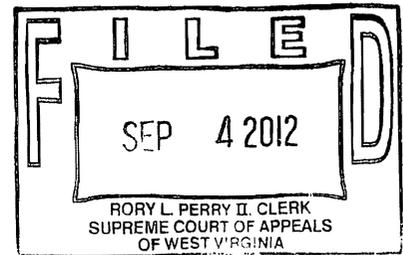


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS

**BRIEF OF RESPONDENTS, JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO PACK AND MINNIE HARRIS**

Respectfully submitted by:

E. Kent Hellems
Attorney at Law
State Bar ID 4584
113 Ballengee Street
PO Box 1229
Hinton, WV 25951
304-466-1060
Fax: 304-466-1666
hellemslaw@yahoo.com

*Counsel for Respondents, Joan Pack, Darlo Pack,
Dello Pack, Don Pack Delso Pack and Minnie Harris*

IN THE SUREME COURT OF APPEALS
STATE OF WEST VIRGINIA

DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS

**BRIEF OF RESPONDENTS, JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO PACK AND MINNIE HARRIS**

TABLE OF CONTENTS

	<u>Pages</u>
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	5
Statement Regarding Oral Argument and Decision	6
Argument	6
1. The Respondents clearly established as a matter of law the elements of adverse possession, particularly that the property in question was possessed openly, notoriously, continuously, hostilely and exclusively for a period in excess of ten (10) years, and further that the Respondent (Pack family) had color of title to the entirety of the subject property. There was no factual determination by the Circuit Court of Summers County that the property in issue was "wild lands." In fact the findings of the Court as set forth in the order clearly indicate that this property was inhabited by the Respondents.	6
2. The Circuit Court of Summers County clearly acted within its discretion in denying the Petitioner the right to call David Huffman of SCS Surveyors, as a witness, particularly in light of the fact that the Petitioner had their own surveyor/expert. Furthermore considering the conduct of Petitioner, his counsel, and his surveyor who improperly interviewed Mr. Huffman at length concerning his survey, the content of the Wentz's survey, and his position with regard to the Holtz survey, the holding of the Circuit Court and the sanction imposed were entirely proper if not lenient to the Petitioner.	14
Conclusion	22
Certificate of Service	24

IN THE SUREME COURT OF APPEALS
STATE OF WEST VIRGINIA

DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS

**BRIEF OF RESPONDENTS, JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO PACK AND MINNIE HARRIS**

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page Nos.</u>
<u>Beto v. Stuart</u> , 213 W.Va. 359, 582 S.E.2d 802 (2003)	22
<u>Somon v. Murphy Fabrication</u> , 160 W.Va. 84, 232 S.E.2d 524 (1977)	11, 12
<u>State ex. rel. Billups v. Clawges</u> , 218 W.Va. 22, 620 S.E.2d 162 (2005)	20, 21
<u>Rules of Civil Procedure</u>	
Rule 26	21
Rule 26(b)(4)	17
Rule 26(b)(4)(A)	17
Rule 26(b)(4)(A)(i)	17, 18
Rule 26(b)(4)(A)(ii)	17, 18
Rule 26(b)(4)(B)	17
<u>Statutes</u>	
None	
<u>Other Authorities Cited</u>	
None	

IN THE SUREME COURT OF APPEALS
STATE OF WEST VIRGINIA

DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS

**BRIEF OF RESPONDENTS, JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO PACK AND MINNIE HARRIS**

STATEMENT OF THE CASE

The Circuit Court of Summers County correctly found after considering the totality of the evidence (both testimonial and exhibits), and after having viewed the land itself, that the Respondents (the Pack family) had color of title to the entirety of the property in question. As the Circuit Court noted in its ruling, the Pack deed contains the exact same description as the parent Deed in the Petitioner's chain of title. The Circuit court further held that the Respondents openly, notoriously, hostilely, adversely and continuously occupied those premises for a period in excess of ten (10) years thereby establishing adverse possession of the property. Additionally the Circuit Court correctly concluded that the survey evidence which established the eastern boundary was more accurately depicted and shown on the survey of David Holtz who testified on behalf of the Respondents (Pack family).

the Petitioner's representation of the facts of the case contains some significant inaccuracies. The Circuit Court did make a thorough view of the premises prior to trial in

the presence of the parties, their surveyors and their counsel. Each party was given the opportunity to point out the landmarks or areas which they thought were important for the Court's consideration. The Respondents acknowledge that the property is typical for West Virginia in general and Summers County West Virginia in particular. There are areas of hillside and areas which are of a flatter terrain, there are also areas which are more heavily forested and areas which have been cleared and/or cultivated. The Petitioner's contention that the subject property is "wild lands" is completely unsubstantiated in the Court's ruling in this matter and is absent from any finding made by the Court. The evidence and testimony presented in this matter would more accurately reflect that the subject property was not uninhabited and that the Pack family resided and made a subsistence living thereon for eleven (11) children for nearly thirty (30) years. The Court also described in great detail the cultivation, animal husbandry, gathering, timbering, and logging operations which were conducted on the property as set forth in the evidence and testimony presented by the Respondents (Pack family). The evidence also reveals there were adjoining farms and families who resided in the area. The deed descriptions reference a county road which traverses the property.

