

ORIGINAL

THE SUPREME COURT OF OHIO

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

CASE NO. 2009-0026
Original Action in Mandamus

MERIT BRIEF OF RESPONDENTS

Thomas A. Young (0023070)
Counsel of Record
PORTER, WRIGHT, MORRIS & ARTHUR
LLP
41 South High Street
Columbus, Ohio 43215
(614) 227-2137
(614) 227-2100 – Fax
tyoung@porterwright.com

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

Attorneys for Respondents

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
Columbus, Ohio 43216-1008
(614) 464-6480
(614) 719-4775 – Fax
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com

Attorneys for Relators

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MERIT BRIEF OF RESPONDENTS

In this mandamus action, Relators seek an order compelling Respondents Erie MetroParks and the Board of Park Commissioners of Erie MetroParks (hereinafter Respondents will be collectively referred to as “Erie MetroParks”) to institute appropriation actions with respect to real estate claimed to be owned by Relators (hereinafter such real estate will be collectively referred to as “Relators’ Claimed Real Estate”). Erie MetroParks is using parts of Relators’ Claimed Real Estate as part of the Huron River Greenway (the “Greenway”), a biking/hiking trail open to the general public.

As will be demonstrated herein, none of the Relators own any of Relators’ Claimed Real Estate, and consequently Relators want this Court to order Erie MetroParks to pay Relators compensation for property they simply do not own. This Court should not grant such relief; public funds should not be used to pay Relators for property they do not own.

STATEMENT OF FACTS

The Statement of Facts section of Relators’ Merit Brief is so riddled with mistakes, statements not supported by the evidence and omissions of important facts that instead of simply pointing out such mistakes, unsupported statements and omissions, Erie MetroParks presents its own Statement of Facts. Additional facts as needed will also appear in the “Argument” section of this brief.

A. The Milan Canal Company And The Milan Canal

In 1827, the Ohio General Assembly enacted 25 Ohio Laws 94, which created the Milan Canal Company (the “Canal Company” or the “Company”). Stipulated Exhibit SE-47.¹

¹ Evidence has been presented to this Court as follows: Stipulations (“Stipulations”; hereinafter an exhibit contained in the Stipulations will be referred to as “Stip. Ex.” followed by its exhibit number); Relators Presentation of Evidence (hereinafter an exhibit from Relators’ Presentation of Evidence will be referred to as “Relators Ex.” followed by its exhibit number); and MetroParks’ Presentation of Evidence (hereinafter an exhibit from MetroParks’

The Canal Company was formed “for the purpose of constructing a navigable canal from Merry’s mill pond in Milan, in the county of Huron, to such point of the Huron River as shall be found most eligible, and a tow path on either or both sides of said river, from said point to Lake Erie;”² *Id.* at Section 1 (hereinafter the canal authorized by this legislation will be referred to as the “Milan Canal” or the “Canal”). In 1838, the Canal Company acquired land for the Milan Canal from Ebeneser Merry (the land acquired by the Canal Company from Ebeneser Merry will be referred to as the “Merry Tract”) and from Kneeland Townsend (the land acquired by the Canal Company from Kneeland Townsend will be referred to as the “Townsend Tract”). Complaint, ¶9; Answer of Erie MetroParks (“Answer”), ¶9; Stip. Exs. SE-1 and SE-2.

The Milan Canal was constructed sometime in the 1830s. Affidavit (“Berckmueller Affidavit”) of David E. Berckmueller, MetroParks Ex. B, ¶12. As 25 Ohio Laws 94 indicated, the Canal consisted of two sections: first, an artificial waterway and a towpath immediately adjacent thereto which started at a basin in Milan, Ohio and went approximately three miles north and northeast to where it joined the Huron River (the “Milan Canal – Artificial Waterway Section”); and, second, a towpath east of and immediately adjacent to the east bank of the Huron River, from the point where the Milan Canal – Artificial Waterway Section joined the Huron River to Huron, Ohio (the “Milan Canal – Towpath Section”).³ *Id.* at ¶13.

The Canal ceased operating sometime in the 1860s. *Id.* at ¶12.

Presentation of Evidence will be referred to as “MetroParks Ex.” followed by its letter designation). Additionally, contemporaneously with the filing of this Brief, Erie MetroParks has filed a Motion (“Erie MetroParks’ Motion to Supplement Evidence”) for Leave to Supplement Its Presentation of Evidence in order to present two additional affidavits to this Court.

² In 1827, Milan was in Huron County. By 1881 Milan was in Erie County.

³For the remainder of this brief, the real estate on which the Milan Canal was actually located will be referred to as the “Canal Corridor.”)

B. The 1881 Lease And The Railroad Corridor

On July 12, 1881, after the Milan Canal ceased operating, the Canal Company, as lessor, entered into a lease (the “1881 Lease” or the “Lease”) with the Wheeling and Lake Erie Railroad Company, an Ohio corporation (“W&LE-Ohio”), as lessee. Stip. Ex. SE-3; “Facts” section of the Stipulations.

The 1881 Lease began by reciting that in April of 1877, the directors of the Canal Company gave the Company’s consent and authorization to W&LE-Ohio to locate a railroad on and to occupy for the purpose of constructing and operating such railroad the real estate owned by the Canal Company, which was described as follows:

Situated in the Townships of Milan and Huron in said County of Erie and State of Ohio being all the land with all the rights and appurtenances thereof owned by said Milan Canal Company within the bounds of a strip of land One Hundred and Fifty (150) feet in width commencing at the southerly end of the canal Basin of said Milan Canal Company near the intersection of Main and Union Streets in the Village of Milan in said Erie County Ohio and running thence in a northerly direction to the mouth of the Huron River in the Village of Huron in said Erie County and which strip of land is bounded on the west by a line distant Fifty (50) feet from and running north parallel with the central line of the Rail Road of the Wheeling and Lake Erie Rail Road Company as now surveyed, located and being constructed between said Villages of Milan and Huron and which said strip of land is bounded on the east by a line distant One Hundred (100) feet from and running north parallel with the said central line of said Rail Road as surveyed the east and west lines of said strip of land being One Hundred and Fifty (150) feet apart and running north parallel with each other and with the central line of said Rail Road from the said place of beginning to the said mouth of Huron River. Also all of the so-called Dry Dock and all of the said canal Basin and all of the upper and lower Locks of said Canal with all the grounds and privileges connected therewith in addition to what is included in the said strip of land above described the said Dry Dock containing about 1 ½ acres and the said canal Basin containing about Five and 45/100 acres of land be the same more or less.⁴

⁴ For the remainder of this Brief, this description will be referred to as the “1881 Lease Description”, and the real estate covered by such Description will sometimes be referred to as the “Leased Premises.”

It is important to note the 1881 Lease Description did not describe any specific parcel of real estate. Instead, it described a 150-foot wide strip of land (the “150-foot Strip”) bounded on the south by “the southerly end of the canal Basin . . . in the Village of Milan”, on the north by “the mouth of the Huron River in the Village of Huron”, on the west by a line “Fifty (50) feet from and running north parallel with the central line of” the rail line which had been surveyed, located and was being constructed by W&LE-Ohio between Milan and Huron, and on the east by a line “One Hundred (100) feet from and running north parallel with the central line of” such rail line, and stated that the Lease covered all land within the 150-foot Strip owned by the Canal Company. The 1881 Lease Description did not purport to cover all real estate within the 150-foot Strip; to ascertain what real estate was actually covered by the 1881 Lease, one would first have to determine what real estate was owned by the Canal Company.

The 1881 Lease further recited that since April of 1877, W&LE-Ohio “has been and now is in the exclusive and undisputed possession [of the Leased Premises] under license and authority of the Directors of the Milan Canal Company and under their promise and agreement to lease or convey said [Leased Premises] to [W&LE-Ohio] in due form of law.” The Lease concluded by leasing the Leased Premises to W&LE-Ohio, its successors and assigns, for a term of 99 years, renewable forever, at a specified annual rent.

Relators described the 1881 Lease as follows on page 4 of their Merit Brief: “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” This description is highly misleading, as it suggests the 1881 Lease was by its very language confined to the Merry and Townsend Tracts. Neither of these Tracts is referred to in the 1881 Lease. It was not until almost 120 years after the execution of the 1881 Lease, in the *Key Trust*

litigation defined and described below, that there was a determination that the 1881 Lease only covered the Merry and Townsend Tracts.

W&LE-Ohio apparently recognized that it could not rely exclusively on the 1881 Lease for the right to construct a rail line from Milan, Ohio to Huron, Ohio. Both Relators and Erie MetroParks have presented to this Court a series of maps (the “Railroad Valuation Maps” or the “Valuation Maps”) prepared in 1918 by W&LE-Ohio, which depict that portion of such rail line that was, as will be described below, eventually conveyed to Erie MetroParks (hereinafter that portion of such rail line that was eventually conveyed to Erie MetroParks will be referred to as the “Railroad Corridor”). Exhibit D to Relators Ex. 20, which is an Affidavit (“Hartung Affidavit”) from Daniel E. Hartung, Jr. (“Mr. Hartung”), a professional land surveyor; Exhibit 1 to MetroParks Ex. C, which is an Affidavit (“Simon Affidavit”) from Thomas A. Simon, also a professional land surveyor. The Railroad Valuation Maps also disclose, for each parcel that comprised the Railroad Corridor, the recorded instrument by which W&LE-Ohio claimed the right to possess such parcel. These recorded instruments include numerous documents in addition to the 1881 Lease.⁵ For a few of the parcels, the Valuation Maps indicated that W&LE-Ohio claimed possessory rights through adverse possession.

As stated in *Erie MetroParks Bd. of Park Commrs. v. Key Trust Co.* (Sept. 13, 2002), Erie App. Nos. E-02-009 and E-02-011, 2002-Ohio-4887, page 3 (Stip. Ex. SE-34)⁶: “It is undisputed that during the next 100 years [after the execution of the 1881 Lease], the railroad

⁵ These recorded instruments are also set forth in the 1990 deed by which Norfolk and Western Railway Company (“Norfolk”), a successor to W&LE-Ohio’s interest in the Railroad Corridor, conveyed its interest in a rail line which included the Railroad Corridor to Wheeling & Lake Erie Railway Company, a Delaware company (“W&LE-Delaware”). Stip. Ex. 8, numbered pages 191 and 192. This 1990 conveyance will be discussed in more detail below.

⁶ This decision is the second of two appellate court decisions in the *Key Trust* litigation defined and described below.

[W&LE-Ohio] and its successor railroad companies maintained and operated a line on the leased corridor.” W&LE-Ohio and its successors’ right to possession of the Railroad Corridor is therefore clear, even without reference to the 1881 Lease and the other recorded documents disclosed on the Railroad Valuation Maps. *Goodwin v. Cincinnati & Whitewater Canal Co.* (1868), 18 Ohio St. 169, paragraph one of the syllabus (“The owner of land, who stands by, without objection, and sees a public railroad constructed over it, can not, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoy its use by the railroad company. In such case there can only remain to the owner a right of compensation”).

In 1980, the 1881 Lease was renewed for another 99 years. Complaint, ¶11; Answer, ¶11.

W&LE-Ohio was eventually merged into Norfolk. Complaint, ¶10; Answer, ¶10; Stip. Ex. SE-7. In 1990, Norfolk deeded its interests in a rail line which included the Railroad Corridor to W&LE-Delaware. Complaint, ¶13; Answer, ¶13. A copy of the deed from Norfolk to W&LE-Delaware has been presented to this Court as Stip. Ex. SE-8. In this deed, Norfolk retained the right to install and maintain on the rail line a fiber optical communication system, apparently for internal railroad communication purposes.

C. Erie MetroParks’ Acquisition Of The Railroad Corridor And Construction Of The Greenway Thereon

On or about October 13, 1995, W&LE-Delaware and Erie MetroParks entered into a written Agreement (the “Use Agreement”) which gave Erie MetroParks a permanent right to possess and use the Railroad Corridor.⁷ Affidavit (the “Granville Affidavit”) of Jonathan R.

⁷ The legal description attached to the Use Agreement described the Railroad Corridor in terms of Valuation Stations and Mileposts on the Railroad Valuation Maps. This legal description indicates the Railroad Corridor was approximately 6.2 miles in length. The Valuation Maps indicate the northern terminus of the Railroad Corridor was

Granville, the former Executive Director of Erie MetroParks, MetroParks Ex. D, ¶4, and Granville Ex. 1; Stip. Ex. 9. Pursuant to Section 4 of the Use Agreement, Erie MetroParks was required to pay W&LE-Delaware \$214,000 over a several-year period for such Agreement. Pursuant to Sections 1(b) and (c) of the Use Agreement, W&LE-Delaware reserved the permanent right “to install, run and maintain one (1) railway line over the” Railroad Corridor.

At the same time the Use Agreement was executed, W&LE-Delaware executed and delivered to Erie MetroParks a written Option (the “Option”) which gave Erie MetroParks the option of obtaining a deed (the “Erie MetroParks Railroad Deed”) conveying the Railroad Corridor from W&LE-Delaware to Erie MetroParks after Erie MetroParks paid the \$214,000. Granville Affidavit, ¶6 and Granville Ex. 2. Pursuant to Section 7 of the Option, the Erie MetroParks Railroad Corridor Deed was to be executed by W&LE-Delaware at the same time as it executed the Option and was to be delivered to an escrow agent.

Erie MetroParks paid the \$214,000 required by the Use Agreement and exercised its right under the Option to obtain and record the Erie MetroParks Railroad Corridor Deed. Granville Affidavit, ¶8; Stip. Ex. SE-10. This Deed expressly referenced W&LE-Delaware’s reservation of a right “to run and maintain a line of railway over” the Railroad Corridor.

