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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35296

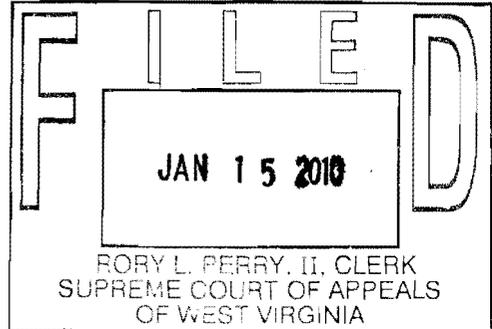
SHIRLEY WHITE, CATHY DENNISON,
and JENNY L. TYLER, on behalf of themselves
and a class of others similarly situated,

Plaintiffs-Respondents,

v.

WYETH, f/k/a AMERICAN HOME PRODUCTS,
d/b/a WYETH-AYERST LABORATORIES,
KETCHUM, INC., and DANNEMILLER
MEMORIAL EDUCATIONAL FOUNDATION,

Defendants-Petitioners.



QUESTION CERTIFIED BY THE CIRCUIT COURT OF PUTNAM COUNTY
PUTNAM COUNTY, WEST VIRGINIA

HONORABLE O.C. SPAULDING, CHIEF JUDGE

=====
BRIEF FOR PETITIONERS
=====

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**KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE LOWER TRIBUNAL**

This case arises from the following question, certified to this Court by the Honorable O.C. Spaulding, Chief Judge of the Circuit Court of Putnam County, West Virginia, by Order dated July 14, 2009 (hereinafter referred to as the “Certified Question”):

Does the “as a result of” language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act require a plaintiff, in a private cause of action under the Act, to allege and prove that he or she purchased a product because of and in reliance upon an unlawful deceptive act?¹

The Circuit Court answered the Certified Question in the negative.

This issue came before the Circuit Court on a motion to dismiss or, in the alternative, for summary judgment filed by Defendant Wyeth, one of the Petitioners in this Court, and joined by the other defendants (including Petitioner Ketchum, Inc. (“Ketchum”), which joins this brief along with Wyeth). The Plaintiffs, Respondents in this Court, brought the underlying lawsuit as a consumer fraud action purportedly pursuant to the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-106 (“the Act”). The Act provides in pertinent part that “[a]ny person who purchases ... goods ... and thereby suffers any ascertainable loss of money ... *as a result of* the use or employment by another person of a method, act or practice prohibited” by other provisions of the Act as deceptive may bring a civil action to recover the greater of the actual loss or \$200.00. (Emphasis added). The sole issue that this appeal presents concerns the meaning of the “as a result of” language of the Act.

¹ Amended Order Denying Defendants’ Motion To Dismiss And, Alternatively, For Summary Judgment, But Certifying A Legal Question To The West Virginia Supreme Court Of Appeals, at 45 (July 14, 2009) (“Amended Order”).

Plaintiffs alleged that Defendants used unfair and deceptive practices in the marketing and sale of Wyeth's hormone therapy ("HT") prescription drugs, drugs that doctors prescribe to treat serious menopausal symptoms such as hot flashes, night sweats, vaginal atrophy, and bone loss in women. (The FDA long ago approved Wyeth's HT drugs and these drugs rank among the most widely-prescribed prescription drugs in the United States to this day.) Specifically, the Plaintiffs alleged that Wyeth committed deceptive acts in violation of the Act when it promoted its products to doctors and individual patients through misleading statements in its advertising, marketing, and labeling for HT in which Wyeth (1) claimed that its HT drug Premarin had been proven to reduce the risk of osteoporosis "when in fact Wyeth knew that there was no evidence to support the statement that Premarin reduced fractures from osteoporosis;" and (2) "knowingly withheld information that Premarin caused an increased risk of breast cancer and that the risk of breast cancer outweighed the benefits of taking Premarin." The Circuit Court ultimately found that "Plaintiffs have not provided the Court with specific evidence of concealment by Wyeth."²

The Plaintiffs did not allege that they or any putative class member had suffered personal injury as a result of using HT. Plaintiffs failed to allege that any of them or their doctors had ever received or read—much less relied upon—the alleged misrepresentations in taking or prescribing HT, respectively. Indeed, the amended complaint contained no allegations about the Plaintiffs at all, except to provide their names and addresses, and never mentioned their doctors.

² *Id.* at 11. Plaintiffs' pleadings had made vague allegations that Wyeth had concealed information and the Circuit Court's original certification order erroneously stated that Plaintiffs had come forward with evidence supporting these allegations. On July 14, 2009, the Circuit Court issued an Order amending its original certification order to correct that erroneous finding, stating that "Plaintiffs have *not* provided the Court with specific evidence of concealment by Wyeth." *See* Order Striking Certain Statements (July 14, 2009) at 3 (emphasis added). The Amended Order similarly stated that in response to Wyeth's summary judgment motion, Plaintiffs had presented no "evidence to show Wyeth concealed any such studies." Amended Order, at 43.

Wyeth took the depositions of the Plaintiffs and their prescribing physicians. They revealed that each of the three Plaintiffs received all the benefits she had expected from taking HT, that one of the Plaintiffs received benefits greater than she had bargained for, and that another continues to use HT drugs today (even knowing of the allegations of deceptive practices she had alleged in her pleadings). Each Plaintiff admitted she had suffered no side effects or physical injury from HT. Each admitted she had received no information about HT from Wyeth. Each admitted that she had not purchased HT because of anything she learned from Wyeth, but rather had relied *solely* on her doctor's advice in doing so. Each prescribing physician, in turn, stated that he had not considered any information from Wyeth in prescribing HT to the Plaintiff he treated. The record before this Court thus stands uncontradicted: neither Plaintiffs nor their prescribing doctors considered anything Wyeth did or said in connection with the purchase, taking, or prescription of HT.

Faced with the absence of both allegations and proof that could in any way connect the Plaintiffs' purchase and use of HT to Wyeth's allegedly deceptive conduct, Wyeth filed the underlying motion to dismiss or for summary judgment upon the conclusion of class discovery. Wyeth's motion to dismiss argued that the Plaintiffs had failed to plead a "causal connection" between their individual claims of injury and any allegedly unfair or deceptive conduct by Wyeth. Its motion for summary judgment argued that Plaintiffs had also failed to come forward with sufficient evidence on this issue to withstand summary judgment. Wyeth contended that the Plaintiffs thereby had (1) failed to plead or establish a *prima facie* claim under the "as a result" language of the Act (as this Court held in *Orlando v. Finance One of West Virginia, Inc.*³); and (2) failed to establish the "causal connection" required to establish standing under the

³ 179 W.Va. 447, 369 S.E.2d 882 (1988).

“controversy” requirement of Art. VIII, § 3 of the West Virginia Constitution (as this Court held in *Findley v. State Farm Mut. Auto. Ins. Co.*⁴).

Wyeth noted that giving effect to the Act’s “as a result of” language so as to require this causal connection would not preclude future plaintiffs from bringing an action if they could allege and prove they or their doctors had relied upon or been influenced by the allegedly deceptive statements from a defendant in purchasing or prescribing a drug. This interpretation simply precludes plaintiffs—like those in this case—from recovering under the Act “as a result of” alleged misconduct where those plaintiffs and their physicians had not seen or heard, placed the slightest reliance on, or come under the influence of the deceptive acts at issue.

The Circuit Court denied Wyeth’s motion to dismiss as well as its motion for summary judgment. But it certified the instant question to clarify the nature of Plaintiffs’ obligations in this regard under both the “as a result of” language of the Act and under the standing requirements of the West Virginia Constitution. Wyeth and Ketchum timely petitioned this Court to docket the certified question for review.⁵ This Court granted that Petition by its Order dated November 12, 2009 (without Justice Workman’s participation).

STATEMENT OF THE FACTS OF THE CASE

A. The Procedural History of the Case.

For themselves and as putative class representatives, the Plaintiffs on April 19, 2004, filed a complaint against Defendants Wyeth, Ketchum, and the Dannemiller Memorial Educational Foundation alleging that the Defendants had violated the Act in the marketing and sale of Wyeth’s HT drugs—Premarin, Premphase, and Prempro. The Plaintiffs sought

⁴ 213 W.Va. 80, 576 S.E.2d 807 (2002).

