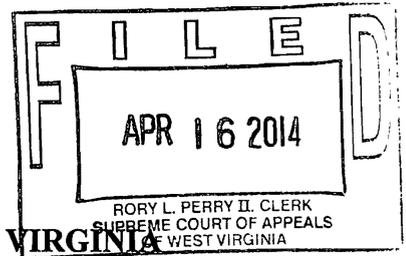


No. 13-1224



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

BRANDY EPLION,

Petitioner,

v.

No. 13-1224

(Kanawha County Civil Action

No. 10-C-1473)

THE WEST VIRGINIA
DIVISION OF CORRECTIONS,
A corporate body and governmental
Instrumentality, and JOHN DOE,
Unknown person or persons,

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

I. Procedural History

Petitioner, Brandy Eplion, filed a Complaint in the Circuit Court of Kanawha County, West Virginia on August 17, 2010 alleging, *inter alia*, that she was sexually assaulted by former Correctional Officer Ronald Crawford (“Crawford”) and further, that such conduct should be imputed to the West Virginia Division of Corrections (“WVDOC.”) Petitioner also alleges that the WVDOC, by and through unnamed individual(s), negligently hired, supervised, trained, and retained Mr. Crawford. Joint Appendix (“JA”) 1-9. The Respondents answered the Complaint, denying all allegations against them. JA 10-21. Petitioner sought leave for additional time to serve Ronald Crawford, which was granted. JA 22-25. Ronald Crawford was ultimately dismissed for Petitioner’s failure to timely serve him by Order entered April 20, 2012. JA 31-33. Petitioner did not file an appeal regarding that dismissal. Instead, under the Savings Statute, W. Va. Code §55-2-18, Petitioner then re-filed a second suit, Civil Action No. 12-C-981. JA 218-226. Petitioner again failed to serve Mr. Crawford, and he was dismissed a second time on February 1, 2013. JA 258-260. On April 25, 2013, Petitioner filed a third suit against the Defendants, Civil Action No. 13-C-804. JA 297-305. In this third suit, Petitioner filed an Affidavit of Publication regarding service upon Mr. Crawford (JA 337-339); however, after a brief stay of the proceedings, Crawford was dismissed a third and final time. JA 455-458. Accordingly, as a result of Mr. Crawford being forever barred from suit by the Plaintiff, the Respondents filed a Motion to Dismiss for Failure to Join an Indispensable Party. JA 34-42. The Motion was granted by Order entered on October 30, 2013, with prejudice. JA 210-217.

This is an appeal from that October 30, 2013 Order of the Honorable Jennifer Bailey, Judge of the Circuit Court of Kanawha County, dismissing the action in its entirety due to the Petitioner’s

failure to join an indispensable party, Ronald Crawford, under Rule 19 of the West Virginia Rules of Civil Procedure. JA 210-217. The Respondents request that this Court affirm the decision of the lower court, finding that it properly dismissed the Respondents with prejudice.

II. Statement of the Facts¹

This litigation arises from allegations by Brandy Eplion of sexual misconduct towards her by former correctional officer, Ronald Crawford², while she was incarcerated at the Lakin Correctional Center (“LCC”). JA 2. The WVDOC operates LCC, located in West Columbia, West Virginia. JA 2. During the times relevant to her Complaint, Ms. Eplion was a convicted felon incarcerated at LCC after pleading to 1st Degree Arson.

Correctional Officer (“C.O.”) Crawford was dismissed from the underlying case by Order dated April 20, 2012 for Petitioner’s failure to timely serve him. JA 31-33. Further, while the Petitioner informed the lower court that C.O. Crawford had “disappeared” after being terminated as an employee of WVDOC, (JA 481), she represented that Petitioner’s counsel has attempted serve officers in other cases via various methods which “have never been accepted by [the Circuit Courts of Kanawha County.]” JA 481-482. Importantly, such timely attempts were never made in this matter.

Noticeably absent from Petitioner’s brief is any explanation as to why the Petitioner failed to timely serve C.O. Crawford by publication in the instant case when she could have, yet simply failed

¹ Notably, Petitioner fails to fully cite to the Joint Appendix as required by Rule 10(c)(4) of the West Virginia Rules of Appellate Procedure and in so doing, makes several assertions that are not contained within the Joint Appendix. In addition, Petitioner’s Joint Appendix contained handwritten page numbers which were misnumbered. For accuracy, and as a convenience to the court and counsel, the undersigned Bates stamped the Joint Appendix and prepared an Amended Index that accurately reflects the contents. A Motion to Amend Joint Appendix has been filed and is pending.