Less than a month after the Use Agreement was entered into, Erie MetroParks published a rule pursuant to R.C. 1545.09 and 1545.99 closing the Railroad Corridor to the public and threatening to fine up to \$500 anyone who violated the rule. Affidavit (“First Dice Affidavit”)⁸ of Stephen Dice, Erie MetroParks’ current Executive Director/Secretary, MetroParks Ex. E, ¶8, and Dice Ex. 1. By November of 1998, Erie MetroParks was working on the Railroad Corridor

slightly south of Huron, Ohio. Such northern terminus was definitely not the mouth of the Huron River, which was the northern terminus of both the Canal Corridor and the 1881 Lease Description.

⁸Erie MetroParks has submitted two affidavits from Mr. Dice. The First Affidavit is MetroParks Ex. E. The second Affidavit (“Second Dice Affidavit”) is Ex. F to Erie MetroParks’ Motion to Supplement Evidence.

to construct the Greenway. First Dice Affidavit, ¶8, and Dice Ex. 2. Clearly, by the end of 1998, if not earlier, Erie MetroParks had occupied, possessed, used and exercised exclusive domain and control over the Railroad Corridor. First Dice Affidavit, ¶8.

The Greenway was eventually constructed and opened to the public in 2003. The Greenway is a public 66-foot wide biking/hiking trail which is located on the Railroad Corridor.⁹ First Dice Affidavit, ¶3-7; Second Dice Affidavit, ¶4; Granville Affidavit, ¶4-9; Hartung Affidavit, ¶15 and 16.

D. The Disposition Of The Canal Company's Real Estate

The Canal Company was dissolved in 1904 and its assets were sold to Stephen A. Lockwood. Complaint, ¶12; Answer, ¶12. Stip. Ex. SE-24 is a copy of the petition (the "Dissolution Petition") which instituted Case No. 9702 in the Court of Common Pleas of Erie County, Ohio; this case (the "Canal Company Dissolution Action") sought the dissolution of the Canal Company and the sale of its real estate. Stip. Ex. SE-25 is a copy of the July 27, 1904 Journal Entry (the "Order of Sale") which was filed in the Canal Company Dissolution Action and which ordered the sale of the Canal Company's real estate by the Receiver (the "Canal Company Dissolution Receiver") appointed in the Canal Company Dissolution Action. Stip. Ex. SE-4 is a copy of the October 24, 1904 Deed (the "Receiver's Deed") by which the Canal Company Dissolution Receiver conveyed the Canal Company's real estate to Stephen A. Lockwood.

In describing the real estate owned by the Canal Company when it dissolved in 1904, the Dissolution Petition, Order of Sale and Receiver's Deed each used the 1881 Lease Description: that is, each of these documents described the real estate owned by the Canal Company in 1904

⁹ The Railroad Corridor was mostly 66 feet wide, with 33 feet being on each side of the centerline of the rail line. Hartung Affidavit (Relators' Ex. 20), ¶15; Railroad Valuation Maps.

as being “all the land . . . owned by the said Milan Canal Company within the bounds of” the 150-foot Strip. None of these documents stated that the Canal Company owned all real estate within the 150-foot Strip. Instead, just as the real estate covered by the 1881 Lease Description could be ascertained only by determining what real estate the Canal Company owned at the time the Lease was executed, the real estate which was described in the Dissolution Petition and Order of Sale and which was conveyed by the Receiver’s Deed could be ascertained only by determining what real estate the Canal Company owned prior to October 24, 1904, the date the Receiver’s Deed was executed. In describing the Canal Company’s real estate, the Dissolution Petition, Order of Sale and Receiver’s Deed each stated that such real estate was subject to the 1881 Lease.

The evidence before this Court discloses what real estate was owned by the Canal Company at the time of its dissolution. As will be demonstrated below, the *Key Trust* litigation conclusively established that the only real estate owned by the Canal Company as of July 12, 1881, the date the Canal Company executed the 1881 Lease, were the Merry and Townsend Tracts. MetroParks Ex. A is the Affidavit (the “Johannsen Affidavit”) of Kyle Johannsen, an experienced attorney title examiner. Mr. Johannsen recently searched the records of the Recorder of Erie County, Ohio to determine if there were any deeds conveying real estate to the Canal Company from the date the Company executed the 1881 Lease through October 24, 1904. Johannsen Affidavit, ¶5-6. No such deeds were found. *Id.* Relators have failed to produce to this Court any deeds conveying any real estate to the Canal Company at any time, other than the deeds conveying the Merry and Townsend Tracts.

The evidence is clear: the only real estate ever owned by the Canal Company were the Merry and Townsend Tracts. Hence those Tracts were the only real estate conveyed by the Receiver's Deed, and that conveyance was expressly subject to the 1881 Lease.

It is also clear from the Canal Company Dissolution Action documents presented to this Court that there were no parties to that Action other than the Canal Company, that no hearing was conducted in that Action to determine what real estate was owned by the Canal Company when it dissolved, and that no such determination was made in that Action.

E. The Hartung Survey

In 2000 Mr. Hartung prepared a survey (the "Hartung Survey" or the "Survey") "of the area involved in this litigation." Hartung Affidavit (Realtors' Ex. 20), paragraphs 9 and 15; a copy of the Hartung Survey is Exhibit C to the Hartung Affidavit. The Hartung Survey purports to show the eastern and western boundaries of the Milan Canal.

The Hartung Affidavit and the Hartung Survey demonstrate that Mr. Hartung prepared the Survey by using the Railroad Valuation Maps to plot the centerline of the rail line constructed by W&LE-Ohio in the Railroad Corridor, and he then assumed, without any evidence, that the eastern and western boundaries of the Canal Corridor were accurately described in the 1881 Lease: that is, he assumed the western boundary of the Canal Corridor was 50 feet west of the centerline of the W&LE-Ohio rail line and the eastern boundary of the Canal was 100 feet east of that centerline. The Hartung Survey used the northern and southern termini of the Railroad Corridor as the northern and southern termini of the Survey.

The Hartung Affidavit shows that the only deeds Mr. Hartung was aware of that conveyed any real estate to the Canal Company were the deeds to the Merry and Townsend Tracts, but that he did not use those deeds or any other deeds conveying real estate to the Canal

Company to prepare the Hartung Survey. It is therefore clear that the Hartung Survey does not show what real estate was owned by the Canal Company or what real estate comprised the Canal Corridor, but only plots the outline of the 150-foot Strip¹⁰. Because the Hartung Survey is based on the centerline of the rail line in the Railroad Corridor, because the Railroad Corridor was 33 feet wide on each side of such centerline, and because the northern and southern termini of the Hartung Survey were the northern and southern termini of the Railroad Corridor, the 150-foot strip of land depicted on the Survey includes the Railroad Corridor.

F. Relators' Acquisition Of Relators' Claimed Real Estate

The chain of title to Relators' Claimed Real Estate is clear. The root of that chain must be deeds conveying real estate to the Canal Company. Only two such deeds have been presented to this Court: the deeds conveying the Merry and Townsend Tracts to the Canal Company. Stip. Ex. SE-1 and SE-2.

The next deed in the chain of title is the Receiver's Deed, which conveyed to Stephen A. Lockwood the real estate owned by the Canal Company when it dissolved in 1904. Mr. Lockwood's rights under the Receiver's Deed eventually devolved to Key Trust Company of Ohio, in its capacity as the trustee for the testamentary trust of Verna Lockwood Williams ("Key Trust"). Complaint, ¶12; Answer, ¶12.

On February 24, 2000, Key Trust executed a deed conveying to Relators Richard and Carol Rinella (the "Rinella Relators") their parcel of Relators' Claimed Real Estate (hereinafter

¹⁰ The body of the Hartung Affidavit (that is, paragraphs 1-20 of that Affidavit) notably does not claim that the 150-foot strip of land shown on the Survey is the Canal Corridor. Consequently, statements on pages 31 and 32 of Relators' Merit Brief that the Hartung Survey confirms "the location of the canal" and that Mr. Hartung "attests that the [Greenway] lies within the canal corridor on each [parcel of Relators' Claimed Real Estate]" are simply wrong and do not even accurately state what Mr. Hartung attested to.

this parcel will be referred to as the “Rinella Parcel”). Complaint, ¶17; Answer, ¶17; Stip. Ex. SE-11.

On April 11, 2000, Key Trust executed a deed (the “Buffalo Prairie Deed”) conveying to Buffalo Prairie, Ltd. (“Buffalo Prairie”) “All of the right, title and interest [Key Trust] holds in the property of the former Milan Canal Company, including but not limited to the canal basin, locks, dry dock and towpath, and further described in the attached Exhibit A, which is incorporated as part of this deed.” Complaint, ¶17; Answer, ¶17; Stip. Ex. SE-12. Exhibit A to the Buffalo Prairie Deed is the 1881 Lease description, and the Buffalo Prairie Deed not only states that its “Prior Deed Reference” is the Receiver’s Deed, a copy of the Receiver’s Deed is attached to and therefore forms a part of the Buffalo Prairie Deed.¹¹

All of the Relators other than the Rinella Relators obtained their deeds to their parcels of Relators’ Claimed Real Estate by deeds from Buffalo Prairie. Complaint, ¶17; Answer, ¶17; Stip. Ex. SE-13 through SE-15 and SE-17 through SE-23. Buffalo Prairie’s claimed source of title for the real estate purportedly conveyed by these deeds was, of course, the Buffalo Prairie Deed.

The legal description in each of the deeds by which Relators claim title to Relators’ Claimed Real Estate purports to describe a 150-foot wide section of the Canal Corridor. Each of these legal descriptions was prepared by Mr. Hartung. Mr. Hartung obviously prepared these descriptions by using the Hartung Survey as his base and then preparing descriptions of various sections of the 150-foot strip of land depicted on the Survey. As noted above, there is no

¹¹ The Deed to the Rinella Parcel purports to be a part of the Canal Corridor. That deed was dated on February 24, 2000. The Buffalo Prairie Deed purports to convey the entire Canal Corridor to Buffalo Prairie; that Deed was dated April 11, 2000. Relators have failed to explain how the Buffalo Prairie Deed can convey to Buffalo Prairie the entire Canal Corridor, in light of the fact that an earlier deed – the deed to the Rinella Parcel – purported to convey a part of such Corridor to the Rinella Relators.

evidence before this Court that the 150-foot strip of land depicted on the Hartung Survey was in fact the true location of this Canal Corridor. Therefore, the mere fact that the legal descriptions for each of Relators' Claimed Real Estate purports to describe a section of the Milan Canal is not evidence that in fact each such legal description was a description of a portion of the Canal Corridor. Likewise, the fact that each of the Relators have stated in affidavits submitted to this Court (Relators Exs. 1-19) that his or her parcel of Relators' Claimed Real Estate "is within the former canal corridor for the Milan Canal Company" proves nothing, as Relators have not submitted any evidence to support those statements.

In fact, there is evidence before this Court that the Canal Corridor and the 150-foot Strip are not in all respects the same property. It is undisputed that the location of the 150-foot Strip is predicated upon the centerline of the W&LE-Ohio rail line in the Railroad Corridor, and not upon the centerline or any other known landmarks of the Milan Canal. As the Berckmueller Affidavit discloses, starting slightly north of Mason Road and on The Milan Canal – Towpath Section, much of that rail line does not follow the Canal Corridor. Berckmueller Affidavit, ¶14, 18. Mr. Berckmueller's testimony on this point is supported by *The Milan Canal*, a paper produced by The Canal Society of Ohio which discusses the history of the Milan Canal and the W&LE-Ohio rail line. Berckmueller Affidavit, ¶20; *The Milan Canal* is Berckmueller Ex. 1. This paper states that the W&LE-Ohio rail line constructed on the Railroad Corridor at or about the time of the 1881 Lease "deviated from the original narrow gauge railroad, no longer following the old canal." *The Milan Canal*, pages 30-31.¹²

Erie MetroParks is not contending that no part of the Milan Canal was on the Railroad Corridor. In fact, Erie MetroParks believes that part of the Milan Canal probably was on part of

¹² Some parcels of Relators' Claimed Real Estate are north of Mason Road. Simon Affidavit (Erie MetroParks Ex. C), ¶12; Hartung Affidavit, ¶11.

the Railroad Corridor. However, whether or not all or any part of the Canal Corridor and the Railroad Corridor are the same is simply not an issue before this Court. What is at issue is what real estate was owned by the Canal Company when it dissolved. Erie MetroParks objects to Relators' cavalier attempt to suggest to this Court that all real estate in the 150-foot Strip is part of the Canal Corridor, and that the Canal Company owned all of the Canal Corridor. The real estate owned by the Canal Company must be proven by deeds or other recorded instruments, not simply by labeling real estate as part of the Canal Corridor.¹³

Erie MetroParks does not dispute Relators' evidence which shows parts of the Greenway are on parts of each parcel of Relators' Claimed Real Estate.¹⁴ Respondents also do not dispute Relators' evidence that except for a 0.9 acre portion of that parcel of Relators' Claimed Real Estate owned by Relators Patricia A. Sipp, fka Patricia A. Charville, Trustee, and Mark R. Charville and David A. Charville, Trustees (hereinafter these Relators will be referred to as the "Charville Relators", and that parcel of Relators' Claimed Real Estate owned by the Charville Relators will be referred to as the "Charville Parcel"), none of Relators' Claimed Real Estate is on either the Merry Tract or Townsend Tract.¹⁵

¹³ Relators cannot claim that the Canal Company owned any real estate by adverse possession that was not subject to the 1881 Lease. Any such adverse possession would have occurred while the Milan Canal was operating, and the Canal ceased operating long before the 1881 Lease was executed. Hence any real estate allegedly owned by the Canal Company by adverse possession would be subject to the 1881 Lease.

