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.

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# PETITIONER'S REPLY BRIEF

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

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## INTRODUCTION

In the Fourth Circuit, Appellee Valley Health argued that the phrase "death or injury of a person" in the Medical Professional Liability Act's definition of "Medical Professional Liability" includes cases where only economic damages are sought. In this Court, Valley now argues—for the first time—that a breach of contract claim seeking economic damages only falls within the definition. In this Court, Valley now argues—for the first time—that a Neidig's breach of contract claim seeking economic damages only falls within the definition. In essence, Valley asks this Court for a total, unqualified application of the MPLA whenever health care services are implicated. Valley's interpretation of the "Medical Professional Liability" definition is inconsistent with the MPLA's statutory scheme, is inconsistent with basic English grammar, flouts the natural reading, and cannot be squared with this Court's varied precedents blessing the disparate treatment of personal injury claims and claims purely for economic loss.

Neidig's interpretation causes none of those problems and solves others. Economic losses are hardly "Medical Injuries" under the MPLA and providing relief to consumers victimized by unlawful business practices does not jeopardize the medical malpractice insurance industry. The ordinary reader need not re-read or continually cross reference the statute to discern its meaning under Neidig's interpretation. And unlike Valley's position, Neidig's position requires no additional work from this Court because her interpretation is consistent with established economic loss jurisprudence. On the other hand, this Court would be forced to

reconcile its established precedent with a special umbrella-like exemption for health care providers and facilities that finds no basis in the statutory text. The provisions of the MPLA do not apply to claims seeking solely on economic damages. This bright line rule appropriately cabins the MPLA to cases where the claim is for death or personal injury and draws a line that excludes cases seeking only economic losses.

## STATEMENT OF THE CASE

There can be no question that the mammograms received by Ms. Neidig were not what she paid for. Valley's attempts to leave doubt on this point utterly fails.

Valley does not contest, nor could it at this stage where Neidig's well-pled complaint must be taken as true, that 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."[1] Nor do they contest that Valley's accreditation to perform these services was canceled.[2]

Valley does not dispute that it wrote Ms. Neidig and told her about a "serious concern about the quality of the mammography that our facility performed" for her.[3] Valley attempts to excuse its failures by pointing out that it told her that its failures did "not necessarily mean that the results you and your health care provider(s) were given were wrong."[4] Of course, the same could be said had Valley based the results it gave her on a flip of a coin. The "serious risk to human health" identified by the

[1] JA 009, at ¶¶ 25–27.

[2] JA 024.

[3] JA 009, at ¶ 28; JA 025.

[4] JA 025.

FDA is that an improperly performed mammogram will miss cancer that is otherwise undetectable.[5]

Notwithstanding Valley's letter to her setting forth its "serious concern[s]" over the quality of her mammograms, it attempts to defend the mammograms Ms. Neidig received.[6] The suggestion, with no citation to the record, that her mammograms were appropriate, was not made in any previous brief or pleading, is contrary to the allegations in the Complaint, and is denied by Ms. Neidig.

Valley also points out, again for the first time in its response brief in this Court, its offer to Neidig to "pay for the reevaluation of [her] mammogram(s) and for [her] repeat mammogram, if needed...."[7] without noting that its offer to pay was conditioned on Ms. Neidig returning to a Valley facility for services.[8] Whether an offer to have the entity that told Ms. Neidig that she couldn't rely on her mammograms repeat them cures its prior failures is a merits question on damages beyond the scope of Valley's motion to dismiss or this certified question proceeding.

## ARGUMENT

Valley no longer contests Neidig's position that the Medical Professional Liability Act ("MPLA") is triggered (at least in a tort case) only when there is a "death

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[5] *See, e.g.,* Center for Disease Control and Prevention, "What Is a Mammogram," https://www.cdc.gov/cancer/breast/basic_info/mammograms.htm (last accessed May 15, 2024) ("Doctors use a mammogram to look for early signs of breast cancer. Regular mammograms can find breast cancer early, sometimes up to three years before it can be felt.")

[6] Response at 3.

[7] *Id.* (quoting JA 025–026).