² Confusingly, the offending officer is identified as “Chandler” on page 6 in Petitioner’s Brief,

to do so. Indeed, in the lower court, she offered nothing more than bare assertions that she tried to locate Crawford, without offering any concrete evidence of same. There is no evidence in the record substantiating these assertions. Service by publication was not attempted until the third case, which was barred by the statute of limitations.

Although Correctional Officer Ronald Crawford is the party to have allegedly committed the sexual assault, harassment, and abuse against her, the Petitioner is still claiming damages from said alleged assault against the WVDOC. JA 1-9. As a result, on July 12, 2012, the WVDOC filed a Motion to Dismiss due to Petitioner's Failure to Join an Indispensable Party. JA 34-42. On April 19, 2013, the WVDOC filed a Supplement to its Motion to Dismiss. JA 79-95. A hearing was held in this matter on October 18, 2013 (JA 461-503), and on January 6, 2014, an Order was entered granting WVDOC's motion, with prejudice, finding that C.O. Crawford was an indispensable party to the lawsuit whose absence would make an equitable adjudication impossible. JA 459-460.

SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion when it dismissed the case upon concluding that the Petitioner failed to join an indispensable party under Rule 19 of the West Virginia Rules of Civil Procedure. Therefore, the decision to dismiss this matter should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not 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 limited question of whether the trial court abused its direction in finding that Ronald Crawford was an indispensable party, requiring the instant case to be dismissed under these facts. The Respondents do not believe that oral

who is an unknown and unidentified non-party herein.

argument will assist the Court in this limited regard and instead, believe that the Court can ascertain all information necessary to decide this matter from the record which was developed below.

ARGUMENT

I. Standard of Review.

“The determination of whether a party is indispensable under the provisions of Rule 19(a) of the West Virginia Rules of Civil Procedure is in the sound discretion of the trial court.” *Pioneer Co. v. Hutchinson*, 159 W. Va. 276, 220 S.E.2d 894 (1975)(*overruled on other grounds, State ex rel. E. D. S. Fed. Corp. v. Ginsberg*, 163 W. Va. 647, 259 S.E.2d 618 (1979); see also *Dixon v. Am. Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974)(employing an “abuse of discretion” standard.). Moreover, West Virginia jurisprudence relies heavily on federal law with regard to Rule 19. Accordingly, the standard of review is an abuse of discretion. In *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980), [the Fourth Circuit] Court enunciated an abuse of discretion standard of review in the context of a district court’s denial of a motion for joinder of a non-party upon finding that the non-party was not a necessary party under Rule 19(a). In light of the Supreme Court’s admonition that the Rule 19(b) inquiry is fact-specific, see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 & n.14, 19 L. Ed. 2d 936, 88 S. Ct. 733 (1968), the Fourth Circuit held that an abuse of discretion standard of review applies to a district court’s determination under Rule 19(b) as well. *Nat’l Union Fire Ins. Co. v. Rite ex rel. S.C.*, 210 F.3d 246, 250 (4th Cir. S.C. 2000).

Although the Respondents acknowledge that “[d]ismissal of a case is a drastic remedy . . . which should be employed only sparingly,” it has been noted that:

In determining whether to dismiss a complaint, a court must proceed pragmatically, “examining the facts of the particular controversy to determine the potential for prejudice to all parties, including those not before it.” The district court’s Rule 19

dismissal of National Union's action is reviewed for abuse of discretion. *See Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980) ("The inquiry contemplated by Rule 19 . . . is addressed to the sound discretion of the trial court."). n7 We review the district court's findings of fact underlying its Rule 19 determination for clear error. *See Tell v. Trustees of Dartmouth College*, 145 F.3d 417, 418 (1st Cir. 1998).

Nat'l Union Fire Ins. Co. v. Rite ex rel. S.C., 210 F.3d 246, 250 (4th Cir. S.C. 2000).

II. The Lower Court Did Not Abuse Its Discretion When It Dismissed the Respondents Because the Petitioner Failed to Join an Indispensable Party.