¹⁴As noted above, the Greenway is on the Railroad Corridor, and both the Railroad Corridor and the Greenway are 66 feet wide. The deeds by which Relators obtained title to Relators' Claimed Real Estate demonstrate that each parcel of such Real Estate is 150 feet wide. Therefore, the Greenway does not occupy all of Relators' Claimed Real Estate.

¹⁵ Relators have admitted that 0.9 acres of the Charville Parcel is on the Townsend Tract. Hartung Affidavit (Relators' Ex. 20), ¶13 and 14. The *Key Trust* litigation established that any real estate on the Townsend Tract is subject to the 1881 Lease, that the 1881 Lease was valid and in force and that the use by Erie MetroParks of property subject to the 1881 Lease as part of the Greenway is a permissible use of such property. Relators have failed to show that that portion of the Greenway which is on the Charville Parcel is not on that part of such Parcel which is on the Townsend Tract. For this reason, the claims of the Charville Relators asserted in this action should be dismissed with prejudice. From this point forward in this Brief, the phrase "Relators' Claimed Real Estate" will mean Relators' Claimed Real Estate, as previously defined, minus the 0.9 acres of the Charville Parcel which is in the Townsend Tract.

G. The Key Trust Litigation

After the interests acquired by Stephen A. Lockwood pursuant to the Receiver's Deed devolved to Key Trust, and after the lessee's rights under the 1881 Lease had been transferred to Erie MetroParks pursuant to the Use Agreement and the Erie MetroParks Railroad Corridor Deed, Key Trust asserted that the Lease was terminated due to various alleged breaches of the Lease by the lessee, including abandonment of the use of the Leased Premises for railroad purposes and non-payment of rent, and that therefore the real estate that had devolved to Key Trust was no longer subject to the Lease. Exhibit B to Stip. Ex. 26. These assertions caused Erie MetroParks to file a declaratory judgment action originally docketed as *Erie MetroParks Bd. of Park Commrs. v. Key Trust of Ohio, N.A.*, Erie County, Ohio Court of Common Pleas Case No. 99-CV-442 (the "*Key Trust* litigation"). Complaint, ¶16; Answer, ¶16. Erie MetroParks was the plaintiff in the *Key Trust* litigation, and eventually virtually all Relators herein, along with Key Trust and others, were named as Defendants. Complaint, ¶18; Answer, ¶18.

Relators' twisting of the facts probably reaches its zenith in their discussion of the *Key Trust* litigation. It is clear that Relators, in their capacity as Defendants in that litigation, lost on each issue they raised therein. Nevertheless, Relators' repeatedly claim in their Merit Brief that *Key Trust* conclusively established that Relators have good title to Relators' Claimed Real Estate. In fact, not only did *Key Trust* not establish such good title, it is one part of the reason this Court should hold that Relators have failed to show that they have such good title.

On page 8 of Relators' Merit Brief, Relators claim: "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 the *Nickoli* Relators." The Amended

Complaint in *Key Trust* is Stip. Ex. SE-26, and a simple review of that pleading will disclose the total fallacy in this claim. The Amended Complaint was not a request by Erie MetroParks to determine any and all of its rights to the Railroad Corridor; instead, it was an action relating exclusively to the 1881 Lease. In the Amended Complaint Erie MetroParks sought declaratory judgment that the Lease was in full force and effect, that Erie MetroParks was the lessee under the Lease, and that the Lease permitted Erie MetroParks to use the Leased Premises as a recreational trail. Nowhere in the Amended Complaint does Erie MetroParks allege 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,” Because the 1881 Lease does not specify what real estate comprised the Leased Premises, clearly the identity of such real estate was an issue raised in *Key Trust*.

Nor does the fact that Erie MetroParks joined all of the *Coles* and *Nickoli* Relators as Defendants in *Key Trust* constitute an admission by Erie MetroParks that these Defendants had any ownership interest in any part of the Railroad Corridor. Erie MetroParks had rights to the Railroad Corridor under the 1881 Lease only to the extent that the Canal Company was the prior owner of all or some of that Corridor. Because all of the Defendants joined by Erie MetroParks as Defendants in *Key Trust* claimed to be successors to the Canal Company’s ownership interest of parts of the Railroad Corridor, it was incumbent upon Erie MetroParks to join these persons as parties in *Key Trust*. Amended Complaint, paragraphs 8-10. What real estate the Canal Company actually owned when it entered into the 1881 Lease was, of course, a central issue in *Key Trust*.

In fact, it was clearly the Defendants in *Key Trust* who were asserting that all of the Railroad Corridor was owned by the Canal Company and was covered by the 1881 Lease.

Answer of Defendants to the Amended Complaint and Counterclaim filed in *Key Trust*, Stip. Ex. SE-29. The reason for such assertion is obvious: Defendants claimed that the only rights Erie MetroParks had in the Railroad Corridor arose out of the 1881 Lease, that the Lease was void for non-payment of rent and for abandonment of the Leased Premises for railroad purposes, and that therefore Erie MetroParks had no rights to the Railroad Corridor. In other words, it was to the benefit of the *Key Trust* Defendants to prove that the Canal Company was the former owner of all of the real estate in the Railroad Corridor.

Relators also claim that Erie MetroParks' Motion ("TRO Motion") for and obtaining of a Temporary Restraining Order ("TRO") in *Key Trust* is a further unequivocal assertion on the part of Erie MetroParks that the Canal Company, and therefore the Defendants in *Key Trust* as transferees of the Canal Company's property, owned the Railroad Corridor. This claim is obviously incorrect. The TRO Motion is Stip. Ex. SE-27, and the TRO is Stip. Ex. SE-28. All that the TRO Motion and TRO show is that Erie MetroParks was asserting, correctly, that it had some interest in the Railroad Corridor pursuant to the 1881 Lease, and that until the trial court finally decided what real estate was covered by the Lease, Defendants should be restrained from interfering with Erie MetroParks' use of the Railroad Corridor. Both the TRO Motion and the TRO show that Erie MetroParks was not unequivocally asserting that the Canal Company previously owned the entire Railroad Corridor. TRO Motion, page 2 ("the Lease covers *at least* portions of' the Railroad Corridor (emphasis added)) and page 4 (the purpose of the TRO Motion was simply "to preserve the status quo between the parties" until the court determined the issues in the case, one of which was what real estate was covered by the 1881 Lease); TRO, page 1 (the "Property" subject to the TRO was defined as "any portion of the property . . . that is covered or *alleged to be covered* by the Lease" (emphasis added)).

A bench trial was conducted in *Key Trust* on August 23 and 24, 2000. Stip. Ex. SE-31. The evidence presented and arguments advanced by Erie Metro Parks and by Defendants at trial are summarized in the first appellate decision in *Key Trust*. Defendants presented evidence which, they argued, demonstrated that the 1881 Lease was “void” for non-payment of rent and for abandonment of the Leased Premises for railroad purposes. *Erie Metro Parks Bd. Of Park Commrs. v. Key Trust Co.* (2001), 145 Ohio App.3d 782, 785, 764 N.E.2d 509; Stip. Ex. SE-32. Erie Metro Parks, on the other hand, not only presented evidence to dispute Defendants’ argument that the 1881 Lease was void, it alternatively presented evidence and argued that:

[E]ven if it were determined that the 1881 lease was void, not all of the appellants [Defendants] were entitled to a quiet title. This is so, according to appellee [Erie Metro Parks], 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.

Id.

On November 7, 2000, the first of two trial court judgments was filed. Stip. Ex. SE-31. One of the issues decided by the trial court in that judgment was “the extent of the property covered by the Lease.” Id. at 1. The trial court answered that question by recognizing that the 1881 Lease only covered real estate owned by the Canal Company within the 150-foot Strip, that the evidence demonstrated that as of July 12, 1881, the date the Lease was executed, the only real estate owned by the Canal Company were the Merry and Townsend Tracts, and that therefore the Lease only covered those Tracts. Id. at 3-6. The other major issue decided by the

trial court in its first judgment was that the 1881 Lease was terminated due to non-payment of rent and abandonment of the Leased Premises for railroad purposes. *Id.*¹⁶

The first trial court judgment was a classic Pyrrhic victory for the *Key Trust* Defendants: although the judgment declared the 1881 Lease terminated, it limited the 1881 Lease to the Merry and Townsend Tracts, a relatively insignificant portion of the Railroad Corridor. Clearly this limitation posed a dilemma to Defendants: because they claimed title to portions of the Railroad Corridor as successors to the ownership interest of the Canal Company, a holding that the Canal Company only owned the Merry and Townsend Tracts was potentially fatal to their claims. Consequently, the Defendants in *Key Trust* appealed the first trial court judgment, asserting that by limiting the 1881 Lease to the Merry and Townsend Tracts, the trial court had impermissibly “reformed” the Lease. *Erie Metro Parks Bd. of Commrs. v. Key Trust Co.*, 145 Ohio App.3d at 786 (Stip. Ex. SE-32). The court of appeals rejected that assertion and affirmed the trial court’s decision that the 1881 Lease was limited to the only real estate which the evidence showed the Canal Company owned in 1881 – the Merry and Townsend Tracts.

¹⁶ On page 9 of Relators’ Merit Brief, Relators claim that in the first trial court judgment, the trial judge “did not find that MetroParks owned any of the sections of the canal corridor by deed, easement or adverse possession. 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.’” The first sentence of this claim is accurate: the trial court did not find that Erie MetroParks owned any section of the Railroad Corridor by deed, easement or adverse possession because that simply was not an issue in *Key Trust*, which pertained exclusively to Erie MetroParks’ rights under the 1881 Lease. The second sentence of this claim (which is repeated at other points in Relators’ Merit Brief) implies that Erie MetroParks argued in *Key Trust* that it owned the entire Railroad Corridor by adverse possession and that the trial court rejected that argument. The only adverse possession claim discussed by the trial court was an adverse possession claim with respect to the Merry and Townsend Tracts. The trial court ruled that until the 1881 Lease was terminated, which was well less than 21 years before the *Key Trust* case was instituted, Erie MetroParks’ possession of the Merry and Townsend Tracts was not hostile, because it was pursuant to a valid lease, and hence Erie MetroParks did not adversely possess either of those Tracts. As the court of appeals correctly recognized in the second appellate decision in *Key Trust*, in the first trial court judgment “the trial court found that MetroParks did not acquire title to the *leased property* by adverse possession because it did not begin to occupy the property adversely until it went into default for nonpayment of rent in 1995” (emphasis added). Stip. Ex. SE-34, page 9. Relators’ claim that the first trial court judgment considered and rejected a claim by Erie MetroParks that it had rights in the entire Railroad Corridor by adverse possession should be seen for what it is – one more distortion of the facts by Relators.

Erie MetroParks cross-appealed that part of the first trial court judgment which held that the 1881 Lease was terminated for non-payment of rent and abandonment of the Railroad Corridor for railroad purposes. *Id.* at 786-787. The court of appeals reversed the trial court on these issues, ruling among other things that the Lease was valid and in force and that the Leased Premises had not been abandoned for railroad purposes. *Id.* at 788-791.

The appellate court's rulings in the first *Key Trust* appeal that the 1881 Lease only covered the Merry and Townsend Tract and that the Leased Premises had not been abandoned for railroad purposes were not changed in the subsequent proceedings in *Key Trust*. On remand, the trial court ruled that although the 1881 Lease stated that the Leased Premises were to be used for railroad purposes, "[t]he transformation of a railroad right-of-way to a recreational trail is a permitted use of such property", and hence Erie MetroParks could construct and maintain the Greenway on the Leased Premises. *Stip. Ex. SE-33* (the second trial court judgment in *Key Trust*), page 6.

The validity of Relator's title to Relators' Claimed Real Estate is predicted upon showing the Canal Company formerly owned such Real Estate. *Key Trust* held that the only real estate owned by the Canal Company, at least in 1881, were the Merry and Townsend Tracts. Relators admit that none of Relators' Claimed Real Estate is in either of those Tracts. Consequently, Relators' statements in their Merit Brief, such as the statement on page 2 of that Brief, that in *Key Trust* the "Relators' ownership of the canal corridor was finally and preclusively adjudicated in favor of Relators and adversely to MetroParks" are patently false and should be rejected by this Court.

H. The Huron Municipal Court Judgment

Relator's Merit Brief makes sporadic references to a judgment ("Huron Municipal Court Judgment") entered in *Buffalo Prairie, Ltd., et al. v. Erie MetroParks, et al.*, Huron, Ohio Municipal Court Case No. 00-CVG-119 ("Huron Municipal Court Action"). A copy of that Judgment is Ex. H to the Affidavit of Edwin M. Coles, which in turn is Ex. 1 to Ex. A of Relators Ex. 21. The Huron Municipal Court Judgment is the only document from the Huron Municipal Court Action presented to this Court. The Judgment is dated July 7, 2000, long after the *Key Trust* litigation was commenced and less than two months before the *Key Trust* trial.

I. *State ex rel. Coles v. Granville*

In *State ex rel. Coles v. Granville*, Ohio Supreme Court Case No. 2006-1259, a number of persons who had been Defendants in the *Key Trust* litigation, claiming that they were owners of portions of the Railroad Corridor through deeds that went back to the Canal Company and that part of the Greenway was constructed on their property, filed an original action in mandamus in this Court seeking an order compelling Erie MetroParks to institute appropriation actions with respect to such property (hereinafter the real estate at issue in *Coles* will be referred to as the "*Coles Real Estate*"). The Relators in *Coles* were different from the Relators in the present case. Additionally, a comparison of the legal descriptions of the *Coles Real Estate* (*Coles* Complaint, Stip. Ex. SE-35, ¶10) with the legal descriptions of Relators' Claimed Real Estate demonstrates that the real estate at issue in *Coles* is different from Relators' Claimed Real Estate. In other words, none of the Relators herein claim to own any of the *Coles Real Estate*.

