

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

AMERICAN CANADIAN EXPEDITIONS,  
LTD, a West Virginia corporation,

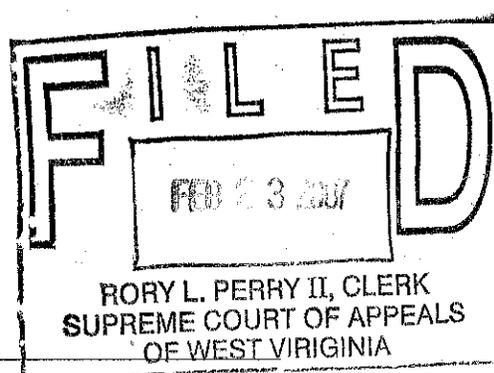
Appellant,

v.

THE GAULEY RIVER CORPORATION,  
a West Virginia corporation, and  
MOUNTAIN RIVER TOURS, INC., a  
West Virginia corporation,

Appellees.

Appeal Number: 33246  
Civil Action Number: 04-C-67H



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BRIEF OF AMERICAN CANADIAN EXPEDITIONS, LTD,  
a West Virginia corporation, Appellant

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Respectfully Submitted:

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Appellant,

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v.

THE GAULEY RIVER CORPORATION,  
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MOUNTAIN RIVER TOURS, INC., a  
West Virginia corporation,

Appellees.

**APPELLANT'S BRIEF**

Now comes Appellant, American Canadian Expeditions, LTD, a West Virginia corporation, Plaintiff below, and presents the following as and for its Appeal Brief in support of its appeal from the order of the Circuit Court of Fayette County entered on May 18, 2006.

STATEMENT OF THE CASE

Appellant American Canadian Expeditions filed a civil proceeding in the Circuit Court of Fayette County, West Virginia, to recover monetary damages for breach of an Option Agreement by Appellees who removed standing timber from the real estate which was the subject of the Option Agreement during the option period. The Circuit Court of Fayette County entered an Order on May 18, 2006 granting a Motion To Dismiss Or For Summary Judgment by Appellee, Gauley River Corporation, dismissing the Appellant's Complaint with prejudice as to the Appellees, Gauley River Corporation and Mountain River Tours, and implicitly denying a Motion For Summary Judgment by Appellant.

## STATEMENT OF THE FACTS OF THE CASE

Appellant and Appellees entered a real estate Option Agreement on May 1, 2002 having a term of three (3) years. Appellee The Gauley River Corporation entered into a timber contract to timber a portion of the same real estate subject to the Option on July 17, 2002, without notifying Appellant. Appellees received payment for the timber removed from the real estate in the amount of Forty-One Thousand Eight Hundred Eighty-Four Dollars and Nine Cents. (\$41,884.09), which represented approximately one half (1/2) of the amount received by the timber company, Bennett Logging, for the timber. As set forth in Plaintiff's verified complaint, the timbering operation further damaged the surface to the real estate itself. Appellee The Gauley River Corporation did not pay Appellant American Canadian Expeditions, LTD for the timber or reduce the sale price for the real estate. During the pendency of this proceeding, Appellant American Canadian Expeditions, LTD exercised its Option on March 2, 2005, within the Option period, asserting in writing by counsel, prior to the closing, that it did not waive any claim for damages.

Appellant's verified Complaint alleged in paragraph 3 as follows:

"By Option Agreement dated May 1, 2002, executed by Paul W. Breuer, acting as President for The Gauley River Corporation and as President for Mountain River Tours, Inc., and by Jerry E. Cook, acting as President of American Canadian Expeditions, LTD, and as Vice-President of Gauley Outdoor Center, Inc., Defendants granted to Plaintiff herein the exclusive option, right and privilege of purchasing certain tracts of real estate more particularly described in the Option Agreement, a copy of which is attached hereto as Exhibit 1, for the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), payable Seventy-Five Thousand Dollars (\$75,000.00) upon the execution and delivery of the Option and One Hundred Seventy Five Thousand Dollars (\$175,000.00) upon execution of closing documents within three (3) years of the date of the Option, which tracts contained substantial standing timber, being a part of the real estate as a matter of law."

Appellees admitted the allegations of paragraph 2 of their Answer, except: "The defendant denies the allegation that the plaintiff has a right as a matter of law to any timber on the tracts." Appellees further admitted in paragraph 3 of their Answer that "... some timbering was conducted but deny the allegation that the timbering operation diminished the value of the subject real property."