The term "wild lands" has no application to property of this nature. The area in issue is comprised of about twenty-seven (27) acres and is not a sprawling tract of land located in the deepest forests of Randolph or Pocahontas County. The Streeter/Panthers Knob is typical of most of rural Summers County which is comprised of small family farms, not "wild lands."

The Respondents believe it is important for the Court to understand that there are more than two (2) parcels of property involved in this case. The Petitioner Wallace

owns hundreds of acres in Summers County, West Virginia. Some of these properties (other than the tract with a common source of title) adjoin the subject property along the eastern boundary of the Pack property. For this reason, it was important for the Circuit Court not only to consider the doctrine of adverse possession but also to make a determination as to the actual boundaries existing between the Petitioner (Wallace) and the Respondent (Pack family). Plaintiffs' Exhibit No. 11 (the map prepared by Mr. Holtz) specifically identifies these boundaries and a review of that document would assist the Court in the understanding that there were multiple tracts owned by Petitioner Wallace which were involved in this litigation. The Petitioner's representation that there are two (2) farms is inaccurate.

The Petitioner does correctly identify that this action was instituted initially concerning obstruction of a right of way which the Respondents (Pack family) had used for in excess of one hundred (100) years. An amended pleading was filed by the Petitioner claiming ownership of the property which is in dispute in this litigation (or at least a portion thereof); and the Court did grant a preliminary injunction with regard thereto. The case was initially tried on the issue of the right of way only, and an order was entered by the Circuit Court of Summers County, West Virginia, finding that the Petitioner, Dr. Wallace, had unlawfully obstructed the Pack's right of way. In response to the Petition for Injunctive Relief, the Respondents plead by their prior counsel the defense of adverse possession. Thereafter, the Respondents and their counsel, David Parmer, retained David Huffman to conduct a survey of the subject properties. The Petitioner retained James Wentz as his surveyor sometime in 2002.

An Amended Complaint was prepared by the Respondents' counsel, David Parmer, (it is unclear if a motion to amend was ever filed concerning the same). Thereafter David Parmer was relieved as counsel for the Respondents and Jeffrey Pritt of Union, West Virginia, was retained. Apparently several scheduling conferences were placed on the Court's docket with regard to this matter while Mr. Pritt and Mr. Lilly acted as counsel for the parties. However no scheduling order was entered by the Court setting the matter for trial during that time frame. The Court granted the reinstatement, a second Amended Complaint was filed upon proper order, and the matter remained on the Court's docket until it was tried on September 20, 2011.

Prior to the matter being brought to trial, the Petitioner identified David Huffman as an expert witness to be utilized at trial. In light of this disclosure, the Respondents, by their counsel, filed a motion to exclude Mr. Huffman as a witness. Following the disclosure of Mr. Huffman as an expert, it was learned that the Petitioner himself (Wallace), had appeared at the office of surveyor Huffman and discussed Mr. Huffman's survey with him. (It should be noted that Dr. Wallace himself had been an expert witness on many occasions according to his own testimony and therefore had direct knowledge of the typical arrangement between an expert and his employer.) Despite this knowledge, the Petitioner (Wallace) arranged for a meeting with Mr. Huffman at his attorney's office in Princeton, West Virginia. As hereinafter discussed, the Respondents' surveyor divulged a plethora of information confidential and otherwise concerning the case to the Petitioner, his counsel, and their expert, James Wentz, who was also present. As hereinafter discussed, such conduct is in violation of the Rules of Civil Procedure and the commonly accepted standards in dealing with experts.

The Circuit Court of Summers County found that a confidential relationship existed between the Respondent (Pack family) and their surveyor, David Huffman, and that confidential information was disclosed to Mr. Huffman by the Respondents and their counsel, David Parmar. The Court also found that the West Virginia Rules of Civil Procedure had been violated by the actions of the Petitioner, his counsel, and David Huffman. (In fact, David Huffman was subsequently reprimanded by the Board of Surveyors for his conduct). Sanctions were imposed against the Petitioner including imposition of a monetary sanction for attorney fees incurred by the Respondents (which remains unsatisfied). Additionally the Petitioner was precluded from calling David Huffman as a witness.

