BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 24-27

ELAINE NEIDIG, individually and on behalf of all others similarly situated,

Petitioner,

v.

VALLEY HEALTH SYSTEM,

Respondent.

PETITIONER'S OPENING BRIEF

On Certified Question from the
United States Court of Appeals for the Fourth Circuit
Case No. 22-2227

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INTRODUCTION

This case is simple. Petitioner Elaine Neidig and thousands of other West Virginia consumers purchased worthless mammograms from Respondent Valley Health System ("Valley"). When Ms. Neidig was informed by Valley (at the demand of its government regulator) that her purchase of the service was worthless, she requested a refund. Valley refused. Ms. Neidig then brought this lawsuit seeking to recover her pure economic loss for having paid for a service that Valley later told her was worthless.

Valley argues that it doesn't have to refund Ms. Neidig's payments because, according to it, she suffered a "medical injury" and, therefore, this case involves a claim for "medical professional liability" governed by the Medical Professional Liability Act ("MPLA").[1] Not so.

This case is no more one of medical professional liability than a run of the mine billing dispute would be. The MPLA is directed at personal injury claims – not pure economic losses. To trigger a medical professional liability claim under the MPLA, the claim must involve the "death or injury of a person."[2] And, the plain meaning of the phrase "death or injury *of a person*" is

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[1] W. Va. Code § 55-7B-1, *et seq.*

[2] W. Va. Code § 55-7B-2(i).

a personal injury. Ms. Neidig's claims are for economic loss. They do not involve a death or injury to her person. It's that simple.

ASSIGNMENTS OF ERROR

This case is before this Court on a certified question from the U.S. Court of Appeals for the Fourth Circuit. In its order, the Court set forth the following Certified Question:

> Whether a plaintiff's claims can fall under the West Virginia Medical Professional Liability Act if the plaintiff disclaims any form of physical or emotional injury.[3]

While Fourth Circuit did not provide an answer its Certified Question,[4] the United States District Court for the Northern District of West Virginia effectively answered the Certified Question in the affirmative, and Petitioner assigns its conclusion and every subsidiary question fairly comprised therein as error.

STATEMENT OF THE CASE

Ms. Neidig is a natural person and resident of West Virginia.[5] Valley operates facilities and advertises in West Virginia.[6] Ms. Neidig was exposed to

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[3] JA 290.

[4] *Id.*; *cf.* W.Va. R. App. Pro. 17(a)(5) ("the petitioner's brief must assign the specific points of legal error that arise from the [state] circuit court's answer to the certified question").

[5] JA 005.

[6] JA 006–008.

Valley's advertisements in West Virginia by phone and mail, , and thereafter chose to purchase mammogram services from Valley.[7] Specifically, Ms. Neidig paid Valley for three mammograms during, the years 2016, 2017, and 2019.[8] The average cost of those three mammograms as billed was $542.00.[9]

Following an investigation, in July 2019 the Food and Drug Administration determined that Valley's staff were performing mammograms improperly, resulting in "serious image-quality deficiencies that constituted "a serious risk to human health."[10] Valley's accreditation to perform these services was canceled.[11] In a letter dated December 16, 2019, Valley informed Ms. Neidig of the FDA's finding noting "a serious concern about the quality of the mammography that our facility performed between June 20, 2017, and August 31, 2019."[12] Such severe deficiency clashed with Valley's representations about the quality of the healthcare services it offered.[13]

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[7] JA 008, at ¶¶ 15–16.

[8] JA 008.

[9] *Id.*

[10] JA 009, at ¶¶ 25–27.

[11] JA 024.

[12] JA 009, at ¶ 28; JA 025.

[13] JA 009.

