No. 28857 – *Timothy T. Woodrum and Gina M. Woodrum, individually and as husband and wife, v. Jerome G. Johnson, M.D., Morgantown Surgical Associates, Inc., Monongalia Health Systems, Inc., and Monongalia County General Hospital Company, dba Monongalia General Hospital*

FILED
December 12, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 12, 2001
RORY L. PERRY II, CLERK
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Albright, Justice, dissenting:

I respectfully dissent from the majority opinion and would answer the certified question in the affirmative. The issue of whether a release or covenant not to sue an agent is tantamount to the release of the principal is an issue of first impression in West Virginia.

I. West Virginia Guidance

West Virginia Code § 55-7-12 (1923) (Repl. Vol. 2000)[1] provides direction regarding releases of tortfeasors, as follows:

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[1]Although the sectional heading for West Virginia Code § 55-7-12 is "Liability of one joint tort-feasor not affected by release to, or accord and satisfaction with, another," West Virginia Code § 2-2-10(z) (1998) (Repl. Vol. 1999) clearly provides as follows:

> The sectional headings or headlines of the several sections of this code printed in black-faced type are intended as mere catchwords to indicate the contents of the section and shall not be deemed or taken to be titles of such sections, or as any part of the statute, and, unless expressly so provided, they shall not be so deemed when any of such sections, including the headlines, are amended or reenacted[.]

Thus, the fact that the heading uses the term "joint-tortfeasor" is of no significance.

> 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.

Prior to the 1931 amendment, that statute did not contain the term "tort-feasor." The statute provided only as follows:

> A release to, or an accord and satisfaction with one joint trespasser, hereafter executed or had, shall not inure to the benefit of another such trespasser, and shall be no bar to an action or suit against such other joint trespasser for the same cause of action to which the release or accord and satisfaction relates.

W.Va. Code Ann., c. 136 § 7 (Barnes' Code 1923).

The 1931 addition of the term "tortfeasor" was explained in the Revisers' Note[2] as follows: "The words 'or tort feasor,' wherever occurring, are new, and are added to indicate that this section applies to all joint *wrongdoers*, as is held in *Leisure v. Monongahela Valley Traction Co.*, 85 W. Va. 346, [101 S.E. 737 (1920)]." (emphasis supplied.).[3] Thus, while the statute[4] clarifies that a release of one

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[2]The Revisers' Note described above is part of the comprehensive revision of West Virginia law incorporated in the Official Code of West Virginia of 1931, which was prepared by the "Commission to Revise and Codify the Statute Laws of the State of West Virginia" and adopted by the Legislature April 3, 1930, effective January 1, 1931.

[3]In *Leisure*, this Court explained that although the statute was not specifically applicable to joint tortfeasors, satisfaction and release of one tortfeasor does not impose a bar to an action by the injured party against a joint tortfeasor with whom no settlement has been made. 85 W. Va. at 349, 101 S.E. at 738.

[4]Supporting case law also supports the proposition that a release of one joint tortfeasor does not release other joint tortfeasors. Syl. Pt. 1, *Hardin v. New York Cent. R. Co.*, 145 W.Va. 676, 116 (continued...)

tortfeasor does not release another tortfeasor, the issue of whether the release of the tortfeasor functions as a release of a non-wrongdoer such as a vicariously liable employer is not resolved thereby. The statute applies strictly and exclusively to joint wrongdoers, as elucidated in the Revisers' Note.[5] Vicarious liability is

a doctrine imposed as a matter of public policy, allowing inclusion of a non-wrongdoer as a party. Vicarious liability is not premised upon the commission of a tort, and there is no *joint wrongdoing* of the employer/principal and employee/agent.[6] Where a principal is liable only through vicarious liability, such

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[4](...continued)
S.E.2d 697 (1960).

[5]Interestingly, Rhode Island and New Jersey have included a definition of "joint tortfeasor" in their statutory schemes which resolves the question conclusively for those jurisdictions. The Rhode Island statute, codified at Rhode Island General Laws § 10-6-2 (1970) (Repl. Vol. 1997), provides that for purposes of the statute governing the effect of a release upon a joint tortfeasor, "'joint tortfeasors' means two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them; provided, however, that a master and servant or principal and agent shall be considered a single tortfeasor." New Jersey's statute similarly states: "A master and servant or principal and agent shall be considered a single tortfeasor." N.J. Stat. Ann. § 2A:53A-1 (West 2000).