The matter proceeded to bench trial per the agreement of the parties on September 20, 2011. The Court took an extensive view of the property in the presence of counsel, the litigants and the surveyors, thereafter the Court received substantial evidence and testimony. At the conclusion of the trial the Court made a detailed verbal ruling and after a considerable delay, due to the subsequent illness of the Petitioner's trial counsel, Tom Lilly, a detailed final order with findings of fact and conclusions of law was ultimately entered on or about January 20, 2012.

SUMMARY OF ARGUMENT

The Respondents (Pack family) clearly established as a matter of law the elements of adverse possession, particularly that the property in question was possessed openly, notoriously, continuously, hostilely and exclusively for a period in excess of ten (10) years, and further that the Respondent (Pack family) had color of title to the entirety of the subject property. There was no factual determination by the Circuit

Court of Summers County that the property in issue was "wild lands." In fact the findings of the Court as set forth in the order clearly indicate that this property was inhabited by the Respondents and that adjoining tracts were owned by others person. The property was never characterized as wild lands by the Court, nor would it have been proper for the Circuit Court to do so. The property in issue is not inaccessible or uninhabited as the Petitioner would now contend.

The Circuit Court of Summers County clearly acted within its discretion in denying the Petitioner the right to call David Huffman of SCS Surveyors, as a witness, particularly in light of the fact that the Petitioner had their own surveyor/expert. Furthermore considering the conduct of Petitioner, his counsel, and his surveyor who improperly interviewed Mr. Huffman at length concerning his survey, the content of the Wentz's survey, and his position with regard to the Holtz survey, the holding of the Circuit Court and the sanction imposed were entirely proper if not lenient to the Petitioner.

STATEMENT REGARDING ORAL ARGUMENT

Based upon the Petitioner's request for argument under Rule 19, the Respondents would like the opportunity to provide a reply to the same. The Respondents believe the case is appropriate for memorandum decision after Rule 19 argument. Ten (10) minutes for argument will be sufficient to the Respondent.

ARGUMENT

1. The Respondents (Pack family) clearly established as a matter of law the elements of adverse possession, particularly that the property in question was possessed openly, notoriously, continuously, hostilely and exclusively for a period in excess of ten (10) years, and further that the Respondent (Pack family) had color of title to the entirety of the subject property. There was no factual determination by the Circuit Court of Summers County that the property in issue

was “wild lands.” In fact the findings of the Court as set forth in the order clearly indicate that this property was inhabited by the Respondents and that adjoining tracts were owned by others person. The property was never characterized as wild lands by the Court, nor would it have been proper for the Circuit Court to do so. The property in issue is not inaccessible or uninhabited as the Petitioner would now contend.

Petitioner alleges that the Circuit Court of Summers County was clearly wrong in concluding from the evidence that the Respondents (Pack family) met their burden of proof by clear and convincing evidence, that they had openly, notoriously, hostilely, adversely, exclusively, and continuously occupied the property in issue for the statutory described period of ten (10) years and that they had done so under color of title. (In fact the Circuit Court’s order says that Respondents evidence was reliable, and largely uncontradicted, (see Paragraph 15 of the final order page 4 of the Appendix). As this Court is well aware, the factual determinations of the Circuit Court must be upheld unless they are clearly erroneous. Apparently the principle argument presented by the Petitioner is that the character of the land in question required the Circuit Court of Summers County to take into consideration other factors than those which had been required in the jurisprudence of the State of West Virginia for the last one hundred fifty (150) years. Despite the fact that literally hundreds if not thousands of cases have been litigated in the State of West Virginia concerning the doctrine of adverse possession, the Petitioner’s counsel believes that a situation has now arisen that requires this Court to consider an additional element in analyzing the legal requirements of adverse possession. The Petitioner provides no statutory authority for his position nor does he cite any West Virginia case which supports his argument.

Additionally Petitioner can point to no finding of the Circuit Court or fact presented in evidence at trial that the subject property should in fact be characterized as

“wild lands”. In fact the rulings of the Circuit Court of Summers County clearly demonstrate that the subject property consisted of a relatively small amount of acreage (27.682), that the Pack family utilized the entirety of the property for their survival from the mid 1920s to the late 1950s. Without question these were some of the most difficult times which our nation has faced. The Great Depression and World War II provided the backdrop for the trials and tribulations the Pack family endured to provide a subsistence living from farming a hillside farm in Summers County, West Virginia.

