No. 33006 - Larry D. Elmore, individually and as Administrator of the Estate of Dorothy Mae Elmore, deceased v. Triad Hospitals, Inc., a Delaware corporation, dba Greenbrier Valley Medical Center; John M. Johnson, D.O.; and BJSM Med, Inc., a West Virginia corporation

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OF WEST VIRGINIA

Davis, C.J., concurring:

In this case, the plaintiff's complaint was dismissed *solely* upon the grounds that he did not serve a notice of claim on the defendant, thirty days before filing the action, as required by the Medical Professional Liability Act. The majority opinion reversed the dismissal on the grounds that the defendant has been properly served with pre-suit notice. I concur in the judgment, but I respectfully reject the reasoning used by the majority opinion to reach this result.

In resolving this case, the majority found it necessary to indicate that the pre-suit notice requirements of the Act are valid and outside the scope of this Court's constitutional authority to promulgate rules of procedure for trial courts. This reasoning "is merely gratuitous (and unwise) dicta." *State ex rel. Stump v. Johnson*, 217 W.Va. 733, ___, 619 S.E.2d 246, 257 (2005) (Starcher, J., dissenting). I am particularly troubled by this dicta because in the recent opinion of *Davis v. Mound View Health Care, Inc.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 33104 Nov. ____, 2006) (Davis, C.J., dissenting), this Court expressly declined to address the issue of whether the Legislature had the constitutional authority to

promulgate the pre-suit notice requirements under the Act. Consequently, it is inappropriate for the per curiam opinion in this case to attempt to constitutionally validate the pre-suit notice requirements, when the Court has expressly declined to address the issue in the authored opinion of *Davis*. As pointed out by Justice Albright in Syllabus point 2 of *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001), "[t]his Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." The dicta language in the majority opinion should be construed as nothing more than dicta, and not the decision of the Court on the important issue of whether or not the pre-suit notice requirements are an encroachment upon our constitutional authority to promulgate rules of procedure for the trial courts of this State.

Finally, for the reasons set out in my concurring opinion in *Hinchman v. Gillette*, 217 W.Va. 378, ___, 618 S.E.2d 387, 396 (2005) (Davis, J., concurring), I believe the pre-suit notice requirements are unconstitutional. Therefore, I would have reversed this case upon that ground.

Consequently, I respectfully concur.