The Option Agreement dated May 1, 2002, prepared by Appellees' counsel, was executed by each party on that same date at Appellees' counsel's office. At the time of execution of the Option Agreement, Paul Breuer and Jerry Cook, President of Appellant American Canadian Expeditions, LTD, discussed the easement, minerals and timber and Breuer assured Cook he was not going to timber the real estate, or convey any further easements over the property. Cook asserted that he expected to receive the property upon exercise of the Option without any diminishing of its value. See Jerry Cook Affidavit, attached to Plaintiff's Motion For Summary Judgment as Exhibit 4, and hereto as Attachment 1.

In August 2002, Ernest Kincaid, Vice President of Appellant American Canadian Expeditions, LTD, questioned Breuer about the timbering and told him American Canadian Expeditions, LTD considered it a problem. See Ernest Kincaid Affidavit, attached to Plaintiff's Motion For Summary Judgment as Exhibit 10, and here to as Attachment 2. Breuer responded with an e-mail dated August 15, 2002, acknowledging Kincaid's concern. See Attachment to Ernest Kincaid Affidavit, attached to Plaintiff's Motion For Summary Judgment as Exhibit 10. Nevertheless, Defendants proceeded with the timbering operation over Plaintiff's oral objection.

Suit was filed by Appellant on February 20, 2004, prior to exercise of the option, or expiration of the option period. After argument on Defendants' Motion to Dismiss before the Circuit Court of Fayette County, the Honorable Charles Vickers presiding, Plaintiff on March 1, 2005, through counsel, gave notice of exercise of the Option to The Gauley River Corporation, received by The Gauley River Corporation by certified mail on March 2, 2005, which letter notice is attached to Plaintiff's Motion For Summary Judgment as Exhibit 11. Further, by letter of counsel dated March 14, 2005, to Lynn Pollard, counsel for The Gauley River Corporation, attached to Plaintiff's Motion For Summary Judgment as Exhibit 12, American Canadian Expeditions, LTD informed Appellees as follows:

"Exercise of the Option does not, and is not intended to, waive any claims for damages against the Appellees to the subject real estate, and for the removal of timber".

By letter dated March 29, 2005, attached to Plaintiff's Motion For Summary Judgment as Exhibit 13, the Appellees asserted that the exercise of the Option would render the lawsuit "moot". Once again, by letter dated March 30, 2005, attached to Plaintiff's Motion For Summary Judgment as Exhibit 14, Plaintiff stated that it "... does not intend to waive, and by exercise of its option and closing thereon, does not waive any rights it may have for damage to the property as a result of the actions of the Appellees."

Closing on the purchase of the subject real estate took place on April 1, 2005, and American Canadian Expeditions, LTD acquired a deed from The Gauley River Corporation dated April 1, 2005, of record in Deed Book 611, at Page 230, attached to Plaintiff's Motion For Summary Judgment as Exhibit 15, paying therefor the full consideration of One Hundred

Seventy-Five Thousand Dollars (\$175,000.00), which amount was received and accepted subject to the matters set forth in this lawsuit and Appellant's assertion that it had no intention of waiving any rights or claims for damages.

#### ISSUES PRESENTED

1. Whether standing timber is part of the real estate.
2. Whether an option to purchase real estate grants *in personam* rights for which damages may be recovered for timbering and other damage to the real estate by Optionor during the option period.
3. Whether an Optionee is required to "formally object" to actions by an Optionor which Optionee believes damage the subject of the option.
4. Whether an option to purchase real estate ripens into an executory contract upon its exercise, relating back to the date of the option.
5. Whether the holder of an executory contract is a beneficial owner of the real estate which is the subject of the contract, and is entitled to treble damages under West Virginia Code §61-3-48a.

#### ASSIGNMENTS OF ERROR

1. The Circuit Court erred as a matter of law in Finding of Fact No. 14 that: "Having no legal or equitable interest in such real estate prior to March 1, 2005, the Plaintiffs have no valid or justifiable claim to the proceeds of such sale of timber".

2. The Circuit Court erred as a matter of law in Finding of Fact No. 21: "... that plaintiff has failed to carry his burden of proof and establish a *prima facie* case of damages against Gauley

River, as he has failed to make a sufficient showing that ACE had either a legal or equitable interest in the real estate in question at the time timber was removed and sold by Gauley River" was dispositive of the case.