⁵ Petitioner Ketchum is an advertising and public relations agency that handled certain products for Wyeth.

certification of a class to include (1) all residents of the State of West Virginia who purchased HT or estrogen replacement therapy tablets manufactured by Wyeth and (2) all non-residents of the State of West Virginia who purchased Wyeth's HT drugs while residing in the State of West Virginia.⁶ Plaintiffs requested statutory damages under the Act or recoupment of the purchase price of HT drugs.⁷ Plaintiffs alleged no personal injuries from their use of HT.⁸

In January 2008, four years after they had filed this action, Plaintiffs filed an amended complaint that replaced two of the original three Plaintiffs—Mary Luikart and Alice Murphy—with Respondents Shirley White and Cathy Dennison. (Respondent Jenny Tyler continued as a named Plaintiff.) As noted, neither the original pleading nor the amended complaint alleged that the Plaintiffs had purchased HT or that their physicians had prescribed HT, as a result of any allegedly deceptive acts by Wyeth, though Plaintiffs did allege that they had suffered ascertainable loss as a result of such acts without pleading any specifics as to how they had done so.

In May 2008, the Court entered its Fifth Amended Class Certification Scheduling Order, directing the parties to complete all discovery “relevant to class certification.” This class certification discovery included Wyeth's depositions of the Plaintiffs and of their doctors. At the close of class certification discovery, Wyeth moved to dismiss the amended complaint or, in the alternative, for summary judgment. Plaintiffs attempted to counter Wyeth's motion by arguing

⁶ Am. Compl. ¶ 6.

⁷ *Id.* ¶ 7. In the wider litigation concerning HT, the federal multidistrict court and state courts in Alabama, Florida, and Pennsylvania have denied motions for class certification, including (in federal court) for claims brought under the West Virginia Consumer Credit and Protection Act, the statute at issue here. *See* n.64, below. In the seven years of HT litigation in state and federal courts across the country, no court has certified a class of HT purchasers or users.

⁸ *Id.* ¶ 7.

that they had suffered an ascertainable loss under the statute and that Wyeth had committed deceptive practices. They argued that neither the Act's "as a result of" language nor the West Virginia Constitution required any allegation or proof that Plaintiffs had relied on any of the allegedly deceptive practices in purchasing HT or that their physicians had done so in prescribing the drugs. The Plaintiffs argued that the Act and the West Virginia Constitution required them to claim and prove only that they purchased the drugs and that Wyeth had committed such acts.

Following supplemental briefing and two hearings, the Circuit Court denied Wyeth's motion to dismiss and its motion for summary judgment. The Circuit Court never expressly addressed the argument Wyeth advanced in support of its motion for summary judgment, that Plaintiffs had produced no evidence of a causal relationship between the alleged deceptive practices and their alleged losses, much less that they (or their physicians) had relied on those deceptive practices in deciding to purchase HT. The Circuit Court instead held that the Act required Plaintiffs only to allege that they suffered ascertainable loss and that Wyeth committed deceptive practices. The Circuit Court specifically rejected the argument that the Act's "as a result of" language required Plaintiffs to show reliance, though it recognized that its decision did not comport with the standing requirement of the West Virginia Constitution. The Circuit Court found that the statute's remedial purpose required it to resolve this tension in favor of the Plaintiffs. The Circuit Court accordingly denied Wyeth's motion to dismiss.

The Circuit Court then denied Wyeth's summary judgment motion on the ground that Plaintiffs had an entitlement to more discovery as to whether Wyeth "acted negligently in failing to further explore the cancer risk associated with hormone replacement therapy."⁹ (The Circuit

⁹ Amended Order, at 43.

Court, as stated above, n.2, found that Plaintiffs had produced no evidence Wyeth concealed information about HT, and so limited further discovery on this point to negligence.¹⁰⁾

The Circuit Court asked the parties to submit a proposed question regarding the meaning of the “as a result of” language that the Circuit Court could certify to this Court. Wyeth framed the certified question as whether the Act’s “as a result of” language required a plaintiff to “plead and prove facts showing he purchased the drug *because of* the allegedly unfair or deceptive conduct of the defendant.”¹¹ Plaintiffs’ proposed question for certification asked whether the Act’s “as a result of” language required a plaintiff “to allege and prove that *he or she relied on* a defendant’s misrepresentations in making the purchase in question.”¹² The Circuit Court seemed to meld the parties’ proposed questions: its Certified Question characterized the issue as whether the “as a result of” language of the Act requires a plaintiff “to allege and prove that he or she purchased a product *because of and in reliance* upon an unlawful deceptive act.”¹³ The Circuit Court postponed ruling on whether to certify a class to provide this Court the opportunity to consider the Certified Question. Wyeth and Ketchum timely petitioned this Court to review the Certified Question, and this Court granted their Petition.

B. Undisputed Facts Regarding The Plaintiffs and Their Doctors.

The three Plaintiffs are Shirley White, Cathy Dennison, and Jenny Tyler. Their doctors are Felipe Jugo, Bennett Orvik, and Ujjal Sandhu, respectively. The record in this case

¹⁰ *Id.*

¹¹ *Id.* at 19 (emphasis added).

¹² *Id.* at 24 (emphasis added).

¹³ *Id.* (emphasis added). *See* n. 2, above.

establishes, without contradiction, the following facts regarding these Plaintiffs, their doctors, and Wyeth's HT drugs.

1. The Plaintiffs Received The Benefits They Expected From HT.

The record in this case establishes that Shirley White took HT for six years;¹⁴ Cathy Dennison, for 29 years;¹⁵ and Jenny Tyler, for nine years, including up to this day.¹⁶

Shirley White testified that she received all of the benefits from HT that she expected, including relief of the night sweats that had left her sleepless, the hot flashes that had made her "deathly hot" and restricted her activities, and the vaginal dryness that had interfered with her marriage.¹⁷ She testified, HT "just made me feel better and look better."¹⁸

¹⁴ Deposition of Shirley White ("White Dep.") at 15, 95, 96, 98-99, 102, attached as Ex. 3 to Wyeth's Opposition to Plaintiffs' Combined Motion for Class Certification, filed October 27, 2008 and Ex. 2 to Wyeth's Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed October 27, 2008.

¹⁵ Deposition of Cathy Dennison ("Dennison Dep.") at 84, attached as Ex. 5 to Wyeth's Opposition to Plaintiffs' Combined Motion for Class Certification, filed October 27, 2008 and Ex. 3 to Wyeth's Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed October 27, 2008.

¹⁶ Deposition of Jenny Tyler ("Tyler Dep.") at 125-26, 135, 137, 167-69, attached as Ex. 7 to Wyeth's Opposition to Plaintiffs' Combined Motion for Class Certification, filed October 27, 2008 and Ex. 4 to Wyeth's Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed October 27, 2008. Ms. Tyler claims that she first received HT in 1988 or 1989, but her medical records show HT use beginning in approximately 1994. She used Prempro and HT drugs manufactured by other companies.

¹⁷ White Dep. at 68, 71-72.

¹⁸ *Id.* at 102-03.

Despite the fact that she took HT for nearly thirty years, Cathy Dennison testified that HT had not alleviated her menopausal symptoms. But her physician Dr. Bennett Orvik testified that “[i]t’s fair to say that she—she felt she was getting benefit from it, yes.”¹⁹

Jenny Tyler acknowledged that she had received benefits from HT, citing her “strong bones.”²⁰ She continues to take HT today.²¹ About her ongoing use of HT, she stated, “I’m feeling good and I don’t have any problems, so obviously, you know, at this point, it’s doing okay for me.”²² Her doctor’s records confirmed that Tyler received the relief from menopausal symptoms she sought from HT.²³

2. The Plaintiffs Purchased HT Solely Because Of Their Doctors’ Advice, Not Because Of Any Representations By Wyeth.

The amended complaint did not allege that the Plaintiffs received, read, or relied upon any representations about HT made by Wyeth, whether in advertising or otherwise. And in discovery, none of the Plaintiffs testified that Wyeth’s advertising or marketing led in any way to their decision to use HT.²⁴

¹⁹ Deposition of Dr. Bennett Orvik (“Orvik Dep.”) at 41, attached as Ex. 11 to Wyeth’s Opposition to Plaintiffs’ Combined Motion for Class Certification, filed October 27, 2008 and Ex. 4 to Wyeth’s Supplemental Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed January 16, 2009.

