RECORD NO. 24-27

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiff-Appellant,

vs.

VALLEY HEALTH SYSTEM,

Defendant-Appellee.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(RECORD NO. 22-2227)

BRIEF OF APPELLEE VALLEY HEALTH SYSTEM

J. Tyler Mayhew (WVSB #11469)
Bowles Rice LLP
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
Tel: (304) 264-4209
Fax: (304) 267-3822
tmayhew@bowlesrice.com

Counsel for Valley Health System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. QUESTION PRESENTED

The United States Court of Appeals for the Fourth Circuit certified the following 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.

JA 290. This Court should exercise its discretion to reformulate that question as follows:

> Whether a claim that arises from "health care" rendered to a "patient," and that necessarily depends upon proof that a "health care provider" or "health care facility" failed to follow the accepted standard of care, falls under the West Virginia Medical Professional Liability Act, regardless of how it has been pled or the type of damages being sought.

See W. Va. Code § 51-1A-4. Pursuant to this Court's precedents, the answer is "yes." *See, e.g., State ex rel. Charleston Area Medical Center, Inc. v. Thompson*, 248 W. Va. 351, 888 S.E.2d 852 (2023) ("By the plain language of the statute, the MPLA applies when the action arises from 'health care' rendered to 'a patient.'"). *See also State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 246 W. Va. 184, 193-194, 866 S.E.2d 350, 360-361 (2021) ("It goes without saying that [a plaintiff] cannot avoid the MPLA with creative pleading," so a corporate negligence claim arising from medical documentation falls within the Act because it "implicate[s] the provision of 'health care' under the amended MPLA.").

II. STATEMENT OF THE CASE

Contrary to Appellant's arguments, this case is not just "a run of the [mill] billing dispute," *see* Appellant Br. at 1, and it has nothing to do with Valley Health's advertising. Instead, Appellant is attempting to circumvent the West Virginia Medical Professional Liability Act ("MPLA" or the "Act") by recasting her time-barred medical professional liability claim as claims for unjust enrichment, breach of contract, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). After this case was removed to federal court and Valley Health

moved to dismiss, the district court concluded that Appellant's claims "are based upon the substandard mammograms she received from Valley Health," and at a minimum are therefore "contemporaneous to or related to the alleged tort or breach of contract … in the context of rendering health care services" for purposes of the MPLA's definition of "medical professional liability." JA 125. The district court's conclusion is correct: regardless of how Appellant pled her claims, her ability to succeed necessarily depends upon proof that Valley Health failed to follow the accepted standard of care in performing her mammograms.

A. Appellant Sues Valley Health, Alleging That the Mammograms She Received "Were Not Quality Healthcare" Because Valley Health's "Staff Were Not Accurately Positioning or Compressing Women's Breasts During Mammograms."

On August 3, 2022, Appellant filed this putative class action in West Virginia state court, seeking over $6 million in damages, plus statutory damages and attorneys' fees, alleging she "has been … injured" by substandard mammograms she received from Appellee Valley Health System's ("Valley Health") Outpatient Diagnostic Center at Winchester Medical Center ("WMC"). JA 1, 5-16, 23-26.[1] Specifically, she claims her mammograms "were not 'quality healthcare'" because "staff were not accurately positioning or compressing women's breasts during mammograms." JA 9. Appellant claims that Valley Health "fail[ed] to ensure that its mammogram technicians were performing [] procedures to the FDA's standards," resulting in "serious image quality deficiencies" that pose a "serious risk to human health." *Id*.

The Mammography Quality Standards Act requires all mammography facilities to be accredited in the United States. JA 8, 25-26. *See also* Mammography Quality Standards Act of 1992, Pub. L. No. 102–539, 106 Stat. 3547. Valley Health, including WMC, voluntarily

[1] Exhibits 1 and 2 to Appellant's Complaint are located at JA 23-26. Appellant appears to have inadvertently included discovery requests that were served with the Complaint but that are not at issue in this appeal. *Cf.* JA 17-22.

participates in the Mammography Accreditation Program provided by the American College of Radiology ("ACR"). JA 8-9.

On July 1, 2019, the ACR notified WMC that it was required to participate in an Additional Mammography Review after a deficiency was noted in reviewing its records. JA 9, 23-24. Thereafter, WMC stopped performing mammography services on August 31, 2019. JA 25-26. On September 4, 2019, the ACR temporarily revoked WMC's accreditation and required it to give Patient and Referring Healthcare Provider Notifications ("PPN") to alert all at-risk patients and their providers of quality issues with mammograms performed at WMC between June 20, 2017 and August 31, 2019. JA 23-26. WMC's accreditation was subsequently reinstated and it is currently performing mammography. JA 24.

Appellant received a PPN letter from Valley Health on December 16, 2019 because she received one or more mammograms at WMC during the relevant timeframe. JA 25-26. Appellant admits she received the PPN on December 16, 2019, and she attached a copy as Exhibit 2 to her Complaint. JA 9, 25-26. *See also* JA 62-63 & Appellant Br. at 3. The PPN informed Appellant that "there is serious concern about the quality of the mammography" she received, although **"[t]his does not necessarily mean that the results you and your health care provider(s) were given were wrong."** JA 25 (emphasis added). The PPN recommended that she take certain actions depending on the date of her last mammogram and offered to "pay for the reevaluation of your mammogram(s) and for your repeat mammogram, if needed…." JA 25-26. Appellant did in fact request reevaluation of her mammograms, which upon review did meet technical standards.

Two (2) years and eight (8) months later, Appellant filed this lawsuit, alleging that her mammograms "were the worst kind of health care because they gave her and others the impression that [they] were accurate when in fact they were not dependably accurate." JA 5, 10. Although

her claims are premised upon Valley Health "failing to ensure that its mammogram technicians were performing those procedures to the FDA's standards," resulting in "serious image quality deficiencies" that posed a "serious risk to human health," JA 11-13, Appellant did not plead her claim as a medical malpractice action and she did not follow the MPLA's pre-suit notice of claim or screening certificate of merit requirements. *See, e.g.*, W. Va. Code § 55-7B-6. Instead, Appellant pled her case under theories of unjust enrichment, breach of contract, and violations of the WVCCPA. JA 10-13.