On November 20, 2007, this Court filed its decision in *Coles*. 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968; Stip. Ex. SE-43. That decision granted a writ of mandamus to

compel Erie MetroParks to commence an appropriation proceeding with respect to the *Coles* Real Estate. *Id.* at ¶59.¹⁷

It is undisputed that Erie MetroParks is in possession of Relators' Claimed Real Estate. Consequently, as will be discussed below, one of the rules that should guide this case is the rule that possession is so far evidence of title that it will be protected until a better title is produced, and the party in possession cannot be ousted by a doubtful claim. Although Erie MetroParks was in possession of the *Coles* Real Estate, that rule was not mentioned, discussed or applied in the *Coles* decision. There is not a single discussion in that decision about the validity of the *Coles* Relators' title to the *Coles* Real Estate. Instead, *Coles* was apparently decided on the assumption that the *Coles* Relators had good title to the *Coles* Real Estate, and therefore Erie MetroParks could prevail only by showing a superior right to possession of such Real Estate.

Relators' Merit Brief claims on page 13 that in *Coles* this 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." There is no such holding stated in *Coles*, for the obvious reasons that *Key Trust* did not establish this and such a holding would ignore the undisputed fact that the Railroad Corridor had been in the possession of Erie MetroParks and several predecessor railroad companies for more than 120 years before the *Coles* decision, and the Court expressly did not rule on "the possible abandonment of any railroad easement." *Coles*, 116 Ohio St.3d 231, ¶59.

¹⁷Since the decision in *Coles*, Erie MetroParks has been working in good faith to gather the extensive information they need and to make the determinations required to institute the appropriation actions required by such decision. That information and determinations include obtaining a survey and legal description of each of six different parcels of real estate, determining exactly how much of such real estate Erie MetroParks needs for the Greenway, determining whether Erie MetroParks will seek fee title to such real estate or merely an easement, and obtaining appraisals of the interests to be appropriated. Erie MetroParks has made the required determinations and has obtained all the information other than the appraisals, and Erie MetroParks is in the process of obtaining such appraisals. Therefore, although no appropriation actions have yet been filed as a result of the decision in *Coles*, such actions should be commenced within the near future.

Relators' Merit Brief asserts on page 15 that this Court "held in *Coles* that *Key Trust* preclusively established the ownership interests of the parties to that action." Again, there is no such express holding in *Coles*, for the simple reason that all that *Key Trust* decided was that the real estate subject to the 1881 Lease consisted solely of the Merry and Townsend Tracts.

Although the Huron Municipal Court Judgment was presented to this Court in *Coles*, the *Coles* decision makes no reference to it.

Finally, there is evidence before this Court in the present case that was not presented to this Court in *Coles*. Included in such evidence is the Johannsen Affidavit (MetroParks Ex. A), which affirmatively establishes that the Canal Company did not acquire any real estate in the time period between July 12, 1881 – the date the 1881 Lease was executed by the Canal Company – and October 24, 1904, the date of the Receiver's Deed arising out of the Canal Company's dissolution. The Canal Company is the alleged source of title for Relators' Claimed Real Estate, and unlike *Coles*, this Court now has before it uncontroverted evidence that the only real estate ever owned by the Canal Company were the Merry and Townsend Tracts.

ARGUMENT

Numerous cases establish that there are three elements that must be satisfied before a writ of mandamus may issue. First, the relator must show that there is a clear legal duty on the part of the named respondent to do the act requested; second, there must be a showing by the relator that relator has a clear legal right to have the requested act performed; and, third, relator must not have a plain and adequate remedy in the ordinary course of law. *E.g.*, *State ex rel. Bennett v. Bds. of Elections* (1990), 56 Ohio St.3d 1, 2-3, 564 N.E.2d 407. The relator in a mandamus action has the burden of establishing a clear right to the relief sought. *State ex rel. York Internl. Corp. v. Indus. Comm.*, 107 Ohio St.3d 421, 2006-Ohio-17, 840 N.E.2d 195, at ¶ 20.

Relators claim they are entitled to a writ of mandamus compelling Erie MetroParks to institute appropriation actions with respect to Relators' Claimed Real Estate. Erie MetroParks is a park district created under R.C. Chapter 1545. Complaint, ¶ 7; Answer, ¶ 7. Pursuant to R.C. 1545.11, Erie MetroParks has the power to appropriate property in the manner provided by R.C. Chapter 163. To be entitled to compensation in an appropriation action under R.C. Chapter 163, a person must be an "Owner", which is defined in R.C. 163.01(E) as "any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated."

As mentioned above, Erie MetroParks does not dispute that it is using portions of each parcel of Relator's Claimed Real Estate for the Greenway. Erie MetroParks also does not dispute that such use is a public use. Instead, based on the Propositions of Law set forth herein and the evidence before this Court, Erie MetroParks submits this action must be dismissed with prejudice.

Proposition Of Law No. 1: Private property is taken for a public use on the earlier of the date of an appropriation trial or the date the appropriator exercised possession and control over such property.

The date of taking of private property for a public use is the date of an appropriation trial or the date the appropriator exercises possession and control over such property. *Evans v. Hope* (1984), 12 Ohio St.3d 191, 120, 465 N.E.2d 869; *Dir. of Highways v. Olrich* (1966), 5 Ohio St.2d 70, 213 N.E.2d 823, paragraph 3 of the syllabus.

Obviously, no appropriation trial has occurred with respect to Relators' Claimed Real Estate. The Complaint in this action and the evidence submitted to this Court establish that Erie MetroParks exercised possession and control over Relators' Claimed Real Estate by January 1, 1999, if not earlier:

- In paragraph 5 of the Complaint, Relators alleged that they own Relators' Claimed Real Estate "which Respondents have since 1999 unlawfully occupied, used, possessed and over which Respondents have otherwise exercised dominion and control" (emphasis added),¹⁸ and
- As described in Section C of the Statement of Facts portion of this Brief, by the end of 1998, if not earlier, Erie MetroParks had closed the Railroad Corridor to the public, threatened to fine any unauthorized intrusion into such Corridor and begun constructing the Greenway on such Corridor.

Respondents anticipate that Relators might rely on statements in the Huron Municipal Court Judgment to argue that there is evidence that Respondents were not in possession of Relators' Claimed Real Estate as of July 7, 2000, the date of that Judgment. In the Judgment, the trial judge stated:

The current status of the use of the land under dispute is that none of the defendants [which included Erie MetroParks] have any structures on the land, that there is no usage of the land by defendants or their invitees; that no developed bicycle path or foot path has been established; no signs have been erected and defendants have not promoted usage of the land by the general public.

Based on these statements, the Judgment found "that none of the defendants is in possession of the land in spite of the fact defendants claim they have a right to possession."

As will be demonstrated in Proposition of Law No. 13 below, neither this finding nor any other finding in the Huron Municipal Court Judgment is entitled to any issue preclusion effect.

¹⁸ Because paragraph 5 of the Complaint alleged that Relators **owned** Relators' Claimed Real Estate and that Erie MetroParks had since 1999 **unlawfully** occupied, used, possessed and otherwise exercised dominion and control over such Real Estate, Erie MetroParks denied the allegations in paragraph 5. However, when a pleader alleges a matter in a pleading, the pleading is "evidence against him as an admission of fact so alleged." *Shifflet v. Thomson Newspapers (Ohio), Inc.* (1982), 69 Ohio St.2d 179, 187, 431 N.E.2d 1014.

The statement in the Judgment that as of June 28, 2000 “there was no usage of the land by” Erie MetroParks is clearly factually incorrect. As demonstrated by the November 10, 1998 “Properties Managed by Erie MetroParks” document attached as Dice Exhibit 2 to the First Dice Affidavit, by that date “much of [the Greenway located on, among other property, Relators’ Claimed Real Estate] is under construction for trail purposes by staff and volunteers.”

The Huron Municipal Court Judgment appeared to equate possession and control by Erie MetroParks of the real estate on which the Greenway was eventually located with having structures or an actual trail on the real estate. However, by the end of 1998, if not earlier, Erie MetroParks was excluding the public from the Railroad Corridor and was in the process of constructing a trail on it. These are clearly acts of possession and control of such Corridor. The evidence presented to this Court establishes that the allegations contained in paragraph 5 of the Complaint concerning the date of Erie MetroParks’ possession and control of Relators’ Claimed Real Estate are accurate: Erie MetroParks has exercised such possession and control over such Real Estate since at least January 1, 1999. Consequently, any taking of Relators’ Claimed Real Estate occurred on or before that date.

Proposition of Law No. 2: If a governmental agency takes real estate without filing an appropriation action, the right to compel such an action and to obtain just compensation for the taking belongs to the owner of the real estate at the time of the taking, and not to a subsequent owner.

As stated by the Ohio Supreme Court in *Steinle v. Cincinnati* (1944), 142 Ohio St. 550, 555, 53 N.E.2d 800, “the general rule is that the right to damages for the taking of the land or for injury to land is in the one who owns the land when the taking or the injury occurs, and does not ordinarily pass to a subsequent grantee.” Accord *Hatfield v. Wray* (2000), 140 Ohio App.3d 623, 629, 748 N.E.2d 612; *Palazzolo v. Rhode Island* (2001), 533 U.S. 606, 628, 121 S.Ct. 2448, 2463, 150 L.Ed.2d 592, 614. (“In a direct condemnation action, or where a State has physically

invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation does not pass to a subsequent purchaser”).

The alleged taking of Relators’ Claimed Real Estate occurred on or before January 1, 1999. Relators did not obtain title to Relators’ Claimed Real Estate until sometime in 2000. Complaint, ¶17; Answer, ¶17. Relators are not the proper parties to maintain a mandamus action to compel Erie MetroParks to file appropriation actions concerning real estate which was allegedly taken by Erie MetroParks **before** Relators obtained any claim of title to such real estate. Realtors have no right, let alone a clear legal right, to an order requiring that Erie MetroParks commence an appropriation action with respect to Relators’ Claimed Real Estate.

Proposition of Law No. 3: For purposes of the statute of limitations, a claim for relief based on a physical taking of private property for a public use without paying just compensation accrues on the date such physical taking occurs, assuming no appropriation action was filed before that date.

For purposes of the statute of limitations, a cause of action accrues at the time the wrongful act is committed. See *Harris v. Liston*, 86 Ohio St.3d 203, 205, 1999 - Ohio – 159, 714 N.E.2d 377, certiorari denied *sub nom. Harris v. Jackson Rd. Co.* (2000), 529 U.S. 1053, 120 S.Ct. 1555, 146 L.Ed.2d 461. As noted above, a physical taking of private property for public use occurs on the date the governmental agency exercises possession and control over the property, assuming no appropriation action was filed before that date. As of that date, the wrongful act (the taking of private property for public use without paying just compensation) is complete, and the owner of the private property has a right to institute a mandamus action to compel the governmental agency to institute appropriation proceedings. Therefore, a claim for relief based on the physical taking of private property for a public use without paying just

compensation accrues on the date the governmental agency takes possession and control over the real estate at issue, assuming no prior appropriation action has been filed.

Erie MetroParks anticipates that Relators will argue that a physical taking of property without paying just compensation is like a continuous trespass on real estate, and therefore just as the running of the statute of limitations for a continuous trespass starts anew on each day of the continuous trespass -- *Sexton v. Mason*, 117 Ohio St.3d 275, 2008 – Ohio – 858, 883 N.E.2d 1013 -- the running of the statute of limitations for bringing a mandamus action to compel institution of appropriation proceedings starts anew on each day the governmental agency remains in possession of the property in question. This argument is faulty for at least two reasons. First, unlike a continuing trespass, the taking of private property for public use without paying just compensation only occurs once, at the time the private property is taken for the public use. Second, adoption of such an argument would mean that there can never be any statute of limitations for appropriation action, and a person alleging that the government has taken his property for public use without paying just compensation could bring an appropriation mandamus action at any time after the taking occurred. This would render a statute of limitations such as R.C. 2305.09(F), which will be discussed below, meaningless.

In the present case, the alleged taking of Relators' Claimed Real Estate by Erie MetroParks occurred on or before January 1, 1999. Therefore, the claim for mandamus relief to compel Erie MetroParks to appropriate Relators' Claimed Real Estate accrued, at the latest, on January 1, 1999.

Proposition of Law No. 4: The statute of limitations contained in R.C. 2305.09(F), which became effective on May 31, 2004, applies to a claim for relief on the grounds of a physical taking of real estate which was filed after that date.

The present action seeks relief on the grounds of an alleged physical taking of real estate. Prior to May 31, 2004, there was no specific statute of limitations that covered an action seeking such relief. In March, 2004, the 125th General Assembly passed Amended Substitute House Bill 161, which, among other things, enacted R.C. 2305.09(F). R.C. 2305.09(F) states that a four-year statute of limitations applies to any action “For relief on the grounds of a physical or regulatory taking of real property.” R.C. 2305.09(F) became effective May 31, 2004, long before this action was filed, and therefore it applies to this case. *Schoenrade v. Tracy* (1996), 74 Ohio St.3d 200, 658 N.E.2d 247; *Smith v. New York Central Rd. Co.* (1930), 122 Ohio St. 45, 170 N.E. 637.

