SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

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December 12, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28857

TIMOTHY T. WOODRUM and GINA M. WOODRUM,
individually and as husband and wife,
Plaintiffs Below

v.

JEROME G. JOHNSON, M.D., MORGANTOWN
SURGICAL ASSOCIATES, INC.,
Defendants Below

and

MONONGALIA HEALTH SYSTEM, INC.,
and MONONGALIA COUNTY GENERAL HOSPITAL COMPANY,
d/b/a MONONGALIA GENERAL HOSPITAL,
Defendants Below

Certified Question from the Circuit Court of Monongalia County
Honorable Robert B. Stone, Judge
Case No. 99-C-157

CERTIFIED QUESTION ANSWERED

Submitted: October 3, 2001
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CHIEF JUSTICE McGRAW delivered the Opinion of the Court.
JUSTICE STARCHER, deeming himself disqualified, did not participate in the decision in this case.
JUDGE BOOKER STEPHENS, sitting by temporary assignment.
JUSTICES MAYNARD and ALBRIGHT dissent, and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

2. "A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." Syl. pt. 2, *Conley v. Hill*, 115 W. Va. 175, 174 S.E. 883 (1934), *overruled on other grounds, Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 213 S.E.2d 102 (1975).

3. A plaintiff's voluntary settlement with and release of a defendant who is primarily liable for the plaintiff's injury does not operate to release parties defendant whose liability is vicarious or derivative based solely upon their relationship with the settling defendant.

McGraw, Chief Justice:

This case comes to the Court on certified question from the Circuit Court of Monongalia County, and requires that we resolve the question of whether a plaintiff's release of a primarily liable tortfeasor necessarily releases other parties defendant that may be derivatively or vicariously liable based upon their relationship with the tortfeasor. Specifically, the circuit court has posed the following question of law:

> Does the settlement with and release of a physician, who is an alleged ostensible agent of a hospital, necessarily release the hospital from further liability for the alleged malpractice of the physician where: (1) the physician is not an employee of the hospital; (2) the only negligence alleged is that of the physician; and (3) there is no allegation of negligence against the hospital?

The circuit court answered this question in the negative. We agree with this conclusion, and determine that a plaintiff's release of a primarily liable defendant should not be permitted to have the potentially unintended effect of releasing other liable parties.

I.

BACKGROUND

In April 1999, Timothy Woodrum, together with his wife, instituted an action in the Circuit Court of Monongalia County, alleging that Dr. Jerome Johnson[1] was negligent in failing to properly

[1]Dr. Johnson's practice group, Morgantown Surgical Associates, Inc., was also named as a party defendant.

diagnose and treat an infection-related empyema of his left chest cavity. Monongalia General Hospital[2] was also named as a party defendant, based upon an allegation that Dr. Johnson was an ostensible agent of the Hospital, thus exposing the hospital to vicarious liability under *Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991) (holding that a hospital is estopped from denying the agency status of physicians practicing in its emergency room).[3]

Plaintiffs settled with Dr. Johnson and his practice group on June 13, 2000, after extensive discovery had already been completed by the parties. The "Release and Settlement Agreement" executed by the settling parties contained the following reservation of rights:[4]

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[2]Monongalia General Hospital is owned and operated by defendant Monongalia County General Hospital Company, which in turn is a wholly owned subsidiary of defendant Monongalia Health Systems, Inc. Both are collectively referred to herein as the "Hospital."

[3]Plaintiffs have contended in their briefs and oral argument before this Court that the Hospital faces liability both as the ostensible principal of Dr. Johnson, and as an active tortfeasor. We note that while the plaintiffs' complaint appears to support both theories, plaintiffs in contesting the Hospital's motion for summary judgment made no mention of any independent liability on the part of the Hospital, but instead confined their argument to the theory that the Hospital was liable on the basis of ostensible agency. We see no reason why this development should alter our present analysis, since the question posed by the circuit court remains pertinent to at least one portion of plaintiffs' current theory of the case, and because the lower court will no doubt be in a position to deal with this matter during the course of future proceedings.

[4]Although nominally designated as a release, the instrument at issue in this case could more properly be construed as a covenant not to sue, given the presence of an express reservation of rights to pursue other parties defendant. The formal distinction between a release and a covenant not to sue has been described as follows:

> A covenant not to sue is to be distinguished from a release in that it is not a present abandonment or relinquishment of the right or claim but is merely an agreement not to sue on an existing claim. It does not

(continued...)

> It is understood by the parties to this Release and Settlement Agreement that [plaintiffs] specifically reserve[] their right to prosecute their claims or causes of action against the remaining defendants in Civil Action No. 99-C-157, including without limitation, the cause of action alleging that Dr. Johnson was an agent and/or employee of the remaining defendants, Monongalia Health Systems, Inc., Monogalia County General Hospital, d/b/a Monongalia General Hospital, at the times that Dr. Johnson provided health care services to Timothy T. Woodrum.