²⁰ Tyler Dep. at 159.

²¹ *Id.* at 158.

²² *Id.* at 158-59.

²³ Deposition of Dr. Ujjal Sandhu (“Sandhu Dep.”) at 40-47, attached as Ex. 12 to Wyeth’s Opposition to Plaintiffs’ Combined Motion for Class Certification, filed October 27, 2008 and Ex. 5 to Wyeth’s Supplemental Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed January 16, 2009.

²⁴ For additional, relevant testimony from the Plaintiffs, *see* Wyeth’s Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed Oct. 27, 2008 at 8-14.

Two of the three Plaintiffs—Shirley White and Cathy Dennison—saw no Wyeth advertising or marketing and did not recall even seeing the FDA-approved labeling. Asked if she had ever seen any advertisements for Wyeth’s HT products, Shirley White said, “No, I don’t remember.”²⁵ Asked if she had seen or received pamphlets or other marketing about HT, White responded again, “I don’t remember.”²⁶ Asked if she had received Wyeth’s labeling, White explained, “I don’t know that one came with it. If it did, I don’t remember if I read it or not.”²⁷ Cathy Dennison, too, did not see any Wyeth advertisements.²⁸ Her response to whether she received marketing materials about HT was an unequivocal “No.”²⁹ Nor did she recall seeing any Wyeth labeling, even after reviewing it at her deposition.³⁰

The third class representative—Jenny Tyler—recalled seeing pamphlets in her doctor’s office about HT but remembered nothing these pamphlets contained and said she did not know whether they concerned Wyeth’s drugs, the drugs of another company, or just HT drugs generally.³¹ She saw magazine advertisements about HT, but she did not recall what products they covered and did not suggest that the advertisement had any connection to Wyeth.³² She did not recall ever seeing the Wyeth labeling.³³

²⁵ White Dep. at 130.

²⁶ *Id.* at 128-30.

²⁷ *Id.* at 115.

²⁸ Dennison Dep. at 138.

²⁹ *Id.* at 137-38.

³⁰ *Id.* at 126-27.

³¹ Tyler Dep. at 99-100.

³² *Id.* at 117-18.

³³ *Id.* at 120.

All three Plaintiffs testified that they took HT solely as a result of their doctors' recommendation and not as a result of any advertising, marketing, or other statements from Wyeth:

- Shirley White: Q: . . . [D]id you consider anything other than what your doctor was telling you about what you should take? A: No, I didn't.³⁴
- Cathy Dennison: Q: And did you rely on anything else [other than her doctor] in making those decisions [to use HT]? A: No.³⁵
- Jenny Tyler: Q: Did you rely on anything else in your decision to begin taking HT? A: No, just his judgment.³⁶

At oral argument on Defendants' motion, Plaintiffs conceded that all of them had taken HT based solely on their doctors' advice and not because of any representations by Wyeth.³⁷

3. The Doctors Prescribed HT Without Regard To Any Representations By Wyeth

Dr. Jugo (Shirley White), Dr. Orvik (Cathy Dennison), and Dr. Sandhu (Jenny Tyler) testified that they did not prescribe HT because of any advertising or marketing from Wyeth. Plaintiffs submitted no evidence to the contrary.

Dr. Felipe Jugo

- On Wyeth advertising:

Q: . . . You did not prescribe HT to Ms. White as a result of any advertisements, it was from your conversations with colleagues and what other experts were saying; is that correct?

A: Yes.

³⁴ White Dep. at 66-67, 88.

³⁵ Dennison Dep. at 89-90, 158-59.

³⁶ Tyler Dep. at 113, 118.

³⁷ Hr'g Tr. (Nov. 21, 2008) at 13-14.

- On Wyeth marketing (i.e. pamphlets, posters, videos, other materials):

Q: And you didn't prescribe HT to Ms. White as a result of any marketing materials?

A: No.

- On Wyeth sales representatives:

Q: And you didn't prescribe HT to Ms. White as a result of conversations with sales reps?

A: No.³⁸

Dr. Bennett Orvik

- On Wyeth advertising:

Q: So is it fair to say that you did not prescribe HT to Ms. Dennison as a result of advertisements?

A: I would say that would be fair to say, yes.

- On Wyeth marketing (i.e. pamphlets, posters, videos, other materials):

Q: Is it fair to say that you did not prescribe HT to Ms. Dennison as a result of marketing materials?

A: I would say that's fair, yes.

- On Wyeth sales representatives:

Q: Is it fair to say that you did not prescribe HT to Ms. Dennison as a result of conversations you had with sales reps?

A: That would be fair to say, yes.³⁹

Dr. Ujjal Sandhu

- On Wyeth advertising:

³⁸ Deposition of Dr. Felipe Jugo ("Jugo Dep.") at 35-37, attached as Ex. 4 to Wyeth's Opposition to Plaintiffs' Combined Motion for Class Certification, filed October 27, 2008 and Ex. 3 to Wyeth's Supplemental Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed January 16, 2009. Here, and throughout this brief, objections to the form of the question have been omitted from quotations of deposition testimony.

³⁹ Orvik Dep. at 25.

Q: . . . Did you base your decision to prescribe Premarin to Mrs. Tyler based upon any advertising on behalf of Wyeth?

A: Never.

- On Wyeth marketing (i.e. pamphlets, posters, videos, other materials):

Q: Did you base your decision to prescribe Premarin to Mrs. Tyler based upon any marketing efforts of Wyeth?

A: Based solely on her symptomatology.

- On Wyeth sales representatives:

Q: . . . So then you did not prescribe Premarin as a result of any conversations with Wyeth sales reps?

A: No.⁴⁰

Each doctor identified the sources on which he did rely in evaluating and prescribing HT drugs, and none cited information from Wyeth. Dr. Jugo's testimony was typical. He made his decision to prescribe HT based on information about HT he obtained from medical journals, 50 hours of continuing medical education every 1-2 years, and his medical colleagues.⁴¹

The fact that Plaintiffs' prescribing physicians did not rely on any of Wyeth's representations about HT makes perfect sense. When evaluating new drugs, doctors may well rely on the manufacturer for information. But for old and familiar drugs—and Wyeth's HT drugs are old and familiar—doctors are not dependent on the manufacturer. They learn about such drugs in medical school, they study the nature and effects of such drugs in textbooks, and they read about such drugs repeatedly in medical journals and textbooks over a period of many years. Professional organizations like the American College of Obstetricians & Gynecologists have developed and provided guidelines for such drugs. Continuing medical education curricula

⁴⁰ Sandhu Dep. at 37.

⁴¹ Jugo Dep. at 37-40, 42, 58-59.

regularly update doctors about them. Wyeth's HT drugs rank among the oldest and most widely prescribed drugs: their widespread use dates from the 1960s and Wyeth's Premarin came into use in the 1940s.

**ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND
THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL**

The Circuit Court formulated the following Certified Question, which it answered in the negative:

Does the "as a result of" language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act require a plaintiff, in a private cause of action under the Act, to allege and prove that he or she purchased a product because of and in reliance upon an unlawful deceptive act?

The Circuit Court's Certified Question asks whether the Act requires the Plaintiffs to prove both that they purchased HT "because of" Wyeth's allegedly deceptive acts *and* that they purchased HT "in reliance upon" those allegedly deceptive acts. At points in its opinion, however, the Circuit Court phrased the issue in the disjunctive. For example, in providing its negative answer to this very Certified Question, the Circuit Court stated that "the Plaintiffs in this case are not required to allege and prove that they purchased hormone replacement therapy drugs because of *or* in reliance upon a deceptive practice of the Defendant."⁴²

The Circuit Court's opinion makes it clear that Wyeth had argued that the Act required at least some allegation and sufficient proof to withstand summary judgment of a causal connection between the injury and the allegedly deceptive practices.⁴³ For example, the Circuit Court noted that Wyeth had argued that the Act required the Plaintiffs to plead and prove some "discernable

⁴² Amended Order, at 45. See Order Issuing Certificate Of Certified Question, at 2 (June 9, 2009), where the Circuit Court used the same conjunctive phrasing in its Certified Question but, in answering the question, phrased the issue in the disjunctive.

