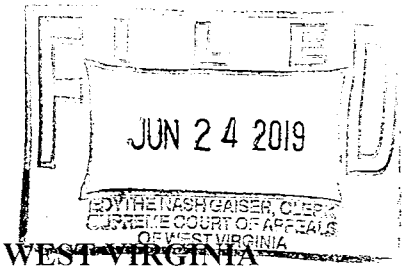

Appeal No. 19-0267

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC
Putative Intervenor Below/Petitioner,
v.
COREY CONLEY, et al.,
Plaintiffs and Defendants Below/Respondents,

Appeal from an Order of the Circuit Court of Brooke County, West Virginia Civil Action No. 14-C-75

PETITIONER'S BRIEF

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June 24, 2019

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I. Assignments of Error.

1. The circuit court erred in denying intervention as of right, pursuant to W.VA. R. CIV. P. 24, to petitioner and putative intervenor below, SWN Production Company, LLC ("SWN"), because SWN has an ownership interest in the property whose title is in dispute in this suit for quiet title. SWN is a necessary and indispensable party to this case, and thus is entitled to intervene as of right.
2. The circuit court erred in concluding that SWN did not timely move to intervene under Rule 24, and thus erred in denying intervention as of right on this ground. The circuit court failed to consider the status of the proceedings at the time SWN sought to intervene and the fact that SWN would be severely prejudiced if intervention were denied.
3. The circuit court erred in concluding that SWN did not have a protectable interest in this case and that it could not intervene because it acquired the lease after suit was filed. The circuit court erred in denying intervention as of right on these grounds.
4. The circuit court erred in failing to consider how the disposition of the underlying claims would impair SWN's ability to protect its property interests and erred in concluding that SWN's interests were adequately protected by Plaintiff Corey Conley. The circuit court thus erred in denying intervention as of right on these grounds.
5. The circuit court erred in denying, in the alternative, permissive intervention to SWN.

II. Statement of the Case.

A. Introduction

The underlying case is a quiet title action over competing claims to the title to certain oil and gas rights in a 3.763 acre parcel of land known as the Conley Parcel. JA00001 – JA00010 (Complaint). The Conley Parcel is one of many parcels that is part of a broader 161.53 acre tract, and title to the oil and gas rights in both the Conley Parcel and in the other parcels stems from the interpretation of the same deed. *Id.* Thus, the decision in this case affects not only the Conley Parcel, but may also implicate the title to the oil and gas rights for other parcels carved out of the 161.53 acres.

Putative intervenor SWN Production is an oil and gas company that has been actively developing oil and gas property in the northern panhandle. JA00167 – JA00179 (SWN Second Motion to Intervene). SWN has a lease of the oil and gas rights in the Conley Parcel. *Id.* It is an ***owner*** of the mineral estate in the very property at issue in this title dispute. SWN also has other oil and gas leases for other parcels that are part of the broader 161.53 acre tract that may be affected by the judgment in this case.

SWN twice moved to intervene in the underlying case, and the circuit court denied both motions—even though Defendants themselves moved to add SWN as a third-party defendant in the underlying case. JA00167 – JA00179 (SWN first motion to intervene); JA00414 – JA00476 (SWN second motion to intervene) JA00215 – JA00219 (Aug. 16, 2016 order) JA01024 – JA01030 (Feb. 22, 2019 order).

SWN timely appealed the denial of its second motion to intervene-the instant appellate case pending before this Court. SWN is also concurrently filing a motion to stay the proceedings in the circuit court pending this appeal.

This Court should reverse the circuit court's decision and allow SWN to intervene in the underlying case. It is black letter law that all persons who claim an interest in property must be parties to a quiet title action involving that property. *Bonafede v. Grafton Feed & Storage Co.*, 81 W. Va. 313, 313, 94 S.E. 471, 471 (1917); *O'Daniels v. City of Charleston*, 200 W. Va. 711, 716, 490 S.E.2d 800, 805 (1997). SWN also satisfies all the other grounds for intervention.

B. Nature of the claims in the underlying quiet title action.

This lawsuit is over the ownership of certain oil and gas rights that stem from an instrument known as the Milliken Deed. In 1959, Maria H. Milliken conveyed the certain mineral interests in a 161.53 acre tract in Brooke County, West Virginia to Eli Rabb, including the "Rights to explore and dig for oil and gas and with all necessary rights to produce and market same[.]" *See* JA00088 - JA00115.[1]

This conveyance of mineral rights expired in 1985. The Milliken Deed limited the duration of the mineral rights being conveyed to no later than December 30, 1985. *Id.* At JA00088 - JA00115.

The 161.53 acre tract was subsequently subdivided into multiple smaller tracts, including the Conley Parcel at issue here.

In 2000 - 15 years after the conveyance of the mineral rights terminated under the Milliken Deed - Conley obtained rights to the Conley Parcel, a 3.763 acre parcel carved out of the 161.53

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[1] The Milliken Deed also conveys "all that coal in an under" the 161.53 acres along with "surface rights which are incident or necessary to the removal of said coal[.]" JA00088 - JA00115.

acre tract.[2] As discussed below, SWN subsequently acquired an oil and gas lease from Conley and has leases in other parcels carved from the 161.53 acres.

In June 2007 - over 30 years after the Milliken Deed's mineral conveyance had expired - Eli Rabb executed a "Farmout Agreement" that purports to authorize third parties to develop the oil and gas underlying the 161.53 acre parcel. JA00001 - JA00010 (Complaint at ¶10). The rights created by that Farmout Agreement and related royalty interests were subsequently assigned by multiple instruments. JA00001 - JA00010 (Complaint at ¶11).