Valley Health timely removed this case from the Circuit Court of Jefferson County, West Virginia to the United States District Court for the Northern District of West Virginia and moved to dismiss. JA 27-35, 36-37. Valley Health argued that the MPLA applied to Appellant's claims, regardless of how she pled them, because her claims all depend upon proof that the mammogram services she received failed to meet the standards set by the FDA and the ACR – specifically, that "staff were not accurately positioning or compressing women's breasts during mammograms." JA 9, 44. In other words, Appellant's Complaint alleges that Valley Health "failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider … acting in the same or similar circumstances," and "[s]uch failure was a proximate cause of [her] injury." (essential elements of an MPLA claim). Valley Health further argued that Appellant's claims are barred by the MPLA because she failed to follow its pre-suit notice and screening certificate of merit requirements, and even if she had her claim was filed outside the MPLA's two-year statute of limitation. JA 44-46.

B. The District Court Dismisses Appellant's Complaint Because Her Claims "Allege Conduct That Was 'Contemporaneous to or Related to the Alleged … Breach of Contract … In the Context of Rendering Health Care Services'" for Purposes of the MPLA, but Were Not Filed Within the Act's Two-Year Statute of Limitation.

On October 31, 2022, the district court granted Valley Health's motion and dismissed Appellant's Complaint with prejudice. JA 120-126. The court agreed that the MPLA applied because all of her claims "are based upon the substandard mammograms she received from Valley Health," and not Valley Health's "advertising and billing practices." JA 125. The court noted that Appellant herself referred to the mammograms as "the worst kind of health care," and that the MPLA's definition of "medical professional liability" includes not only "breach of contract based on health care services rendered" but also "other claims that may be contemporaneous … or related … in the context of rendering health care services." *Id.* *See also* W. Va. Code § 55-7B-2(i). The court therefore ruled that Appellant "is unable to escape the MPLA's broad reach because her claims clearly arise from alleged deficient health care she received, which occurred in the context of medical professional liability." JA 125.

Because the MPLA applies to her claims, Appellant was required to file her Complaint within two (2) years after receiving the PPN on December 16, 2019, or no later than December 16, 2021. JA 126. However, Appellant filed her Complaint on August 3, 2022 – eight (8) months after the statute of limitation expired. *See* JA 5, 126. The district court therefore dismissed Appellant's Complaint with prejudice as time-barred. JA 126.

C. The Fourth Circuit Asks This Court to Determine If Appellant's Breach of Contract and Related Claims for Substandard Mammograms Fall Within the MPLA's Definition of "Medical Professional Liability."

Appellant appealed to the United States Court of Appeals for the Fourth Circuit. JA 127. Appellant argued that her claims do not meet the MPLA's definition of "medical professional liability," and therefore fall outside the scope of the Act, because she "does not allege any tort" for

"death or injury of a person." JA 160. Appellant, however, did not address the fact that the Act's definition of "medical professional liability" also includes claims for "breach of contract based on health care services" and "other claims that may be contemporaneous or related to the alleged … breach of contract," or the district court's conclusion that Appellant's breach of contract claim "clearly arise[s] from alleged deficient health care she received." JA 125.

The Fourth Circuit framed the question presented as whether Appellant's claims fall within the MPLA, despite being styled as claims for breach of contract, unjust enrichment, and violations of the WVCCPA. JA 294. The court "conclude[d] that the answer to that question is unclear" because Appellant has disclaimed "any form of personal injury," JA 293-294, and then discussed how the MPLA's definition of "medical professional liability" and this Court's precedents appear to support both parties' reading of the Act. *See* JA 294-306. For example, although Appellant argues that the Act only covers claims for "personal injury," this Court's opinion in *State ex rel. West Virginia University Hospitals, Inc. v. Scott* "could be interpreted to mean that an anchor claim need not be tied to a personal injury; while *Scott's* failure-to-document anchor claim did pertain to a physical injury in that case, it postdated the injury and thus did not cause it." JA 304. Likewise,

> the West Virginia legislature has used the term 'personal injury' in other statutes … so the lack of such reference here may be telling. Further, the statute's reference to "liability for damages resulting from the … injury of a person for any … ***breach of contract*** based on health care services rendered" might most naturally be read to refer to legal injuries ….

JA 304-305 (emphasis in original). The court further noted that the Legislature's 2015 amendments "arguably create[] a wide opening for anchor claims to be defined as 'other claims that may be … otherwise provided, all in the context of rendering health care services.'" JA 305. Given that "[t]he Act's legislative history makes clear 'the Legislature's intent for the [MPLA] to

broadly apply to services encompassing patient care,'" JA 296, the Fourth Circuit certified the question to this Court for resolution. JA 306.

III. SUMMARY OF ARGUMENT

A plaintiff cannot avoid the MPLA through creative pleading. Appellant sued Valley Health for breach of contract and related claims, alleging that she "has been injured" by substandard mammograms that did not meet the imaging quality standards of Valley Health's accrediting body. Although Appellant characterizes this as a "consumer claim," whether Valley Health failed to meet the applicable standard of care when it performed her mammograms states a claim for medical professional liability under the MPLA, and not a consumer claim under the WVCCPA. The district court correctly determined that Appellant's claims fall squarely within the confines of the MPLA, despite her attempt to circumvent the statute.

