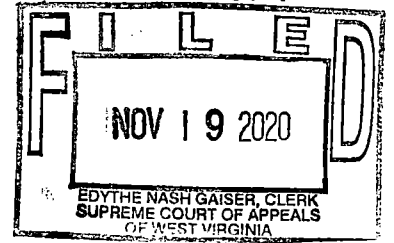


STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS  
Charleston

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**SWN Production Company, LLC  
Putative Intervener Below, Petitioner**

v.

**Case No. 20-0490**

**William K. Walden, et al.,  
Plaintiffs and Defendants Below, Respondents**

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**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**

---

Richard N. Beaver (WVSB No. 6864)  
PHILLIPS, GARDILL, KAISER &  
ALTMAYER  
61 Fourteenth Street  
Wheeling, WV 26003  
Phone 304-232-6810  
richardbeaver@pgka.com  
*Counsel for Lee M. Rabb, individually  
and as Trustee of the Eli Rabb  
Revocable Trust dated October 7, 2005  
and Trinity Health System Foundation*

Joseph G. Nogay (WVSB No. 2743)  
SELLITTI, NOGAY & NOGAY, PLLC  
3125 Pennsylvania Avenue  
P.O. Box 3095  
Weirton, WV 26062  
Phone: 304-723-1400  
jgn-snmlaw@comcast.net  
*Counsel for Trienergy, Inc., Trienergy  
Holdings, LLC, and WPP, LLC*

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*Cox v. State*, 194 W.Va. 210, 460 S.E.2d 25 (1995)

*Gibbs v. W. Virginia ALF-CIO*, No. 17-0320 (W.Va. Supreme Court, October 23, 2017)

*Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451 (2010)

*NAACP v. New York*, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973)

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*State ex rel. E.D.S. Fed. Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979)

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*Stern v. Chemtail, Inc.* 217, W.Va. 329, 337, 617, S.E. 2 d 876, 884 (2005)

*SWN Production Company, LLC v. Conley, et. al.*, No. 19-0267, 2020 (W.Va. November 2, 2020)

*Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997)

### West Virginia Rules of Civil Procedure

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 in the real property at the time the Complaint was filed, (2) the only interest SWN claimed in its motion to intervene was an interest it created by entering into an "option" to enter into an oil and gas lease with the plaintiff below, eight (8) months after the Complaint was filed. Specifically, SWN attempted to create its interest by entering an Option to Acquire Oil and Gas Lease ("Option") with Walden. While that Option would have expired on September 14, 2020, without SWN exercising its Option, which would have rendered this appeal moot, SWN entered into an Amendment and Ratification of Option to Acquire Oil and Gas Lease ("Amendment") on July 23, 2020. However, SWN has still not, to Respondents' knowledge, exercised that option. While W. Va. R. Civ. P. 24, does not prohibit a party from creating an interest in a case solely for intervention, as SWN did in this matter, the conduct by SWN in this case was improper and any interest that it created by the Option is not direct and substantial, as required for intervention. Additionally, the circuit court correctly found that SWN's attempt to intervene was not 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 moved to intervene more than two (2) years after the case was filed, with, admittedly, no interest in the underlying property when this case was filed. SWN had waited eight (8) months after the case was filed before it attempted to create an interest in the subject property, by entering into an Option with the plaintiff and then waited another fifteen months after that before attempting to intervene. The

determination of whether a motion to intervene is timely is a matter of discretion with the trial court. 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 protectable interest when the Complaint was filed, and any interest created by the Option or the Amendment, is not a direct and substantial interest. SWN's interest in the subject property was an option to create an interest in the subject property, eight (8) months after the Complaint was filed. While W. Va. R. Civ. P. 24, does not prohibit a party from creating an interest in a case solely for intervention, as SWN did in this matter, the conduct by SWN in this case was improper. As noted herein before, SWN entered an Option with Walden. While that Option would have expired on September 14, 2020, without SWN exercising its option, which would have rendered this appeal moot, SWN entered into an Amendment on July 23, 2020. However, SWN has still not, to Respondent's knowledge, exercised that option. Any interest created by the Option or the Amendment does not meet the direct and substantial interest required for intervention.