Eli Rabb died testate on October 31, 2009. JA00001 - JA00010 (Complaint ¶2). He devised his assets to the Eli Rabb Revocable Trust ("Trust"), which is a Defendant below. *Id.* Lee M. Rabb, also a Defendant, is the trustee. *Id.*

As a result of these instruments, multiple parties claim certain rights related to the oil and gas underlying the 161.53 acre tract, including the Conley Parcel. These parties include: (a) Plaintiff Conley; (b) SWN; and (c) Defendants, Tri-Energy, Inc., Tri-Energy Holdings, LLC, WPP, LLC, and Intervenor Trinity Health Systems Foundation. JA00001 - JA00010 (Complaint ¶12). Trinity purports to hold an overriding royalty interest in the oil and gas underlying the Conley Parcel, and its motion to intervene was unopposed and granted. JA00027 - JA00058 (Trinity motion to intervene); JA00059 - JA00061 (Aug. 3, 2015 order).

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[2] Conley acquired these rights by deed dated June 26, 2000 from James Lee Milliken and Beatrice S. Milliken recorded in Deed Book 288, page 48 in the Brooke County Clerk's records. JA00001 - JA00010, Complaint, ¶13.

C. Procedural history.

1. Conley files this lawsuit for quiet title.

In 2014, Plaintiff Conley filed this suit over the competing claims to the ownership rights to the oil and gas underlying the Conley Parcel. *See* JA00001 - JA00010 (Complaint). Conley seeks a declaration that he, not the Defendants, owns the rights to develop the oil and gas underlying his property.

In response, the Trust filed a counterclaim seeking a declaration that "Eli Rabb purchased the coal, oil and gas underlying" the 161.53 acre parcel under the Milliken Deed. JA00015 - JA00026 (Answer and Counterclaim by Trust at p. 8 – 9).

The Trust also seeks a declaration relating to the mineral rights underlying the entire 161.53 acre parcel — not just the 3.763 acre Conley Parcel. Despite this fact, none of the persons who has an interest in the 161.53 acre tract has been named as parties to the case. Indeed, nothing in the record even reflects who may have an interest in the 161.53 acre tract besides Conley and Defendants.

In June 2016, Conley filed a motion for summary judgment. JA00088 - JA00115. Conley asked the circuit court to construe the unambiguous language of the Milliken Deed to determine the legal effect of that language on the nature and ownership status of the oil and gas rights referenced in the deed. JA00088 – JA00115 (Conley memorandum served June 2, 2016). According to Conley, the Milliken Deed created a perpetual leasehold interest in the oil and gas, which is unenforceable under West Virginia law and/or was abandoned by Eli Rabb due to failure to explore for oil and gas on the property. *Id.* at 6 - 12. Conley contended that a result, the oil and gas interests are held by the grantor of the Milliken Deed, Maria Milliken, and her successors in title, which includes Conley. *Id.*

In response, Defendants filed a cross-motion for summary judgment, seeking a declaration that they own the oil and gas rights as successors in title to Eli Rabb. *Id.* at 12 – 13. Defendants contended that the unambiguous language of the Milliken Deed provides that it conveyed a fee interest in the oil and gas to Eli Rabb that cannot be abandoned. *Id.* at 3 – 8.

Both cross-motions for summary judgment were over the construction of the Milliken Deed and thus implicated the oil and gas interests in the Conley Parcel, as well as potentially affecting title to other parcels carved from the broader 161.53 acres.

2. SWN learned of the Conley action and twice moved to intervene.

SWN learned of the Conley action while his summary judgment motion was pending. SWN has been actively developing oil and gas property in Brooke County and other portions of the West Virginia northern panhandle since 2014. JA00155 - JA00164 at 1–3. (Memorandum in Support of SWN Motion to Intervene). SWN has entered into oil and gas leases for other properties with chains of title that include deeds naming Eli Rabb as the grantee that reflect the same operative language as set forth in the Milliken Deed. *Id.* This includes properties that were once part of the 161.53 acre tract governed by the Milliken Deed.

On July 21, 2016, SWN first moved to intervene. SWN had leases for other properties governed by other deeds to Eli Rabb that contained the same type of language pertaining to the oil and gas rights. JA00155 - JA00164 at 1 – 3. (Memorandum in Support of SWN Motion to Intervene). Thus, SWN's rights and interests in those properties shared, at a minimum, common questions of fact and law with the claims and counterclaims at issue in the Conley action.

On August 16, 2016, the circuit court denied SWN's first motion to intervene. JA00217. It ruled that SWN's motion was not timely because it was made two years after the case was filed.

Id. at 3. The circuit court also ruled that SWN did not have any interest in the Conley Parcel, and any interests SWN could have would be adequately protected by Conley. *Id.*

The August 16, 2016 order denying intervention also granted Conley's request to delay ruling on the pending summary judgment motions to allow the parties to engage in limited discovery. *Id.* at 4. JA00218.

Following limited discovery, both sides renewed their summary judgment motions. JA00255 - JA00275 (Conley's renewed motion February 22, 2017); JA00228 - JA00254 (Defendants' renewed joint motion February 21, 2017). In June 2017, the circuit court denied both summary judgment motions. It determined that the language of the Milliken Deed was ambiguous with regard to the intent of the parties to the instrument. The court's order states that a jury will determine the following issues:

> (1) Who drafted the document in question?
>
> (2) Was the meaning or intention of the parties to convey a fee or a lease to Rabb of the coal, oil, and gas, or was the meaning and intention of the parties to create some combination?
>
> (3) If the parties[']' intention was to create a lease of any or all of those rights, did said lease expire and, if so, when?
>
> (4) Any and all other factual questions that are deemed appropriate by the Court.

JA00324-JA00338 (June 16, 2017 Order).

On June 2, 2017 - in the midst of the summary judgment briefing - SWN recorded an oil and gas lease from Conley for his parcel. JA00414 - JA00476. Defendants subsequently served SWN with an expansive subpoena duces tecum requesting 14 different categories of information concerning SWN's oil and gas operations and leases for property within the 161.53 acres governed

by the Milliken Deed, including requests for obviously privileged information such as title opinions. JA00387 - JA00391, Subpoena. Exh. A, ¶2.[3]

Shortly after receiving Defendants' subpoena, on August 17, 2018, SWN filed a second motion to intervene, which is at issue in this appeal. JA00414 - JA00476 SWN sought intervention under both the "mandatory" and "permissive" provisions of Rule 24. As explained more fully in the memorandum of law supporting the second motion to intervene, SWN's lease with Conley triggered a mandatory right for intervention. The lease created a legally protectable property interest in the Conley Parcel, and disposition of the pending declaratory judgment claims may impair SWN's ability to protect that interest. JA00088 - JA00115. SWN also explained how Conley could not adequately represent SWN's interests in the Conley parcel and other properties affected by an interpretation of the Milliken Deed. *Id.* SWN's interests in those other properties shared common questions of law and fact that also support permissive intervention. *Id.* At the time SWN filed its second motion to intervene, no scheduling order was in place, no trial date had been set, and very limited discovery had occurred.