Prior to the enactment of R.C. 2305.09(F), no specific statute of limitations existed for a mandamus action seeking an order that a governmental agency institute an appropriate action. Justice Stratton’s opinion in *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998, ¶27-30, stated that the six-year statute of limitations contained in R.C. 2305.07, the statute of limitations for an action based on a contract not in writing, governed such a mandamus action. Two other Justices concurred in this opinion. Chief Justice Moyer and Justice Douglas dissented without an opinion, stating that they “would affirm the court of appeals in all aspects.” The court of appeals decision in *R.T.G.* is reported at 141 Ohio App.3d 784, 2001-Ohio-4267, 753 N.E.2d 869. In that decision, all three appellate judges held that the four-year statute of limitations contained in R.C. 2305.09(D), the statute of limitations for an injury not arising in contract, applied to an appropriation mandamus action. *Id.*, 141 Ohio App.3d at 791-793.

Assuming that prior to the May 31, 2004, the effective date of R.C. 2305.09(F), the statute of limitation applicable to an appropriation mandamus action was four years, the

enactment of the four-year statute of limitations found in R.C. 2305.09(F) made no change in the law, and therefore Relators were required to file this mandamus action on or before January 1, 2003. This action was not filed until January 5, 2009.

Assuming that prior to May 31, 2004, the statute of limitations for an appropriation action was six years, the enactment of R.C. 2305.09(F) shortened the limitation period by two years. Under a six-year statute of limitations, Relators were required to file this action on or before January 1, 2005. Application of R.C. 2305.09(F) to Relators' claims would therefore result in barring such claims on the very date the statute became effective. Because of this, and again assuming the statute of limitations for an appropriation mandamus action prior to the enactment of R.C. 2305.09(F) was six years, Relators had a reasonable amount of time after May 31, 2004 to file their claims. *Smith v. New York Central Rd. Co.*, 122 Ohio St. 45, 48-51. Relators delayed in filing this action until January 5, 2009, which was more than four years after January 1, 2005, the expiration of any six-year statute of limitations on Relators' claim, and which was more than four and one-half years after the effective date of the four-year limitation period established by R.C. 2305.09(F). Such a delay is unreasonable as a matter of law.¹⁹

Proposition of Law No. 5: A person who claims to be entitled to possession of real estate currently in the possession of another person can recover only if his title is better than the title of the person in possession. In other words, the person out of possession must show a better legal title to take possession than the other person has to retain it. The person in possession cannot be ousted by a doubtful claim, and any doubt as to possession must be resolved in favor of the person in possession.

Even if Relators are proper parties to bring this action and this action is not time-barred, Relators cannot prevail, because Relators have failed to carry their burden of proof that they have

¹⁹ Although Erie MetroParks believes the evidence in this case establishes that Relators' claims accrued on or before January 1, 1999, there can be no doubt such claims accrued at the latest in 2003, the year in which the Greenway was opened to the public. Second Dice Affidavit, ¶4. Applying R.C. 2305.09(F) to a claim that accrued in 2003 would require that the claim be filed by 2007. Relators did not file until 2009.

any interest in Relators' Claimed Real Estate. In fact, the evidence indicates Relators have no interest in such Real Estate.

It is undisputed that at the time this action was filed and continuing to the present, Erie MetroParks was and is in possession of Relators' Claimed Real Estate. Such Real Estate is in the Railroad Corridor, and the evidence before this Court establishes that Erie MetroParks and its predecessors -- W&LE-Delaware, Norfolk and W&LE-Ohio -- have been in possession of the Railroad Corridor since shortly before the 1881 Lease was executed.

Relators' request for an appropriation mandamus order is predicated on Relators' claim that they have title to Relators' Claimed Real Estate and that that title is superior to any rights Erie MetroParks may claim to such Real Estate. In other words, Relators claim that their right to possession to Relators' Claimed Real Estate is superior to Erie MetroParks' right to possession.

Because Erie MetroParks is in possession of real estate which Relators claim, this case is governed by the rule of law succinctly stated in 37 Ohio Jurisprudence 3d (2002) 18, Ejectment, Section 6:

It is an axiomatic principle that the plaintiff in an action to recover real property must recover on the strength of the plaintiff's own title and not on the weakness of the adversary's. In other words, the plaintiff must show a better legal right to take possession than the defendant has to retain it. Possession is so far evidence of title that it will be protected until a better title is produced, and the defendant in possession cannot be ousted by a doubtful claim. Any doubt must be resolved in the defendant's favor.²⁰

Relators claim title and a superior right to possession of Relators' Claimed Real Estate based on deeds going back to the 1904 Receiver's Deed arising out of the Canal Company's dissolution. Complaint, ¶12, 17, 33; Answer, ¶12, 17, 33. As already shown in the Statement of

²⁰ This statement is supported by cases stretching from 1831 to 1991. Id. at footnotes 1-5.

Facts portion of this Merit Brief, the Receiver's Deed did not describe any specific parcels of real estate, but merely stated it was conveying all real estate owned by the Canal Company within the 150-foot Strip. Therefore, Relators' deeds to Relators' Claimed Real Estate conveyed such Real Estate only if the Canal Company previously owned such Real Estate.

The evidence before this Court is clear: the Canal Company never owned Relators' Claimed Real Estate. As this Court recognized in *Coles*, the *Key Trust* litigation conclusively determined that at least as of July 12, 1881, the date the 1881 Lease was executed by the Canal Company, the Company only owned the Merry and Townsend Tracts. *Coles*, 116 Ohio St.3d 231, at ¶7-13. The Johannsen Affidavit (Erie MetroParks Ex. A) conclusively establishes that the Canal Company did not acquire any additional real estate after July 12, 1881 and up to the date of its dissolution and the Receiver's Deed.

A grantor in a deed cannot convey better title than he has, and hence a grantee in a deed obtains no better title than his grantor had. *Lipps v. Lipps* (1949), 54 Ohio Law Abs. 425, 430, 87 N.E.2d 823. If a grantor does not own title to the real estate he purports to convey, his deed conveys nothing. *Coles*, at ¶57. The Receiver's Deed only conveyed the Merry and Townsend Tracts, as these Tracts were the only real estate owned by the Canal Company when it dissolved, and that conveyance was subject to the 1881 Lease. It is undisputed none of Relators' Claimed Real Estate is in the Merry or Townsend Tracts. Therefore, Relators, who claim title to Relators' Claimed Real Estate as the successors to the Canal Company, do not have valid title to such Real Estate, let alone a better claim to possession to such Real Estate than does Erie MetroParks.²¹

²¹ This Court in *Coles* never discussed what real estate was covered by the Receiver's Deed. Instead, this Court simply and correctly recognized that "the canal company was dissolved in 1904, and its property interests devolved to" Key Trust. *Coles* at ¶3.

Relators know that if this Court examines the issue of what real estate was conveyed by Receiver's Deed, this Court will conclude Relators' claimed title to Relators' Claimed Real Estate is invalid. Therefore, Relators advance a number of arguments based on res judicata, admission by pleading and judicial estoppel in a desperate effort to persuade this Court not to examine this critical issue. As will now be demonstrated, none of those arguments is valid.

Proposition of Law No. 6: A corporate dissolution action which involved no party other than the corporation being dissolved and which resulted in the judicial sale of all real estate owned by the corporation within a defined area, but did not determine or describe the real estate owned by the corporation, is not entitled to issue preclusion effect as to what real estate was owned by the corporation.

As explained in *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶6-7:

The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel. Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter.

Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ. [Citations omitted.]²²

The Canal Company Dissolution Action, which resulted in the Receiver's Deed, does not have either a claim preclusion or a issue preclusion effect in the present case.²³ Neither Erie MetroParks nor any of the railroads which previously had possession of the Railroad Corridor

²² For the remainder of this Brief the term "res judicata" shall mean both claim preclusion and issue preclusion.

²³ There is no discussion in *Colas* of the res judicata effect of the Canal Company Dissolution Action.

were parties to that Action or in privity with any party to that Action. In fact, there were no parties to the Canal Company Dissolution Action other than the Canal Company. Additionally, that Action and the present case are clearly different claims, and hence that Action does not have claim preclusion effect in the present case. Finally, that Action has no issue preclusion effect in the present case because the issue of what real estate was owned by the Canal Company when it dissolved was obviously neither litigated nor decided in the Canal Company Dissolution Action.

Proposition of Law No. 7: For purposes of res judicata, a prior declaratory judgment only precludes claims that were actually decided.

In their Proposition of Law No. 1, Relators claim that *Key Trust* found that they owned Relators' Claimed Real Estate and that that finding must be accorded preclusive effect in this action. That claim is based on a complete distortion of what *Key Trust* determined, which is set forth in detail under Section G of the Statement of Facts portion of this Brief.

Key Trust was a declaratory judgment action. For purposes of res judicata, a prior declaratory judgment is accorded preclusive effect only with respect to claims that were actually decided. *Coles*, 116 Ohio St.3d 731, ¶37; *State ex rel. Trafalgar Corp. v. Miami Cty. Bd of Commrs.*, 104 Ohio St.3d 250, 2004-Ohio-6406, 819 N.E.2d 1040, ¶22.

Relators and Erie MetroParks can argue at length in briefs as to what *Key Trust* decided. The resolution of that issue, however, can be found only by consulting the decisions in that case. Relators have not cited a single passage from any *Key Trust* decision to support a contention that that case determined the validity of Relators' title to Relators' Claimed Real Estate, because there was no such determination.

Key Trust was limited to determining Erie MetroParks' rights under the 1881 Lease. It did not discuss the validity of anyone else's title to any part of the Railroad Corridor. However, the admitted preclusive effect of *Key Trust's* determination that in 1881 the Canal Company only

owned the Merry and Townsend Tracts seriously put in doubt the validity of Relators' title to Relators' Claimed Real Estate, as that title depended on a showing the Canal Company previously owned such Real Estate.²⁴

Proposition of Law No. 8: The use of offensive claim preclusion is generally disfavored, and it will not be permitted in a mandamus action seeking to compel institution of an appropriation action involving different real estate and different alleged owners from those involved in a prior appropriation mandamus action.

Offensive claim preclusion involves a situation in which a plaintiff seeks to bar a defendant from raising any new defenses not involved in a prior case. *O'Nesti*, 113 Ohio St.3d 59, at ¶14.²⁵ Offensive claim preclusion is disfavored in Ohio - *O'Nesti*, at ¶17 - and will generally be allowed only in a suit between the same parties to allow the plaintiff in the second suit to obtain the exact same relief he obtained in the prior litigation. *Id.* at ¶14-15.

Relators contend that this Court must afford them the same relief as was granted in *Coles*, without considering any defenses raised by Erie MetroParks. Relators admit at pages 30-31 of their Merit Brief that this contention is based on offensive claim preclusion, and Relators assert this case presents a proper use of that doctrine. It does not. Relators were not parties to *Coles*,

²⁴ On page 18 of Realtors' Merit Brief, Relators claim that the non-existent *Key Trust* determination that the Canal Company owned all of the Railroad Corridor "is consistent with the actions of Erie MetroParks when it first learned that the Coleses [two of the Relators in *Coles*] 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." Erie MetroParks anticipates that Relators will argue Erie MetroParks' attempt to amicably acquire any interest the Coleses had in the Railroad Corridor, and Erie MetroParks' actual amicable acquisition of any interest of Allan and Nancy Anderson in the Railroad Corridor, who acquired any such interest through a deed from Buffalo Prairie demonstrate the Erie MetroParks believed the Key Trust and Buffalo Prairie had good title to the Railroad Corridor. However, these actions do not mean that; they merely reflect efforts by Erie MetroParks to avoid costly litigation.

²⁵ This is different from a situation in which a defendant seeks to completely bar a plaintiff's claim which could have been raised as a defense in a prior suit against the plaintiff. In such a situation, *res judicata* bars the claim. *Corrigan v. Downing* (1988), 55 Ohio App.3d 125, 562 N.E.2d 923.

and the relief sought in *Coles* involved completely different parcels of real estate from Relators' Claimed Real Estate. This is clearly not a proper case for use of offensive claim preclusion.²⁶

Proposition of Law No. 9: For claim preclusion purposes, a mandamus action seeking the institution of appropriation proceedings with respect to specific real estate does not arise out of the transaction or occurrence that was the subject matter of a prior mandamus action involving different real estate.

Relators assert this Court's decision in *Coles* must be given claim preclusion effect to bar Erie MetroParks from raising any arguments herein. The breathtaking assertion is wrong.

To successfully invoke claim preclusion, Relators must prove two matters: they must show that this case and *Coles* involved the same claim, and they must show that they were in privity with the *Coles* Relators. Relators have failed to prove either matter.

In *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, this Court held in the syllabus that: "A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." A "transaction" is a "common nucleus of operative facts." *Id.* at 73 Ohio St.3d 382 (quoting Restatement of the Law 2d Judgments (1982), Section 24, comment b). An "occurrence is an event which triggers a claim for relief." *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 490, 2001-Ohio-1593, 756 N.E.2d 657.

The "transaction" or "occurrence" in the present case is Relators' claimed acquisition of Relators' Claimed Real Estate and Erie MetroParks' alleged taking of that Real Estate. *Coles* involved totally different persons as Relators and totally different real estate. Consequently, the present action did not, for purposes of claim preclusion, arise out of the same transaction or occurrence that was the subject matter of *Coles*.

²⁶ Relators incorrectly claim on page 30 of their Merit Brief that this Court permitted offensive claim preclusion in *Coles*, citing ¶34, 49 and 54-55 of that decision. *Coles* never mentioned nor applied offensive claim preclusion. The cites given by Relators are cites where this Court in *Coles* gave *Key Trust* issue preclusion effect.