4. The circuit court did not abuse its discretion in concluding that any interest that SWN claimed in the subject property, which interest created by entering into an Option for an oil and gas lease with the plaintiff, could be adequately protected by the plaintiff. SWN had no protectable interest when the case was filed and arguably would not have any direct and substantial interest in any of the real property at issue in the underlying circuit court action until it exercised its option and entered into an oil and gas lease with the plaintiff, which it has not done.

5. The circuit court did not abuse its discretion in denying permissive intervention by SWN under Rule 24(b) of the West Virginia Rules of Civil Procedure. The circuit court is

given broad discretion and its ruling on permissive intervention is reviewed on an abuse of discretion standard. Here, the circuit court did not abuse its discretion in denying SWN's request for permissive intervention, when SWN sought intervention more than two (2) years after the case was filed and more than a year and a half after entering into the Option with Walden. SWN's created intervention was an Option to enter into oil and gas lease because it believed the plaintiffs owned that interest. Therefore, the plaintiffs could protect that interest.

## II. STATEMENT OF THE CASE

The issues relevant to SWN's appeal are: 1) whether SWN's interest created by the Option to enter into an oil and gas lease is direct and substantial interest in the underlying property at issue; 2) whether SWN was timely in its attempt to intervene, 3) whether the circuit court abused its discretion in denying SWN's permissive intervention. Any interest that SWN attempted to create by the Option or the Amendment is not a direct and substantial interest as required by W. Va. R. Civ. P. 24 and, therefore, the circuit court did not abuse its discretion. SWN was not timely in its motion to intervene and while W. Va. R. Civ. P. 24, does not prohibit a party from creating an interest in a case solely for intervention, as SWN did in this matter, the conduct by SWN in this case was improper. Additionally, the circuit court did not abuse its discretion in denying permissive intervention by SWN under Rule 24(b) of the West Virginia Rules of Civil Procedure. As such, the ruling by the trial court denying SWN's motion to intervene should be upheld.

It should be noted that the facts of this case are distinguishable from this Court's recently decided *SWN Production Company, LLC v. Conley, et. al.*, No. 19-0267, 2020 (W.Va. November 2, 2020). In *Conley*, the Plaintiff claimed ownership in only 3.63 acres of a much larger tract of land that the trial court made relevant. In *Conley*, SWN had entered into oil and gas leases with other persons on the larger tract of land made relevant by the trial court before SWN created an interest with Conley by entering into an oil and gas lease with him. Here, the plaintiffs claimed ownership the **entire** 138.75-acre tract of land at issue, before filing their Complaint, and SWN had only entered into an Option to acquire a leasehold interest in the oil and gas underlying the subject real estate with the plaintiffs.

Specifically, William K. Walden and Andrea Walden (hereinafter “Walden”) filed their quiet title action on January 23, 2018, claiming ownership of all or a share of the oil and gas rights underlying 138.75 acres located in Brooke County, West Virginia (“138.75-acre tract” or “subject property”). JA000001-JA000011. Walden had acquired the subject property by Deed dated April 16, 1993 from Dorothy Fay Walden, William K. Walden’s mother. JA000005. Dorothy Fay Walden (and her husband, William Bailey Walden) acquired their interest in the 138.75-acre tract by a Deed dated March 29, 1960, excepting and reserving a one-half (1/2) interest in the oil and gas underlying the 138.75 acre tract.<sup>1</sup> JA000004. By instrument dated January 22, 1962, William Bailey Walden conveyed to Eli Rabb the coal, excepting and reserving to the Grantor the Pittsburgh vein of coal and further excepting and undivided one-half (1/2) interest in the oil and gas, underlying the subject property conveyed one-half (1/2) of 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 taken from the above premises....” JA000004. Unlike previous attempts by SWN to intervene into oil and gas matters brought by plaintiffs in Brooke County, West Virginia, including in the underlying case in this Court’s decision of *SWN Production Company, LLC v. Conley, et al., supra*, there was no “larger parcel” of land implicated in the underlying action. All of the real property at issue in the instant matter was owned by the plaintiffs at the time they filed their Complaint.

Eli Rabb later transferred his oil and gas production rights underlying the Walden property, via a “Farmout Agreement,” dated June 8, 2007, to TriEnergy, Inc., excepting and reserving a 1.5% overriding royalty interest in all oil and gas saved and produced from the

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<sup>1</sup> William Bailey Walden died testate on October 26, 1984 and pursuant to his Last Will and Testament devised all of his undivided interest in the subject property to his wife, Dorothy Fay Walden. JA000005.