While SWN's second motion to intervene was pending, three defendants moved for leave to assert counterclaims against Conley for declaratory judgment, trespass, and slander of title. JA00489-JA00515 (motion for leave). The Court granted the requested leave.

On September 13, 2018, Defendants jointly served a memorandum opposing SWN's motion to intervene and instead, jointly moved for leave to file a third-party complaint against

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[3] SWN objected to the subpoena on multiple grounds and did not produce any documents in response. JA00388 - JA00390

SWN. JA00489 - JA00515. SWN did not oppose becoming a third-party defendant. JA00529 - JA00540.

On February 15, 2019, the circuit court entered a scheduling order, setting trial on August 26, 2019 and a discovery deadline of June 26, 2019. JA01003 - JA01009

A week later, on February 22, 2019, the circuit court denied SWN's second motion to intervene. It did not address Defendants' joint request for leave to file a third-party complaint against SWN. The circuit court denied this motion on the following grounds: (1) SWN's request was not timely; (2) SWN acquired its lease from Conley after the circuit court denied SWN's first motion to intervene; and (3) SWN's interests are adequately protected by Conley. *Id.*

The circuit court also granted Conley's motion to dismiss the trespass and slander of title claims on February 22, 2019. As a result, Conley's only remaining claim is for declaratory judgment regarding the title to the oil and gas in the Conley Parcel — whether the oil and gas interest is owned by Conley and SWN, or one of the Defendants.

Neither of the February 22, 2019 orders address the Defendants' joint request for leave to file a third-party complaint naming SWN. Only after the Court denied SWN's second motion to intervene did the Defendants seek leave to withdraw their request to name SWN as a third-party defendant. JA01121 - JA01127. The circuit court granted that motion by order entered on June 19, 2019.

3. SWN appealed the denial of its motion to intervene, and the circuit court refused to enter a stay pending the appeal.

SWN timely appealed the February 22, 2019 order denying its second motion to intervene to this Court. That order is at issue in this appeal.

On April 17, 2019, this Court established the appellate briefing schedule, with the final brief being due no later than August 28, 2019 - after the trial date in the circuit court. SWN is thus concurrently filing with this Court a motion to stay the proceedings in the circuit court.

This Court should reverse and remand to the circuit court, ordering that SWN be allowed to intervene in the underlying suit.

III. Summary of argument.

A. Assignment of Error No. 1.

This Court need not look far to reverse the circuit court's denial of intervention. SWN has an ownership right to the oil and gas interests at issue in this title dispute. The circuit court is deciding whether Plaintiff and SWN own the mineral rights, or whether one of the Defendants does. SWN is a necessary and indispensable party to this suit for quiet title and is entitled to intervene.

B. Assignment of Error No. 2.

The circuit court abused its discretion in finding that SWN did not timely move to intervene. SWN twice moved to intervene in this case, and filed its second motion to intervene - the one at issue here - shortly after acquiring its leasehold interest to the oil and gas in the Conley Parcel. At the time it moved to intervene, no scheduling order had been entered, no trial date had been set, and only limited discovery had occurred. Further, the circuit court failed to consider the fact that SWN will be severely prejudiced if denied intervention, but conversely, no party will be unduly prejudiced if it intervenes. Indeed, the Defendants sought to add SWN as a third-party defendant in this case.

C. Assignment of Error No. 3.

The circuit court erred as a matter of law by denying intervention on the grounds that SWN acquired its property interest after suit was filed. SWN has a direct and substantial interest in this case - it is a necessary and indispensable party. The judgment in this case may also affect SWN's other leases stemming from the Milliken Deed.

Further, nothing in Rule 24 allows the circuit court to deny intervention based on an after acquired property right. The circuit court's interpretation of Rule 24 unfairly precludes intervention by persons who acquire an interest in property either with or without knowledge of pending litigation. Such an interpretation is contrary to the text and purpose of Rule 24 - to provide all persons having a cognizable interest in the subject of litigation with a proverbial "seat at the table" to protect their interests.

D. Assignment of Error No. 4.

The circuit court erred in concluding that SWN's interests would not be impaired if intervention were denied, and that SWN is adequately represented by Plaintiff Conley. SWN's rights would plainly be impaired, as discussed above.

Further, the circuit court made no findings of fact concerning SWN's interests or how Conley would adequately represent them. Nor could it. SWN's interests are not fully aligned with Conley's interests and are not adequately represented by him.

SWN's development of oil and gas underlying the Conley Parcel poses considerable risks not shared by Conley – namely the potential loss of substantial investment of time and capital associated with efforts to produce oil and gas. SWN also has leases for other properties governed by the Milliken Deed or instruments with similar language. A decision interpreting the Milliken Deed will likely be used as evidence to interpret ownership rights to those other properties. There

is no evidence that Conley has any motivation to protect those interests. Conley also likely lacks the financial wherewithal to vigorously pursue his property rights to the same degree as SWN.

