

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

RELATORS' REPLY BRIEF IN SUPPORT OF WRIT OF MANDAMUS

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Introduction

The rule of law and logic dictate that, following this Court's unanimous decision in *Coles*, which held that the *Coles* Relators had a clear legal right to a writ of mandamus compelling Respondents (or "MetroParks") to initiate appropriations proceedings, MetroParks would: 1) initiate appropriations proceedings to compensate the *Coles* Relators; and 2) initiate appropriations proceedings for all those identically situated, i.e., the *Coles* Relators' neighbors who acquired the canal corridor on their property from the same source—Key Trust Company of Ohio ("Key Trust"), the *Coles* and Buffalo Prairie. MetroParks has done neither. This Court should reject all of the counter propositions of law advanced by MetroParks because these either could have been or were advanced in the *Key Trust* and *Coles* cases. These cases cannot be relitigated again in this case and, in any event, each counter proposition lacks merit. The *Nickoli* Relators should be granted the requested writ.

Argument

Response to Proposition of Law No. 1: The Date Of Take Is The Date Of Trial In The Appropriation Action Ordered By This Court.

Contrary to MetroParks' contention, the appropriate date of take is the date of trial in the appropriation actions to be ordered by this Court. To rule to the contrary, this Court would have to ignore both the Ohio Constitution and Ohio law. The Ohio Constitution requires compensation to be made or secured first before property may be taken:

Where private property shall be taken for public use, a compensation therefor shall **first** be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Constitution, Section 19, Art. I (emphasis added). Compensation must first be "made or secured" before a taking occurs, and therefore the property must be valued as of the date

compensation is determined by a jury. *Miami Conservancy Dist. v. Bowers* (1919), 100 Ohio St. 317, 318, 125 N.E.2d 876; *Nichols v. City of Cleveland* (1922), 104 Ohio St. 19, 135 N.E. 291; *Pittsburgh & W.R. Co. v. Perkins* (1892), 49 Ohio St. 326, 31 N.E. 350. MetroParks relies on case law concerning two inapplicable and narrow exceptions to this general rule: (1) when a condemnor with the right to “quick take” deposits money with a court and then takes possession of the property; and (2) instances of “condemnation blight.” Under these limited circumstances, the date of take is the date of possession. MetroParks cannot cite to any authority in which a condemnor unlawfully occupies the property for years, disregarding the landowner’s right to just compensation, and yet is entitled to a date of take years before it pays any compensation. This does not satisfy the mandate of the Ohio Constitution. No take occurs until the date of trial in appropriation actions ordered by this Court. Regardless, as set forth below, this Court need not even decide this issue because of the continuing nature of MetroParks’ unlawful control of Relators’ property.

Response to Proposition of Law No. 2: Relators Have The Right To Bring This Action To Compel MetroParks To Take And Pay Just Compensation For Their Property.

Though never raised by MetroParks in *Coles*, MetroParks now seeks to challenge the standing of the identically situated *Nickoli* Relators to bring this mandamus action. Collateral estoppel precludes any such argument. Nonetheless, as set forth above, MetroParks has not taken Relators’ property until just compensation has been secured and, in any event, MetroParks exercises continuing control over Relators’ property and did not simply act once in 1999 to take Relators’ property. In addition, to this day, MetroParks continues to contest Relators’ previously vindicated right to the property in question; no owner could have obtained compensation until this right was vindicated. Thus, MetroParks’ claim that Relators cannot pursue this mandamus action because MetroParks occupied their property before Relators acquired title to it lacks merit.

Indeed, a takings claim “is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.” *Palazzolo v. Rhode Island* (2001), 533 U.S. 606

MetroParks cannot cite to any decision of this Court to support their contention and its reliance upon *Steinle v. Cincinnati* (1944), 142 Ohio St. 550, 555, 53 N.E.2d 800, is misplaced. In *Steinle*, this Court considered the claim of a landowner who bought property years after a temporary taking by the City had ceased. In fact, recognizing that a take could be continuing, this Court affirmed the dismissal of the case based on the fact that “[a]ny taking or appropriation by the city was temporary and had ended before the plaintiff bought the property.” *Id.* Relators can pursue this mandamus action because of MetroParks’ continued conduct in exercising control over Relators’ property. See, e.g., *Hensley v. Columbus* (6th Cir. 2009), 557 F.3d 693; *McNamara v. City of Rittman* (6th Cir. 2007), 475 F.3d 633, 638 (acknowledging claims of continuous takings).¹

Furthermore, because MetroParks contests that a take has even occurred, Relators have spent years in litigation simply in order to vindicate their right to the property in question, just as in a regulatory taking a plaintiff may spend years proving the existence of the take before obtaining compensation. To dismiss this action merely because MetroParks occupied the property before Relators obtained their deeds from Buffalo Prairie or Key Trust and before their ownership was vindicated by the courts would pervert justice and encourage government entities to bully landowners into giving up and selling their land to others so that an illegal seizure of private property could not be contested. Cf. *Palazzolo*, 533 U.S. at 628 (“It would be illogical