Ms. Neidig requested a refund.[14] Valley refused, denying liability.[15] Because Valley did not *reimburse* Ms. Neidig for what turned out to be effectively worthless mammograms, she sustained an economic loss in the form of overpayment for those deficient mammograms.[16]

Ms. Neidig filed her Class Action Complaint ("Complaint") on August 3, 2022, in the Circuit Court of Jefferson County, West Virginia.[17] The Complaint named Valley as the sole defendant and asserted claims for violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"),[18] unjust enrichment,[19] and breach of contract[20] on behalf of a putative class.[21]

On September 20, 2022, Valley removed this case to the U.S. District Court for the Northern District of West Virginia, under the Class Action Fairness Act.[22] A week later, Valley moved for the dismissal of the Complaint in its entirety.[23] Valley moved to dismiss under both Fed. R. Civ. P. 12(b)(1)

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[14] JA 012 at ¶48.

[15] *Id.*

[16] JA 010, at ¶¶ 33–35.

[17] JA 005.

[18] JA 010–012.

[19] JA 012–013.

[20] JA 013.

[21] JA 013–015.

[22] JA 027–035.

[23] JA 036–037.

and (b)(6), arguing, with regard to the former, that the federal district court lacked subject-matter jurisdiction because Ms. Neidig allegedly had not complied with pre-suit notice requirements under the MPLA.[24] As to Rule 12(b)(6), Valley argued that Ms. Neidig's claims were actually subject to the MPLA, including its two-year statute of limitations, so as to be time-barred.[25] Valley averred that this was so "for two primary reasons": (1) because of the 2015 augmentation of the MPLA's definition of "medical professional liability," the statute embraced her claims *generally*; and (2) because *Blankenship v. Ethicon, Inc.* was "analogous," the court should just rely on that decision.[26] Valley's dismissal motion did not mention the word "anchor."[27] It did not mention the word "personal," as in "personal injury," either.[28] It did not address why W. Va. Code § 55-7B-2(i) includes the modifying phrase "of a person" or mention that the MPLA amended the common law of personal injury.[29]

On October 31, 2022, the district court granted Valley's dismissal motion on just the Rule 12(b)(6) ground, reasoning that "there can be no doubt that a

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[24] JA 038.

[25] JA 038–039.

[26] JA 042–044.

[27] JA 038–047.

[28] *Id.*

[29] *Id.*

mammogram falls under the West Virginia Legislature's definition for health care."[30] Then, the trial court simply stated, "All of Ms. Neidig's claims are based upon the substandard mammograms she received from Valley."[31] Those two steps of reasoning—"health care" and contemporaneous/related claims generally—was all that court needed to conclude that "Ms. Neidig [was] unable to escape the MPLA's broad reach."[32] Tracking Valley's motion, the trial court's dismissal order did not contain the word "anchor" or the phrase "personal injury" at all.[33]

On November 28, 2022, Ms. Neidig noticed her appeal to the U.S. Court of Appeals for the Fourth Circuit.[34] In her appellate brief, filed on January 23, 2023, Ms. Neidig framed the issue on appeal:

> Whether the four-year limitations period of West Virginia's Consumer Credit & Protection Act ("WVCCPA"), W. Va. Code § 46A-6-101 *et seq*. governs a case against a medical provider where the damages sought are purely statutory and economic and there is no claim of bodily injury or death.[35]

In her brief, Ms. Neidig argued that, because she did not allege "*death or injury*

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[30] JA 125.

[31] *Id.*

[32] *Id.*

[33] JA 120–126.

[34] JA 127.

[35] JA 141 (emphasis added).

to her person," the MPLA does not apply to her case.[36] Following oral argument, the U.S. Court of Appeals for the Fourth Circuit entered the order presenting to this Court the Certified Question, as stated above.[37]

SUMMARY OF ARGUMENT

This is a consumer case seeking only economic losses. Ms. Neidig sued because she did not get what she paid for. She did not bring a medical malpractice action. Her claims stem from misrepresentations that lead to only economic loss without any allegations of personal injury or death. The district court's holding improperly expanded the MPLA's reach to include "health care"-related actions devoid of allegations of personal injury.[38] In so doing, the trial court allowed the MPLA to invade the rightful domain of the WVCCPA, impliedly providing entities covered by the MPLA *carte blanche* to escape liability for consumer-protection claims seeking purely economic damages.

