No. 31755 – *State of West Virginia ex rel. Elizabeth Ann Miller, individually, and as Administratrix of the Estate of Rachel M. Miller, deceased v. The Honorable Robert B. Stone, Judge of the Circuit Court of Monongalia County, West Virginia University Board of Governors*

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OF WEST VIRGINIA

Starcher, J., dissenting:

I want to state that I have grave reservations about several aspects of the 2003 amendments to the Medical Professional Liability Act, particularly those that relate to procedural matters. It is well established that this Court has the primary constitutional authority to administer and control the procedural aspects of litigation. *See W.Va. Const.* Art. VIII, § 3 ("The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law."); *State v. Davis*, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987), (*overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994)) ("under our rule-making authority . . . rules promulgated by this Court have the force and effect of law and will supersede procedural statutes that conflict with them."). *See also*, *West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 150, 516 S.E.2d 769, 773 (1999) (recognizing that *Rule of Evidence* 702, and not a statute, is the paramount authority for determining whether or not an expert is qualified to give an opinion). The new amendments appear to have crossed this constitutional boundary.

Nevertheless, accepting arguendo the statutes as written, I believe that the circuit judge erred in deciding to apply the 2003 amendments to the Medical Professional Liability Act to the instant case. The petitioner – who alleges that her deceased child was the victim of medical malpractice in June 2001 – filed her case on June 9, 2003, and the statutory changes at issue did not take effect until July 1, 2003. It is a fundamental rule of statutory construction that statutory changes are presumed to apply prospectively only. *See W.Va. Code* 2-2-10(bb) [1989]; Syllabus Point 3, *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980). Furthermore, constitutional due process protections generally preclude the retroactive application of a statute where to do so would impair an existing property right. *See, e.g., Mildred L.M. v. John O.F.*, 192 W.Va. 345, 351 n. 10, 452 S.E.2d 436, 442 n. 10 (1994) ("It has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights."). Lastly, statutes that limit or are in derogation of the common law are to be given a narrow construction. *See, e.g.*, Syllabus Point 1, *Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1907) ("Statutes in derogation of the common law are strictly construed.").

The majority opinion disregards these basic rules of statutory construction to reach an inequitable result. The opinion gives a liberal reading to the Medical Professional Liability Act so as to retroactively apply the July 2003 statutes to impair the petitioner's legal rights established when the alleged malpractice occurred in June 2001. I cannot accept such a misreading of the Legislature's actions, and therefore respectfully dissent.