The lower court *in its discretion* correctly determined that Ronald Crawford was an indispensable party to this civil action and dismissed this matter, with prejudice, under Rule 19(a) of the West Virginia Rules of Civil Procedure because the Petitioner failed to join an indispensable party. 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 person 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 parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Rule 19(b) 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 him or those already parties; second, the extent to which, by protective provisions 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.***

This Court has noted that, “[t]he test has become less scholastic in the sense of trying to define who is an indispensable party. Instead, under the amended rule, the emphasis is placed on the question of whether the case can be equitably prosecuted in the absence of a missing party.” *Wachter v. Dostert*, 172 W. Va. 93, 95, 303 S.E.2d 731, 734 (1983). Whether a party is indispensable under the Rules of Civil Procedure is a determination to be made by the trial court. *Pioneer Co. v. Hutchinson*, 159 W. Va. 276, 220 S.E.2d 89 (1975). However, facts determine whether a party is indispensable and a necessary part of the case, and the court may only proceed if to do so would be consistent with principles of equity and good conscience. *Housing Auth. of City of Bluefield v. E.T. Boggess, Architect, Inc.*, 160 W. Va. 303, 233 S.E.2d 740 (1977). An indispensable party’s presence is required so that the court may make adjudication equitable to all persons involved. *Dixon v. Am. Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974). Indeed, the “Rule 19(b) analysis is not mechanical; rather it is conducted in light of the equities of the case at bar.” *Nat’l Union Fire Ins. Co. v. Rite ex rel. S.C.*, 210 F.3d 246, 252 (4th Cir. S.C. 2000)(citations omitted)(finding that joinder is not feasible because it would destroy diversity of citizenship; however, dismissal was necessary because the non-party was indispensable).

It has been held that:

Rule 19(a) of the West Virginia Rules of Civil Procedure 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 have a claim that, if he is not joined, will be impaired or will his nonjoinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations? If the absent person meets the foregoing test, his joinder is required. However, in the event that the absent person cannot be joined, the suit should be dismissed only if the court concludes that the 19(b) criteria cannot be met.

Wachter v. Dostert, 172 W. Va. 93, 303 S.E.2d 731 (1983).

In the instant matter, C.O. Crawford was dismissed by Order dated April 20, 2012 for Petitioner's failure to timely serve him. JA 31-33. On June 13, 2012, the Honorable Judge Bloom, in addressing circumstances identical to those herein, dismissed a case against the West Virginia Regional Jail Authority in its entirety with prejudice due to the Petitioner's failure to timely serve an offending correctional officer, finding that the correctional officer was an indispensable party to the lawsuit. JA 89-92. It is clear that Judge Bloom agrees that Respondents should not be held responsible for a Plaintiff's lack of diligence and care to join a necessary party. JA 91.

Other courts in the same circuit in multiple cases procedurally analogous to the case *sub judice* have dismissed the West Virginia Division of Corrections for Plaintiff's failure to join an indispensable party (namely, the alleged offending officer). Specifically, on May 28, 2013, the Honorable Judge Zakaib dismissed a case against the West Virginia Division of Corrections in its entirety with prejudice due to the Plaintiff's failure to properly join the alleged offending correctional officer, finding that the correctional officer was an "indispensable party." (See, *Tara Eplion v. WVDOC et al.*, Civil Action No. 10-C-2059, Dismissal Order). Similarly, the Honorable Carrie Webster dismissed the West Virginia Division of Corrections with prejudice in two separate matters due to Plaintiff's failure to join the alleged offending officer because that officer was deemed an indispensable party. (See, *Jividen v. WVDOC et al.*, Civil Action No. 12-C-690, Dismissal Order; *Tonya Sloan v. WVDOC et al.*, Civil Action No. 11-C-534). Judge Jennifer Bailey likewise dismissed *Nicole Lawrence v. WVDOC et al.* Civil Action No. 10-C-2184³, Dismissal Order). These Dismissal Orders are attached collectively hereto as **Addendum 1**.

³ The appeal in *Lawrence v. WVDOC et al.*, No. 13-1322 recently was voluntarily dismissed by Lawrence, who was represented by the same attorney as the Petitioner herein and involved the same offending officer.