Appellant seeks to avoid this common-sense conclusion by parsing a single phrase in the MPLA's definition of "medical professional liability," arguing that the Act "requires a personal injury or death," so her claims for "purely economic damages" were properly brought under the WVCCPA. Appellant's argument is defeated by the plain language of the same sentence of the very definition she relies upon. By its terms, the MPLA's definition of "medical professional liability" includes "any liability for damages resulting from" three types of claims: (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." *See* W. Va. Code § 55-7B-2(i). In other words, the MPLA

encompasses all claims for damages (whether sounding in tort, contract, or otherwise) that implicate the provision of "health care" to a "patient" and that necessarily depend upon proof that a "health care provider" or "health care facility" failed to follow the accepted standard of care. This is true regardless of how the case has been pled or the type of damages sought, and it applies to Appellant's claims for substandard mammograms in this case.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Valley Health agrees this case is suitable for Rule 20 argument because it involves an issue of first impression and fundamental public importance.

V. ARGUMENT

"It goes without saying that [a plaintiff] cannot avoid the MPLA with creative pleading." *Damron v. Primecare Medical of West Virginia, Inc.*, No. 20-0862, 2022 WL 2078178, at *3 (W. Va. Supreme Court, June 9, 2022) (memorandum decision). While Appellant now attempts to downplay the operative facts alleged in her Complaint, "her claims clearly arise from alleged deficient health care she received, which occurred in the context of medical professional liability." JA 125. Specifically, Appellant sued Valley Health for breach of contract, alleging that she received "deficient" mammograms, containing "serious image quality deficiencies" that posed a "serious risk to human health," because Valley Health staff "were not accurately positioning or compressing women's breasts" during the procedure. JA 9, 13. This is obviously a claim for "medical professional liability" that falls within the MPLA, regardless of how Appellant pleads it.

Appellant attempts to avoid this common-sense conclusion by parsing a single phrase in the MPLA's definition of "medical professional liability" that is not repeated anywhere else in the entire Act, while ignoring the very next phrase in the same sentence of that same definition that defeats her arguments. *See generally* Appellant Br. (arguing that "medical professional liability"

requires "death or injury of a person for any tort" while ignoring the definition's inclusion of "breach of contract based on health care services"). The MPLA plainly applies to claims for "death or injury of a person for any tort … based on health care services," but it equally applies to claims for "breach of contract based on health care services" as well as "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." *See* W. Va. Code § 55-7B-2(i). This plain reading of the statutory language "illustrate[s] the Legislature's intent for the MPLA to broadly apply to services encompassing patient care – not just the care itself." *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 246 W. Va. 184, 866 S.E.2d 350 (2021). As discussed below, the gravamen of Appellant's Complaint is a claim for "medical professional negligence" that falls within the MPLA, regardless of how it has been pled or the type of damages being sought, because Appellant's claim for breach of contract arises from the provision of "health care" to a "patient" and necessarily depends upon proof that a "health care provider" or "health care facility" failed to follow the accepted standard of care in performing her mammograms.

A. Appellant's Breach of Contract Claim for Substandard Mammograms Fits Squarely Within the Act's Definition of "Medical Professional Liability" and Anchors Her Contemporaneous or Related Claims Within the MPLA.

"The failure to plead a claim as governed by the Medical Professional Liability Act … does not preclude application of the Act." Syl. Pt. 5, in part, *Scott*, 866 S.E.2d at 350. This Court has consistently rejected attempts to plead around the MPLA when the facts giving rise to a plaintiff's claims relate to "health care" services rendered, or that should have been rendered, by a "health care provider" to a "patient."[2] This includes attempts to recast MPLA claims as violations of the

[2] *See, e.g., State ex rel. Charleston Area Medical Center, Inc. v. Thompson*, 248 W. Va. 352, 888 S.E.2d 852 (claims for post-delivery mishandling of fetal remains, invasion of privacy fell within the MPLA); *Scott*, 866 S.E.2d 350 (corporate negligence claims for failure to purchase and utilize, failure to document, spoliation of evidence, and failure to report fell within the MPLA); *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W.

exact same provisions of the WVCCPA at issue in this case. *Compare Blankenship*, 656 S.E.2d at 454, 456-459 (plaintiff's claims for "violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46[A]-6-101 *et seq.*" fell within the MPLA) *to* JA 10-12 (violations of the WVCCPA, W. Va. Code § 46A-6-101 *et seq.*). Here, Count Three of Appellant's Complaint (Breach of Contract) falls within the MPLA's definition of "medical professional liability," which by its plain language includes claims for "breach of contract based on health care services," because it depends upon proof that her mammograms did not meet the standard of care. Appellant's other claims are "contemporaneous or related" to the alleged breach of contract and also fall within the MPLA's reach.

"By the plain language of the statute, the MPLA applies when the action arises from 'health care' rendered to 'a patient.'" *State ex rel. Charleston Area Medical Center, Inc. v. Thompson*, 248 W. Va. 351, 358, 888 S.E.2d 852, 858 (2023). The MPLA was first enacted by the Legislature in 1986 and has been amended multiple times over the years, usually to expand its scope in response to court decisions that did not apply the Act. Notably, in 2015, the Legislature amended the MPLA in the wake of *Manor Care v. Douglas* to significantly broaden the scope of "medical professional liability" and other definitions. *See Scott*, 866 S.E.2d at 357-359. The MPLA now defines "medical professional liability" to include not only claims for "breach of contract based on health care services," but ***also*** "other claims that may be contemporaneous or related to the alleged … breach of contract or otherwise provided, all in the context of rendering health care services." W. Va. Code § 55-7B-2(i). The "contemporaneous or related" language was added in response to

Va. 335, 835 S.E.2d 579 (2019) (claims for deprivation of state constitutional rights, negligent supervision, negligent training and retention, negligent and intentional infliction of emotional distress, general negligence, and wrongful death fell within the MPLA); *Minnich v. MedExpress Urgent Care, Inc. – West Virginia*, 238 W. Va. 533, 796 S.E.2d 642 (premises liability claim fell within the MPLA); *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007) (claims for product liability, violations of the WVCCPA, fraud, and intentional infliction of emotional distress fell within the MPLA).

the *Manor Care* decision and "illustrate[s] the Legislature's intent for the MPLA to broadly apply to services encompassing patient care – not just the care itself." *Scott*, 866 S.E.2d at 359.