3. The Circuit Court erred as a matter of law in Finding of Fact No. 12: "That the granting of an exclusive right to purchase to ACE was not '*in rem*' but was '*in personam*' in nature, vesting neither legal or equitable title in such real estate. While Gauley River may have been morally or ethically obligated to notify ACE of the timbering operation in 2002, it was not legally obligated to do so, under the terms and conditions set forth in option contract."

4. The Circuit Court erred as a matter of law in Finding of Fact No. 13: " That the exercise of its right to purchase by ACE on March 1, 2005, does not relate back to the date of option, that is to say, May 1, 2002."

5. The Circuit Court erred as a matter of fact and law in Finding of Fact No. 6 in which the Court stated that: "... The Defendants never received any formal, written objections from ACE about the logging once it began. (Breuer Deposition, p. 24, lines 16-18)", and in Finding of Fact No. 7 that: "... No representative of ACE, however, raised any formal, written objection to the Defendants about the logging activities".

#### ARGUMENT

##### Standing timber is part of the real estate.

It is well recognized in the law that "growing timber is part and parcel of the land on which it stands", Pardee, et al. v. Camden Lumber Company, 70 W.Va. 68 (1910), Syllabus Pt.

1. "Standing timber, before severance, is realty and the title is in the owner of the land on which

it grows." Lange & Crist Box And Lumber v. Haught, 132 W.Va. 530 at 532, 52 S.E.2d 695 at 697 (1945).

In Elliott v. Shaffer, 30 W.Va. 347; 4 S.E. 292 (1887), in a case involving the right to redeem under a tax deed, this Court stated as follows: "... for the right to redeem is incident to every owner of the land, or of any beneficial interest therein. By his contract for the purchase of the timber he acquired an interest in the land itself; and this interest, so acquired, was real estate, of which he thus became the owner, and, as such owner, he had to redeem the same." (Emphasis added). Thus, timber is part of the real estate.

In Brown v. Crozer Land, 144 W.Va. 296, 107 S.E.2d 777 (1959), this Court stated as follows: "Where the surface of land is conveyed and no reservation is contained in the conveyance showing an interest in the land reserved to the Grantor to remove the timber, the rights to the timber are conveyed without reservation." This holding is supported by, West Virginia Code §36-3-10, which provides: "Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced."

It is clear that timber is part of the real estate; yet, Defendants' sold the timber and were, thus, unable to transfer the timber with the real estate. Appellant suffered damages when Appellee removed and sold the timber.

An option to purchase creates *in personam* rights for which damages may be recovered.

In Woodall v. Bruen, 76 W.Va. 193, 83 S.E. 170 (1915), which involved an option for the purchase of land, this Supreme Court held that an option of purchase is a personal right, not

an interest in the optioned land. In West Virginia Pulp & Paper Company, et al v. Cooper, 87 W.Va. 781, 106 S.E. 55 (1921), this Court addressed the issue of what rights an optionee holds, and stated that: "Such a contract transfers to the optionee no title to the property. His right is not *in rem*, but *in personam*." (at 59).

As set forth in 77 Am.Jur.2d, Section 33, "Vendor and Purchaser":

"An option does, however, create a right *in personam*, that is, the right to accept or reject the first offer within a limited or reasonable time in the future, during which time the offer is irrevocable and cannot be withdrawn. Moreover, an option creates rights which are valuable for a violation of which damages are recoverable, and which may be specifically enforced by the Courts. While the giving of an option to purchase does not deprive the optionor of the right during the life of the option to sell the land subject to the rights of the optionee, as such a sale to one with notice of, and subject, to the option, does not constitute a breach of the option contract, any acts or omissions of the optionor which effectively prevent the optionee from the full exercise of the rights conferred upon the latter by the option will, in a proper case, render the optionor liable to the optionee in damages for breach of contract." (Emphasis added).