⁴³ Amended Order, at 3, 6, 7, 14, 19, 25, & 40.

nexus between Wyeth's allegedly deceptive conduct and the Plaintiffs' decision to buy the drugs prescribed by their doctors."⁴⁴ The Circuit Court observed that, for their part, Plaintiffs had recognized that the Act "requires them to prove causation," but that Plaintiffs somehow interpreted "proof of causation" to consist of nothing more than an allegation "that Wyeth engaged in deceptive practices and that Plaintiffs were harmed."⁴⁵ At another point, the Circuit Court said Plaintiffs had gone further and conceded that the Act required a plaintiff to establish a "causal link between the plaintiff's loss and the defendant's conduct" and that the Act's "as a result language" means "caused by."⁴⁶ The Circuit Court characterized the parties' differing positions as being whether the Act's "as a result of" can be interpreted to mean 'because of' or 'caused by' or, as Wyeth argues, can be interpreted to require proof of reliance/causation."⁴⁷ This statement, as the Circuit Court's own analysis of Plaintiffs' position indicates, did not accurately characterize the difference between the parties. Plaintiffs grudgingly conceded, in the abstract, that the "as a result of" language requires proof of a causal connection, but insisted, as a practical matter, that they need only show that they had purchased the drug and that Wyeth had made misrepresentations. Wyeth, on the other hand, argued that both the Act and the West Virginia Constitution required a showing of some causal nexus – a showing that would be satisfied by proof of reliance.

For its part, the Circuit Court seems to have sometimes viewed the issue here as whether the Act requires proof of reliance, and sometimes as whether it requires only proof of some

⁴⁴ *Id.* at 6, 25.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 27 n.11 & 33.

⁴⁷ *Id.* at 33.

causal nexus between the injury and the allegedly deceptive practices.⁴⁸ The Circuit Court's holding appears to be that the Act requires neither proof that the Plaintiffs suffered injury because of any deceptive practice by Wyeth nor proof that Plaintiffs suffered injury because they relied on Wyeth's representations in any way. This must be so, given that the Circuit Court found its holding in conflict with this Court's ruling on standing in *Findley v. State Farm Mut. Auto. Ins. Co.*⁴⁹ The Circuit Court read *Findley* as requiring that Plaintiffs allege and prove facts "showing that the Plaintiffs purchased hormone replacement therapy *because of* Wyeth's statements."⁵⁰ The Circuit Court apparently viewed its holding as not requiring such proof, and therefore viewed its ruling as at odds with *Findley*.

The Circuit Court's opinion can only be viewed as adopting what Plaintiffs have all along really been arguing: that to state a claim under the Act, they need allege and prove only that they purchased HT and that, at some time in some way, Wyeth engaged in deceptive acts regarding its HT products. The corollaries to this ruling are that Plaintiffs (1) need not allege or prove that the Plaintiffs or their doctors relied on the allegedly deceptive acts or came under influence of those acts in deciding to take or prescribe HT; and (2) need not allege or prove any causal connection between Plaintiffs' injuries and Wyeth's allegedly deceptive acts, whether directly by their own testimony or indirectly through their doctors' testimony. Indeed, Plaintiffs' definition of the putative class proves this point: it consists of persons who purchased HT in West Virginia, and nothing more.

⁴⁸ Compare *id.* at 41 (only issue is reliance) with *id.* at 45 (issue is either "because of" or "in reliance upon").

⁴⁹ 213 W.Va. 80, 576 S.E.2d 807 (2002).

⁵⁰ Amended Order, at 42.

Because the record evidence here establishes without contradiction that none of the Plaintiffs nor their physicians considered anything from Wyeth in taking and prescribing HT, this case presents the question of the meaning of “as a result of” in § 106 in its most elemental form: Does the Act’s “as a result of” language or West Virginia’s constitutional standing jurisprudence require at the least some allegation and proof of a “causal connection” between the allegedly deceptive acts and the purchase of HT? Put another way, can a plaintiff state and prove a claim under the Act and the West Virginia Constitution with absolutely no allegation or proof of this “causal connection?”

The opinion correctly found that this issue is one of first impression in West Virginia, not having been resolved by *In Re West Virginia Rezulin Litigation*.⁵¹ The Circuit Court also correctly concluded that the structure of the Act points to the existence of a reliance requirement and that other courts, both in West Virginia and elsewhere, have interpreted the Act to require reliance in circumstances similar to the facts presented by this case. The Circuit Court correctly concluded that a negative answer to the Certified Question goes against this Court’s established test for standing under the West Virginia Constitution and most particularly conflicts with this Court’s decision in *Findley v. State Farm Mut. Auto. Ins. Co.* In the face of these correct findings—all of which point to an affirmative answer to the Certified Question—the Circuit Court nevertheless answered it in the negative, largely because it believed the remedial purpose of the Act required it to do so. In so ruling, the Circuit Court provided no explanation as to how plaintiffs in a prescription drug case could meet the Act’s “as a result of” requirement stated in § 46A-6-106 or could establish constitutional standing without proving at least some causal connection between the deceptive acts alleged and the losses suffered.

⁵¹ 214 W. Va. 52, 585 S.E. 2d 52 (2003).

That issue now confronts this Court.

STANDARD OF REVIEW

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.”⁵² This Court reviews both the Circuit Court’s denial of a motion to dismiss and of a motion for summary judgment *de novo*.⁵³

POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW SUMMARY OF ARGUMENT

This Court should answer the Certified Question “Yes” for two reasons:

First, the structure and plain language of the Act require it. The statutory framework created by the Legislature distinguishes between public enforcement actions by the Attorney General and private actions by individual consumers. The Legislature intended private plaintiffs to face a higher threshold than the Attorney General in suing under the Act to ensure that only individuals whom a defendant’s unfair or deceptive practices have harmed could seek redress. To answer “No” alters the balance between public and private actions that the Legislature established. To answer “No” reads out of the Act the explicit “as a result of” language in § 46A-6-106. That provision can only be understood as requiring proof that the Plaintiffs purchased HT *because of* statements from Wyeth. The case law interpreting the Act, other state consumer protection statutes, and other statutes with similar language confirm that the Act requires proof of this type of causal relationship.

On the record here, “as a result of” and “because of” mean that the doctors somehow relied on Wyeth’s allegedly deceptive acts in prescribing HT to the Plaintiffs. For there exists no

⁵² Syl. Pt. 1, *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W. Va. 243, 243, 617 S.E.2d 790, 790 (2005).

⁵³ *Findley*, 213 W.Va. at 89, 576 S.E.2d at 816.

dispute here that (1) the Plaintiffs themselves saw, read, and heard no representations by Wyeth and (2) they relied solely on their doctors in deciding to purchase HT. These undisputed facts leave the prescribing doctors as the only possible avenue available to the Plaintiffs to prove they purchased HT “as a result of” Wyeth’s deceptive acts. Because the doctors here also saw, read, and heard no representations by Wyeth regarding HT in prescribing the treatment, that avenue is a dead end for Plaintiffs’ case. To establish the requisite causal connection, the Plaintiffs have to allege and come forward with sufficient evidence to withstand summary judgment that the doctors somehow relied on Wyeth’s allegedly deceptive acts in prescribing HT to the Plaintiffs. They have made no such allegation and could not support it by evidence had they done so. Plaintiffs therefore cannot prove a claim under § 106. The Circuit Court should have granted Wyeth’s motion to dismiss and its motion for summary judgment for this reason.

Second, answering “Yes” reconciles the Act to the settled test for standing under the West Virginia Constitution. Standing is a “constitutional requirement.” To possess constitutional standing, a plaintiff must show a “causal connection” between her injury and “the conduct forming the basis of the lawsuit.” This requirement obliges Plaintiffs to connect their purchases of HT to specific conduct by Wyeth. On the record here, that means showing that in prescribing HT to the Plaintiffs, the Plaintiffs’ doctors somehow relied on or were influenced by Wyeth’s allegedly deceptive acts. Those doctors have testified they did not so rely and were not so influenced. Plaintiffs have not contradicted that evidence in any way. Therefore, they have failed to come forward with sufficient proof of a causal connection between their taking HT at their doctor’s recommendation and any conduct of Wyeth. They thus lack standing. In certifying this question, the Circuit Court acknowledged the conflict between its interpretation of the Act and this Court’s test for constitutional standing, admitting that its own interpretation

“goes against the standing requirements under the West Virginia Constitution that this Court articulated in *Findley*.” For this reason also, the Circuit Court should have granted summary judgment in favor of Wyeth.

