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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS
Charleston

SWN Production Company, LLC
Putative Intervener Below, Petitioner

v. **Case No. 19-0267**

Corey Conley et al.,
Plaintiffs and Defendants Below, Respondents

JOINT RESPONDENTS' BRIEF OF LEE M. RABB, INDIVIDUALLY AND AS TRUSTEE OF THE ELI RABB REVOCABLE TRUST DATED OCTOBER 7, 2005, TRIENERGY, INC., TRIENERGY HOLDINGS, LLC, WPP, LLC AND TRINITY HEALTH SYSTEM FOUNDATION

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West Virginia Rules of Civil Procedure

Rule 20

Rule 24

I. PETITIONER'S ASSIGNMENTS OF ALLEGED ERROR

1. The circuit court did not abuse its discretion in denying Petitioner's right to intervene in the case below, because the Petitioner, SWN Production Company, LLC ("SWN"), did not have an ownership interest at the time the complaint was filed, it admittedly did not have an interest when its first motion to intervene was filed more than two (2) years later, and the only interest it claimed in its second motion to intervene was an interest it attempted to create by entering into an oil and gas lease with the plaintiff below, some three (3) years after the complaint was filed, and at a time when SWN knew that the ownership rights were in dispute. Respondents are aware of no West Virginia law that allows a party to create an interest in a case solely for intervention, as SWN did in this matter. Additionally, the circuit court correctly found that neither of SWN's attempts to intervene were timely.

2. The circuit court was correct in holding that SWN did not timely move, pursuant to W. Va. R. CIV. P. 24, to intervene in the underlying case. SWN first moved to intervene more than two (2) years after the case was filed, with, admittedly, no interest in the underlying property. Subsequently, it waited seventeen (17) months after it attempted to create an interest in the subject property, by entering into an oil and gas lease with the plaintiff, before attempting to intervene a second time. The determination of whether a motion to intervene is timely is within the discretion of the circuit court and will only be reversed on appeal if the circuit court abused its discretion. Here, the circuit court did not abuse its discretion.

3. The circuit court did not abuse its discretion in concluding that SWN had no protectable interest in the underlying subject property. SWN had no interest when the complaint was filed. SWN admitted it had no interest in the subject property when it first attempted to intervene and the only interest SWN had when it attempted to intervene a second time, was an

interest it attempted to create in the subject property, by entering into a lease with the plaintiff, three (3) years after the complaint was filed. Respondents are aware of no West Virginia law allowing SWN to create an interest in a case, solely for the purpose of intervention, as SWN did in the case below.

4. The circuit court did not abuse its discretion in concluding that any interest that SWN claimed in the subject property, by way of its attempts to create such an interest by entering into a lease with the plaintiff, could be adequately protected by the plaintiff.

5. The circuit court did not abuse its discretion in denying permissive intervention by SWN. The circuit court is given broad discretion and its ruling on permissive joinder is reviewed on an abuse of discretion standard. Here, the circuit court did not abuse its discretion in denying SWN's request for permissive joinder, when SWN first attempted sought intervention two (2) years after the case was filed. Similarly, the court did not abuse its discretion in denying SWN second motion to intervene, because SWN waited nearly a year and a half after attempting to create its interest in the subject property to seek joinder. SWN's created intervention was a leased interest in the oil and gas it believed the plaintiff owned. Therefore, the plaintiff could protect that interest.

II. STATEMENT OF THE CASE

A. Introduction

As a threshold matter, SWN's contentions within its Appellate Brief are confusing and contradictory. It claims it has an "ownership interest in the property whose title is in dispute in this suit to quiet title" (Pet'r's Br. at 1), yet it admitted in its initial attempt to intervene, which it sought two (2) years after the complaint was filed, **that it had claimed no "ownership of any mineral right in the** (subject property)" JA00155 – JA00164 at 7. (Memorandum in Support of SWN Motion to Intervene) (emphasis supplied). Even when SWN attempted to create an interest one (1) year later, by entering into an oil and gas lease with plaintiff Corey Conley ("plaintiff" or "Conley"), it entered into that lease, ostensibly, because it believed Conley, not SWN, owned the oil and gas rights underlying the subject property.

In that regard, the actual issues relevant to SWN's appeal are: 1) whether the circuit court abused its discretion in denying SWN's intervention; 2) whether SWN was timely in either of its attempts to intervene, and 3) whether a can a party, like SWN can, **create** its interest in a case for intervention purposes. The Circuit court did not abuse its discretion, SWN was not timely in its motion to intervene and Respondents are aware of no West Virginia law allowing a party to create its interest for intervention.

Conley brought this quiet title action on May 22, 2014, claiming ownership of all or a share of the oil and gas rights underlying 3.763 acres located in Brooke County, West Virginia ("3.763-acre tract" or "subject property"). Conley had acquired the subject property by Deed dated June 26, 2000. The 3.763-acre tract comprises a part of the surface estate of the larger tract of property consisting of approximately 161 acres that belonged to Maria H. Milliken, who, pursuant to the deed dated June 5, 1959 (hereinafter "Milliken Deed"), conveyed the coal and the

oil and gas rights to the underlying property to Eli Rabb, excepting a 1/8 royalty of "of any and all production of Oil and Gas that may be discovered on said property".