¹ While MetroParks attempts to rely upon *Hatfield v. Wray* (2000), 140 Ohio App. 3d 623, 629, 748 N.E.2d 612, that decision involved only a single act by a government entity – reconstruction of an existing state route – that resulted in flooding about which parents and the children to whom they sold the property were aware for decades prior to filing suit. Here, MetroParks exercises continued control over Relators’ property daily by entering, maintaining, and patrolling the greenway trail and inviting the public to trespass over Relators’ property. Cf. *Sexton v. City of Mason*, 117 Ohio St. 3d 275, 2008-Ohio-858, 883 N.E.2d 1013, ¶ 45 (“The defendant’s ongoing conduct or retention of control is the key” to identifying a continuing trespass).

and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken . . . by a previous owner.”).²

Response to Propositions of Law Nos. 3 and 4: R.C. 2305.09 Does Not Time Bar This Action.

Though never raised in *Coles*, MetroParks now argues that *Nickoli* Relators, whose property was seized and occupied during the same time period as the *Coles* Relators’ property, are time barred from pursuing this action. Collateral estoppel precludes any such argument. Nonetheless, MetroParks’ argument is meritless.

A citizen of Ohio cannot be deprived of his land by the state unless he is *first* either compensated in money or a deposit of money is made for such compensation. See Ohio Constitution, Section 19, Art. I. A landowner in Ohio whose property has been physically invaded and occupied by the state may not sue the state directly for the taking of his land. Instead, the landowner must compel the state through a mandamus action to commence *condemnation* proceedings under R.C. 163.01 et seq. Under Section 19, Art. 1 of the Ohio Constitution, the landowner retains title to his property until the payment of compensation; therefore, the land cannot be “taken” from him by reason of a failure to initiate a mandamus action within a specific time period.³ Thus, R.C. 2305.09 cannot time bar a landowner’s constitutional right to maintain a mandamus action to compel the payment of compensation for the physical seizure of his property.

Interpreting an Arizona constitutional provision similar to Ohio’s Section 19 Article 1, the Arizona Supreme Court held that no amount of delay short of the prescriptive period of ten

² Acceptance of MetroParks’ conclusion would also lead to the astounding – and unjust – result that a subsequent purchaser of real property has standing to contest a continuing trespass, as well as an ongoing nuisance, but *not* the government’s continuing illegal seizure of land.

³ The only time period that is permissible would be the twenty-one year prescriptive period for adverse possession, R.C. 2305.04.

years can defeat a landowner's action for compensation for a physical taking of his property.

Maricopa County Municipal Water Conservation Dist. No. 1 v. Warford (1966), 69 Ariz. 1, 206 P.2d 1168.⁴ See also *Rutledge v. State* (1966), 100 Ariz. 174, 178-80, 412 P.2d 467.

To avoid the constitutional infirmity of R.C. 2305.09, however, this Court need only appropriately determine that the conduct of MetroParks is continuing, in the nature of a continuing trespass, such that this action could not be time barred. When a trespass is continuing, the limitations period does not even begin to run until the tortious conduct ceases or the prescriptive period has run. *Sexton v. City of Mason*, 117 Ohio St. 3d 275, 2008-Ohio-858, 883 N.E.2d 1013, ¶ 29-38. In *Sexton*, this Court held that a continuing trespass "occur [s] when there is some continuing or ongoing allegedly tortious activity attributable to the defendant," and that an important factor in determining if tortious activity is *ongoing* is whether the tortfeasor retains control over the property. *Id.* at ¶ 45. Here, MetroParks is continuously exerting control over the premises.⁵ As a result, any statute of limitations has not yet run.

Moreover, it makes no sense to allow the government to seize and occupy property of a landowner, subject only to a four year statute of limitations, when there is no statute of limitations short of the prescriptive period for the same conduct of a private trespasser. Constitutional rights cannot be less deserving of protection than rights not imbedded in the fundamental law of the state.

Response to Propositions of Law Nos. 5 and 6: Through Operation Of Law, As Successors To Key Trust, Nickoli Relators Own The Canal Corridor Unlawfully Occupied By MetroParks.

⁴ The pertinent Arizona constitutional provision provided that "...no private property shall be taken or damaged for public...use without just compensation having first been made, or paid into court for the owner...." Art. II, Sect. 17 Arizona Constitution.

⁵ In their Motion for Judgment on the Pleadings, Respondents could not make it any more clear that they claim continuous possession and control of the property at issue: "Respondent Board and the predecessor railroad companies who used the Railroad Corridor [within the pertinent sections of the Milan Canal Corridor] have been in exclusive possession and control of such Corridor for the past approximately 130 years." *Id.*, at pg. 1.

MetroParks admits that the *Key Trust* litigation held that the property subject to the MetroParks' property interest under the 1881 railroad lease was limited to the Canal Corridor⁶ in the Merry and Townsend tracts. Resps. Br., at 20. In addition, in *Key Trust*, MetroParks also raised, and the court considered, whether MetroParks owned the Canal Corridor in fee. *Coles*, 2007-Ohio-6057, ¶ 16. This was resolved against MetroParks. *Id.*, ¶ 14, 16. *Key Trust* thus adjudicated that MetroParks has no interest in the Canal Corridor outside of the Merry and Townsend tracts.