Further, as set forth in 92 C.J.S. Vendor and Purchaser, § 98, P.P. 147 (2000):

"The Optionee does not, by the Option, get lands or an agreement that he or she shall have lands, nor does he or she presently have a contract of purchase. However, he or she gets something of value, or rights that are valuable, and for the violation of which damages may be recovered, namely the right to call for and receive the lands if he or she so decides. (Emphasis added)

In Rutherford v. MacQueen, 111 W.Va 353, 161 S.E. 612 (1931), a Lessee held an option to a particular leasehold property, which was damaged by fire. The Optionor had maintained fire insurance proceeds on the building. Although the case held that beneficial title

to the property was in the Optionor at the time of fire, and, therefore, the Optionor was entitled to the proceeds of the insurance which he had purchased, the Court specifically held that the Lessee/Optionee should receive credit against the purchase price for the repairs he made as a result of the damages caused by the fire. In the present case, Appellant has at minimum a claim for damages *in personam* against the Appellees for the value of the timber and damage to the surface of the real estate, which damages were not caused by fire or other act of God, but were caused by the direct and intentional actions of the Appellees.

Likewise, an American Law Report annotation found at 17 ALR3d 976, entitled "Tenant's Right To Damages For Landlord's Breach Of Tenant's Option To Purchase", Supp. Page 119, addresses damages in tenants' options contained in leases, and specifically defines "damages" for the annotation as follows:

" 'Damages', as used in the present title, has been construed broadly to mean pecuniary, as distinguished from specific, relief." (Emphasis added).

As set forth in the annotation, some jurisdictions provide for damages in addition to recovery of the land itself, some provide for damages in lieu of recovery, and Section 4 of the annotation deals with the measure and elements of damage, which would be the subject of jury instructions in the event of a trial.

Further, Corbin on Contracts, Section 11.16 "Option Holder's Interest In Land - Rights Against Third Parties", states:

"...the holder of an option to buy land has a conditional right to a conveyance, a power to turn that right into an unconditional right to immediate conveyance by performing the conditions, an

immunity from revocation by the option giver, and the legal privilege of performing or not performing the conditions at the holder's option. During the agreed term of the option, the option holder has right that the option giver shall not repudiate or make performance impossible or more difficult by conveying the land to a third person. These rights are enforceable by all the usual judicial remedies, including judgment for damages, injunction, and decree for specific performance. It is beyond question that those who have bought and paid for an option on the land believe that they have something on which they can rely; they make contracts for the resale of the land, often make valuable improvements on it, and make other important changes of position as evidence of such reliance." (Emphasis added).

Appellant submits that the Circuit Court erred in finding that Appellant herein is not entitled to recover damages even if Appellant did not have legal, equitable or beneficial title at the time of the damage. The right is *in personam*, not *in rem*, and, as a matter of contract right, title is immaterial.

The Appellees do not dispute the fact that, while the real estate was subject to the Option Agreement, The Cauley River Corporation sold the standing timber thereon, without Appellant's consent, and over its oral and e-mailed objection. Appellees asserted in their Memorandum in Support of Motion to Dismiss that "the only means by which Defendants could breach the Option Agreement is either to sell the property to another or to refuse to enter into a purchase contract with Plaintiff". (Emphasis added). Selling a portion of the real estate is exactly what the Appellees did in selling the standing timber which was a part of the subject real estate. Even though Appellee subsequently conveyed the real estate to Appellant by deed, a portion thereof, i.e., the standing timber, had been removed, and therefore was not conveyed, and the property received did not have the full value it had upon execution of the Option.

Appellee also breached the agreement by damaging the surface of the real estate. Appellant contends in its verified complaint that the timber roads and removal of timber damaged the real estate. Appellee says it did not, citing the opinion of its president and a nine year old appraisal, which is immaterial and does not address the damage issue.

In addition to contract rights, exercise of the Option gave Appellant equitable title to the real estate, entitling Appellant to treble damages.

This Court addressed the effect of exercise of an option in Leslie, Moore v. Gross, 151 W.Va. 872, 157 S.E.2d 589 (1967), and stated at page 879, as follows:

"In the recent decision of this Court of Aetna Casualty And Surety Co. v. Cameron Clay Products, Inc., 151 W.Va. 269, 151 S.E.2d 305 (1966), this Court discussed the effect of an executory contract growing out of an option prior to its acceptance by the optionee. In that case the Court discussed at some length the so called "New York" or majority rule and the "Wisconsin" or minority rule. We did not accept either but based our decision upon whether the optionors still retained an insurable interest in the property under the facts of the case. Although there is a division of authority upon the question of whether the provisions of an option revert back to its date upon acceptance by the optionee by a kind of retroactive fiction or whether the option applies only from the date of the acceptance, there apparently is no conflict here or elsewhere as to the rule that when the optionee accepts the option within the time provided therein and notifies the optionor thereof equitable title passes to the property." (Emphasis added).