Like Judge Bloom in the *Farley* matter discussed above, Judges Bailey, Zakaib and Webster determined that dismissal with prejudice was appropriate under such procedural instances. Judge Bailey, Zakaib and Judge Webster's reasoning applies with equal force in this case:

[F]urther in the unlikely event that Plaintiff is awarded damages, there would be no section on the jury form for a jury to assign a percentage of fault/contribution to Defendant C.O. Ronald Crawford. By having the case go forward without C.O. Ronald Crawford, and assuming damages are awarded, it would subject the WVDOC to the inequitable position of receiving the portion of the damages for which C.O. Ronald Crawford would be responsible.

Id.

Identical to the procedural facts of *Farley, Jividen, Lawrence, Tonya Sloan and Tara Eplion*, the instant Plaintiff failed to join the alleged offending correctional officer, the party alleged to have committed the sexual assault, harassment, and abuse against her. As determined by each of those judges as to the alleged offending correctional officer in their respective cases, and as determined by the lower court in this matter, Mr. Crawford is an indispensable party in this case. Petitioner's failure to properly join him in this action has caused the case to be in a posture where an equitable adjudication to all persons involved cannot be achieved. The way the case is currently postured, C.O. Ronald Crawford would not be present at trial and would offer no testimony regarding Petitioner's allegations. Further, in the unlikely event that the Petitioner is awarded damages, there would be no section on the jury form allotting fault/contribution to C.O. Ronald Crawford. By having the case go forward without C.O. Ronald Crawford, and assuming damages are awarded, it would subject the WVDOC to the inequitable position of receiving the apportion of damages for which C.O. Ronald Crawford would be responsible. Rule 19(a) was created specifically to avoid such a dilemma. *Dixon*, 157 W. Va. 735, 205 S.E.2d 4.

It does not appear from the briefing below that the Petitioner disputes that C. O. Crawford is a necessary party to this claim under Rule 19(a). This is evident by the fact that she initially named him as a Defendant and simply failed to timely and/or properly serve him in several identical suits. Particularly, the Complaint states that “the Plaintiff was sexually assaulted, sexually abused and sexually harassed by Defendant Crawford.” JA 2. The Respondents certainly cannot adequately respond or defend against these allegations as to it because C.O. Crawford is no longer a party. JA 210-217. C.O. Crawford cannot become a party again because he was already dismissed through an Order on April 20, 2012. Further, aside from her bare unsupported allegations, the Petitioner offered no concrete evidence whatsoever, such as an Affidavit outlining her efforts to serve him, to show that she was diligent in trying to perfect service upon him. Indeed, in her Brief, the Petitioner still offers nothing but her own representations (Pet. Amended Brief, pg.1-2), yet a review of the docket sheet below shows no evidence of such attempts. JA 504.⁴

⁴ Counsel for Petitioner raised several arguments in other cases with identical procedural postures and evidently abandoned those arguments herein. For instance, in *Sloan v. WVDOC et al.*, No. 13-0973, Petitioner Sloan, by counsel, claimed that she made the strategic decision not to proceed against Crawford because any judgment against him would be “worthless” and “he would likely not be provided insurance coverage for his intentional acts.” (Sloan Pet. Brief, pg. 2). Further, while Sloan (represented by the same attorney as the other inmates including the Petitioner herein) asserted that, because the State’s insurer would presumptively file a declaratory action if/when a judgment was awarded against the intentional tortfeasor officer as occurred in *April Tomblin Chafin v. John Reed, Logan County Home Confinement, Logan County Commission*, Case No. 2:11-CV-00034, this not only was sheer speculation and irrelevant to the indispensable nature of Crawford, but it actually underscored the fact that an alleged perpetrator of an intentional act such as sexual assault is critically indispensable. Indeed, in relying on the *Chafin* case, the Sloan Petitioner simply highlighted the need for the alleged perpetrator to be a party at trial because in *Chafin*, there was a judgment against the alleged perpetrator. See, *Chafin v. Reed et al.*, Judgment Order, Civil Action No. 2:11-0034. Because this argument actually provides yet another basis for finding an offending individual is a critically indispensable party, Petitioner, by counsel, evidently decided to abandon this argument after the Sloan briefing was completed.

