Appeal No. 20-0490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC
Putative Intervenor Below/Petitioner,

v.

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

Appeal from an Order of the Circuit Court of Brooke County, West Virginia Civil Action No. 18-C-4

REPLY BRIEF OF PETITIONER SWN PRODUCTION COMPANY, LLC

Submitted by:

Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
BB&T Square Suite 1000
300 Summers Street
Charleston West Virginia 25301
681-205-8888
681-205-8814 (fax)
tmiller@babstcalland.com
rstonestreeet@babstcalland.com

Counsel for Petitioner

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I. Introduction and summary.

On November 2, 2020, this Court published a signed opinion in a related case that presents virtually identical circumstances and issues as the pending appeal. *SWN Production Company, LLC v. Conley*, No. 19-0267 (Nov. 2, 2020) ("*Conley*"). In *Conley*, this Court reversed an order issued by the Circuit Court of Brooke County through Judge Cuomo denying SWN's motion to intervene in another quiet title action involving a recorded instrument similar to the one at issue in the present case. The rationale set forth Judge Cuomo's order is practically identical to what appears in the order issued by the Circuit Court of Brooke County through Judge Olejasz that is presently before this Court. Like Judge Cuomo, Judge Olejasz deemed SWN's motion untimely based solely on the amount of time that had passed without taking into consideration the overall status of the case and the prejudice that would result from granting or denying SWN's motion. JA 000269-000271. Like Judge Cuomo, Judge Olejasz concluded that SWN could not intervene since its interest in the property was created after the underlying action had commenced. *Id.* As with Judge Cuomo, Judge Olejasz ruled that the SWN's interests would not be impaired by the underlying quiet title action, and that the mineral fee owner would adequately represent SWN's interests. *Id.* *Conley* squarely held that Judge Cuomo erred in each of these rulings. Judge Olejasz's order presents the exact same errors, and should be reversed for the exact same reasons explained in *Conley*. In light of all these similarities, *Conley* effectively directs the outcome of this appeal.

Although Respondents make an effort to factually distinguish the circumstances before Judge Olejasz from those presented in *Conley*, their brief otherwise ignores the principles and reasoning set forth in *Conley*. The Response repeatedly argues an "abuse of discretion" standard of review for all elements of mandatory intervention under Rule 24(a) notwithstanding Syllabus

Point 3 of Conley, which states: "The standard of review of circuit court rulings on the elements governing a timely motion to intervene as a matter of right under Rule 24(a) of the West Virginia Rules of Civil Procedure is de novo."

Respondents claim that the amount of time preceding SWN's intervention request justified denial of the motion without regard to the overall status of the case or the respective prejudice, if any, of granting or denying SWN's motion. In doing so, Respondents ignore *Conley's* reversal of Judge Cuomo for doing that very thing. "[W]e conclude that the circuit abused its discretion in finding that SWN's motion to intervene as of right was untimely because it based its denial solely on the passage of time without considering the factual context of the case, the status of the proceedings, and the prejudice, if any, to the Respondents and to SWN." *Id.* at 16.

The Response contends that Judge Olejasz correctly concluded that the Waldens would adequately represent SWN's interests. This is directly contrary to this Court's recognition in *Conley* that SWN has significantly different interests than a mineral owner, and those interests would not be adequately represented by the mineral owner. "We are convinced that SWN's interests are significantly different from Mr. Conley's due to the nature of SWN's business and its stated intent to finance and invest in developing the oil and gas by the mechanism of pooling which Mr. Conley has no interest in doing and no financial capital to undertake." *Conley* at *25.

As explained below, Respondents cannot meaningfully distinguish this case from *Conley*. Respondents also fail to offer any cogent, much less meritorious, arguments for why this Court should not reverse Judge Olejasz's order denying intervention to SWN for the same reasons explained in *Conley*.