[6]This distinction between joint tortfeasors and an entity liable only vicariously is apparent throughout tort law. In the formula for the determination of whether tortfeasors are to be considered concurrent or successive, for instance, this Court explained in *Sansom v. Physicians Associates, Inc*., 182 W. Va. 113, 386 S.E.2d 480 (1989), that the test is simply whether "[t]he negligent acts of each of the defendants . . . 'in point of time and place concur.'" *Id*. at 115, 386 S.E.2d at 482 (*quoting* Syl. Pt. 2, in part, *Lewis v. Mosorjak*, 143 W. Va. 648, 104 S.E.2d 294 (1958)). Thus, a vicariously liable entity cannot be deemed either concurrent or successive in this context since no negligent act was committed by that entity. As explained in the concurring opinion in *Dessauer v. Memorial General Hospital*, 628 P.2d 337 (N.M. 1981),

> Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy

(continued...)

principal did not commit a negligent act and would consequently not constitute a "tortfeasor" under West Virginia Code § 55-7-12. Consequently, that statute does not provide a foundation for a conclusion that release of an agent cannot function as a release of the principal.

West Virginia case law similarly fails to provide a definitive answer to the certified question posed. We tangentially addressed issues of the doctrine of respondeat superior in conjunction with a determination of the moral obligation of the State in *State ex rel. Bumgarner v. Sims*, 139 W. Va. 92, 79 S.E.2d 277 (1953),[7] and acknowledged that a joint action may be maintained against a master and

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[6](...continued)

> that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another.

Id. at 353 (Sutin, J., concurring) (*citing Nadeau v. Melin*, 110 N.W.2d 29, 34 (1961)).

[7]In *Bumgarner*, the Court meandered toward the issue of respondeat superior in a somewhat convoluted and unique manner. Mr. Wallace Bumgarner had brought an action in mandamus against the State Auditor "for the purpose of commanding the auditor to honor the requisition of the State Board of Control for two thousand dollars, the amount awarded to petitioner by the State Court of Claims. . . ." 139 W. Va. at 95, 79 S.E.2d at 281. Mr. Bumgarner had been shot in the thigh by state prison guard I.M. Coiner while Mr. Coiner was searching for an escaped prisoner in Roane County, West Virginia. *Id*. at 96, 79 S.E.2d at 282. The case had proceeded to trial, and Mr. Bumgarner had obtained a judgment against Mr. Coiner in the amount of $3,000.00. The judgment remained unsatisfied, and upon adjudication of Mr. Coiner as bankrupt, the Court of Claims awarded Mr. Bumgarner $2,000.00. The Legislature thereafter allegedly "made an appropriation . . . and authorized payment . . . as a claim against the State Board of Control to be paid from the general revenue fund." *Id*. at 97, 79 S.E.2d at 282. The Auditor refused to pay the $2,000.00 on the grounds that there is no moral obligation of the State to pay and that the legislative appropriation was unconstitutional. Thus, the Court stated that "[t]he basic question presented by this record is whether the appropriation in the amount of two thousand dollars made by the Legislature in the Budget Act for the 1953-55 biennium contained in Chapter 1, Acts of the Legislature, First Extraordinary Session, 1953, is unconstitutional. . . ." *Id*. at 104, 79 S.E.2d at 286. Thus, in (continued...)

servant in a case in which the plaintiff's injuries were occasioned solely by the negligence of the servant.[8]

Id. at 111, 79 S.E.2d at 289. We explained as follows:

> Subject to the rule set forth in points 3 and 4 of the syllabus of the *Humphrey* case that where the master's duty is absolute and nondelegable, or where the liability of the master is not predicated solely upon the negligence of the employee impleaded, but upon the negligence of another employee, or that of the master himself, an acquittal by a jury of the servant in an action instituted against the master and servant to establish liability based solely on the servant's negligence will not release the master. The relation of master and servant in those cases, in which the doctrine of *respondeat superior* applies, is joint, and the parties should be regarded as though they were joint tort-feasors. *Wills v. Montfair Gas Coal Co.*, 97 W.Va. 476, 125 S.E. 367. In some respects, however, the relation may be regarded as joint and several.

Id. at 111, 79 S.E.2d at 289.[9] Syllabus point eight of *Bumgarner* provided:

> Subject to the rule that an acquittal by a jury of the servant in an action instituted against the master and servant to establish liability based

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[7](...continued)
determining the moral obligation of the state, the Court noted that while the "doctrine of *respondeat superior* is not applicable to the State because of the State's immunity from suit . . . , this Court has tacitly applied the rationale of the doctrine in several cases in which declarations by the Legislature of moral obligations on the part of the State, arising from the negligence of its officers, agents and employees in the exercise of governmental functions, were held to be valid." *Id*. at 109, 79 S.E.2d at 288. Upon reaching the subject of respondeat superior, the Court addressed the question of whether an unsatisfied judgment against the agent, coupled with the agent's bankruptcy, would serve to release Mr. Coiner's employer, "if such employer were a private person and not the State of West Virginia." *Id.* at 111, 79 S.E.2d at 289.

[8]In syllabus point one of *O'Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937), this Court addressed the dismissal of a negligent servant and explained: "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*."

[9]*Wills*, however, noted that actors are considered joint tortfeasors "[i]f the tortious act be jointly done, or severally done though for a similar purpose and at the same time, without concert of action. . . ." 97 W. Va. at 478, 125 S.E. at 367.

> solely on the servant's negligence, will release the master, 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.