ARGUMENT

The West Virginia Consumer Credit and Protection Act authorizes the Attorney General to bring an enforcement action against defendants who engage in deceptive conduct whether or not any consumer has yet suffered—or indeed, will ever suffer—any ascertainable loss because of that conduct. But the Act permits a *private* cause of action *only* where a consumer alleges and proves that she has suffered a loss “as a result of” the deceptive conduct, a limitation the Act does not place on the Attorney General. This Court has never directly addressed the statutory requirement, applicable solely to private actions, that the plaintiff’s loss be “as a result of” the defendant’s conduct. Here, the uncontroverted facts establish that Plaintiffs had no knowledge of any allegedly deceptive representations by Wyeth and never relied upon them in any way, either directly themselves or indirectly through their physicians. Plaintiffs thus cannot be said to have purchased and used HT “as a result of” those representations.

Plaintiffs’ interpretation of the Act topples the careful balance struck by the Legislature between public enforcement actions by the Attorney General and private enforcement actions by individual consumers. It contradicts the plain language of the Act, reading out of the Act the “as a result of” language. It ignores this Court’s established test for standing under the West Virginia Constitution. And, as a practical matter, it provides no usable standard for enforcing the Act’s standing provision in the unique context of prescription drug cases.

I. **THE STRUCTURE AND PLAIN LANGUAGE OF THE ACT REQUIRE PROOF THAT THE PLAINTIFFS KNEW OF AND RELIED UPON THE ALLEGEDLY DECEPTIVE CONDUCT.**

The Circuit Court erred when it held that the general remedial purpose of the Act overrides the Legislature's distinction between actions brought by the Attorney General and actions brought by private citizens, as well as the Legislature's requirement that a private plaintiff prove that she purchased the product "as a result of" the defendant's conduct. The structure and plain language of the Act cannot be squared with an interpretation that permits a plaintiff to proceed with no evidence that she was even aware of the deceptive conduct or that she somehow took it into account in deciding to purchase the defendant's product, or that her prescribing physician somehow did so.

A. **The Structure and Language of the Act Require Proof of a Causal Connection.**

West Virginia Code § 46A-6-106(a) defines the elements of a private cause of action under the Act. It requires that a consumer must allege that she "suffer[ed] any *ascertainable loss* of money . . . *as a result of* the use or employment by another person of a *method, act or practice prohibited or declared to be unlawful* by the provisions of this article."⁵⁴ It follows that the private party plaintiff must then prove all these elements, and in the context of a motion for summary judgment, must demonstrate at least that genuine issues of material fact exist regarding them. A claim pursuant to §106 therefore requires each of the Plaintiffs to allege and to prove three elements: First, that she suffered an "ascertainable loss;" second, that the Defendants engaged in unfair or deceptive conduct; and third, that her loss came about "as a result of" the Defendants' prohibited actions. The causal "as a result of" provision bridges the gap between the injury and the offense elements of the Act.

⁵⁴ W. Va. Code § 46A-6-106(a) (emphases added).

Plaintiffs would have the Court interpret § 46A-6-106 as requiring Plaintiffs to prove only the first and second elements—ascertainable loss and deceptive conduct by Wyeth. They contend that, for a private plaintiff to establish standing and make out a *prima facie* claim for relief under the Act, she need allege and prove only that (i) she purchased a medication and (ii) Wyeth committed practices in violation of the Act regarding that medication. But Plaintiffs never explain what the “as a result of” language in the statute means if it does not require them to connect their individual decisions to purchase HT to Wyeth’s allegedly misleading representations. Plaintiffs read that language right out of the Act. As the Circuit Court recognized, Plaintiffs’ interpretation of the Act conflicts with three critical aspects of the statutory scheme crafted by the Legislature.

First, the Circuit Court correctly found that the differently-worded provision authorizing public enforcement actions by the Attorney General constituted a “compelling argument that the legislature intended to place a higher burden on private actions brought by consumers.”⁵⁵ Comparison of the provision permitting private rights of action (§ 46A-6-106) with the provisions empowering the Attorney General to sue (§ 46A-7-108 through -111) demonstrates that the Legislature knew how to draft language that created judicial remedies but did not impose a requirement that anyone ever directly or indirectly have purchased the product at issue “as a result of” a defendant’s deceptive conduct. Section 7-108 authorizes the Attorney General to “bring a civil action to restrain a person from violating this chapter and for other appropriate relief.”⁵⁶ Section 7-110 authorizes the Attorney General to seek temporary injunctive relief when “there is reasonable cause to believe” that violations of the Act are occurring or may

⁵⁵ Amended Certification Order at 33-34.

⁵⁶ W. Va. Code § 46A-7-108.

occur.⁵⁷ The Legislature thus empowered the Attorney General to bring suit at the first sign of deceptive or unfair conduct and even before any consumer has suffered any injury. Indeed, these provisions authorize legal action by the Attorney General even if no injury ever occurs.

Had the Legislature intended individual consumers to enjoy the same rights, the Legislature could have done so. It could have readily drafted a section of the Act that read, in effect: “Any person who purchases or leases goods or services may bring a civil action for money damages against a person who violates this act with regard to such goods or services, or to restrain a person from violating this chapter and for other appropriate relief.” But the Legislature did not draft such a statute. It drafted a private right of action that expressly requires that the loss for which a plaintiff may sue have been suffered “as a result of” the deceptive acts. It required proof of causation.

Courts interpreting similar provisions in other consumer protection statutes generally recognize that the legislature often designs distinct provisions governing public and private causes of action “to separate private plaintiffs (who may only sue for harm they actually suffered *as a result of* the defendant’s deception) from the Attorney General (who may sue to protect the public from conduct that is *likely to mislead*).”⁵⁸ The same is true of the Act.

Second, the Circuit Court correctly found that the language of § 46A-6-106 specifying the elements of a private right of action should govern the general definitional language in § 46A-6-102(7)(M). Section 102(7)(M) does no more than provide that an act may be deceptive

⁵⁷ W. Va. Code § 46A-7-110.

⁵⁸ *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 225 (3d Cir. 2008) (applying Pennsylvania law) (emphasis added); see *Citaramanis v. Hollowell*, 613 A.2d 964, 969 (Md. 1992) (recognizing “bright-line” distinction between public and private remedies under Maryland consumer protection act; Attorney General eligible to sue without showing injury to consumers, but private litigants obligated to show loss “sustained *as a result of* the prohibited practice.” (emphasis added)).

“whether or not any person has in fact been misled, deceived or damaged thereby.” Plaintiffs argue that § 46A-6-102(7)(M) negates the “as a result of” requirement of § 106. The Circuit Court rightly rejected that interpretation, invoking the tenet of statutory construction that “specific statutory language generally takes precedence over more general statutory provisions.”⁵⁹ The “more specific provisions contained in W. Va. Code § 46[A]-6-106,” the Circuit Court said, “should govern over the more general provisions in W. Va. Code § 46A-6-102(7)(M).”⁶⁰ And so they should. In any event, § 102(7)(M) merely provides a definition of a “deceptive act” that applies to all the other provisions of the Act, and does so by defining such an act without regard to whether it causes injury. That definition applies to one of the elements the Legislature specified for a private cause of action under § 106, but says nothing about the other elements, such as the “as a result of” element here at issue. And it serves as a general definition, applicable both to the private cause of action (as one element among others) and the authority vested in the Attorney General to bring actions without regard to injury to private persons.

Third, the Circuit Court correctly found that it was “reasonable” to read the plain language of the Act as requiring Plaintiffs to prove some degree of causation. Inclusion of the “as a result of” provision in § 46A-6-106 constitutes a “compelling argument that the legislature intended to place a higher burden on private actions brought by consumers.”⁶¹ This suit rests on the claim that Wyeth “deceptively and unfairly marketed” HT in violation of the Act through the

⁵⁹ *Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005); Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 331, 325 S.E.2d 120, 120 (1984) (“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.”).