Eli Rabb later transferred his oil and gas production rights underlying the Milliken property, including the plaintiff's 3.763 acres, via a "Farmout Agreement," dated June 5, 2007, to TriEnergy, Inc., excepting and reserving a 1.5% overriding royalty interest in all oil and gas saved and produced from the 161-acre tract (including the oil and gas underlying Conley's property). Subsequently, Mr. Rabb conveyed the 1.5% overriding royalty interest as a gift to Intervener Defendant Trinity Health System Foundation and conveyed, via a Conveyance and Assignment of Oil and Gas Rights dated May 16, 2008, Mr. Rabb conveyed his interests in the oil and gas rights to TriEnergy Inc.

After presumably conducting his title search to determine all parties who may have a claim to the oil and gas rights underlying the subject property, Conley sued seven (7) parties who he believed had an interest in the oil and gas rights underlying the subject property on May 22, 2014: Lee M. Rabb, individually and as Trustee of the Eli Rabb Revocable Trust Dated October 7, 2005 ("Rabb") Chesapeake Appalachia, LLC ("Chesapeake"), Jamestown Resources, LLC ("Jamestown"), and TriEnergy, Inc., TriEnergy Holdings, LLC and WPP, Inc. (collectively "TriEnergy"). Conley did not sue SWN because they owned no interest in the oil and gas underlying his property at the time he filed his complaint. For a variety of reasons, all defendants except Rabb and TriEnergy were dismissed, ostensibly, because none had valid claims to the oil and gas rights underlying the property. Interestingly, not only did Conley not sue SWN's in his initial Complaint, he never sought to amend his Complaint to name SWN as a party.

B. Nature of SWN's Attempts to Intervene in The Underlying Case Below.

SWN has twice, unsuccessfully, attempted to intervene into the instant action. SWN initially moved to intervene into this matter on or about July 22, 2016, although it admittedly did not have any ownership interest of "any mineral right", including the oil and gas, in the subject property. By Order entered on August 16, 2016, the Court denied SWN's initial Motion to Intervene. The Court denied that motion largely based upon SWN's lack of an ownership interest in the oil and gas underlying the subject property, the fact that SWN's motion was untimely, because the disposition of the case did not impair SWN's ability to protect its interests, and because SWN aligned itself with Conley, thereby adequately protecting its interests.

Approximately seven (7) months after the Court's August 16, 2016, Order denying SWN's Motion to Intervene, SWN entered into an oil and gas lease with Conley, relative to the subject property. When SWN entered into the lease with Conley on March 7, 2017, it knew that the ownership of the oil and gas rights underlying the subject property were in dispute in this case. JA00414. Although the lease was dated March 7, 2017 it was not recorded until June 2, 2017. Inexplicably, SWN then waited an additional seventeen (17) months after it entered into the lease with Conley, and fifteen (15) months after the lease was recorded, before attempting intervention for a second time. In its second motion to intervene, filed on August 17, 2018, SWN argued, in part, that it should be permitted to intervene because it now possessed a leasehold in the oil and gas rights to the subject property. JA00414 – JA00476 (SWN's Second Motion to Intervene).

The Court denied SWN's second motion to intervene by Order entered February 22, 2019. JA001024 – 001030 (Order Denying SWN's Second Motion to Intervene). In exercising its discretion to deny SWN's second motion to intervene, the circuit court first found that the motion was untimely because SWN waited nearly a year and a half after entering the lease with Conley to

file its second motion to intervene. Second, the circuit court recognized that, after being denied intervention, SWN entered the lease with Conley *to attempt to create an interest in the real estate in an effort to cure one of its defects in its initial motion for intervention.* Third, the Court found that SWN aligned itself with Conley by entering the lease, which lease resulted in both Conley and SWN having the same apparent interest in the real estate. The circuit court's ruling denying SWN's Second Motion to Intervene was within its sound discretion, and the trial court, clearly, did not abuse that discretion. As such, SWN's appeal must be denied.

III. SUMMARY OF ARGUMENT

A. SWN's Petition Does Not Set Forth a Basis for How the Circuit Court Abused its Discretion in Denying its Multiple Attempts to Intervene. As such, its Petition Should Be Denied.

The right to allow intervention is vested solely with the circuit court in West Virginia. To be successful in its appeal, SWN must set forth a basis as to how the circuit court abused its discretion in denying SWN's multiple attempts to intervene in the case below. The Court's denial of SWN's motion to intervene must be reviewed on an abuse of discretion standard. When the circuit court's orders denying SWN's intervention are analyzed, it is clear that the circuit court followed the law in West Virginia in denying SWN's attempts to intervene and did not abuse its discretion in those denials. As such, SWN's appeal must be denied.

