

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**AMERICAN CANADIAN EXPEDITIONS,  
LTD, a West Virginia corporation,**

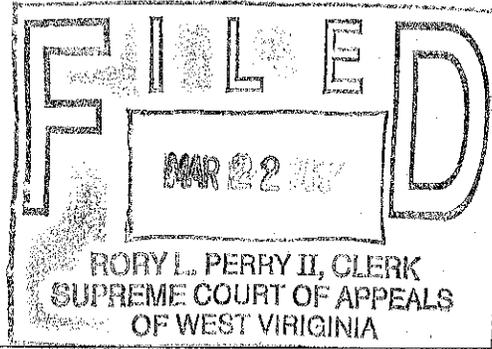
**Appellant,**

**v.**

**Appeal Number: 33246  
Civil Action Number: 04-C-67(B)**

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

**Appellees.**



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

**APPELLEE'S BRIEF**

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**v.**

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**Appellees.**

**APPELLEE'S BRIEF**

Now comes Appellee, The Gauley River Corporation, a West Virginia Corporation and Mountain River Tours, Inc., a West Virginia Corporation, Defendants below, to present the following for its Appeal Brief in support of the Order of the Circuit Court of Fayette County, West Virginia which said Order was entered on May 18, 2006.

**STATEMENT OF THE CASE**

On the 18th day of May, 2006, Judge Paul M. Blake, Jr. Judge of the Circuit Court of Fayette County, West Virginia, entered an Order Granting Defendant's Motion for Summary Judgement and Dismissing All Claims Presented in this Case with Prejudice. Said Order found as a matter of law and of fact that the Petitioner (Appellant herein) has failed to carry the burden of proof to establish a prima facie case of damages against the Defendant (Appellee herein) as there is not a sufficient showing that Appellant had either a legal or equitable interest in the real estate in question at the time the timber was removed.

## STATEMENT OF THE FACTS

Appellee owned three tracts of land situate in New Haven District, Fayette County, West Virginia comprised of one tract of approximately 75 acres, one tract of approximately 27.5 acres and one tract of approximately 212.5 acres. Together these contiguous tracts comprised one large parcel of roughly 315 acres. As one large tract, this parcel appraised for \$300,000.00 in the late 90's (Breuer Deposition, p.18 line 10 and line 13).

By Option Agreement and by Deed of Easement executed on May 1, 2002, the parties herein entered into an agreement whereby the Appellant was granted an immediate easement for access to the Gauley River and an option to purchase the 315 acres of land within three years. The consideration for the option and easement was the sum of \$75,000.00. The remaining monies owed upon execution of the easement were \$175,000.00. The Appellant exercised its rights under the option by March 1, 2005 and the Appellee conveyed the property in question to the Appellant on April 1, 2005. Therefore, the Appellant purchased property with an appraised value of \$300,000.00 for the total sum of \$250,000.00.

In July of 2002, Appellee, The Gauley River Corporation contracted for the removal of timber from the property. This contract was entered into two months after the option agreement and nearly three years before the Appellant exercised its rights under the option. The Appellee ultimately received almost \$42,000 from this transaction. In the process of the logging, the access road to the river was improved (Breuer Deposition, p.24 line 23-25 p. 25 lines 2-3 and Bennett Deposition, p. 15, lines 18-21), the amount of available parking was increased and a bigger turn around area for river buses was created. In addition, gravel was purchased from the \$42,000.00 in logging proceeds to help maintain the road (Breuer Deposition, p.29 lines 10-12). It should be noted that the

Appellant directly benefitted from this transaction as the Appellant used the access road in its rafting business, used the parking area in its rafting business and used the turn around area for its river buses in its rafting business. Therefore, the Appellant derived benefit from the logging operation during the river seasons of 2002, 2003 and 2004 before its purchase of the property in 2005.

