

No. 13-1224
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

BRANDY EPLION,

Petitioner,

v.

No. 13-1224

**THE WEST VIRGINIA DIVISION OF
CORRECTIONS, a corporate body and governmental
instrumentality,**

Respondents.

AMENDED PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

1. **The lower court erred in granting Defendant West Virginia Division of Corrections *Motion to Dismiss for Failure to Join an Indispensable Party*.**

STATEMENT OF THE CASE

Procedural History and Statement of the Facts

Plaintiff below, Brandy Eplion, (hereinafter referred to as Eplion or Petitioner) was incarcerated at Lakin Correctional Center (LCC or Lakin), an institution operated by Respondent West Virginia Division of Corrections (WVDOC), in 2009. During her incarceration at LCC in 2009, Eplion has alleged that she was repeatedly threatened, sexually harassed sexually abused and assaulted by Ronald Crawford, an LCC correctional officer. Additionally, there are no less than four (4) other female inmates at LCC which claim that Crawford sexually abused and sexually assaulted them. Upon information and belief, Crawford was terminated from his employ with WVDOC due to these sexual assaults and sexual abuses.

On or about August 17, 2010, Eplion filed her Complaint against Crawford, his employer, WVDOC, and John Doe, unknown Defendant or Defendants. (Please see Joint Appendix 1). Respondent WVDOC filed a responsive pleading to the Complaint and included a cross-claim against Crawford. (JA 10). In her Complaint Eplion claims that the WVDOC was negligent in several regards including, but not limited to, negligently hiring, supervising, training and retaining Crawford as a correctional officer. (JA 10). WVDOC was served by and through the West Virginia Secretary of State and discovery commenced. As Crawford was no longer employed at Lakin, Eplion hired a private investigator to locate the whereabouts of Crawford in this and the four (4) related matters pending against Crawford and WVDOC. However, Eplion was unable to locate and serve Crawford after no

less one year of searching for him. By and through an Order of April 20, 2012, The Honorable Jennifer Bailey dismissed Crawford, without prejudice, pursuant to Rule 4 of the West Virginia Rules of Civil Procedure. (Crawford's Motion to Dismiss – JA 26, April 20, 2012 Order - JA 31). Plaintiff timely re-filed pursuant to West Virginia Code § 55-2-18, commonly referred to as the “savings statute.” (JA 218). That matter was likewise dismissed as to claims against WVDOC, as the allegations were duplicative, by and through a February 26, 2013 Order. (WVDOC's Motion to Dismiss – JA 261, February 26, 2013 Order - JA 294). Although Plaintiff again attempted to locate Crawford, he was never found. Further, his counsel, retained by AIG Insurance to defend Crawford, refused to accept service on his behalf. To that end, Crawford was again dismissed, without prejudice, from the 12-C-981 matter pursuant to Rule 4 of the West Virginia Rules of Civil Procedure by and through Judge Zakaib's February 1, 2013 Order. (Crawford's Motion to Dismiss – JA 240, February 1, 2013 Order - JA 258). Plaintiff re-filed a third time against all Defendants and that matter was given civil action number 13-C-804 and was assigned to the Honorable Louis Bloom. (JA 297). Crawford filed a Motion to Dismiss for the action being time barred. (JA 306). Judge Bloom stayed a ruling on that Motion.

Defendant WVDOC then moved to be dismissed for Eplion's failure to join an indispensable party. (WVDOC's Motions and Replies - JA 34, JA 50, JA 79, JA 173, JA 203). WVDOC claimed it would be unfairly prejudiced if Crawford were not a party in the Trial of this matter. Eplion argued that WVDOC had several other remedies to cure any prejudice of which it complained. (Eplion's Responses - JA 43, JA 96, JA 197). These remedies included WVDOC pursuing its timely filed cross-claim against Crawford or filing a third party complaint against Crawford as well as drafting a proper limiting jury instruction and a proper jury verdict form. The Honorable Jennifer Bailey granted

WVDOC's Motion to Dismiss and WVDOC was dismissed, with prejudice, by and through the lower court's October 30, 2013 Order. (JA 210).

SUMMARY OF ARGUMENT

The lower court committed reversible error when it granted WVDOC's *Motion to Dismiss for Failure to Join an Indispensable Party* concerning Petitioner Eplion's claims of negligent hiring, negligent retention, negligent supervision and negligent training. As stated more fully below, Petitioner is left with no remedy concerning her claims against WVDOC after WVDOC was dismissed, with prejudice, and after Defendant below, WVDOC correctional officer Ronald Crawford, was dismissed.