As for who owns the Canal Corridor, this Court held in *Coles* that Relators' predecessors in title owned the Canal Corridor on their properties and ordered MetroParks to bring condemnation actions to compensate the *Coles* Relators: "Relators have established that by employing their private property for public use as a recreational trail, the board of park commissioners has taken their property." *Id.*, ¶ 17. *Key Trust* and *Coles* conclusively determined not only that MetroParks has no rights in the Canal Corridor outside of the Merry and Townsend tracts but that *Relators' predecessors in title – Key Trust, Coles Relators, and Buffalo Prairie – owned* the Canal Corridor. Thus, MetroParks' attempt to re-litigate Relators' title to their respective Canal Corridor properties is barred by res judicata.

Not only is MetroParks' collateral attack on *Coles* barred by res judicata, it is meritless. MetroParks' principal argument is that in the absence of evidence that the Canal Company owned the Canal Corridor outside the Merry and Townsend tracts at the time of its dissolution – an argument MetroParks chose not to make in *Coles* – Relators could not have obtained title to the corridor from Key Trust. Thus, the argument goes, none of the parties to this case have title to the Canal Corridor outside the Merry and Townsend tracts.

⁶ As consistently used by Relators, the "Canal Corridor" is the 6.5. mile 150-ft wide strip of canal property sold in 1904 by the receiver for the canal company through a public sale.

The evidence before this Court demonstrates that, at the time of its dissolution, the Canal Company was vested with title to the Canal Corridor by operation of law. Whether the 1904 Dissolution Action is itself entitled to issue preclusion effect is irrelevant, and thus, so is Respondents' Counter Proposition of Law No. 6. The Act under which the Canal Company was chartered vested "complete title" to lands possessed for canal purposes in the Canal Company and their successors forever.⁷ Thus, at dissolution, the Canal Company was vested with complete title to the Canal Corridor which was ultimately passed to *Nickoli* Relators, just like the *Coles* Relators, as successors to the Canal Company (through Key Trust). MetroParks must compensate Relators for its illegal seizure of Relators' land.⁸

Response to Proposition of Law No. 7: Key Trust Preclusively Established MetroParks Has Only Lease Rights In The Merry And Townsend Tracts And The Successors To Key Trust Own The Trail.

MetroParks is correct that claim preclusion applies only to those claims that were decided in *Key Trust*. As this Court held in *Coles*, *Key Trust* preclusively established that MetroParks had "no property interest in the land north of Lock No. 1 [just North of Mason Road]" and as to south of Mason Road only had leasehold rights "within the boundaries of the Merry and Townsend parcels." 2007-Ohio-6057, ¶ 48-49, 55-56. Any claim by MetroParks to the property of the *Key Trust* Defendants – these Relators – was preclusively determined in *Key Trust*.

⁷ Stipulated exhibit SE-47, the 1827 Canal Act, 25 Ohio Laws 94, which created the Milan Canal Company, provided that "complete title to the premises [lands entered upon and possessed for purposes of construction of the canal], to the extent and for the purposes set forth in or contemplated by this act, shall be vested and forever remain in said company and their successors."

⁸ To the extent MetroParks is indulged to also collaterally attack *Key Trust* by claiming that the railroad lease actually granted rights to the entire corridor and not just the Merry and Townsend tracts, the fact that the canal was abandoned in the 1860s and was no longer used as a canal would have caused the canal land to revert to the landowner of the underlying land, in which event Relators are owners of the canal corridor as successors to the former landowners. See *Vought v. Columbus, H. V. & A. R. Co. Walsh*, (1858), 58 Ohio St. 123, 50 N.E. 442. Moreover, Relators presented the same evidence and arguments in both *Key Trust* and *Coles* that it is again presenting to this Court. There is no legitimate basis on which to re-visit the decisions made in both those cases.

Likewise, the *Key Trust* Defendants' ownership interests in the Canal Corridor was established in *Key Trust*. In *Key Trust*, MetroParks asserted ownership of the entire 6.5 mile Canal Corridor against the *Key Trust* Defendants by leasehold rights, adverse possession,⁹ or quitclaim deed. See Rel. Merit Br., at 6-10 and evidence cited therein. As established by MetroParks' Amended Complaint, SE-26, and Motion for TRO, SE-27, in *Key Trust*, MetroParks placed the entire 6.5 mile Canal Corridor at issue. In asserting rights to the entire Canal Corridor, MetroParks acknowledged that the only other parties with a claim of ownership to those properties were itself, Key Trust, and the successors to Key Trust – the *Coles* and *Nickoli* Relators. This Court agreed, holding that to the extent the *Key Trust* Defendants/*Coles* Relators' sections of the Canal Corridor lay outside the Merry and Townsend tracts, *Key Trust* preclusively established their ownership of the property. *Coles*, 2007-Ohio-6057, ¶ 34, 49, 54-57.

Key Trust conclusively established that the *Key Trust* Defendants, including the *Nickoli* Relators, have title to their sections of the Canal Corridor and, outside of the Merry and Townsend tracts, MetroParks has no property rights in the corridor.