Id. at 94, 79 S.E.2d at 280-81. The statements in *Bumgarner* regarding the manner in which the principal/agent relationship may resemble the joint tortfeasor relationship were made only in the "sense that both master and servant are liable for injuries caused by the negligent wrongdoing of the servant" as clearly articulated in syllabus point eight of *Bumgarner*. *Id.* Indeed, they are both liable, as joint tortfeasors would both be liable. 139 W. Va. at 94, 79 S.E.2d at 280-81. However, they are not liable as joint wrongdoers; one is culpable and one is not. Thus, while the principal/agent or master/servant relationship does resemble the joint tortfeasor relationship in limited degree, the parallels are not boundless, and the *Bumgarner* court neither encountered nor resolved the question presently before this Court.

The *Bumgarner* court also stated that the common law rule that a valid release of the servant releases the master from liability was abrogated, in part,[10] by West Virginia Code § 55-7-12. 139 W. Va. at 112, 79 S.E.2d at 290. In reviewing the *Bumgarner* opinion in its entirety, it appears that this

[10]It must also be acknowledged that a statute in derogation of common law must be strictly construed. This Court explained in *State ex rel. Keller v. Grymes*, 65 W.Va. 451, 64 S.E. 728 (1909), that "'[s]tatutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires.'" *Id*. at 456, 64 S.E. at 730 (*quoting* Lewis' Sutherland Stat. Const. (2d ed.) § 573); *see also Shifflette v. Lilly* 130 W.Va. 297, 43 S.E.2d 289 (1947); *Poling v. Poling*, 116 W.Va. 187, 179 S.E. 604 (1935).

statement was pure dictum. There was neither an actual release nor a covenant not to sue[11] executed by the plaintiff in *Bumgarner*. The civil action against the wrongdoer, Mr. Coiner, had proceeded to trial, and a jury verdict had been rendered. It was simply not satisfied due to Mr. Coiner's bankruptcy. Any statements regarding the effect of a release of the wrongdoing agent upon the principal must therefore be considered dicta. Such statements were not necessary to the conclusion reached and were not restricted to the facts before the *Bumgarner* Court. This Court has clearly stated as follows in *In re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959):

> The rule of stare decisis does not apply where the former decisions have misunderstood or misapplied the law or are contrary to reason. *Simpkins v. White*, 43 W.Va. 125, 27 S.E. 361. ". . . no legal principle is ever settled until it is settled right." *Weston v. Ralston*, 48 W.Va. 170, 36 S.E. 446, 450. " . . . it is better to be right, than to be consistent with the errors of a hundred years." *Lovings v. Norfolk & W. R. Co.*, 47 W.Va. 582, 35 S.E. 962, 965.

Id. at 382, 109 S.E.2d at 669.[12]

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[11]Both a release and a covenant not to sue represent affirmative acts by the entity executing the release or covenant not to sue. The failure to satisfy the judgment due to bankruptcy in *Bumgarner* is not analogous to a release or covenant not to sue. In *Didner v. Keene Corp.*, 593 N.Y.S.2d 238 (1993), the New York court reasoned that a consent judgment did not qualify as a "release" for purposes of application of the release of other tortfeasors statute and that "[t]he interpretation which appellant seeks to accord to General Obligations Law § 15-108 is not only at variance with the language of the statute itself but completely ignores its historical genesis and purpose and impermissibly skews the intent of the statute." 593 N.Y.S.2d at 240. The *Didner* court's suggestion was that the release statute is applicable only where the plaintiff discharges a tortfeasor prior to a verdict and entry of judgment. *Id.*

[12]In *Newman v. Kay*, 57 W.Va. 98, 49 S.E. 926 (1905), this Court reasoned as follows:

> One of the best definitions of the term *obiter dictum* is said to be that given by Folger, J., in *Rohrbach v. Ins. Co.*, 62 N. Y. 47, 58. He said: "*Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or

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This Court has also repeatedly cautioned against establishing precedent based upon dicta. As explained in *Kanawha Valley Bank*, "[o]biter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent." 144 W. Va. at 382-83, 109 S.E.2d at 669. Regarding the rationales of prior holdings and their inclusion within the doctrine of stare decisis, we distinctly stated as follows in *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996): "This doctrine concerns the *holdings* of previous cases, not the rationales[.]" *Id*. at 546 n. 13, 474 S.E.2d at 476 n. 13.

> *Stare decisis* is the policy of the court to stand by precedent. It is different from the doctrine of *stare rationibus decidendi*–"to keep to the *rationes decidendi* of past cases." Rather under the doctrine of *stare decisis*, a case is important only for what it decides--for the "what" not for "why" and not for "how."

Id.

> A judicial precedent attaches to a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

Allegheny Gen, Hosp. v. N.L.R.B., 608 F.2d 965, 969-70 (3rd Cir. 1979) (footnote omitted).

