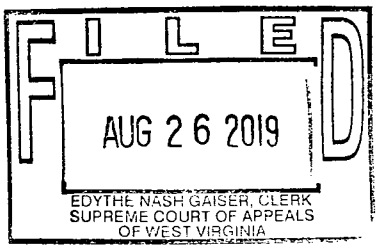

Appeal No. 19-0267

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

REPLY BRIEF OF PETITIONER

Submitted by:

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August 26, 2019

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I. Introduction and Summary.

As set forth in SWN Production Company, LLC's ("SWN's") opening brief, SWN fully satisfies all the requirements for mandatory and permissive intervention. This Court has already stayed the underlying trial pending this appeal. It should now reverse the circuit court and order that SWN be allowed to intervene in the case.

Nothing in the Response by the Rabb defendants undermines SWN's arguments.

Initially, Respondents concede, as they must, many of the key points made by SWN. Most importantly, Respondents cannot refute the facts that:

- SWN is an owner of the property at issue. It is thus an indispensable party to this suit for quiet title and any judgment without it will be void.
- Respondents themselves recognized this fact, as they moved to add SWN as a party in the circuit court —after SWN moved to intervene.
- SWN will be severely prejudiced if it not allowed to intervene.
- It is a waste of the circuit court's and the parties' time to proceed to trial without SWN.

These points alone are dispositive.

Respondents' brief ignores these points and instead makes a series of arguments, all of which should be rejected. First, the Response is based on the assumption that an alleged abuse of discretion standard applies to all elements of mandatory intervention. This is a false premise. This Court reviews de novo all elements of mandatory intervention, except for timeliness.

Second, the Response fails to substantively respond to the arguments set forth in the opening brief on each assignment of error, and instead attempts to convince this Court to simply give deference to the trial court's conclusions without any amount of scrutiny — an argument that fails, particularly in light of the de novo standard of review by this Court.

Third, the Response repeatedly asserts — without any authority — that Rule 24(a) precludes intervention by a person who acquired an interest in property after commencement of the action. As discussed below, this argument is wrong for a multitude of reasons.

Fourth, the Response relies on Rule 20(a) permissive joinder, not permissive intervention, in addressing the trial court's failure to rule on SWN's request for permissive intervention under Rule 24(b). Again, this is the wrong legal standard. SWN satisfies the requirements for permissive intervention, in addition to that for mandatory intervention, and the circuit court erred in denying permissive intervention.

This Court should thus reverse the circuit court and order that SWN be allowed to intervene.

II. Respondents apply the wrong standard of review.

The grounds for intervention are set forth in detail in SWN's opening brief. SWN will not repeat all of its arguments here, but will only address those raised by Respondents.

Initially, Respondents argue throughout their brief that an abuse of discretion standard applies to the circuit court's ruling on mandatory intervention. They repeat the phrase *over 40 times* in their brief. Response at 1 – 3, 5 – 12, 14, 16, 19 – 22. Respondents then couple this with generalized assertions that the circuit court did not abuse its discretion.

Respondents are applying the wrong standard of review. All elements of mandatory intervention other than timeliness are reviewed de novo. As set forth in SWN's opening brief, federal courts have consistently so held, and this Court gives "substantial weight" to these federal cases. *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 399, 540 S.E.2d 917, 923 (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*."). As observed in *Ball*, the versions of Rule 24 appearing in the West Virginia and federal rules of civil procedure "are substantially similar" and therefore "we follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure." *Ball*, 208 W. Va. at 399, 540 S.E.2d at 923 (citations omitted).

The Response does not even mention, much less distinguish, the federal cases cited above, which were also cited in SWN's opening brief (p. 14). None of the cases cited in the Response supports Respondents' position that all the elements of mandatory intervention under Rule 24(a) are subject to an abuse of discretion standard.

That said, SWN should be granted intervention under either standard. It has fully satisfied the requirements to intervene.

III. Assignments of Error 1 and 3: As a property owner, SWN has an absolute right to intervene, and the fact that SWN acquired the lease during the pendency of the litigation is irrelevant.

The Response addresses these two arguments together. *Response* at 14-16. For ease of reference, SWN will reply in kind.

The Response repeatedly asserts that SWN did not have an ownership interest at the time suit was filed and that (allegedly) "West Virginia law does not specifically allow a party to create an interest in case, [sic] solely for the purpose of seeking intervention for a second time, after initially being denied intervention." *Response* at 15. This argument fails for multiple reasons.

First, the Response does not and cannot cite a single legal authority supporting their argument. SWN has an ownership interest in the property at issue — an undisputed point. *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 528, 766 S.E.2d 785, 787 (2014).