Response to Propositions of Law Nos. 8 and 12: Because Nothing Could Be Gained By Relitigating The Same Claim Of Ownership As In *Coles* Except A Perversion Of The Rule Of Law And Justice, Offensive Claim Preclusion Should Apply.

The unique facts of this case warrant applying claim preclusion offensively. The *Nickoli* Relators do not seek different relief than the *Coles* Relators. They want the identical relief that their neighbors received in *Coles*. Nothing could be gained from relitigating Key Trust's title.

⁹ MetroParks now claims that the *Key Trust* court's rejection of its claim of adverse possession was limited to the Merry and Townsend tracts. Resps. Br., at fn. 16. This Court already rejected this argument once when it denied MetroParks' Motion to Strike. See April 4, 2009 Entry. As this Court recognized in *Coles*, the "ultimate emphasis of the litigation [*Key Trust*] at both the trial and appellate courts [was] on the interests of the board being limited to the Merry and Townsend parcels..." *Coles*, 2007-Ohio-6057, ¶ 48. Finding that the trial court kept open the issue of adverse possession is absolutely inconsistent both with this conclusion and MetroParks' claims in *Key Trust*.

In addition, justice and fairness warrant offensive claim preclusion. Ignoring *Coles*, MetroParks refused to comply with this Court's order to initiate appropriation actions and refused to acknowledge this Court's holding that the *Key Trust* Defendants all acquired ownership in the Canal Corridor through Key Trust or Buffalo Prairie. The boundaries of the Merry and Townsend tracts are readily discernible. MetroParks clearly understood that it was the conveyance from Key Trust that gave the *Coles* Relators a clear legal right to their requested writ. SE-44, Motion for Reconsideration, at 3. Despite these undisputed facts, MetroParks did not commence appropriation actions against any of the *Nickoli* Relators and instead forced them to initiate this mandamus action. See Rel. Evid. Nos. 1-19 Affs. of Relators. MetroParks now speciously contends that all this Court did in *Coles* was hold that the *Coles* Relators' property was not encumbered by the 1881 Lease. Resps. Br., at 40. Principles of fairness and justice require that this Court's ruling apply to all identically situated landowners.

Res judicata is a principle designed to enforce the rule of law and justice. It is for that very reason that this Court in *Coles* applied offensive claim preclusion to hold that *Key Trust* established the ownership interests of the litigants to that action.¹⁰ Under the circumstances of this action, enforcing the rule of law and justice warrants the same result.

Response to Propositions Of Law Nos. 9 and 10: Nickoli Relators Acquired Their Valid And Enforceable Ownership Interest In Canal Property Through The Same Series Of Transactions And From The Same Common Source As The Coles Relators, And, Thus, Claim Preclusion Establishes Their Right To The Same Writ As The Coles Relators.

Even if *Key Trust* did not preclusively establish the *Key Trust* Defendants' ownership in their respective sections of the Canal Corridor, this Court's 6-0 decision in *Coles* unequivocally did so. Each of the *Coles* Relators presented their deeds acquired either directly from Key Trust

¹⁰ MetroParks mischaracterizes this Court's application of res judicata in *Coles*. It claims that this Court only applied issue preclusion. A cursory review of this Court's discussion in *Coles* of the application of claim preclusion for a declaratory judgment action establishes that this Court applied claim preclusion, *not* issue preclusion. Otherwise, this Court's discussion of claim preclusion, at ¶ 37 in *Coles* was pointless.

or indirectly through Buffalo Prairie as evidence of ownership. They also presented the chain of title for those deeds traced back to the 1904 Dissolution Action and public sale of canal property from that action. Rel. Evid. No. 21, 2nd Aff. of Edwin Coles, Ex. D; Aff. of Yan Ge, Exs. H-I. In fact, as to Edwin and Lisa Coles and their home parcel, the *only* deed that this Court found gave them a clear legal right to the requested writ was their 1999 deed with Key Trust. *Coles*, 2007-Ohio-6057, ¶ 6, 52. Likewise, this Court found that Buffalo Prairie, which also traced its retained ownership of several sections of the canal property to Key Trust, had a clear legal right to appropriation. *Id.* at ¶ 59. The *only* deed Buffalo Prairie had was from Key Trust. *Id.*, ¶ 6. Since Key Trust acquired title from the Canal Company's successors, all persons who purchased sections of the Canal Corridor from Key Trust are entitled to the same relief, including the *Nickoli* Relators. Yet, MetroParks ignores this clear application of the rule of law in *Coles*.

MetroParks claims that the *Coles* Relators' title was merely "assumed" and that it did not press the issue of the validity of those Relators' title. That contention is belied by a review of MetroParks' Answer and Response Merit Brief in *Coles*. MetroParks contends that this Court in *Coles* misread *Key Trust*, ignored the parties' arguments, disregarded MetroParks' affirmative defenses, misconstrued the evidence and reached the wrong decision. That MetroParks does not like the *Coles* decision is beside the point; this Court unequivocally found that owners of the Canal Corridor through Key Trust and Buffalo Prairie had a clear legal right to their requested writ of mandamus and, thus, ownership of their sections of the Canal Corridor.