Moreover, the Appellee took care to ensure that the logging did not detract from the river experience as a tree buffer was maintained between the access road and logging operation (Breuer Deposition Exhibit No. 1 and Bennett Deposition p. 16, line 23). The logging operation occurred on approximately 1/6th of the 315 acre tract (Breuer Deposition p. 18, line 10 and Exhibit No. 1).

Paul Breuer, the owner of the Appellee companies, testified that there was no discussion with the Appellant's representatives about logging the property at or before the time of the execution of the deed, and that he would have remembered such a discussion. (Breuer Deposition, p. 23, line 14 - p. 24, line 10). He also stated that he never received any objections from the Appellant about the logging once it began. (Breuer Deposition, p. 24, lines 16-18). Instead, Mr. Breuer said,

"I recall one discussion with Mr. Kincaid, who mentioned two things. One is that they were looking for a better road to the river than the current steep grade, and I said that we were logging and part of that logging was to develop that road. That's all I recall of that conversation."

(Breuer Deposition, p. 24, line 23 - p. 25, line 3). Thus, the Appellant was aware of the logging operations. No formal protest or objection was made by the Appellant about the timbering for over one year after the timbering operation had ceased.

Although the Appellant states in its Petition for Appeal that "the timbering operation further damaged the real estate itself [page 2 of said Petitioner, line 6], no evidence was presented by the Appellant with regard to the value of the property, diminished or otherwise, or that the logging had

caused any damage whatsoever to the property. Furthermore, no evidence was presented by the Appellant that the logging had caused any diminution in value to the property. The evidence is that the property had an appraised value of \$300,000.00, that the logging operation not only included improvements to the property, but funded the improvements and that the Appellant purchased the property for less than the appraised value, i.e. \$250,000.00.

#### **ARGUMENT IN RESPONSE TO APPELLANTS'S ASSIGNMENTS OF ERROR**

1. **The Circuit Court did not err 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".**

##### **The option contract did not grant rights to the land or the timber.**

In its Appeal Brief, the Appellant makes several legal points, none of which support its argument that the option contract conveyed an interest in the timber. The Appellant states that standing timber is part of the realty and owned by the owner of the land. That is true. The timber is part of the real property when the property is sold. The difficulty with the Appellant's argument is that the option agreement was not a sale of the property. Thus, the fact that the timber was part of the property does not advance the Appellant's argument.

The Appellant also states that an option contract grants rights for which damages can be recovered. This too is true. An option grants a right to enforce the option contract itself. It is not true, however, that an option grants any interest in the land or the resources on the land. As even the sources cited by the Appellant state, the option grants only ". . . a right to accept or reject the first offer within a limited or reasonable time." 77 Am.Jur.2d Vendor and Purchaser, § 33 (Vendor and

Purchaser). The option grants no right to the property. West Virginia Pulp & Paper Co. v. Cooper, 87 W.Va. 781, 106 S.E.2d 55 (1921). It is a personal right and not an interest in the land. Woodall v. Bruen, 76 W.Va. 193, 83 S.E.2d 170 (1915). Thus, all of these authorities support the Appellee's position that the option contract conveyed no rights to the timber.

The West Virginia authorities have consistently held for 100 years that an optionee has no interest in the property before the option is exercised. In the earliest West Virginia case on the subject, the court set out the principles which have remained unchanged. As stated in Rease v. Kittle, 56 W.Va. 269, 49 S.E. 150 (W.Va. 1904), "Before payment or tender of the purchase price within the time specified in an offer to sell land, the contract does not vest in the person to whom the offer is made any title to the land, either legal or equitable." The most recent case on the subject reiterates the rule. In John D. Stump & Associates, Inc. v. Cunningham Memorial Park, Inc., 187 W.Va. 438, 419 S.E.2d 699 (W.Va. 1992), the court stated that an option to purchase is not a sale nor an agreement to sell. All cases in between have consistently adhered to these same principles. In Pollock v. Brookover, 60 W.Va. 75, 53 S.E. 795 (1906), the court reaffirmed that an option is not a sale of real estate. In Wheeling, O. & E.R. Co. v. Wheeling Coal R. Co., 94 W.Va. 536, 119 S.E.551 (1923), the optionee's only right against the optionor is the privilege of accepting the option by the method outlined in the option agreement. It conveys no legal or equitable interest in the land. Title does not pass until the option is exercised. Leslie v. Gross, 151 W.Va. 872, 157 S.E.2d 582 (1967). A mere option to purchase vests no right until accepted. Tate v. Wood, 169 W.Va. 584, 289 S.E.2d 432 (W.Va. 1982). In Tate, the court quoted extensively from the Pollock case as follows:

It is not a contract to sell, nor an agreement to sell, real estate, because there is no mutuality of obligation and remedy; but it is a contract by which the owner agrees with another person that he shall have the right to buy, within a certain time, at a

stipulated price. It is a continuing offer to sell, which may or may not, within the time specified, at the election of the optionee, be accepted. The owner parts with his right to sell to another for such time, and gives to the optionee this exclusive privilege. **It is the right of exclusive election to purchase, which has been bought and paid for, and which forms the basis of the contract between the parties.** Upon the payment of the consideration, and the signing of the option, it becomes an executed contract — not, however, an executed contract selling the land, but the sale of the option, which is irrevocable by the optionor, and which is capable of being converted into a valid executory contract for the sale of land by the tender of the purchase money, or his performance of its conditions, whatever they may be, within the time to which such offer has been limited. When such an option is thus accepted, it becomes an executory contract for the sale of the land, with mutuality of obligation and remedy. . . .

Id. at 434 (quoting Pollock, 53 S.E.2d at 796, syllabus, points 1 and 2). Thus, the option contract did not convey any interest in the land or its resources. The Tate court also noted that

The doctrine of equitable conversion, placing beneficial ownership and risk of loss on vendee, does not apply until there is an executory contract for sale of land.

Id. at 434, n. 2 (citing Annot., Vendor and purchaser: Risk of Loss by Casualty Pending Contract for Conveyance, 27 A.L.R.2d 444 (1953 and later case service)). Thus, if the Appellant is making some kind of equitable argument, this too must fail, since there was no executory contract until the option was exercised.

As stated in 53A Am.Jur.2d Mines and Minerals § 200, p. 397-98 (1996),

Mineral property, like other property, may be the subject of an option to purchase. The person holding the option is not a purchaser. He or she acquires no part of the mineral land or interest in it, except the privilege, at his or her election, to demand and receive a conveyance of the land.

Id. (citing Waterman v. Banks, 144 U.S. 394, 12 S.Ct. 646, 36 L.Ed. 479 (1892)). By analogy to mineral resources, timber also is not conveyed by an option contract. That is even more true here, where the contract made no mention of the timber.

The Appellant attempts to argue that the Appellee sold a part of the real estate resulting in a diminution of value to the real estate conveyed. The Appellant completely failed to present any evidence to support this argument. The only evidence presented in the matter below was that the property was worth more than the purchase price and that the logging operation benefitted both the Appellant and the real property.

**2. The Circuit Court did not err 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”.**

**The general authorities also hold that an optionee has no interest in the property before the option is exercised.**

The general encyclopedic authorities affirm the point, made by the West Virginia opinions, that an option contract conveys no interest in the land before the option is exercised. As stated in 77 Am.Jur.2d Vendor and Purchaser § 56, p. 161 (1997), “On the timely exercise of an option, the optionee becomes the owner of an equitable interest in the land.” By exercising the option within the stipulated time, the optionee becomes the owner of an equitable interest, which becomes vested, or the optionee becomes equitable owner of the land subject to performance of his or her contract obligations with the optionor, and legal title is held by the optionor as trustee for the optionee. 92 C.J.S. Vendor and Purchaser, § 114, p. 181 (2000). In either case, nothing passes to the optionee before the option is exercised.

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.

\* \* \*

There is authority that an option to purchase land does not, before acceptance, vest in the holder of the option any interest, legal or equitable, in the land, or any estate, right, title, or equity therein, and does not transfer to, or vest in, him or her any title or right in rem. Under such authority, an option to purchase does not authorize the optionee to grant or convey to a third person any interest in the property, and an optionee who has failed to exercise the option has no interest whatsoever.