⁶⁰ Amended Certification Order at 34-35.

⁶¹ Amended Certification Order at 33-34.

use of misleading advertising and labeling.⁶² Here, the Plaintiffs have not alleged or produced evidence establishing any causal connection between the alleged deceptive practices and their alleged injuries. Moreover, the undisputed evidence establishes that the Plaintiffs purchased and used HT solely because their doctors recommended the medication, not because of Wyeth's advertising and marketing of HT—advertising and marketing of which Plaintiffs knew nothing, according to the record. The evidence likewise establishes that those doctors did not prescribe HT to these Plaintiffs based on anything Wyeth did. On these allegations and these undisputed facts, a determination that Plaintiffs have properly alleged standing or causation, or that they have presented sufficient evidence of causation to defeat summary judgment, effectively excises the words “as a result of” from the Act. But as this Court has held, “every word used [in a statute] is presumed to have meaning and purpose, for the Legislature is thought by the courts not to have used language idly.”⁶³

B. The Circuit Court Correctly Found that Other Courts on Analogous Facts Have Interpreted Similar Statutes To Require Reliance.

The case law interpreting § 46A-6-106 holds that the Act requires that Plaintiffs prove that they or their doctors had at least some awareness of Wyeth's allegedly deceptive conduct. In *Orlando v. Finance One of West Virginia, Inc.*, borrowers who executed notes and security agreements with a loan company brought a class action under the Act alleging in part that a term in their agreement waiving certain exemptions was unconscionable and constituted a deceptive

⁶² Am. Compl. ¶¶ 33-47, 86.

⁶³ *Bullman v. D & R Lumber Co.*, 195 W.Va. 129, 133, 464 S.E.2d 771, 775 (1995); *Cottrill v. Ranson*, 200 W.Va. 691, 697, 490 S.E.2d 778, 785 (1997) (“This Court’s responsibility is to give effect, whenever possible, to every word in a statute and not distort the plain language contained therein.”).

trade practice.⁶⁴ This Court held that the term violated the Act, but ruled that plaintiffs could not recover damages because they “suffered no ascertainable loss of money or property as a result of the inclusion of [the contract term],” because the “[defendant] *made no attempt to enforce* [the contract term].”⁶⁵ Like the unlawful waiver clause that this Court held could not support a cause of action under the Act because the defendant had never applied it, Wyeth’s supposedly deceptive marketing never reached or affected the Plaintiffs (who by their own admission knew nothing of the marketing and relied solely on their doctors’ advice) or their doctors (who by their own testimony did not consider it in prescribing HT).

In *Harless v. First National Bank in Fairmont*, this Court discussed the purpose of the Act.⁶⁶ Addressing the remedial nature of the statute soon after its passage, the Court observed that “[n]ot only did the Legislature regulate various consumer and credit practices, but it went further and established the right to civil action for damages on behalf of persons *who have been subjected to practices* that violate certain provisions of the Act.”⁶⁷ A plaintiff who did not see or hear a defendant’s deceptive conduct and in no way relied upon it—as the Plaintiffs in this case did not—cannot be said to have been “subjected to” unlawful practices under the Act. Here, too, the Plaintiffs did not read a Wyeth advertisement in a magazine or watch a Wyeth advertisement on television and then request HT from their doctors. Nor did the doctors read Wyeth marketing materials or discuss HT with Wyeth sales representatives and then prescribe HT for Plaintiffs based on those materials or discussions. The Plaintiffs here cannot be said to have been in any

⁶⁴ 179 W. Va. 447, 451-52, 369 S.E.2d 882, 886-87 (1988).

⁶⁵ *Id.* at 453, *Id.* at 888 (internal quotation marks omitted) (emphasis added).

⁶⁶ 162 W. Va. 116, 125, 246 S.E.2d 270, 275-76 (1978).

⁶⁷ *Id.* (emphasis added).

way “subjected to” the alleged misconduct by Wyeth. Their lack of connection to Wyeth’s conduct requires that their private actions under the Act be dismissed.

This Court’s decision in *In Re West Virginia Rezulin Litigation* supports Wyeth’s reading of the Act.⁶⁸ In that case, this Court addressed the meaning of “ascertainable loss” under the Act. In evaluating the decision on appeal, this Court found fault with every aspect of the trial court’s decision regarding class certification, except one: it noted without criticism the trial court’s reading of the Act to require each member of the putative class “to prove that a violation of the Consumer Protection Act caused him or her to purchase” the drug at issue.

As the Circuit Court noted, the Northern District of West Virginia (Keeley, J.) considered this issue in *Bertovich v. Advanced Brands & Importing Co.*⁶⁹ Plaintiffs there, a group of parents who sued several alcoholic beverage manufacturers and distributors, alleged that the defendants deceptively advertised and marketed alcohol to minors. District Judge Keeley held that the Plaintiffs lacked standing to sue under the Act because they failed to allege “any facts that would connect any of the Defendants’ conduct to [Plaintiffs’] injury.”⁷⁰ Citing the standard for constitutional standing under West Virginia law, the District Court found it “clear” that the plaintiffs needed to “allege a causal connection between their alleged injury and the Defendants’ alleged acts or omissions” to bring a private claim under the Act.⁷¹ The District Court reasoned

⁶⁸ 214 W.Va. 52, 74-75, 585 S.E.2d 52, 74-75 (2003).

⁶⁹ No. 5:05CV74, 2006 WL 2382273 (N.D.W. Va. Aug. 17, 2006).

⁷⁰ *Id.* at *13.

⁷¹ *Id.* at *4, *9.

that plaintiffs had not met this burden because their complaint “contains no allegation that directly links the Defendants’ actions or omissions to the [plaintiffs’] alleged injury.”⁷²

Similarly, in *State of West Virginia ex rel. Miller v. Secretary of Education*, Judge Copenhaver of the Southern District of West Virginia analyzed § 46A-6-106 and declined to certify a consumer fraud class action.⁷³ Addressing the plaintiffs’ argument that there existed no need for “an individualized, case-by-case investigation of what misrepresentation each member of the putative class relied upon,” the District Court held that such argument “ignores the plain language of § [46A-6-]106(1)” as well as “West Virginia case law which speaks of a threshold aspect to obtaining relief under this statute.”⁷⁴ The court observed that “a prerequisite for bringing an action for damages under § 106(1) is that a party must have suffered ‘an ascertainable loss . . . as the result of the use’ of the unfair method, act or practice.”⁷⁵ The court identified the “as a result of” language in the Act as an independent requirement, holding that “it would be improper to certify a class action on the mere basis of an alleged violation of [the Act] when neither plaintiff has produced evidence to show that they suffered ‘an ascertainable loss’ from the alleged written misrepresentations employed by Century.”⁷⁶

⁷² *Id.* at *9.

⁷³ No. 2:90-0590, 1993 WL 545730 (S.D.W. Va. Sept. 30, 1993).

⁷⁴ *Id.* at *12-13.

⁷⁵ *Id.* at *14.

⁷⁶ *Id.* So, too, the federal court responsible for the multidistrict litigation concerning the prescription drug Baycol declined to certify a class of West Virginia purchasers because it read the Act as requiring each plaintiff to prove ascertainable loss “because of [the defendant’s] conduct in the marketing and sale of Baycol.” *In re Baycol Prod. Liab. Litig.*, No. 02-199, MDL-1431 (D. Minn. Dec. 9, 2008) (Davis, C.J.) at 3 (attached as Exhibit 2 to Wyeth’s Supplemental Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment Due to Lack of Standing, filed January 16, 2009), *aff’d*, ___ F.3d ___, 2010 WL 10397 (8th Cir. 2010).