In sub and substance it was the uncontradicted testimony of the Pack family members that they existed on what they could raise from their land, including the twenty-seven (27) acre overlap which the Respondent Wallace claims. The Respondents testified uniformly that they utilized each area of the property in the manner for which the property was best suited (Trial Transcript, Minnie Harris pages 128-129, Darlo Pack page 150, Dello Pack page 143). Some parts of their farm contained fruit trees, other parts were used as pasture, still other parts were hunting grounds, other areas were timbered for logs and for their wedge mill and firewood was always a necessity, both for heating and cooking. In fact, Darlo Pack testified that it was a daily task to cut and retrieve firewood to heat their home and provide fuel for cooking (Trial Transcript Darlo Pack pages 147-162). Obviously firewood was not cut from every piece of property every day; however those areas which contained wood were used for that purpose. Darlo Pack and Dello Pack both testified that there was never a time when wood was not being cut from the property (Trial Transcript page 156 and page 146, see also pages 172-173, Delso Pack testified he cut mine timber for two (2) to three (3) years after 1956). Additionally the family cut timbers over the forested

areas of the property and had a wedge mill which they used to supplement their meager existence by selling wedges to the mines. In fact the testimony of the Respondent Packs indicated that the wedge mill was located in the disputed Buck Knob area for approximately one (1) to two (2) years. (Transcript pages 122, 126, 128, 130-131, 139-141, 151-153, 172). The mill was moved around as the timber was cut out (Transcript Minnie Harris page 128). The Respondents' as children traveled to and from school in close proximity to the wedge mill, they worked as children at the mill tying bundles of wedges with wire and cutting trees with crosscut saws and hauling them all about the property with horses. (Transcript pages 130-131, 139-141, 153-154). In fact, the sale of wedges was the only disposable income which the family (consisting of a mother, father and eleven (11) children) had during the relevant time periods. This cash was used to buy things such as salt and soda which were not available upon the property. The family even grew their own cane to make molasses to obtain a sugar substitute. (Transcript page 170).

It is further evident from the evidentiary record in this matter that Ralph Pack, the father of the Respondents, always took great care in describing the boundaries of the farm to his children. As they explained this was done so that they would not infringe upon the property of others. (Trial Transcript pages 122, 136-137, 149-150, 169-170) Clearly the evidence and testimony of the Pack family reveals that they occupied and use the property as their own. They clearly believed they owned the entirety of the property and they clearly exercised dominion over the same from 1926-1956, just as the Circuit Court of Summers County properly concluded.

The Petitioner alleges that the Circuit Court failed to consider the nature of the property in making its findings. However, a review of the Court's order in this matter finds that that Court did take that matter into consideration. In fact, paragraph twenty-four (24) of the Court's order provides in pertinent part:

"The Pack's use of the property (including but not limited to farming, cutting firewood, hunting, timbering, wedge cutting, gathering, general occupation and use, were all open notorious, hostile, exclusive, continuous and under color of title for a period in excess of the statutory prescribed ten (10) years. Additionally the Court finds that the Packs use of the property was consistent with the ordinary uses the property was suited for." (Emphasis added)

Clearly the Circuit Court of Summers County took into consideration the character of the property, what an owner of the property could use it for in making his analysis and determination that the criteria for adverse possession had been satisfied.

It is also important to note that the Court concluded that the Respondents (Pack family) acted under "color of title". Obviously this is the proper conclusion to be reached from the evidence in this matter, particularly the deeds which were admitted into evidence. As the Order of the Circuit Court of Summers County provides, the description in the deed dated March 10, 1926 to Ralph Pack, which is found in Deed Book 55 at page 111 (Plaintiffs' Exhibit 5), contains the exact same metes and bounds description as that deed dated January 23, 1885 which is recorded in Deed Book G at page 342 (Plaintiffs' Exhibit 8). The chain of title through which Wallace claims title relates back to a deed recorded in Deed Book 37 at page 60 in Summers County (Defendant's Exhibit 6) and purports by its terms to be a part of the deed described in Deed Book G at page 342. Therefore in summary the deed which the Respondent

Packs' father obtained describes the entirety of the property which was the parent tract of the Wallace deed.

It is an important consideration that the Respondents (Pack family) have color of title to the entirety of the property.

The opinion of Justice Miller in Somon v. Murphy Fabrication, 160 W.Va. 84, 232 S.E.2d 524 (1977) clearly differentiates a "color of title" adverse possession claim from "a claim of right" claim.

In Somon, Justice Miller states:

"Color of title" imports there is an instrument giving the appearance of title." But it is actually defective.

Somon, 160 W.Va. at 92, 232 S.E.2d at 529

"Claim of Right" means nothing more than entering upon the land with the intent to claim.

Somon, 160 W.Va. at 91, 232 S.E.2d at 529

Most importantly for those who assert a claim of adverse possession by color of title, the limit of the area claimed is not determined exclusively by the area occupied. "The limit is determined by the description contained in the title paper, as long as the disseisor has exercised some dominion over a portion thereof and the other elements are satisfied." Somon, 160 W.Va. at 92, 232 S.E.2d at 529

In the case at bar the Pack family absolutely established a color of title claim, which the Circuit Court acknowledges in its order. Clearly the Circuit Court's findings of fact substantiate the verdict entered and reflect the legal principles long held and established in this state.