The MPLA applies only in cases of "medical professional liability" which statutorily requires a claim involving "death or injury *of a person*" to trigger the MPLA. As an "injury of a person" requires a physical or at least an emotional injury, Ms. Neidig's claims of pure economic loss are outside the MPLA. While the MPLA can be triggered by claims that are contemporaneous

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[36] JA 148 (emphasis added).

[37] JA 288–308.

[38] JA 120–126.

to or related to an "anchor claim" under this Court's precedents, the anchor claim must still arise from a death or injury to a person. This Court has never held to the contrary and should not do so here.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant to W. Va. R. App. P. 20(a) is necessary as this appeal presents issues of first impression in a case involving issues of fundamental public importance.

ARGUMENT

I. The MPLA Requires a Personal Injury or Death.

Given that everything Valley—or any healthcare provider—sells, prices, advertises, represents, etc. will ostensibly somehow relate to "health care," and that every civil suit will allege some kind of "injury," a practical effect of the district court's flawed interpretation of the MPLA is to functionally exempt healthcare providers from WVCCPA liability.[39] The district court erred by ignoring the phrase the "death or injury of *a person*"[40] demanded by W. Va. Code §§ 55-7B-2(i) and 55-7B-4(a)-(b) and the meaning of "medical injury," especially as used in W. Va. Code § 55-7B-4(a)-(b). In doing so, the district court lost sight of the fact that the MPLA is and always has been a personal injury

[39] JA 124–125.

[40] *Compare* W. Va. Code § 55-7B-2(i) (emphasis added) *with* JA 124–125.

statute that amended the common law of personal injury which has no application to the pure economic losses for which the WVCCPA controls.

As explained fully below, the MPLA requires a *personal* injury or death to a patient to be applicable. Because Ms. Neidig has not alleged a personal injury and is very much alive, the MPLA does not apply to her case against Valley.

A. The plain statutory language of the MPLA limits its applicability to claims involving physical or emotional injury.

As the Fourth Circuit recognized, the MPLA applies only when a plaintiff sues for "'medical professional liability' as those terms are defined under the Act."[41] The MPLA defines "[m]edical professional liability" as

> any liability for *damages resulting from the death or injury of a person* for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.[42]

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[41] JA 294–295 (quoting *State ex rel. W. Va. Div. of Corr. & Rehab. V. Ferguson*, 889 S.E.2d 44, 53 (W. Va. 2023)).

[42] W. Va. Code § 55-7B-2(i) (emphasis added).

Ms. Neidig's claims do not meet the definition of medical professional liability claims as they are not claims for "*damages resulting from the death or injury of a person*" because she claims no physical or emotional injury.[43]

1. The plain meaning of the phrase "*death or injury of a person*" is a personal injury.

In the Fourth Circuit, Valley argued that the MPLA does *not* demand a personal injury.[44] Citing *Black's Law Dictionary*, Valley argued that, because the Legislature used the phrase "personal injury" in another statute, it "knows the difference" and thereby intended for West Virginia's primary medical professional liability statute to, inexplicably, pertain to harms that have nothing to do with *medical* injury, even though that adjective is used throughout the statute.[45] Of course, Valley has no explanation why the Legislature *did* specify that "medical professional liability" concerns "death or injury *of a person*"[46] and what that means if it does not refer to, again, *personal* injury.

The Legislature did not define medical professional liability as merely "death or injury" negating Valley's argument that the West Virginia Legislature intended "injury" to be something broader than personal injury.

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[43] *Id.*

[44] JA 193.

[45] *Id.*

[46] *See* W. Va. Code § 55-7B-2(i)(emphasis added).

Valley's reading of the statute improperly reads the phrase "of a person" out of the statute.[47] Indeed, as the Fourth Circuit noted: "[t]he definition of "[m]edical professional liability" at issue here... places "injury" alongside "death," again most naturally encompassing physical injury arising from medical malpractice.[48] Thus, the plain meaning of the phrase "death or injury of a person" is a personal injury.