The *Coles* decision requires claim preclusion here. The *Nickoli* Relators and *Coles* Relators all acquired title from the same source and through the same series of transactions. These facts comprise a common nucleus of operative facts between the two mandamus actions. Further, the *Nickoli* Relators are in direct privity with their neighbors, the *Coles* Relators. The

only reason MetroParks added both sets of Relators as Defendants in *Key Trust* was because they all acquired ownership interests in the canal property through Key Trust. Moreover, the *Key Trust* Defendants' claim of ownership through Key Trust was litigated in *Coles*. Had this Court held in *Coles* that Key Trust did not convey a valid ownership interest to those Relators, the *Nickoli* Relators would have been bound by that adverse decision. Privity is broadly defined, and, under the broad general principles of claim preclusion, the *Nickoli* Relators have privity with the *Coles* Relators to take advantage of the judgment in *Coles*. *Schachter v. Oh. Pub. Employees Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 32-34; *Johnson's Island, Inc. v. Bd. of Tp. Trustees of Danbury Tp.* (1982) 69 Ohio St.2d 241, 244, 431 N.E.2d 672.

Moreover, the *O'Nesti v. Debartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803 case is inapposite. The *Nickoli* Relators do not seek "different benefits," but the identical relief as the *Coles* Relators -- enforcement of the same property interest in the Canal Corridor through the same source of title. Because the *Nickoli* Relators would have been bound by an adverse decision in *Coles*, assert the identical claim and seek the identical relief, claim preclusion applies to grant these Relators their requested writ. *Schachter*, 2009-Ohio-1704, ¶ 32-34.

Applying claim preclusion establishes that MetroParks has taken the *Nickoli* Relators' canal property for its recreational trail. The affidavits of Mr. Hartung and each of the Relators establish that their canal property is unlawfully occupied by MetroParks. Rel. Evid. Nos. 1-21. Indeed, MetroParks does not dispute that, except for 0.9 acres of the property of the Charville Relators, the *Nickoli* Relators' canal property lies outside the Merry and Townsend tracts.¹¹

¹¹ MetroParks's claim that the Charville Trusts have failed to establish whether any of their property occupied by MetroParks lies outside the Townsend tract. Yet Mr. Hartung's Affidavit establishes that only .9 acres of the

Likewise, it admits that the trail occupies each of the Relators' 150-foot wide strip of property they acquired from Key Trust/Buffalo Prairie. Resps. Br., at 14. MetroParks also does not dispute that these strips of property lie outside the Merry and Townsend tracts (except 0.9 acres of the 7.8 acre Charville Trusts' strip). *Id.* Thus, as to the Relators South of Mason Road (Nickolis, Charville Trusts, Landoll Trust and Doug Hildebrand), MetroParks concedes that if the Relators have a valid and enforceable interest in their respective 150-ft wide strip of canal property, then MetroParks has seized and occupied that property with its trail.

As to North of Mason Road, MetroParks suggests that "the Canal Corridor and 150-foot Strip are not in all respects the same property." Resps. Br. at 13. Although not entirely clear, MetroParks appears to argue that not all of the 150-foot wide strip was owned by the Canal Company. Specifically, it now claims that North of Mason Road, much of the rail line "does not follow the Canal Corridor," which it defines as the Canal "Towpath." Thus, according to MetroParks, since the 150-foot wide strip is tied to the centerline of the railroad, it does not all fall within the property owned by the Canal Company – the Towpath. *Id.* Apparently, that means to MetroParks that some Relators North of Mason did not acquire parcels occupied by the trail.

This convoluted argument must be rejected outright as contradicted by the Order of Sale and Receiver's Deed in the 1904 Dissolution Action, which establishes that the canal property is a 150-ft wide strip of property with its centerline being the centerline of the 66-ft wide strip of railroad right of way from the village of Milan to the village of Huron – which includes all of Relators' Canal Corridor property. Accordingly, since MetroParks admits it occupies the 66-ft

Charville Trusts' 7.8 acre tract of *canal property* lies within the Townsend tract. Rel. Evid. No. 20, at ¶¶ 13-14. The 66-ft wide rail corridor is more than .9 acres and, thus, extends beyond the Townsend tract on the Charville Trusts' 150-ft wide canal property. This point is confirmed by the legal description for the Charville Trusts' deed, which describes the railroad on Charville Trusts' canal property as crossing not only the Townsend tract, but the "Ward Tract." Ex. A to Rel Evid. Nos. 3-5.

wide rail corridor and the rail corridor lies within the Canal Company's 150-ft wide strip, including North of Mason, all Relators North of Mason own canal property unlawfully seized by MetroParks. This conclusion is consistent with this Court's holding in *Coles* that Edwin and Lisa Coles had a valid ownership interest in the 66-ft wide railroad right of way on their home parcel North of Mason Road through their acquisition of the 150-ft wide strip from Key Trust. Likewise, the conclusion is consistent with the Court's holding in *Coles* that, as to North of Mason Road, MetroParks built the trail on "pertinent canal corridor property." *Coles*, 2007-Ohio-6057, ¶ 55. Thus, this Court concluded correctly that the Canal Corridor and rail corridor were co-terminous North of Mason Road.