As a result, if a complaint alleges a breach of contract claim, arising from "health care" rendered by a "health care provider" or "health care facility" to a "patient," then that claim and all other claims that are either "contemporaneous to or related to" the health care claim, "all in the context of rendering health care services," meet the definition of "medical professional liability" and are governed by the MPLA. *See Scott*, 866 S.E.2d at 360. Relevant here, the Act defines "health care" broadly to include "any service performed by any health care provider" for "medical diagnosis," including but not limited to "positioning":

> (1) Any act, service, or treatment provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment;
>
> (2) Any act, service, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement, including, but not limited to, staffing, medical transport, custodial care, or basic care, infection control, positioning, hydration, nutrition, and similar patient services; and
>
> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging, and supervision of health care providers.

W. Va. Code § 55-7B-2(e). A health care claim is the "anchor" claim that extends the MPLA to all other contemporaneous or related claims. *Scott*, 866 S.E.2d at 360.

Appellant's breach of contract claim is a "health care" claim that anchors her other claims within the statutory framework of the MPLA. *See* JA 13. As stated by the district court, "there can be no doubt that a mammogram falls under the West Virginia Legislature's definition for health care." JA 125. Indeed, Appellant herself refers to her mammograms as "health care." In

her Complaint, Appellant alleges "[t]he mammograms provided to [her] were not 'quality healthcare,'" but were instead "the worst kind of health care." JA 9-10.

Even looking past these admissions, Appellant's breach of contract claim arises out of "health care" rendered by a "health care provider or facility" to a "patient," and therefore constitutes a "medical professional liability" claim as those terms are defined by the MPLA:

- Appellant is a "patient" because she is "a natural person who receives or should have received health care from a licensed care provider under a contract, expressed or implied," W. Va. Code § 55-7B-2(m);
- as a hospital, Valley Health is both a "health care provider" and a "health care facility," W. Va. Code §§ 55-7B-2(f) & (g);
- a mammogram, or breast X-ray exam, is a "service provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment," W. Va. Code § 55-7B-2(e)(1);
- Appellant's claim alleges deficiencies in the "service … performed or furnished … including, but not limited to … positioning," W. Va. Code § 55-7B-2(e)(2); and
- Appellant is claiming "liability for damages resulting from … 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," W. Va. Code § 55-7B-2(i).

Appellant's Complaint demonstrates this on its face. Appellant alleges she entered into a contract with Valley Health "exchanging mammography examinations and the resulting films for money." JA 13. She further alleges that Valley Health breached that contract by providing "deficient" mammograms, containing "serious image quality deficiencies" that posed a "serious risk to human health," and that she "has been proximately harmed and/or injured" as a result. *Id.* As support, Appellant alleges that Valley Health staff "were not accurately positioning or compressing women's breasts during mammograms," and therefore Valley Health "failed to meet the clinical image quality standards" established by its accrediting body. JA 9.

Putting aside the "labels and conclusions" in her Complaint, Appellant's breach of contract claim bears all of the hallmarks of an MPLA claim and will require the same elements of proof.

The Act requires the following "necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care":

> (1) 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; and
>
> (2) Such failure was a proximate cause of the injury or death.

W. Va. Code § 55-7B-3. The gravamen of Appellant's Complaint is that Valley Health allegedly "failed to follow the accepted standard of care" when it performed her mammograms, and that "such failure was a proximate cause of the injury" at issue in her breach of contract claim. This is easily illustrated by examining two scenarios. First, if this Court were to strip out Appellant's allegations that "[t]he mammograms provided to [Appellant] were not 'quality healthcare'" and did not meet the standards of its accrediting body, would she still have a valid claim? Of course not. On the other hand, if this Court were to strip out Appellant's allegations about Valley Health's advertising and its representations about the quality of its services, would she still have a valid claim? Yes, albeit a time-barred claim under the MPLA.

Appellant's other causes of action also fall within the MPLA because they are "contemporaneous or relate to" her breach of contract claim and arise in "the context of rendering health care services." This Court's decision in *Scott* is instructive on this point. 866 S.E.2d 350. In *Scott*, the plaintiffs brought multiple claims against West Virginia University Hospitals ("WVUH"), including corporate negligence claims for "failure to purchase and utilize, failure to document, spoliation of evidence, and failure to report" after a nurse negligently allowed air bubbles to be introduced into their newborn child's intravenous tubing. *Id.* at 355. The plaintiffs

argued that because these causes of action "pertain to non-medical conduct made at the corporate level, they are not subsumed by the MPLA or its pre-suit notice requirements." *Id.* at 356.

Ultimately, this Court determined that the corporate negligence claims were "either an anchor claim or an ancillary claim that falls within the context of rendering health care," and were therefore governed by the MPLA. *Scott*, 866 S.E.2d at 360. The plaintiffs accused WVUH of negligence arising from their child's medical care, which is clearly a medical professional liability claim, and each of their corporate negligence claims were "based on the health care provided to the minor child." *Id.* at 361. For example, the plaintiffs' failure to document claim "assume[d] the cause of the [infant's] cardiac arrest and subsequent injuries, and the same must be proven to prevail on this claim. That does not change simply because a 'corporate policy' is invoked." *Id.*

So it is here. Like in *Scott*, all of Appellant's claims in this case are premised on proof that the mammograms she received were not "properly executed mammograms" and therefore "were of different, deficient, inferior, and lesser value." *See* JA 12-13. This necessarily requires proof that Valley Health "fail[ed] to ensure that its mammogram technicians were performing those procedures to the FDA's standards" by "not accurately positioning or compressing" her breasts during the procedure. *See* JA 9, 11. In other words, Appellant must prove that Valley Health failed to meet the applicable standard of care and as a result breached its contract to provide Appellant with properly executed mammograms. As set forth in the PPN itself, Valley Health denies that it breached the standard of care in performing Appellant's mammograms: **"[t]his does not necessarily mean that the results you and your health care provider(s) were given are wrong."** JA 25 (emphasis added).[3]

[3] Appellant's mammograms were in fact reviewed at her request, and she was told on second review that her studies did meet the applicable technical standards.