The settlement amount remains undisclosed under the terms of the settlement agreement, although it is undisputed that plaintiffs accepted an amount less than the maximum amount payable under the defendant physician's malpractice insurance policy.

Upon being informed of the settlement between plaintiffs and the defendant physician, the Hospital moved for summary judgment, arguing that the release executed by plaintiffs inured to their benefit by operation of law. Citing the common-law rule applicable in several other jurisdictions, the Hospital argued that the release of an agent should also release the principal, where the plaintiff's claim against the

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[4](...continued)

> extinguish the cause of action. As between the parties to the agreement, the final result is the same in both cases. The difference is primarily in the effect as to third parties, and is based mainly on the fact that in the case of a release there is an immediate release or discharge, whereas in the other case there is merely an agreement not to prosecute a suit. A covenant not to sue is nothing but a contract, and should be so construed.

66 Am. Jur. 2d *Release* § 2, at 679 (1973) (footnotes omitted). *See also Goldstein v. Gilbert*, 125 W. Va. 250, 253, 23 S.E.2d 606, 608 (1942). We are not inclined to draw any significant distinctions on this basis. As the Restatement (Second) of Torts observes, this would amount to an "artificial distinction," which in the past has "frequently resulted in the unintended and unpaid-for discharge of one of the tortfeasors. This earlier rule is not consistent with the modern American point of view." *Restatement (Second) of Torts* § 885 cmt. b, at 334 (1979).

principal is based solely upon ostensible agency. Upon determining that courts in other jurisdictions are split on this issue, and finding no West Virginia authority on point, the circuit court denied the Hospital's summary judgment motion, and certified the question to this Court pursuant to W. Va. Code § 58-5-2 (1998).

II.

STANDARD OF REVIEW

As we stated in syllabus point one of *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996), "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." *Accord*, syl. pt. 2, *Keplinger v. Virginia Elec. and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000); *Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 314, 504 S.E.2d 135, 141 (1998); *Griffis v. Griffis*, 202 W. Va. 203, 208, 503 S.E.2d 516, 521 (1998) .

III.

DISCUSSION

The Hospital urges this Court to recognize "the well-settled maxim of common law that when a plaintiff's only claim against a principal is under the theory of . . . agency, a release of the agent from the suit also releases the principal." We note at the outset that although this common-law rule has been in force for some time in other states, it has never before been expressly adopted in this jurisdiction.[5]

The issue was recently recognized, but not resolved, in *Dunn v. Kanawha County Bd. of Educ.*, 194 W. Va. 40, 459 S.E.2d 151 (1995), where we said in the context of a product liability suit that

> it is arguable that basic fairness and sound public policy dictate that a settlement by a plaintiff with the manufacturing defendant solely responsible for the defective product covers all damages caused by that product and extinguishes any right of the plaintiff to pursue others in the chain of distribution who did not make the product, contribute in any way to the defect, or commit any independent acts of negligence or fault. However, this issue was not raised by this certified question, and we leave its resolution for a later time.

Id. at 47, 459 S.E.2d at 158.

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[5]The earliest reference to such rule even in Virginia did not occur until 1936, where it was treated as an analogue of the common-law rule that the release of one joint tortfeasor released all others who were liable for the same injury. *See McLaughlin v. Seigel*, 166 Va. 374, 185 S.E. 873 (1936); *see also Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 225, 3 S.E.2d 405, 415 (1939) (observing that the "release of the servant, from responsibility for the tort actually committed by him, releases the master") (citing *McLaughlin*).

The only other reference to this issue in our past cases came in *State ex rel. Bumgarner v. Sims*, 139 W. Va. 92, 79 S.E.2d 277 (1953), where the Court went so far as to indicate that W. Va. Code § 55-7-12 (1931) abrogates the common-law rule that the release of an agent necessarily released the agent's principal:

> In this jurisdiction the common-law rule . . . that 'Where both master and servant are liable to a third party for a tort of the servant, a valid release of either master or servant from liability for the tort operates to release the other,' has been abrogated, in part, by [W. Va.] Code, 55-7-12. Section 12 reads: 'A release to, or an accord and satisfaction with, one or more joint trespassers, or tort-feasors, shall not [inure] to the benefit of another such trespasser, or tort-feasor, and shall be no bar to an action or suit against such other joint trespasser, or tort-feasor, for the same cause of action to which the release or accord and satisfaction relates.'