Cases from numerous jurisdictions have found that the identical “as a result of” language in their state consumer protection acts requires proof that the plaintiff either relied on or was somehow influenced by the deceptive act alleged, despite the remedial nature of such statutes. In *Weinberg v. Sun Company, Inc.*, for example, the Pennsylvania Supreme Court considered the meaning of “as a result of” in light of the Pennsylvania consumer protection act’s remedial purpose.⁷⁷ There, consumers of gasoline brought false advertising claims against an oil company, alleging that the company had engaged in deceptive advertising of the benefits of its higher octane fuel.⁷⁸ Reviewing the legislative history of the Pennsylvania statute, the court noted that the prevention of fraud served as the “underlying foundation” of the statute. It cited its own precedent directing that the statute “be construed liberally to effect its object of preventing unfair or deceptive practices.”⁷⁹ But it read the “as a result of” language in the statute to “clearly require[e]” that “a plaintiff must allege reliance, that he purchased Ultra® because he heard and believed Sunoco’s false advertising that Ultra® would enhance engine performance,” notwithstanding the statute’s remedial nature.⁸⁰ The court further observed that “[n]othing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.” *Id.* Neither does anything in the legislative history of the Act. The courts in other states with the same “as a result of” provisions likewise have determined that their statutes’ remedial purposes do not justify reading “as a result of” out of those laws.

⁷⁷ 777 A.2d 442 (Pa. 2001).

⁷⁸ *Id.* at 446 (quotation marks omitted).

⁷⁹ *Id.* at 446; *Commonwealth by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Pa. 1974).

⁸⁰ 777 A.2d at 446.

In the recent decision in *De Bouse v. Bayer AG*,⁸¹ the Illinois Supreme Court considered a case close factually to the instant case before this Court. There the plaintiff brought a class action under the Illinois Consumer Fraud Act seeking damages relating to a cholesterol-lowering drug, Baycol. The Illinois Consumer Fraud Act required that to allege and prove a cause of action under the statute's "as a result of" language,⁸² a plaintiff must claim and prove "actual damage to the plaintiff that is ... a result of the" plaintiff's reliance on the deception" alleged.⁸³ The plaintiff there, like the Plaintiffs before this Court, had not seen or relied on any of the defendant's alleged deceptive advertising and had taken the drug solely on her doctor's recommendation.⁸⁴ Bayer argued that De Bouse could not recover unless she could prove she had relied on the alleged deceptive practices. Even De Bouse, in arguing for a finding that she could proceed by proving an "indirect deception" via a third party, recognized that she still would have to prove that the alleged deceptive statements "in fact cause[d] plaintiff's reliance to plaintiff's detriment."⁸⁵ The Illinois Supreme Court held "that to maintain an action under the Act, the plaintiff must actually be deceived by a statement or omission that is made by the defendant."⁸⁶ It followed, that Court held, that "[i]f a consumer has neither seen nor heard any

⁸¹ ___ N.E. 2d ___, 2009 WL 4843362 (Ill. 2009).

⁸² Ill. C. S. 505/10a(a).

⁸³ *Id.* at *3-*4.

⁸⁴ *Id.* at *5.

⁸⁵ *Id.* at *3.

⁸⁶ *Id.* at *5.

such statement, then she cannot have relied on the statement and, consequently, cannot prove proximate cause.”⁸⁷ The Illinois Supreme Court said:

De Bouse must prove that she was actually deceived, either directly or indirectly. De Bouse acknowledged in her deposition testimony that before she began taking Baycol she had seen no advertisements for the drug and had no independent knowledge of the drug or its effects. Therefore, she was not directly deceived by Bayer.⁸⁸

The court accordingly reversed and remanded for entry of summary judgment on the named plaintiff’s individual claim. And it reversed the trial court’s certification of the class because the plaintiff, who herself could “not maintain a cause of action against Bayer,” was thus “no longer an appropriate representative of the putative class.”⁸⁹

In the same way, the Maryland Court of Appeals in *Lloyd v. General Motors Corporation* interpreted that state’s consumer protection act to protect reliance.⁹⁰ Maryland’s act authorized a private right of action for anyone “injured as the result of a practice prohibited by” the statute.⁹¹ The Maryland Court of Appeals noted that it had interpreted its statute to require a plaintiff to prove that the loss for which he sued had occurred “as a result of his or her reliance on the sellers’ misrepresentation.”⁹² And the Maryland Court imposed this reliance requirement even though its statute, like the Act at issue in this case, provided that “[a]ny practice prohibited

⁸⁷ *Id.*

⁸⁸ *Id.* at *7.

⁸⁹ *Id.* at *8.

⁹⁰ 397 Md. 108, 916 A.2d 257 (2007)

⁹¹ *Id.* at 142 n.15, 916 A.2d at 277 n.15 (quoting Maryland Code Ann., Commercial Law § 13-408 (1975, 2005 Repl. Vol.))

⁹² *Id.* at 143, 916 A.2d at 277.

by this title is a violation of this title, whether or not any consumer has in fact been misled, deceived, or damaged as a result of that practice.”⁹³

Many other jurisdictions require the plaintiff to prove that he or she relied upon or came under the influence of the allegedly deceptive practices to establish causation under a statute with the same “as a result of” language as the Act.⁹⁴ The record before this Court establishes without contradiction that the Plaintiffs did not have knowledge of or rely in any way on any deceptive act by Wyeth in deciding to take HT, but instead purchased the drug solely because their doctors recommended they do so. And the record likewise establishes without contradiction that those physicians prescribed HT for each plaintiff without regard to any allegedly deceptive act by Wyeth. Plaintiffs thus cannot prove they relied in any way on the allegedly deceptive practices of Wyeth, directly or through their doctors. Their purchase of HT cannot be said to be “as a result of” Wyeth’s allegedly deceptive conduct without at least some proof that they, or (more to the point on this record) their doctors relied on Wyeth’s allegedly deceptive acts in purchasing or prescribing Plaintiffs’ HT or that those allegedly deceptive acts somehow influenced Plaintiffs’ decision or their doctors’ professional judgment.

⁹³ *Id.* at 142, 916 A.2d at 277 (quoting Maryland Code Ann., Commercial Law § 13-302 (1975, 2005 Repl. Vol.).

⁹⁴ *E.g.*, *De Bouse, supra* (Ill.C.S. 505/1, *et seq.*); *Garcia v. Medved Chevrolet, Inc.*, ___ P.3d ___, 2009 WL 3765481 (Colo. Ct. App. 2009) (Colo.R.S.A. § 6-1-101, *et seq.*); *Lloyd, supra* (Md. Code Ann., Comm. Law § 13-101, *et seq.*); *Cohen v. DirecTv, Inc.*, 178 Cal. App. 4th 966, 980 (Cal. Ct. App. 2009) (Cal. Civ. Code § 1780); *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009) (Cal. Bus. & Prof. Code § 17204) (named class plaintiffs are required to show reliance); *Tilsman v. Linda Marin Homes Corp.*, 637 S.E.2d 14, 16-17 (Ga. 2006) (OCGA § 10-1-399); *Padin v. Oyster Point Dodge*, 397 F. Supp. 2d 712, 722 (E.D. Va. 2005) (Va. Code § 59.1-204); *Weinberg v. Sun Co.*, 777 A.2d 442, 445-46 (Pa. 2001) (73 P.S. § 201.3); *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (O.R.S. § 646.638)

Some jurisdictions have relaxed the requirement that a plaintiff prove reliance.⁹⁵ But even those states require proof of causation, that is, proof that the allegedly deceptive practice caused the purchase of the product or service at issue. Research has revealed no case holding that a plaintiff need allege and prove no causal connection to satisfy the “as a result of” requirement of consumer protection statutes. No court has held—as Plaintiffs contend this Court should and as the Circuit Court’s opinion effectively did—that “as a result of” has no meaning at all. Here, Plaintiffs have neither alleged nor produced any evidence of a causal connection between what they alleged Wyeth did wrong and Plaintiffs’ purchase of HT. Even if this Court finds some validity to distinguishing between reliance and causation in this context, it should find that Plaintiffs have failed even the more relaxed test.

C. The Circuit Court Mistakenly Held that the Act’s Remedial Purpose Overrides the Legislature’s Distinction Between Public and Private Suits.