B. Petitioner's Assignment of Alleged Error No. 1.

The circuit court did not abuse its discretion in denying Petitioner's right to intervene in the case below, because the petitioner, SWN Production Company, LLC ("SWN") did not have an ownership interest at the time the complaint was filed. SWN admittedly did not have an interest when its first motion to intervene was filed more than two (2) years later. The only interest SWN claimed in its second motion to intervene was an interest it attempted to create by

entering into an oil and gas lease with the plaintiff below, some three (3) years after the complaint was filed, and at a time when SWN knew that the ownership rights were in dispute. Nothing within West Virginia law allows a party, like SWN, to create its intervention in a case for the sole purpose of intervening.

C. Petitioner's Assignment of Alleged Error No. 2.

The circuit court correctly held that SWN did not timely move, pursuant to W. Va. R. CIV. P. 24, to intervene in the underlying case. Timeliness in seeking intervention is a requirement of the West Virginia Rules of Civil Procedure. This Honorable Court has repeatedly held that the issue of timeliness in seeking intervention is within the discretion of the trial court. SWN first moved to intervene more than two (2) years after the case was filed, with, admittedly, no interest in the underlying property. Subsequently, SWN waited more than seventeen (17) months after it attempted to create an interest in the subject property, by entering into a lease with the plaintiff, before filing its second motion to intervene. The circuit court properly, and within its discretion, found SWN's second motion to intervene to not be timely.

D. Petitioner's Assignment of Alleged Error No. 3.

The circuit court did not abuse its discretion in concluding that SWN had no protectable interest in the underlying subject property. SWN admitted it had no interest in the subject property when it first attempted to intervene and the only interest in the subject property that SWN had when it attempted to intervene a second time, was an interest it attempted to create in the subject property, by entering into a lease with the plaintiff three (3) years after the complaint was filed. By entering into an oil and gas lease with the Plaintiff, SWN tacitly admitted that the Plaintiff, not it, owned the oil and gas rights underlying the subject property. Further,

Respondents are aware of no law that allows SWN to create an interest in a case for the sole purpose of intervention. Therefore, the circuit court's findings on this issue were correct.

E. Petitioner's Assignment of Alleged Error No. 4.

The circuit court did not abuse its discretion in concluding that any interest that SWN claimed in the subject property, by way of its attempts to create such an interest by entering into a lease with the plaintiff, could be adequately protected by the plaintiff. The plaintiff has been prosecuting his claim to the oil and gas underlying the subject property for more than five (5) years, utilizing a substantial and aggressive motion practice. As such, the circuit court's finding that any interest created by SWN into the underlying action could be adequately protected by the plaintiff was appropriate.

F. Petitioner's Assignment of Alleged Error No. 5.

The circuit court did not err in denying permissive intervention by SWN. SWN has not established that the circuit court abused its discretion in denying SWN's attempts to seek permissive joinder. The circuit court did not abuse its discretion in denying SWN permissive joinder. SWN was so dilatory in seeking permissive joinder that the circuit court was correct in denying the same.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents assert that oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

V. ARGUMENT

A. Standard of Review.

Motions to intervene in West Virginia are within the sound discretion of the trial court. Appeals of the trial court's rulings on intervention as viewed on an abuse of discretion standard.

SWN's multiple attempts to intervene into this matter were not proper under the West Virginia Rules of Civil Procedure and applicable law and, therefore, the circuit court was correct in using its discretion to deny SWN intervention into the underlying case. The circuit court's denials of SWN's motions to intervene were within its discretion and SWN's appeal can only be successful if the circuit court abused its discretion. It did not. The circuit court based its denials of SWN's multiple attempts to intervene after applying the facts of this case to the applicable standards for intervention. While the circuit court's denials of both of SWN's motions to intervene were proper, the circuit court's denial of SWN's second motion to intervene, upon which SWN predicates its appeal, was particularly warranted. The circuit court's order denying SWN's second motion to intervene set forth the basis behind the court's denial of that motion and the circuit court's basis for denial was correct.

SWN was not one of the original eight (8) parties to the complaint filed by Conley on May 22, 2014. The parties included the plaintiff and seven (7) defendants, all of whom had an arguable interest in the oil and gas rights underlying the subject property at the time the Complaint was filed. SWN waited almost three (3) years after the case was filed to attempt to create an interest in the subject property to seek intervention. It then waited another seventeen (17) months after attempting to create its interest before seeking its second motion to intervene. Those facts support the circuit court's denials of SWN's motions to intervene, particularly its second motion to intervene.

In order to be successful in its Appeal, SWN must prove that the circuit court abused its discretion in denying its second motion to intervene. *See Pauley v. Bailey*, 171 W. Va. 651, 653, 301 S.E.2d 608, 609 (1983). This Court has set forth requirements that must be met before intervention can be allowed under West Virginia Rule of Civil Procedure 24(a)(2). West Virginia Rule of Civil Procedure 24(a)(2) allows intervention of a party when an applicant meets four conditions: (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the actions may as a practical matter, impair the applicant's ability to protect that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties. Syl. Pt. 2, *State ex rel. Ball v. Cummings*, 208 W.Va. 393, 398 (W. Va. 1999).