[8] JA 025–026.

or injury of a person" and that "death or injury of a person" is synonymous with a personal injury.[9] Nor does Valley contest that the 2015 MPLA amendments adding MPLA coverage for claims that are "contemporaneous" still require a showing that the "contemporaneous" claim is anchored to a claim for "damages resulting from the death or injury of a person for any tort or breach of contract."[10] Instead, it asserts an entirely new argument – that any claim for breach of contract based on health care services falls within the MPLA. Not so. For the reasons noted below, Valley's claim that the MPLA applies to *all* breach of contract actions violates the established rules of statutory construction and is procedurally defective.[11]

## III. Valley Health's Definition Of Medical Professional Liability Distorts The Statutory Text And Basic Rules Of English Grammar.

We begin with the text of the Act. The MPLA applies only when a plaintiff sues for "'medical professional liability' as that term is defined under the Act."[12] 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

[9] W. Va. Code § 55-7B-2(i); *see generally* Opening Brief at Part I(A).

[10] W. Va. Code § 55-7B-2(i); *see generally* Opening Brief at Part I(C).

[11] With a healthy dose of hutzpah, Valley chides Petitioner for not addressing their argument that the MPLA trigger in W. Va. Code § 55-7B-2(i) applies to breach of contract claims regardless of whether the claim involves death or injury to a person. Valley's response brief in this Court is the first time they raised this interpretation of the MPLA either at argument or in motions or briefs. Nor did its Amici, the largest hospitals in the State, raise the argument here or in the Fourth Circuit.

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

> or otherwise provided, all in the context of rendering health care services.[13]

Valley argues that the express requirement that there be a claim for "death or injury of a person" only applies to tort claims not claims for breach of contract.

A proper reading of the definition, however, establishes that the phrase "damages resulting from death or injury to a person" modifies "any liability" and applies equally to anchor claims in tort and in contract. Valley Health's interpretation violates basic rules of grammar by ignoring the syntactical structure of the sentence and misplacing modifiers.

Valley Health argues that there are three sets of claims that fall under the definition of medical professional liability:

> (1) "the death or injury of a person for any tort … based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient"; (2) "breach of contract based on health care services rendered, or which should have been rendered, by any health care provider or health care facility to a patient"; and (3) "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."[14]

Under Valley's interpretation, any contract claim based on health care services, irrespective of the injury to the patient or the harm alleged, fall under the MPLA. The MPLA's scope, which must be strictly construed,[15] is not that broad.

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

[14] Response at 7–9.

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

### A. Interpreting the phrase "for death or injury of a person" to only modify "for any tort" and not any claim for "breach of contract" violates basic rules of grammar and statutory interpretation.

Petitioner begins with what should be obvious:

> Although drafters, like all other writers and speakers, sometimes perpetrate linguistic blunders, they are presumed to be grammatical in their compositions. They are not presumed to be unlettered. Judges rightly presume, for example, that legislators understand subject–verb agreement, noun–pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word-choice. No matter how often the accuracy, indeed the plausibility, of this presumption is cast in doubt by legislators' oral pronouncements, when it comes to what legislators enact, the presumption is unshakable.[16]

This Court regularly uses basic grammar to interpret statutes.[17] In an attempt to broaden the MPLA to cover economic injuries, Valley ignores basic grammar rules.

The West Virginia Legislature's definition of "medical professional liability" begins with "any liability." That broad, general category is then modified by a series of four prepositional phrases, three of which are integrated with the conjunction "or." These four phrases control the reading of this statute because prepositions express the relationship between the object of the preposition and the word or phrase being modified, and joined by the conjunction "or" offer alternative, co-equal conditions.

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[16] Antonin Scalia & Bryan A. Garner, *Scalia and Garner's Reading Law: The Interpretation of Legal Texts* at p. 121 (2012).

[17] *Williamson v. Greene*, 200 W. Va. 421, 427, 490 S.E.2d 23, 29 (1997) (crediting interpretation of statute "[a]s a matter of grammar"); *State ex rel. Lorenzetti v. Sanders*, 235 W. Va. 353, 361, 774 S.E.2d 19, 27 (2015) ("Parsing the relevant statutory text according to the rules of grammar. . . .").

when following a positive statement like "resulting from" or "based on."[18] Thus, each of the four prepositional phrases exists both as individual modifiers and in the context of the comprehensive modification of the sentence's operative object "any liability."

