

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STEPHEN BROWN,	:	APPEAL NO. C-220535
	:	TRIAL NO. A-2103186
and	:	
	:	<i>OPINION.</i>
ANDRA BROWN,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
BOARD OF EDUCATION, READING COMMUNITY SCHOOL DISTRICT,	:	
	:	
SHOOK CONSTRUCTION, INC.,	:	
	:	
TOUCHSTONE CPM, INC.,	:	
	:	
CHARLES F. JERGENS CONSTRUCTION, INC.,	:	
	:	
VOORHIS, SLONE, WELSH, CROSSLAND ARCHITECTS, INC.,	:	
	:	
and	:	
	:	
CHARLES LAFATA,	:	
	:	
Defendants-Appellees.	:	

**OHIO FIRST DISTRICT COURT OF APPEALS**

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Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 26, 2023

*John H. Forg, III*, for Plaintiffs-Appellants,

*Gordon & Rees LLP, Gregory D. Brunton and Michael Britt*, for Defendant-Appellee  
Voorhis, Slone, Walsh, Crossland Architects, Inc.,

*Ennis Britton Co. LPA, William M. Deters, II and Ryan M. LaFlamme*, for  
Defendants-Appellees Reading Community School District Board of Education and  
Charles Lafata,

*Teetor Westfall L.W. Westfall*, for Defendants-Appellees Shook Construction, Inc.,  
and Touchstone CPM, Inc.,

*Gallagher Sharp LLP, Kohl Schneider and Steven A. Keslar*, for Defendant-Appellee  
Charles F. Jergens Construction Co., Inc.

**KINSLEY, Judge.**

{¶1} Plaintiffs-appellants Stephen and Andra Brown find themselves in a real-world Catch-22. Under the trial court’s ruling dismissing their lawsuit, they cannot sue the Reading School District and its Board of Education (together “the School District”) for flooding damage the Browns believe a school construction project caused to their home because they did not also sue the Ohio Facilities Construction Commission (“the OFCC”), a state agency that apparently provided funding for the project. But they cannot sue the OFCC, because lawsuits against state agencies must be filed in the Ohio Court of Claims, not here in Hamilton County, and they have run out of time to file a new lawsuit against the OFCC in that jurisdiction.

{¶2} On appeal, the Browns ask us to reverse the trial court’s decision dismissing their entire action on the basis that the OFCC is an indispensable party. For the following reasons, we agree with the Browns that, on the record that exists at this stage of the proceedings, the trial court erred in finding OFCC’s presence in the lawsuit to be necessary to its existence. We thus sustain the Brown’s sole assignment of error and reverse the judgment of the trial court dismissing their complaint.

***Factual and Procedural Background***

{¶3} This case arises out of a claim brought by the Browns against the School District and the contractors they hired to renovate several Reading School District Buildings.

{¶4} The Browns reside downhill from these buildings. When the Reading School District began construction to replace these buildings, the Browns allege they noticed water flowing downhill in their yard due to the construction.

{¶5} The initial problem, as the Browns describe it in their complaint, began in June 2017. However, according to the Browns, in October 2017, severe flooding washed out the Browns' landscaping and flooded their basement. In September 2021, the Browns filed suit against the School District and others, alleging they negligently caused this damage to the Browns' property.

{¶6} The School District and the other defendants moved to dismiss the Browns' complaint, asserting the Browns' claim was barred by the applicable statute of limitations. The trial court determined the Browns' claim was timely, because the Browns did not notice damage to their property until October 2017. But the trial court also noted that if the first instance of water flowing into the Browns' property was instead used to calculate whether the Browns' claim was timely, their claim would have failed. Thus, following the trial court's calculation, the Browns' statute of limitations for this lawsuit expired in October 2021.

{¶7} Months after that date, on February 23, 2022, the School District moved to join the OFCC as an indispensable party under Civ.R. 19(A). The School District's motion argued that the OFCC was the majority owner of the project at the time the Browns' claim accrued and that the School District merely served as an agent of the state. As a result, the School District argued complete relief could not be afforded in the action under Civ.R. 19(A) without joining the OFCC. Importantly, at the time the School District sought to declare the OFCC a necessary party, the Browns' statute of limitations had expired.

{¶8} Initially, the Browns opposed this motion. They pointed out that the School District's motion relied upon conclusory statements about the relationship

between it and the OFCC and lacked any evidentiary support for its claim that the OFCC was the majority owner of the project.

{¶9} In response, the School District filed an amended Civ.R. 19(A) motion and produced its agreement with the OFCC. Pursuant to this agreement, the OFCC is a 54 percent owner of the construction project, and the School District acts as an agency of the state with respect to the construction project.

{¶10} The School District’s amended motion also explained the statutory role performed by the OFCC. Pursuant to R.C. 3318.08(F), the OFCC has a majority ownership interest in the construction project for the School District during construction, with the School District acting as its agent. The School District then obtains a certificate of completion from the OFCC when the project is finished pursuant to R.C. 3318.48(D).