138.75 acre tract.<sup>2</sup> JA000005. 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 August 15, 2009. JA000006.

After presumably conducting a title search to determine all parties who may have a claim to the oil and gas rights underlying the subject property, Walden sued eleven (11) parties who Walden believed had an interest in the oil and gas rights underlying the subject property: Lee M. Rabb, individually and as Trustee of the Eli Rabb Revocable Trust Dated October 7, 2005 (“Rabb”) TriEnergy, Inc., TriEnergy Holdings, LLC (collectively “TriEnergy”), AB Resources, Chevron U.S.A., Inc., Trinity Health System Foundation, KRP Marcellus, I, LLC, Rivercrest Royalties, II, LLC, Diversified Rox Minerals, LLC, BRD Royalty Holdings, LLC, and Amon G. Carter Foundation. JA000001-JA000011. Walden did not sue SWN because it owned no interest in the oil and gas underlying his property at the time Walden filed the 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 Walden not sue SWN in his initial Complaint, Walden also never sought to amend the Complaint to name SWN as a party.

When Walden filed this lawsuit on January 23, 2018, SWN owned no interest in the real estate, nor did it have any interest in any larger parcel of property implicated by the action. Additionally, and unlike the *Conley* case, the circuit court had entered its scheduling order on May 15, 2019, prior to SWN seeking to intervene, with a trial date of July 29, 2020. JA000096-JA000100. Unlike SWN’s conduct in the *Conley* case, in order to attempt to create an interest in an action where none existed, on September 14, 2018 (eight months after the Complaint was

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<sup>2</sup> TriEnergy assigned all rights, title and interests to TriEnergy Holdings by instrument dated December 31, 2008. JA000006. TriEnergy and TriEnergy Holdings assigned their overriding royalty interest to WPP by instrument dated December 13, 2012. JA000006.

filed), SWN entered an Option with Walden, not an oil and gas lease. While that Option would have expired on September 14, 2020, without SWN exercising their option, which would have rendered this appeal moot, **SWN entered into the Amendment with plaintiffs on July 23, 2020, after the circuit court denied its motion to intervene**, to extend that option date. However, SWN never exercised that Option during the pendency of this action, and SWN has still not, to Respondent's knowledge, exercised that Option. Any interest created by the Option or the Amendment does not meet the direct and substantial interest required for intervention under W. Va. R. Civ. P. 24.

Even if the Option, which is the document by which SWN claims an interest in this matter, did not expire prior to this appeal, that Option did not create a direct and substantial interest in the underlying matter as required by Rule. Additionally, *SWN waited more than one (1) year after creating its interest in the underlying case and nine (9) months after the court entered its scheduling order to seek intervention into this case on February 12, 2020*. SWN's Petition does not explain why it waited until nine months after the scheduling order was entered and five months before the trial to try to move to intervene.

The circuit court denied SWN's motion to intervene by Order entered June 4, 2020. JA000269 – 000271. In exercising its discretion to deny SWN's motion to intervene, the circuit court first found that the motion was untimely. Second, the circuit court recognized that SWN did not have any interest in the property when the lawsuit was filed and SWN entered the Option with Walden *to attempt to create an interest in the real estate in an effort to intervene*. Third, the Court found that SWN aligned itself with Walden by entering into the Option, which Option resulted in Walden having the same interest in the real estate until, and unless, SWN exercised that Option. Fourth, the circuit court held that if SWN's interests are adversely affected in the

underlying lawsuit, SWN can file suit after this legal action has ended. The circuit court's ruling denying SWN's 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 Did Not Have a Direct and Substantial Interest in the Underlying Action to Allow Intervention Under W. Va. R. Civ. P. 24.

As this Court has held, "To justify intervention of right under West Virginia Rule of civil Procedure 24(a)(2) the right claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one capable of definition, protectable under some law and specific to the intervenor. In determining the adequacy of the interest of the interest in a motion to intervene, courts should give due regard to the efficient conduct of the litigation. Syl. Pt. 4, *State ex rel. Ball v. Cummings*, 208, W.Va. 393, 540 S.E. 2<sup>nd</sup> 917 (1999).