When the *Ball* standard of review is applied to SWN's Appeal, it is clear that the SWN's Appeal should be denied. The circuit court did not abuse its discretion in denying SWN motions to intervene because it correctly found that: (1) SWN's Motion to Intervene was not timely; (2) SWN did not have an interest in the real estate when the case was filed; (3) SWN's ability to protect its interest in this matter is not impaired because it can enter into a lease with the prevailing party; and (4) Conley has the same interest as SWN in this matter and, as the circuit court found, SWN's interests will be adequately protected.

SWN did not meet the four (4) *Ball* requirements for intervention into the underlying case. First, neither of SWN's motions to Intervene were timely, evidencing a pattern of dilatory conduct by SWN in asserting an interest in the underlying litigation. SWN filed its initial motion to intervene on July 21, 2016, more than two (2) years after the complaint was filed. That initial motion to intervene was denied, in part, because SWN, admitted it had no interest in the subject oil and gas rights, stating in its Memorandum. Specifically, SWN admitted two (2) years after

Plaintiff's Complaint was filed: ..." SWN does not claim ownership of any mineral right in the (subject property)" JA00155 – JA00164 at 7. (Memorandum in Support of SWN Motion to Intervene. Because SWN admittedly had no ownership interest in the mineral rights to the subject property and because its initial motion to intervene was not timely, its initial motion to intervene was denied, by an order entered on August 16, 2016. JA00215 – JA00219 (Order Denying SWN's Motion to Intervene).

After its initial motion to intervene was denied, SWN then attempted to create an interest in this matter by entering into a lease on May 7, 2017 with Conley, although Respondents believe nothing within West Virginia law allows it to do so. Although SWN knew that the ownership of the oil and gas was in dispute, SWN ignored the dispute and attempted to create its interest in this matter so as to seek to force its intervention into the case. Not only was SWN's attempt to create an interest that would allow it to move to intervene into this matter improper, its second motion to intervene, like its first, was not timely. Inexplicably, SWN waited seventeen (17) months after its attempted creation of an interest in the underlying case to seek to intervene a second time, via motion filed on August 17, 2018. JA00414 – JA00476 (SWN's Second Motion to Intervene). In fact, its second motion to intervene was filed almost two years, to the day, of the circuit court denying its first motion to intervene. While SWN was inexplicably dilatory in filing its second motion to intervene, the parties in this action were actively engaged in prosecuting their claims and moving this case toward trial. Thus, the circuit court did not abuse its discretion in denying SWN's Motion to Intervene because it was SWN's conduct that resulted in the denial of SWN's Motion to Intervene –initially by attempting to create an interest in the subject property for the purpose of intervention in this case, and, then by being extremely dilatory in filing its second motion to intervene.

Second, SWN did not have an interest in the real property when the case was filed nor did it have an interest in the real property when it filed its first motion to intervene, two (2) years after the Complaint was filed. In fact, the only interest that SWN has ever had in the underlying case or the subject property is an interest it attempted to create, although SWN could not cite the West Virginia law to support its "creation of interest for the purpose of intervention" theory. Specifically, SWN entered into its lease with Conley, although it knew that this dispute over the oil and gas ownership existed. SWN could have simply waited until the case resolved to attempt to enter a lease with the prevailing party, but did not. Rather, it attempted to improperly wedge itself into the underlying case by creating an interest without citing to law allowing it to do so.

Third, SWN's interests will be protected even if it is not a party to this action. SWN has entered into a lease, albeit several years after the complaint was filed, with Conley. In doing so, it implicitly recognized that Conley, not SWN, owned the oil and gas rights to the subject property. If Conley does not prevail, SWN can enter a lease with the parties who the jury determines owns the oil and gas rights to the subject property. SWN complaint that it could lose its lease with Conley is disingenuous, inasmuch as SWN entered the lease with Conley fully aware that the ownership of the oil and gas rights to that property was in dispute.

Finally, SWN's interests will be fully represented by Conley because SWN has tacitly recognized that Conley owns the oil and gas rights and Conley has the same lease interest as SWN in the oil and gas rights of the real property. For these reasons, SWN's appeal of the circuit court's order denying it intervention in this litigation should be denied.

B. Grounds Why Intervention by SWN in the Pending Action Was Not Proper.

The paramount issue of SWN's appeal is whether the circuit court abused its discretion in denying SWN's second motion to intervene.[1] It did not. The granting of a motion to intervene is within the sound discretion of the circuit court and its Appeal can only be successful if the circuit court abused its discretion. Here, the circuit court, in denying SWN's second motion to intervene, did not abuse that discretion. Although, SWN could cite to no West Virginia law allowing it to create an interest in a case, years after the case was filed, for the sole purpose of intervention.

This Court's standard of review of a circuit court order denying a motion to intervene has been explained as a review under the "abuse of discretion standard". Specifically, this Court has held:

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review. Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Syllabus Point 1, *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454 (2001)."

Gibbs v. W. Virginia AFL-CIO, No. 17-0320 (W.Va. Supreme Court, October 23, 2017) (memorandum decision) (internal quotations omitted).