Elsewhere, the Legislature has used the terms personal injury and injury of a person interchangeably in the same statutes.[49] And, where the Legislature intends to include economic injuries in addition to injuries to a person, it does so explicitly.[50]

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[47] Syl. Pt. 11, *Brooke B. v. Ray*, 230 W. Va. 355, 738 S.E.2d 21 (2013) ("courts are not to eliminate through judicial interpretation words that were purposely included[.]")).

[48] JA 304 (citing § 55-7B-2(i)).

[49] *See e.g.*, W. Va. Code § 17C-4-1(a) (subsection of code setting forth duties when "driver of any vehicle involved in a crash resulting in the injury to or death of any person" contained in section entitled "Crashes involving death or personal injuries"); W. Va. Code § 19-18-1(a) (subsection of code creating liability for "damages for personal injury or property damage" in section entitled "damages for injuries to person or property").

[50] *See e.g.*, W. Va. Code § 17A-4A-11 ("Article to create no cause of action against such lienor for damage to property or injury to person."); W. Va. Code § 19-18-1 (section relating to "damages for injuries to person or property"); W. Va. Code § 61-5A-2(9) ("Harm" means loss to a person, physical injury of a person or injury to the property of a person, including loss to, physical injury of or injury to the property of any other person in whose welfare he is interested); *compare* W. Va. Code § 17C-4-1(a) (setting forth duties when "driver of any vehicle involved in a crash resulting in the injury to or death of any person") *with* W. Va. Code § 17C-4-2 (setting forth duties when "driver of any vehicle involved in a crash resulting only in damage to a vehicle").

2. Other provisions of the MPLA confirm that it only applies in the case of death or personal injury.

Other MPLA provisions confirm that death or a physical/emotional injury is required to trigger the MPLA. The MPLA defines "[i]njury" as "injury or death to a patient arising or resulting from the rendering of or failure to render health care." W. Va. Code § 55-7B-2(h). And, as the Fourth Circuit noted, "[t]his definition, in the medical context, most naturally points to a physical injury, particularly because [the MPLA] provides a single definition defining 'Injury' and '*Medical injury*' together."[51] Relatedly, Valley completely ignores the MPLA's use of "medical injury" throughout the statute, including in the right-of-action provision that would apply to Ms. Neidig.[52]

Moreover, if the MPLA applies in cases involving only economic injuries, this would lead to absurd results in the application of its other provisions. For example, an MPLA claim requires that the plaintiff establish that "the health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances."[53] While this standard makes sense in the context of a

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[51] JA 304 (citing § 55-7B-2(h)) (underscore added italics by court).

[52] *See* W. Va. Code § 55-7B-4(a).

[53] W. Va. Code § 55-7B-3(a)(1).

professional negligence claim, application to economic loss cases would be strained at best.

The results become even more absurd when one tries to apply the MPLA's provisions regarding prerequisites for suit to cases of economic injury only. In cases where expert testimony is necessary, the putative MPLA plaintiff is required to file a screening certificate of merit that is "executed under oath by a *health care provider* who... [d]evoted, at the time of *medical injury*, 60 percent of his or her professional time annually to *the active clinical practice in his or her medical field or specialty*, or to teaching in his or her *medical field or specialty* in an accredited university."[54] The expert health care provider providing the screening certificate of merit must also meet two of the expert witness requirements – that the medical expert "maintains a current *license to practice medicine* with the appropriate licensing authority of any state of the United States" and that "the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient."[55] For expert trial testimony in a MPLA action, in addition to the licensing and

[54] W. Va. Code § 55-7B-6(b)(3).

[55] W. Va. Code § 55-7B-6(b)(2) (emphasis added) (incorporating § 55-7B-7(a)(5) and § 55-7B-7(a)(6)).

practice requirements also applicable to the screening certificate of merit,[56] the expert must meet several additional provisions including: that the expert's "opinion can be testified to with *reasonable medical probability*"[57] and that "(4) the expert witness's opinion is grounded on *scientifically valid peer-reviewed studies* if available."[58]

These provisions make little sense in the context of cases involving only economic losses. Courts will struggle on how to apply them and reach absurd results that will be appealed. The existence of these absurd results is strong evidence that the MPLA was intended to only apply to injuries to a person that manifest physically.[59]

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Because of its failure to properly place the MPLA in the context of personal injury or wrongful death claims, Valley misconstrues the statute, resulting in a version of the MPLA where all one needs to trigger coverage is

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[56] W.Va. Code §§ 55-7B-7(a)(5), (6).