However, there is also authority that the optionee's right or privilege to buy is an interest in the land which he or she may sell or assign and that it is considered an interest in land within the meaning of a statute providing the manner in which an estate or interest in land may be surrendered.

92 C.J.S. Vendor and Purchaser, § 98, pp. 147-149 (2000). Even in those latter authorities, however, the interest in the land is only the privilege to buy it, and nothing more. In any event, as discussed above, the West Virginia courts have unanimously and consistently maintained that an option contract conveys no interest in the land.

**3. The Circuit Court did not err 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 the option contract”.**

**Any loss is not recoverable by the optionee before the option is exercised.**

In the few authorities which discuss losses to the property while an option is pending, it is usually held that the optionee has no claim. As stated in one annotation,

In the majority of jurisdictions which have decided the question, it has been held that where compensation for condemnation of property is payable only for the loss of an interest in property, the loss of an option to purchase through condemnation is not compensable, because such an option is not an interest in property.

Annot., Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588, 589 (1962). Moreover, the West Virginia courts have expressly held that the optionee may not recover for a fire loss to the property before the option is exercised. This was the ruling in Rutherford v. MacQueen, 111 W.Va. 353, 161 S.E. 612 (1931), where the insurance was maintained by the owner of the subject property when it was damaged by fire before the exercise of the option. The ruling was based precisely on the ground that the option conveyed no interest in the land. Similarly, in Tate, supra, fire damaged the property before the option was exercised. The court held that the optionee was not entitled to the proceeds.

Thus, not only do the general authorities, but all of the West Virginia cases, adhere to the principle that an option contract conveys no interest in the land, either legal or equitable, before the option is exercised. Consequently, losses are not recoverable by the optionee. Thus, the Appellant, as the optionee, has no right to the proceeds from the timber, nor any claim for damage to the land.

The Appellant asserts that by selling off some of the timber from the land, the Appellee effectively sold part of the land. Even if the timber were considered a part of the land, an option gave the Appellant only a right to buy. The West Virginia courts have consistently held that an option conveys no legal or equitable interest in the property. That right to buy, moreover, relates to some future date when the option is exercised. Otherwise, the optionee would be allowed to recover for losses during the pendency of the option. As shown, however, by the authorities dealing with condemnation or loss by fire before the option was exercised, the optionee does not have a claim for recovery. Furthermore, the Appellant never presented any evidence of damage to the property or

diminution in value of the property. Since there is no legal or equitable basis for the Appellant's claim to the timber or damage to the land, this appeal should be denied.

**The Plaintiff is not entitled to treble damages under the statute.**

An argument made by the Appellant is that, because its interest in the timber relates back to the date of the signing of the option agreement, the Appellee is liable for treble damages under the statute dealing with trespass to property. The statute requires no such conclusion. The statute provides

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 . . . any timber, trees, logs . . . shall be liable to the owner in the amount of three times the value of the timber . . . .

§ 61-3-48a.

The Appellant was not the owner of the property until the closing of the sale of the property. Even after the option was accepted, the Appellee was still the owner of the legal title to the land and the timber on it. Even if it were assumed that the Appellant's rights to the property related back from the time it exercised the option to the date the option was signed, the Appellant still did not own the property when it exercised the option. When the option is exercised, the optionee becomes the owner of an equitable interest, or the optionee becomes the equitable owner of the land subject to performance of his or her contract obligations with the optionor. Legal title is held by the optionor as trustee for the optionee. 92 C.J.S. Vendor and Purchaser, § 114, p. 181 (2000). Thus, the Appellant did not own the property until the transfer actually occurred. Even after the exercise of the option, only an equitable interest was transferred. The Appellee was the sole holder of legal title. There was no violation of the statute, then, when the Appellee entered upon its own land to harvest the timber.