IV. Statement regarding oral argument and decision.

The Court should grant Rule 20 oral argument for at least two reasons. First, the assignments of error present at least one issue of first impression under West Virginia law -- whether a person who acquires a legally protectable interest in real property during the pendency of a quiet title action is precluded from intervening in that action under Rule 24 of the West Virginia Rules of Civil Procedure. SWN has not identified any reported decision by the West Virginia Supreme Court squarely addressing this issue. The circuit court's ruling that those circumstances preclude intervention finds no support in the text of Rule 24 and is contrary to existing law governing indispensable parties for resolution of quiet title actions. "It is axiomatic that when a court proceeding directly affects an interest in real property, any persons who claim an interest in the real property at issue are necessary parties to the proceeding. Therefore, any decree issued in the absence of those parties is void." *O'Daniels v. City of Charleston*, 200 W. Va. 711, 716, 490 S.E.2d 800, 805 (1997). The circuit court's ruling is also contrary to the purpose of Rule 24 -- ensuring that all persons with an interest in real property have an opportunity to participate in an action that may affect or impair their respective property interests.

Second, a property owner's ability to participate in pending litigation involving the ownership of its property involves issues of fundamental public importance: protection of private property rights. The lower court's decision excluding SWN from participating in a quiet title action involving the very oil and gas rights that SWN has acquired threatens the ability of property owners to protect their rights.

For all these same reasons, a memorandum decision would not be an appropriate means for disposition of this appeal.

V. Argument.

A. Grounds for intervention in a pending civil action.

Rule 24 of the West Virginia Rules of Civil Procedure governs intervention. Its purpose is to "achieve judicial economies of scale by resolving related issues in a single lawsuit" while also preventing "intervention by nonparties who have no real interest whatsoever in an action." *Palmer, et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, 5th ed. at 698.

Rule 24 should be liberally construed in favor of the prospective intervenor. *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 403, 540 S.E.2d 917 (1999); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). "Courts should allow intervention where no one would be hurt and greater justice could be attained." *Palmer, et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, 5th ed. at 698. "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

Rule 24 recognizes two grounds for intervention: mandatory and permissive. Rule 24(a) creates a mandatory right to intervene when four criteria are met:

> (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 action may, as a practical matter, impair or impede 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, *Ball*, 208 W. Va. 393.

Rule 24(b) empowers a trial court to grant intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." W. Va. Civ.R. 24(b); *see also, Fauble v. Nationwide Mut. Fire Ins. Co.*, 222 W.Va. 365, 664 S.E.2d 706 (2008). Permissive intervention is also warranted when there are questions of law and fact in common between the parties. *Stern v. Chemtall Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005).

Failure to allow intervention when such common questions exist constitutes an abuse of discretion. "It is obvious to us that intervention should have been permitted due to the questions of law and fact in common between the parties." *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005).

B. Standard of review.

On appeal, a trial court's denial of intervention as of right under Rule 24(a) is reviewed *de novo* except for timeliness, which is reviewed for abuse of discretion. Syl. Pt. 3, *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999); *Brumfield v. Dodd*, 749 F.3d 339, 342 (5th Cir. 2014) ("We review a denial of a right to intervene *de novo*."); *Medical Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) ("We review a district court's denial of mandatory intervention *de novo*."); *Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 840 (9th Cir. 2011) ("We review a denial of a motion to intervene as of right *de novo*."). Permissive intervention is reviewed under an abuse of discretion standard. *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005).

C. Assignment of Error No. 1: As an owner of the property, SWN has an absolute right to intervene in the quiet title action and any judgment without it is void.

The circuit court erred in denying intervention for numerous reasons. Initially, the circuit court's ruling is contrary to black letter law on suits to quiet title.

SWN's lease from Conley creates an ownership right to the oil and gas interests. Despite the term "lease," an oil and gas lease is not a rental. An oil and gas lease is a conveyance by the Lessor of the fee mineral estate to the Les for a term. As long as the lease is in force, the Lessee is the owner of the minerals covered by the lease, and the Lessor is the owner of a royalty interest only. *See Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 528, 766 S.E.2d 785, 787 (2014) (recognizing that oil and gas leases are a form of real property protectable by law).

This Court has consistently held that a party who claims an interest in real property that is the subject of a quiet title action is a ***necessary and indispensable party*** that must be permitted to participate. "In a suit to cancel a cloud upon the title to real estate, all parties who have or claim any interest, right, or title under the instrument, or instruments, of writing sought to be cancelled, should be made parties defendant." *Bonafede*, 81 W. Va. at 313. "It is axiomatic that when a court proceeding directly affects an interest in real property, any persons who claim an interest in the real property at issue are necessary parties to the proceeding. Therefore, any decree issued in the absence of those parties is void." *O'Daniels,* 200 W. Va. at 716.

SWN is a property owner in the Conley Parcel, whose title is in dispute in this suit; the suit is over who owns the title to the oil and gas minerals underlying the Conley tract, either Conley and SWN, or one of the Defendants. SWN has an absolute, unconditional right to intervene, and any judgment in this case without it is void.

This point is dispositive, and the circuit court's decision should be reversed on this ground.

D. Assignment of Error No. 2: SWN timely moved to intervene.

The circuit court also erred in concluding that SWN's intervention was not timely and in denying intervention on this ground.

"The requirement of timeliness must be considered within the factual context of each case, including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties." 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019) (citing various federal cases). "In order to properly determine whether a motion to intervene in a civil action is sufficiently timely, a trial court in this Circuit is obliged to assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. United States EPA*, 758 F.3d 588, 591 (4th Cir. 2014).

"The mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits." 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019). "The timeliness requirement prevents disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence." *Id.*

1. The circuit court failed to consider the circumstances and status of proceedings in denying intervention.

SWN first moved to intervene shortly after it learned of the suit. At that time, little development had occurred in the case. SWN's second motion to intervene was likewise timely. It moved to intervene after recording its lease in the Conley Parcel. At that time, no scheduling order was in place, no trial date and discovery deadline had been set, and limited discovery had occurred. Also, at that time, the circuit court had ruled that summary judgment could not be

granted for either side, and that a jury would have to resolve questions of fact relevant to the intent of the parties to the Milliken Deed.

Further, SWN filed its second motion after it received an extensive subpoena from Defendants - a de facto recognition that it had an interest and information highly relevant to the case. ***And lest there be any doubt, Defendants jointly moved to add SWN as a third party defendant in the case.***

These circumstances establish that SWN's motion to intervene was timely, and the circuit court wholly failed to consider any of these circumstances.