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[12](...continued)

> full consideration of the point, are not the professed deliberate determinations of the judge himself. *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside from the main topic of the case to collateral subjects."

Id. at 112, 49 S.E. at 931.

An engaging commentary upon the value of dicta was provided by Justice Neely in his dissent to *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983). Justice Neely surmised that "a dissent to dicta is like the sound of one hand clapping." "[L]aw must be written with care. It is meant to be an exercise of the mind, not a venting of the spleen." *Id*. at 758, 310 S.E.2d at 690 (Neely, J., concurring in part and dissenting in part).

The references in *Bumgarner* to the effect of a plaintiff's release of a wrongdoing agent upon a principal were sheer dicta and were confined to a unique set of facts not present in the case sub judice. In its exuberance to provide the victim with recompense and ensure that the moral obligation of the State was satisfied, the majority was overly generous in its comments on the effect of the statute. It is therefore inaccurate to presume that *Bumgarner* provides the answer to this certified question.

II. Analysis of Reasoning of Other Jurisdictions

Based upon the absence of any definitive authority in West Virginia on this issue, the reasoning and conclusions of other jurisdictions are particularly instructive. As recently recognized by the South Dakota Supreme Court, a split of authority exists in other jurisdictions addressing similar issues regarding a plaintiff's release or covenant not to sue an agent tortfeasor and the effect of such release upon the principal. *Estate of Williams ex rel. Williams v. Vandeberg*, 620 N.W.2d 187 (S.D. 2000).

"The majority of jurisdictions have held that a principal/employer is released from liability when the agent/employee is released via a settlement agreement." *Id.* at 189.[13]

A. The Statutory Basis

Prior to extensive discussion of the weight of such well-reasoned authority, a significant distinction must be recognized; in those jurisdictions deviating from what *Williams* recognized as the majority posture, application of the Uniform Contribution Among Joint Tortfeasors Act ("UCAJTA") has typically played a predominant and decisive role. West Virginia has not adopted the UCAJTA and has relied upon West Virginia Code § 55-7-12, as discussed above, for resolution of issues regarding the release of tortfeasors.

Where the UCAJTA is implicated, some jurisdictions have applied the language of their unique UCAJTA-based statutes to conclude that a principal is indeed deemed a "joint tortfeasor" with the

[13]*See* Annotation, *Release of One Joint Tortfeasor as Discharging Liability of Others Under Uniform Contribution Among Tortfeasors Act and Other Statutes Expressly Governing Effect of Release,* 6 A.L.R.5th 883 (1992); Annotation, *Release of, or Covenant not to Sue, One Precisely Liable for Tort, but Expressly Reserving Rights Against One Secondarily Liable, as Bar to Recovery Against Latter,* 24 A.L.R.4th 547, 555-560 (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). Some jurisdictions have held that release of the agent does not release the principal. *See, e.g., Yates v. New South Pizza, Ltd.,* 412 S.E.2d 666 (N.C. 1992); *Van Cleave v. Gamboni Constr. Co.,* 706 P.2d 845 (Nev.1985); *Alaska Airlines, Inc. v. Sweat,* 568 P.2d 916 (Alaska 1977). Other courts have determined that the release of the wrongdoer must act as a release of the vicariously liable entity. *See, e.g., Mamalis v. Atlas Van Lines, Inc*., 560 A.2d 1380 (Pa. 1989); *Bristow v. Griffitts Constr. Co.*, 488 N.E.2d 332 (Ill. App. 1986); *Horejsi v. Anderson*, 353 N.W.2d 316 (N.D.1984); *Craven v. Lawson*, 534 S.W.2d 653 (Tenn.1976);

agent actually engaging in the wrongdoing. In *Saranillio v. Silva*, 889 P.2d 685 (Haw. 1995), for instance, the precise language of the UCAJTA statute and the statutory definition of joint tortfeasor provided the reviewing court little choice. The statute provided as follows:

> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

889 P.2d at 693-94. The *Saranillio* court observed that the statute was designed to abrogate the common law rule that a release of one joint tortfeasor acted as a release to other joint tortfeasors and recognized the dilemma of application in matters involving principal and agent relationships. *Id.* at 694. The court reasoned that "[i]t clearly applies to joint tortfeasors as that term traditionally has been used; that is, it applies to 'wrongdoers' who act in concert or concurrently. Traditionally, however, an employer was not considered a joint tortfeasor with his/her employee when the employer's liability was based on *respondeat superior*." *Id.* The *Saranillio* court struggled with the proper application of the statute, explaining, "On its face, therefore, Section 4 would seem not to apply to vicariously liable parties because they are not ordinarily considered joint tortfeasors." *Id*. Upon application of the 1939 version of the UCAJTA, however, the *Saranillio* court observed that the UCAJTA "does not define joint tortfeasors in the traditional sense." *Id.* The statute provides that for purposes of this statute, the "term 'joint tortfeasors' means two or more persons jointly or severally *liable in tort* for the same injury to person or property, whether or not judgment has been recovered against all or some of them." *Id.* (*quoting* 1939 UCATA § 1, HRS § 663-11 (1985) (emphasis supplied)).

