

No. 30088— *Sandra K. Hicks, Administratrix of the Estate of  
Charles R. Hicks, Deceased v. David A. Ghaphery, M.D.,  
and Wheeling Hospital*

**FILED**

**July 3, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**July 3, 2002**

RORY L. PERRY II, CLERK  
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McGraw, J., concurring, in part, and dissenting, in part:

I concur in the majority's decision to grant a new trial in this case, but I dissent to the majority's decision to uphold summary judgment in favor of the hospital. We have held in other cases where a hospital has been sued in connection with a doctor's malpractice that, "[w]here a patient goes to a hospital seeking medical services and is forced to rely on the hospital's choice of physician to render those services, the hospital may be found vicariously liable for the physician's negligence." Syl. pt. 2 of *Thomas v. Raleigh General Hospital*, 178 W. Va. 138, 358 S.E.2d 222 (1987). We have also held that:

Where a hospital makes emergency room treatment available to serve the public as an integral part of its facilities, the hospital is estopped to deny that the physicians and other medical personnel on duty providing treatment are its agents. Regardless of any contractual arrangements with so-called independent contractors, the hospital is liable to the injured patient for acts of malpractice committed in its emergency room, so long as the requisite proximate cause and damages are present.

Syl. pt. 1, *Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991). In the instant case, the appellant makes the argument that she had no practical options for other medical providers during the time her husband was being treated, other than those provided by the hospital. I believe that the appellant had demonstrated that there existed genuine issues of fact to be tried on this issue, and that inquiry into those facts was desirable to clarify the application

of the law. See syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Because I feel the lower court's grant of summary judgment in favor of the hospital was in error, I must respectfully dissent to this aspect of the majority opinion.