In applying the facts of this case to the law, we must again turn our attention to Justice Miller's opinion in Somon v. Murphy Fabrication, 160 W.Va. 64, 232 S.E.2d 524

(1977). This opinion is often recognized as the decision for defining and clarifying the doctrine of adverse possession in West Virginia.

In Somon, Justice Miller defines the necessary elements of adverse possession as follows:

“Hostile” or “Adverse” – “The person claiming adverse possession must show his possession of the property was against the right of the true owner and inconsistent with the title of the true owner.”

Somon, 160 W.Va. at 90, 232 S.E.2d at 528

“Actual” possession - “There must be an exercising of dominion over the property...” “The quality of the acts of dominion are governed by the location condition and reasonable use which can be made of the property.”

Somon, 160 W.Va. at 90 232 S.E.2d at 529

“Open” and “Notorious” – The acts asserting dominion over the property must be of such a quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own.”

Somon, 160 W.Va. at 91, 232 S.E.2d at 529

“Exclusive” – “The disseisor must show that others do not have possession.” “Sporadic use by other does not defeat this element.”

Somon, 150 W.Va. at 91, 232 S.E.2d at 529

“Continuous” – “Must last for the statutory period.”

Somon, 160 W.Va. at 91, 232 S.E.2d at 529

The exclusivity of the Packs’ possession of the subject property is clearly substantiated by the evidentiary record in this matter. During the period of time of 1926 to 1956 it was completely uncontroverted that at no time did any other person ever exercise any dominion over the property in question other than the Pack family. The Court found this evidence to be uncontroverted. The Petitioner did attempt to elicit testimony from other persons that others may have cut timber on the 27.682 acre overlap after 1956; however the Circuit Court of Summers County found that said

evidence was unpersuasive. In fact the Court held in paragraph 21 of its findings of fact as follows:

“It was not established if timber was cut on the Pack property or some adjoining property to the west.”

A review of the testimony of the Petitioner’s witnesses clearly substantiates the Court’s conclusion in this matter.

At trial the Petitioner’s sole argument as reflected in the record was that the Pack family did not continuously possess the property from 1926 to the present time. Obviously such is not the legal requirement for establishing adverse possession. Adverse possession is obtained once property is continuously and uninterruptedly possessed for a period of ten (10) years. The Circuit Court of Summers County correctly noted that from the period of time of 1926 to 1956 it was conclusively established that the Pack family continuously possessed the property.

The open nature of the possession exercised by the Respondents (Pack family) is also clearly substantiated from the record. The Packs had a sawmill located on the disputed area for a period of one (1) to two (2) years. They gathered firewood on the property on a daily basis; they hunted and gathered on the property on a regular basis to help subsidize their diet. They had family gatherings on the “flat”, eleven (11) children traversed the property to go to school. Mine posts were cut there for two (2) to three (3) years after the family moved. As the record in this matter indicates, they used the property in the manner for which it was suited. If the Petitioners predecessors in title paid any attention at all to this property they would have seen and witnessed the Pack family exercising dominion thereof on a daily basis in order to meet the necessities of a family of thirteen (13).

It also merits the Court's consideration that the Petitioner Wallace was advised of the Packs position with regard to the ownership of this property prior to the time that he purchased the land in question.

The trial record in this matter reveals that Delso Pack met with Dr. Wallace and discussed the boundaries of the property with him some twenty (20) years prior to 2009 which was prior to Dr. Wallace's purchase of the property. (See Trial Transcript Delso Pack testimony pages 178-181), (Basham testimony page 206) (Wallace denied these discussions even though his own witness Basham testified that Dr. Wallace and Mr. Delso Pack discussed the corners of the property many years ago). In fact that was the stated purpose for the meeting. Clearly the Petitioner knew the Packs claimed the property before he bought it.

The fact that no other person ever exercised any dominion, control or ownership over the disputed area from the period of 1926 through 1956 is further substantiated by the Petitioner's own chain of title. As the record in the matter reveals, the Petitioner's title derives out of a tax sale deed. This deed is identified as Defendant's Exhibit 3. The property was sold before 1930 for nonpayment of the taxes. Clearly Wallace's predecessors in title had such little interest in this property that they allowed it to be sold for the nonpayment of taxes.