Proposition of Law No. 10: For res judicata purposes, persons seeking appropriation mandamus relief with respect to real estate are not in privity with different persons who sought and obtained appropriation mandamus relief with respect to different real estate.

Obviously, the Relators herein are not the same as the *Coles* Relators. Consequently, *Coles* can be given claim preclusion or issue preclusion effect in this case only if Relators are in privity with the *Coles* Relators.²⁷ They are not.

As stated in *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958: “What constitutes privity in the context of res judicata is somewhat amorphous.” Privity was formerly found only if a person succeeded to the interest of a party or had the right to control the original proceedings or make a defense therein. *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 114, 254 N.E.2d 10.²⁸ The concept of privity has expanded, and a mutuality of interest, including an identity of desired result, can on occasion create privity. *Brown v. Dayton*, 89 Ohio St.3d at 248.

Relators claim that because they seek the same result herein as was sought and obtained in *Coles* by the *Coles* Relators, Relators and the *Coles* Relators have a mutuality of interest and an identity of desired result, and therefore privity exists between them. *O’Nesti*, 113 Ohio St.3d 59, is fatal to Relators’ privity argument.

²⁷ Relators assert on page 32 of their Merit Brief that privity is no longer required for issue preclusion, citing *State ex rel. Schachter v. Ohio Pub. Emp. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶35 for the proposition that claim preclusion applies to those in privity and those who could have but did not enter the prior proceeding. This does not abolish the long-standing requirement of privity for issue preclusion, but merely creates a limited exception to such requirement. There is no showing in this case that the Relators herein, owning different real estate than the *Coles* Relators, could have entered *Coles*. The *Schachter* exception has no application to the present case.

²⁸ Edwin and Lisa Coles were Defendants in *Key Trust* because they alleged to own real estate in the Railroad Corridor. After that litigation ended, but before *Coles* was filed, the Coleses deeded part of their alleged real estate to Isolated Ventures, Ltd. Consequently, Erie MetroParks’ contention in *Coles* that Isolated Ventures was in privity with the Coleses and therefore subject to the issue preclusion effects of *Key Trust* was simply a classic and correct utilization by Erie MetroParks of the doctrine that a person who succeeds to the interest of a party to a lawsuit is in privity with that party for purposes of res judicata. Such contention was not, as claimed on page 28 of Relators’ Merit Brief, a recognition by Erie MetroParks that the Relators herein and *Coles* Relators have a mutuality of interest sufficient to constitute privity between them.

O'Nesti involved two groups of employees who sued their employer in two different suits. Both groups of employees claimed they were entitled to benefits under the same stock incentive plan. After the first group of employees won their case, the second group filed their lawsuit. The second group claimed that because the facts, claims and issues in the first suit were identical to those in the second suit, there was a mutuality of interest and therefore privity between both groups of employees, and claim preclusion arising out of the first suit required that they (the second group of employees) prevail in their suit.

The court of appeals upheld the privity and claim preclusion contentions of the second group of employees. This Court reversed the court of appeals, and held that because each employee was entitled to different benefits under the stock incentive plan, there was neither mutuality of interest nor identity of desired result and consequently “privity simply does not exist, and [the second group of employees] may not use claim preclusion to their benefit.” *Id.* at ¶12. Because both groups of employees sought “individually tailored results -- a judgment for the value of the stock each claimed was due to each of them -- and not a blanket result, such as a blanket enforcement of the stock incentive plan”, privity was lacking. *Id.* at ¶11.

In the present case the *Coles* Relators and the Relators herein sought “individually tailored relief”: the individual members of each group of Relators sought an order compelling Erie MetroParks to appropriate each individual member’s claimed tract of real estate. Applying *O'Nesti* to such facts requires a finding that there was no privity between the *Coles* Relators and the Relators herein. Hence, *Coles* has neither a claim preclusion nor an issue preclusion effect on the present case.

Proposition of Law No. 11: Issue preclusion only applies to an issue actually litigated and decided in prior litigation.

In their Proposition of Law No. III, Relators wrongfully contend that “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.” As noted above, Relators’ lack of privity with the *Coles* Relators prevents issue preclusion from applying herein. Additionally, Relators’ issue preclusion argument fails because issue preclusion only applies to “a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction” -- *Ft. Frye Teachers Assn. v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140 -- and this Court in *Coles* never passed upon and determined the validity of the titles of either the *Coles* Relators or the Relators herein.

What was actually passed upon and determined by this Court in *Coles* must be ascertained from the *Coles* decision. There was no discussion in that decision about the validity of the *Coles* Relators’ titles, apparently because that issue was not pressed by Erie MetroParks before the decision. Instead, a reading of *Coles* will demonstrate that it was assumed that Relators’ title to the *Coles* Real Estate were valid, and hence because Erie MetroParks could not show a superior title to such Real Estate, the *Coles* Realtors prevailed.

In the present case Erie MetroParks asserts that the validity of Relators’ title to Relators’ Claimed Real Estate is the paramount issue. That issue was not actually litigated and decided in *Coles* and hence *Coles* has no issue preclusion effect in the present case.²⁹

²⁹ Erie MetroParks recognizes that it could have argued in the alternative in *Coles* that if this Court held that the real estate claimed by Relators therein was not part of the real estate covered by the 1881 Lease, then the *Coles* Relators could not possibly have good title to such real estate. However, this Court has recently held that issue preclusion simply does not apply to an issue which could have been, but was not, raised and decided in prior litigation. *State ex rel. Davis v. Public Emp. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254,899 N.E.2d 975, ¶28, 30-32.

Erie MetroParks also recognizes that in its Motion for Reconsideration filed in *Coles*, it alluded to an argument that because Key Trust only owned the Merry and Townsend Tracts, any conveyance by Key

Proposition of Law No. 12: Res judicata is to be applied in particular situations as fairness and justice require, and it will not be applied so rigidly as to defeat the ends of justice or so as to work an injustice.

Even if this Court were to hold that Relators have established the technical elements to give *Coles* either claim preclusion or issue preclusion effect in this case, Erie MetroParks submits this Court should not do so. In *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d at 491, this Court refused to apply res judicata to a case, stating:

The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time, but rather a rule of fundamental and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. [Citations and quotation marks removed].

It is uncontestable that as a matter of fact, the Canal Company never owned Relators' Claimed Real Estate, and therefore Relators, who claim title through the Canal Company, never owned such Real Estate. It would defeat the ends of justice and work an injustice to use res judicata to make Erie MetroParks, a public entity, pay Relators for real estate not owned by them.

On the other hand, requiring that Relators actually prove that they have good title to Relators' Claimed Real Estate would not be unfair to Relators. Relators were not parties to *Coles* and hence did not participate in the costs and efforts required to obtain the *Coles* decision. In effect, Relators want a free ride on the backs of the *Coles* Relators to compel Erie MetroParks

Trust of real estate which was not part of those Tracts conveyed nothing. This Court denied the Motion for Reconsideration in a one-line Entry which stated no reasons. This Entry cannot be the basis for any issue preclusion argument, as it does show why the Motion for Reconsideration was denied. See 3 Moore, Federal Practice (2008), ¶132.03[3][d], at 132-98 and the cases cited therein: "A decision that does not mention the specific issue in question is too vague to afford issue preclusive effect. If there is no showing with regard to the issues that were actually decided, there is no issue preclusion."

to pay them for real estate they do not own. Res judicata should not be employed to reach such a result.

Proposition of Law No. 13: A judgment based entirely on stipulations will not be accorded issue preclusion effect.

In their Proposition of Law No. VI, Relators claim that: “The stipulations of fact by MetroParks in [the Huron Municipal Court Action] preclude MetroParks from re-litigating the *Nickoli* Relators’ ownership rights in the Canal Corridor.” This claim is faulty for two reasons. First, the Judgment expressly disclaimed that it was deciding any title issues, stating: “There is an action [an obvious reference to the *Key Trust* litigation] pending in Erie County Common Pleas Court regarding the title to the land. Until such time as another court makes a ruling regarding title this court must proceed based upon the apparent status of title as it is shown by the evidence in this case. This court has no jurisdiction to ultimately decide title.” Huron Municipal Court Judgment, page 2. Second, as shown above, issue preclusion only applies to a matter which was actually litigated and decided in a prior lawsuit. For issue preclusion purposes, an issue is not deemed to be “actually litigated” if it is the subject of a stipulation between the parties. *United States v. Young* (C.A. 8, 1986), 804 F.2d 116, 118, certiorari denied (1987), 482 U.S. 913, 107 S.Ct. 3184, 96 L.Ed2d 673; *Otherson v. Dept. of Justice* (D.C.C.A., 1983), 711 F.2d 267, 274. Because the Huron Municipal Court Judgment was based entirely on stipulations, none of the alleged findings in that Judgment is entitled to issue preclusion effect in this case.

Proposition of Law No. 14: The doctrine of judicial estoppel prevents a party from taking a position inconsistent with one unequivocally and successfully asserted by the same party in a prior proceeding.

As stated in *Smith v. Dillard Dept. Stores, Inc.* (2000), 139 Ohio App.3d 525, 533, 744 N.E.2d 1198, quoting *Teledyne Inds., Inc. v. NLRB* (C.A. 6, 1990), 911 F.2d 1214, 1217: “The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one

successfully and unequivocally asserted by the same party in a prior proceeding.” The doctrine of judicial estoppel “preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.” *Teledyne*, 911 F.2d at 1218. Relators assert in their Propositions of Law Nos. IV and V that by various actions in *Key Trust*, Erie MetroParks took the position that the Canal Company owned the entire Canal Corridor, and the doctrine of judicial estoppel prevents Erie MetroParks from now claiming otherwise.

Again, Section G of the Statement of Facts portion of this Brief describes *Key Trust* in detail. Not only does that description completely dispel Relators’ assertions, but also it shows that in *Key Trust* Erie MetroParks took the exact opposite position – that the Canal Company did not own the entire Canal Corridor – and that Erie MetroParks prevailed on that issue. Consequently, Relators cannot show that in *Key Trust* Erie MetroParks either unequivocally asserted that the Canal Company owned all of the Canal Corridor or that Erie MetroParks prevailed on any such assertion.

Proposition of Law No. 15: To constitute abandonment of a railroad right-of-way, the person asserting such an abandonment must show non-use of the right-of-way for railroad purposes, coupled with an intention on the part of the railroad to permanently abandon the right-of-way for such purposes.

In their Proposition of Law No. VII, Relators claim: “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).” Based on this Proposition of Law, Relators further claim they own that part of the Railroad Corridor included in Relators’ Claimed Real Estate. These claims should be rejected for numerous reasons.

A. The Abandonment Claim Is Not Before This Court, As It Was Not Set Forth In The Complaint Herein

In a complaint filed under the Ohio Rules of Civil Procedure, “[t]he pleader is required to set forth operative facts sufficient to give fair notice of the nature of the action.” *Oxford Sys. Integration, Inc. v. Smith-Boughan Mechanical Services*, 159 Ohio App.3d 533, 2005-Ohio-210, 824 N.E.2d 586, ¶9. In the present case, Relators did not simply allege they owned Relators’ Claimed Real Estate, they repeatedly alleged such ownership came through Key Trust or Buffalo Prairie, which in turn claimed ownership through the Canal Company. Complaint, ¶¶12, 17, 23, 33. Nowhere in the Complaint is there an allegation Relators own Relators’ Claimed Real Estate through abandonment of a railroad right-of-way. Consequently, this Court should refuse to consider Relators’ abandonment claim.

B. Relators Have Failed To Prove They Would Own The Railroad Corridor If It Were Abandoned For Railroad Purposes

Relators Merit Brief simply assumes, without any evidence, that if the Railroad Corridor were abandoned, they would own it. This assumption is wrong.

Each of the affidavits of Relators presented as evidence in this case (Relators Exs. 1-19) contains the deed or deeds by which Relators acquired title to the real estate abutting the Railroad Corridor. Virtually all of these deeds expressly except any part of the Railroad Corridor from the real estate being conveyed or expressly state that the conveyances evidenced by the deeds are subject to the rights of the railroad in the Railroad Corridor. None of these deeds has a reverter clause claiming any real estate abandoned by the railroad would revert to Relators, and Relators have not presented to this Court any deed with such a reverter clause.

In summary, Relators have failed to prove they would own any real estate in the Railroad Corridor abandoned for railroad purposes.

C. Key Trust Determined That The Railroad Corridor Was Not Abandoned For Railroad Purposes, And That Determination Is Entitled To Issue Preclusion Effect In This Action

Relators, in their capacity as Defendants in *Key Trust*, argued that the Railroad Corridor had been abandoned for railroad purposes. On page 4 of the first trial court opinion in *Key Trust* (Stip. Ex. 31), the trial court agreed that the Corridor “was abandoned for the purpose of operating a railroad.” However, the first appellate decision in *Key Trust* expressly reversed the trial court on this issue and ruled that the Railroad Corridor had not been abandoned for railroad purposes. 145 Ohio App.3d at 789-791. That ruling was not changed in any of the subsequent proceedings in the *Key Trust* litigation.