Further, the undisputed evidence establishes that the 150-foot wide strip of canal property acquired by the Relators North of Mason Road is co-terminous with the Milan Canal and Towpath. MetroParks' sole claim is that parts of the trail North of Mason Road are more than 150 feet from the east bank of the Huron River and, thus, were not within the Towpath of the Canal. That argument is rebutted by the stipulated fact in the Huron Municipal Court Forcible Entry Action that MetroParks planned to construct its path from Milan to Lake Erie along "the former towpath of the Milan Canal Company along the Huron River" and that "[t]he towpath property became the railroad right of way where a railroad was operated for many years." Rel. Evid. No. 21, 2nd *Coles* Aff., Ex. H.¹² The railroad company, like MetroParks, was a party to the Forcible Entry Action and both stipulated to that admission.

As in *Coles*, Relators here have submitted testimony of professional engineer and surveyor Daniel Hartung, along with a 2000 survey he performed (as well as Mr. Hartung's affidavit from *Coles*). Rel. Evid. No. 20. Relators also submit a 1996 Map of the Forbes Tract

¹² See *infra*, at 17, establishing why the stipulations are binding admissions on MetroParks.

prepared by Mr. Hartung (Ex. A to Second Affidavit of Hartung attached to Motion for Leave to Supplement Record) and his survey of Rick and Carol Rinellas' section of canal property (Rel. Evid. Nos. 14, 15, at Ex. A). In his first affidavit, Mr. Hartung states unequivocally that the trail lies within the 150-foot strip of canal property conveyed to each of the Relators through Key Trust. Rel. Evid. No. 20, ¶ 15-18.¹³ With his second affidavit, Mr. Hartung testified that the railroad is immediately adjacent to the east bank of the Huron River on the pertinent property of the Steineres, Michael Meyer, Cheryl Lyons, Donna Rasnick, Maria Sperling the Rinellaes. Second Affidavit of Hartung, at ¶ 3-5. The railroad valuation map Mr. Hartung attached to his second affidavit confirms that the rail line ran immediately adjacent to the east bank of the Huron River on these Relators' property. *Id.* at Ex. A. MetroParks has not offered any competent evidence to refute Mr. Hartung's professional work and opinion.¹⁴

The only rebuttal evidence MetroParks comes forward with is amateur historian David Berckmueller's vague statement that "much of the Railway Line" is not on the "Milan Canal -- Towpath Section." Resps. Evid. B, ¶ 18. Berckmueller did not state that the railroad line was not on the towpath that traverses the Relators' properties. In contrast, Mr. Hartung, the professional surveyor and engineer, and the Relators who have lived on the property, many for decades, all have testified by affidavit that the former railroad right of way *is* within the former canal corridor on their property. Rel. Evid. Nos. 1-20. Mr. Hartung has also submitted both his 2000 survey and 1996 map and the railroad valuation maps establishing that the former railroad

¹³ MetroParks claims that Mr. Hartung did not attest that the 150-foot strip of land shown on the survey is the Canal Corridor. This is false. Mr. Hartung clearly attests that the Huron River Greenway lies within the properties of the Relators they acquired from Key Trust, i.e., their strips of the canal corridor. Rel. Evid. No. 20, at ¶ 15-18.

¹⁴ This Court has already relied on Mr. Hartung's professional work. For each of the conveyances of canal property to the *Nickoli* Relators, Mr. Hartung prepared legal descriptions, including for Edwin and Lisa Coles' section of canal property on their home parcel North of Mason Road. It was the Coles' property in that legal description that the Court found was encumbered by the recreational trail. Rel. Evid. No. 21, at Affidavit of Daniel Hartung.

right of way is within the former Canal Corridor on the Relators' property North of Mason Road. Rel. Evid. No. 20 at Exs. C, D; Motion for Leave at Hartung Aff., at Exs. A, B.

Finally, MetroParks' surveyor, Thomas Simon, does not in his affidavit identify which, if any, of the Relators' sections of the canal property are supposedly not co-terminous with the towpath. MetroParks could have had Mr. Simon survey the trail and determine if the rail line, and thus, the Relators' 150-ft wide strips of property were more than 150-ft from the bank of the Huron River. It chose not to do so.

In sum, the evidence is uncontradicted that the Canal and Towpath and 150-ft wide strips of canal property acquired by the Relators are co-terminous through: (1) the affidavit of Mr. Hartung; (2) the Relators' affidavits; (3) the railroad and MetroParks' stipulated facts in the Forcible Entry Action; and (4) this Court's own conclusion in *Coles*.

Response to Proposition of Law No. 11: The Issue Of Whether Successors To Key Trust Acquired A Valid And Enforceable Interest From Key Trust Has Been Actually Decided And In Favor Of The *Nickoli* Relators.

This Court held in *Coles* that the *Key Trust* Defendants acquired an ownership interest that is valid and enforceable. That holding, at the very least, is issue preclusion as to the *Nickoli* Relators' ownership interest in the Canal Corridor. The validity of Key Trust's title was an issue fully litigated in *Coles* and conclusively determined by this Court. The 1904 Dissolution Action, and its Order of Sale and Receiver's Deed, were before this Court in *Coles*. MetroParks had the opportunity to dispute the import of the 1904 dissolution of the Canal Company and subsequent sale of its property. In fact, as demonstrated by its Motion for Reconsideration in *Coles*, MetroParks understood that the validity of Key Trust's title and the import of the Canal Company's dissolution and sale of its property were issues passed upon and determined by this Court. SE-44.