B. Appellant Fails to Even Address, Let Alone Give Effect, to the Plain Language of the MPLA's Definition of "Medical Professional Liability," Which by Its Terms Includes Claims for "Breach of Contract Based on Health Care Services" and "Other Claims That May Be Contemporaneous to or Related to the … Breach of Contract or Otherwise Provided, All in the Context of Rendering Health Care Services."

Appellant nonetheless argues that she is not seeking "damages resulting from the death or injury of a person," so her claims do not meet the MPLA's definition of "medical professional liability" and therefore fall outside the Act. *See* Appellant Br. at 8-21. Appellant's argument is defeated by the plain language of the very definition she relies on.

The MPLA's definition of "medical professional liability" is not limited to claims for "the death or injury of a person for any tort." The Act specifically defines "medical professional liability" to include claims for "breach of contract based on health care services" and also "claims that may be contemporaneous to or related to the alleged breach of contract or otherwise provided":

> "Medical professional liability" means ***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.***

W. Va. Code § 55-7B-2(i) (emphasis added). By its plain language, "medical professional liability" therefore means "any liability for damages resulting from" three types of claims: (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." *Id*.

To be sure, the Legislature included "death or injury of a person for any tort … based on health care services" within the MPLA's definition of "medical professional liability" to reflect its intent to encompass all tort claims that "arise[] from 'health care' rendered to 'a patient.'" *See Thompson*, 248 W. Va. at 358. *See also* W. Va. Code § 55-7B-2(i). In order to encompass all tort claims "arising from health care," the Act's definition of "medical professional liability" includes both "injury of a person" and "death" because "no right of action for death by a wrongful act existed at common law." *See McDavid v. United States*, 213 W. Va. 592, 596-597, 584 S.E.2d 226, 230-231 (2003) (discussing the history of Lord Campbell's Act and similar statutes that create a statutory remedy for wrongful death). *Cf. State ex rel. Morgantown Operating Company, LLC v. Gaujot*, 245 W. Va. 415, 859 S.E.2d 358 (2021) (the MPLA's omission of "death" from its statute of limitation, W. Va. Code § 55-7B-4(b) (2017), means that the Wrongful Death Act's statute of limitation applied to an MPLA claim against a nursing home).[4] If Appellant is correct that "the MPLA requires a personal injury or death," then this is all the Legislature needed to say when it defined "medical professional liability."

But the Legislature did not stop there. "Medical professional liability" ***also*** includes "breach of contract based on health care services," and as of 2015 ***further*** includes "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." W. Va. Code § 55-7B-2(i). The statute's specific reference to "***any*** liability for damages" resulting from "tort," "breach of contract," or "other claims that may be contemporaneous to or related to the alleged tort or breach

[4] In the wake of the *Gaujot* decision, in 2022 the Legislature again amended the MPLA "to reinstate and codify a one-year statute of limitations for any cause of action [against a nursing home] for medical injury resulting in … death." *See* W. Va. Code § 55-7B-4(b) (eff. June 8, 2022). The 2015 and 2022 amendments reflect the Legislature's clear directive that courts must apply the MPLA broadly to effectuate its purpose as the exclusive remedy for claims that arise from the provision of "health care" by a "health care provider or facility" to a "patient," regardless of how those claims have been pled or the types of damages sought.

of contract or otherwise provided" reflects "the Legislature's intent for the MPLA to broadly apply" whenever "the action arises from 'health care' rendered to 'a patient,'" and irrespective of the theory of liability alleged or the types of damages sought. *See Thompson*, 248 W. Va. at 358; *Scott*, 866 S.E.2d at 359. To read the definition of "medical professional liability" otherwise would render the "breach of contract" and "contemporaneous to or related" language meaningless, "and in matters of statutory construction, every effort is made to give effect to each word and phrase adopted by the Legislature, the presumption being that the Legislature would not have committed a futile act." *State ex rel. Tucker County Solid Waste Authority v. West Virginia Div. of Labor*, 222 W. Va. 588, 599, 668 S.E.2d 217, 228 (2008).

Appellant focuses on the meaning of the word "injury." A breach of contract resulting in damages is certainly a legal "injury," and Appellant herself uses this same language to describe her breach of contract claim in this case. *See, e.g., Wilson v. Wiggin*, 77 W. Va. 1, 87 S.E. 92, 93 (1915) ("To recover damages for breach of contract the claimant must prove with reasonable certainty the extent of the injury sustained by him."). *See also* JA 13¶ 61 ("Ms. Neidig has been proximately harmed and/or injured and is entitled to recover actual damages and costs from Defendant."). In other sections of the MPLA, the Legislature used the general term "injury," as opposed to "personal injury" or similar, specifically because the general term encompasses all of the types of claims and resulting damages that could fall within the Act's definition of "medical professional liability." *See* Injury Definition, *Black's Law Dictionary* (11th ed. 2019) ("The violation of another's legal right, for which the law provides a remedy…."). *See also, e.g.,* W. Va. Code § 55-7B-3(a) (setting forth the "necessary elements of proof that an injury or death resulted

from the failure of a health care provider to follow the accepted standard of care").[5] The Legislature knows the difference, as the Fourth Circuit recognized in its Certification Order:

> On the other hand, the West Virginia legislature has used the term "personal injury" in other statutes … so the lack of such a reference here may be telling. Further, the statute's reference to "liability for damages resulting from … the injury of a person for any … ***breach of contract*** based on health care services rendered" might most naturally be read to refer to legal injuries….