As also stated more fully below, Petitioner argued that WVDOC had many remedies to cure any prejudice it could possibly encounter at Trial in this matter. Petitioner further argued that she could initiate allegations of negligence against any party as she is the "master of her complaint." Finally, Petitioner argued that even though Crawford is not a party, the spirit and intent of Rule 19 of the West Virginia Rules of Civil Procedure does not recognize the remedy sought by WVDOC and granted by the lower court.

The lower court's stated reasons for granting WVDOC's *Motion to Dismiss for Failure to Join an Indispensable Party* was clearly erroneous. In this and similar lawsuits, many of the individual defendants, usually WVDOC or West Virginia Regional Jail and Correctional Facility Authority (WVRJA) correctional officers, seem to disappear after they are dismissed by WVDOC or WVRJA and are difficult or impossible to locate. To that end, the individual defendants are dismissed, without prejudice, after plaintiffs cannot locate and serve them with summonses and complaints. As such, plaintiffs, such as Petitioner, are left with their negligent claims against the WVDOC or the WVRJA due to the inability to properly effect service on the individual defendants. After the lower court dismissed WVDOC, with prejudice, in regard to

Petitioner's negligent claims against that entity, Petitioner is left with no cause of action and remedy for the abuses she suffered due to WVDOC's alleged negligence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under W.Va. R. App. Pro. 18(a) and W. Va. R. App. Pro. 20, because, as indicated in the Notice of Appeal, this case involves a question of a State of West Virginia entity being dismissed after one of its employees was dismissed due to failure to properly and timely effect service of the complaint and summons. This request is further compounded by the fact that there are several dozen cases throughout West Virginia concerning this same issue. Finally, there are other cases before this Honorable Court which address the issue of dismissal for failure to join and indispensable party.

ARGUMENT

1. Standard of Review

While Respondent WVDOC did not move the lower court to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, Petitioner believes that the standard of review is the same. As such, this Honorable Court has held that the standard of review applicable to dismissal orders entered pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is that the “[a]ppellate review of the circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). This Honorable Court has further held that “[t]he purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice.” Cantley v. Lincoln County Comm’n, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007).

This Honorable Court further held in Sedlock v. Moyle, 222 W.Va. 547, 668 S.E.2d 176 (2008), that “[s]ince the preference is to decide cases on their merits, court presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” Id., at 550, 179. Finally, this Honorable Court has held that “[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

Therefore, the above-referenced standard of review denotes that the issues contained in Petitioner Eplion’s Brief are proper for this Honorable Court to hear and, further, that this standard clearly confirms Petitioner’s arguments concerning the lower court erring in granting WVDOC’s *Motion to Dismiss for Failure to Join an Indispensable Party*.

2. The lower court erred in granting Defendant West Virginia Division of Corrections Motion to Dismiss for Failure to Join an Indispensable Party.

After the lower court dismissed Crawford and entered the Order regarding the same, WVDOC renewed its *Motion to Dismiss for Failure to Join an Indispensable Party* claiming that it would be unfairly prejudiced if this matter would proceed to trial without Crawford as it claims he is indispensable. In its October 30, 2013 Dismissal Order (JA 210), the lower court granted WVDOC’s *Motion to Dismiss*. Petitioner contends that if Crawford is not a party to the underlying civil matter, various holdings by this Honorable Court and various provisions of the West Virginia Rules of Civil Procedure as well as the West Virginia Code dictate that the lower court erred in dismissing WVDOC, with prejudice.

Rule 19(a) of the West Virginia Rules of Civil Procedure provides that a person who is subject to service of process shall be joined as a party in the action if:

(1) In the person's absence complete relief cannot be accorded among those already parties, or (2) the party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claim interest.