The UCAJTA definition of joint tortfeasor is based upon liability rather than negligence and is "exceedingly broad and goes beyond the traditional meaning of the term." *Holve v. Draper*, 505 P.2d 1265, 1267 (Idaho 1973). Thus, where a reviewing court is limited to the definition of joint tortfeasor provided in the act, as in *Saranillio*, many courts have held that the definition encompasses the principal liable only vicariously based upon the following reasoning:

> The *basis* of liability is not relevant, nor is the relationship among those liable for the tort. In short, it makes no difference whether the . . . [employer's] liability is based on the doctrine of *respondeat superior* or any other legal concept. The point is that both it and the [employee] are (at least) "severally" liable for the same injury to the plaintiff. Therefore, the Uniform Contribution Among Tort-feasors Act applies.

Blackshear v. Clark, 391 A.2d 747, 748 (Del. 1978).[14]

Similar reasoning was employed in applying a statute containing the "liable in tort" definition in *Wrenn v. Maria Parham Hospital*, 522 S.E.2d 789 (N.C. Ct. App. 1999). The statute, codifying the UCAJTA as North Carolina General Statute §§ 1B-1 to 1B- 6, provided that:

> When a release or a covenant not to sue ... is given in good faith to one of two or more persons *liable in tort* for the same injury or the same wrongful death:
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide[.]

[14]*See Alaska Airlines*, 568 P.2d at 930 ("[i]t may be that Alaska Airlines is not technically a 'tortfeasor,' but it is 'one of two or more persons liable in tort for the same injury'"); *Yates*, 412 S.E.2d at 669 ("[c]learly, both the master and the servant are 'persons liable in tort for the same injury,' and 'tortfeasors' as used in this provision refers to those persons liable in tort").

522 S.E.2d at 793 (*quoting* N.C. Gen.Stat. § 1B-4 (1983) (emphasis supplied)). The *Wrenn* Court observed:

> Initially, it did not appear that the Uniform Act made any change in the established law of master and servant since the two were not considered to be joint tort-feasors. However, in *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992), our Supreme Court held that the term "tort-feasors" as used in the Uniform Act included vicariously liable masters. Thus, the *release* of a servant did not release a vicariously liable master, unless the terms of the release provided for release of the master. In *Yates*, the plaintiff was injured in an accident with a pizza deliveryman who was working for New South Pizza, Ltd., d/b/a Domino's Pizza. The plaintiff settled with the driver for $25,000.00, the amount of his insurance coverage, and executed a *covenant not to sue* the driver or the driver's insurer, but "expressly reserved all rights to proceed against defendant ... employer." *Id.* at 791, 412 S.E.2d at 667. In a divided opinion, our Supreme Court held that "*for purposes of this Act*, a 'tort-feasor' is one who is liable in tort." *Id.* at 794, 412 S.E.2d at 669 (emphasis in original).

Id. at 793.

B. The Weight of Well-Reasoned Authority: A Vicariously Liable Entity is Not a Tortfeasor

Some jurisdictions, as examined above, have confined their evaluation to the strict language of their UCAJTA-based statutes. In the absence of deliberation of the fundamental tort principles and the differences between a joint tortfeasor and a vicariously liable entity, however, a decision regarding this subject is more a matter of linguistics than logic. Where jurisdictions have thoroughly examined the jurisprudential development of the law of tort, specifically the inclusion of the principal/master/employer as a party to be implicated where the impropriety was committed by the agent and the principal is completely

free of wrongdoing, the well-reasoned decisions have released the vicariously liable principal upon the release of the agent.

An excellent illustration of such reasoning is found in *Biddle v. Sartori Memorial Hospital*, 518 N.W.2d 795 (Iowa 1994), wherein an emergency patient was negligently discharged from the hospital by her physician. Her legal representative released the physician from liability after a settlement had been reached with the physician. The hospital was thereafter sued for the physician's negligence on a vicarious liability claim. The Iowa Supreme Court acknowledged 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." *Id.* at 798. The *Biddle* court emphasized the need to address "head-on this important distinction." *Id.*

The *Biddle* court discussed opinions of other jurisdictions holding that settlement with the tortfeasor removes the basis for any additional recovery from the principal upon the same acts of negligence. The *Biddle* court adopted the theory that the agent and the principal should be treated as one, applying the single share theory for liability to permit a "settlement with an agent [to] effectively adjudicate[] and satisf[y] the vicarious claim." *Id*. (*citing Glover v. Tacoma Hosp.*, 658 P.2d 1230, 1238 (Wash. 1983)). An opposite outcome, the *Biddle* court reasoned, would generate multiplicity of civil actions and a circuity of claims. The court noted that the doctor's settlement would not be protected if a cause of action were permitted to go forward against the hospital. 518 N.W.2d at 799. "

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The *Biddle* court utilized the reasoning of the North Dakota Supreme Court in *Horejsi v. Anderson*, 353 N.W.2d 316 (N.D. 1984). *Horejsi* expressed the theory of vicarious liaiblity as follows:

> 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.