Moreover, although recovery for the Appellant depends on the applicability of a relation back of its equitable interest once it has accepted the option, the Appellant recognizes that the relation back rule has not been adopted in West Virginia. No statute which imposes a penalty such as treble damages should be applied on the basis of conduct which the law has not recognized as illegal. The West Virginia court discussing the New York rule even called the relation back as "legal fiction." The statute cannot impose treble damages upon the admitted "legal fiction" of the relation back of the beneficial interest.

**4. The Circuit Court did not err 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".**

The Appellant argues that the exercise of the option gave it equitable title to the real estate. It is true that an equitable interest in the real estate attaches once the option is accepted. Here, however, the Appellant did not accept the option until long after the timber had been harvested. The timber was harvested in July and August of 2002 and the option was exercised in late March of 2005. The only way, then, that the Appellant might have acquired any rights to the timber *before* it exercised the option, would be if its rights in the property somehow related back to the date of the signing of the option agreement.

Some jurisdictions do permit an option to relate back to the date of the option agreement and not to run from the later date of acceptance. According to 92 C.J.S. Vendor and Purchaser, § 114, p. 181-82 (2000), the authorities conflict on this point.

There is authority that acceptance of an option takes effect on the date of the acceptance and binds the party only to the conveyance of the property in its present condition, and that it does not relate back to the date of the option so as to cut off intervening rights acquired with notice of the option. Thus property acquired through the exercise of an option is acquired at the date of such exercise, as against the contention that title relates back to the date of the option. The interest of the optionee does not, by fiction, on the acceptance of the offer, date back from the granting thereof.

On the other hand, there is also authority that acceptance of an option and performance of the conditions entitled the holder of the option to call for performance as of the date of giving the option, so as to cut off intervening rights acquired with knowledge of the existence of the option. Additionally, there is authority that where an option is exercised the title of the optionee relates back to the date of the option, and his or her interest is regarded as real estate as of that time.

Id. at pp. 181-82

The Appellant points out that the West Virginia courts have discussed this split of authority. The court in Leslie v. Gross, 151 W.Va. 872, 157 S.E.2d 582 (1967), cited Aetna Cas. & Sur. Co. v. Cameron Clay Products, Inc., 151 S.E.2d 305 (W.Va. 1966) which dealt with whether a seller of property still holds an insurable interest in the property after a contract of sale has been made but before the transfer has occurred. The Plaintiff, however, has misread the Leslie and Aetna cases in their discussion of the majority and minority rules relating to whether there is an insurable interest in property which is under an executory contract of sale. In Leslie, the court said

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 . . . .

Id. at 586. The court went on to say that it did not need to choose between the split authorities, since

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.

Id. The Leslie court went on to hold that “[w]e believe in the instant case that [the passing of equitable title] occurred on July 2, 1962 when Sun accepted the option of the Gross heirs and formally informed them thereof.” Id. (citing Casto v. Cook, 91 W.Va. 209, 112 S.E.2d 502; Rease v. Kittle, 56 W.Va. 269, 49 S.E.2d 150). Thus, the Leslie court merely noted the existence of a split of authority similar to that already discussed above.

In mentioning the split, however, the Leslie court referred to the Aetna decision and described the arrangement in Aetna as an option. This may have been a mistake. In Aetna, the court described the contract as a sale, but with the buyer retaining an option to nullify the agreement if the buildings on the property were destroyed before closing. The Leslie court’s description of the contract in Aetna as an option seems doubtful, since the Aetna court itself pointed out that the buyer in that case had already acquired an equitable interest in the property. The Leslie court further said that Aetna did not accept either the majority or minority rule, but simply based its decision on “whether the optionor still retained an insurable interest in the property.” Id. at 586. That too seems doubtful, since the Aetna court ruled directly in line with the New York or majority rule. As explained in Aetna, the New York or majority rule holds that recovery may be had on an insurance policy

as long as the insured has a valid insurable interest at the time of the casualty, even though there is an executory contract for the sale of the real property outstanding which is later consummated. [citations omitted] The contrary view, which we believe to be the minority and less acceptable rule, denies recovery where the existence of an executory contract for the sale of the real property shields the vendor from any possibility of pecuniary loss from the casualty.