139 W. Va. at 112-13, 79 S.E.2d at 290 (citation omitted). This construction apparently stemmed from the Court's observation that "[t]he relation of master and servant in those cases, in which the doctrine of *respondent superior* applies, is joint, and the parties should be regarded as though they were joint tort-feasors." *Id*. at 111, 79 S.E.2d at 289 (citing *Wills v. Montfair Gas Coal Co.*, 97 W. Va. 476, 125 S.E. 367 (1924)).[6]

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[6]In *Wills*, we had stated that

> [t]here is no reason perceived why the Coal Company and its superintendent who employed and permitted the infant to work in the mine cannot be joined as joint tort-feasors. *See Barger v. Hood*, 87 W. Va. 78, 104 S.E. 280 [(1920)]. If the tortious act be jointly done, or severally done though for a similar purpose and at the same time, without concert of action, the actors are joint tort-feasors. Ordinarily both parties guilty of concurrent negligent acts may be joined in the action, even though they had no common purpose, and there was no concert of action. *Johnson*

(continued...)

In *Bumgarner*, the plaintiff had been accidentally shot by Coiner, a prison guard, while the latter was searching for an escaped convict. The plaintiff later brought a successful negligence action against Coiner, which resulted in a $3,000 judgment. A later attempt to collect on the judgment through execution proved unsuccessful, however, and Coiner's liability was later discharged in bankruptcy. The plaintiff subsequently sought relief from the Court of Claims, which awarded the plaintiff $2,000. Yet the Auditor refused to honor the resulting legislative appropriation, asserting that it was unconstitutional insofar as the State was not morally obligated to compensate the plaintiff.

In determining whether the plaintiff in *Bumgarner* was entitled to payment of the award made by the Court of Claims, the Court addressed the "question whether the unsatisfied judgment in [plaintiff's] favor and against Coiner alone, entered by the Circuit Court of Roane County in the action at law instituted by the [plaintiff] against Coiner, and whether Coiner's bankruptcy and his discharge in the bankruptcy proceeding, without any satisfaction of [plaintiff's] claim, either in whole or in part, would serve to release Coiner's employer, if such employer were a private person and not the State of West Virginia." *Bumgarner*, 139 W. Va. at 111, 79 S.E.2d at 289. In answering this question, the Court held that "[a]s

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[6](...continued)

> *v. Chapman*, 43 W. Va. 639, 28 S. E. 744 [(1897)]. There is no misjoinder of parties in this count. While the decisions are not harmonious, the weight of authority backed by reason sustains the right of an injured person to join in the same action master and servant where the right of action springs from the wrongful act of the servant for which the master is responsible.

Wills, 97 W. Va. at 478, 125 S.E. at 366-67; *see also Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 684, 289 S.E.2d 692, 699 (1982).

the [plaintiff's] judgment against Coiner . . . was not satisfied, either in whole or in part, under the executions issued on the judgment or in the bankruptcy proceeding, the judgment, in our opinion, would not serve to bar [plaintiff's] claim against the State of West Virginia based on a moral obligation; and we so hold under the provisions of [W. Va.] Code, 55-7-12, and under the authority of *Griffie v. McClung*, [5 W. Va. 131 (1872)]. *Bumgarner*, 139 W. Va. at 116, 79 S.E.2d at 292.[7]

The holding in *Bumgarner* was predicated at least in part upon the Court's conclusion regarding the abrogation of the common-law rule concerning the effect that the release of a primarily liable agent or employee has on the continued liability of a vicariously responsible principal or employer. As it was already accepted law that a judgment against one tortfeasor did not bar suit against another who was jointly liable, *see Griffie v. McClung*, *supra*, such rule furnished the only logical resistance to the

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[7]The *Bumgarner* Court reiterate this holding in the syllabus of the opinion, stating as follows:

> Under the common law, as it existed in this State prior to the enactment of Section 7, Chapter 136, West Virginia Code of 1868, now Code, 55-7-12, and under the present statute contained in Code, 55-7-12, a judgment obtained by a person injured through the negligence of the employee of another, while the employee was acting within the scope of his employment, which has not been satisfied in whole or in part under execution or executions issued thereon, or in a proceeding in bankruptcy, in which the employee is the bankrupt, will not bar a recovery against the employer for the same injury in a separate action at law; and by the same token will not bar a claim against the State by the injured person to recover compensation for injuries inflicted, based upon the moral obligation of the State to pay.

Syl. pt. 9, *Bumgarner*.

ultimate holding in *Bumgarner*. Thus, on *stare decisis* grounds,[8] we would be hard-pressed to disregard the relevant statement in *Bumgarner* as dictum. *See Miller v. Huntington & Ohio Bridge Co.*, 123 W. Va. 320, 329, 15 S.E.2d 687, 692 (1941) (the fact that a point of law does not appear in the syllabus of an opinion does not relegate it to the status of mere dictum). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996); *see also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S. Ct. 3086, 3141, 106 L. Ed. 2d 472 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explication of the governing rules of law.") (Kennedy, J., concurring and dissenting).[9]

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[8]As this Court explained in *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974):

> "*Stare decisis* is not a rule of law but is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted."