Petitioner Eplion argued that if Crawford would *not* be a party to the underlying lawsuit, the spirit and intent of Rule 19 of the West Virginia Rules of Civil Procedure does not grant the relief sought and granted by WVDOC. In Pioneer Co. v. Hutcheson, this Honorable Court held that whether a party is indispensable under the Rules of Civil Procedure is a determination to be made by the trial court. 220 S.E.2d 89 (W.Va. 1975). More importantly, and as cited by WVDOC in its *Motion to Dismiss*, facts determine whether a party is indispensable and a necessary part of the case and a court may only proceed to do so if it would be *consistent with the principles of equity and good conscience*. Housing Authority of City of Bluefield v. E.T. Boggess, Architect, Inc., 233 S.E.2d 740 (W.Va. 1977). The facts surrounding this matter are that Crawford sexually assaulted and sexually abused Eplion while on the grounds of Lakin Correctional Center. Crawford was working as a correctional officer with the WVDOC and was assigned to Lakin when the acts were perpetrated. At the very least, due to his history of sexually abusing no less than four (4) other female inmates, a jury could determine that WVDOC was negligent in its supervision, training and retention of Crawford. Most importantly, granting WVDOC's *Motion to Dismiss for Failure to Join an Indispensable Party* is clearly not consistent with the principles of equity and good conscience as Petitioner Eplion is left with no remedy for her negligent claims against WVDOC.

Eplion also argued that if WVDOC believes that Crawford should be a party to the underlying lawsuit as he is indispensable, it had plenty of time to file a third party Complaint against Chandler pursuant to Rule 14 of the West Virginia Rules of Civil Procedure. Rule 14 states that "[a]t any time after

commencement of the action a defendant party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff *for all or part of the plaintiff's claim against the third-party plaintiff.*" (emphasis added). Simply put, WVDOC could have easily filed a third party Complaint and, to protect its interests and to protect itself from being unfairly prejudiced at Trial.

Most importantly, Eplion argued that WVDOC could have also pursued its timely filed cross-claim against Crawford pursuant to Rule 13 of the West Virginia Rules of Civil Procedure. However, it chose not to pursue that route. To that end, WVDOC had the opportunity to protect its interests by and through a third-party complaint or pursuing its cross-claim against Crawford. It should be noted that Eplion has stated in her Responses as well as on the record that she would not object to any untimely filed third-party Complaint or WVDOC pursuing its timely filed cross-claim.

Petitioner Eplion believes that Rule 19 of the West Virginia Rules of Civil Procedure further addresses remedies which could cure WVDOC's alleged unfair prejudice of which it argued before the lower court. Specifically, subsection (b) of Rule 19 states:

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include, first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

As stated above, Eplion argues that WVDOC had many remedies to avoid being prejudiced by Crawford's absence. First, Eplion argues that WVDOC and Petitioner could draft a jury instruction to avoid any confusion or prejudice. Second, Eplion argues that WVDOC could draft a jury verdict form that

would also cure any confusion or prejudice. Third, as stated above, WVDOC could have pursued its cross-claim against Crawford. Fourth, as also further stated above, WVDOC could have filed a third-party complaint against Crawford. Eplion further argues that pursuant to Rule 19(b) and Rule 13 and Rule 14 of the West Virginia Rules of Civil Procedure, WVDOC had no less than four (4) remedies to cure any confusion and prejudice should this matter proceed to Trial. Specifically, Eplion referred to the fourth factor in Rule 19(b) wherein it states “whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.” Eplion argues that she will have no adequate remedy due to this matter being dismissed, with prejudice.

As a general rule, a plaintiff has the choice to sue such parties as she deems to hold accountable for her claims as "plaintiff is the master of the Complaint." Greenfield v. Schmidt Baking Co., et al., 199 W. Va. 447; 485 S.E.2d 391; 1997 W. Va. LEXIS 42 (HN6). Further, the West Virginia Rules of Civil Procedure may not be used to compel a plaintiff to sue a person whom he originally might have joined as a defendant and whom he or she chose not to join. Maxey v. City of Bluefield, 151 W. Va. 689, 151 S.E.2d 689 (HN7) (1966).

Rule 19(a) requires two general inquiries for joinder of a person who is subject to service of process. “First, is his presence necessary to give complete relief to those already parties? Second, does he or she have a claim that, if he is not joined, will be impaired or will his non-joinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations? If the absent person meets the foregoing test, the joinder is required." Learner v. Dostert, 172 W. Va. 93, 303 S.E.2d 731(1983); Glover v. Narick, 184 W. Va. 381, 400 S.E.2d 816 (1990). The presence of Crawford is not necessary to give complete relief to any party involved in this case. No compulsory joinder of Crawford is mandated by Rule 19(b). Stated differently, the stated objective of the WVDOC is for the jury to confirm its vigorous contention that it is in no manner legally responsible for Crawford’s alleged damages. This objective can be fully and finally achieved via a defense verdict. The

WVDOC is proclaiming *zero tolerance* for abuse of female inmates under its custody as well as professing *zero* liability to Petitioner Eplion. As stated above, Rule 19 "requires joinder where, in the absence of the person whose joinder is sought, complete relief cannot be accorded among those who are already parties." It cannot be argued that complete relief cannot be accorded Eplion if, for the sake of argument, she has chosen not to name Crawford as a party defendant. The trier of fact will either accord her relief by way of a verdict in her favor or it will not.