II. Respondents cannot meaningfully distinguish this case from Conley.

In the "Statement of the Case" section of their brief, Respondents attempt to convince this Court that *Conley* should not control the outcome of this appeal. *Response* at 4 – 7. In an effort to do so, Respondents identify the following factual differences between the circumstances in *Conley* and this case. First, the recorded instrument at issue in *Conley* was in the chain of title for multiple parcels that had been "carved out" of the same parent tract of land, including the 3.63 acre parcel at issue. In *Walden*, there are no other parcels whose title is governed by the specific recorded instrument at issue – the Walden-Rabb Instrument.[1] Second, unlike *Conley*, a scheduling order was in place at the time SWN moved to intervene in *Walden*. Third, SWN's interest in the *Walden* parcel arises from a two-year exclusive option to lease oil and gas rights as opposed to a five-year lease of the parcel in *Conley*. *Id.* For the reasons explained below, none of these factual differences have any legal significance for this appeal.

A. The absence of other tracts with the Walden-Rabb Instrument in the chain of title does not diminish SWN's important interests in participating in this case.

Respondents do not explain how the absence other tracts with the Walden-Rabb Instrument in their chain of title renders proper the circuit court's order denying SWN's intervention motion. That circumstance does not diminish SWN's important interests in a judicial interpretation of the instrument. As explained in section II.C. below, SWN has a direct and substantial interest in the Walden Property through the exclusive option rights that SWN paid substantial consideration (over $24,000) to obtain from the Waldens. SWN also has an interest as an operator looking to make substantial capital investments to develop oil and gas reserves through pooling of properties,

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[1] As noted in SWN's Opening Brief (page 8), the Walden-Rabb Instrument is a recorded instrument that is self-described as a deed dated January 22, 1962 between William Bailey Walden and Dorothy Fay Walden, as grantors, and Eli Rabb, as grantee ("Walden-Rabb Instrument"). JA 000142-000146.

including the Walden Property, which interest *Conley* recognized to be "significantly different" from the Waldens interests. "We are convinced that SWN's interests are significantly different from Mr. Conley's due to the nature of SWN's business and its stated intent to finance and invest in developing the oil and gas by the mechanism of pooling which Mr. Conley has no interest in doing and no financial capital to undertake." *Conley* at *25. SWN also maintains a stronger interest in pursuing development of oil and gas because the Waldens will retain the $24,281.25 paid by SWN to obtain the option rights regardless of whether SWN exercises the option before it expires. JA 000130. This is similar to Mr. Conley's ability to retain the bonus payment tendered to him if SWN does not commence exploration operations relative to his property before expiration of the five-year primary term of the lease. *Conley* recognized that this type of interest was not adequately protected by the mineral owner. *Id.* at *25 – 26.

As noted in SWN's opening brief, SWN's interests also extend to other properties leased in Brooke County with instruments similar to the Walden-Rabb Instrument in their chains of title. *Opening Brief* at 6 – 7. A court's interpretation of the language set forth in operative instrument at issue will likely influence the interpretation of other similar instruments, and therefore may affect SWN's ownership interests in oil and gas underlying other properties with a similar instrument in the chain of title. *Conley* recognized this important interest. "We also consider that SWN's interest in the construction of the Milliken Deed is greater than that of Mr. Conley's due to its interests in property beyond the Conley parcel that will be affected by the Milliken Deed." *Conley* at *25.

SWN maintains all of these important interests regardless of whether other tracts have the Walden-Rabb Instrument in their chain of title.