Id. at 318.

Utilizing this "single share" theory,[15] the South Dakota Supreme Court in *Williams* clearly and conclusively stated that "the plaintiff cannot recover against the principal once recovery against the agent has been completed." 620 N.W.2d at 190. The *Williams* court reasoned: "The rationales of preventing circuity of action and encouragement of settlement complement one another. The complementary aspects of both rationales serve another important goal: finality. Public policy favors finality, thus avoiding circuity of action that is merely derivative . . . ." *Id.* "Our holding today fosters the principle of finality while attempting to limit circuity of action and multiplicity of lawsuits, which in this Court's wisdom, is the fairer result." *Id.* at 191.

Similarly, in *Copeland v. Humana of Kentucky, Inc.*, 769 S.W.2d 67 (Ky. Ct. App. 1989), the Kentucky tribunal found that because vicarious liability derives solely from the principal's legal relation to the wrongdoer, settlement, through a covenant not to sue, with the tortfeasor removes the basis for any additional recovery from the principal upon the same acts of negligence. *Id.* at 70.

> As far as the vicarious liability issue, we find that other courts have spoken to this issue with persuasive reasoning which we paraphrse and adopt. The covenant not to sue not only operated to discharge the anesthesiologists, Schafer and Nash, P.S.C. (the servants/employees) as the parties primarily responsible, it affected a complete discharge of the

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[15]The Commissioners' Comment to the Uniform Act illuminates the single share issue, as follows:

> [This provision] invokes the rule of equity which requires class liability, including the common liability arising from vicarious relationships, to be treated as a single share. For instance, the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share.

Unif. Contribution Among Tortfeasors Act § 2, 12 U.L.A. 246 (1975).

> hospital (the master/employer) who is only secondarily liable, despite the attempted reservation by the Copelands in the covenant of all their rights against the hospital.

Id. The Kentucky court found the the plaintiffs

> had but one cause of action which the law gave to compensate them for their daughter's injuries. This cause of action for the allegedly tortious conduct of Schafer and Nash was assertable against the hospital only because Schafer and Nash were allegedly acting in their function as employees or ostensible agents of the hospital. . . .

Id.. Settlement with the wrongdoers "repaired the wrong." *Id*.

> This acquittance inured to the benefit of the hospital, for the discharge of the primary tortfeasor (Schaefer and Nash) must be held to discharge the secondary tortfeasor (the hospital) also from further responsibility, as the hospital's liability for the tortious act was vicarious in nature and derived solely from its legal relation to the wrongdoer, Schafer and Nash.

Id.

A plurality of the Michigan Supreme Court, in an extensive and discerning opinion in *Theophelis v. Lansing General Hospital*, 424 N.W.2d 478 (Mich. 1988), held that release of the agent is release of the principal even where a plaintiff indicates an express reservation of the right to sue the principal. In *Theophelis*, representatives of the decedent signed a release absolving the doctor and nurse of liability, expressly reserving the right to sue other entities. The Michigan court evaluated the effect of the following Michigan statute:

> "When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons *liable in tort* for the same injury or the same wrongful death:

> (a) It does not discharge any of the *other tortfeasors* from liability for the injury or wrongful death unless its terms so provide."

Id. at 481 (emphasis supplied in original). The court reasoned that "[t]he principal, having committed no tortious act, is not a 'tortfeasor' as the term is commonly defined." 424 N.W.2d at 483 (*citing* Black's Law Dictionary (5th ed.) (defining a tortfeasor as "a wrong-doer; one who commits or is guilty of a tort.")). The Michigan court concluded that release of the culpable agent discharges any liability of the principal. *Id.* at 486. The "single share" theory was adopted, citing the *Horejsi* rationale, as discussed above. The Michigan court elaborated as follows:

> Put in another context, if *A*, *B* and *C* are sued because each is guilty of negligence which resulted in injury to a plaintiff, their pro-rata shares of the common liability are to be determined under the contribution statute without regard to whether *A* 's principal, not a wrongdoer, is also joined as a fourth defendant. As between *A*, an agent, and his principal, there is only one tortfeasor, and they represent only one share of the common liability.

424 N.W.2d at 491.

In *Andrade v. Johnson*, 546 S.E.2d 665 (S.C. Ct. App. 2001), the Court of Appeals of South Carolina evaluated the claims of a consumer against a heating contractor and an electric and gas utility company. The consumer had executed a covenant not to sue the contractor, and had specifically reserved the right to proceed against the utility. The issue before the court was whether a covenant not to sue the agent also released the principal, the utility company. The court held that the UCATJA[16] governs

[16]The *Andrade* court noted that South Carolina Code Annotated § 15-38-50 (Supp. 2000), (continued...)

only those situations involving joint tortfeasors and does not apply to an employer who is only derivatively liable. The consumer had urged the court to "expand the definition of tortfeasor under the UCATA to include vicariously liable parties." 546 S.E.2d at 669. The court explained that the key inquiry is "whether the liability arises *only* vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." *Id.* The court concluded that the covenant not to sue[17] terminated both the consumer's claims against the contractor and the utility company's derivative liability.