There is no basis in law to dismiss, with prejudice, Eplion's case under a Rule 19 analysis. As the lower court dismissed Eplion's case against WVDOC for nonjoinder, Eplion has no remedy for the negligent acts of WVDOC which led to the sexual abuses she suffered during her incarceration. As stated above, a dismissal with prejudice would be a harsh and unwarranted result and the lower court lacked jurisdiction to do so under Rule 19(a) as Crawford is subject to service of process.

Due to of the harshness of such a sanction, a dismissal with prejudice should be considered appropriate only in flagrant cases, Dimon v. Mansy, 198 W. Va. 40, 479 S.E.2d 339 (1996). The lower court's Dismissal Order of October 30, 2013, relied on Dixon v. American Indus. Leasing Co. 205 S.E.2d 4, 157 W. Va. 735 (W. Va. 1974). The Dixon opinion, to the contrary, *reversed* such a dismissal by the Circuit Court per Rule 19 and is fully supportive of Eplion's position— not that of the WVDOC. Further, the WVDOC cited and the lower court adopted in support of its dismissal, with prejudice, of all Eplion's sexual exploitation and negligent claims against the WVDOC. Housing Authority of the City of Bluefield v. E.T. Boggess, 160 W. Va. 303; 233 S.E.2d 740; 1977 W. Va. LEXIS 243 (1977). This Honorable Court's attention is directed to the final page of the Housing Authority opinion where a Rule 19(b) analysis is found. This language is wholly supportive of Eplion's position and confirms that if a dismissal is ordered, the grounds are to be "dismissed for lack of jurisdiction." Such a dismissal is without prejudice.

Such would trigger application of the West Virginia Code § 55-2-18 and be consistent with jurisprudence which recognizes that the law favors a case be decided on its merits.

Further, West Virginia Code §56-4-34, *Misjoinder and nonjoinder of parties*, states, in pertinent part, as follows:

No action or suit shall abate or be defeated by the misjoinder or nonjoinder of parties, plaintiff or defendant. . . . Whenever in any case full justice cannot be done and a complete and final determination of the controversy cannot be had without the presence of other parties, and such nonjoinder shall be made to appear by affidavit or otherwise at any time before final judgment or decree, the court of its own accord, or upon motion, may cause such omitted persons to be made parties to the action or suit, as plaintiffs or defendants, by proper amendment and process, at any stage of the cause, as the ends of justice may require, and upon such terms as may appear to the court to be just; but no new party shall be added upon motion unless the place of his residence, if known, be stated with convenient certainty in the affidavit of the party questioning his nonjoinder, and, if his place of residence be not known, unless such fact be stated. (emphasis added).

As clearly stated by the West Virginia Legislature, “no action or suit shall abate or be defeated by the nonjoinder of parties.” Further, the code provision states that if full justice cannot be had, the lower court may make that person a party to the action. Basically, if the lower court believed that Crawford should be a party, which Defendant WVDOC claimed and the lower court agreed, it may enter an Order stating the same. That would have surely cured any prejudice WVDOC claimed it would have faced at Trial.

Also, West Virginia Code §56-4-53, *Hearing as to defendants served; discontinuance*, states as follows:

Where, in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others or from time to time, as the process is served as to such others, proceed to judgment as to them until judgment be obtained against all. Such discontinuance of the action as to any defendant not served with process shall not operate as a bar of any subsequent action which may be brought against him for the same cause. (emphasis added).

Again, the West Virginia Legislature clearly states that a plaintiff may proceed to judgment as to any defendant served. In this matter, that would be the WVDOC for Eplion's negligence claims alleged in her Complaint. To that end, the lower court should have held that Eplion's negligent claims against Defendant WVDOC could proceed to Trial.