In denying SWN's second motion to intervene, the circuit court failed to consider the status of the proceedings. Instead, the February 22, 2019 order focuses on the filing date of the complaint, SWN's first motion to intervene, and the timing of the lease with Conley. The order fails to acknowledge that no scheduling order was in place and no trial had been scheduled at the time of SWN's second motion to intervene (August 17, 2018). The order did not mention the June 16, 2017 ruling that summary judgment could not be granted for either side, and that a jury would have to resolve questions of fact relevant to the intent of the parties to the Milliken Deed.

In short, the circuit court did not give any consideration to the status of the proceedings aside from the age of the case in making a determination of SWN's timeliness. This constitutes an abuse of discretion. As set forth above, "[t]he mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits." 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019).

2. The circuit court failed to consider the fact that SWN will be severely prejudiced if it is not allowed to intervene, and that conversely, no party will be harmed by intervention.

The circuit court further failed to consider the severe prejudice that SWN would suffer by being excluded from a trial to determine ownership of its title to the oil and gas rights that it acquired from Conley. "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1916 (3d ed.). "Conversely, the absence of prejudice supports finding the motion to be timely." *Id.*

"[I]n situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely . . . ." *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995) (quoting Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1916 at 424).

In *Mt. Top Condo.*, the Third Circuit affirmed a district court's decision to permit intervention in a case that had been pending for *four years* when the motion was made. The Third Circuit observed that "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Id.* In that case, some discovery had taken place, but no depositions had been taken or decrees entered. *Id.* The court also recognized that the intervening party would be severely prejudiced if it were excluded from the case. *Id.*

Here, the circuit court made no determination that allowing SWN to intervene would cause prejudice to the existing parties or otherwise cause disruption in the case. And it could not have done so, given the case status - very little had occurred in the case and no trial date had been set.

Moreover, the circuit court failed to consider the fact that SWN would be severely prejudiced if intervention were denied, but conversely no party would be harmed by intervention:

- SWN will be severely harmed if a stay is not granted. Trial will proceed without it, even though it is an indispensable party to this title dispute. The court and jury will decide whether SWN has a valid leasehold interest, even though it would have no opportunity to participate in the trial.

- The circuit court's judgment will implicate SWN's interests in other leases stemming from the Milliken Deed.

- The circuit court's judgment will be void. It is a waste of the Court's and the parties' time to try the matter without SWN. At the same time, this decision may be used against SWN in other matters stemming from the Milliken Deed or deeds with similar language.

- The defendants themselves sought to add SWN as a third party defendant, and cannot seriously argue now that they would be prejudiced if SWN joined this suit.

The circuit court further abused its discretion by failing to consider any of these facts.

E. Assignment of Error No. 3: SWN's acquisition of its oil and gas lease during the pendency of the civil action is irrelevant as to whether SWN satisfies the requirements for mandatory intervention.

1. A direct and substantial property interest creates a mandatory right to intervene regardless of when the interest is acquired.

To satisfy the "interest" element for mandatory intervention, the claimed interest must be "direct and substantial." As stated in *State ex rel. Ball v. Cummings,*

> To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest 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 that is capable of definition, protectable under some law, and specific to the intervenor. In determining the adequacy of the interest in a motion to intervene of right, courts should also give due regard to the efficient conduct of the litigation.
> Syl. Pt. 4, 208 W. Va. 393, 396, 540 S.E.2d 917, 920 (1999).

Here, SWN plainly has a direct and substantial interest in the suit.

a. SWN has an ownership interest in the Conley Parcel, whose title is in dispute in the underlying suit.

The circuit court did not address whether SWN's oil and gas lease with Conley created a "direct and substantial" interest in the Conley Parcel. SWN's lease clearly so qualifies as such an interest. An oil and gas lease is undeniably a property interest protectable by law, and the lease is specific to SWN. *See Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 528, 766 S.E.2d 785, 787 (2014) (recognizing that oil and gas leases are a form of real property). "It has been recognized that "interests in property are the most elementary type of right that Rule 24(a) is designed to protect. Thus, many of the cases in which a sufficient interest has been found under amended Rule 24(a)(2) have been cases in which there is a readily identifiable interest in land". Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1908.1 (3d ed.).

Here, a judgment on the pending claims and counterclaims will purportedly effectively resolve SWN's oil and gas rights in the Conley Parcel and will definitely impair or impede SWN's property rights. Again, the suit is over who owns the oil and gas rights, SWN and Conley or one of the Defendants. SWN's oil and gas interest may be purportedly invalidated, even though it would not be a party to the case. Further, as set forth above, this makes SWN an indispensable party, and any judgment without it will be void. *Bonafede,* 81 W. Va. at 313; *O'Daniels,* 200 W. Va. at 716. SWN plainly satisfies the

b. Any judgment in the underlying suit may affect SWN's other leases stemming from the 161.53 acres and the Milliken Deed.

SWN's interest is further affected by the Conley action because any judgment will likely be used as evidence in other actions addressing the ownership of the oil and gas rights for other properties comprising the 161.53 acres conveyed (until 1985) in the Milliken Deed. Although Conley's 3.763 parcel is a small piece of the larger tract, interpretation of the Milliken Deed in this

action will likely be used as evidence of the nature and ownership of the oil and gas interests of the remaining portion of the 161.53 acres that were conveyed to Eli Rabb by that deed. SWN also has other portions of the 161.53 acres under lease from other property owners who are not parties to this action.

The interests of those property owners are also implicated in this action. Further litigation involving SWN and those other property owners could lead to inconsistent judgments interpreting the same instrument, the Milliken Deed. That would further cloud the title to the oil and gas interests rather than resolve the dispute.

c. The circuit court's holding that a party cannot intervene if its property right is obtained after suit is filed should be rejected.

The circuit court's order failed to address the above points and was otherwise in error. The circuit court only stated that Rule 24 does not "specifically allow[] a party to intervene when that party creates the interest after the suit is filed." JA01010 - JA01019 at 5 (Feb. 22, 2019 order). "Because SWN created the 'interest related to the property or transaction which is the subject of the action' after the suit was filed, it does not meet the Bell [sic] [4] criteria for intervention under West Virginia law." *Id.* (emphasis in original). The circuit court's ruling is in error for at least four reasons.

