.* (Feb. 11, 2000), 4th Dist. No. 99 CA 07, 2000 WL 203997, at * 10-12, *appeal not allowed* 89 Ohio St.3d 1408, 729 N.E.2d 381 (May 31, 2000) (holding that a "right" conveyed to a railroad is an easement and not a fee).¹² Moreover, the parties in that action stipulated to facts establishing that the railroad abandoned its right of way across the *Nickoli* Relators' property. Rel. Evid., No. 21, 2nd Coles Aff., Exh. H, pg. 1. The undisputed record shows that in 1988, the

¹² Several courts have recognized that when landowners grant narrow strips of land to a railroad for a rail line, they can be used only as a right-of-way. E.g., *Harvest Queen Mill & Elev. Co. v. Sanders* (Kan. 1962), 370 P.2d 419, 422 ("May a railroad purchase a strip of land extending a great distance through the country and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use – one which might be both obnoxious and menacing to the adjoining owners?"); *Hartman v. J & A Dev. Co.* (Mo Ct. App. 1984), 672 S.W.2d 364, 365.

railroad filed an application with the Interstate Commerce Commission to abandon rail service over the corridor, and the application was granted. Rel. Evid., No. 21, Stimpert Aff., Exh. A; see also Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9. The railroad began removing rails and ties, ceased maintaining the right of way, and allowed the property to deteriorate. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9-11 & Exhs. G, H. In fact, the Huron Municipal Court in Buffalo Prairie's lawsuit against MetroParks and the rail companies concluded that "[t]here was and is no intention that any railroad company intended to reactivate the right of way for railroad transportation." Rel. Evid., No. 21, 2nd Coles Aff., Exh. H, pg. 2.

An easement is extinguished or abandoned when there is non-use combined with an intention to abandon, such as the relinquishment of possession. *West Park Shopping Ctr. v. Masheter* (1966), 6 Ohio St.2d 142, 144, 216 N.E.2d 761. Such intention to abandon may be inferred "from any act inconsistent with the future enjoyment of the easement." See *McCarley*, 2000 WL 203997, * 10-12. Here, the undisputed evidence shows not only non-use, but a clear intent to relinquish possession of the above surface easement – as evidenced by the railroad companies' agreement to stipulate to the facts in the Forcible Entry Action. Moreover, the evidence in *Coles* established that the railroad did not take any action against landowners that built structures on the abandoned railroad corridor, such as decks and stairs, entirely inconsistent with the railroad's future enjoyment of the above surface railroad easement. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9-12, Exhs. G, H. Accordingly, the railroad abandoned the railroad right of way on the *Nickoli* Relators' property. *McCarley*, 2000 WL 203997, * 12.

That the railroad abandoned the railroad right of way on the *Nickoli* Relators property is consistent with MetroParks' lack of any property interest north of Mason Road, which it tried in *Key Trust* and in *Coles* to argue it derived from its quit-claim deed with the railroad or as a

successor to the railroad's purported adverse possession. As this Court correctly held, *Key Trust* established that MetroParks had "no" property interest north of Mason Road. *Coles*, 2007-Ohio-6057, ¶ 55. In contrast, the *Nickoli* Relators have submitted as evidence their sources of ownership establishing that they have an ownership interest in the property upon which the railroad had its right of way. Since the railroad abandoned its right of way prior to its quit-claim deed to MetroParks, not only did MetroParks not obtain any interest in the property, but the canal and railroad corridor became free and clearly owned by the *Nickoli* Relators. Consequently, the Relators have a clear legal right to their requested writ and Respondents have a clear legal duty to initiate appropriation actions to compensate the Relators for constructing the recreational trail on their property.

Proposition of Law No. VIII:

Even if MetroParks has rights in the canal and railroad corridor from the railroad, outside of the Townsend and Merry tracts through the Railroad Lease, which it does not, the transfer of those "rights" to a public entity for purposes of a park is an added burden for which compensation is due.