A proper construction of this definition makes as much clear. The object of the definition's first sentence "any liability" is modified by the first phrase "for damages," which is modified further by the dependent clause "resulting from death or injury to a person." The second phrase "for any tort or breach of contract," also modifies "any liability" because the mirrored use of the preposition "for" indicates mutual modification. The subsequent dependent clause, "based on health care services rendered, or which should have been rendered," then modifies that second phrase. Finally, the third phrase "by a health care provider or health care facility" modifies the second phrase because the third is set off by a comma, and the fourth phrase modifies the third phrase because of the last antecedent rule.[19]

Together, each modification clarifies under what circumstances "any liability" is considered "Medical Professional Liability." Most telling is the parallel use of the two prepositions "for," initiating the first half of prepositional phrases governing the

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[18] *See Pulsifer v. United States*, 144 S. Ct. 718, 727–729 n.3, 5 (2024) (emphasizing that "content drives meaning," and "conjunctions are versatile words, which can work differently depending on context"); *see also id.* at 742 (Gorsuch, J., dissenting) (explaining how when "'and' connects a list following a negative conditional statement ('if . . . the defendant does not have')" it plays an additive, dependent role).

[19] *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."); *see also Cyan, Inc. v. Cty. Emples. Ret. Fund*, 583 U.S. 416, 440 (2018) (concluding "the modifier goes back to the beginning of the preceding clause" because "clause hangs together as a unified whole, referring to a single thing").

statute. Each expresses the relationship between "any liability" and cognizable claims under the MPLA—the first limiting claims only for certain damages, the second limiting claims only for certain actionable conduct.[20]

In *Navy Fed. Credit Union*, the Court was tasked with determining whether a federal credit union was a corporation, and if so, where it was a citizen, for purposes of diversity jurisdiction.[21] Because "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business[,]" the Court had to decide if a federally incorporated corporation with a principal place of business in Virginia was a citizen of Virginia or if it was a stateless corporation.[22] The Court rejected the argument that the federally incorporated corporation had no citizenship because it could not satisfy the first prepositional (adjectival) phrase: "of every State and foreign state by which it has been incorporated" in § 1332.[23] "By its own terms, § 1332(c)(1) offers two grounds for corporate citizenship—a corporation is (1) a citizen 'of every State and foreign state by which it has been incorporated' *and* (2) a citizen 'of the State or foreign state where it has its principal place of business.'"[24]

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[20] *Navy Fed. Credit Union v. Ltd Fin. Servs., LP*, 975 F.3d 344, 357 (4th Cir. 2020) (reasoning "parallel use of . . . preposition[s]" creates structural independence and indicates such clauses should operate independently of each other and modify the same operative noun or object) (citing Chicago Manual of Style § 5.176 (17th ed. 2017)).

[21] *Id.* at 351–352 (citing 28 U.S.C. § 1332(a)(1)).

[22] *Id.* at 356 (quoting 28 U.S.C. § 1332(c)(1)).

[23] *Id.* (quoting 28 U.S.C. § 1332(c)(1)).

[24] *Id.*

The Court relied on "three structural and contextual features" to read "and" in § 1332(c)(1) as two independent conditions for establishing citizenship, rather than a second condition triggered only by satisfying the first.[25] First, "[t]he parallel use of the preposition 'of' confirms that both clauses (really, adjectival phrases) are directed toward the word 'citizen,' not one another."[26] "Second, the clauses' logical independence confirms their structural independence."[27] Third, the use of "and" throughout the rest of the statute confirmed the Court's reading.[28]

This Court has similarly interpreted statutes with parallel construction, refusing to accept "that the Legislature haphazardly structured" its' written intent.[29] In *Woodrum*, this Court found the "parallel language" of the kidnapping statute was "to be read similarly" and "describe[d] a single form of the offense of kidnapping."[30] This Court was also unpersuaded by the State's insistence that "or" in subsection (a)(2) cutoff the effect of the subsection's initial phrase.[31]

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[25] *Id.* at 357.

[26] *Id.* (finding each clause provides a different structural basis for determining corporate citizenship).

[27] *Id.* (reasoning "[w]hen objects connected [by a conjunction] are independent, they are generally taken 'in addition'") (quoting Reed Dickerson, *The Fundamentals of Legal Drafting* § 6.2, at 105 (2d ed. 1986)).

[28] *Id.* at 358 (refusing to condition the second clause on the first because "[t]he first clause itself uses the word *and*, providing that a corporation is a citizen 'of every State *and* foreign state' where incorporated") (emphasis in original); *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) ("In all but the most unusual situation, a single use of a statutory phrase must have a fixed meaning' across a statute.").