Id. at 1029, 207 S.E.2d at 173 (quoting *Adkins v. St. Francis Hosp. of Charleston*, 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965)).

[9]We recognize that arguably there may be flaws in *Bumgarner's* reasoning as it relates to the scope of W. Va. Code § 55-7-12. For example, in amending the statute in 1931, the Legislature indicated that its addition of the word "tort-feasor" was intended so as to make the statute applicable to "wrongdoers." *See* Revisers' Note to W. Va. Code of 1931. Of course, the Legislature also made clear its intent to codify this Court's holding in syllabus point one of *Leisure v. Monongahela Valley Traction Co.*, 85 W. Va. 346, 101 S.E. 737 (1920), where we concluded that the term "trespasser" broadly includes "every person guilty of an tortious infringement upon the rights of another." But it is clear (continued...)

Nor are we convinced that there is any compelling reason to abandon the stance taken in *Bumgarner*. There is broad and diverse disagreement among courts as to whether the release of a primarily liable defendant necessarily inures to the benefit of parties whose liability is purely derivative.[10]

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[9](...continued)
that *Bumgarner* did not rely entirely upon the statute. It is significant that the Court indicated that abrogation of the common-law rule dealing with the consequences of releasing an agent was only "in part" dictated by § 55-7-12. As evidence by the syllabus of *Bumgarner*, *see* note 7, *supra*, as well as related text within the opinion, 139 W. Va. at 114, 79 S.E.2d at 291, such rule was also implicitly rejected as a matter of common law, based partially upon the reasoning of *Bloss v. Plymale*, 3 W. Va. 393, 1869 WL 1926 (1869), which long ago abrogated the parallel rule that the release of one joint tortfeasor necessarily releases all others who are jointly liable. The Court has more recently made clear that § 55-7-12 is "merely expositive of the common-law rule and makes no change in the respective inchoate liability of joint tort-feasors to the injured party." *Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 510, 213 S.E.2d 102, 106 (1975) (citations omitted).

[10]*See* Vitauts M. Gulbis, Annotation, *Release of, or Covenant Not to Sue, One Primarily Liable for Tort, But Expressly Reserving Rights Against One Secondarily Liable, as Bar to Recovery Against Latter*, 24 A.L.R. 4th 547 (1983); Annotation, *Release of (or Covenant not to Sue) Master or Principal as Affecting Liability of Servant or Agent for Tort or Vice Versa*, 92 A.L.R. 2d 533 (1963). Whether by statute or by way of common law, several jurisdictions have rejected the proposition that the release of, or covenant not to sue, a primarily liable defendant extinguishes a plaintiff's right to obtain a judgment against a party that is derivatively liable. *See, e.g.*, *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977); *Hovatter v. Shell Oil Co.*, 111 Ariz. 325, 529 P.2d 224 (1975); *JFK Med. Ctr., Inc. v. Price*, 647 So.2d 833 (Fla. 1994); *Saranillio v. Silva*, 78 Haw. 1, 889 P.2d 685, 698 (1995); *Pelo v. Franklin College of Indiana*, 715 N.E.2d 365 (Ind. 1999); *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 706 P.2d 845 (1985); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980); *Plath v. Justus*, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117 (1971); *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805 (Tex. 1980). On the other hand, a number of jurisdictions take the opposite view based upon similarly diverse reasoning. *See, e.g.*, *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 622 N.E.2d 788, 190 Ill. Dec. 758 (1993); *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795 (Iowa 1994); *Atkinson v. Wichita Clinic, P.A.*, 243 Kan. 705, 763 P.2d 1085 (1988); *Copeland v. Humana of Kentucky, Inc.*, 769 S.W.2d 67 (Ky. Ct. App. 1989); *Anne Arundel Med. Ctr., Inc. v. Condon*, 102 Md. App. 408, 649 A.2d 1189, 1193 (1994); *Hoffman v. Wiltscheck*, 411 N.W.2d 923 (Minn. Ct. App. 1987); *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993); *Horejsi v. Anderson*,
(continued...)

The Hospital, embracing one side of this debate, emphatically argues that "the issue before this Court is one of the law of vicarious liability, not of joint tortfeasors," and directs us to *Theophelis v. Lansing General Hosp.*, 430 Mich. 473, 424 N.W.2d 478 (1988), where a plurality of a heavily divided Michigan Supreme Court stated that

> common-law rules which once governed contribution rights among joint and concurrent tortfeasors should not be confused with the deeply rooted common-law doctrine that release of an agent discharges the principal for vicarious liability. The rationale for the latter rule is entirely different and is grounded on the very nature of the principal's derivative liability.