JA 304-305 (emphasis in original).

Appellant wholly fails to address the Legislature's decision to include "breach of contract" and "other claims that may be contemporaneous to or related to the … breach of contract" in the definition of "medical professional liability." Aside from block-quoting W. Va. Code § 55-7B-2(i) and making a single reference to the Breach of Contract Count in her Complaint, *see* Appellant Br. at 4 & 9, Appellant does not even use the phrase "breach of contract" in her entire brief, let alone explain its meaning in connection with the MPLA's definition of "medical professional liability." Appellant does not acknowledge or even attempt to address this statutory language because she cannot do so in a way that fits her narrative.

"When interpreting a statute, the primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select any single part, provision, section, sentence, phrase or word." Syl. Pt. 2, *Mills v. Van Kirk*, 192 W. Va. 695, 453 S.E.2d 678 (1994) (cleaned up). Appellant attempts to "select a single phrase" from the MPLA's definition of "medical

[5] *Cf.* W. Va. Code §§ 55-7B-1 (stating that the MPLA reforms the common law relating to "[c]ompensation for injury and death"); 55-7B-2(h) (defining "injury" or "medical injury" as "injury or death to a patient"); 55-7B-4(b) (2022 amendment "that intends to reinstate" the 1-year statute of limitation "for any cause of action for medical injury resulting in injury or death to a person" against nursing homes); 55-7B-6 (screening certificate of merit must include an expert's opinion as to how "the breach of the applicable standard of care resulted in injury or death"); 55-7B-9a (reducing economic losses by "payments the plaintiff has received from the same injury from collateral sources").

professional liability" as a basis for avoiding application of the Act while completely ignoring the remainder of the definition. The Legislature could not have intended to include "breach of contract" and "contemporaneous or related" claims within the MPLA's ambit while simultaneously restricting its reach to only tort claims for "personal injury or death." Rather, the Act's definition of "medical professional liability," when read as a whole, encompasses ***all*** claims for damages (tort, contract, or otherwise) that implicate the provision of "health care" to a "patient" and that necessarily depend upon proof that a "health care provider or facility" failed to follow the accepted standard of care. *See Thompson*, 248 W. Va. at 358 (the MPLA applies "when the action arises from 'health care' rendered to 'a patient'"); *Scott*, 246 W. Va. at 195 (corporate negligence for failure to document is an anchor claim because it "implicate[s] the provision of 'health care' under the amended MPLA"). *See also* W. Va. Code § 55-7B-3 (setting forth the "necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care"). This is true regardless of how the case has been pled or the type of damages being sought.

C. Whether Valley Health's Mammogram Services Met the Standard of Care It Advertised Falls Squarely Within the MPLA and Not the WVCCPA.

Appellant seeks to avoid the MPLA, including its procedural requirements, damages caps, and two-year statute of limitation, by recasting her medical professional liability claims as "a consumer case" arising from Valley Health's "advertising and billing practices." JA 146, 148. *See also* Appellant Br. at 1 (characterizing this case as "a run of the [mill] billing dispute"). Specifically, Appellant seeks to turn this case into a class action for over $6 million in damages, plus statutory penalties and attorneys' fees, under the unfair and deceptive acts or practices ("UDAP") provisions of the WVCCPA, which "is among the most ambiguous provisions of the consumer protection act." *State ex rel. Morrisey v. Copper Beech Townhome Communities*

Twenty-Six, LLC, 239 W. Va. 741, 750-751, 806 S.E.2d 172, 181-182 (2017). *See also* JA 10-12 (alleging violations of W. Va. Code §§ 46A-6-102 & 46A-6-104).

Again, Appellant "cannot avoid the MPLA with creative pleading." *Scott*, 866 S.E.2d at 359. Underlying her references to "advertising" and "billing" is a medical professional liability claim based on substandard mammography services. The WVCCPA was never intended to regulate claims that implicate the provision of "health care" to a "patient" and depend upon proof that a "health care provider" failed to follow the accepted standard of care – those claims are specifically and extensively regulated by the MPLA. Appellant has not, and cannot, cite a single West Virginia case in which a plaintiff has been permitted to bring a claim under the WVCCPA that is premised on substandard health care services. In fact, this Court has already rejected attempts to recast MPLA claims as violations of the UDAP provisions of the WVCCPA, and it should again reject such efforts in this case. *Blankenship*, 656 S.E.2d at 454, 456-459 (plaintiff's claims for "violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code§ 46[A]-6-101 *et seq.*" fell within the MPLA).

1. The Ambiguous UDAP Provisions of the WVCCPA Do Not Apply to Medical Professional Liability Claims.

Appellant claimed to the Fourth Circuit, without any supporting West Virginia legal authority, that the "West Virginia Legislature intended to include the [medical] profession[] in the broad reach of the UDAP law." *See* JA 151. This is untrue. "The purpose of the [WVCCPA] is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." *Vanderbilt Mortg. & Fin., Inc. v. Cole*, 230 W. Va. 505, 511, 740 S.E.2d 562, 568 (2013). "The legislature [] did not intend that [the] WVCCPA serve as a Plan B litigation backstop for *ultra vires* consumer claims when a plaintiff had—but squandered—

appropriate traditional causes of action." *Wamsley v. LifeNet Transplant Servs. Inc.*, No. 2:10-cv-00990, 2011 WL 5520245, at *12 (S.D.W. Va. Nov. 10, 2011). In fact, this Court has held that the UDAP provisions of the WVCCPA – "among the most ambiguous provisions of the consumer protection act" – do not apply to areas of the law that are not mentioned in the act and that are separately and extensively regulated by the Legislature in other sections of the West Virginia Code.