2. The Circuit Court of Summers County clearly acted within its discretion in denying the Petitioner the right to call David Huffman of SCS Surveyors, as a witness, particularly in light of the fact that the Petitioner had their own surveyor/expert. Furthermore considering the conduct of Petitioner, his counsel, and his surveyor who improperly interviewed Mr. Huffman at length concerning his survey, the content of the Wentz's survey, and his position with regard to the Holtz survey, the holding of the Circuit Court and the sanction imposed were entirely proper if not lenient to the Petitioner.

The Circuit Court of Summers County clearly acted within its discretion in precluding the Petitioner from eliciting the testimony of David Huffman, licensed land surveyor, who had been retained as an expert by the Respondents (Pack family) for the purposes of this litigation. The Respondents take issue with the Petitioner's second assignment of error, in light of the fact that Petitioner's appellant counsel did not participate in the hearing that was conducted and apparently made no review of the evidentiary record of that hearing prior to filing this appeal. The Petitioner's characterization of this issue as a discovery dispute is tantamount to describing the Lincoln assassination as "the discharge of a firearm at Ford's Theatre." The facts developed at the evidentiary hearing on this issue were clear and undisputed.

1. David Huffman was retained as a professional land surveyor for services relating to the subject litigation by the Respondents several years after the initial right of way suit was initiated.

2. Mr. Huffman conducted a survey at the request of the Respondents (Pack family) and met with the Respondent Delso Pack himself on fifteen (15) to twenty (20) occasions; some on the property itself, others at Mr. Huffman's office. Mr. Huffman also met with the Respondents attorney, David Parmer. Both Mr. Huffman and Delso Pack clearly understood and believed that Mr. Huffman was an expert for the Respondents (Pack family). During those fifteen (15) to twenty (20) meetings, Delso Pack provided Mr. Huffman with a plethora of information, including deeds and his personal knowledge of the property. Mr. Huffman completed his survey and was paid in full by the Respondents (Pack family).

3. Mr. Huffman was never terminated or relieved of his obligations to the Respondents (Pack family) by any oral or written communication.

4. Sometime shortly after May of 2006, and without notice to the Respondents, the Petitioner David Wallace personally appeared at the office of David Huffman and made inquiries of him pertaining to his survey. Wallace met with Mr. Huffman for approximately one (1) hour.

5. Wallace invited Mr. Huffman to attend a meeting at his attorney's office in Princeton, West Virginia, and on or about March 5, 2009 (immediately before a trial scheduled for March 9, 2009). Mr. Huffman appeared at the Petitioner's attorney's office in Princeton, West Virginia. This meeting was held without any notice formal or informal to the Respondent (Pack family) or their counsel. Those persons who attended the meeting at the attorney's office included Petitioner Wallace, Petitioner's trial counsel, Tom Lilly, Petitioner's surveyor, James Wentz, and David Huffman.

6. The testimony at the hearing revealed that the Petitioner, his trial counsel and his surveyor discussed with Mr. Huffman the Huffman survey, they discussed Mr. Wentz's, the Petitioner's surveyor's survey, and they discussed the survey undertaken by David Holtz, who the Respondents (Pack family) subsequently hired and who was identified as the expert to be used at trial. The Petitioner compensated Mr. Huffman for attending the meeting.

7. The Petitioner (Wallace) testified that he had acted as an expert witness in dental cases several times over the last forty (40) years. Petitioner (Wallace) further testified at the hearing that he had never attended such a meeting as an expert witness with parties counsel or experts with any litigant who had not hired him.

8. James Wentz, the Petitioner's surveyor, also testified that he would not have attended such a meeting if he was in Mr. Huffman's shoes.

As the Court is well aware, Rule 26(b)(4) of the West Virginia Rules of Civil Procedure provides in pertinent part as follows:

(4) Trial preparation: experts. - discovery of facts known and opinions held by experts, otherwise discoverable under provisions of Subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial may be obtained only (emphasis added) as follows:

Rule 26(b)(4)(A) of the West Virginia Rules of Civil Procedure identifies two means of discovering those facts known and opinions held by experts. Rule 26(b)(4)(A)(i) provides that interrogatories may be submitted requesting: 1) The subject matter which the expert is expected to testify; 2) The substance of the facts and opinions to which the expert is expected to testify; and 3) A summary of grounds for each opinion. Rule 26(b)(4)(A)(ii) further provides that a party may depose an expert whose opinions may be presented at trial.

Clearly Rule 26(b)(4) of the West Virginia Rules of Civil Procedure limits the methods of inquiry of an expert who will be used at trial to interrogatory and deposition. In fact the Rule states that this is the only means by which discovery may be obtained.