Also, as stated above, interpleader of a third-party defendant by the original defendant is available as a matter of course. An alleged joint tortfeasor may bring into the action a fellow tortfeasor by way of a third-party complaint under Rule 14 or a cross-claim under Rule 13. Haynes v. City of Nitro, 161 W. Va. 230, 240 S.E.2d 544 (1977); Slitzes v. Anchor Motor Freight, Inc., 169 W. Va. 698, 289 S.E.2d 679 (1982). The WVDOC made a conscious choice not pursue a third party complaint or, more importantly, pursue its timely filed cross-claim against Crawford. To that end, the WVDOC knew and understood that Crawford could be responsible for damages, if awarded by the jury, and took steps to limit any prejudice which the WVDOC may incur if he were not a party. In fact, WVDOC argued the same at the Hearing in this matter. However, WVDOC obviously chose to not pursue its cross-claim or file a third- party Complaint against Crawford at any time throughout the litigation of this matter. Petitioner Eplion believes this tactical decision was clearly done so WVDOC could argue that Crawford is indispensable and, in turn, WVDOC filed its *Motion to Dismiss for Failure to Join an Indispensable Party* and WVDOC was dismissed, with prejudice.

Finally, this Honorable Court has recently addressed the issue of indispensable party in the matter of State Affiliated Construction Trades Foundation AFL-CIO v. Stucky, No. 11-1690, June 21, 2012. In this matter, the lower court found that a party was indispensable and added it as a defendant. When reviewing the ruling, this Honorable Court analyzed the substantive issues raised in the declaratory judgment action. The claims addressed were "(1) did the DOH violate West Virginia law when it failed to solicit competitive

bids for the highway construction contract, and (2) does West Virginia law require the contract to contain a prevailing wage clause. *These issues relate solely to West Virginia law.*” (emphasis added).

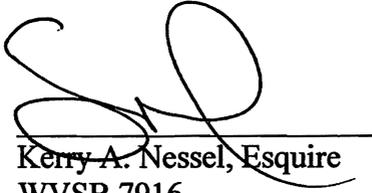
After analyzing the roles of the parties in formulating a contract and the party (Federal Highway Administration) which the lower court held was indispensable and made a defendant to that matter when they were not a party to the contract, this Honorable Court found that the lower court’s error in holding was “a substantial, clear cut legal error which would be reversed on appeal if we did not correct the error in advance of trial.”

While Petitioner Eplion’s situation is admittedly different, namely, the lower court ruling that Crawford is indispensable and thereby dismissing *all* of Petitioner’s claims out of fear that the WVDOC will be unfairly prejudiced at Trial, the same rationale can be applied. Specifically, Petitioner’s West Virginia state law claims against the WVDOC are claims regarding negligent hiring, negligent training, negligent supervision and negligent retention, among others. Any and all of Petitioner’s negligence claims are not alleged against Crawford. Petitioner argues that Crawford did not *negligently* sexually assault her on the grounds of a high security WVDOC-run prison as his acts were intentional. Further, when WVDOC began accepting West Virginia taxpayer monies to operate Lakin and house inmates, such as Petitioner, a contract between WVDOC and Petitioner Eplion was created. Crawford was not a party to that contract. Therefore, Crawford was not indispensable concerning Petitioner Eplion’s negligence claims against the WVDOC and the lower court’s ruling was in error.

CONCLUSION and PRAYER

WHEREFORE, as the above-referenced Rules and holdings dictate, Petitioner Brandy Eplion respectfully requests that this Honorable Court reverse the lower court’s ruling concerning WVDOC’s

Motion to Dismiss for Failure to Join an Indispensable Party and for any and all other relief this Honorable Court deems just and proper.

A handwritten signature in black ink, appearing to read 'K. Nessel', is written over a horizontal line.

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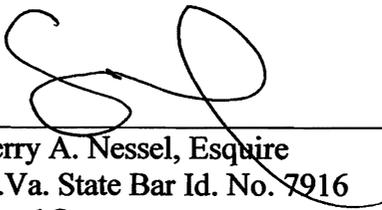
**THE WEST VIRGINIA DIVISION OF
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instrumentality,**

Respondent.

Certificate of Service

The undersigned counsel for the Petitioner, Brandy Eplion, hereby certifies that a true copy of the foregoing **AMENDED PETITIONER'S BRIEF** was served upon counsel of record this 19th day of March, 2014, by placing the same in an envelope, properly addressed with postage fully paid, and depositing the same in the U.S. Mail to the following individuals:

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