First, the circuit court's point is irrelevant. The critical fact is that SWN has an ownership interest in the title of the property at issue - giving it an unconditional right to intervene and making

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[4] The circuit court likely intended to reference "Ball" - i.e. *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999).

the circuit court's judgment void if it is not a party. When SWN acquired the lease is irrelevant, so long as SWN owns it at the time the judgment is entered.

Second, nothing in Rule 24 prevents a party from seeking intervention in these circumstances based on an after-acquired property right. The circuit court is effectively re-writing the rule to impose such a requirement. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (courts should not interpret the Rules of Civil Procedure to impose greater obligations than stated in the text). Such an interpretation would not make sense, in addition to being an incorrect construction of Rule 24. It would also unfairly restrict the ability of persons who have an interest in the object of litigation to intervene. Persons may acquire or dispose of various property interests without any knowledge of pending litigation concerning the property. Depending on the type of property involved, such as personal property, a potential buyer or seller may have no reasonable means of discovering the existence of pending litigation concerning the subject property. Under the limitation adopted by the circuit court, one who acquires property after litigation has commenced involving the property would be prohibited from intervening under Rule 24 regardless of the person's knowledge concerning the litigation.

Third, any such interpretation would be contrary to the liberal standards of Rule 24. As this Court has emphasized, "[a] liberal view toward allowing intervention should be followed." *Ball*, 208 W. Va. at 403; *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). "Courts should allow intervention where no one would be hurt and greater justice could be attained." *Palmer, et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, 5th ed. at 698. "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single

action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

Fourth, SWN's intervention was timely under the circumstances of the case, as set forth above, and indeed, SWN twice sought to intervene. Further, SWN will be severely prejudiced if intervention is denied, but no party will be prejudiced if intervention is allowed.

In short, SWN's lease of the Conley Parcel qualifies as a "direct and substantial interest" in the property at issue regardless of when SWN acquired it. The circuit court plainly erred by reading into Rule 24 an additional limitation that would prohibit intervention when the property interest was created after commencement of the respective litigation.

F. Assignment of Error No. 4: SWN's interests will plainly be impaired it is not allowed to intervene, and its interests are not adequately represented by Conley.

The circuit court's order collapses the "impairment" and the "adequate representation" elements of mandatory intervention into one determination - whether Conley will adequately represent SWN's interests. JA01010 - JA01019 (Feb. 22, 2019 order at 5). The circuit court did not separately determine whether SWN satisfied the "impairment" element of Rule 24 -- a showing that disposition of the underlying claims "may as a practical matter impair or impede the applicant's ability to protect that interest[.]" To fully assess whether an existing party can adequately represent a putative intervenor's interest, a determination of the potential for impairment of that interest should also be made. Although the circuit court did not reach this issue, the record demonstrates that SWN clearly satisfied the "impairment" element of Rule 24.

In determining whether disposition of an action may impair or impede an intervenor's ability to protect its interest, "courts must first determine whether the proposed intervenor may be practically disadvantaged by the disposition of the action." Syl. Pt. 5, *Ball*, 208 W. Va. at 396. If

so, the court "then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions." *Id.*

The circuit court did not determine whether SWN may be practically disadvantaged as a result of the underlying civil action. Instead, the circuit court's order merely notes that SWN had no interest in the property when Conley filed the case, was aware of the litigation when it entered into the lease for the Conley Parcel, and "the Court had already ruled that SWN's interests are adequately represented by the Plaintiff in this matter." JA01010 - JA01019 at 5 (Feb. 22, 2019 order). The circuit court further stated - without any citation to authority - that: "SWN cannot, now, complain that its fate is tied to the resolution of this civil action. If SWN had such concerns, it simply could have waited until this action was resolved to enter a lease with the victorious party." *Id.* at 6. The circuit court went on to reject SWN's position that an interpretation of the Milliken Deed would impact the interpretation of similarly worded deeds that conveyed mineral interests to Eli Rabb. *Id.*

The circuit court's ruling was in error, for numerous reasons.

1. SWN has an ownership interest in the title to the property at issue.

The circuit court's conclusion is contrary to black-letter West Virginia law recognizing that any person who claims an ownership interest in real property is an indispensable party in a quiet title action. It is so well established that SWN's interests would be impaired that any judgment is void if it is not a party. *Bonafede,* 81 W. Va. at 313; *O'Daniels*, 200 W. Va. at 716.

There is no serious question that disposition of the underlying case would impair or impede SWN's ability to protect its leasehold interest. A judgment finding that Defendants own the oil

and gas underlying the Conley Parcel would purport to deprive SWN of its leasehold rights. In this case, either Conley and SWN own the rights, or one of the Defendants does.

Moreover, the result of the underlying action will be a judgment purporting to determine the ownership rights to the oil and gas underlying the Conley Parcel that may impact the remaining parts of the 161.53 acres governed by the Milliken Deed. Such a decision not only implicates SWN's leasehold interests, but the fee ownership interests of other persons who claim an ownership interest in the balance of the 161.53 acres governed by the Milliken Deed. Those persons are not parties to the underlying action. As noted above, potential future litigation involving SWN and those other property owners could lead to inconsistent judgments interpreting the Milliken Deed and ownership of the oil and gas rights underlying the 161.53 acres. This would create a further cloud on the title rather than clarifying the ownership rights.

2. The circuit court did not weigh SWN's interest against the interests of the existing parties to conclude the underlying case without undue complication and delay.

This factor strongly supports intervention, and this point cannot be seriously disputed. Defendants responded to SWN's intervention motion with a request for leave to file a third-party complaint against SWN. JA00489 - JA00515. Defendants obviously did not believe that SWN's addition to the case would be prejudicial. Just the opposite was true. Defendants *wanted* SWN in the case, and Conley and SWN made no objection to SWN becoming a party. JA01108 - JA01120 (docket sheet reflects no objection by Conley to SWN's second motion to intervene). Defendants only withdrew their motion for leave to assert claims against SWN after the circuit court denied SWN's second motion to intervene, which made it fairly obvious that their motion would also be denied. None of the parties asserted that SWN's addition to the case would cause undue delay or otherwise further complicate the trial.