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[16](...continued)
based upon the UCAJTA, provides as follows: "When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide. . . ." 546 S.E.2d at 668 n. 1 (*quoting* S.C. Code Ann. § 15-38-50 (Supp. 2000)).

[17]The *Andrade* court also explained that although a covenant not to sue is not a release, it functioned as a release of the principal nonetheless.

> While some of the cases on this subject deal with covenants not to sue and others with releases, this distinction should not be the determining factor in the end result. The most important factor is the type of liability and the relationship *inter se* of the various allegedly liable parties rather than the type of document used to discharge liability. It must be determined whether the liability arises *only* vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party.

546 S.E.2d at 669. Similarly, in *McCurry v. School District*, 496 N.W.2d 433 (Neb. 1993), the Nebraska court noted the typical distinction between a covenant not to sue and a release but concluded that the distinction was meaningless within the principal/agent context because of the vicarious liability of the principal. The *McCurry* court sustained the distinction between settlements involving joint tortfeasors and settlements involving vicarious liability and concluded that "it matters not how the settlement was reached; whether by release or covenant not to sue, settlement with the agent constitutes a settlement with the principal, no matter what the parties may have intended." *Id*. at 444.

> 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).

Id. at 670. Based upon this reasoning, the South Carolina court concluded that even if it were to expand the definition of tortfeasor as North Carolina did in Yates, "we find the UCATA simply is not applicable to cases involving indemnity." *Id*.

In *Anne Arundel Medical Center, Inc. v. Condon*, 649 A.2d 1189 (Md. Ct. Spec. App. 1994), a plaintiff released an allegedly negligent pathologist and attempted to sue the medical center on the theory of vicarious liability. The court held that where liability of the medical center was based exclusively upon the negligent conduct of the purported agent, the center and the pathologist were not joint tortfeasors for purposes of the effect of the release under the UCAJTA.[18] The patient's release of the pathologist was therefore found to function as a release of the medical center as a matter of law. *Id.* at 1191. Recognizing the split in authority regarding whether a principal and an agent are considered joint tortfeasors, the Maryland court was "persuaded that the better reasoned approach is to hold that Maryland's version of the UCATA does not include vicariously liable defendants and, therefore, that an agent and his principal are not joint-tortfeasors under . . . [the act]." *Id*. at 1193.

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[18]The *Anne Arundel* court noted that Maryland Annotated Code article 50, § 16(a) defines "joint tortfeasors" as "'two or more persons jointly or severally *liable in tort* for the same injury to person or property, whether or not judgment has been recovered against all or some of them.'" 649 A.2d at 1193 (*quoting* Md. Ann. Code 50-16(a) (emphasis supplied)).

The Maryland court considered the argument that the statute should be applied to all entities jointly or severally liable in tort, "regardless of the modality of liability." *Id.* The court astutely recognized, however, that such holding would require it "to ignore the basic and significant distinctions between vicarious and joint liability." 649 A.2d at 1193. Reviewing those basis distinctions, the court held that "[i]t is because of their independent wrongdoing [in the case of true joint tortfeasors] that . . . a plaintiff is permitted to bring an action against one joint tortfeasor after having released another joint tortfeasor from liability." *Id.* "Each tortfeasor faces liability for his or her own wrongdoing." *Id.*

III. Conclusion

Ultimately, it must be the statutory scheme and the underlying tort principles which are determinative. Where tortfeasor is defined as a wrongdoer, as in West Virginia, most reviewing tribunals have held that release of an agent also releases the principal.[19] Where tortfeasor is defined as an entity liable in tort, many courts have held that the release of an agent does not release the principal. Even where the statutory definition of tortfeasor is an entity liable in tort, however, many discerning courts have applied the theoretical underpinnings of tort law to conclude that release of a wrongdoing agent should foreclose further action against the innocent principal.

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[19]*See Atkinson v. Wichita Clinic, P.A.*, 763 P.2d 1085, 1087 (Kan. 1988) (explaining "[o]n the other hand, if the principal's alleged liability is merely imputed by virtue of the alleged tortious conduct of its agent, the principal is not a 'joint tortfeasor' in terms of being an equally culpable wrongdoer. That the master is *jointly liable* does not make him a *joint tortfeasor* as the latter term is generally understood").