The current joint and several liability statute requires the apportionment of fault as to all possible tortfeasors. W.Va. Code § 55-7-24. Under certain circumstances, several liability will apply, necessarily requiring the consideration and apportionment of fault by the jury (in relevant part):

§55-7-24. *Apportionment of damages.*

(a) In any cause of action involving the tortious conduct of more than one defendant, the trial court shall:

(1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation ***at the time the verdict is rendered***; and

(2) Enter judgment against each defendant found to be liable on the basis of the rules of joint and several liability, except that if any defendant is thirty percent or less at fault, then that defendant's liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.

The right of contribution is derivative of the original Plaintiff's claim(s) against the alleged tortfeasor; however, if that tortfeasor cannot be made a party for any reason, an alleged joint tortfeasor cannot proceed on a claim of contribution. This concept was recently affirmed in *Landis v. Hearthmark, LLC*, 232 W.Va. 64, 750 S.E.2d 280 (2013)(holding that in a product liability case, the defendants were not permitted to assert claims of contribution against the minor plaintiff's parents due to parental immunity.) Although the *Landis* Court found that the plaintiff's comparative negligence must be assessed against all possible negligent actors to determine if plaintiff's negligence equaled or exceeded the defendant's liability, it expressly did not permit the defendants to assert third party claims of contribution against the immune parents. Accordingly, Petitioner's suppositious scenario to include now-dismissed defendant Crawford on some unspecified verdict form at the trial of this matter is not only speculative, but expressly impermissible under *Landis*. (*see also, Small v. Jack B. Kelley, Inc.*, Not Reported in F.Supp.2d, 2012 WL 4056745 (N.D.W.Va., 2012)).

This analysis becomes all that more critical because state agencies like the West Virginia Division of Corrections are subject only to several liability and are entitled to sovereign immunity for any judgments above and beyond the several liability which is apportioned. Indeed, the State's Liability Policy contains Endorsement 16 which limits coverage to purely several liability. It states:

No coverage exists as to claims, demands, or actions seeking relief or damages from any state agency or entity or from its employees, agents and servants in their official capacities (referred to collectively as "state agency") except as to the percentage of fault or negligence attributable to such "state entity" in relation to the total fault or negligence causing or claimed to have caused such damages, but in no event may recovery be had in an amount exceeding the state policy limit.

(See, Endorsement 16, State Commercial General Policy, attached as **Addendum 2** hereto).

As sovereign immunity applies to claims for which there is no insurance coverage, the WVDOC (and by extension, John Doe) is immune from joint liability, and can only be held severally liable in the amount of its/their own proportionate fault. This apportionment necessarily requires the inclusion of Crawford in the instant matter in light of the allegations giving rise to the Complaint. In *dicta*, this Court has previously commented on the inclusion of non-parties on a verdict form for the purpose of apportioning liability:

. . . Under W.Va. Code, 55-7-24(a)(1) [2005], a jury must determine "the proportionate fault of each of the parties in the litigation at the time the verdict is rendered[.]" The defendant asserts that because she was still pursuing a property damage claim against Mr. Withrow at the time the verdict was rendered, Mr. Withrow was one of the "parties in the litigation." She therefore contends the jury should have been allowed to apportion fault for the plaintiff's injuries to Mr. Withrow. We, however, reject the defendant's interpretation of the statute. It is clear that, when the jury's verdict was rendered, Mr. Withrow was not a party to any litigation involving the plaintiff.

Halcomb v. Smith, 230 W.Va. 258, 737 S.E.2d 286 (2012)(finding that a settlement with one defendant barred the inclusion of that non-party on the verdict form).

The Petitioner, citing *Housing Auth. Of City of Bluefield v. E.T. Boggess, Architect, Inc.*, 160 W. Va. 303, 233 S.E.2d 740 (1977), asserts that the case should, nevertheless, proceed against the Respondents under Rule 19(b) because dismissal would not be “consistent with principles of equity and good conscience.” To the contrary, because the Petitioner failed to properly join Crawford, by failing to serve him to make him a proper party to the case, the Respondents are now prohibited from requesting a jury to assess fault/contribution for Crawford’s alleged acts. Again, Judge Bloom correctly determined in virtually identical circumstances that dismissal was appropriate. JA 89-92. Judge Bloom’s reasoning in *Farley* applies with equal force in the instant case:

[P]laintiff’s failure to properly join [the C.O.] would prohibit the jury from assessing fault/contribution for their alleged acts. Moreover, the jury would be improperly denied the opportunity to properly apportion damages to the individual [sic] who are alleged to have committed the sexual assault and harassment against her.