B. The circuit court vacated the scheduling order after denying SWN's motion.

Respondents claim that, unlike *Conley*, a scheduling order was in place in *Walden* that scheduled trial to commence on July 29, 2020. *Response* at 6. That scheduling order is of no moment because, as detailed in SWN's opening brief, the existing parties and the circuit court all discussed the need to amend that scheduling order during the June 3, 2020 hearing on SWN's motion to intervene. *Opening Brief* at 19 – 20. At the conclusion of that hearing, the court invited the parties to submit a joint motion to vacate the scheduling order. JA 000395. The parties did so on June 10, 2020, which motion was granted the next day (June 11, 2020). JA 000272-000274. Later that month, the court entered a new scheduling order setting the case for trial on May 17, 2021. JA000275-2790. Respondents do not argue that granting SWN's motion to intervene would have somehow resulted in the existing scheduling order remaining in place. Such an argument would fly in the face of the discussion during the June 3, 2020 hearing about how none of the parties had complied with multiple filing deadlines under the existing scheduling order, and the need to amend the scheduling order. That dialogue is quoted extensively in SWN's opening brief at pages 19 – 20. The Response does not even attempt to address that evidence.

In short, the existence of a scheduling order that was promptly vacated upon request of the parties does not somehow make proper the circuit court's denial of SWN's intervention motion. If anything, the entry of a new scheduling order upon a joint request of the parties demonstrates that SWN's intervention would not have resulted in any delays that would not have otherwise occurred without SWN's participation.

C. An exclusive option to lease minerals creates a direct and substantial property interest.

The "Statement of the Case" section and various other portions of the Response argue than an option to lease minerals is not a "direct and substantial" property interest that can support intervention. *Response* at 8, 10, 13 – 14, 16 – 18. Respondents argue that SWN lacks any protectable interest in the Walden Property until it exercises its lease option rights. *Id.* This Court should reject Respondents' argument for at least three reasons. First, the circuit court made no finding that SWN's option rights were insufficient to support intervention. Rather, the circuit court committed the same legal error that was made in *Conley* by concluding that the timing of SWN's acquisition (after commencement of the lawsuit) and SWN's alleged knowledge of the litigation when obtaining the option rights barred intervention. JA 000269 – 000271.

Second, the rights established under the option agreement are by their very nature direct and substantial. SWN paid substantial consideration ($24,281.25) to obtain the exclusive right to lease the oil and gas underlying the Walden property during a two-year period. JA 000130. Not only did SWN obtain the exclusive right to lease, but SWN also "locked in" the lease terms that would govern should SWN exercise the option. *Id.* This includes the amount of the per-acre up front bonus payable to the Waldens. *Id.* Moreover, the option prohibits the Waldens from taking any action during the two-year period that could in any way interfere or conflict with SWN's rights to lease the oil and gas, including leasing the mineral rights to others. *Id.* The right to exclude others granted to SWN by the option is a fundamental property right recognized in the common law. *See EQT Prod. Co. v. Crowder*, 241 W. Va. 738, 744, 828 S.E.2d 800, 806 (2019) ("In every case where one man has a right to exclude another from his land, the common law encircles it, if not inclosed [sic] already, with an imaginary fence. And to break such imaginary fence, and enter

the close of another, is a trespass[.]" (quoting *Haigh v. Bell*, 41 W.Va. 19, 21, 23 S.E. 666, 667 (1895)).

Third, Respondents do not offer a single legal authority to support their position that an option does not create direct and substantial property interests. In SWN's memorandum of law submitted to the circuit court in support of its intervention motion, SWN identified multiple court decisions recognizing the legally protectable property interests created by an option agreement that give rise to a right to intervene. JA 000107. *See Kaiser Dev. Co. v. Honolulu*, 649 F. Supp. 926, 936 (D. Haw. 1986) (option holder "has the power to force conveyance of the land, has immunity from revocation or repudiation by the optionor, and may enforce these rights in court."); *Brown v. Brown*, 136 A.D.3d 852, 853 (Sup. Ct. N.Y., Appellate Division, 2nd Dept. 2016) (recognizing that an option agreement creates a property right that gives rise to a mandatory right to intervene in litigation involving the subject property); *Renewable Land, LLC v. Rising Tree Wind Farm, LLC*, 2013 U.S. Dist. LEXIS 34908, *8 (E.D. Cal. 2013) (granting mandatory intervention based in part on finding that movant's "contractual interests under its option agreement are a significant protectable interest relating to the transaction that is the subject of the litigation."). Respondents are well aware of these authorities through SWN's brief submitted to the circuit court, and apparently decided to ignore them in the Response.