Additionally, this Court has stated that "[w]hile Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention of parties upon a timely application, the timeliness of any intervention is a matter of discretion with the trial court." *Id.*, 208 W. Va. at 399, 540 S.E.2d at 923 citing Syl. Pt. 10, *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (W. Va. 1975),

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[1] Intervention by Trinity was proper. Shortly after the Complaint was filed Trinity made a timely and sufficient showing of its interest in Plaintiff's property (further submitting to the Court a copy of the recorded assignment of the interest) and established that its overriding royalty interest was a separate and distinct interest that would not be adequately protected by the other parties.

overruled on other grounds, *State ex rel. E.D.S. Fed. Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (W. Va. 1979). In *Ball*, the civil action was filed on November 17, 1998, and the petitioners' motion to intervene was filed on January 7, 1999, approximately two (2) months later. This Court determined that the petitioners' application was timely. *Id.* Therefore, this Court did not disturb the circuit court's finding that "timeliness of application is satisfied because less than two months passed before intervention was requested." *Id.* As discussed hereinbefore, the Petitioner's second motion to intervene was correctly denied because SWN cannot meet the four *Ball* conditions, in part, because the motion to intervene was filed two (2) years after its initial motion to intervene was denied and more than seventeen (17) months after attempting to create its interest in the subject litigation.

C. Assignment of Alleged Errors No. 1 and 3 – The Circuit Court Correctly Held That SWN Did Not Have an Interest in the Real Estate Underlying the Subject Property When the Action was Filed and its Attempts to Create an Interest in the Subject Property Were Not Proper Reasons for Intervention.

As stated above, SWN first attempted to intervene in this case on July 21, 2016, two (2) years after the suit was commenced. Its first motion to intervene was denied, in part, because it admittedly had no interest in the subject oil and gas rights. Although it knew that the ownership of the oil and gas is in dispute, SWN ignored the dispute and attempted to create its interest in this matter so as to seek to intervene again, despite being unable to cite West Virginia law allowing it to create an interest solely for intervention purposes.

Nothing within W. Va. R. Civ. P. 24, nor the cases cited by SWN, specifically allows a party to do what SWN sought to do to rationalize its second motion to intervene. That is to say, Respondent can find **nothing within the Rules or the case law allows a party to create** the "interest relating to the property or transaction which is the subject of the action" as set forth in *State ex rel. Ball v. Cummings*. Thus, SWN's conduct in attempting to create an interest in the

subject property of the underlying case, for the purpose of a second motion to intervene in this case was improper. West Virginia law does not specifically allow a party to create an interest in case, solely for the purpose of seeking intervention for a second time, after initially being denied intervention.

In fact, SWN sought to do what other jurisdictions have expressly disallowed. For example, the Florida Supreme Court has held that a party who does not have an interest in the property which is the subject of a bill to quiet title, as this case was, has no right to intervene. Specifically, the Florida Supreme Court has held that "[a]t the time a bill is filed to quiet title to land and a final decree recorded, a party having no interest in the land has no right to intervene for the purpose of defending." *Minge v. Davison*, 94 Fla. 1197, 115 So. 510 (Fla. 1928). The Supreme Court of Florida determined that since the "purchase of the land and the assignments of the judgments all occurred pendente lite," or during litigation, the purchaser was not entitled to intervene in the underlying action. *Id.*, 94 Fla. at 1200, 115 So. at 511. In Florida, however, a purchaser pendente lite *may* be allowed to intervene in such suits where he or she asserts a superior title to that of the complainant. *See Nelson Bullock Co. v. South Down Development Co.*, 132 Fla. 495, 181 So. 365 (Fla. 1938). Here, SWN has not asserted a superior title to the complainant, Conley. In fact, SWN leased the oil and gas rights from the complainant, Conley, ostensibly, because SWN believed that Conly owned the oil and gas rights at the time it entered its oil and gas lease with Conley. Therefore, SWN's created interest for intervention relies upon Conley owning the oil and gas rights. As such, SWN's interest is inferior to Conley's.

Nonetheless, as is the case in West Virginia, intervention in Florida is subject to the discretion of the trial court judge. *Id.* Clearly, SWN's conduct in attempting to create a property interest, solely for the purpose of attempting to intervene in a case, and its lack of legal authority

to support its conduct, has been rejected by other jurisdictions, like the Florida Supreme Court and it should be rejected by this honorable Court.

Although Rule 24 does not require the circuit court to consider prejudice to the parties, SWN, nevertheless, makes the argument that it will be prejudiced if not made a party to this case. SWN's argument is not credible because it belies the fact that it waited nearly a year and a half after entering the lease with Conley, thereby attempting to create an interest in the subject property, to attempt to intervene. On the contrary, the Respondents are the parties who will suffer prejudice if this case is reset to permit SWN to participate. This case was filed on May 22, 2014. Since that time, the parties have been conducting extensive discovery and participated in significant motions practice.

D. Assignment of Alleged Error No. 2 – SWN's Appeal Must Be Denied Because It Cannot Overcome the Fact that Its Motion to Intervene Was Not Timely.

SWN has not adequately explained the nearly year and a half lapse of time between when it entered the lease with Conley attempting to create an interest in the underlying matter and its filing of its second motion to intervene. Although it knew that this case was pending, SWN did nothing to attempt to secure its rights. On the contrary, the parties to the litigation were actively engaged in discovery and pleadings practice to push this case forward to trial.[2] Eventually, SWN decided to attempt to create an interest to assert its rights and demanded that the circuit court and the parties cease five years-worth of litigation to accommodate its newly claimed interest in this case. A review of the facts and timeline bears this out.