Id. at 483, 424 N.W.2d at 482 (plurality opinion). Some courts have, in accord with this reasoning, stressed the "fundamental distinction between the full recovery permitted under the doctrine of joint and several liability, and the limitations inherent in a claim that rests on the doctrine of vicarious liability." *Biddle v. Sartori Mem. Hosp*., 518 N.W.2d 795, 798 (Iowa 1994). These courts take the position that because "vicarious liability derives solely from the principal's legal relation to the wrongdoer, settlement with the tortfeasor removes the basis for any additional recovery from the principal upon the same acts of negligence." *Id*.; *see also Estate of Williams v. Vandeberg*, 620 N.W.2d 187, 190 (S.D. 2000); *Theophelis*, 430 Mich. at 490-91, 424 N.W.2d at 486 (plurality opinion). As the North Dakota Supreme Court had earlier explained:

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[10](...continued)
353 N.W.2d 316, 318 (N.D. 1984); *Mid-Continent Pipeline Co. v. Crauthers*, 267 P.2d 568 (Okla. 1954); *Mamalis v. Altas Van Lines, Inc.*, 522 Pa. 214, 560 A.2d 1380 (1989); *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976). We note that several of the jurisdictions that take the restrictive position nevertheless distinguish between a release and a covenant not to sue, giving preclusive effect only to the former instrument. *See, e.g., Atlas Tack Corp. v. DiMasi*, 37 Mass. App. Ct. 66, 637 N.E.2d 230 (1994); *Theophelis v. Lansing General Hosp.*, 430 Mich. 473, 424 N.W.2d 478 (1988); *Riley v. City of Cincinnati*, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976).

> The "percentage of negligence" attributable to the conduct of the servant constitutes the entire "single share" of liability attributable jointly to the master and servant. . . . Because this percentage of negligence represents the "single share" of liability covered by the common liability of the master and servant, the master is necessarily released from vicarious liability for the released servant's misconduct.

Horejsi v. Anderson, 353 N.W.2d 316, 318 (N.D. 1984).

If there were practical significance to this "single share" theory, however, it would necessarily prohibit an injured plaintiff from maintaining an action solely against a derivatively liable defendant. *See Theophelis*, 430 Mich. at 516-17, 424 N.W.2d at 497 (Levin, J., concurring in judgment). But this Court has consistently repudiated such an approach, taking the position that a plaintiff is permitted to sue the principal either alone or together with the agent. In *Bumgarner*, the Court stated that

> the relation between the master and servant, the latter acting within the scope of his employment, is joint and several in the sense that both master and servant are liable for injuries caused by the negligent wrongdoing of the servant, acting within the scope of his employment, and liability for such injuries may be asserted in an action at law against the master and servant jointly or against each of them in a separate action at law.

Syl. pt. 8, in part, *Bumgarner, supra*; *see also Musgrove v. Hickory Inn, Inc.*, 168 W. Va. 65, 68, 281 S.E.2d 499, 501 (1981); *Muldoon v. Kepner*, 141 W. Va. 577, 583-84, 91 S.E.2d 727, 731 (1956).

In *O'Dell v. Universal Credit Co.*, 118 W. Va. 678, 191 S.E. 568 (1937), the plaintiff's decedent had been killed when he was struck by an automobile driven by Hager, the purported

agent of the Universal Credit Company. Plaintiff subsequently brought an action against both Hager and Universal, but later voluntarily dismissed Hager prior to trial. On appeal, Universal argued that Hager's dismissal necessarily prohibited further proceedings against it, "since its liability [was] dependent upon Hager's." *Id*. at 680, 191 S.E. at 570. The Court rejected this argument, stating that "[t]he effect of dismissing Hager was to relinquish the instant action against *him only*." *Id.* (emphasis in original). We went on to hold in syllabus point one of *O'Dell*:

> In a joint action of tort against master and servant, the plaintiff may dismiss the servant for a reason not going to the merits, without impairing his right to proceed against the master, although the latter is liable only under the doctrine of respondeat superior.

O'Dell therefore permits a plaintiff to voluntarily dismiss a negligent agent while still maintaining an action against the vicariously liable principal. It would be peculiar indeed if we were to allow a plaintiff to gratuitously dismiss a primarily liable tortfeasor without consequence to the right to proceed against a vicariously responsible defendant, but impose the harsh sanction of total preclusion simply because the plaintiff was successful in obtaining some measure of recompense for his or her injuries.

What is instructive about our prior cases is that while the Court has clearly acknowledged the fact that there is a technical difference between joint tortfeasors and those whose liability is derivative or vicarious, *see, e.g., Wills v. Montfair Gas Coal Co.*, 97 W. Va. at 478, 125 S.E. at 368 (explaining that actors may be considered joint tortfeasors "[i]f the tortious act be jointly done, or severally done for a similar purpose and at the same time, without concert of action") (citation omitted), we have never used this difference to make a practical distinction between the two. Hence our statement in

Bumgarner that vicariously liable parties "should be regarded as though they were joint tort-feasors." 139 W. Va. at 111, 79 S.E.2d at 289 (citation omitted); *see also Harless*, 169 W. Va. at 684, 289 S.E.2d at 699 (noting that in *Bumgarner* the Court "characterized the relationship of master and servant as similar to joint tortfeasors").