Further, the issue of whether MetroParks constructed its recreational trail in the canal property of the *Key Trust* Defendants was an issue considered and determined in *Coles*. This Court held that MetroParks physically invaded and occupied the trail on the *Coles* Relators' sections of the canal property. In fact, in claiming that the 1881 Lease covered the entire Canal Corridor South of Mason Road, MetroParks conceded that it built its trail on all canal property South of Mason Road. As to North of Mason Road, this Court held that MetroParks built the trail on "pertinent canal corridor property." *Coles*, 2007-Ohio-6057, ¶ 55. Thus, this Court concluded correctly that the Canal Corridor and rail corridor were co-terminous North of Mason Road.

MetroParks tries to side-step issue preclusion now by claiming that the *Nickoli* Relators are not in privity the *Coles* Relators. As established above, the two sets of Relators are indeed in privity, but regardless privity is not a requirement for issue preclusion. *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 367, 544 N.E.2d 878 (citing *Wright v. Schick* (1938) 134 Ohio St. 193). All that is required is that the *Nickoli* Relators could have entered the proceeding. *Id.* They were *Key Trust* Defendants and owners of canal property through the same source of title as the *Coles* Relators. In addition, MetroParks constructed and operates its recreational trail on their canal property. As such, the *Nickoli* Relators would have been bound by an adverse ruling on whether Key Trust had a valid ownership interest that it could convey to the Key Trust Defendants. That issue preclusion should apply is consistent with Civ. R. 20's requirements for permissive joinder of parties.¹⁵

Response to Respondents' Proposition of Law No. 13: MetroParks Is Precluded From Denying Facts Previously Alleged To Be True In The Huron Municipal Court.

¹⁵ "All persons may join in one action, as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action" (emphasis added).

The stipulations in the Forcible Entry Action preclude MetroParks from arguing that the Canal Corridor and the railroad right of way are not co-terminous. MetroParks cites *United States v. Young* (8th Cir. 1986), 804 F.2d 116, 118 and *Otherson v. Dept. of Justice* (D.C. Cir. 1983), 711 F.2d 267, 274. Those out-of-state cases do not even involve a stipulation of facts. *Young*, 804 F.2d at 117-18; *Otherson*, 711 F.2d at 275.

In any event, MetroParks is estopped from denying facts they previously alleged to be true in a judicial proceeding. See *Shifflet v. Thompson Newspapers (Ohio), Inc.* (1982), 69 Ohio St.2d 179, 187, 431 N.E.2d 1014. MetroParks represented to the Huron Municipal Court that: (1) it had “a plan to construct and maintain a bicycle and walking path from Milan to Lake Erie along the former towpath of the Milan Canal Company along the Huron River...;” (2) that “[t]he towpath property became the railway right of way...;” and (3) that by the late 1980s, the railroad had abandoned the railroad right of way. These stipulated facts demonstrate that MetroParks constructed its recreational trail on the *Nickoli* Relators’ sections of the Canal Corridor, which are part of the abandoned railroad right of way. MetroParks cannot now deny those facts.

Response to Respondents’ Proposition of Law No. 14: MetroParks’ Position Is Impermissibly Inconsistent With Its Position Taken In Key Trust.

Notwithstanding the preclusive effect of *Coles* and *Key Trust*, MetroParks is also estopped from disputing Relators’ property interests by claiming that the Canal Company did not own the entire Canal Corridor. As MetroParks concedes, “[t]he 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.” Resps. Br., at 41-42. Further, where a party alleges a matter of fact in a pleading, that pleading is an admission. See *Shifflet*, 69 Ohio St.2d at 187. Because MetroParks previously asserted rights over Relators’ property through the Lease,

which derived from the Canal Company, MetroParks cannot now challenge the Relators' property rights, which also derive from the Canal Company.

In its Merit Brief, MetroParks confuses the courts' decisions in *Key Trust* with its own position taken in that litigation; the mere fact that *Key Trust* held that the Lease was limited to the Merry and Townsend tracts does not mean that MetroParks sought only to assert property rights under the Lease in just those two tracts. To the contrary, in *Key Trust*, MetroParks contended that it had the right to operate a recreational trail over *each* of the Defendant's property, and successfully obtained a TRO based on those contentions. MetroParks cannot now use hindsight to escape admissions of material fact and its legal position in prior litigation.

Response to Respondents' Proposition of Law No. 15: MetroParks Cannot Assert Rights In Property Interests That Were Previously Abandoned By The Railroad.

Both *Key Trust* and *Coles* conclusively establish that the *only* ownership interest that MetroParks has is a lease interest in the Merry and Townsend tracts. Moreover, MetroParks cannot have any right in the right of way that was abandoned by the railroad. MetroParks, however, in its Brief raises arguments suggesting otherwise. Those arguments lack merit.