[57] W.Va. Code § 55-7B-7(a)(2) (emphasis added).

[58] W.Va. Code § 55-7B-7(a)(4) (emphasis added).

[59] Syl. Pt. 1, *Justice v. W. Va. Office of Ins. Comm'n*, 230 W. Va. 80, 736 S.E.2d 80 (2012) ("Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity will be made.").

an "injury" of any kind that is somehow derived from "health care."[60] This is not what the Legislature provided for in the MPLA, nor what it intended.

B. This Court has long recognized that the MPLA amended the common law with respect to claims predicated upon personal injury or death.

Repeatedly, this Court has acknowledged instances where the MPLA abrogates common law tort claims; however, those cases explicitly involved personal injury or wrongful death claims. "Thus, through the MPLA, the Legislature enacted a number of changes in the common law surrounding **personal injury** and **wrongful death** actions as applied to medical malpractice cases."[61] In previously considering the MPLA's statute of limitations, it held, "that once a patient is aware, or should reasonably have become aware, that medical treatment by a particular party has caused a **personal injury**, the statute begins."[62] Far more recently, the Court affirmed and built upon that analysis: "the Legislature intended the Wrongful Death Act statute of limitations to apply to causes of action for death sounding in medical negligence, and the MPLA to apply to causes of action for **personal**

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[60] JA 125.

[61] *Hicks v. Ghaphery*, 212 W. Va. 327, 339, 571 S.E.2d 317, 329 (2002) (emphasis added).

[62] *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714, 487 S.E.2d 901, 909 (1997) (emphasis added).

injury sounding in medical negligence."[63] Here, there is no personal injury alleged and no negligence claim of any kind asserted.[64] As such, this action is *not* embraced by the MPLA's definition of "medical professional liability" because there is no "death or injury **of a person.**"[65] Just as, Ms. Neidig would have no cause of action under W. Va. Code § 55-7B-4(a) because she has not suffered a "medical injury."

This Court, too, knows the difference between "personal injury" and common-language "injury" and has consistently used the phrase "personal injury"—both before and after 2015—to refer to the type of injuries comprised by MPLA claims.[66] And this Court, in responding to certified questions from the U.S. Court of Appeals for the Fourth Circuit, defined "personal injuries" in relation to "the rather obvious fact that **injuries to the person both physical and mental** can occur in an almost infinite variety of patterns."[67]

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[63] *State ex rel. Morgantown Operating Co., LLC v. Gaujot*, 245 W. Va. 415, 429, 859 S.E.2d 358, 372 (2021) (emphasis added).

[64] *See generally* JA 005–016.

[65] *See* W. Va. Code § 55-7B-2(i) (emphasis added).

[66] *See*, *e.g.*, *Gaujot*, 245 W. Va. at 429, 859 S.E.2d at 372; *Hicks*, 212 W. Va. at 339, 571 S.E.2d at 329.

[67] *Flannery v. U.S.*, 171 W. Va. 27, 29, 297 S.E.2d 433, 435 (1982) (emphasis added).

The MPLA governs cases of personal injury or wrongful death; a case devoid of personal injury or death falls nowhere on the "spectrum."[68]

Relatedly, it is inescapable that, in reviewing MPLA cases that have been before this Court, one will consistently find at the heart of the action a serious personal injury or death—e.g.: the death of an infant;[69] the permanent impairment of a newborn from intravenous air bubbles;[70] contaminated sutures that had been implanted in the plaintiffs' bodies;[71] or a serious left-shoulder injury suffered by a baby when she was being extracted from the womb.[72] The nature of those cases—medical malpractice resulting in personal injury—accords with the Legislature's declaration of purpose for the MPLA. That declaration includes mention of "*the possibility of injury or death from negligent conduct"; "injury or death as a result of professional negligence"; "traumatic injury health care services"; "the trauma care system"; and "compensation for injury and death."*[73]

This interpretation also accords with this Court's jurisprudence

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[68] *See Hicks*, 212 W. Va. at 339, 571 S.E.2d at 329; *Gaujot*, 245 W. Va. at 419–420, 859 S.E.2d at 362–363 (emphasis added).