[29] *State v. Woodrum*, 243 W. Va. 503, 509–510, 845 S.E.2d 278, 284–285 (2020); *see also State v. Smith*, 243 W. Va. 470, 844 S.E.2d 711 (2020) (same conclusion under same statute).

[30] *Id.*

[31] *Id.* at 510, 285 (concluding "[c]ommon sense also counsels against" reading "or" in

The same three structural and contextual features relied upon in *Navy Fed. Credit Union* prove Valley Health's reading of the MPLA's definition medical professional liability untenable. And the interpretive approach employed by this Court in *Woodrum* is compatible only with Plaintiffs' definition of Medical Professional Liability. First, as discussed above, this statutory definition uses parallel prepositions to modify the object "any liability" with two distinct phrases. The first prepositional (adjectival) phrase relates to damages resembling personal injuries, and the second prepositional (adjectival) phrase relates to causes of action. Second, and similarly, types of damages and causes of actions are as independent as incorporation and principal place of business in *Navy Fed. Credit Union, supra* — buttressing the modifiers' independence. Third, "or" is used six times in the definition, but Valley Health's reading interprets it two different ways. Take for example the first two usages of the conjunction. Liability exists for damages resulting from death or injury to a person—not just death, but under Valley's interpretation, liability for damages resulting from death or injury to a person exists only in tort—not for any tort or breach of contract.[32] The Legislature, in all likelihood, intended a more natural—less haphazard—reading.

This Court's interpretation of similarly drafted statutes confirms that result. Like in *Woodrum* where multiple adjectival phrases that began with "to" followed by

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subsection (a)(2) as a "hard stop" because doing so asks the reader to describe "intent" in subsection (a), at the very beginning of the statute, "[r]ather than describe the noun ["intent" in (a)(2)] that immediately precedes it").

[32] Def. Br. 15–16.

a verb conveyed parallel structure, here the first two prepositional phrases beginning with "for" should be read similarly. They do not modify each other but instead modify the operative object, "any liability." Additionally, Valley reads "or" as a "hard stop" in the same way that this Court disapproved of in *Woodrum*. There is no textual basis to read *only* the "or" in the second phrase as disjunctive. And that is particularly true here, because Valley, undeterred by its own disjunctive reading of "or," transports the dependent clause following the word "contract" to also modify "tort." That makes no sense, grammatically or otherwise.

Simply put, the definition operates to condition what subset of "any liability" qualifies as "Medical Professional Liability." Those conditions are imposed through the four prepositional phrases discussed above. Context and content answer any lingering interpretative concerns. Plaintiffs' reading is the only reading consistent with the text itself, the statutory scheme, and this Court's precedent differentiating between claims for economic loss and claims for personal injury.

Valley's unnatural reading of the statute asks too much of readers, and this Court.[33] Valley Health can offer no explanation consistent with traditional rules of grammar, the existing statutory scheme, or this Court's MPLA jurisprudence to justify its choppy dissection of the statute. This Court should find the MPLA is

[33] *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 99 (2018) (finding "it would be odd to read" the first half of similarly written statute with "distributive phrasing and then, halfway through and without warning, switching to a disjunctive phrasing—all the while using the same word ("or") to signal both meanings.").

triggered, whether the claim sounds in tort or in contract, only when the claim involves a death or injury to the person.

### B. Valley's reading ignores the 2022 definitional changes to the MPLA by the Legislature.

The West Virginia Legislature amended the Medical Injury definition in 2022, as part of its response to this Court's decision in *Gaujot I*.[34] The actual definition remained the same but Injury and Medical Injury were defined as synonyms. *See* W. Va. Code § 55-7B-2(h) ("'Injury' or 'Medical injury' means injury or death to a patient arising or resulting from the rendering of or failure to render health care.").

In *Gaujot I,* this Court decided that the Wrongful Death Act's two-year statute of limitations applied to wrongful death actions alleging medical negligence, as opposed to the MPLA's one-year statute of limitations.[35] That decision turned in large part on this Court interpretation of the word "injury" because the MPLA's statute of limitations then referred only to injury, but "Medical Professional Liability" referenced death or injury.[36] And this Court came to that conclusion under the implicit assumption injury meant personal injury.[37]

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

[35] *Gaujot I*, 245 W. Va. at 429, 859 S.E.2d at 272.

[36] *Id.* at 428, 371 (finding "that injuries are distinct from death . . . and unless expressly lumped together by the legislature, must be treated differently").