For all these reasons, SWN's option to lease the oil and gas underlying the Walden Property creates legally protectable property interests that qualify as direct and substantial interests to support mandatory intervention.

III. Respondents ignore the standard of review for mandatory intervention established in Conley.

While Respondents at least acknowledge *Conley* as part of their unsuccessful attempt to distinguish the factual circumstances of that decision from this appeal, they otherwise ignore the principles and reasoning set forth in *Conley*, including the applicable standard of review. The first example appears in Section I of the Response, which is erroneously titled "Petitioner's Assignments of Alleged Error." Here, Respondents appear to attempt to respond to each of SWN's assignments of error rather than state SWN's assignments of error.[2] In each of the five paragraphs set forth in Section I, Respondents' argue that the circuit court did not abuse its discretion in denying intervention. *Response* at 1 – 2. This includes arguments applicable to the following elements of mandatory intervention: whether the movant asserts a direct and substantial interest in the property; whether that interest may be impaired by the pending action; and whether the movant's interest can be protected by an existing party. *Response* p. 1 – 2. These arguments inexplicably disregard Syllabus Point 3 of *Conley* where the Court unambiguously established a *de novo* standard of review for all elements of a timely motion to intervene. "The standard of review of circuit court rulings on the elements governing a timely motion to intervene as a matter of right under Rule 24(a) of the West Virginia Rules of Civil Procedure is de novo."

In Section V.A. of the Response, titled "Standard of Review," Respondents continue the erroneous argument that an "abuse of discretion" standard of review applies to all aspects of the circuit court's order. "Motions to intervene in West Virginia are within the sound discretion of the trial court." *Response* at 12. "The circuit court's denials of SWN's motions to intervene were

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[2] SWN's opening brief asserts six assignments of error. The Response sets forth five numbered paragraphs in Section I.

a proper exercise of that discretion and it should not be overturned."[3] *Id.* "To be successful in its Appeal, SWN must prove that the circuit court abused its discretion in denying its motion to intervene." *Id.* at 13. This section of the Response does not even mention *Conley*.

In section V.B. of the Response, titled "Grounds Why Intervention by SWN in the Pending Action Was Not Proper," Respondents continue to ignore *Conley* by stating that "[t]he paramount issue of SWN's appeal is whether the circuit court abused its discretion in denying SWN's motion to intervene." *Response* at 15. Rather than acknowledge *Conley*, the Response cites to a memorandum decision from 2017. *Gibbs v. West Virginia AFL-CIO*, No. 17-0320 (W. Va. Oct. 23, 2017). *Id.* at 15 – 16.

In light of *Conley*, it is difficult to comprehend how Respondents can in good faith make these representations to the Court about the applicable standard of review for an order denying intervention sought under Rule 24(a). In any event, *Conley* makes abundantly clear that a *de novo* standard of review applies to all elements of a timely motion to intervene as a matter of right under Rule 24(a).

IV. *Conley* rejects Respondents' "passage of time" argument on timeliness.

In addition to ignoring Syllabus Point 3 of *Conley* addressing the *de novo* standard of review, the Response repeats the same "passage of time" arguments about the timeliness of SWN's motion to intervene that *Conley* squarely rejected. Throughout the Response, including some apparently random locations, Respondents continually recite the mantra that SWN's intervention motion came two years after commencement of the case, and approximately fifteen months after SWN entered the option agreement with the Waldens. *See Response* at 12, 13, 14, 18 – 20.

[3] It is unclear why Respondents use the plural "denials" and "motions." SWN only made one motion to intervene, which the circuit court denied.