[69] *Trivett v. Summers County Commission*, 249 W. Va. 231, 895 S.E.2d 86 (2023).

[70] *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 246 W. Va. 184, 866 S.E.2d 350 (2021).

[71] *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007).

[72] *Sexton v. Grieco*, 216 W. Va. 714, 613 S.E.2d 81 (2005).

[73] W. Va. Code § 55-7B-1 (emphasis added).

regarding personal injury whereby that term means *bodily* injury, which may include *severe* emotional distress of the type required for intentional infliction claims.[74] In incorporating severe emotional distress into the concept of "personal injury," this Court was careful to compare the modifier "personal" with "physical," noting "*this type of severe emotional distress will exhibit mental and emotional damages readily recognizable by qualified experts.*"[75]

No such injury has been alleged here—not even close.[76] Indeed, it is not a coincidence that this case, involving alleged overpayments for deficient mammograms, appears to stick out like a sore thumb among the types of cases—e.g., a stillbirth;[77] a newborn suffering permanent neurological impairment from intravenous air bubbles;[78] EMT services for a dying infant;[79] death after falling off an examination table after a hip surgery;[80] and death

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[74] *Mack-Evans v. Hilltop Healthcare Ctr.*, 226 W. Va. 257, 700 S.E.2d 317 (2010);*Nees v. Julian Goldman Stores*, 109 W. Va. 329, 154 S.E. 769 (1930) (personal injury case where plaintiff miscarried after being physically attacked by defendant's employee).

[75] *Courtney v. Courtney*, 190 W. Va. 126, 132, 437 S.E.2d 436, 442 (1993) (personal injury case concerning bodily injury and severe emotional distress from domestic violence) (emphasis added).

[76] *See generally* JA 005–016.

[77] *State ex rel. Charleston Area Med. Ctr. v. Thompson*, 248 W. Va. 352, 888 S.E.2d 852 (2023).

[78] *Scott*, 246 W. Va. 184, 866 S.E.2d 350.

[79] *Trivett*, 249 W. Va. 231, 895 S.E.2d 86.

[80] *Minnich v. MedExpress Urgent Care, Inc.—West Virginia*, 238 W. Va. 533, 796 S.E.2d 642 (2017).

from a stroke[81]—properly embraced by the MPLA. The reason for this absurdity is plain: the MPLA does not embrace Ms. Neidig's claims because she has not alleged a personal injury of any kind. Rather, because Ms. Neidig claims only economic loss related to misrepresentations and related charges, her case falls squarely within the WVCCPA's purview.

C. There is no MPLA "anchor claim" when the supposed "anchor claim" does not involve an allegation of death or a physical (or even an emotional) injury to a person.

Just last year this Court, acknowledging the 2015 MPLA amendments, held that the "contemporaneous" or "related" claims newly embraced by W. Va. Code § 55-7B-2(i) must be contemporaneous or related to a healthcare "anchor" claim.[82] The Court described the anchor claim as "the medical injury being asserted."[83] And the Court considered such *medical* injury in the context of the MPLA's new definition of "medical professional liability," which still requires "the death or injury *of a person.*"[84] That particular case, *State ex rel. Charleston Area Med. Ctr., Inc. v. Thompson*, concerned alleged negligence related to fetal remains.[85] However, the patient for MPLA purposes was the mother, not the

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[81] *Cline v. Kresa-Reahl*, 229 W. Va. 203, 205–206, 728 S.E.2d 87, 89–90 (2012).

[82] *Thompson*, 248 W. Va. at 361, 888 S.E.2d 852at 861.

[83] *Id.*

[84] *Id.*; W. Va. Code § 55-7B-2(i) (emphasis added).