Id. at ¶ 6.

The Petitioner herein named C.O. Ronald Crawford as a Defendant and had 120 days to serve him in this matter but failed to do so. Plaintiff got two more bites at the apple to no avail via two subsequent cases that likewise were filed and never properly and/or timely served on Crawford. The WVDOC should not be held responsible for, and in effect penalized, for C.O. Ronald Crawford’s portion of damages, if awarded, due to Petitioner's lack of attention to her case. By allowing this case to go forward as currently postured, Petitioner's inattention to her own case would be rewarded at the WVDOC's expense.

It is particularly noteworthy that the lower court in this matter made its determination that Crawford was an indispensable party based on the *particular* facts of this case, following the guidance of *Housing Auth. of City of Bluefield v. E.T. Boggess, Architect, Inc.*, 160 W. Va. 303, 233 S.E.2d 740 (1977). It is important to emphasize that the lower court did *not* find as a general rule that W.Va R.

Civ. Pro. 19(a) requires in all instances that a case against an entity must include as a party the person who may have been the one to commit the acts or omissions that led to the suit, and expressly stated as much. The lower court, in its discretion and based on the specific facts of the instant case, concluded that Mr. Crawford was indispensable and, because he was dismissed and could no longer be brought in as a party due to the Petitioner's dilatory conduct, dismissal of the WVDOC, was warranted. JA 210-217.

As noted above, in a litany of hypothetical "suggestions," the Petitioner weakly asserts that the prejudice to the Respondents for Petitioner's failure to join Crawford can be cured either by some undefined jury instruction and/or jury verdict form or filing a third party claim against Crawford. Despite Petitioner's gratuitous suggestions, however, dismissal was proper.

First, the Petitioner asserts that the Respondents had the opportunity to join C.O. Crawford as a third-party defendant under Rule 14(a). Neither the text of Rule 14 nor West Virginia case law supports the Petitioner's assertion that WVDOC must defeat its own Rule 12(b)(7) Motion by impleading C.O. Crawford. On the contrary, Rule 14(a) is a permissive provision that allows a Defendant to choose whether or not to implead a third-party Defendant, and does not contemplate mandatory joinder of a third-party Defendant that the Petitioner initially sued, and then simply failed to timely serve. It is well-settled that, "no rule should be expanded to include situations which were not within the contemplation of the framers and which are thus outside the purpose and scope of the rule itself." *Cromer v. Sollitt Constr. Co.*, 16 F.R.D. 559 (S.D. W. Va. 1954) (refusing to allow a Plaintiff to maintain a lawsuit against a third-party defendant which had been improperly joined by the original defendant because the Federal Rules of Civil Procedure did not contemplate such a result).

Indeed it would be illogical for Rule 14(a) and Rule 12(b)(7) to co-exist if Rule 14(a) required a Defendant to add a party whose presence in the lawsuit would defeat the Defendant's Rule 12(b)(7) motion. *See, e.g., Bass v. Harbor Light Marina, Inc.*, 372 F. Supp. 786, 794 (Dist. Ct. S.C. 1974) (suggesting that Defendant choose between a Rule 14(a) impleader and a Rule 12(b)(7) Motion, depending on Defendant's litigation strategy). Like the Federal Rules, the West Virginia Rules of Civil Procedure clearly place the burden of joining and serving indispensable parties on the Petitioner, not the Respondents. Rule 14 places no obligation on WVDOC to join C.O. Crawford, and this Court should disregard Petitioner's procedurally illogical and wholly unsupported argument to the contrary.

Further, it has been routinely held that third-party practice is within the discretion of the Court. W. Va. R. Civ. P. 14(a) "maintains a screening function for circuit courts with regard to motions to implead that are filed after the close of that 10-day window." *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 584 S.E.2d 203 (2003)(per curiam)(citing Fed. R. Civ. P. 14 advisory committee's note to 1963 amendment)(although ultimately permitting the impleader, the Court noted that "a party must not be dilatory in proceeding . . . after a basis for impleader becomes clear. . . Ideally, of course, motions for leave to implead a third party under Rule 14 should be made promptly or 'as soon as possible after the filings of the pleadings in the suit.'"(citations omitted)). In this case, the Petitioner wants the Court to mandate these Respondents to implead Crawford due to her own failure to timely serve him as a Defendant literally years after the alleged offending conduct.