Under the majority or "New York" rule; upon acceptance of the option by Appellant, the option became an executory contract with equitable title retroactively passing to Appellant; that is, a "beneficial interest". Under the Wisconsin or minority rule, equitable title passes upon exercise of the Option. Appellant contends the majority rule should apply.

Appellant, by exercise of its Option, became the beneficial owner of the subject real estate, and arguably, its beneficial ownership relates back to the date of the Option and renders the Appellees liable for treble damages under West Virginia Code §61-3-48a, which provides as follows:

"Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage, or carry away or cause to be cut, damaged, or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or produce of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided." (Emphasis added.)

Appellant is not estopped from proceeding with this lawsuit, and has not waived its right to damages.

As this Supreme Court stated in Potesta, et al v. United States Fidelity and Guaranty Company, et al, 202 W.Va. 308; 504 S.E.2d 135 (1998), at page 315:

"Although the doctrines of waiver and estoppel are both grounded in equity, they differ significantly in application. To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right. Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact."

In John H. Hoffman, Receiver of Wheeler Savings and Loan Association v. Wheeler Savings and Loan Association, et al, 133 W.Va. 694; 57 S.E.2d 725 (1950), the Savings and Loan Association attempted to transfer certificates of deposit into a stock account, to which the

certificate holder protested, but the certificate holder died before instituting a suit to enforce the return of her certificates. The Supreme Court discussed waiver as follows:

"We have heretofore adverted to the fraudulent nature of this transaction on the part of the Loan Association, and the discussion on that point ... may be used with equal force on the theory of waiver. A waiver of any right has been defined as the voluntary, intentional relinquishment of a known right.

'The essential elements of a waiver, within the definitions already given, are the existence, at the time of the alleged waiver, of a right, advantage, or benefit, the knowledge, actual or constructive, of the existence thereof, and an intention to relinquish such right, advantage or benefit, voluntary choice is the very essence of waiver. It is a voluntary act which implies a choice by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on.' 56 Am Jur 113.

There must be first, the existence of the right; second, knowledge of the existence of such right; and third, voluntary intention to relinquish. The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed. Hamilton v. Republic Casualty Company, 102 W.Va. 32, 135 S.E. 259.

'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' Security Loan and Trust v. Fields, 110 Va. 827, 67 S.E. 342." Other citations omitted.

More recently, this Court affirmed these concepts in Board of Education of the County of Wood v. Airhart, et al, 212 W.Va. 175; 569 S.E.2d 422 (2002), in which this Court addressed the issue of whether educational employees employed under 240 day annual contracts, who were entitled to compensation and benefits under 261 day annual contract terms under the West Virginia Code, had waived their rights to the benefits of the 261 day contract by applying for and accepting a 240 day contract. This Supreme Court held that the acceptance of the 240

day contract did not constitute a waiver of the appellants' rights to file a grievance on the issue and seek redress. At page 429, this Court reviewed the law of waiver as set forth in the above cited cases, and in addition reviewed Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1978), in which this Court addressed whether certain applied habitability rights could be waived and concluded that they could not.

As in Board of Education of the County of Wood (employment contracts) and Teller, (real estate leases), supra, there was no intent in this case to waive appellant's rights even though the Appellants went forward with the transactions in question.

#### CONCLUSION

Appellees' actions in removing standing timber which was part of the real estate, and in damaging the surface of the real estate by building roads and otherwise disturbing the surface to real estate subject to the Option Agreement, breached the Option Agreement. Count 1 of Appellant's Complaint is the assertion of an *in personam* right to damages in accordance with the law, and is not dependent on a "beneficial interest" or equitable title. Accordingly, Appellant should have been granted summary judgment on the issue of liability on Count 1 of its Complaint which alleges breach of the Option Agreement by Appellees.

In Count III of the Complaint, Appellant alleged a beneficial ownership, based on anticipated exercise of the Option Agreement. Under the majority rule referred to in Leslie, Moore v. Gross, supra: "... the provisions of an option revert back to its date upon acceptance by the Optionee ...". The Option was subsequently exercised and the property purchased by

Appellant. Accordingly, Appellant is entitled to treble damages for the timber removed under West Virginia Code §61-3-48(a), and should have been granted summary judgment on the issue of liability in Count III of Appellant's Complaint.