[85] *Thompson*, 248 W. Va. 352, 888 S.E.2d 852.

deceased infant[86]—yet there was still a *personal* injury to the plaintiff mother.[87] More specifically, the mother asserted a claim for intentional infliction of emotional distress, which requires emotional distress so severe "that no reasonable person could endure it."[88] This is precisely the type of *severe* emotional distress that this Court has acknowledged as diagnosable by experts, including with the possibility of presentation via physical symptoms.[89]

Likewise, this Court expressly distinguished between the garden-variety emotional distress damages that are typically pleaded in civil actions and the type required to sustain a claim based on outrage.[90] Again, Ms. Neidig has plainly pleaded nothing that could even give rise to a reasonable inference of such severe emotional distress.[91] And *Thompson* followed *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, in which this Court applied the expanded language of W. Va. Code § 55-7B-2(i) to embrace claims that had

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[86] *Thompson*, 248 W. Va. at 358–359, 888 S.E.2d at 858–859.

[87] *Id.*

[88] 248 W. Va. at 360, 888 S.E.2d at 860; *e.g.*, *Travis v. Alcon Labs.*, 202 W. Va. 369, 375, 504 S.E.2d 419, 425 (1998) (internal quotation omitted).

[89] *See Courtney*, 190 W. Va. at 132, 437 S.E.2d at 442; *Flannery*, 171 W. Va. at 29, 297 S.E.2d at 435.

[90] *See e.g.*, *Zsigray v. Langman*, 243 W. Va. 163, 174, 842 S.E.2d 716, 727 (2020); *Travis*, 202 W. Va. at 380, 504 S.E.2d at 430; *Tanner v. Rite Aid of W. Va., Inc.*, 194 W. Va. 643, 651, 461 S.E.2d 149, 157 (1995).

[91] *See generally* JA 005–016.

been pleaded as corporate negligence.[92] In *Scott*, the patient-plaintiff was a minor, an infant that became "neurologically impaired and require[d] twenty-four hour care" following exposure to intravenous air bubbles.[93] Thus, *Scott* also featured a severe bodily injury to the plaintiff, as well as a claim for medical negligence.[94] Thus, there was in *Scott*, as in *Thompson*, an MPLA anchor claim—i.e., one predicated upon personal injury.[95]

All this is ultimately to say that because Ms. Neidig has not alleged injury to her person—or, obviously, death—there is no MPLA anchor claim here. This is not a matter of "creative pleading"[96]—it is a matter of properly pleading a consumer claim for economic damages. This Court's jurisprudence has since the MPLA's inception made it evident that the MPLA is a personal injury statute, not a free pass for healthcare providers to overcharge consumers as long as that overcharge somehow pertains to "health care."

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[92] *See generally Scott*, 246 W. Va. 184, 866 S.E.2d 350.

[93] 246 W. Va. at 189, 866 S.E.2d at 355.

[94] *Id.*

[95] *Id.*; 248 W. Va. at 361, 888 S.E.2d at 861.

[96] *See* JA 038; JA 113.

II. Valley's Interpretation of the MPLA Fails to Strictly Construe the MPLA in Violation of This Court's Rules of Statutory Construction.

A. The MPLA must be strictly construed.

This Court has acknowledged that the MPLA is in derogation of the common law and thus must be strictly construed:

> [T]his Court concluded in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, that the MPLA is in derogation of the common law and as such, its provisions must be given narrow construction. In recognizing the MPLA as in derogation of the common law, we cited syllabus point 3 of *Bank of Weston v. Thoma*s: "[s]tatutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms." We thus concluded in *Phillips*, "*[w]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.*"[97]

This Court has also expressly held that the MPLA was in derogation of the common law as to *personal* injury.[98] The ultimate point of this sub-section is simple: for the reasons already discussed, and others, the trial court failed to strictly construe the MPLA. Indeed, by failing to even analyze "personal injury," "medical injury," or "medical negligence"—all key MPLA elements and terms—and analyzing nothing more than "injury" and "health care," the district court *loosely* construed the MPLA and usurped the Legislature's role

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[97] *State ex rel. Morgantown Operating Co., LLC v. Gaujot*, 245 W. Va. 415, 428, 859 S.E.2d 358, 370 (2021) (emphasis added).