Nowhere in the Response, however, do Respondents acknowledge the Court's admonition in *Conley* that the passage of time alone will not justify denial of a motion to intervene. "The circuit court looked solely to the age of the case in addressing the question of timeliness, thereby failing to consider the status of the proceedings and the circumstances of the parties." *Conley* at *14. "[W]e conclude that the circuit abused its discretion in finding that SWN's motion to intervene as of right was untimely because it based its denial solely on the passage of time without considering the factual context of the case, the status of the proceedings, and the prejudice, if any, to the Respondents and to SWN." *Id.* at 16.

Respondents cannot and do not contest that the circuit court did not consider the factual context of the case, the status of the proceedings, or any potential prejudice to Respondents or SWN when denying intervention to SWN. Those circumstances are largely the same as presented in *Conley*. As explained in SWN's opening brief, the parties' discovery activity was limited to Defendants' responses to a set of written discovery served by the Waldens. *Opening Brief* at 19. No depositions had taken place. *Id.* No dispositive motions had been filed. *Id.* The parties did not serve the final lists of witnesses or exhibits by the May 27, 2020 deadline established under the original scheduling order, or file dispositive motions by the June 3, 2020 deadline. *Id.* More importantly, the parties and the circuit court recognized during the June 3, 2020 hearing on SWN's motion the need to amend the scheduling order, which promptly took place after the court denied SWN's motion. *Id.* at 19 – 20.

The circuit court also ignored the substantial prejudice to SWN of being excluded from the proceedings. As noted in *Conley*, "SWN may be prejudiced because a jury trial will proceed to determine the construction of the Milliken Deed and thereby determine whether SWN has a valid interest in its leasehold even though SWN was afforded no opportunity to appear and participate

at trial and will have no ability to appeal in the event its interest is adversely affected." *Conley* at *15. Conversely, nothing the record supports a finding that the Respondents would be unfairly prejudiced by allowing SWN to participate. The Respondents attempt to claim that they "are the parties who will suffer prejudice if the is case is reset to permit SWN to participate." *Response* at 17 – 18. Respondents do not, however, explain how they would be prejudiced, especially since the scheduling order was going to be amended regardless of whether SWN was granted intervenor status.

In short, the circuit court did not give any consideration to the amount of prejudice, if any, to the parties of allowing SWN to intervene, or the overall status of the proceedings aside from the age of the case. *Conley* squarely held that doing so constitutes an abuse of discretion. Rather than attempt to explain otherwise, Respondents simply ignore that holding.

V. *Conley* recognizes that a fee owner will not adequately represent SWN's mineral development interests in a title dispute over mineral ownership.

Although omitted from the list of relevant issues set forth in the "Statement of the Case" section, the Response later contends that the circuit court correctly concluded that the Waldens would adequately represent SWN's interests in the case. *Response* at 20 – 22. This is yet another example of the Respondents completely ignoring the principles and holdings set forth in *Conley*. As discussed above in section II.A., *Conley* recognized that a mineral owner and an oil and gas operator have similar, but not identical, interests in a dispute involving competing ownership claims to mineral interests. That does not mean, however, that a mineral owner will adequately represent the interests of an oil and gas operator.

As an operator looking to make substantial capital investments to develop oil and gas reserves through pooling, SWN continues to maintain what *Conley* recognized to be "significantly

different" interests than the Waldens. "We are convinced that SWN's interests are significantly different from Mr. Conley's due to the nature of SWN's business and its stated intent to finance and invest in developing the oil and gas by the mechanism of pooling which Mr. Conley has no interest in doing and no financial capital to undertake." *Conley* at *25. SWN also maintains a stronger interest in pursuing development of oil and gas because the Waldens will retain the $24,281.25 paid by SWN for the option rights regardless of whether SWN exercises the option before it expires. JA 000130. This is similar to Mr. Conley's ability to retain the bonus payment tendered to him if SWN does not commence exploration operations relative to his property before expiration of the five-year primary term of the lease. *Conley* recognized that this type of interest was not adequately protected by the mineral owner. *Id.* at *25 – 26.