It is well established that all persons who claim an interest in property are indispensable parties for 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). Such persons are so indispensable that a judgment will be void if they are not named as parties. *O'Daniels,* 200 W. Va. at 716. SWN thus has an unconditional right to intervene. When and why it acquired the lease is irrelevant, so long as SWN owns it at the time of judgment. That is the relevant point in time for purposes of intervention.

Respondents do not and cannot refute this black letter law. They make no attempt to address *Bonafede* or *O'Daniels* or to explain how a person — without whom a judgment will be void — is not entitled to intervene in a pending action.

Again, this point is dispositive. SWN's intervention is required — a point Respondents conceded, as the moved to join SWN as a party in the circuit court.

Second, nothing in Rule 24(a) prevents a party from seeking mandatory intervention based on a property right acquired after suit was filed. The plain and unambiguous text of Rule 24(a) contains no such provision, and the circuit court is effectively and impermissibly re-writing the rule to impose such a requirement. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The party's intent in acquiring the property interest is likewise irrelevant under Rule 24, though there is no evidence SWN had any allegedly improper interest. SWN is in the business of exploring for oil and gas, not litigation. The circuit court's interpretation is contrary to the liberal standards of Rule 24. *See* SWN Brief at 22-23.

Third, the two Florida cases cited by the Rabb defendants are inapposite. The case of *Minge v. Davison,* 94 Fla. 1197, 115 So. 510 (1928) addressed a motion to intervene that was filed in a quiet title action *after* the trial court entered a judgment resolving the title dispute. The court

observed that at the time judgment was entered, the putative intervenor had no interest in the land. *Id.* at 1199. The court declined to set aside the judgment to allow intervention by a person who acquired an interest in the property after entry of the judgment. *Id.* at 1200. Of course in the instant case, no judgment has been entered, and this Court has ordered a stay of the trial.

Additionally, *Minge* did not address the elements for mandatory intervention set forth in Rule 24(a). That is because Florida law does not recognize a mandatory right to intervene as noted in the other Florida case cited in the Response, *Nelson Bullock Co. v. South Down Development Co.*, 131 Fla. 495, 497, 181 So. 365, 365 (1938). Under Florida law, intervention is permissive only. *Id.* ("Anyone claiming an interest in pending litigation **may** at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.") (emphasis added). This same language appears in the current version of the Florida Rules of Civil Procedure. *See* Fla. R. Civ. P. 1.230. Unlike Rule 24(a), Florida law does not distinguish between mandatory and permissive intervention, and Florida law does not recognize a mandatory right to intervene. Decisions under Florida law therefore have no bearing on mandatory invention here.

The case of *Nelson Bullock Co. v. S. Down Dev. Co.*, 132 Fla. 495, 497–98, 181 So. 365, 366 (1938) likewise did not address the issue of whether a party with an ownership interest in the land is entitled to intervene, particularly when, as here, no party to the case adequately represents the putative intervenor.

Fourth, the Response claims that any prejudice to SWN in being denied intervention is irrelevant because "Rule 24 does not require the circuit court to consider prejudice to the parties[.]" *Response* at 16. Again, Respondents are incorrect. "[S]ince in 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). As discussed below, SWN will be highly prejudiced if it is not allowed to intervene. That prejudice to SWN is certainly relevant, and the circuit court erred in failing to consider the prejudice to SWN of being denied intervention in a quiet title case addressing property in which SWN has an ownership interest.

IV. SWN's motion to intervene was timely.

Respondents next argue that SWN's motion to intervene was untimely, pointing out that SWN acquired the lease acquired after suit was filed and that some time elapsed between that time and when SWN filed its second motion to intervene. Respondents' argument fails.

Again, SWN has an absolute right to intervene. When it acquired the interest is irrelevant, so long as it is a property owner at the time of judgment. The circuit court abused its discretion in denying intervention given this black letter law.

Moreover, SWN's motion to intervene was timely. It twice moved to intervene, demonstrating its diligence.[1] The Response, like the circuit court, relies solely on the time that elapsed. That is the wrong legal standard.

As set forth in SWN's opening brief, "[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). "The requirement of timeliness must be considered within the factual context of each case, including the purpose for which

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[1] Contrary to Defendants' assertions, SWN's first motion to intervene was timely and appropriate, and SWN has not "admitted" that it had no relevant interest at that time. While SWN did not own the lease at the time, it did have an "interest relating to the property or the subject of the action". Rule 24(a). 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. JA00155-164 at 1-3.

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." *Id.* (collecting federal cases).

The circuit court must consider the following 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 circuit court's order failed to assess these factors, making it 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)).