The Supreme Court of New Jersey took a similar approach in *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980), where it held that the release of a negligent manufacturer did not have the effect of releasing a retailer who was sued on the basis of strict liability:

> "The general rule in this jurisdiction is that a release of one tortfeasor will not release others who may also be liable to plaintiff for his harm unless the release is so intended or the plaintiff receives as a result thereof either full satisfaction or satisfaction intended as such. . . . While that departure from the common law was formulated in the context of multiple acts of negligence committed by concurrent tortfeasors, each of whom was himself actually rather than merely vicariously liable, we see no reason why the rule should not apply as well to the single act of negligence for which both the actual wrongdoer and his master or principal are each independently liable. The rationale of the rule is equally apposite whether the liability is actual or vicarious namely, that plaintiff is entitled to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained."

Id. at 560, 410 A.2d at 680 (quoting *McFadden v. Turner*, 159 N.J. Super. 360, 366-67, 388 A.2d 244, 246-47 (App. Div. 1978)) (internal citations omitted). The Court agrees with this statement, finding that it cogently explains the approach we have taken in the past.

Our emphasis has consistently been upon giving full effect to the terms of settlement agreements. As we stated in syllabus point two of *Conley v. Hill*, 115 W. Va. 175, 174 S.E. 883

(1934), *overruled on other grounds, Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 515, 213 S.E.2d 102, 108 (1975), "[a] release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." *See also Thornton*, 158 W. Va. at 515, 213 S.E.2d at 108 (stating that "we deem it patently illogical to conclusively presume, in the absence of particular language indicative of such intention, that a release of the original tort-feasor bars recovery from the subsequent tort-feasor"). Thus, like the Indiana Supreme Court, "[w]e perceive no valid reason to disregard the intent of parties to a release regardless of the theory under which multiple potentially liable parties may be pursued." *Pelo v. Franklin College of Indiana*, 715 N.E.2d 365, 366 (Ind. 1999).

If the "single share" theory holds any currency in the distinctions it makes between primarily liable tortfeasors and those parties whose liability is entirely derivative, it must rest upon the ground of fundamental fairness. In this regard, however, we simply do not see how the Hospital could in any way be prejudiced by a rule which permits plaintiffs to proceed further against it in the present matter. As we have seen, had they chosen, the plaintiffs could have appropriately brought an action solely against the Hospital, or otherwise voluntarily dismissed the defendant physician. Significantly, a vicariously liable defendant's right to implied indemnity is not affected by settlement between a plaintiff and other liable parties. *See, e.g.*, syl. pt. 7, *Hager v. Marshall*, 202 W. Va. 577, 505 S.E.2d 640 (1998) ("In non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault."). The substantive impact of the settlement agreement in this case is therefore

not materially different from what would result if plaintiffs had chosen to utilize procedures that have long been permitted under West Virginia law.

The Hospital raises the point that, given its right to indemnity, any derivative action against it at this juncture would be circuitous, in that an exercise of its right to indemnity would result in "any verdict in excess of [Dr. Johnson's] settlement [being] the ultimate responsibility of such defendant physician." This line of reasoning has been embraced by several courts. As the Court of Appeals of South Carolina remarked:

> Were we to find the covenant released [the agent] but not [the principal], it would necessarily follow that [the principal] could seek indemnification from [the agent] and recover the entire amount of any verdict against it from him. This would effectively strip the covenant not to sue of any real meaning and result in what the court in *Nelson v. Gillette* described as a "corrosive circle of indemnity." 571 N.W.2d 332, 339 (N.D. 1997).

Andrade v. Johnson, 345 S.C. 216, 226, 546 S.E.2d 665, 670 (S.C. Ct. App. 2001); *see also Williams v. Vandeberg*, 620 N.W.2d 187, 191 (S.D. 2000) (holding that release of agent releases principal notwithstanding express reservation of rights, noting that such conclusion "fosters the principal of finality while attempting to limit circuity of action and multiplicity of lawsuits"); *L.C. v. R.P.*, 563 N.W.2d 799, 801 (N.D.1997) (holding that rule is "premised on avoiding a circle of indemnity that would have resulted if the release of the servant did not also release the master from vicarious liability").