Like the mineral owner in *Conley*, the Waldens stated in their response brief that their interests are not aligned with SWN and they lack the financial resources to adequately represent SWN's interests. "The Waldens particularly emphasize and agree with the SWN's contention that it has more at stake in the underlying civil action than the Waldens, and that the Waldens do not have the financial resources to fully and adequately protect Petitioner's interests." Counsel for the Waldens made the same representations to the circuit court in support of SWN's motion to intervene. JA 000387, 000382–000383. When the putative intervenor and the party with whom the putative intervenor is purportedly aligned both agree on the inadequacy of one party's ability to represent the other's interests, it is difficult at best to find support for a contrary finding by the circuit court.

These differing interests are more than sufficient to demonstrate that the Waldens will likely not adequately represent SWN's interests. This is especially true in light of *Conley's* recognition that "the showing required of inadequate representation should be treated as minimal.

Moreover, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party to intervene so that the absentee may be heard in his own behalf." *Conley* at 25 (citations and internal quotations omitted). Respondents simply cannot establish any rational support for the proposition that SWN's interests are adequately protected by the Waldens.

VI. Respondents' argument on permissive intervention is limited to timeliness of SWN's motion.

Respondent's defense of the circuit court's denial of permissive intervention is limited to the argument that SWN's motion was untimely. *Response* at 22 – 23. The Response does not attempt to justify the other rationales offered by the circuit court in support of denying permissive intervention: that the Waldens adequately protect SWN's interests, and the existing parties would be unfairly prejudiced by SWN joining the litigation in light of the July 29, 2020 trial date under the original scheduling order. JA 000269 – 000271. SWN explained in detail above and its opening brief why its motion was timely, why the Waldens do not adequately represent SWN's interests, and why no unfair prejudice would result by allowing SWN to join case. SWN will not belabor the Court by repeating those explanations again.

In any event, this Court need not reach the issue of permissive intervention. As in *Conley*, SWN has established all the elements required for mandatory intervention under Rule 24(a). That alone is sufficient to support reversal of the circuit court's order.

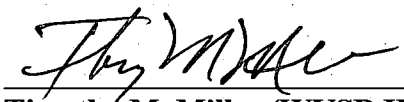
VII. Conclusion.

For all the reasons stated above and in SWN's opening brief, Judge Olejasz's order suffers from the same legal errors identified by this Court in *Conley*. None of the factual differences between this matter and *Conley* have any legal significance to the outcome. This Court should

therefore reverse Judge Olejasz's order denying SWN's motion to intervene. This Court should further issue 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.

PETITIONER SWN PRODUCTION COMPANY, LLC

By Counsel



Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
BB&T Square Suite 1000
300 Summers Street
Charleston West Virginia 25301
681-205-8888
681-205-8814 (fax)
tmiller@babstcalland.com
rstonestreet@babstcalland.com

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **REPLY BRIEF OF PETITIONER SWN PRODUCTION COMPANY, LLC** has been served this 9th day of December, 2020, by first-class U.S. mail, postage pre-paid, and via email to counsel of record listed below:

Daniel J. Guida, Esq.
Guida Law Offices
3374 Main St.
Weirton, WV 26062

Joseph G. Nogay, Esq.
Maximillian F. Nogay, Esq.
Sellitti, Nogay & Nogay, PLLC
3125 Pennsylvania Ave.
P.O. Box 3095
Weirton, WV 26062

Jonathan E. Turak, Esq.
Gold Khourey & Turak
510 Tomlinson Ave.
Moundsville, WV 16041

Richard N. Beaver, Esq.
Phillips, Gardill, Kaiser & Altmeyer, PLLC
61 Fourteenth St.
Wheeling, WV 26003

Timothy M. Miller (WVSB ID No. 2564)
Robert M. Stonestreet (WVSB ID No. 9370)