[2] Indeed, Plaintiffs have served and Defendants have responded to five different sets of Requests for Admission, three sets of Requests for Production and three sets of Interrogatories. Defendants have served and Conley has responded to Interrogatories and Requests for Production and Defendants have taken Conley's deposition which was a Deposition *Duces Tecum*. Additionally, the parties have engaged in significant pleadings practice. The circuit court' s docket reflects almost five hundred (500) lines of entries in this case, and as such, the litigation of this matter has been quite extensive. JA001108 – JA001120.

After being denied its first attempt to intervene in this case in or about July, 2016, in part, because it admittedly had no interest in the subject oil and gas rights, SWN entered into a lease on May 7, 2017 with Conley, in an apparent attempt to create an interest in the case although Respondents can find nothing within West Virginia law allowed it to do so. That lease was recorded on June 2, 2017. In its second motion to intervene filed on August 17, 2018 SWN argued, in part, that it should be permitted to intervene because it now had a leasehold in in the oil and gas rights to the subject property. Importantly, however, SWN did not file its second motion to intervene until nearly a year and half after entering the lease with Conley.

This Court has held that "[West Virginia's] Rule 24 is analogous to the federal Rule 24... Timeliness is to be determined from all the circumstances and it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *Pauley v. Bailey*, 171 W. Va. 651, 653, 301 S.E.2d 608, 609 (W. Va. 1983) quoting *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648, 662–63 (U.S. 1973) (internal quotations omitted); *see also* Syl. Pt. 10, *Pioneer Co.*, 159 W.Va. at 291, 220 S.E.2d at 904. In *Pauley*, the Court concluded that "the trial judge properly exercised his discretion in denying appellant's motion to intervene" because petition was untimely in view of the protracted course of the litigation and because the motion to intervene was filed almost one year after the evidentiary hearings had closed and some seven months after the court's May orders." 171 W. Va. at 653, 301 S.E.2d at 609. Here, SWN's attempts to intervene were filed long after evidentiary hearings and protracted litigation.

Additionally, in *Gibbs v. W. Virginia AFL-CIO*, this Court held that "where the motion to intervene was filed on the day that summary judgment motions were argued, by petitioner's counsel who, as participating amicus counsel, was familiar with the progression of the action and the circuit

court's expressed desire to rule expeditiously, [the Court found] no abuse of discretion in the circuit court's having found that petitioner failed to make timely application under either Rule 24(a) or Rule 24(b)." *AFL-CIO*, No. 17-0320 (W.Va. Supreme Court, October 23, 2017) (memorandum decision). Here, SWN filed its initial motion to intervene **after** summary judgment motions were argued. Therefore, under the *Gibbs'* holding, the denial of SWN's motion to intervene should be upheld.

The Late Justice Franklin D. Cleckley wrote that "[a] trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law." *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) citing *Cox v. State*, 194 W.Va. 210, 218 n. 3, 460 S.E.2d 25, 33 n. 3. (Cleckley, J., concurring). Below, the trial court's findings in its seven (7) page order denying SWN's second motion to intervene were diligent, well-reasoned in fact and law, and therefore not based on an erroneous assessment of the evidence. JA001024 – JA001030. As such, the trial court did not abuse its discretion and should not be reversed.

While it inexplicably dithered in filing its second motion to intervene, SWN knew that the parties were past the summary judgment stage of the case, because it had counsel present for the July 15, 2016, oral argument on the parties' Motions for Summary Judgment. Although SWN initially attempted to intervene after the summary judgment hearings, its motion was denied, largely, because it had no interest in the oil and gas underlying the subject real estate and because its motion wasn't timely. SWN attempted to remedy its deficiency by creating an interest by entering into the May 7, 2017 lease with Conley despite any supporting law allowing it to do so. This attempt to create an interest occurred less than a year after being denied its motion to intervene. SWN then waited until August 17, 2018, more than two (2) years after its initial motion to intervene was denied, and seventeen (17) months after creating its interest in the subject

litigation, to attempt to intervene for a second time. SWN, apparently, was not overly concerned with the case proceeding without its participation for the seventeen (17) months after it created its interest in the case before seeking to intervene a second time on August 17, 2018. While SWN sat on its rights, the parties in this action were actively pushing this case toward trial. In its Appellate Brief, SWN fails to provide any meaningful explanation for its dilatory conduct; rather, it states, without providing meaningful factual support, that its attempt at intervention was timely.

This Honorable Court has upheld a circuit court's refusal of rights to parties who are dilatory in seeking them. Specifically, in regard to motions to amend, the West Virginia Supreme Court has held:

> "The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay." *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 386, 693 S.E.2d 451, 460 (W. Va. 2010) citing Syl. Pt. 3, *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (W. Va. 2005).