Under Ohio law, "[i]ncreased traffic on an access easement can constitute an unreasonable burden on servient estate." *Fruth Farms v. Village of Holgate* (N.D. Ohio 2006), 442 F.Supp.2d 470, 477 (applying Ohio law). A recreational trail built upon a railroad right of way imposes an added burden upon the adjacent landowners that amounts to a taking without just compensation. The Federal Circuit court has recognized that such a trail or park creates a "greater burden" upon the servient landowner and constitutes a "physical taking" of the property. *Preseault v. U.S.* (Fed. Cir. 1996), 100 F.3d 1525, 1535, 1550-1551; *Towes v. U.S.* (Fed. Cir. 2004), 376 F.3d 1371, 1376-1377. Since the recreational trail imposes a greater burden upon the *Nickoli* Relators, the trail is a sufficient interference with their property right to constitute a compensable taking. *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, 206, 667

N.E.2d 8. For this additional reason, the requested writ should be granted and MetroParks ordered to commence appropriation actions and compensate the Relators.

CONCLUSION

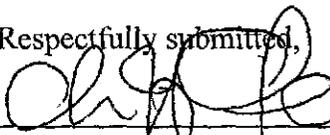
Granting a writ of mandamus ordering Respondents to commence appropriation actions within sixty (60) days to compensate the Relators for MetroParks' unlawful taking promotes the rule of law in Ohio. Otherwise, how could *Coles* Relators Robert Bickley and Warren Jones, for example, have a clear legal right to their sections of the canal corridor upon which MetroParks constructed and operates its recreational trail, but not Jones' next door neighbors Gerald and Robin Nickoli or the Landoll Trust, 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 could the Coleses and Buffalo Prairie have a clear legal right, as this Court unanimously held, but not the Rinellaes? As this Court held in *Coles*, "the ultimate emphasis in [*Key Trust*]" was "on the interests of the board being limited to the Merry and Townsend parcels." The ultimate emphasis of *Coles* was on exonerating the *Key Trust* Defendants' constitutional right to just compensation for MetroParks' physical and long-standing invasion of their property. Granting the *Nickoli* Relators their requested writ honors the ultimate emphasis of both actions.

Respondents' absurd position would have this Court ignore the evidence before it and completely eviscerate *Key Trust*, the Forcible Entry Action, and this Court's unanimous holding in *Coles* ordering 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 seeks to sanction and excuse the complete defiance by a governmental entity (unaccountable to voters) of the rule of law and should be categorically rejected. Moreover, it would leave neighbors, though all identically situated, with some having their identical right to just compensation vindicated and others absolutely deprived of that fundamental right and wondering why the Constitution does not protect them.

The appropriate answer is that through the evidence before this Court and the sound factual and legal conclusions of the *Coles* decision, the *Key Trust* litigation and the Forcible Entry 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 facts and evidence and the rule of law. Accordingly, this Court should issue a writ of mandamus ordering Respondents to commence appropriation actions to compensate all *Nickoli* Relators for MetroParks' unlawful taking of their sections of the canal corridor. Finally, because MetroParks has shown a wanton disregard for this Court's writ in *Coles*, the writ of mandamus should order MetroParks to commence such actions within sixty days of this Court's mandate.

Respectfully submitted,



Bruce L. Ingram (0018008)

(Counsel of Record)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Vorys, Sater, Seymour & Pease LLP

52 East Gay Street

P.O. Box 1008

Columbus, OH 43216-1008

Tel: (614) 464-6480

Fax: (614) 719-4775

blingram@vorys.com

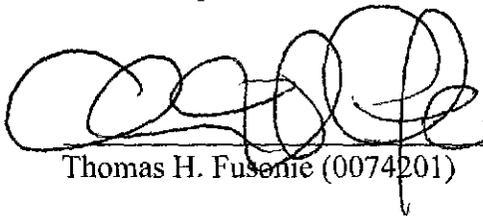
jrmiller@vorys.com

thfusonie@vorys.com

Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 28th day of May, 2009 via hand delivery, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and via regular U.S. mail, postage prepaid, upon 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.



Thomas H. Fusonie (0074201)