Respondents ignore the correct test for timeliness, and the argument on timeliness should thus be rejected. As set forth in SWN's opening brief, the trial court's order does not reflect any consideration, or even acknowledgment, that no scheduling order had been entered, no trial date had been set, and the defendants had filed a motion for leave to name SWN as a third-party defendant.[2] These are all relevant facts that the trial court did not consider.

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[2] The Response states that "[a]fter the circuit court denied SWN's second motion to intervene and denied TriEnergy's motion for leave to file certain counterclaims against Conley, the defendants abandoned their efforts to join SWN because their slander of title and trespass claims appeared moot at this time." *Response* at 20. This is not an accurate description of the procedural history. The trial court *granted* TriEnergy's motion for leave to assert additional counterclaims against Conley on December 7, 2018. JA000786. Conley later moved to dismiss those claims and the trial court granted Conley's motion by order entered January 16, 2019. JA00795 – 00956; 00977 – 00983. The defendants did not withdraw their motion for leave to file a third-party complaint against SWN until February 28, 2019, which was six days after the trial court denied SWN's second motion to intervene on February 22, 2019. JA 01031-01034; JA 01024 – 01030.

The trial court also failed to consider the fact that no party would be prejudiced by allowing SWN to intervene — a point that cannot credibly be disputed, as Respondents themselves moved to add SWN as a party. "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.). Respondents do not and have not articulated any undue prejudice that would have resulted from SWN's intervening in August 2018. Respondents assert that they will be prejudiced because the case has been on file for some time, and discovery and other pre-trial proceedings had occurred. *Response* at 16. But the case was largely dormant for part of the time, no trial has occurred, and SWN is not seeking to "undo" all the proceedings to date. Moreover, the fact that motions for summary judgment were filed is hardly dispositive, and the *Gibbs* case does not so hold. *Response* at 17 – 18 (citing *Gibbs v. West Virginia AFL-CIO*, No. 17-0320 (W. Va. Oct. 23, 2017) (memorandum decision)). And in fact, the trial court denied the motions for summary judgment in this case, making them a moot issue. Further, Respondents moved to add SWN as a third-party defendant *after* SWN filed its second motion to intervene — demonstrating that there would be no prejudice to adding SWN as a party at that time. Respondents cannot escape this basic fact.

Likewise, the trial court did not consider the prejudice to SWN that would result by denying intervention. Respondents do not dispute this fact. As set forth in SWN's opening brief, it would suffer severe prejudice. The circuit court would be adjudicating SWN's property interest in the lease, without allowing it to be a party to the case. Any judgment may impact the remaining parts of the 161.53 acres governed by the Milliken Deed, and any potential litigation could lead to inconsistent judgments.

Indeed, not allowing SWN to intervene would be *per se* prejudicial. The resulting judgment would be void — a waste of the court's and the parties' time. Respondents do not and cannot refute this point.

Finally, Respondents try to brush aside the fact that they moved to join SWN as third party defendant, characterizing this as merely a "preemptive" move. But Respondents' reason was transparent: they moved to join SWN as a party in this suit because SWN has an ownership interest in the property at issue and any judgment without it will be void.

For all these reasons, the trial court abused its discretion in denying intervention based on the timing of SWN's second motion to intervene.

V. Assignment of Error 4: SWN's interest are impaired and impeded in this case, and Conley does not and cannot adequately protect SWN's interests.

The Response does not deny that disposition of the underlying action "may as a practical matter impair or impede [SWN's] ability to protect" its interests in not only the Conley lease, but other properties with the Milliken Deed or a similar instrument in the chain of title. Rule 24(a); *Response* at 21 – 22. Respondents' only response is to assert, without analysis, that Conley adequately protects SWN's interests. But the Response does not even make a token effort to refute all the reasons why SWN's interests are not aligned with Conley's interests. As set forth in SWN's opening brief:

- No party has a similar legal or factual interest to SWN, which intends to develop the oil and gas interests underlying the 3.763 acre parcel. Among other things, Conley has no interest in pooling and does not have the investment in time and capital to develop the oil and gas that SWN does.
- SWN has ownership interests in other properties with the Milliken deed or similar instrument in the chain of title.
- There is no evidence that Conley has adequate financial resources to properly fund the litigation, and he certainly does not have the same resources that SWN does.

The circuit court's order does not reflect any consideration of these factors.

Respondents make two arguments in response, both of which should be rejected. First, Respondents contend that SWN could have simply waited and entered into a lease with the winning party in the litigation. But this fails to address the fact that SWN has an interest in the litigation beyond the Conley lease alone. Further, Respondents assume that the winning party would agree to lease to SWN on the same terms, a purely speculative argument.