The Petitioner also suggests a theoretical verdict form or jury instruction to address the Respondent's concerns of prejudice; however, Petitioner fails to identify what instruction(s) would be offered to cure such prejudice. A blanket, unspecific offer of a "jury instruction" does not cure the prejudice that the Respondents would suffer if required to proceed to trial without Crawford

properly named as a party. Moreover, to simply nominally include Crawford on a verdict form without him being present and participating at trial does not resolve the prejudice. In fact, such a scenario would create greater confusion for a jury. To mandate that the Respondents implead Mr. Crawford would complicate matters inasmuch as the jury would be asked to apportion fault to Mr. Crawford, a non-contributory non-party who cannot be held legally liable. This scenario (as hypothesized by the Petitioner) would then require the jury to be instructed on the differences between contribution theories of liability compared with general rules of apportionment in a theoretical sense only (since Mr. Crawford cannot be held liable for a derivative claim of contribution). This would make trial extremely difficult and complicated, and prejudice the Respondents in defending this case.

In this regard, this Court has held that “[a]lthough Rule 14(a), West Virginia Rules of Civil Procedure, allows a defendant to implead one who is or may be liable to him for all or part of the plaintiff’s claim, there must be *substantive right to relief that will accrue to a third party plaintiff* under the applicable law.” *Bluefield Sash & Door Co., Inc. v. Corte Const. Co.*, 158 W.Va. 802, 216 S.E.2d 216 (1975)(*overruled on other grounds*).

This Honorable Court has held that, “where the third party procedure may create confusion or cause complicated litigation involving separate and distinct issues the trial court does not abuse its discretion in refusing to allow impleader under third party practice.” Syl. Pt. 4, *State ex rel. Thrasher Engineering, Inc. v. Fox*, 218 W.Va. 134, 624 S.E.2d 481 (2005)(citing Syl. Pt. 5, *Bluefield Sash & Door Co., Inc. v. Corte Constr. Co.*, 158 W.Va. 802, 216 S.E.2d 216 (1975), *overruled on other grounds by Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977)). Even if feasible (which is disputed because Crawford has been dismissed and cannot be liable for contribution now), such an option would cause great confusion at trial.

In her Brief, the Petitioner emphasizes that “she is left with no remedy” if this matter is dismissed in its entirety. (Pet. Amended Brief, pg. 3). She further relies on Rule 19(a) for the proposition that Crawford is “not necessary” to ensure complete relief to the remaining parties. (Pet. Amended Brief, pg. 8). Ironically, the Plaintiff claims that she “has the choice to sue such parties as she deems to hold accountable,” which is precisely what she did in this case. (Pet. Amended Brief, pg. 8). The problem arises, however, as a result of the Petitioner’s recidivistic failure to timely and/or properly serve Crawford, despite multiple opportunities to do so. As a result of the Petitioner’s failure to timely and/or properly serve him, C.O. Crawford was dismissed from the instant case.

In an effort to disguise her repeated failure to serve Crawford, the Petitioner attempts to shift the burden of proof to the WVDOC by requiring the WVDOC to prove “it is in no manner legally responsible [to the Petitioner]. . .” (Pet. Amended Brief, pg. 8). What the Petitioner refuses to acknowledge, however, is that a true jury verdict cannot be attained as to the Respondents because Crawford was dismissed almost two years ago due to Plaintiff’s failure to serve him. Because Crawford (the alleged sexual offender) was dismissed, a jury cannot assess liability against Crawford at the trial of this matter. While it is true that under all circumstances the WVDOC will vigorously defend itself, it is *not* a legally feasible option for the jury to assess Crawford’s culpability because of his dismissal, thereby significantly and irreversibly prejudicing the Respondents.