Clearly if the Respondents (Pack family) had intended to illicit testimony from David Huffman at trial, the only means by which the Petitioner and his counsel could have obtained discovery was by interrogatory or deposition. More importantly Rule 26(b)(4)(B) of the West Virginia Rules of Civil Procedure differentiates and further restricts the information which can be obtained pertaining to experts who are not going to be called at trial. That Rule provides in pertinent part as follows:

“A party may discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or in preparation for trial who is not expected to be called as a witness at trial only as provided in Rule 35b (which pertains to independent medical examinations) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”

Clearly in the case at bar, the Petitioner had already retained his own expert witness, James Wentz. In fact Mr. Wentz was apparently retained in early 2002. The evidentiary record from the hearing conducted in this matter shows the total absence of any “exceptional circumstances” which would have permitted the Petitioner to call David Huffman as a witness under ordinary circumstances. Even if we were to assume that “exceptional circumstances” did exist which made it impracticable for the Petitioner to obtain facts or opinions on the same subject by other means (which is clearly absent from the record and nonexistent otherwise) the Petitioner would have had to comply with Rule 26(b)(4)(A)(i) and Rule 26(b)(4)(A)(ii) of the West Virginia Rules of Civil Procedure and obtain those facts or opinions only through interrogatory and/or deposition. The tactics which the Petitioner employed to obtain information from the Respondent’s expert was not in conformity with West Virginia Rules of Civil Procedure and highly improper to say the least.

The Circuit Court of Summers County correctly found that the surreptitious actions of the Petitioner with regard to the multiply interviews with David Huffman without notice formal or informal to the Respondents (Pack family) and/or their counsel, was improper. The Court further concluded that it was a significant infraction which warranted sanction.

Honestly the Respondents believe that the sanction which was imposed was a very delicate one. The Petitioner unlawfully and improperly obtained confidential information from the Respondents' (Pack family) expert which aided and assisted their examination of the Respondents' expert, David Holtz, and further provided them an opportunity to have the expert retained by the Respondent (Pack family) critique the survey work undertaken by their own expert, James Wentz. This was a huge advantage for the Petitioner at trial. Unfortunately the sanction of the Circuit Court of Summers County, West Virginia, did little to remedy that advantage. Clearly the Petitioner personally, his attorney and their expert witness, knew or should have known that such an interrogation was improper, and that it was undertaken to obtain an unfair advantage in the litigation, substantially compromising the administration of justice. Fortunately the advantage "cheaters never prosper" was borne out at trial.

The underhanded actions of the Petitioner in this matter with regard to David Huffman in and of itself warranted the imposition of sanctions. The fact that they usurped the West Virginia Rules of Civil Procedure and communicated with an expert witness for the Respondents is clearly a violation of Rule 26 of the West Virginia Rules of Civil Procedure. The record with regard to the hearing on the motion to exclude the testimony of David Huffman is absent any good faith explanation from the Petitioner and/or his counsel why they did not comply with the Rules of Civil Procedure and seek discovery of Mr. Huffman's opinions and/or knowledge by the required means of deposition and/or interrogatory. The Petitioner supplies no legal authority to the Court or argument to the Court as to why they should have been permitted to conduct two (2) interrogations of an expert witness retained by the Pack family without notice of any

means to the Pack family or their counsel. The Petitioner provides no statutory authority for such conduct, no case law which supports such conduct, and no constitutional privilege which would authorize such action. The actions and conduct of the Petitioner and his counsel were wrong. The Petitioner himself knew they were wrong, the Petitioner's expert knew they were wrong. Nevertheless he sought to obtain an unlawful, improper and unfair advantage at trial by whatever means were necessary.

The Petitioner cites the West Virginia Supreme Court of Appeals decision of State ex. rel. Billups v. Clawges, 218 W.Va. 22, 620 SE2d 162, 2005, as providing a legal basis to overturn the Circuit Court of Summers County in this matter. Syllabus point 3 of this decision provides as follows:

(3) In cases where disqualification of the expert witness is sought, the party moving for disqualification bears the burden of proving that the time the moving party consulted with the expert 1) it was objectively reasonable for the moving party to have preclude that confidential relationship existed with the expert; and 2) the confidential privileged information was disclosed to the expert by the moving party. Disqualification is only when the evidence satisfies and demonstrates both these conditions.

The Petitioner himself agreed that a confidential relationship existed between Mr. Huffman and the Respondent (Pack family). However despite the fact that Delso Pack met with Mr. Huffman fifteen (15) to twenty (20) times concerning the survey, provided his personal knowledge and information pertaining to the same and documents related thereto, and Mr. Huffman conferred with David Parmer, the Petitioner's counsel at the time (trial preparation), somehow the Petitioner claims that confidential or privileged information was not disclosed to the expert. Clearly this is not the case. In fact, such an argument by the Petitioner is ludicrous.