Id. at 306-07.

In Aetna, the court held that the insured owner could recover insurance proceeds on the fire loss to the property even though the insured had previously contracted to sell the property and the

buyer subsequently closed the sale. In that case, after the loss by fire, the buyer sued for specific performance and for the insurance proceeds, which the court awarded. The insurers then brought a declaratory judgment action against the seller. The court affirmed the trial court's grant of summary judgment for the seller. Noting the split of authority, the court emphasized that the contract of sale was executory and the seller could not have required specific performance after the fire loss. "There can be no question . . . that at the time of the fire [the seller] had an insurable interest in the property. *Id.* at p. 307. The court, thus, ruled in line with the New York or majority rule that, after a contract of sale has been entered into but before it has been performed, the equitable interest of the buyer did not relate back to override the seller's interest in the property such as to cut off the seller's right to insurance proceeds on a loss occurring in that period.

Despite the discussion in Leslie and Aetna, the West Virginia courts have expressly held that an optionee may not recover for a fire loss to the property before the option is exercised. This was the ruling in Rutherford v. MacQueen, 111 W.Va. 353, 161 S.E. 612 (1931), where the insurance was maintained by the owner of the subject property when it was damaged by fire before the exercise of the option. The ruling was based precisely on the ground that the option conveyed no interest in the land. Similarly, in Tate, *supra*, fire damaged the property before the option was exercised. The court held that the optionee was not entitled to the insurance proceeds.

These rulings follow the general authorities. As stated in Annot. Destruction of or Damage to Building as Affecting Rights of Parties to Option, 23 A.L.R. 1225, 1225 (1923),

With regard to insurance, the authorities appear to be agreed that a mere contract of option for the purchase of land does not . . . entitle the holder of the option to have insurance money collected by the giver applied on the purchase price, where the holder undertakes to exercise his option after buildings on the premises have been accidentally destroyed.

A more recent annotation summarizes as follows:

In the majority of jurisdictions which have decided the question, it has been held that where compensation for condemnation of property is payable only for the loss of an interest in property, the loss of an option to purchase through condemnation is not compensable, because such an option is not an interest in property.

Annot., Right to Damages or Compensation upon Condemnation of Property, of Holder of Unexercised Option to Purchase, 85 A.L.R.2d 588, 589 (1962).

If West Virginia were to have recognized the relation back which the Appellant asserts, an optionee would then be entitled to the insurance proceeds once it accepts the option. Since the West Virginia courts clearly do not allow an optionee to collect proceeds for a loss which occurs before the option is exercised, West Virginia would not follow the relation back rule.

**5. The Circuit Court did not err as a matter of law in Findings of Fact Nos. 6 and 7 : 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 that “No representative of ACE, however, raised any formal, written objection to the Defendants about the logging activities”.**

**The Plaintiff should be barred from asserting its claim because of unclean hands.**

A party seeking equity must come with clean hands. Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (W.Va. 1996). In the case at hand, the Appellant knew of the harvesting of the timber at the time it occurred. This is clear from the fact that the logging occurred on the land in full view of the Appellant and its employees. The lower Court made a finding of fact that although the Appellant claimed that it felt it was purchasing the timber on the land in question, that it did not lodge any formal protest or objection until February 2004, over one year after the timbering operation had ceased. Further, the Court found that the logging was done at a time when the

Appellant was using the option property on a regular basis and that the logging operation was visible to anyone on the property.

The Appellant, however, did not attempt to stop the logging by exercising its option, nor did it attempt to assert any interest in the timber under its option contract. It failed, moreover, even to raise any objections. Instead, it stood by silently as the logging continued. Now, it seeks to obtain the benefit of those logging operations after having purchased title to the property. Since the Appellant now seeks to benefit from an activity of which it was aware and which it took no steps to stop, it comes to this court with unclean hands.