[37] *Id.* at 419, 363 (reiterating "at the outset the distinctions between personal injury cases alleging medical negligence and wrongful death cases alleging medical negligence" under the MPLA). Federal Courts in West Virginia have likewise assumed the MPLA is limited to personal injuries. *See Taylor v. Nursing Care Mgmt. of Am.*, No. 2:05-1165, 2007 U.S. Dist. LEXIS 115847, at *6 (S.D. W. Va. April 10, 2007) (finding contract claim for physical injuries caused by inadequate health care "does not alter the fact that it is an action for personal

Thereafter, the Legislature redefined "Injury" and "Medical Injury" as synonyms.[38] Ironically, the Legislature's elimination of any distinction between claims for injury and claims for death proves Plaintiffs' point here. The word injury in the "Medical Professional Liability" definition must also be read to mean "Medical Injury."[39] Plaintiffs' claims for economic damages are certainly not best or most naturally understood as "Medical Injur[ies]"—especially after this Court decisions post-dating the most recent legislative amendments.[40]

When the Legislature defined "Injury" and "Medical Injury" synonymously, it strengthened the relationship between death and injury, as used in the "Medical Professional Liability" definition. Medical malpractice is distinct and requires a personal injury or death.

### C. The Legislature is presumed to be aware that this Court regularly recognizes distinctions between claims for personal injury and claims for economic loss.

When interpreting a statute, the Legislature is presumed to be aware of judicial decisions of this Court:

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injury under the MPLA."); *Totten v. Scaife*, No. 3:21-0306, 2022 U.S. Dist. LEXIS 12279, at *5 (S.D. W. Va. Jan. 24, 2022) (applying the Federal Tort Claim Act to MPLA claim because "[i]t protects commissioned officers or employees . . . from liability for personal injury, including death"); *Sumpter v. United States*, No. 5:16-cv-08951, 2019 U.S. Dist. LEXIS 224953, at *4 n.4 (S.D. W.Va. July 1, 2019) (same).

[38] *See* W. Va. Code §55-7B-2(h).

[39] *Id.*

[40] *See Sager v. Duvert*, 895 S.E.2d 76, 82 (2023) (reasoning a medical injury "necessarily occurred prior to the end of [plaintiff's] treatment"); *Trivett v. Summers Cnty. Comm'n.*, 895 S.E.2d 86, 99 (2023) ("extending the MPLA to include individuals or entities [or claims] other than those specifically designated by the Legislature would be inconsistent with the statute's purpose").

> This Court has held that it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law. This includes familiarity with the rules of statutory construction. We may, therefore, presume that when it legislates, the Legislature is aware of judicial interpretations of existing statutes when it passes new laws.[41]

This Court has consistently recognized that there is a distinction between claims for personal injury and claims seeking only economic losses even when the claims sound in contract. The requirement that an MPLA claim arise out of a death or injury to a person whether sounding in tort or contract is a recognition of the established distinction which the Legislature should be presumed to be aware.

For example, this Court's adoption of the "economic loss rule" generally precludes negligence and strict liability claims seeking only economic losses.[42] This

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[41] *Duff v. Kanawha Cnty. Comm'n*, No. 23-43, 2024 W. Va. LEXIS 175, at *17–18 (Apr. 22, 2024).

[42] *Aikens v. Debow*, 208 W. Va. 489, 499, 541 S.E. 2d 576, 589 (2000) (concluding that "an individual who sustains purely economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages…"); *Webb v. Appalachian Power Co.*, Civil Action No. 2:09-0813, 2011 U.S. District LEXIS 46947 at *9 (S.D. W. Va. 2011) (same); *Commercial Steam Cleaning, L.L.C. v. Ford Motor Co.*, Civil Action No. 2:09-1009, 2010 U.S. Dist. LEXIS 41372 at **21–22 (S.D. W. Va. 2010) (same); *Aikens v. Debow*, 208 W. Va. 489, 499, 541 S.E. 2d 576, 589 (2000) (concluding that "an individual who sustains purely economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages…");*Webb v. Appalachian Power Co.*, Civil Action No. 2:09-0813, 2011 U.S. District LEXIS 46947 at *9 (S.D. W. Va. 2011) (finding negligence claim foreclosed by West Virginia's economic loss rule in a case where the plaintiff sought to recover economic damages in the absence of physical harm to person or property); *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 84, 297 S.E.2d 854, 859 (1982) (strict liability claim for damage to the product itself limited to cases of sudden calamitous events); *Commercial Steam Cleaning, L.L.C. v. Ford Motor Co.*, Civil Action No. 2:09-1009, 2010 U.S. Dist. LEXIS 41372 at **21–22 (S.D. W. Va. 2010) ("Plaintiffs have not