In *State ex rel. Morrisey v. Copper Beech Townhome Communities Twenty-Six, LLC*, this Court was asked to determine if the WVCCPA's debt collection provisions and UDAP provisions applied to the fees a landlord charges tenants under a residential lease. 239 W. Va. 741, 806 S.E.2d 172 (2017). The Attorney General of West Virginia essentially made the same arguments Appellant is making in this case: the WVCCPA was written to "broadly [and] unambiguously apply to many different categories of people," and under its plain language a tenant is a "consumer" and a landlord "engages in a trade or commerce and is prohibited from using unfair or deceptive acts or practices." 806 S.E.2d at 176. *Cf.* JA 10-11. After extensively reviewing the history and purpose of the WVCCPA, and after noting that the UDAP provisions are "among the most ambiguous provisions of the consumer protection act," this Court held that those provisions do not apply to the landlord-tenant relationship. *Id.* at 181-182. This Court offered five reasons for its holding: (1) the UDAP provisions do not ***explicitly*** apply to the landlord-tenant relationship; (2) when the Legislature intends for a statute to apply to the landlord-tenant relationship, it does so explicitly; (3) the origin, history, and purposes of the WVCCPA indicate it was not intended to generally apply to and regulate the landlord-tenant relationship; and (5) the case relied on by the Attorney General did not support its position. *Id.* at 182.

The same is true of claims that fall within the MPLA. First, the UDAP provisions do not explicitly mention health care providers or health care services; in fact, the WVCCPA's general

definition of "services" only mentions "hospital accommodations," which are not at issue here.[6] *See* W. Va. Code § 46A-1-102(47). Second, the Legislature has extensively regulated health care under numerous provisions of the West Virginia Code, including but not limited to medical licensing, hospital accreditation, and claims for medical professional liability. *See, e.g.,* W. Va. Code Chapter 16; W. Va. Code Chapter 30, Article 3; W. Va. Code Chapter 55, Article 7B. The fact that the Legislature did not do so as part of the WVCCPA is telling: "[i]t is not for this Court arbitrarily to read into a statute that which it does not say." *Copper Beech*, 806 S.E.2d at 180. Third, Appellant herself concedes that "[h]istorically, professions like law, medicine and theology were largely exempt from scrutiny under consumer protection laws." JA 151, n.1. Finally, the ***only*** case this Court has considered in which a plaintiff attempted to bring a WVCCPA claim premised on health care specifically held that the claim was governed by the MPLA instead. *See Blankenship*, 656 S.E.2d 451. For these reasons, the ambiguous UDAP provisions of the WVCCPA cannot be read to serve as "a Plan B litigation backstop" just because Appellant failed to timely bring a claim under the MPLA.

2. The WVCCPA Does Not Apply to Appellant's Claim that Valley Health Failed to Provide Her With Mammography Services That Met the Standard of Care It Advertised, Which Is an Action Based in Medical Professional Liability.

Appellant is not the first plaintiff to attempt to plead a medical malpractice claim as "a consumer case" under a state's consumer protection statute. As noted above, this Court rejected that exact approach in *Blankenship*. 656 S.E.2d at 454, 456-459 (plaintiff's claims for "violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46[A]-6-101 *et seq.*" fell within the MPLA).

[6] "Goods" "includes goods not in existence at the time the transaction is entered into and gift and merchandise certificates, but excludes money, chattel paper, documents of title and instruments." W. Va. Code § 46A-1-102(21). Goods are generally defined as "articles of trade or items of merchandise." Goods Definition, *Black's Law Dictionary* (11th ed. 2019). A mammogram is neither of those things.

The Supreme Court of Connecticut also rejected such an approach. In *Haynes v. Yale-New Haven Hospital*, the plaintiff, as administrator of the deceased patient's estate, sued for medical malpractice and violations of Connecticut's consumer protection statute after the patient died during surgery following a car accident. 699 A.2d 964, 966 (Conn. 1997). The medical malpractice claim was based on the hospital's failure to meet the standard of care in applying emergency room care, inadequate staffing, and inadequate training and support. *Id.* The consumer protection claim alleged that the hospital engaged in unfair and deceptive trade practices because, although it "was certified as a major trauma center and held itself out as such," *id.* at 974, it failed to meet the standards for such a center "for essentially the same reasons stated in the medical malpractice count." *Id.* at 966. The Supreme Court of Connecticut held that the hospital's representation that it was a major trauma center:

> is simply what all physicians and health care providers represent to the public—that they are licensed and impliedly that they will meet the applicable standards of care. If they fail to meet the standard of care and harm results, the remedy is not one based upon [consumer protection], but upon malpractice.

Id. at 974-975. The court therefore affirmed summary judgment on plaintiff's consumer protection claim: "[m]edical malpractice claims recast as [consumer protection] claims cannot form the basis for a [consumer protection] violation. To hold otherwise would transform every claim for medical malpractice into a [consumer protection] claim." *Id.*

Appellant similarly claims that "Valley Health advertised a service and billed for that service, but it did not deliver the service for which it billed." JA 148. Just like in *Haynes*, Appellant argues that her claims are based on what Valley Health represented to the public – "that it is licensed and impliedly will meet the applicable standards of care" – but her remedy is not one based on consumer protection, but upon medical malpractice. 699 A.2d at 974-975. The fact that

Appellant now "disclaims any physical injury arising from her mammograms," *see* JA 295, doesn't change the analysis – Appellant's claims still arise from alleged "breach of contract based on health care services" and falls within the MPLA. *See* W. Va. Code § 55-7B-2(i). Again, to prove her claim of "unfair and deceptive advertising," Appellant must first prove that Valley Health deviated from the standard of care when it performed her mammograms. Thus, Appellant's Complaint states a claim for medical professional liability under the MPLA, not a violation of the WVCCPA.

D. Applying the MPLA to Appellant's "Consumer" Class Action for Over $6 Million in Damages, Plus Statutory Damages and Attorneys' Fees, Is Consistent With the Plain Language of the Act's Definition of "Medical Professional Liability," Honors the Intent of the Legislature, and Avoids Absurd Results.