As noted above, the doctrine of issue preclusion prevents the re-litigation of an issue which was actually litigated and decided in a prior case involving the same parties as in the subsequent case. Therefore, the decision in *Key Trust* that the Railroad Corridor was not abandoned for railroad purposes is binding in this case.³⁰

D. The Evidence Presented To This Court Fails To Establish An Abandonment Of The Railroad Corridor For Railroad Purposes

Non-use of a railroad right-of-way for railroad purposes is not sufficient to constitute an abandonment of the right-of-way under state law; instead, to constitute such an abandonment, there must be non-use of the right-of-way for railroad purposes “together with an intention to abandon.” *Schenck v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* (1919), 11 Ohio App. 164, 167. The intent to abandon an easement requires evidence of unequivocal and decisive acts inconsistent with the continued use and enjoyment of the easement. *Bauerbach v. LWR Ent., Inc.*, 169 Ohio App.3d 20, 2006-Ohio-4991, 861 N.E.2d 864, ¶9. As stated in *Buffalo Twp. v.*

³⁰ Although *Key Trust* pertained to the Merry and Townsend Tracts, it is obvious that the abandonment ruling applied to the entire Railroad Corridor. The Merry and Townsend Tracts are not contiguous -- Hartung Affidavit (Relators Ex. 20), ¶7 -- “but in fact are separated by a great distance.” *Id.* Clearly the *Key Trust* abandonment ruling was not based solely on activity concerning a rail line on two non-contiguous tracts of real estate, but instead considered the operation of the line in the entire Railroad Corridor to determine if railroad operations had been abandoned on the Merry and Townsend Tracts.

Jones (2002), 571 Pa. 637, 646, 813 A.2d 659, 665: “In order to establish an abandonment of a [railroad] right-of-way, the evidence must show that the easement holder intended to give up its right to use the easement permanently. Such conduct must consist of some affirmative act on his part which renders use of the easement impossible, or of some physical obstruction of it by him in a manner inconsistent with its further enjoyment [citations and internal quotation marks omitted].”

The burden of proof to establish the abandonment of a railroad right-of-way is clearly on the party claiming the abandonment, in this case, Relators. *McFadden v. Elmer C. Breuer Trans. Co.* (1952), 156 Ohio St. 430, 433, 103 N.E.2d 385.

Relators point out that in December of 1988, Norfolk filed with the Interstate Commerce Commission (“ICC”³¹) a notice (the “ICC Notice”; Ex. A to Tab 6 of Ex. B to Relators Ex. 21) for abandonment of a rail line that included the Railroad Corridor.³² The ICC has exclusive jurisdiction to deem a rail line abandoned and therefore not subject to federal regulation. *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.* (1981), 450 U.S. 311, 319-320, 101 S.Ct. 1124, 1131-1132, 67 L.Ed.2d 258, 266-268. On January 10, 1989, the ICC filed a Notice of Exemption (“ICC Exemption”; Ex. B to Tab 6 of Ex. B to Relators Ex. 21) that stated the exemption requested in the ICC Notice would be effective February 9, 1989.

Obtaining authority from the ICC to abandon a rail line is not the same as abandonment under state property law. ICC abandonment merely ends the ICC’s regulatory jurisdiction over

³¹ As of January 1, 1996, all of the functions of the ICC were assumed by the federal Surface Transportation Board (“STB”). Section 702, Title 49, U.S. Code.

³² Railroads are subject to extensive federal regulation. Generally, a railroad may abandon a rail line only if the ICC “finds that the present or future public convenience and necessity require or permit the abandonment” Section 10903(a), Title 49, U.S. Code. However, pursuant to Section 10505, Title 49, U.S. Code, the ICC had authority to grant exemptions from the formal abandonment provisions. The ICC Notice claimed Norfolk was entitled to such an exemption.

the line, at which time state property law determines whether an abandonment under state law has occurred. See, e.g. *Chevy Chase Land Co. v. United States* (1999), 355 Md. 110, 168-169, 733 A.2d 1055, 1086.

The ICC Exemption was **not** a determination that Norfolk had already abandoned the Railroad Corridor for federal regulatory purposes. ICC approval for abandonment of a railroad merely permits the railroad to **proceed** with such abandonment. *Vieux v. East Bay Regional Park Dist.* (C.A. 9), 906 F.2d 1330, 1339, certiorari denied (1990), 498 U.S. 967, 111 S.Ct. 430, 112 L.Ed.2d 414. Whether such an abandonment has actually occurred requires evidence that the railroad “consummated” the abandonment; that is, evidence that the railroad has demonstrated an intent to permanently or indefinitely cease all transportation service on the line in question. *Birt v. STB* (D.C.C.A. 1996), 90 F.3d 580, 585.

Until a railroad has actually abandoned a rail line after receiving ICC approval to do so, the ICC retains jurisdiction over the line. *Preseault v. ICC* (1990), 494 U.S. 1, 4, 110 S. Ct. 914, 918, 108 L. Ed.2d 1, 10 (footnote 3); *Birt v. STB*, 90 F.3d at 585.³³ State law claims to a rail line can only be brought after the ICC has authorized a regulatory abandonment and after the railroad has consummated such authorization. *Grantwood Village v. Missouri Pacific R.R. Co.* (C.A. 8, 1996), 95 F.3d 654, 659.

Although Norfolk received authority in 1989 to pursue a regulatory abandonment of the Railroad Corridor, the evidence disclose that instead of pursuing such an abandonment it pursued and obtained a buyer for the Corridor -- W&LE-Delaware. In early 1990, a corporate predecessor of W&LE-Delaware filed a notice with the ICC that it intended to “acquire and

³³ Erie MetroParks believes Norfolk never actually abandoned the Railroad Corridor for federal regulatory purposes after the ICC Exemption was filed, and hence the STB may retain jurisdiction over the Corridor. For example, one of the indicia of such abandonment is cancellation of tariffs. *Birt*, 90 F.3d at 585. Norfolk never canceled its tariffs on the line in the Railroad Corridor. See September 14, 1992 letter attached as Young Ex. 2 to the Affidavit of Don John Young. (“Young Affidavit”), MetroParks Ex. G to Erie MetroParks’ Motion to Supplement Evidence.

operate” a number of rail lines, including the line on the Railroad Corridor. Young Affidavit Ex.

1. Pursuant to a deed dated May 8, 1990 (Stip. Ex. SE-8), Norfolk conveyed the Railroad Corridor (along with numerous other rail lines) to W&LE-Delaware, reserving the right to install and maintain a fiber optical communication system on the Corridor.

Relators conveniently neglect to inform this Court that in the 1995 Use Agreement (Stip. Ex. SE-9) by which W&LE-Delaware gave Erie MetroParks the right to use the Railroad Corridor to construct and maintain the Greenway and in the 1995 deed (Stip. Ex. SE-10) from W&LE-Delaware conveying the Railroad Corridor to Erie MetroParks, W&LE-Delaware reserved the right to use the Railroad Corridor to re-institute rail service.³⁴ Such a reservation is obviously direct evidence that W&LE-Delaware never intended to permanently abandon the Railroad Corridor for railroad purposes.

The other evidence of abandonment presented by Relators was that at some unspecified time rail service on the Railroad Corridor ceased and “[t]he railroad began removing rails and ties, ceased maintaining the right-of-way, and allowed the property to deteriorate.” Relators’ Merit Brief, page 39. Such evidence is merely evidence of non-use of the Railroad Corridor for present railroad purposes, as opposed to evidence of an intent to **permanently** cease using the Corridor for such purposes. *Rieger v. Penn Central Corp.* May 21, 1985, 2nd Dist. No. 85-CA-11 (copy attached to Appendix) (cessation of railroad operation on a railroad right-of-way, removal of all ties and tracks from the right-of-way and conveyances by the railroad company of portions of the right-of-way to a non-railroad entity by deeds in which the railroad reserved the right to renew railroad operations in the future did not constitute an abandonment of the right-of-way for

³⁴ As will be demonstrated in Proposition of Law No. 16, use of a railroad right-of-way as a trail is a permitted use of such right-of-way.

railroad purposes); *Buffalo Twp. v. Jones*, 571 Pa. at 646, 813 A.2d at 665 (“mere failure to maintain and repair existing tracks did not amount to an intent to abandon it”).

In the first appeal in *Key Trust*, the court of appeals had before it much of the same evidence as is before this Court on the abandonment issue. That court held that such evidence did not prove an abandonment of the Corridor for railroad purposes under Ohio law. *Erie MetroParks Bd. of Commrs. v. Key Trust Co.*, 145 Ohio App.3d at 789-791. If this Court reaches the abandonment claim raised by Relators, Erie MetroParks respectfully submits that once again this claim should be rejected.

Proposition of Law No. 16: The construction and operation of a public biking/hiking trail by a park district on a railroad right-of-way is a permissible use of the right-of-way and therefore does not impose an added burden on adjacent property for which the park district must pay compensation.

Under their Proposition of Law No. 8, Relators argue that even assuming Erie Metro Parks has the right to construct and operate the Greenway in the Railroad Corridor, “[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.” Relators’ Merit Brief, page 40. As support for this argument, Relators contend: “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.” *Id.* However, both of these cases were predicated upon an express finding that under applicable state law (Vermont law in *Preseault*, California law in *Towes*), an easement given for railroad purposes cannot be used as a public trail, and hence such use requires the appropriation of a new easement and payment of just compensation to the person from whose property the new easement is taken: *Preseault*, 100 F.3d at 1541-1544; *Towes*, 376 F.3d at 1377-1381.

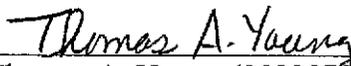
Ohio law, on the other hand, permits the use of a railroad easement for a public trail. *Erie Metro Parks Bd. of Commrs. v. Key Trust Co.*, 145 Ohio App. 3d at 790 (the first appellate decision in the *Key Trust* litigation); *Rieger v. Penn Central Corp.* Accord *Minnesota Dept. of Wildlife Preservation v. Minnesota Dept. of Natural Resources* (Minn.), 329 N.W. 2d 543, certiorari denied (1983), 463 U.S. 1209, 103 S.Ct. 3540, 77 L. Ed. 2d 1390. See also *State ex rel. Fogle v. Richley* (1978), 55 Ohio St.2d 142, 146, 378 N.E.2d 472 (use of a railroad easement for highway purposes was a permitted use of the easement).

The use of the Railroad Corridor for a biking/hiking trail by Erie Metro Parks was a permitted use of that property. Obviously, a public agency should not be forced to appropriate property it owns simply because the public agency is using the property in a permitted manner.³⁵

CONCLUSION

This case is not *Coles*. This case involves different Relators, different real estate and conclusive evidence that the Relators do not own Relators' Claimed Real Estate. For that reason and the other reasons stated herein, Erie MetroParks respectfully requests that this mandamus action be dismissed with prejudice.

Respectfully submitted,



Thomas A. Young (0023070)
Counsel of Record
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
(614) 227-2137
(614) 227-2100 – Fax
tyoung@porterwright.com

³⁵ Relators have totally failed to present any evidence to support their contention that use of a railroad right-of-way as a biking/hiking trail is a greater burden on the surrounding property than is use of such a right-of-way to permit massive trains to move over such right-of-way.

John D. Latchney (by Thomas A. Young
per authorization)
John D. Latchney (0046539)
TOMINO & LATCHNEY, LLC LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
(330) 723-4656
(330) 723-5445 – Fax
jlatchney@brightdsl.net

Attorneys for Erie MetroParks

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of June, 2009, he served a copy of the foregoing “Merit Brief of Respondents” on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus, Ohio 43216-1008, counsel of record for Relators, by causing said copy to be hand-delivered to his office.

Thomas A. Young
Thomas A. Young (0023070)
Counsel of Record for Erie MetroParks

Appendix

▷ Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Greene
 County.

FREDERIC L RIEGER and KATHERINE G.
 RIEGER, Plaintiffs-Appellants

v.

PENN CENTRAL CORPORATION and LITTLE
 MIAMI RAILROAD COMPANY, Defendants-
 Appellees

CASE NO. 85-CA-11.

85-CA-11

May 21, 1985.

PHILIP AULTMAN, Allen Building, P.O. Box H,
 Xenia, Ohio 45385 Attorney for Plaintiffs-
 Appellants.

JOHN V. GIBNEY and PETER D. STEPHAN, 1228
 N. Monroe Drive, Xenia, Ohio 45385 Attorneys for
 Defendants-Appellees.

OPINION

BROGAN, P.J.

*1 Appellants, Frederic L. and Katherine G. Rieger, appeal from a decision of the Greene County Court of Common Pleas denying appellants' requests for a declaratory judgment to quiet title and an injunction enjoining appellees, Penn Central Corporation and the Little Miami Railroad Company, from negotiating the sale of an easement to the State of Ohio.

The record and stipulations of fact indicate that appellants are owners of 88.919 acres of land located in Spring Valley Township, Greene County, Ohio. Appellee, Penn Central Corporation, and its predecessor, the Little Miami Railroad, have operated a railway line between Cincinnati and Springfield, Ohio for over 140 years. The Little Miami Railroad merged with the Penn Central Corporation on December 31, 1981. A segment of the railway line is situated on a

12.06 acre tract of land, a portion of which runs through appellants' property. The parties stipulate that, although one Enoch Pilner signed a document on December 3, 1838, recorded on February 12, 1857, purporting to grant an easement to the Little Miami Railroad for railroad purposes, Enoch Pilner did not in fact own the property by virtue of another deed conveying said land to Robert Evans in 1838. Appellees discontinued use of the track on October 31, 1981, and the ties and tracks were removed between October 31, 1981, and June 30, 1982. The ballast remains intact on the right of way running through appellants' property. Appellee, Penn Central, has continued to pay real property taxes on this right-of-way.

Since June 30, 1982, appellee has conveyed various portions of the land in the vicinity of the right-of-way by Quit Claim Deeds. Notably, the State of Ohio has also expressed an interest in purchasing the right-of-way from appellee for use as a recreation trail.