Here, the interest that SWN attempted to create into the underlying action by entering into the Option with the Plaintiff is neither direct nor substantial. In fact, the Option, in its "Method of Exercising Option" section states that the "Grantee (SWN) **shall have the right but not the obligation, ...to exercise the option...**" (emphasis supplied). The "Paid Up Oil and Gas Lease" which, was attached to the Option, and which might, arguably have created an interest in the underlying subject property was *unsigned by either SWN or the plaintiffs*.

The circuit court did not abuse its discretion in denying Petitioner's attempt to intervene in the case below, because the petitioner, SWN, did not have an ownership interest at the time the Complaint was filed and any interest it attempted to create by entering into the Option with the Plaintiffs was not direct and substantial. The only interest SWN claimed in its motion to

intervene was an interest it attempted to create by entering into the Option with the plaintiffs below, some eight (8) months after the Complaint was filed, and at a time when SWN knew, or should have known, that the ownership rights were in dispute. Although nothing within West Virginia law prohibits a party, like SWN, to create its interest in a case for purposes of intervention, that interest must be direct and substantial. SWN's unexercised Option with the plaintiffs below is neither and, as such, the circuit court was correct in denying SWN's attempts to intervene.

**B. SWN's Attempt to Intervene Was Not Timely.**

As this Court has held, "While Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention upon a timely application, the timeliness of any intervention is a matter of discretion with the trial court". Syl. Pt. 3, *State ex rel. Ball v. Cummings*, 208, W.Va. 393, 540 S.E. 2d 917 (1999). Here, 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 moved to intervene more than two (2) year after the case was filed and fifteen (15) months after it attempted to create an interest in the subject property, by entering into an Option with Walden. The circuit court had already entered its scheduling order and a trial was scheduled. The circuit court properly, and within its discretion, found SWN's motion to intervene to not be timely. As such, the discretionary refusal of the circuit court to deny SWN's motion to intervene because it was untimely, should not be disturbed, and SWN's appeal should be denied.

### **C. SWN Had No Protectable Interest in the Underlying Subject Property.**

The circuit court did not abuse its discretion in concluding that SWN had no protectable interest in the underlying subject property. This case is distinguishable from this Court's decision of *SWN Production Company, LLC v. Conley, et al., supra*. In *Conley* the Plaintiff claimed ownership in only 3.63 acres of a much larger tract of land that the trial court made relevant pursuant to its Order on the parties cross-motions for summary judgment. Also, in *Conley*, SWN had entered into oil and gas leases with other persons on the larger tract of land implicated by the trial court's rulings before SWN created an interest with the plaintiff. Here, Walden claimed ownership to the entire 138.75-acre tract of land at issue before filing their Complaint. Additionally, in *Conley*, SWN had entered into an oil and gas Lease with the plaintiff. Here, SWN has only entered into an Option to acquire a leasehold interest in the oil and gas underlying the subject real estate. That Option was not exercised by SWN during the fifteen (15) months it waited before filing its motion to intervene.

Unlike previous attempts by SWN to intervene into oil and gas matters brought by plaintiffs in Brooke County, West Virginia, including in *Conley v. Rabb*, which was the underlying case in this Court's decision of *SWN Production Company, LLC v. Conley, supra*, there was no "larger parcel" of land implicated in the underlying action. All of the real property at issue was owned by the plaintiffs at the time they filed their complaint. As such, SWN has no protectable interest in the underlying subject property.

Because SWN had no interest in the subject property when the lawsuit was filed, and the unexercised Option does not create such an interest, the circuit court's denial of its motion to intervene was proper. SWN attempts to create an interest in the subject property, by entering into an Option with Walden eight (8) months after the Complaint was filed, is not a protectable

interest. By entering into an Option for an oil and gas lease with Walden, SWN tacitly admitted that Walden, not it, owned the oil and gas rights underlying the subject property. In fact, until SWN exercises its right “to acquire an oil and gas lease”, it had no interest in the property at issue. Therefore, the circuit court’s findings on this issue were correct.

**D. Any Claimed Interest in the Subject Property Could Be Adequately Protected by Walden.**

The circuit court was correct 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 an Option with the plaintiffs, could be adequately protected by the plaintiffs. The plaintiffs own the underlying subject property and claim to own the oil and gas rights thereunder, and SWN’s Option does not alter that realty. Plaintiffs have been prosecuting their claim to the oil and gas underlying the subject property for more than two (2) years. As such, the circuit court’s finding that any interest created by SWN into the underlying action, by way of its unexercised Option, could be adequately protected by the plaintiffs was appropriate and that finding should not be disturbed by this Court.