Multiple courts, including circuit courts in the same jurisdiction as this case, have dismissed cases in identical circumstances. See, *infra*. Moreover, Petitioner’s reliance on W. Va. Code §56-4-34 and 56-4-53 is wholly misplaced and should be disregarded by this court because neither statute has any bearing on any issue presented herein. Specifically, issues related to nonjoinder as explained

in W. Va. Code §56-4-34 are addressed in Rules 20 and 21 of the West Virginia Rules of Civil Procedure, not *Rule 19*, which is the applicable rule in this matter:

Three types of parties are generally recognized with respect to the issue of joinder under Rule 19 and Rule 20: indispensable parties, necessary parties and proper parties. Indispensable and necessary parties are associated with Rule 19. Proper parties are associated with Rule 20. As the note to W.Va.R.Civ.P. 19 states in part: “Indispensable parties are those without whose presence the action cannot proceed.... Necessary parties are defined as those who should be joined if feasible, but whose presence is not essential.” Furthermore, as *the note to W.Va.R.Civ.P. 20 states in part: “This rule deals with joinder of parties other than ‘necessary’ and ‘indispensable’ parties, which are dealt with in Rule 19....* Those joinable under this rule are generally called ‘proper’ parties in federal courts.” Of course, this Court is not unmindful that a mechanical designation of parties as indispensable, necessary or proper, should not be substituted for a comprehensive analysis of the rules of joinder. *See* WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1604 (1972). However, those designations are still in use in federal cases and are somewhat helpful in distinguishing the reasons why the joinder of parties is granted or denied.

Anderson v. McDonald, 170 W. Va. 56, 289 S.E.2d 729 (1982)(emphasis added). Contrary to the Petitioner’s assertion, W. Va. Code §56-4-34 does not preclude dismissal in the instant action. That code provision simply stands for the proposition that a party’s failure to include or exclude *non-indispensable* (yet, proper and even necessary) parties does not warrant dismissal:

We believe the test under the old Rule 19 as stated in *Dixon, supra*, is rather compatible to the present Rule 19 although it lacks some of the specificity of Rule 19(a), which 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 have a claim that, if he is not joined, will be impaired or will his nonjoinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations? If the absent person meets the foregoing test, his joinder is required. However, *in the event that the absent person cannot be joined, the suit should be dismissed only if the court concludes that the 19(b) criteria cannot be met.*

Wachter v. Dostert, 172 W. Va. 93, 303 S.E.2d 731 (1983)(emphasis added). The *Wachter* Court further observed that:

. . . it does appear that there has been a shift in emphasis by the federal courts since the 1966 Amendments to the federal rule. The test has become less scholastic in the sense of trying to define who is an indispensable party. *Instead, under the amended rule, the*

emphasis is placed on the question of whether the case can be equitably prosecuted in the absence of a missing party. If so, there is no reason to join the party or to dismiss the action. [Footnote omitted].

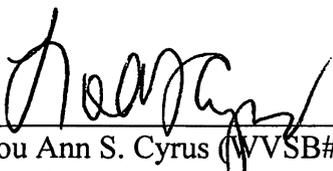
Id. at 280 (emphasis added).

Indeed, “[i]n the absence of a necessary party the merits of a cause may not be adjudicated.” *Bowen v. West Va. Gas Corp.*, 121 W. Va. 403, 3 S.E.2d 629 (1939). In the instant action, Crawford is indispensable (as opposed to simply “necessary” or “proper”) and the Petitioner’s failure to serve him despite multiple opportunities to do so has prohibited the Respondent from fully defending itself in this matter. Accordingly, the lower court did not abuse its discretion in concluding that, under the specific facts of this case, Mr. Crawford was an indispensable party whose absence required dismissal of the entire matter.

CONCLUSION

The Respondents respectfully ask this Court to find that the lower court did not abuse its discretion and to affirm the decision of the lower court dismissing the claims against the Respondents because the Petitioner failed to join an indispensable party in violation of Rule 19 of the West Virginia Rules of Civil Procedure.

Respectfully Submitted,
**WEST VIRGINIA DIVISION
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No. 13-1224

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

BRANDY EPLION,

Petitioner,

v.

No. 13-1224

(Kanawha County Civil Action
No. 10-C-1473)

THE WEST VIRGINIA
DIVISION OF CORRECTIONS,
A corporate body and governmental
Instrumentality, and JOHN DOE,
Unknown person or persons,

Respondents.

CERTIFICATE OF SERVICE

We certify that we have caused to be placed in first class mail, with postage prepaid, a copy of "Respondents' Brief" to counsel of record as follows:

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DONE this 16th day of April, 2014.



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Exhibits on File in Supreme Court Clerk's Office