is especially true when it comes to the statute of limitations. A breach of warranty claim alleging a personal injury is subject to a two-year statute of limitations rather than the four-year statute of limitations under the Uniform Commercial Code.[43] In contrast, the five-year statute of limitations for implied contracts was applied to wage payment claims rather than the two-year statute for personal injury and death claims because the injuries were solely economic.[44] And, with respect to the discovery rule, while an injured party claiming a personal injury as a result of a breach of warranty is entitled to rely on tolling,[45] a person claiming only economic losses is not.[46]

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alleged that defects in the engine caused a physical injury to persons or property. Neither does it appear that the special relationship exception to the economic loss rule reaches situations such as this that allege economic loss resulting from a defective product. Also absent is any allegation of a sudden calamitous event under *Star Furniture*. Count Four thus appears to sound in Uniform Commercial Code warranty or contract law rather than tort.").

[43] *Taylor v. Ford Motor Corp.*, 185 W. Va. 518, 522, 408 S.E.2d 270, 274 (1991) (In a case where a Plaintiff suffered severe injuries including becoming a quadriplegic following a vehicle collision who filed suit against the vehicle manufacturer alleging breach of implied warranty of fitness, this Court concluded that "the four-year U.C.C. provision is ill suited to personal injury suits;" thus, "where a person suffers personal injuries as a result of a defective product and seeks to recover damages for these personal injuries based on a breach of express or implied warranties, the applicable statute of limitations is the two-year provision contained in W. Va. Code, 55-2-12, rather than the four-year provision contained in our U.C.C., W. Va. Code, 46-2-725").

[44] *Grim v. E. Elec., Inc.*, 234 W. Va. 557, 566, 767 S.E.2d 267, 276 (W.Va. 2014) (circuit court erred in applying the two year statute of limitations set forth in West Virginia Code §55-2-12 to a Prevailing Wage Act claim since it was not a personal injury or property injury tort claim as the "injury that flows from a violation of the PWA is purely economic; the **only** damages a worker may recover is the difference between the rate he or she was paid and the posted prevailing wage, a statutory penalty equal to the difference, and reasonable attorney's fees." (emphasis in original)).

[45] *Taylor*, 185 W. Va. at 522, 408 S.E.2d at 274. Similarly, the statute of limitations for breach of warranty claims asserting economic losses generally begins to run on the date of sale while the limitations from the same breach resulting in a personal injury generally runs from the date of the personal injury.

[46] *Basham v. Gen. Shale*, 180 W. Va. 526, 531, 377 S.E.2d 830, 835 (1988) (rejecting discover rule "where the only loss suffered is an economic loss").

The MPLA's requirement that a death or injury to a person exist as a prerequisite to invoking the statute is consistent with the established distinction between claims arising out to personal injury and those that are pure economic losses as is the case here. This Court should presume that the Legislature understands how this Court interprets the distinction and give the phrase death or injury to a person for any tort or breach of contract the clear meaning the statutory text demands.

### D. Public policy requires that this Court honor the intent of the Legislature as expressed in the clear language it uses in the MPLA.

Valley Health argues that its "interpretation" of the MPLA somehow honors the intent of the Legislature. It suggests that this Court reformulate the certified question to ask include the failure to follow the accepted standard of care as a trigger for the MPLA regardless of the injury claimed.[47] It also attempts to cabin its expansive interpretation of the Act by adding a requirement that the MPLA only be triggered when the actions of the defendant "implicate medical judgment."[48] This turns Legislative intent on its head as there is no basis for reading these concepts into MPLA's clear trigger which requires a claim asserting death or injury to a person.

As this Court has noted it presumes that that the "Legislature says in a statute what it means and means in a statute what it says there."[49] This Court has rejected attempts to broaden the MPLA by adding words that are not there:

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[47] Response at 1.

[48] Response at 25.

[49] *W. Va. Consol. Pub. Ret. Bd. v. Clark*, 245 W. Va. 510, 513, 859 S.E.2d 453, 457 (2021).