MetroParks' contention that abandonment is not before the Court is confounding. The Complaint specifically alleges that the "rail corridor was abandoned." Compl., ¶ 13. MetroParks also contends that, because Relators' deeds do not contain a reverter clause, any abandonment by the railroad has no effect on Relators' property rights. MetroParks is mistaken. Because the railroad held only a right of way easement, by operation of law, abandonment reverts possession to the owner of the servient estate. See *Rieger v. Penn Central Corp.* (May 21, 1985), 2nd Dist. No. 85-CA-11, 1985 WL 7919 (quoting *Junction Railway Co. v. Ruggles* (1857), 7 Ohio St. 1). Further, MetroParks incorrectly suggests that *Key Trust* precludes a suggestion of abandonment by the railroad. To the contrary, *Key Trust* confirms abandonment outside the Merry and

Townsend tracts.¹⁶ As previously discussed, *Key Trust* determined that MetroParks, as successor to the railroad, had *no* rights in the Canal Corridor outside the Merry and Townsend tracts. MetroParks' contention that the railroad did not abandon the right of way, and that Relators are precluded from arguing abandonment, is entirely inconsistent with the ultimate holding in *Key Trust*.

The evidence establishes abandonment. Rail traffic on the corridor ceased in the 1980s. After receiving approval from the ICC to abandon the line, the railroad removed the rails and ties, and allowed the property to deteriorate. Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9-12. In addition, several landowners built structures on the abandoned railroad corridor, such as decks and stairs. *Id.* The evidence also establishes an intent to abandon. The railroad sought and obtained approval to abandon the line, and in 1996, confirmed that the line had in fact been abandoned in 1989. Rel. Evid., No. 21, Stimpert Aff., Ex. A; see also Rel. Evid., No. 21, 2nd Coles Aff., ¶ 9. Further, in the Forcible Entry Action, seeking to avoid an eviction judgment, the railroad stipulated that “[t]here was and is no intention that any railroad company intended to reactivate the right of way for railroad transportation.” Rel. Evid., No. 21, 2nd Coles Aff., Ex. H, pg. 2. Therefore, unlike the factual situation in *Rieger*, there is more than just a removal of rails and ties to demonstrate abandonment. Moreover, like *McCarley v. O.C. McIntyre Park Dist.* (Feb. 11, 2000), 4th Dist. No. 99 CA 07, 2000 WL 203997, * 10-12 , the abandonment occurred *before* the railroad attempted to transfer to MetroParks. Thus, consistent with *Key Trust* and *Coles*, MetroParks did not obtain any interest in the property. Instead, by operation of law, ownership reverted to the *Nickoli* Relators.

¹⁶ *Key Trust* decided that MetroParks' property rights in the Canal Corridor were limited to leasehold rights in the Merry and Townsend tracts and that, as the Lease would terminate on abandonment, the railroad had not abandoned the canal property subject to the 1881 Lease.

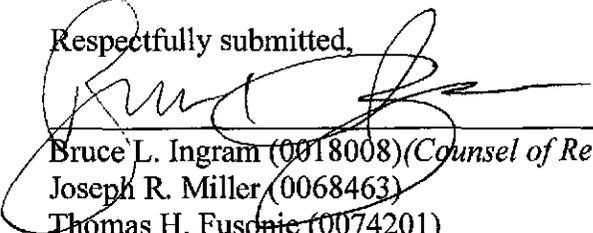
Response to Respondents' Proposition of Law No. 16: MetroParks Operation Of The Recreational Trail Imposes An Added Burden On The Nickoli Relators For Which Compensation Is Due.

MetroParks does not dispute that its recreational trail imposes added burdens upon landowners adjacent to the railroad corridor, but instead argues that Ohio law permits the use of a railroad easement for a public trail. Notwithstanding the fact that this line of attack is precluded by *Coles*, MetroParks' argument misses the point. Whether a recreational trail is a permitted use, and therefore does not constitute an abandonment, is a distinct issue from whether that trail imposes additional burdens. See *Preseault v. U.S.* (Fed. Cir. 1996), 100 F.3d 1525, 1543. Because MetroParks' use of the right of way as a recreational trail imposes added burdens to the *Nickoli* Relators, such use amounts to a taking without just compensation.

Conclusion

For the reasons above and those in the Relators' Merit Brief, this Court should issue a writ of mandamus ordering Respondents to commence appropriation actions to compensate all *Nickoli* Relators for MetroParks' unlawful taking of their sections of canal property. Finally, because of MetroParks' wanton disregard for this Court's writ in *Coles*, the writ of mandamus should order MetroParks to commence such actions within sixty days of this Court's mandate.

Respectfully submitted,



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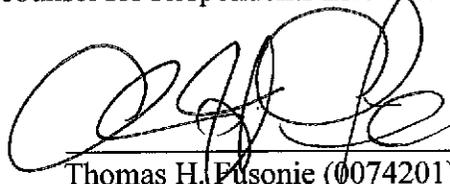
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Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 24th day of June, 2009 via hand delivery, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and via regular U.S. mail, postage prepaid, upon John D. Latchney, Tomino & Latchney, LPA, 803 East Washington Street, Suite 200, Medina, Ohio 44256, counsel for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks.



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