{¶11} In light of this new information, the Browns asserted they would “take no position” as to whether the OFCC was a necessary party. But the Browns noted that if the trial court determined the OFCC was a necessary party, they would request that the trial court issue an order granting them leave to file a second amended complaint to add the OFCC as a defendant.

{¶12} Ultimately, the trial court concluded the OFCC was a necessary party under Civ.R. 19(A) and therefore granted the School District’s motion. In reaching this conclusion, the trial court relied upon both the OFCC’s statutory role and specific language from the agreement that outlined the OFCC’s role in approving aspects of the construction project. It specifically cited one section of the agreement in which the School Board and the OFCC agreed “to cooperate in the design, construction and closeout” of the construction project. It also relied upon language

in the agreement discussing design approval: “No Fund Moneys or interest thereon shall be spent for any items inconsistent with the provisions of the Design Manual and Commission policies, unless a variance is approved by the [OFCC].” From these provisions, it concluded the OFCC may have a role in approving or overseeing the alleged design flaws that caused flooding to the Browns’ residence and on that basis was a necessary party under Civ.R. 19(A).

{¶13} But the trial court did not initially dismiss the Browns’ lawsuit because they had failed to sue the OFCC. Instead, the trial court acknowledged it would lose its jurisdiction to the Court of Claims if the OFCC was added as a defendant, given that the OFCC is a state agency. Accordingly, the trial court gave the Browns the option of either joining the OFCC on their own or voluntarily dismissing the action.

{¶14} The Browns did not pursue either option. They instead filed a petition to remove their existing lawsuit to the Court of Claims and simultaneously moved to amend their complaint to add the OFCC as a defendant. But because the OFCC had not yet been added as a party, the Court of Claims denied the Browns’ petition.

{¶15} After their unsuccessful attempt to pursue this action in the Court of Claims, the Browns then moved the trial court for relief from judgment under Civ.R. 60(B) in an effort to undo the trial court’s finding that the OFCC is an indispensable party. But the trial court held the Browns’ arguments did not meet any of the criteria under Civ.R. 60(B) and denied the motion.

{¶16} In addition, the trial court also sua sponte dismissed the Browns’ entire complaint without prejudice. As a practical matter, it did so because the Browns had not successfully added the OFCC as a party, either in the action below or

in a new action before the Court of Claims. But the trial court did not indicate under which rule it was dismissing the lawsuit.

{¶17} The Browns timely appealed from the trial court’s order dismissing their lawsuit for failure to join a necessary party under Civ.R. 19.

***Civ.R. 19 and Necessary Parties***

{¶18} In their sole assignment of error, the Browns argue the trial court abused its discretion in denying relief from its decision declaring the OFCC a necessary party under Civ.R. 19(A) and dismissing the complaint on its own accord instead. We agree.

{¶19} The Ohio Supreme Court has recognized that dismissal for failure to join an indispensable party under Civ.R. 19 is a “harsh result.” *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 81, 537 N.E.2d 641 (1989). Accordingly, the court has adopted a preference for joining necessary parties rather than dismissing cases in which they are not originally named. *Id.*

{¶20} Civ.R. 19 establishes a two-part framework determining whether a party is indispensable to a case and must therefore be joined. The first step is to determine whether joining the party is feasible. If so, Civ.R. 19(A), entitled “Persons to be Joined if Feasible,” applies. This section begins by indicating that it applies only to parties subject to the court’s service of process. Such parties shall be joined if at least one of three factors apply: (1) complete relief cannot be afforded among the existing parties in the absence of the missing party; (2) the missing party claims an interest in the proceeding and the party’s absence may either impede his or her ability to protect that interest or subject the existing parties to a substantial risk of

multiple or inconsistent obligations; or (3) the missing party has an interest related to assignment or subrogation.

{¶21} If joinder is not feasible, then Civ.R. 19(B) applies. Under Civ.R. 19(B), “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.” In making this determination, the court should consider the factors listed in Civ.R. 19(B), including the extent to which a judgment rendered in the person’s absence might be prejudicial to him or those already parties; the extent to which such prejudice can be lessened or avoided by protective measures or carefully proscribed relief; whether a judgment rendered in the person’s absence will be adequate; and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

{¶22} The trial court determined the OFCC was an indispensable party under Civ.R. 19(A). But in doing so, it never considered, at least not directly, whether joining the OFCC was actually feasible. This was incorrect.

{¶23} Two issues make suing the OFCC infeasible for the Browns. First, when the School District moved to join the OFCC, the statute of limitations had expired—a point neither party disputes. *See* R.C. 2305.09(D).

{¶24} Second, and even more problematic, the Hamilton County courts lack jurisdiction over the OFCC, because it is a state agency that must be sued in the Court of Claims. *See generally* R.C. 2743.02. The trial court acknowledged as much, noting in its entry denying the Browns’ Civ.R. 60(B) motion that it would be required to dismiss their lawsuit for lack of subject-matter jurisdiction were they to add the OFCC as a party. For these two reasons, the OFCC could never be added as a party



before the trial court. Thus, the trial court should not have analyzed the necessary party question under Civ.R. 19(A), which applies only to parties whose joinder is feasible.