West Virginia Code § 55-7-12 is applicable exclusively to tortfeasors, defined as "wrongdoers." A vicariously liable entity is not a wrongdoer; therefore the statute simply does not apply. Abundant case law from other jurisdictions should persuade this Court that the weight of well-reasoned authority maintains that unless the plaintiff can demonstrate independent wrongdoing on the part of the principal, termination of the claim against the agent, through release or covenant not to sue, extinguishes the derivative, vicarious claim against the principal as a matter of law. As the *Anne Arundel* court found, "[t]he release of an agent removes the only basis for imputing liability to the principal." 649 A.2d at 1196. A contrary holding would, as so many courts have observed, undermine the public policy favoring settlements. As the *Anne Arundel* court explained: "It is unlikely that an agent would ever settle with a plaintiff if he still remained liable to indemnify his principal for any further amount the principal might be compelled to pay to the plaintiff." *Id*.[20]

Principles of contribution and indemnity may also be significantly confounded where the majority's approach is applied to a complex litigation. The majority opinion obliterates, or at the very least significantly obscures, the distinction between joint liability and vicarious liability. The practical effect of the majority's conclusion may be to frustrate the principles of contribution, properly a concept applicable to joint

[20]I would also emphasize that an assertion was made in oral argument that this Court could contemplate a separate rule on vicarious liability in medical cases. Adoption of such a rule would have obvious shortcomings and would contribute to expenses and concerns regarding the protection of the rights of the citizens of this state to dependable medical care. Additionally, I would caution that references to the Medical Professional Liability Act, particularly West Virginia Code § 55-7B-9(c) (1986) (Repl. Vol. 2000), are not appropriate since the scheme enunciated therein is essentially based upon principles of contribution.

wrongdoers,[21] compelling one wrongdoer to contribute to the other wrongdoer based on joint and several liability.[22] In syllabus point six of *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990), this Court explained that "[a] party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution."

Indemnification principles apply between the wrongdoer and an entity only vicariously liable through that wrongdoer, such that the vicariously liable entity could seek reimbursement from the wrongdoer even after the wrongdoer had possibly presumed he had been released from further liability based upon the negligent act. In syllabus point seven of *Hager v. Marshall*, 202 W.Va. 577, 505 S.E.2d 640 (1998), this Court explained as follows: "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 right of the vicariously liable entity to seek

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[21]The distinction between indemnity and contribution was clearly explained in *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 457 P.2d 364 (N.M. 1969), as follows: "[T]he difference between indemnity and contribution in cases between persons liable for an injury to another is that, with indemnity, the right to recover . . . enforces a duty on the primary wrongdoer to respond for all damages; with contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability." *Id*. at 368.

[22]In *Sitzes v. Anchor Motor Freight, Inc.*,169 W.Va. 698, 289 S.E.2d 679 (1982), this Court explained that "[t]he right of contribution developed because it was thought unfair to have one of several joint tortfeasors pay the entire judgment and not be able to obtain contribution from any of his fellow wrongdoers." *Id*. at 708, 289 S.E.2d at 686; *see* West Virginia Code § 55-7-13 (1923) (Repl. Vol. 2001) ("Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu.")

indemnification against the settling party, however, has not been held to be extinguished by the settlement and release, and the potential that a vicariously liable entity will seek indemnification from the settling defendant is precisely the basis for the concerns, addressed above, of the various courts examining the circuity of action issue.

The majority is inviting an interminable procession of multifarious applications of contribution and indemnity principles. It creates a tangled web for which there is no end; even perceived resolution through a settlement or covenant not to sue is not a conclusion. To the extent that the majority, by its pronouncements in this case, seeks to protect and sanctify the agreement between the plaintiff and one party that further action against that party is not desired, the majority fails miserably. Permitting further action against the vicariously liable entity only serves to perpetuate the litigation and increase the prospect that the released entity will be revisited through indemnification.[23] As observed by one commentator:

> On the other hand, allowing the suit against the master or principal after a settlement with the servant or agent would reduce the incentive for the servant or agent to settle since he would still be liable for indemnity to the master or principal. This latter construction would probably discourage

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[23]In *Anne Arundel*, the Maryland court explained as follows:

> If a plaintiff, under such a hypothetical legal scheme, were able to find an agent willing to settle, to allow the plaintiff then to proceed additionally against a vicariously liable principal would, in essence, permit the plaintiff "two bites out of the apple." If the principal could then seek indemnity from the agent, the agent's earlier settlement would be of little solace to him. Such a double exposure would act as a disincentive for agents ever to agree to a settlement.

649 A.2d at 1196.

> settlements more than would the *Craven* construction. If suit were brought against the master or principal, he might be lax in defending the suit, secure in the knowledge that whatever damages are assessed against him can be recovered by way of indemnity from the servant or agent. The possibility of such conduct by the master or principal may well induce the servant or agent in order to protect his own interests to go to trial rather than to settle.

Recent Developments, Torts -- Vicarious Liability -- Covenant Not to Sue Servant or Agent as Affecting Liability of Master or Principal, 44 Tenn.L.Rev. 188, 198 (1976).

Based upon the foregoing, I respectfully dissent.

I am authorized to state that Justice Maynard joins in this dissent.