In *Vedder*, the Court upheld a circuit court's denial of Plaintiff's motion to amend his complaint because the plaintiff waited ten (10) months before moving to amend his complaint. This Court held in *State ex rel. Ball v. Cummings* a two (2) month delay before the petitioner's request for intervention was timely under W. Va. R. C. P. 24. Here, however, SWN waited more than two (2) years after the Complaint was filed to initially attempting to intervene and then waiting another fifteen (15) months after creating an interest in the case to try, for a second time, to intervene. Like the plaintiff in *Vedder,* SWN was dilatory in filing its motions to intervene in the instant case.

In an effort to excuse its dilatory conduct in moving to intervene, SWN relies on two events that fail to explain its lack of timeliness. First, SWN argues that the defendants issued it a subpoena

seeking information about the real estate. The August 16, 2018, subpoena does not excuse SWN's dilatory conduct because SWN did not provide any meaningful response to the same. It produced no documents and, instead, filed objections alleging various privileges and **relying on its position as a non-party to avoid compliance**. JA00443 – JA00455. SWN now seeks to speciously use the subpoena that it ignored and objected to as a defense for its lack of timeliness. The subpoena had nothing to do with SWN waiting nearly one and a half years to intervene, nor did it mark the date that SWN attempted to create an interest in the property, which occurred nearly a year and a half prior to the subpoena.

Second, SWN cites to the defendants' motions to file a third party complaint against SWN as another excuse for its procedurally defective failure to timely move to intervene. The defendants filed their preemptive motions in the event the circuit court would, wrongfully, permit SWN to intervene. The defendants reasoned that if SWN was to be a party in the case, based on action it took to try to create an interest in the oil gas rights, SWN should be a third-party defendant rather than an intervener, so that the defendants could assert slander of title and trespass claims against Conley and SWN for entering into a lease while the ownership of the oil and gas was in dispute. After the circuit court denied SWN's second motion to intervene and denied TriEnergy's motion for leave to file certain counterclaims against Conley, the defendants abandoned their efforts to join SWN because their slander of title and trespass claims appeared moot at this time. Nevertheless, these motions do not explain away SWN's dilatory conduct. They merely describe events that occurred because of actions taken by SWN in attempting to create an interest for intervention purposes. They do not excuse or explain SWN's fatal dilatory conduct in moving to intervene and as such, SWN has provided no valid basis for its dilatory conduct.

E. Assignment of Alleged Error No. 4 – The Circuit Court Correctly Held That SWN's Interests Will Be Adequately Represented by Conley.

In denying SWN's second motion to intervene, the circuit court recognized that, after being denied intervention, SWN entered the lease with Conley in an attempt to create an interest in the real estate in an effort to cure a defect in its initial failed attempt to intervene in this case. SWN did so despite knowing that the ownership of the oil and gas was in dispute. The circuit court correctly determined that SWN should not be rewarded for attempting to create its interest in the case and did not believe that its docket should be altered to rescue SWN from the defects of its own making, including timelines. The circuit court correctly held that SWN aligned itself with Conley by entering the lease, which lease resulted in them both having the same interest in the real estate and that, since SWN knew that the ownership of the oil and gas was in dispute at the time it entered into the lease, it cannot assign error to the fact its fate is tied to Conley's ability to prosecute the action. If SWN was concerned about Conley's ability to protect its interests in this matter, it simply could have waited until the action was resolved to enter a lease.

SWN has failed to show compelling evidence that Conley will not adequately represent its interests. In *State ex rel. Ball v. Cummings*, this Court held as follows:

> "If the proposed intervenor's interest is not represented by the existing party, or the existing party's interests are adverse to those of the proposed intervenor, intervention should be granted. **If the interests of the proposed intervenor and the existing party are similar, a discriminating judgment is required on the circumstances of the particular case**, but [the proposed intervenor] ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee. 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1909, p. 319 (footnote omitted). See also 26 Fed. Proc. L.Ed. Parties § 59:303. Finally, **if the interests are identical, intervention should be denied unless there is a compelling showing as to why the existing representation is inadequate**."

208 W. Va. 393, 400, 540 S.E.2d 917, 924 (W. Va. 1999) (emphasis added). The circuit court after analyzing the facts, correctly held that SWN's interest could be adequately represented by Conley.

As established above, Conley and SWN have the same interest in the oil and gas underlying the subject property, pursuant to the May 7, 2017, lease that they entered. The circuit court obviously recognized that, during the time that it was considering the motions for summary judgment, Conley and SWN entered into the lease. Various briefs related to Motions for Summary Judgment were filed beginning February 21, 2017 with the last being filed on or about June 12, 2017, and a hearing on some of the motions was held on May 17, 2017. The lease was entered into on March 7, 2017 and recorded on June 2, 2017. Based on discovery produced by Conley, SWN had been monitoring the case and was, or should have been, aware of the posture of the case. Nevertheless, it entered the lease knowing that it would have to rely on Conley to protect its interests and should not be afforded the argument or insinuation, that the person it chose to enter a lease with is wholly inadequate to protect its interests. Indeed, Conley's counsel are attorneys who have engaged in multiple oil and gas litigation matters, including the instant case. Because it is clear that SWN should not win on the merits of its appeal, its motion to stay should be denied.