Other courts, however, take the opposite view concerning the consequences of a principal's right to indemnity. The Supreme Court of Texas, in *Knutson v. Morton Foods, Inc.*, 603

S.W.2d 805 (Tex. 1980), addressed a factual scenario little different than that posed by this case. The plaintiff Knutsons were injured as a result of an automobile collision allegedly caused by Chastain, who at the time of the accident was purportedly acting within the scope of her employment with defendant Morton Foods. 603 S.W.2d at 806. The Knutsons brought an action against both Chastain and her husband, as well as Morton Foods, but later settled with the Chastains for $10,000, executing a release that included an express reservation of their right to pursue a judgment against Morton Foods. *Id*.

Just as the Hospital has done in this case, Morton Foods argued in *Knutson* that the plaintiffs should be prohibited from proceeding against it because it would result in a confusing circuity of action. The *Knutson* Court, while recognizing the fact that the Chastains could potentially be subject to an indemnity suit by Morton Foods, rejected this argument, stating that

> [t]here are reasons . . . which favor a recognition of partial settlements . . . to this case and situation. We have long recognized that encouraging settlement and compromise is in the public interest. . . . The instant decision will aid in the achievement of that goal. A plaintiff will be able to settle with a tortfeasor who acts for another without being fearful of losing his cause of action against the party that may be liable under *respondeat superior*. At the same time, the party who is liable under *respondeat superior* will retain complete access to the courts for a full adjudication of his liabilities and his rights of indemnification.
>
> The Knutsons and Chastains knew about these possibilities, and they were exposed to these obligations to indemnify when they executed the release. They contracted with these possibilities in mind. . . . . Only the Knutsons and the Chastains will be affected by the fact that this agreement may fail to protect the Chastains from all future liability . . . . Ironically, the only party that is troubled by the incompleteness, or wisdom, of this release is Morton Foods. Morton Foods, however, neither participated in the negotiation of this instrument, nor paid any consideration for its release from liability.

> Morton Foods, who was not a party to the settlement agreement, is the only one who does not want to give it the force expressed in the document, but it is no more prejudiced by the settlement than if none had been made. Morton Foods has actually been benefitted since the partial settlement made by the Chastains to the plaintiffs reduces Morton Foods' liability. We see no reason why we should be concerned with the potential problems that the Knutsons and Chastains may encounter as a result of this settlement than they were at the time they executed the release.

603 S.W.2d at 807-08 (citation omitted). The Texas court went on to hold that "[t]he fact that an employee has been released in a settlement has no bearing on the continued liability of the employer unless the settlement is in full satisfaction of the plaintiff's claims against both the employer and the employee." *Id*. at 807. This Court is persuaded that *Knutson* states the better reasoned approach to this issue.

This raises the very real possibility, however, that the primarily liable agent will remain liable for the full amount of damages notwithstanding the fact that he or she has settled with the plaintiff. But, "[a]s to any subsequent action by the [principal] against the [agent], '[a] primary wrongdoer enters [settlement] agreements at the peril of being later held to respond again in an indemnification action brought against him by the vicarious wrongdoer.'" *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 529, 706 P.2d 845, 848 (1985) (citation omitted). This potentially undesirable consequence can, of course, be avoided by providing in the settlement agreement that the plaintiff will indemnify the settling defendant for any amount that such party may be called upon to pay in excess of the settlement amount.[11] In such case the plaintiff

[11]It is arguable that such a provision is part of the settlement agreement at issue in this case. Plaintiffs have agreed "to indemnify and hold harmless the [settling physician] of and from any and all claims, demands, actions or causes of action that may hereafter be asserted against [such party] as a result of or (continued...)

would have little, if any, incentive to continue pursing a judgment against the derivatively responsible principal, thus effectively bringing the action to a conclusion.

Even where there is no agreement by the plaintiff to indemnify the settling agent, there undoubtedly will be instances where

> the master may elect not to seek indemnification. This is especially true in cases . . . where the servant's settlement was for the entire amount of his insurance coverage. Given that the master may choose not to seek indemnity from his servant, who in many cases may be judgment proof, the servant's settlement with the injured party fulfills the underlying policy of [promoting settlement].

Yates v. New South Pizza, Ltd., 330 N.C. 790, 795, 412 S.E.2d 666, 670 (1992). *See also Saranillio v. Silva*, 78 Haw. 1, 14, 889 P.2d 685, 698 (1995) (observing in context of statutory provision permitting settlement between plaintiff and employee to the exclusion of vicariously liable defendant, that "the employee might be spared from indemnifying his/her employer if the employer chooses not to seek reimbursement").