3. The circuit court's rationale was contrary to the plain language of Rule 24 and otherwise in error.

The grounds cited by the circuit court have no basis in the text of Rule 24(a). As noted above, nothing in Rule 24(a) precludes intervention by a person who acquired a property interest after commencement of litigation. SWN's knowledge of the pending litigation when it entered into a lease with Conley has no relevance to whether "disposition of the action may as a practical matter impair or impede" SWN's ability to protect its leasehold interest.

The circuit court's comment that SWN should just have waited until resolution of the case to enter into a lease with the victorious party is simply inappropriate. Again, nothing in Rule 24(a) or other legal authority cited by the circuit court prohibits a party from intervening in pending litigation as a result of a property interest acquired during the pendency of the case. The circuit court also assumes that the victorious parties would be willing to enter into a lease with SWN on the same terms as Conley did in 2017, which is nothing more than speculation. Again, the only relevant fact is whether SWN owns the lease at the time of trial and judgment.

Applying the *Ball* standard to the undisputed facts, SWN clearly satisfied the "impairment" element to establish a right to intervene. Rule 24(a) only requires a proposed intervenor to be situated such that "disposition of the action may impair or impede" the ability to protect the intervenor's interest. The circuit court's rationale cannot override the fact that SWN has an ownership interest in the property, is a necessary and indispensable party, and that any judgment without it is void.

For all these reasons, the circuit court erred in finding that SWN did not satisfy the "impairment" element of Rule 24(a).

4. SWN's interests are not adequately protected by Conley.

The circuit court erred in determining that SWN's interests are not adequately protected by Conley. The burden of demonstrating inadequate representation is "minimal" and "a liberal view toward allowing intervention should be followed." *Ball,* 208 W. Va. at 403. "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Id.* (quoting *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992)).

"[A] proposed intervenor need only show that his claimed interest may not be adequately represented; no showing of actual inadequacy is required." *Id.* "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." *Id.* "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.'" *Id.* (quoting 7C Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 1909, p. 319) (alteration in original).

The circuit court concluded, without analysis, that Conley would adequately protect SWN's interests. JA00215 - JA00219 at 3 (August 16, 2016 order). Significantly, the Court made no findings concerning whether and how Conley would adequately represent SWN's interest, or whether SWN's interests are completely aligned with Conley's interests.

The order merely notes that when SWN entered into the lease with Conley, "the Court had already ruled that SWN's interests are adequately represented by the Plaintiff in this matter." JA00215 - JA00219 at 5 (apparently referring to the order denying the first intervention). This

appears to be a reference to the circuit court's August 16, 2016 order denying SWN's first motion to intervene. In that order, the circuit court made no findings concerning whether Conley would adequately protect SWN's interests save for the following conclusory statement: "Finally, to the extent the Plaintiff has aligned himself with SWN, SWN's interests are adequately represented by the Plaintiff in this matter." JA00215 - JA00219 at 3 (August 16, 2016 order).

The circuit court erred in determining that SWN's interests are adequately represented by Conley for multiple reasons.

First, no party to this matter occupies a position legally or factually similar to SWN. Conley and certain of the Defendants claim fee ownership of the oil and gas interests underlying only the 3.763 acre parcel. SWN's interest in the parcel is that of a lessee with the rights and intent to develop the underlying oil and gas - most likely through pooling the property with other nearby property as part of a development unit. JA00414 - JA00476 at 5 (SWN memorandum in support of second motion to intervene). Conley has no interest similar to SWN's in pooling.

Second, any judgment in this case will impact leases from the broader 161.53 acres that are not part of the Conley Parcel. Conley has no interest in title disputes in the other parcels. Conversely, SWN has a strong interest beyond the Conley Parcel in how a jury resolves the factual questions associated with the Milliken Deed and how the Court construes the Milliken Deed based on the jury's findings. SWN has leased other property that was once part of the 161.53 acres and are governed by the Milliken Deed.

A judgment concerning ownership of the Conley Parcel may be used as evidence concerning ownership of the oil and gas underlying the other acreage with the Milliken Deed in the chain of title. As the circuit court noted in its order denying the cross-motions for summary judgment, a jury will determine who drafted the Milliken Deed, whether the parties to that

instrument intended to convey a fee interest in the minerals or only a lease, and if a lease was created, whether the lease has expired. JA00324 - JA00338 at 15 (June 15, 2017 order finding deed ambiguous). The answers to all of these questions potentially pertain equally to the 161.53 acres as they do to the Conley Parcel.

Beyond those properties, the operative language of the Milliken Deed appears in numerous instruments in chains of title for other properties that SWN owns or controls in Brooke County. JA00427 at 6 (SWN memorandum in support of second motion to intervene). SWN has active oil and gas operations on some of these lands. *Id.* A decision interpreting the Milliken Deed will likely be used as evidence to interpret those other instruments. This is especially true since SWN is unaware of any decision by a West Virginia court interpreting this type of deed language. JA00427 at 6. There is no indication that Conley has any stake in protecting SWN's interests in those other properties.

Third, Conley's interests are not completely aligned with SWN's interests. JA00426 - JA00427 at 5 – 6. SWN has far more at stake than Conley does. SWN's development of the oil and gas underlying the subject property poses considerable risks not shared by Conley - namely, the potential loss of a substantial investment of time and capital associated with efforts to produce minerals from the 3.763 acres. *Id.* Conley has no obligation to commit time and capital to develop the oil and gas, and likewise bears no risk of loss associated with SWN's development. *Id.* Conley has already received a per acre bonus payment from SWN for executing a lease for the 3.763 acres. *Id.* Conley will retain these funds regardless of whether SWN proceeds with mineral production. *Id.* While Conley would benefit from mineral production through payment of royalties, if SWN does not extend the lease or undertake certain activities within the five year primary term of the lease that expires on March 7, 2022, the lease will expire. *Id.* Conley will then have received the

bonus payment from SWN and have the ability to lease the minerals again, which would likely include another per acre bonus payment. *Id.*

Fourth, Conley likely does not have the financial resources necessary to mount a full challenge to the claims of the competing parties - and there is certainly no finding that he does. JA00414 - JA00476 (SWN Memorandum supporting second motion to intervene). This is particularly important because SWN has far more of a financial interest here than Conley does.