The Respondent would also like to draw the Court's attention to the significantly different means by which the disqualification matter was handled in the State ex. rel. Billups. v. Clawges case. It should first be noted that the attorneys in Billups upon learning of the expert's prior employment by the Plaintiffs immediately stopped further inquiry of the expert and advised the Plaintiff's counsel as to the situation. Thereafter the matter was brought to the attention of the Circuit Court and the Court ruled upon the matter and it subsequently appealed to the West Virginia Supreme Court of Appeals. This factual scenario is completely absent from the case at hand. In fact, the Petitioner, his counsel and their expert interviewed Mr. Huffman without regard to the West Virginia Rules of Civil Procedure contacting Mr. Huffman on numerous occasions and questioning him for hours without notice to the Respondents, their counsel or the Court.

The Circuit Court in its ruling in this matter found that:

"The Petitioners (now Respondent Pack family) engaged in numerous conferences with Mr. Huffman, and provided a great deal of relevant information to him, which was calculated to advance their position at trial. The prior attorney, David Parmer, also consulted with him and utilized his services to prepare for trial in this matter. The surveyor completed a boundary survey and was prepared to testify in the previously scheduled trial on behalf of the Petitioners at the time they decided to employ another surveyor." (Page 32 of Appendix)

The Circuit Court of Summers County further concluded under these facts this case must be distinguished from Billups because there was a much stronger showing of confidential relationship between the moving party, the Petitioners (now Respondent Pack family) and the expert, David Huffman. Furthermore there was not a showing of "exceptional circumstances" as contemplated by Rule 26. Based on this the Circuit Court concluded that the Respondent has violated the provisions of Rule 26 dealing

with the contact between an expert witness and an adverse party, and the Petitioners are entitled to sanctions.

The Petitioner's contention that the sanction of precluding calling David Huffman as a witness at trial was improper clearly lacks any merit. The West Virginia Supreme Court of Appeals has held in Beto v. Stuart, 213 W.Va. 359, 582 S.E.2d 802 (203), that the rulings pertaining to the appropriate sanction which are imposed by the Circuit Court for discovery violations are within the discretion of the Trial Court.

The award of One Thousand Dollars (\$1,000.00) in costs and the preclusion of Mr. Huffman's testimony at trial was a very slight sanction in light of the egregious conduct exhibited by the Petitioner.

CONCLUSION

The verdict of the Circuit Court of Summers County is not clearly erroneous. It is based on the facts and the application of the law thereto. Clearly the Respondents satisfied their burden of proof, in fact, their evidence was largely uncontroverted. The Circuit Court made detailed findings of fact and considered the appropriate points of law in reaching its verdict.

The Petitioner's contention as to the claimed nature of the land in question is not substantiated in the record nor was it a finding of the Court. Additionally contrary to the assertion in the Petition for Appeal the Circuit Court did consider the nature of the land in determining the reasonable uses the Respondents could make of it. Clearly the setting up of the wedge mills for months or years, cutting timber regularly, cutting mine posts for two (2) to three (3) years after 1956, harvesting firewood daily, hunting, general occupation, gathering foods and berries, walking upon, prohibiting others from

trespassing thereon (Transcript page 181) for more than 30 years were all sufficient to put the "owner" on notice that the Packs claimed the land. Furthermore these uses were all the reasonable uses which could be made of the 27 acre area in dispute. It is amazing that a family of thirteen (13) could be so resourceful during some of our nation's most desperate times.

The Circuit Court acted well within its discretion in precluding the Petitioner from calling David Huffman as a witness. In fact a much more severe sanction would have been fully justified for the Petitioners egregious violation of the Rules of Civil Procedure and the resulting harm done to the administration of justice.

Wherefore, the Respondents pray that the order of the Circuit Court of Summers County be affirmed.

By Counsel:



E. Kent Hellems
Attorney at Law
State Bar ID 4584
113 Ballengee Street
PO Box 1229
Hinton, WV 25951
304-466-1060
Fax: 304-466-1666
hellemslaw@yahoo.com

IN THE SUREME COURT OF APPEALS
STATE OF WEST VIRGINIA

DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOAN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS

CERTIFICATE OF SERVICE

I, E. Kent Hellems, counsel for Respondents, do hereby certify that service of the BRIEF OF THE RESPONDENTS, JOAN PACK, DELLO PACK, DON PACK, DELSO PACK AND MINNIE HARRIS has been made upon the following person(s) by mailing a true and exact copy thereof in a properly stamped and addressed envelope this the 31st day of August, 2012.

William S. Winfrey, II
Attorney at Law
1608 West Main Street
PO Box 1159
Princeton, WV 24740



E. Kent Hellems
Attorney at Law
State Bar ID 4584
113 Ballengee Street
PO Box 1229
Hinton, WV 25951
304-466-1060
Fax: 304-466-1666
hellemslaw@yahoo.com