Indeed, given the existence of West Virginia Rule of Civil Procedure 14(a), the only way that a settlement between a plaintiff and a primarily liable agent could have any practical consequence in the prosecution of an action would be if the derivatively responsible principal chose not to pursue indemnity

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[11](...continued)
any way connected with the treatment or hospitalizations of Timothy T. Woodrum." Given the fact that this case arises on certified question, we are not called upon to interpret this provision of the settlement agreement, and therefore express no opinion as to its consequence.

by way of a third-party claim. "The purpose of Rule 14(a), . . . permitting impleader of a third party defendant by the original defendant, is to eliminate circuity of actions when the rights of all three parties center upon a common factual situation." Syl. pt. 1, *Bluefield Sash & Door Co., Inc. v. Corte Constr. Co.*, 158 W. Va. 802, 216 S.E.2d 216 (1975), *overruled on other grounds*, *Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977). Had it choosen to, the Hospital could have filed a third party complaint against the defendant physician on the basis of implied indemnity, in which case the action would proceed, at least from the Hospital's prospective, almost as if there had been no settlement.

As this Court has consistently made clear in the past, "'[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]'" Syl. pt. 6, in part, *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999) (quoting syl. pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968)); *see also Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 604, 390 S.E.2d 796, 803 (1990); *State ex rel. Vapor Corp. v. Narick*, 173 W. Va. 770, 320 S.E.2d 345 (1984); *Floyd v. Watson*, 163 W. Va. 65, 254 S.E.2d 687 (1979); *Janney v. Virginian Ry. Co.*, 119 W. Va. 249, 193 S.E. 187 (1937). In our estimation, permitting plaintiffs to enter into partial settlements with primarily liable parties without requiring them to necessarily forsake their right to pursue further action against parties whose liability is vicarious or derivative, encourages settlement in those instances where countervailing claims for indemnity are unlikely, thus permitting a negligent agent or employee who is without substantial financial resources to buy his or her peace. In virtually every other conceivable circumstance, the converse rule would be just as likely to obstruct settlement as it would be

to promote it. This is particularly true because "at least some injured parties 'would be reluctant to settle with the servant or agent, and thereby extinguish his [or her] cause of action against the master or principal, unless he [or she] could settle with the servant or agent for' for full satisfaction (in which case the effect of the common law rule would be irrelevant)." *Saranillo v. Silva*, 78 Haw. at 13, 889 P.2d at 697 (quoting *Van Cleave*, 101 Nev. at 530, 706 P.2d at 849) (alterations in *Saranillo*); *see also Pelo v. Franklin College of Indiana*, 715 N.E.2d at 366 (stating that under common-law rule "a knowledgeable plaintiff simply cannot afford to settle piecemeal even if . . . one potential defendant is willing to contribute the full amount of his or her available resources—typically policy limits").

Such a preclusive rule would also result in the creation of a perilous danger to the unwary plaintiff, a circumstance that most citizens would find both mystifying and untenable. *Cf. Thornton*, 158 W. Va. at 514, 213 S.E.2d at 108 (abrogating rule that release of original tortfeasor necessarily releases successive tortfeasors, observing that such rule "may, in fact, prove to be a trap for the unwary layman who is ignorant of the law"). We agree with the Indiana Supreme Court that the rule advocated by the Hospital in this case, which would ignore the express intention of the parties to the settlement,

> sets a trap for those litigants who are unaware of the exception for cases based on derivative liability, notwithstanding the general rule . . . that a release will operate as the parties intended. The law is not a game where the litigant with the lawyer who happens to know all the traps wins. To the extent possible rules of law should produce results consistent with the expectations of ordinary citizens. Surely most people, like the [plaintiffs], would be surprised to discover that the [plaintiffs'] release did not mean what it said when it purported to preserve their claim against [the derivatively liable defendant]. Accordingly, when parties sign an agreement releasing one defendant with the clearly expressed expectation

> that they will be able to proceed against others, that expectation should be given effect by the courts

Pelo, 715 N.E.2d at 366.

From a practical standpoint, moreover, it may not always be possible for a settling plaintiff to determine at the time of partial settlement whether his or her claims against other non-settling defendants rest upon actionable conduct on the part of such defendants, or vicarious liability. It is easily conceivable that a plaintiff could release a primarily liable defendant at an early stage of the litigation without obtaining full satisfaction for the underlying claim, on the assumption that the remaining defendants are directly liable, only to find out at a later point that the viability of his or her action against the non-settling defendants rests entirely upon theories of vicarious liability. The rule advocated by the Hospital would deny relief to the plaintiff under such easily foreseeable circumstances.

In short, while we are cognizant of the fact that there are differing viewpoints on this subject, we think that a rule permitting a plaintiff to settle with and release a primarily liable defendant without prejudice to the plaintiff's right to further pursue a judgment against defendants who are vicariously responsible is more consistent with our past precedent and holds greater promise for promoting fair and expeditious settlement among litigants. Consequently, we hold that a plaintiff's voluntary settlement with and release of a defendant who is primarily liable for the plaintiff's injury does not operate to release parties defendant whose liability is vicarious or derivative based solely upon their relationship with the settling defendant.

IV.

CONCLUSION

For the reasons stated, we answer the question of law certified by the Circuit Court of Monongalia County in the negative.

Certified question answered.