Second, the Response claims that "SWN has failed to show compelling evidence that Conley will not adequately represent its interests." Response at 21. But again, this is the wrong legal standard. As noted in *Ball*, 208 W. Va. at 403, 540 S.E.2d at 927 compelling evidence to support intervention is only required when interests shared by the putative intervenor and an existing party are *identical*. "[I]f the interests are identical, intervention should be denied unless there is a compelling showing as to why the existing representation is inadequate."

As set forth above and in its opening brief, SWN's interests are not aligned with Conley's interests and are most certainly not identical. Nor does the circuit court's order reflect any analysis or factual findings to demonstrate that the interests of Conley and SWN are identical. When interests are not identical, 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).

Moreover, *Ball* recognizes that the burden of demonstrating inadequate representation is "minimal, and that a liberal view toward allowing intervention should be followed." *Id.* "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)).

In short, the circuit court abused its discretion in concluding that Conley adequately protects SWN's interests. There is no indication it considered any of the above facts.[3]

VI. Assignment of Error No. 5: In the alternative, SWN is entitled to permissive intervention, and the district court abused its discretion in failing to address permissive intervention under Rule 24(b).

The Response takes a rather unusual approach to addressing permissive intervention under Rule 24(b). Respondents devote nearly three pages of their brief to argument under Rule 20(a), which governs permissive *joinder* of multiple persons as plaintiffs or defendants, rather than Rule 24(b), which governs permissive *intervention* by a non-party into an existing civil action. *Response* at 22 – 25. The Response does not explain the relevance of Rule 20(a) permissive *joinder*, and its applicable case law cited in the Response, to the trial court's failure to grant permissive *intervention* under Rule 24(b). After discussing various cases addressing permissive *joinder*, the Response concludes by arguing that the trial court properly denied permissive *intervention* on timeliness grounds. *Response* at 25. Yet again, Respondents are applying the wrong legal standard.

The Response wholly ignores that the trial court's order does not address permissive joinder at all. The Response does not even mention this fact. As detailed in SWN's opening brief, the trial court's decision to rule only on SWN's request for mandatory intervention is itself reversible error.

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[3] The Response concludes the section addressing "adequate representation" by stating as follows: "Because it is clear that SWN should not win on the merits of its appeal, its motion to stay should be denied." *Response* at 22. As of service of the Response on August 5, 2019, the Court had already issued a stay of the underlying civil action by orders entered on July 17, 2019 and a July 26, 2019.

Additionally, SWN has more than met the grounds for permissive intervention. The standard is highly liberal. It only requires common questions of fact and law to exist between the putative intervenor and the existing parties. 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); *Stern v. Chemtall Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005). There is no dispute that common questions of fact and law exist between SWN's interest in its lease of the oil and gas from Conley and the parties' competing claims to ownership of the same oil and gas. Therefore, SWN satisfied the requirements for permissive intervention. The trial court abused its discretion by not even addressing SWN's request for permissive intervention, and by not granting permissive intervention.

Moreover, SWN meets even Respondents' incorrect standard. As set forth in SWN's opening brief (pages 31-32), is certainly a "logical relationship" and, at a minimum, a "single factual or legal question" in common between SWN's interests and this case. The court is adjudicating whether SWN has a valid ownership interest in the property at issue.

VII. Conclusion.

Respondents' arguments should be rejected, and the circuit court's order reversed and vacated. Respondents repeatedly apply the wrong legal tests. Among other things, the "abuse of discretion" standard of review applies only the "timeliness" element of mandatory intervention under Rule 24(a). The trial court abused that discretion by relying only on the passage of time to deny SWN's motion, rather than examining the overall status of the case, the prejudice to SWN of being excluded, and the lack of prejudice to the parties by allowing SWN to become a party.

The Response fails to substantively respond to SWN's arguments for the other assignments of error. Respondents fail to cite any persuasive legal authority for the trial court's reading that Rule 24(a) precludes intervention by a person who acquired a property interest after

commencement of litigation. And Respondents arguments under the permissive joinder provisions of Rule 20(a) are irrelevant to the trial court's failure to rule on SWN's request for permissive intervention under Rule 24(b).

Finally, Respondents do not and cannot dispute the fact that Rule 24 applies a liberal standard, in favor of intervention.

For all these reasons and those stated in SWN's opening brief, SWN requests an order reflecting the following:

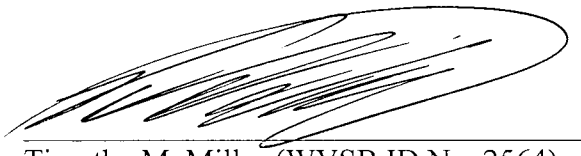
1. A reversal of the circuit court's February 22, 2019 order denying SWN's second motion to intervene;

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; and

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

SWN Production Company, LLC

By Counsel



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