**E. The Trial Court Did Not Err in Denying Permissive Intervention.**

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 intervention. The circuit court did not abuse its discretion in denying SWN permissive intervention. SWN had no interest in the underlying case when it was filed, the Option did not, arguably, create an interest in the underlying matter for SWN and SWN was so dilatory in seeking permissive intervention 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. SWN's attempt to intervene into this matter was 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 a proper exercise of that discretion and it should not be overturned. The circuit court based its denials of SWN's attempt to intervene after applying the facts of this case to the applicable standards for intervention. The circuit court's denial of SWN's motion to intervene was proper.

SWN was not one of the original thirteen (13) parties to the Complaint filed by Walden on January 23, 2018. The parties included the plaintiffs and eleven (11) 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 nine months after the case was filed to attempt to create an interest in the subject property to seek intervention. It then waited another year and a half after attempting to create its interest before seeking its motion to intervene. Those facts support the circuit court's denials of SWN's motions to intervene.

To be successful in its Appeal, SWN must prove that the circuit court abused its discretion in denying its 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 and the Option did not, arguably, create an interest in the real estate; (3) SWN's ability to protect its interests in this matter is not impaired because Walden can represent those interests; and (4) If SWN's interests are adversely affected in the underlying lawsuit, SWN can file suit after this legal action has ended.

SWN did not meet the four (4) *Ball* requirements for intervention into the underlying case. First, SWN's motion to Intervene was not timely. SWN filed its motion to intervene on February 12, 2020, more than two (2) year after the Complaint was filed and fifteen (15) months after it entered into the Option with Walden. However, that Option does not create a substantial or direct interest into the underlying suit, particularly because SWN did not exercise that Option



prior to seeking intervention. Not only was SWN's attempt to create an interest that would allow it to move to intervene into this matter improper, but also its motion to intervene was not timely. Inexplicably, SWN waited fifteen (15) months after its attempted creation of an interest in the underlying case to seek to intervene, via motion filed on February 12, 2020. JA00414 – JA00476. While SWN was inexplicably dilatory in filing its motion to intervene, the parties in this action were actively engaged in prosecuting their claims and moving this case toward trial. The circuit court entered its scheduling order on May 15, 2019, eight (8) months after SWN entered into the Option, with a trial date of July 29, 2020. Permitting SWN to intervene would no doubt affect the trial date and require the parties to rush through discovery.<sup>3</sup> 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 motion to intervene.

Second, SWN did not have an interest in the real property when the case was filed and attempted to acquire the purported interest 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, while the case was pending, was an *Option* to enter into an oil and gas lease. Specifically, SWN entered into its Option with Walden, although it knew, or should have known, that this dispute over the oil and gas ownership existed.

Third, SWN's interests will be protected even if it is not a party to this action. SWN has entered into an Option with Walden eight (8) months after the Complaint was filed. In doing so, it implicitly recognized that Walden, not SWN, owned all of the oil and gas rights to the subject 138.75-acre property. If Walden does not prevail, SWN can enter a lease with the parties who the

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<sup>3</sup> The parties discussed vacating the scheduling order dates before SWN moved to intervene.

jury determines owns the oil and gas rights to the subject property. SWN complaint that it could lose its Option with Walden is disingenuous, because SWN entered the Option with Walden 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 Walden because SWN has tacitly recognized that Walden owns the oil and gas rights and even if SWN had exercised its rights to an oil and gas lease, Walden 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 its 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 motion to intervene. 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 motion to intervene, did not abuse that discretion. Although West Virginia law does not prohibit a party from creating an interest in the underlying action for the purpose of intervention, that interest must be direct and substantial. SWN's Option is neither.

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), 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 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 the Complaint and a year and a half after attempting to create its interest in the subject litigation.

**C. 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 Attempt to Create an Interest in the Subject Property Was Not Proper Reasons for Intervention.**

As stated above, had no interest in the subject oil and gas rights when the Complaint was filed. Although it knew, or should have known, that the ownership of the oil and gas is in dispute, SWN ignored the existing lawsuit and attempted to create an interest in this matter by entering into an “option” to acquire an oil and gas lease. Although nothing within W. Va. R.