Further, the Circuit Court erred as a matter of fact and as a matter of law in Findings No. 6 and No. 7 that the Appellant waived its rights by not making a formal written protest at the time of timbering. Factually, the affidavit of Ernie Kincaid, Vice President of Appellant, and the responding e-mail from Paul Breuer of Appellees, show a protest in August 2002, and at no time did Appellant waive its rights.

Appellant did not waive or release its rights under this lawsuit by paying for and accepting a deed to the subject real estate, even though the real estate conveyance was deficient because of the missing timber and damage to the surface of the real estate. At the time of exercise of the option, Appellant had asserted its rights in this lawsuit, and asserted affirmatively in writing prior to the closing its intention not to waive any such rights. As in Board of Education of the County of Wood v. Airhart, supra, in which the acceptance of a deficient contract did not constitute a waiver by the Wood County employees, the acceptance of a deficient conveyance from The Gauley River Corporation was not a waiver of Appellant's contract rights.

#### RELIEF REQUESTED

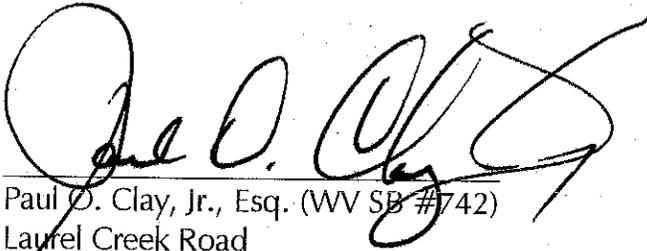
Appellant requests that this Supreme Court reverse and overrule the ruling of the Circuit Court granting the Appellees' Motion To Dismiss Or Motion For Summary Judgment, and implicitly denying the Appellant's Motion For Summary Judgment. Appellant further requests

that this Supreme Court enter an Order directing the Circuit Court to grant Appellant's Motion For Summary Judgment as to liability on each Count of Appellant's Complaint.

AMERICAN CANADIAN EXPEDITIONS, LTD,  
a West Virginia corporation

BY COUNSEL

Respectfully submitted:



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AUTHORITIES RELIED UPON

Woodall v. Bruen, 76 W.Va. 193, 83 S.E. 170 (1915) ..... pg. 6

West Virginia Pulp & Paper Company, et al v. Cooper,  
87 W.Va. 781, 106 S.E. 55 (1921) ..... pg. 6

77 Am Jur 2d, Section 33 ..... pg. 6

92 C.J.S. Vendor and Purchaser, § 98, P.P. 147 (2000) ..... pg. 6

Rutherford v. MacQueen, 111 W.Va 353, 161 S.E. 612 (1931) ..... pg. 7

American Law Report annotation found at 17 ALR3d 976, entitled  
"Tenant's Right To Damages For Landlord's Breach Of Tenant's  
Option To Purchase", Supp. Page 119 ..... pg. 7

Corbin on Contracts, Section 11.16 "Option Holder's Interest In Land  
- Rights Against Third Parties" ..... pg. 8

Pardee, et al. v. Camden Lumber Company, 70 W.Va. 68 (1910), Syllabus Pt. 1 ..... pg. 8

Lange & Crist Box And Lumber v. Haught, 132 W.Va. 530 at 532,  
52 S.E.2d 695 at 697 (1945) ..... pg. 8

Elliott v. Shaffer, 30 W.Va. 347; 4 S.E. 292 (1887) ..... pg. 9

Brown v. Crozer Land, 144 W.Va. 296, 107 S.E.2d 777 (1959) ..... pg. 9

West Virginia Code §36-3-10 ..... pg. 9

West Virginia Code §61-3-48a ..... pg. 9

Leslie, Moore v. Gross, 151 W.Va. 872, 157 S.E.2d 589 (1967),  
and stated at page 879 ..... pg. 10

Aetna Casualty And Surety Co. v. Cameron Clay Products, Inc.,  
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202 W.Va. 308; 504 S.E.2d 135 (1998), at page 315 ..... pg. 11

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Hamilton v. Republic Casualty Company, 102 W.Va. 32, 135 S.E. 259 ..... pg. 12

Security Loan and Trust v. Fields, 110 Va. 827, 67 S.E. 342 ..... pg. 12

Board of Education of the County of Wood v. Airhart, et al, 212 W.Va. 175; 569 S.E.2d 422 (2002) ..... pg. 12

Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1978) ..... pg. 12

Attachment 1

STATE OF WEST VIRGINIA,

COUNTY OF FAYETTE, ss:

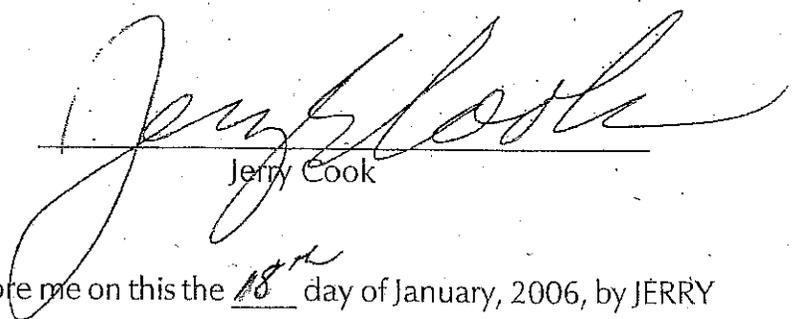
AFFIDAVIT

I, Jerry Cook, being first duly sworn, do hereby state and affirm that I am President of American Canadian Expeditions, LTD, and that as President I executed an Option Agreement between The Gauley River Corporation and Mountain River Tours, Inc. and American Canadian Expeditions, LTD on May 1, 2002 at the office of Attorney Lynn Pollard of the law firm of Hamilton, Burgess, Pollard, Hewitt and Salvatore, which document was prepared by Mrs. Pollard on behalf of The Gauley River Corporation and Mountain River Tours, Inc.

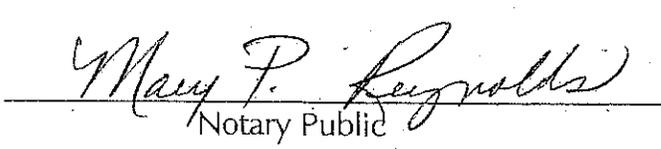
Paul W. Breuer, President of the Gauley River Corporation and Mountain River Tours, Inc., discussed and negotiated the Option with me over approximately a one (1) year period prior to the signing of the Option. At the time of execution of the Option Agreement, I specifically asked if there would be any other rights of ways granted or sold across the subject real estate. I also asked about timber and mineral rights and Paul Breuer said that George Legg had cut some hemlock in exchange for dozer work on the access road, and that was all Breuer planned to do. I then asked Lynn Pollard if the documents protected American Canadian Expeditions, LTD from the property being mined, timbered or rights of ways or land being sold, to which she responded that it did. I stated that I just wanted to make sure that when American Canadian Expeditions, LTD exercised the Option, we get the property as is without any diminishing of its value.

We also executed a Memorandum of Option, and Deed of Easement, and I understood that Lynn Pollard would record both.

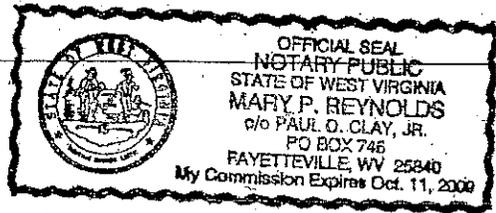
At no time prior to execution of the Option Agreement on May 1, 2002, did Paul Breuer, or any other representative of either of the Defendants, tell me that it was the intention of The Gauley River Corporation to timber the subject real estate prior to our exercise of the Option Agreement.

  
\_\_\_\_\_  
Jerry Cook

The foregoing was witnessed before me on this the 18<sup>th</sup> day of January, 2006, by JERRY COOK.

  
\_\_\_\_\_  
Notary Public

My commission expires: 10-11-09



Attachment 2

STATE OF WEST VIRGINIA,  
COUNTY OF FAYETTE, ss:

AFFIDAVIT

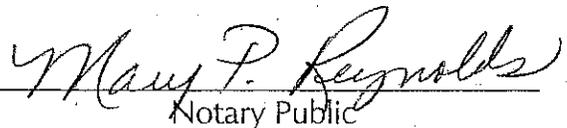
I, Ernest Kincaid, being first duly sworn, do hereby state and affirm that I am Vice-President of American Canadian Expeditions, LTD. After execution of the Option Agreement dated May 1, 2002, between the Gauley River Corporation and Mountain River Tours, Inc. and American Canadian Expeditions, LTD at the office of Attorney Lynn Pollard of the law firm of Hamilton, Burgess, Pollard, Hewitt and Salvatore, I learned that timbering activities were taking place on the real estate which was the subject matter of Option. I discussed the matter with Paul Breuer, President of The Gauley River Corporation and Mountain River Tours, Inc. and told him that the timbering of the Option Property was a problem. Breuer told me that he had discussed the matter with his lawyer and said that he would have to discuss the matter further with his attorney. I then sent an e-mail to Mr. Breuer regarding our protest, to which he responded, a copy of which response is attached hereto.