F. Assignment of Alleged Error No. 5 – The Circuit Court Properly Denied SWN's Request for Permissive Joinder.

In its Appeal Brief, SWN argues that the circuit court erred in denying it permissive intervention. SWN's request for permissive intervention is even less compelling than its request for intervention by right. Rule 20(a), WVRCP governs permissive joinder and provides:

> **(a) Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in

> the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

The circuit court is given broad discretion and its ruling on permissive joinder is reviewed on an abuse of discretion standard. *See Jeffcoat v. Blyth Eastman Paine Webber, Inc.*, 896 F.2d 1367 (4th Cir. 1990) (*per curiam*). "Determining whether joinder of defendants is proper under Rule 20(a) entails a two-step process. The first step is to assess whether the claims to be joined arise out of the same transaction or series of transactions. If the answer to the first question is yes, then the second step is to consider whether any common question of law or fact will arise in the joined claims." *State ex rel. Energy Corp. of Am. v. Marks*, 235 W. Va. 465, 469, 774 S.E.2d 546, 550 (2015).

"As to the first prong (transactional relatedness), there are no hard and fast rules for determining whether it has been met. However, it is well established that this prong does not require that the events giving rise to the claims be absolutely identical. Rather, claims are transactionally related if there is a logical relation between them." *Id.,* 235 W. Va. at 469-70, 774 S.E.2d 550-51. Here, SWN's transaction is not the same as the other parties' transactions, nor are they transactionally related. SWN's transaction occurred years after the Farmout Agreement and assignments were entered by Rabb and Trienergy. In fact, SWN had no transactionally related claims existing at the time the case was filed. Any claimed transaction by SWN which might give rise to permissive joinder, occurred years later, after this case was pending. Perhaps most disturbing is that any transactionally related claim of SWN to this case is predicated upon its attempt to create that claim.

"The second prong (commonality) is an easy requirement to satisfy and is relatively straightforward." *Id.,* 235 W. Va. at 470, 774 S.E.2d at 551. "It only requires that a *single* factual *or* legal question will arise in the litigation against the joined parties." *Id.* at 465, 759 S.E.2d at 208. "The commonality requirement is satisfied even if the common question is not the most dominant issue in the case." *Id.* Here, there was no commonality, and SWN's basis to assert commonality is predicated upon an interest it attempted to create almost three (3) years after the underlying case was instituted.

Although permissive joinder is provided a liberal standard, as with joinder by right, it is not an absolute right and a party cannot be dilatory in seeking permissive joinder. In *Jeffcoat, infra*, the Fourth Circuit upheld denial of permissive joinder because it was made "...over two years after initiation of the lawsuit and only four months before trial." 896 F.2d 1367 (4th Cir. 1990). The Fourth Circuit found that the trial judge did not abuse his discretion in ruling that the motion was untimely. SWN waited almost three years (3) years after the suit was initiated, a year longer than the party whose permissive joinder was denied because it was dilatory in seeking such joinder. SWN also waited more than seventeen (17) months after it attempted to create an interest in the subject property before seeking its second motion to intervene. This type of dilatory behavior was exactly the type of behavior that the *Jeffcoat* decision found to be a proper basis to deny permissive joinder.

This Honorable Court has held that a party seeking permissive intervention must be timely in its application and timeliness of that intervention is a matter of discretion with the Court. In *Pauley v. Bailey,* 171 W.Va. 651 (WV 1983) 301, S.E.2d 608 the Court held:

> "we note that appellant's petition for intervention is not based on any claim of right under Rule 24(a), R.C.P., but is a claim for permissive intervention. Our Rule 24 is analogous to the federal Rule 254 and this case is similar to NAACP v. New York, 413, U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973), where the Supreme Court upheld denial

> of intervention in a voting discrimination case as untimely. The Court recognized that Rule 24 requires that intervention must be timely sought and went on to state: "Timeliness is to be determined from all the circumstances.
> And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." 413 U.S. at 366, 93 S.Ct. at 2603, 37 L.Ed.2d at 662-63." *Id.*

Not only did the circuit court **not** abuse its discretion in denying SWN's request for permissive intervention, its denial of SWN's motion followed applicable law and the standards for denial. As noted hereinabove, SWN did not satisfy the requirements under West Virginia law and it was dilatory in pursuing intervention. The circuit court did not abuse its discretion in denying SWN's request for permissive joinder when it first sought intervention two (2) years after the case was filed and because SWN waited nearly a year and a half after attempting to create its interest in the subject property to seek joinder. For the foregoing reasons, the circuit court's ruling denying permissive joinder must be affirmed.

IV. CONCLUSION

The Brooke County Circuit Court did not abuse its discretion in denying SWN's second motion to intervene because SWN's motion was not timely; SWN did not have an interest in the real estate when the case was filed; SWN's ability to protect its interest in this matter is not impaired because it can enter a lease with the prevailing party; and Conley has the same interest in this matter as SWN; therefore, SWN's interests will be adequately protected. Additionally, Respondents are aware of no law in West Virginia that allows SWN to create an interest in the underlying litigation for the sole purpose of intervention. Thus, SWN's Appeal should be denied.

Respectfully submitted by:

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