Civ. P. 24 prohibits a party from creating an interest for the purposes of a motion to intervene, that interest must be substantial and direct. “To justify intervention of right under West Virginia Rule of civil Procedure 24(a)(2) the right claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one capable of definition, protectable under some law and specific to the intervenor. In determining the adequacy of the interest of the interest in a motion to intervene, courts should give due regard to the efficient conduct of the litigation.” Syl. Pt. 4, *State ex rel. Ball v. Cummings*, 208, W.Va. 393, 540 S.E. 2d 917 (1999).

Here, the interest that SWN attempted to create into the underlying action by entering into the Option with the Plaintiff is neither direct nor substantial. In fact, the Option, in its “Method of Exercising Option” section states that the “Grantee (SWN) shall have the right but not the obligation, ...to **exercise the option...**” (emphasis supplied). The “Paid Up Oil and Gas Lease” which, was attached to the Option, and which might, arguably have created an interest in the underlying subject property was *unsigned by either SWN or the plaintiffs*.

Therefore, SWN’s attempt to create an interest for the purpose of intervention relies upon Walden owning the oil and gas rights and/or SWN acquiring an oil and gas lease from Walden. As such, SWN’s interest is inferior to Walden’s and its interest, if applicable under the Option, is not substantial or direct.

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 it is not made a party to this case. SWN’s argument is not credible because *it belies the fact that SWN did not exercise the option for an oil and gas lease before attempting to intervene*. To 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 January 23, 2018. Since that time, the parties conducted discovery and participated in motions practice.

**D. 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 fifteen (15) months lapse of time between when it entered the Option with Walden, attempting to create an interest in the underlying matter, and its filing of its motion to intervene, nor does it adequately explain why it did not exercise that option and enter into an oil and gas lease with Walden during that period. Although it knew, or should have known, 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. Unlike in the *Conley* case, *supra*, SWN never decided to enter into an oil and gas lease with the plaintiffs before seeking to intervene. Instead, it simply demanded that the circuit court and the parties cease two years-worth of litigation to accommodate its newly claimed “Option” for an interest in this case. A review of the facts and timeline bears this out.

SWN entered into an Option to acquire an oil and gas lease on September 14, 2018 with Walden, in an apparent attempt to create an interest in the case. In its motion to intervene filed on February 12, 2020 SWN argued, in part, that it should be permitted to intervene because it now had an option for a leasehold interest in the oil and gas rights to the subject property. Importantly, however, SWN did not file its motion to intervene until nearly a year and half after entering the lease with Walden.

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 the scheduling order was entered and protracted litigation.

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 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 motion to intervene, SWN knew that the court had entered its scheduling order on May 15, 2019 and that the case was set for trial to begin on July 29, 2020. Nevertheless, SWN then waited until February 12, 2020, more than two (2) years after the Complaint was filed, and fifteen (15) months after entering the Option with Walden, to attempt to intervene. SWN, apparently, was not overly concerned with the case proceeding without its participation for the months after it attempted to create its interest in the case before

seeking to intervene. 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 attempt to intervene. Like the plaintiff in *Vedder*, SWN was dilatory in filing its motions to intervene in the instant case.

**E. The Trial Court Correctly Held That SWN's Interests Will Be Adequately Represented by Walden.**

Again, unlike the *Conley* case, there is no larger parcel of property to which SWN claims to own an interest that was implicated in the underlying case. In denying SWN's motion to intervene, the circuit court recognized that, after being denied intervention, SWN entered the Option with Walden in an attempt to create an interest in the oil and gas rights in the real estate in an effort to attempt to intervene in this case. 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 Walden by entering the Option, which option it had not exercised when it sought to intervene. Since SWN knew that the ownership of the oil and gas was in dispute at the time it entered into the Option, it cannot assign error to the fact its fate is tied to Walden's ability to prosecute the action. If SWN was concerned about Walden's ability to protect its interests in this matter, it simply could have waited until the action was resolved to enter a lease, or to exercise its right to "Acquire Oil and Gas Lease".

SWN has failed to show compelling evidence that Walden 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 Walden.