> However, "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted."[50]

Thus, when a statute is clear, "this Court is not permitted to engage in an examination of the public policy ramifications potentially resulting from its application or to comment upon the wisdom of the legislation as unambiguously expressed."[51] Here, the common sense meaning of the words used and the rules of grammar preclude reading into the MPLA's trigger any case where medical judgment is at issue.[52]

Indeed, public policy demands applying the words chosen by the Legislature instead of straining to interpret the MPLA to encompass economic losses when the definition clearly requires a death or personal injury. It is clear that Valley and other health care providers would prefer that "the MPLA [be] the exclusive remedy" for all claims against them,[53] but this Court's precedents compel the opposite: "we conclude that, where there is any doubt about the meaning or intent of a statute in derogation of the common law [such as the MPLA], the statute is to be interpreted in the manner

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[50] *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007).

[51] *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 533, 782 S.E.2d 223, 228 (2016).

[52] Neidig's opening argument pointed out that her interpretation is consistent with the other provisions of the Act. Opening Brief, Part I(A)(2). Valley's only response is a circular argument that the existence of these inconsistent provisions is evidence that the MPLA applies to economic injuries. It ignores the fact that if personal injury is required, as the definition of medical professional liability states, the inconsistencies pointed out by Neidig resolve themselves. Not so with Valley's interpretation.

[53] Response at 25.

that makes the least rather than the most change in the common law."[54] Valley's interpretation does not meet this standard.

## IV. The Applicability Of The WVCCPA Is Beyond The Scope Of These Proceedings.

Valley argues that this Court should rule that the WVCCPA does not apply to Medical professional liability claims. This argument is both procedurally and substantively improper.

First, neither the question certified by the Fourth Circuit, nor the reformulation of the certified question posed by Valley, encompass the applicability of the WVCCPA. Under the Uniform Certification of Questions of Law Act, this Court's power to answer a certified is limited cases where "the answer may be determinative of an issue in a pending cause."[55] Here the Fourth Circuit expressly found the issue of whether MPLA was inapplicable to cases not involving death or injury to a person was actually determinative to the case.[56] While Valley raised the issue in the District Court and Forth Circuit,[57] the district court did not rule on the issue,[58] and the Fourth Circuit expressly declined to certify the question of the applicability of the WVCCPA. Here, Neidig has pled claims for breach of contract and unjust enrichment in addition to her WVCCPA claims.[59] Thus, it is speculative

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[54] *Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. at 492, 647 S.E.2d at 928.

[55] W.Va. Code § 51-1A-3.

[56] JA 305.

[57] JA 197–200.

[58] JA 120–126.

[59] JA 010–013.

whether the answer to the viability of her WVCCPA claim may be determinative of an issue in the case. While this Court can certainly reformulate the certified question,[60] certified question cases are interlocutory, and this Court should tread lightly and not resolve a question that is beyond the scope of the certified question that neither of federal courts have spoken on.[61]

With respect to the merits of Valley's arguments. Neidig incorporates her substantive arguments from its briefs in Federal Court.[62] Valley argues that this Court found that the MPLA applied to an action bringing claims based on the WVCCPA.[63] Suffice to say that this Court has never ruled that economic losses caused by a hospital incurred in violation WVCCPA were not cognizable. *Blankenship v. Ethicon, Inc.*, the case relied on by Valley, is distinguishable as that case expressly involved a "infections, injuries and damages after improperly sterilized Vicryl sutures had been placed in their bodies."[64] As such the issue raised by this case – the applicability of the MPLA to claims limited to economic loss – was not at issue in that case. Unlike *Blankenship,* this case involves a core consumer issue –

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[60] W.Va. Code § 51-1A-4.

[61] *Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999) ("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."); *Whitlow v. Bd. of Educ.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.").

[62] JA 135–169; JA 256–287.

[63] Response at 22 (citing *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 702, 656 S.E.2d 451, 453 (2007)).

[64] *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 703, 656 S.E.2d 451, 454 (2007).

not receiving the services as they were represented. As applied to the facts of this case, the WVCCPA is neither vague nor ambiguous.[65]

## CONCLUSION

The MPLA was designed to address claims for death or injury to a person. The rules of statutory interpretation compel the conclusion that the Plaintiff's claims cannot fall under the MPLA if the plaintiff disclaims any form of physical or emotional injury. This Court should answer the Fourth Circuit's certified question in the negative.

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[65] JA 011-012.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2024, I served Petitioner's Reply Brief upon counsel of record through the Court's Electronic Filing System (FileandServeXpress).

s/ Anthony J. Majestro