The nature of SWN's property interest, its investment risk, and the potential impact of the outcome of this case on other property interests demonstrate that the interests of SWN and Conley are not completely aligned. As recognized in *Ball*, intervention should be granted in this situation: "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." *Ball,* 208 W. Va. at 403; *see also West Virginia Public Employees Insurance Board v. Blue Cross Hospital Service, Inc.*, 180 W.Va. 177, 181 375 S.E.2d 809, 813 (1988) (proper for court to consider "whether unusual circumstances exist which establish that the interest the movant alleges was inadequately protected[.]").

Thus, SWN's interests are not adequately protected by Conley, particularly in light of the liberal standards applied to this factor.

G. Assignment of Error 5: The circuit court erred in denying permissive intervention.

Rule 24(b) empowers a trial court to grant intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." W. Va. Civ.R. 24(b); *see also*, *Fauble v. Nationwide Mut. Fire Ins. Co.*, 222 W.Va. 365, 664 S.E.2d 706 (2008). Permissive

intervention is also warranted when there are questions of law and fact in common between the parties. *Stern v. Chemtall Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005).

Failure to allow intervention when such common questions exist constitutes an abuse of discretion. "It is obvious to us that intervention should have been permitted due to the questions of law and fact in common between the parties." *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005). Ignoring evidence also constitutes an abuse of discretion. "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *State v. LaRock*, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 (1995)).

The circuit court's order does not address permissive intervention at all. SWN has satisfied the grounds for permissive intervention under Rule 24(b), in addition to intervention of right. SWN and Conley have a common interest in seeking a determination that Conley owns the oil and gas interests underlying the 3.763 acres. JA00414 - JA00476 at 7 - 8. The validity of SWN's oil and gas lease from Conley depends on Conley having title to the oil and gas. *Id.* The questions of fact and law pertaining to a determination of whether Conley owns the oil and gas interests underlying the 3.763 acres are common between Conley, SWN, and the other parties to this case. *Id.*

Common questions of law and fact also exist between SWN and the parties to this case by virtue of SWN's ownership interests in other properties with the Milliken Deed or similar instruments involving Eli Rabb in the chain of title. This includes potentially the same issues that

the Court held, in denying cross motions for summary judgment, that the jury should address, such as:

> (1) Who drafted the document in question?
>
> (2) Was the meaning or intention of the parties to convey a fee or a lease to Rabb of the coal, oil, and gas, or was the meaning and intention of the parties to create some combination?
>
> (3) If the parties[’] intention was to create a lease of any or all of those rights, did said lease expire and, if so, when?

JA00414 - JA00476 at 15. Thus, SWN has satisfied all the grounds for permissive intervention, and the circuit court erred in failing to address that point.

The February 22, 2019 order does not even mention permissive intervention, much less determine whether SWN established grounds for permissive intervention. It appears the circuit court concluded that the timing of SWN's acquisition of its lease of the Conley Parcel also precluded permissive intervention. That has been addressed above. Nothing in the language of Rule 24(b) supports such an interpretation, and when SWN acquired the lease is irrelevant. The relevant fact is that SWN is an indispensable party at the time of trial and judgment. SWN satisfies, in the alternative, the requirements for permissive intervention. SWN reincorporates here all of its arguments above regarding mandatory intervention here, on permissive intervention.

VI. Conclusion.

In sum. SWM is an indispensable party to this case and will be severely prejudiced if intervention is denied. This suit is over who owns the title to the oil and gas interests at issue - Conley and SWN, or one of the Defendants. This suit may also affect SWN's interests in other leases carved from the Milliken Deed or with similar language to the Milliken Deed. SWN will be severely prejudiced if intervention is denied, but no party will be prejudiced if intervention is granted. Defendants themselves sought leave to add SWN as a third party defendant.

For these reasons and all the reasons stated above, the circuit court erred in denying SWN's second motion to intervene. SWN's motion was timely in light of the status of the proceedings. Rule 24 does not preclude either mandatory or permissive intervention based on when a property interest was acquired. SWN's interests were not aligned with, and not adequately represented, by Conley in the underlying action. SWN asks this Court to issue an order reflecting the following:

1. A reversal of the circuit court's February 22, 2019 order denying SWN's second motion to intervene;

2. A directive to the circuit court to enter an order making SWN an intervening party and to enter a new scheduling order that permits a reasonable time for SWN to participate in discovery and filing of dispositive motions;

3. If the underlying circuit court proceedings are not stayed pending this appeal,[5] a declaration that any previous verdict, order, or other decision by the circuit court purporting to

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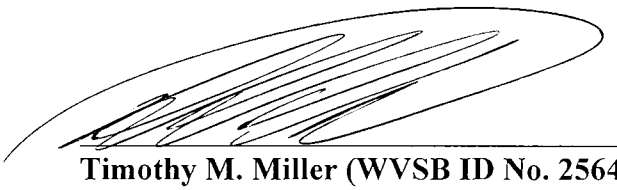
[5] SWN concurrently filed a motion requesting this Court to stay the trial of the underlying matter pending resolution of this appeal. This request for relief will be moot if the Court grants SWN's motion before the circuit court enters any judgment on the merits of the underlying declaratory judgment claims concerning ownership of oil and gas underlying the Conley Parcel.

adjudicate the merits of the underlying declaratory judgment claims concerning ownership of oil and gas underlying the Conley Parcel is void.

4. All further relief this Court deems appropriate, equitable, and just.

SWN PRODUCTION COMPANY, LLC
By Counsel



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