As established above, Walden and SWN will have the same interest in the oil and gas underlying the subject property if SWN exercises its option, pursuant to the September 14, 2018, Option between them. The circuit court obviously recognized that SWN knew, or should have



known, of the pending litigation when it entered the Walden lease. Nevertheless, it entered the Option knowing that it would have to rely on Walden to protect its interests and should not be afforded the argument or insinuation, that the person it chose to enter an option with is wholly inadequate to protect its interests. Indeed, Walden's counsel are attorneys who have engaged in multiple oil and gas litigation matters, including the instant case.

**F. The Circuit Court Did Not Abuse its Discretion When It Denied SWN's Request for Permissive Intervention.**

This Court has held that a circuit court's decision on an applicant's request for permissive intervention under Rule 24(b) of the West Virginia Rules of Civil Procedure is reviewed under an abuse of discretion standard. *Stern v. Chemtail, Inc.* 217, W.Va. 329, 337, 617, S.E. 2d 876, 884 (2005). In the underlying case, the circuit court did not abuse its discretion in denying SWN permissive intervention. SWN waited more than two (2) years to seek intervention. 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.*

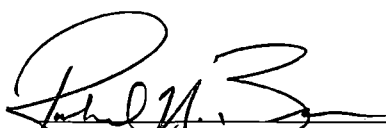
Not only did the circuit court **not** abuse its discretion in denying SWN's request for permissive intervention, its denial of SWN's motion followed applicable law and the standards

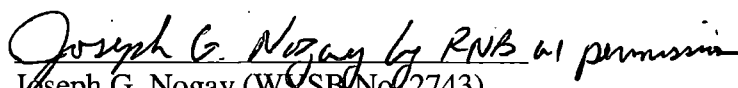
for denial. As noted hereinabove, SWN did not satisfy the requirements under West Virginia law and it was dilatory in pursuing intervention. The circuit court did not abuse its discretion in denying SWN's request for permissive intervention when it first sought intervention two (2) years after the case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

## VI. CONCLUSION

The Brooke County Circuit Court did not abuse its discretion in denying SWN's 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 and any interest it acquired under the Option to Acquire Oil and Gas Lease was not direct and substantial; SWN's ability to protect its interest in this matter is not impaired because it can exercise its option if Walden is successful or it can enter a lease with the prevailing party; and Walden has the same interest in this matter as SWN; therefore, SWN's interests will be adequately protected. Thus, SWN's Appeal should be denied.

Respectfully submitted by:

  
Richard N. Beaver (WVSB No. 6864)  
PHILLIPS, GARDILL, KAISER &  
ALTMAYER, PLLC  
61 Fourteenth Street  
Wheeling, WV 26003  
Phone 304-232-6810  
richardbeaver@pgka.com  
*Counsel for Lee M. Rabb, individually  
and as Trustee of the Eli Rabb  
Revocable Trust dated October 7, 2005  
and Trinity Health System Foundation*

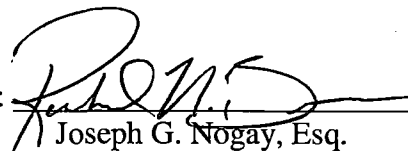
  
Joseph G. Nogay (WVSB No. 2743)  
SELLITTI, NOGAY & NOGAY, PLLC  
3125 Pennsylvania Avenue  
P.O. Box 3095  
Weirton, WV 26062  
Phone: 304-723-1400  
jgn-snmlaw@comcast.net  
*Counsel for Trienergy, Inc., Trienergy  
Holdings, LLC, and WPP, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing **JOINT RESPONDENTS' BREIF 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** has been served this 18<sup>th</sup> day of November, 2020, by first-class U.S. mail, postage pre-paid, and via email to counsel of record listed below:

William Cipriani, Esq.  
Aaron J. Caviani, Esq.  
CIPRIANI LAW OFFICES, LC  
634 Charles Street  
Wellsburg, WV 26070  
*Attorneys for William and Andrea Walden.*

Timothy M. Miller, Esq.  
Robert M. Stonestreet, Esq.  
Babst, Calland, Clements & Zomnir, PC  
BB&T Square Suite 1000  
Charleston, WV 25301  
*Attorneys for SWN Production Company, LLC*

By:   
Joseph G. Nogay, Esq.  
Richard N. Beaver, Esq.