[98] 245 W. Va. at 427, 859 S.E.2d at 370.

by de facto exempting healthcare providers from WVCCPA and other common law liability. In contrast, the WVCCPA is a remedial statute to be broadly construed.[99]

B. Broadening the MPLA to include cases where there is no injury to a person or death will lead to absurd results.

If Valley's interpretation of the MPLA prevails, absurd results will occur in the kinds of cases that will be subsumed by the MPLA. This provides another reason to reject the limitless application of the MPLA argued by Valley.

If an economic injury is sufficient to trigger an MPLA claim, a large number of claims will now be subsumed into the MPLA. Other claims arising out of billing by medical providers provides one illustration. A claim against a medical provider that the patient was billed twice for services, billed for services never received, or billed for services in contravention of the providers' agreements with the patient's health insurer would all be subsumed into the MPLA. Similarly, if a hospital van on the way to pick up medical supplies hit a parked vehicle belonging to a patient in the hospital parking lot causing property damage, Valley's interpretation of the MPLA would require its application. There are numerous other examples of actual cases against

[99] *Barr v. NCB Mgmt. Servs.*, 227 W. Va. 507, 514, 711 S.E.2d 577, 584 (2011) (applying a section of the WVCCPA "broadly and liberally").

healthcare facilities that could be subsumed by the MPLA if Valley is correct and medical injury simply means *any* injury.[100]

By extension, it's not difficult to imagine bond holders of hospital debt needing to comply with the MPLA after a default.

CONCLUSION

Given the MPLA's text, legislative history and purpose; this Court's repeated use of the phrase "personal injury" in MPLA decisions; and this Court's sole consideration of MPLA cases where there was a bodily injury (or severe emotional distress capable of presenting physically), there is no reasonable argument that the MPLA was not intended to embrace cases where no claim involving death or injury to a person (a personal injury) has been asserted. A strict construction of the MPLA demands rejection of an interpretation of the MPLA to cases outside the context of personal injury or

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[100] This would include physician suits like *Camden-Clark Mem'l Hosp. Corp. v. Tuan Nguyen*, 240 W. Va. 76, 807 S.E.2d 747 (2017) (physician suit for economic damages as a result of his termination); *Katrib v. Herbert J. Thomas Mem'l Hosp. Ass'n*, 247 W. Va. 763, 885 S.E.2d 894 (2023) (physician suit for economic damages for suspension of his privileges); *Hamrick v. Charleston Area Med. Ctr., Inc.*, 220 W. Va. 495, 648 S.E.2d 1 (2007)(group of doctors seeking redress for nonpublic meetings); sexual harassment and discrimination suits like *State ex rel. ERx, LLC v. Cramer*, 247 W. Va. 739, 885 S.E.2d 870 (2023)(injury from sexual harassment by doctor); and even litigation regarding certificates of need such as *Stonewall Jackson Mem. Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc.*, 2023 W. Va. App. LEXIS 202, 2023 WL 4197305 (ICA) (hospital alleges potential injury from other healthcare facility); *Raleigh Gen. Hosp., LLC v. Appalachian Reg'l Healthcare, Inc.,* 2024 W. Va. App. LEXIS 14 (ICA). By extension, it's not difficult to imagine bond holders of hospital debt needing to comply with the MPLA after a default.

wrongful death cases because the statute, properly applied, requires a claim for physical or emotional injuries to a person. By failing to strictly construe the MPLA, as was required of it, Valley improperly interprets the statute outside of the appropriate context of personal injury, wrongful death, and medical negligence.

In the end, this is a case of a billing dispute by a customer seeking her economic losses because she didn't get what she paid for. This is not a medical malpractice case.

This Court should answer the Certified Question by holding that a claim that does not arise from a physical or emotional injury to a person is not within the scope of the MPLA.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I served the foregoing Petitioner's Opening Brief and Joint Appendix upon counsel of record through the Court's Electronic Filing System (FileandServeXpress).

s/ Anthony J. Majestro