

No. 30256 - *Ronald L. Matheny and Sherry Matheny, his wife, v. Fairmont General Hospital, Inc., a West Virginia corporation, and Robert Thompson, M.D.*

FILED

December 11, 2002

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

RELEASED

December 13, 2002

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

Albright, Justice, concurring:

I concur to the majority's opinion based on the established principle of the rule of law, specifically, the fact that this Court's holding in *Woodrum v. Johnson*, 210 W.Va. 762, 559 S.E.2d 908 (2001), remains valid.¹ However, for all the reasons I stated at length in my dissent to *Woodrum*,² I believe that the settlement reached between Dr. Thompson, an ostensible agent of the hospital, and the plaintiffs, should have extinguished the plaintiffs' claims against the hospital.³ This is because the plaintiffs' derivative claims against Fairmont General arose solely out of the agency relationship that resulted from the physician's employment by the hospital. As I previously stated in explaining my position: "[T]he release

¹In syllabus point three of *Woodrum*, this Court held 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.

210 W.Va. at 763, 559 S.E.2d at 909.

²Justice Maynard joined me in that dissent.

³Although the majority refused to address the issue of ostensible agency, (*see* opinion, note 3) on the theory that liability was not being asserted against Fairmont General under such a theory, the trial court's instruction to the jury on the issue of ostensible agency suggests that the issue may be raised on remand.

of a wrongdoing agent should foreclose further action against the innocent principal.” 210

W.Va. at 781, 559 S.E.2d at 927.

Based on the foregoing, I respectfully concur.