At no time prior to execution of the Option Agreement on May 1, 2002, did Paul Breuer, or any other representative of either of the Defendants, tell me that it was the intention of the Gauley River Corporation to timber the subject real estate prior to our exercise of the Option Agreement.



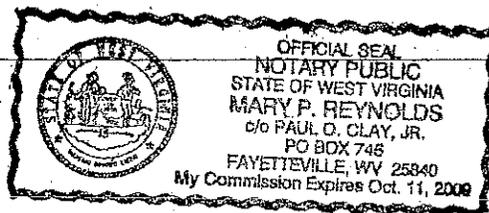
Ernest Kincaid

The foregoing was before me on this the 18<sup>th</sup> day of January, 2006, by ERNEST KINCAID.

  
Notary Public

My commission expires: 10-11-09

C:\old\2006\jan\ace-kincaid affi.wpd



**Ernie Kincaid**

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**From:** "Paul Breuer" <paulb@raftmrt.com>  
**To:** "Ernie Kincaid" <Ernie@aceraft.com>  
**Sent:** Thursday, August 15, 2002 10:51 AM  
**Subject:** Outhouse, logging and etc

Ernie,

I hope all is going well in ACE Land. As you are, we are gearing up for Gauley. One of our plans is to build an outhouse at Iron ring similar to yours at Sweets Falls. Can I copy your plans? Please forward a copy if you can - Thanks. buy you a Beer!!

FYI I am currently looking at using a two stage portable spa blower to inflate rafts? yes inflate rafts - cost is about \$90 vs \$500? I will keep you posted.

On logging - I have talked with Lynn Pollard and she is confused about your concerns - but I assure you that all logging is being done to Best Forrestry practices and we will be reseeding and we are only select cutting 16inch or larger the 72 ac on Goldie Walk-Ups former property and then only out of sight except the landing which will be reclaimed and replanted. Plus we are going to haul in two loads for gravel for the road. Let me know if you all want to meet for Lunch and talk.

Anything else going on? How is Gauley season looking for you?

Yours in Rapid Fun Whitewater  
Paul Breuer  
President  
Mountain River Tours  
Country Road Cabins  
1-888-822-1FUN(386)

8/16/02

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

AMERICAN CANADIAN EXPEDITIONS,  
LTD, a West Virginia corporation,

Appellant,

Appeal Number: 33246

Civil Action Number: 04-C-67B

v.

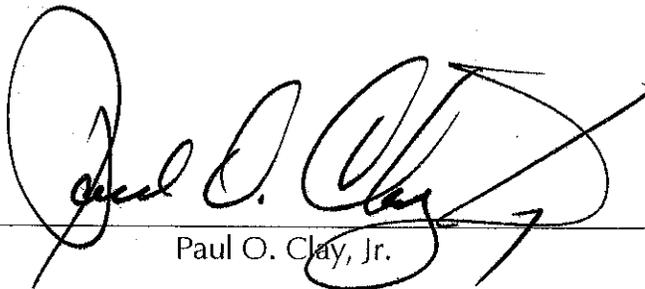
THE GAULEY RIVER CORPORATION,  
a West Virginia corporation, and  
MOUNTAIN RIVER TOURS, INC., a  
West Virginia corporation,

Appellees.

CERTIFICATE OF SERVICE

I, Paul O. Clay, Jr., counsel for Appellant American Canadian Expeditions, LTD hereby certify that a copy of the foregoing Petition For Appeal was served upon the following by mailing a true copy thereof by United States Mail, postage prepaid on this the 22<sup>nd</sup> day of February, 2007.

Lynn B. Pollard, Esq.  
Counsel for Appellees  
P. O. Box 959  
Fayetteville, WV 25840



Paul O. Clay, Jr.