### **CONCLUSION**

The findings of fact and conclusions of law of the Circuit Court of Fayette County were clearly made without error. As has been shown herein, the Appellant presented no evidence to the lower court to substantiate its claim of damage to the real property or diminution in value to the real estate. The only evidence presented with regard to value was that of the Appellee which clearly evidence value in the optioned property higher than the ultimate purchase price. The lower Court followed West Virginia law which has been in effect for the past 100 years when it ruled that the Appellant received no legal or equitable title in the real estate upon the signing of the option agreement and that the exercise of the right to purchase on March 1, 2005 did not relate back to the date of the option. Having no legal or equitable interest in the real estate prior to March 1, 2005, the Court properly ruled in favor of the Appellee.

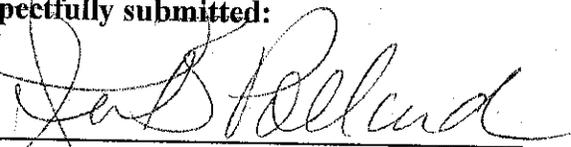
**RELIEF REQUESTED**

Appellant's request for the reversal of the lower court ruling should be denied.

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

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**Respectfully submitted:**



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AUTHORITIES RELIED UPON

77 Am.Jur.2d Vendor and Purchaser, ..... pg. 4

West Virginia Pulp & Paper Co. v. Cooper, 87 W. Va. 781, 106 S.E.2d 55 (1921) ..... pg. 5

Woodall v. Bruen, 76 W. Va. 193, 83 S.E.2d 170 (1915) ..... pg. 5

Rease v. Kittle, 56 W. Va. 269, 49 S.E. 150 (W.Va. 1904) ..... pg. 5

John D. Stump & Associates, Inc. v. Cunningham Memorial Park, Inc., 187 W.Va. 438, 419 S.E. 2d 699 (W.Va. 1992) ..... pg. 5

Pollock v. Brookover, 60 W.Va. 75, 53 S.E. 795 (1906) ..... pg. 5

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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**AMERICAN CANADIAN EXPEDITIONS,  
LTD, a West Virginia corporation,**

**Appellant,**

**v.**

**Appeal Number: 33246  
Civil Action Number: 04-C-67(B)**

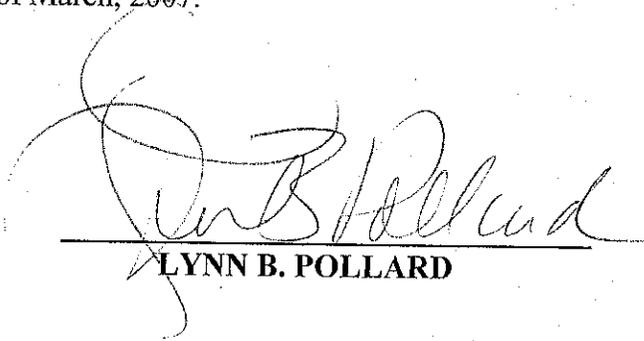
**THE GAULEY RIVER CORPORATION,  
a West Virginia corporation, and  
MOUNTAIN RIVER TOURS, INC., a  
West Virginia corporation,**

**Appellees.**

**CERTIFICATE OF SERVICE**

I, Lynn B. Pollard, counsel for appellees, The Gauley River Corporation, a West Virginia corporation and Mountain River Tours, Inc., a West Virginia corporation, hereby certify that a copy of the foregoing **APPELLEE'S BRIEF OF THE GAULEY RIVER CORPORATION, A WEST VIRGINIA CORPORATION AND MOUNTAIN RIVER TOURS, INC., A WEST VIRGINIA CORPORATION** was served upon the following by mailing a true copy thereof by United States Mail, postage prepaid on this the 21<sup>st</sup> day of March, 2007.

Paul O. Clay, Jr.  
P.O. Box 746  
Fayetteville, WV 25840

  
\_\_\_\_\_  
**LYNN B. POLLARD**