{¶25} More applicable to the question of whether the OFCC is an indispensable party, and whether the Browns' lawsuit should be dismissed for not joining the OFCC, is Civ.R. 19(B). This section of the rule defines who constitutes an indispensable party using a multifaceted approach and an equitable lens. Among the key factors to consider is the prejudice that results to both the existing parties and the missing party, as well as the consequences of dismissal to the plaintiff.

{¶26} Courts considering whether a missing party is indispensable under Civ.R. 19(B) have answered that question in the negative where the party seeking joinder is capable of pursuing a separate cause of action against the nonjoined party. *See, e.g., Sciko v. Cleveland Elec. Illuminating Co.*, 83 Ohio App.3d 660, 669, 615 N.E.2d 674 (1st Dist.1992); *see also Englehart v. C.T. Taylor Co.*, 9th Dist. Summit No. 19325, 1999 Ohio App. LEXIS 5829, 6 (Dec. 8, 1999) (holding that moving party failed to demonstrate that missing party was necessary under Civ.R. 19 where moving party did not demonstrate it was incapable of pursuing a separate action against missing party). The failure to consider the Civ.R. 19 factors in granting dismissal has also been the basis of reversal on appeal. *See Pyles v. Mullen*, 9th Dist. Lorain No. 11CA010101, 2012-Ohio-2238, ¶ 9.

{¶27} Here, the trial court failed to consider the Civ.R. 19(B) factors in dismissing the Browns' complaint. But, on review, we do not find sufficient indication in the record to support the trial court's conclusion that the OFCC is an

indispensable party under Civ.R. 19(B) such that the Browns' lawsuit should be dismissed.

{¶28} We first consider prejudice. With regard to any potential prejudice to the School District, the record does not identify any such prejudice. The School District has not indicated why it could not file a separate subrogation action against the OFCC, thereby mitigating any prejudice to it in the event that OFCC is actually liable for any ultimate damage proven by the Browns, an outcome that is speculative at this point given the early stage of the litigation. *See, e.g., Sciko*, 83 Ohio App.3d at 669, 615 N.E.2d 674. And with regard to the OFCC, no party has identified any potential prejudice to it, nor do we see any on the record before us.

{¶29} In contrast, the prejudice to the Browns from the trial court's order is both obvious and "harsh." *See State ex rel. Bush*, 42 Ohio St.3d at 81, 537 N.E.2d 641. While the procedure of the case is somewhat tricky, applying the jurisdictional rules and limitations statutes to the OFCC leaves the Browns without any options for obtaining relief.

{¶30} To start, the trial court appeared to assume that the Browns could simply refile their case and add the OFCC, but the Browns take issue with this assumption. They argue that the OFCC cannot be sued at all because the four-year statute of limitations has expired. The Browns are correct.

{¶31} Viewing the statute-of-limitations question most favorably to the Browns, they had until October 2021 to sue the OFCC, which they did not do.

{¶32} Not even Ohio's savings statute, R.C. 2305.19, which effectively extends the statute-of-limitations period by one year by allowing a party to refile a dismissed case, cures the problem. Actions refiled using the savings statute only

extend the limitations period if the parties to the original and refiled action are the same. *See Burch v. Ohio Farmer Ins. Co.*, 5th Dist. Delaware No. 22 CAE 04 0029, 2023-Ohio-912, ¶ 22. Were the Browns to refile this case in the Court of Claims and add the OFCC, the savings statute would not apply because the parties would not be the same.

{¶33} Turning next to remedy, we also believe, based on the limited record before us, that a remedy can be afforded between the existing parties in the event the Browns prove liability. In this regard, we emphasize the speculative nature of the trial court's finding regarding the OFCC's role. After reviewing the School District's agreement with the OFCC, the trial court merely found that the OFCC *may* have played in role in design approval, not that it definitely or even likely did. Nor did the School District in either of its Civ.R. 19 motions portray the OFCC as the primary decision-maker in the construction project. In fact, at this juncture, we do not even know with any certainty whether the Browns' alleged damage occurred, much less whether it was caused by design defects attributable to the School District, the OFCC, or someone else. The School District admitted as much at oral argument.

{¶34} Therefore, considering prejudice and remedy, and on the abbreviated record before us, we cannot say that the OFCC is an indispensable party under Civ.R. 19(B) at this stage of the case. The trial court therefore erred in dismissing the Browns' complaint for the failure to join the OFCC as a defendant. We express no opinion as to whether the OFCC can be joined by the School District under Civ.R. 14(A).

***Conclusion***

{¶35} The Browns' sole assignment of error is sustained. The trial court's decision dismissing the complaint for the failure to join a necessary party under Civ.R. 19 is reversed, and the cause is remanded to the trial court for further proceedings.

Judgment reversed and cause remanded.

**CROUSE, P.J., and ZAYAS, J., concur.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.