Appellants filed a complaint against appellee on May 3, 1983, requesting a declaratory judgment that (1) appellee's right-of-way through appellants' property has been abandoned; (2) that appellee's interest be declared terminated; (3) that appellants' title be quieted as to any claim of the appellee railroad; and (4) that appellee be enjoined from negotiating a sale of any claimed interest in appellants' land. In support of this request, appellants maintained that appellee had acquired an easement, rather than a fee simple in the right-of-way; that the easement had been abandoned and that as a result of the abandonment, the underlying fee reverted to them free of the easement. Appellants also alleged that use of the right-of-way as a recreational trail would be inconsistent with the original purpose for which the easement was acquired and would materially increase the burden on the servient estate.

In its Decision and Judgment Entry filed on January 10, 1985, the trial court determined that appellee had only acquired a prescriptive easement^{FN1} over the right-of-way. Further, the court held that appellee had not legally abandoned the easement because it had maintained the ballast and continued to pay real estate taxes on the easement. Finally, the court deter-

mined that although one acquiring an easement may not materially increase the burden on the servient estate (appellants' property), that use of the right-of-way as a recreation trail is a public use, consistent with the purpose for which the easement was acquired. Appellants timely filed their notice of appeal from this judgment on January 23, 1985.

FNI The period necessary to acquire an easement by prescription corresponds to the 21-year time period required to acquire title to real property by adverse possession. Pavey v. Vance (1897), 56 Ohio St. 162.

*2 Appellants assert three assignments of error. The first is set forth below:

THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO, ERRED IN HOLDING THAT THE DEFENDANT-APPELLEE, PENN CENTRAL RAILROAD CORPORATION, HAS NOT ABANDONED ITS PRESCRIPTIVE EASEMENT THROUGH PLAINTIFF-APPELLANTS' LAND.

The trial court determined that the appellee had acquired an easement by prescription rather than a fee simple over the 12.06 acre tract of appellants' land. Appellants contend however that by ceasing to use the land for railroad purposes and by virtue of the sales of land in the vicinity of the right-of-way, appellee has abandoned its prescriptive easement. We disagree.

In its January 10, 1985, Decision and Judgment Entry, the trial court stated:

"Plaintiffs are correct to suggest that the rights underlying an easement will revert to the owner of the servient estate if such easement is abandoned. However, 'abandonment' has two requirements: (1) nonuse of the easement, (2) intention to abandon. An intention to abandon must be established by unequivocal and decisive terms. Schenck v. The Cleveland, Cincinnati Chicago & St. Louis Railway Co. (1919), 11 Ohio App. 164,167. Although the easement is no longer used for railway operations, the Defendant continues to pay taxes on the easement and the ballast upon the right-of-way remains intact. Accordingly, the Court finds that the Defendant has not legally abandoned the easement." (Decision p. 5).

"Plaintiffs suggest that the Quit Claim Deeds executed and delivered on March 15, 1983, and July 7, 1983, show intent to abandon the easement. A Quit Claim Deed purports to convey only the rights and interests of the said grantor. Thus, the Defendant, as owner of an easement, transferred no greater rights or interest than it had. And, therefore, the grantees are bound by the restrictions imposed upon the easement by its creation. More is needed here, however, to show abandonment." (Decision p. 6).

We agree.

It is well-settled in Ohio that easements may be acquired by prescription and an easement so created stands in all respects on equal footing with an easement acquired by grant. Pavey v. Vance (1897), 56 Ohio St. 162; 2 Ohio Jur 3d, Adverse Possession, Section 90, Easements, p. 599. Appellants correctly maintain that under appropriate circumstances, a prescriptive easement may be abandoned. To constitute an abandonment of a railroad right-of-way, there must be a nonuser together with an intention to abandon. The intention can be established by unequivocal and decisive acts clearly indicative of abandonment. Schenck v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co. (1919), 11 Ohio App. 164; Junction Railway Co. v. Ruggles (1857), 7 Ohio St. 1. Where a railroad right-of-way constitutes an easement and such easement is abandoned, the land is discharged of the burden and the right to possession reverts to the owner of the servient estate. Ruggles, supra. Accordingly, appellants maintain that because appellee has not used the right-of-way since 1981, removed its ties and tracks and sold land in the vicinity of the right-of-way to parties who have no intention of putting the land to public use, that appellee has unequivocally demonstrated its intention to abandon the right-of-way. Consequently, appellants maintain that their reversionary interest has matured.

*3 A determination of whether a railroad right-of-way has been abandoned focuses most strongly on the matter of intent. Generally no single factor has been held sufficient, in and of itself, to establish an inference of intent to abandon. See 95 A.L.R. 2d 468, Annotation: Railroad Right-Of-Way Abandonment. Additionally, Ohio case law indicates that a right-of-way is not abandoned merely upon proof of non-use. Ruggles, supra. In the case sub judice, the record

indicates that appellee continues to pay real property taxes on the right-of-way. The ballast on the right-of-way remains intact. Although appellee has sold various portions of the property in the vicinity of the right-of-way, the Quit Claim Deeds clearly state:

“(2) that the Grantee shall not have or assert to have any claim or demand whatsoever for compensation for damages whether said damages be direct or consequential, to the land hereinbefore described or to any buildings or improvements now or hereafter erected thereon, or to the contents thereof, which may be caused by the operation, maintenance, repair or renewal of Grantor's railroad or which may be caused by vibration resulting from the operation, maintenance, repair or renewal thereof; and the said Grantee hereby expressly releases the said grantor from liability from any such damages.” (Emphasis ours).

We do not find that the language in the deeds evinced any intention on the part of the appellee to unequivocally abandon its right-of-way, especially in light of the language reserving the right to renew railroad operations. Further, as the trial court noted, a Quit Claim Deed purports to convey only the rights and interests of the grantor. Accordingly, the grantees are bound by the restrictions imposed upon the easement by its creation. Realty Title and Investment Co. v. Railroad Co. (1919), 12 Ohio App. 73, 78; See generally 36 Ohio Jur 2d, Easements and Licenses, Section 72, p. 475.

The trial court determined that appellee had not abandoned its right-of-way and we hold that this determination is supported by competent, credible evidence. Judgments supported by some competent, credible evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence. Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77. Additionally, we find the trial court's decision to be in accordance with the law of Ohio and is neither unreasonable, arbitrary or unconscionable. State v. Adams (1980), 62 Ohio St. 2d 151. Appellants' first assignment of error is overruled.

Appellants' second and third assignments of error are set forth below:

THE COURT ERRED IN HOLDING THAT THE STATE OF OHIO'S USE OF THE RIGHT OF WAY OF SAID RAILROAD AS A RECREATIONAL

TRAIL IS WITHIN THE SCOPE OF INTEREST ACQUIRED BY THE RAILROAD.

THE COURT ERRED IN DENYING THE PLAINTIFFS-APPELLANTS' REQUEST FOR A QUIET TITLE ACTION AND FOR AN INJUNCTION ENJOINING THE SALE OF THE RAILROAD EASEMENT TO THE STATE OF OHIO.

The second assignment of error alleges that the trial court erred in determining that acquisition of the right-of-way by the State of Ohio for use as a recreation trail is within the scope of interest of the original easement. The logical corollary to this argument is that the trial court erred in denying appellants' request for a quiet title action and an injunction prohibiting the potential sale. Accordingly, we shall address the assignments of error together.

*4 We first point out that the appellee has not yet sold the right-of-way to the State of Ohio. Apparently, appellants contend that, even if appellee has not presently abandoned its right-of-way, transfer of the right-of-way to the State of Ohio for use as a recreation trail will exceed the scope of the original easement, constituting an abandonment.^{FN2} Appellants maintain that although a railroad right-of-way and a recreation trail are both designed for public use, that a railroad transports cargo and people in closed carriers and a recreation trail permits movement of people by hiking, jogging, motor bikes, snowmobiles^{FN3} and bicycles which would substantially increase the burden on appellants' servient estate.

FN2 Technically, appellant continues to argue that the alleged abandonment occurred upon discontinuation of the right-of-way for railroad purposes in 1981-1982. We have already determined in Part One of this opinion that the trial court properly determined that the easement had not been abandoned. We find that the thrust of appellants' contention in its second and third assignments of error is that a conveyance to the State of Ohio will work as an abandonment of the use for which the easement was originally acquired and trigger appellants' reversionary interest.

FN3 We note that if the State of Ohio purchases the right-of-way for use as a recreation trail, the use of motorized forms of rec-

reational travel is expressly prohibited by R.C. 1519.01 and 1519.02.

Generally, the character of a prescriptive easement is fixed and determined by the user under which it was acquired. See, 25 American Jurisprudence 2d, Easements and Licenses, Section 84. Further, a prescriptive easement stands on equal footing with an easement acquired by grant and may pass by conveyance of the dominant estate. Pavey v. Vance (1897), 56 Ohio St. 162. Ohio case law recognizes that transfer of a canal right-of-way to a railroad or a railroad right-of-way to another railroad does not generally constitute an abandonment of an easement for public use. Hatch v. Cincinnati & L. R. Co. (1864), 18 Ohio St. 92; Garlick v. Pittsburgh & W.R. Co. (1902), 67 Ohio St. 223. These cases are supported by the rationale that the original easement in the land is not extinguished because the proposed use is similar to that originally contemplated and "because the general purpose to which the easement was and is applied, are the same; to wit, the purposes of a public way to facilitate the transportation of persons and property. Means and appliances are different, but the objects are similar; and the legislation of the State has always favored both." Hatch, supra.

Although other state courts have determined that use of a railroad right-of-way as a public recreational trail or for other public purposes does not constitute an abandonment of the easement for public travel, we find that this precise issue has not yet been addressed by Ohio courts. See Minnesota Department of Wildlife v. State of Minnesota (1983), 329 N.W. 2d 543; Faus v. City of Los Angeles (1967), 67 Cal. 2d 350; 63 Cal. Rptr. 193, 451 P. 2d 849; Bernards v. Link (1951), 199 Or. 579, 248 P. 2d. Following a thorough review of the rationale underlying these cases and based upon Ohio statutory authority, we hold that conveyance of a railroad right-of-way to the State of Ohio for use as a recreation trail does not constitute an abandonment of the right-of-way for public travel.

*5 In Minnesota Department of Wildlife, supra, the Supreme Court of Minnesota reasoned that:

"The holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and other methods of use in aid of the general purpose for which the easement was acquired are permissible."

"The right of way in this case will be used by hikers, bikers, cross-country skiers and horseback riders. The right of way is still being used as a right of way for transportation even though abandoned as a railroad right of way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purposes for which the easement was originally acquired. State and federal statutes encouraging the conversion of railroad rights-of-way to recreation trails also support our holding."

Although the easements at issue in the aforementioned case were created by conveyance and grant, we do not find this distinction to be dispositive to an analysis of the case sub judice, as appellants maintain in their reply brief. In the Minnesota case, the deeds did not define the scope of use of the conveyed easements. Accordingly, the court determined that railroad rights-of-way are transferable and that such rights-of-way are generally acquired and held by a railroad to serve a public purpose. The court then reasoned that use as a recreation trail would continue to serve a public purpose. Although appellants correctly maintain that an easement by grant is limited by the specific language of the grant, we find that the Minnesota Supreme Court's analysis of an easement by grant, without any specific use restrictions, logically applies to a case involving a prescriptive easement.

We acknowledge appellants' reliance on Pollnow v. State Department of Natural Resources (1979), 88 Wis. 2d 350, 276 N.W. 2d 738, in which the Wisconsin Supreme Court ruled that use of a railroad right-of-way as a recreation trail constituted an abandonment of the easement. We hold that this case is not controlling. As the Court noted in Minnesota Department of Wildlife, supra, at the time Pollnow was decided, Wisconsin did not have a law addressing acquisitions of railroad rights-of-way nor had Congress enacted 16 U.S.C. 1247 ("Trails System Lands") which expressly encourages the States to consider "needs and opportunities for establishing park, forest and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails in or near urban areas." Section D of 16 U.S.C. 1247 specifically addresses conversion of railroad rights-of-way. The Pollnow court,

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itself noted:

“We make no holding as to the power of Congress or the State Legislature to preserve the rights of the public in existing rail corridors for multiple public uses, including transportation, conservation and recreation.”

*6 Chapter 1519 of the Ohio Revised Code, Recreational Trails, enacted in 1972, clearly recognizes the importance of the State's right to acquire property for recreational trail use. Section 1519.02 states in pertinent part:

“Trail right-of-way acquisition, improvement, maintenance and supervision.

The Director of natural resources may acquire real property or any estate, right, or interest therein for the purpose of establishing...any state recreational trail. The Director may appropriate real property or any estate, right, or interest therein for trail purposes only along a canal, watercourse, stream, existing or abandoned road, highway, street, logging road, railroad . . . particularly suited for nonmotorized vehicular recreational use.”

Clearly, under the terms of R.C. 1519.02, the State of Ohio is permitted to acquire appellee's right of way for use as a recreational trail as a matter of statutory right. Additionally we find that use of the right of way as a recreation trail, based upon case law analysis, does not exceed the scope of the purpose for which the easement was originally acquired. Since the right-of-way has not been abandoned by appellee as of this point, See Part I of this opinion, appellee is the proper party to convey the right-of-way. Such conveyance will not constitute an abandonment of the right-of-way for public use. Consequently, appellants' rights, if any, to the property, free of the easement, have not yet matured.

The decision to grant or deny an injunction lies within the sound discretion of the trial court and a reviewing court may not reverse such decision absent a clear abuse of discretion. Sternberg v. Board (1974), 37 Ohio St. 2d 115. Based upon the foregoing analysis, we do not find the trial court's decision to deny appellants injunctive relief to be unreasonable, arbitrary or unconscionable. State v. Adams (1980), 62 Ohio St. 2d 151. Appellants' second and third as-

signments of error are overruled.

The judgment of the trial court is Affirmed.

KERNS, J. and WILSON, J., concur.

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