Appellant concludes by declaring that Valley Health seeks "the limitless application of the MPLA," rattling off a parade of horribles that would supposedly result if this Court finds that her breach of contract claim arising from alleged substandard mammograms falls within the Act. *See* Appellant Br. at 23-24. Appellant jumps to this conclusion by reasoning that everything Valley Health does "will ostensibly somehow relate to 'health care,'" Appellant Br. at 8, so even claims that ***do not*** "arise[] from 'health care' rendered to 'a patient,'" *see Thompson*, 248 W. Va. at 358, such as "a hospital van … hitting a parked vehicle … in the hospital parking lot" or "bond holders of [a] hospital needing to [collect] … after a default" would fall within the MPLA. Appellant Br. at 23-24. Appellant's argument grossly overstates Valley Health's position (and the district court's dismissal order), as well as the plain language of the Act and this Court's precedents.

A claim "must be in the overall context of rendering health care services" to fall within the MPLA. *See Scott*, 246 W. Va. at 194. Appellant's claim obviously meets this criteria: as stated by the district court, "her claims clearly arise from alleged deficient health care she received, which occurred in the context of medical professional liability." JA 125. The Fourth Circuit correctly articulated the material difference between Appellant's MPLA claim and a true "run of the [mill]

billing dispute" that would fall outside of the Act: "[a] claim for an erroneously high copay charge, for example … might not constitute an anchor claim under *Scott* because it does not implicate a medical judgment." JA 305. *Cf.* Appellant Br. at 1. Appellant's straw man is easily addressed because the "absurd results" she offers ***do not*** arise "in the overall context of rendering health care services" and ***do not*** "implicate a medical judgment." Simply put, driving a hospital van does not implicate a medical judgment. *See, e.g.,* Appellant Br. at 23. A claim that a patient was billed twice for services does not require proof that the underlying "health care" rendered to the "patient" did not meet the standard of care. *Id.* A claim on a hospital's bond is governed by the terms and conditions of the bond. *Id.* at 24. The distinguishing factor is ***not*** whether a plaintiff seeks "an economic injury" as Appellant claims, but whether the facts that proximately caused the injury "arise from 'health care' rendered to 'a patient'" and implicate a medical judgment.

This is consistent with the Legislature's intent. As this Court noted in *Scott*, "one would be remiss to ignore the legislative pathway of the MPLA." 246 W. Va. at 193. The Legislature specifically defined "medical professional liability" to encompass "***any*** liability for damages," under ***any theory of liability*** (i.e., "death or injury of a person for any tort," "breach of contract," and "other claims that may be contemporaneous to or related to the alleged tort or breach of contract"), so long as the claim is "based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient." W. Va. Code § 55-7B-2(i). The Legislature, as it did in 2015 in the wake of *Manor Care* and again in 2022 in the wake of *Gaujot*, has made it crystal clear that the MPLA is the exclusive remedy for ***all*** claims that "arise[] from 'health care' rendered to 'a patient.'" *Thompson*, 248 W. Va. at 358. Appellant's claim for breach of contract is no different just because she is disclaiming physical injury.

What is decidedly ***inconsistent*** with the Legislature's intent, and what ***would*** lead to absurd results, is allowing a "consumer" class action for over $6 million, plus statutory penalties and attorneys' fees, to proceed outside of the MPLA when the actual conduct at issue arises from the provision of "health care" (i.e., mammograms) to a "patient." The MPLA is designed to limit the risk of outsize legal liability against health care providers, and thereby stabilize the cost and improve the quality of health care in West Virginia, by ensuring that medical malpractice claims proceed within certain parameters. To accomplish these goals, among other provisions the MPLA requires claims to be brought within two years (or one year against nursing homes), requires pre-suit notice and a screening certificate of merit from a qualified expert, defines the qualifications required of experts, places caps on certain types of damages, requires adjustments to damages based on collateral sources, and establishes specialized trial procedures and evidentiary rules. *See, e.g.*, W. Va. Code §§ 55-7B-4 through 6c, 55-7B-7 through 9d. In contrast, the WVCCPA has a four-year statute of limitation, its pre-suit notice and opportunity to cure requirement does not require expert review like an MPLA screening certificate of merit, there are no qualifications for experts beyond those generally required by the Rules of Evidence, and in addition to actual damages plaintiffs can recover statutory penalties and attorneys' fees and costs that are not available remedies under the MPLA. *See* W. Va. Code §§ 46A-5-101, 46A-5-104, and 46A-5-108. Allowing Appellant to sue for "deceptive billing and advertising" under the WVCCPA, instead of medical professional liability under the MPLA, is contrary to the intent of the MPLA and would "amount to a judicial repeal" of the Act. *See Scott*, 866 S.E.2d at 365.

VI. CONCLUSION

For all of the foregoing reasons, Appellant's claim for "breach of contract based on health care services" and her "other claims that may be contemporaneous or related to the alleged …

breach of contract" fall within the MPLA's definition of "medical professional liability" and are governed by the Act. This is true regardless of whether Appellant disclaims any form of physical or emotional injury.

Respectfully submitted,

/s/ J. Tyler Mayhew
Charles F. Printz, Jr. (WVSB #2985)
J. Tyler Mayhew (WVSB #11469)
Liana L. Stinson (WVSB #13968)
Bowles Rice LLP
101 South Queen Street
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
Tel: (304) 264-4222
Fax: (304) 267-3822
cprintz@bowlesrice.com
tmayhew@bowlesrice.com
lstinson@bowlesrice.com

Counsel for Valley Health System

CERTIFICATE OF SERVICE

I certify that I served this **Brief of Appellee Valley Health System** upon counsel of record on the date indicated by filing the same using the Court's electronic filing system (File & Serve*Xpress*).

Dated: April 22, 2024.

/s/ J. Tyler Mayhew
J. Tyler Mayhew (WVSB #11469)