The Circuit Court erroneously reasoned that the remedial purpose of the Act required it to adopt a reading of § 46A-6-106 at odds with the Act’s structure and plain language and the holdings of other cases. That conclusion cannot withstand scrutiny for three reasons. First, the statute contains no ambiguity. Plaintiffs allege that Wyeth “deceptively and unfairly marketed” HT and claim that Wyeth promoted nonexistent cardiovascular and other benefits of HT. If these allegations sufficed, as Plaintiffs suggest, to establish a violation of the Act without connecting

⁹⁵ See, e.g., *Collins v. Anthem Health Plans, Inc.*, 880 A.2d 106, 120-21 (Conn. 2005) (Conn. Gen. Stat. § 42-110b); *Land v. Dixon*, 2005 WL 1618743, *4 (Tenn. App. Ct. July 12, 2005) (Tenn. Code. Ann. § 47-18-109(a)(1)); *Hall v. Walter*, 969 P.2d 24, 234-35 (Colo. 1998) (Colo.R.S.A. § 6-1-113); *Fields v. Yarborough Ford, Inc.*, 414 S.E.2d 164, 166 (S.C. 1992); *Bartner v. Carter*, 405 A.2d 194, 200-04 (Me. Sup. Ct. 1979) (5 Me.R.S.A. 213); *Welch v. Centex Home Equity Co.*, 2008 WL 713690, *17 (Kan. Ct. App. 2008) (Kan. Stat. Ann. § 50-634(d)); *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund*, 929 A.2d 1076, 1086 (N.J. 2007) N.J.S.A. § 56:8-19); *Hershenow v. Enterprise Rent-a-Car Co. of Boston, Inc.*, 840 N.E.2d 526, 532-35 (Mass. 2006) (Mass. Gen. L. A. ch. 93A § 11); *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. Dist. Ct. App. 1st Dist. 2000) (Fla. Stat. § 501.211(2)); *Smoot v. Phys. Life Ins. Co.*, 87 P.3d 545, 551 (N.M. Ct. App. 2003) (N.M. St. § 57-12-10(B)).

those two events to Plaintiffs' "loss," then the "as a result of" language in the Act would have no purpose or meaning. But this Court must give effect to that language, because the Legislature adopted it. And that language plainly and unmistakably requires proof that the Plaintiffs have purchased the product in some way *because of* the deceptive conduct. This Court has recognized that the words "as a result of" convey a plain meaning: "A plaintiff, of course, must establish by satisfactory proof that the injury of which he complains was *caused by, or was the result of,* action on the part of the defendant, before recovery is permitted."⁹⁶ The Act clearly requires a private plaintiff to prove that her injuries "were caused by" the deceptive acts of the defendant.

Second, even if § 46A-6-106 could be read as ambiguous, such a reading does not compel the result reached by the Circuit Court. Assuming that the remedial purpose of the Act requires that the Act be interpreted broadly, that interpretation nevertheless must take account of the fact that the Act assigns a different role to enforcement actions by the Attorney General than it does to private actions for damages. When ascertaining legislative intent, "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."⁹⁷ The Circuit Court overrode the statutory division of responsibility that the Legislature created. To a substantial degree, its ruling puts private litigants in the Attorney General's shoes, something the Legislature did not intend.

The West Virginia Legislature already has allowed for the broadest possible action to correct an alleged violation of the Act. The Legislature chose to vest this power in the Attorney General, not in private litigants. The Legislature gave the Attorney General, and the Attorney

⁹⁶ *Whitney v. Ralph Myers Contracting Corp.*, 146 W.Va. 130, 134, 118 S.E.2d 622, 624 (1961) (emphasis added).

⁹⁷ Syl. Pt. 1, *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W. Va. 573, 574, 618 S.E.2d 582, 583 (2005) (alteration in original) (quotation marks omitted).

General only, the authority to act preemptively by suing before any consumer has suffered injury based on no more than “reasonable cause to believe” that a defendant had violated the Act. The Legislature gave the Attorney General this considerable authority because it expected that the Attorney General would exercise it in the public interest, as is his sworn duty, and that, if he did not, the public could refuse to vote for him. By contrast, private plaintiffs operate under no duty to serve the public interest and owe no accountability to the public at large. The Legislature recognized this difference by imposing explicit constraints on private plaintiffs, including the requirements that they prove “ascertainable loss” and injury “as a result of” deceptive conduct, restraints that it did not impose on the Attorney General. The Circuit Court’s answer to the Certified Question eliminates the key distinction, empowering private litigants to sue for deceptive conduct of which these private plaintiffs knew nothing and from which they suffered no injury. If the remedial purpose of the Act obviates the need to prove that the plaintiff suffered loss “as a result of” the defendant’s conduct, it could just as well be said to obviate the need for the plaintiff to prove in the first instance that she suffered any ascertainable loss at all. Such a result flows logically from the Circuit Court’s reasoning that remedial purpose trumps the statute’s language. In granting the same powers to private litigants as to the Attorney General, the Circuit Court eviscerated the Legislature’s intent to separate the enforcement mechanisms for public and private actions under the Act.

Words have meaning. Legislatures use them for a purpose. Plaintiffs here would have this Court delete from the Act the words, “as a result of” in § 106. For neither they nor the Circuit Court have explained how Plaintiffs—on this record—can prove that their injuries occurred “as a result of” a deceptive practice by Wyeth, or that such a deceptive practice “caused” their losses, if they need prove no more than that they purchased HT and Wyeth

committed deceptive practices regarding HT, without establishing any causal relationship. The plain language of the statute requires that they prove some facts establishing causation.

II. THE CIRCUIT COURT'S ANSWER TO THE CERTIFIED QUESTION CONFLICTS WITH THE WEST VIRGINIA CONSTITUTION'S REQUIREMENT OF A "CAUSAL CONNECTION" FOR STANDING.

The Circuit Court acknowledged that its answer to the Certified Question "goes against" the standing requirement of the West Virginia Constitution. The Circuit Court's inability to reconcile Plaintiffs' reading of the Act with this Court's standing jurisprudence led to the Circuit Court certifying the issue.⁹⁸

In West Virginia, standing constitutes a threshold "constitutional requiremen[t]" under Art. VIII, § 3 of the West Virginia Constitution.⁹⁹ "The very jurisdiction of a circuit court in civil matters depends upon the existence of a 'case' or 'controversy.'"¹⁰⁰ In Syllabus Point Five of *Findley v. State Farm Mut. Auto. Ins. Co.*, this Court identified the three elements to establish standing under the West Virginia Constitution:

[I]t is well-recognized, and we now so hold, that "[s]tanding . . . is comprised of three elements: First, the party . . . [attempting to establish standing] must have suffered an 'injury-in-fact'-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis

⁹⁸ Amended Certification Order at 42 ("[T]he Court will certify a question to the West Virginia Supreme Court of Appeals addressing whether this Court's interpretation of the WVCCPA can be reconciled with the Supreme Court's holding in *Findley*.").

⁹⁹ *State ex rel. Abraham Linc v. Bedell*, 216 W. Va. 99, 112 n.2, 602 S.E.2d 542, 555 n.2 (2004) (Davis, J., concurring); *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 164, 248 S.E.2d 602, 604 (1978) ("Since the question of petitioner's standing is a threshold issue, we deal with it first.").

¹⁰⁰ *Bd. of Educ. of Monongalia County v. Starcher*, 176 W. Va. 388, 392 n.3, 343 S.E.2d 673, 677 n.3 (1986).

of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.”¹⁰¹

The United States Supreme Court has explained that, to establish standing under the “case or controversy” provision of Art. III of the federal Constitution, a plaintiff must “allege *facts* demonstrating that [she] is the proper party to invoke judicial resolution of the dispute.”¹⁰² This Court has also instructed that the pleadings must “demonstrate that *a set of facts* may exist which could arguably invoke the court’s jurisdiction” and that “the allegations both with regard to the facts and the applicable law” must be “of sufficient substance to require the court to make . . . a reasoned determination of its own jurisdiction.”¹⁰³ This means that the plaintiff “must set forth . . . specific facts” supporting each element of standing: injury, causation, and redressability.¹⁰⁴ And having set them forth, the plaintiff must, when facing a motion for summary judgment, produce sufficient evidence of those allegations to establish a genuine dispute on the issue.

The Circuit Court saw that “*Findley* requires the Plaintiffs to allege *facts* in their complaint showing that the Plaintiffs purchased hormone replacement therapy *because of*

¹⁰¹ 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (emphasis added) (*quoting Coleman v. Sopher*, 194 W. Va. 90, 95 n.6, 459 S.E.2d 367, 372 n.6 (1995) and *citing as in accord with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

¹⁰² *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation marks omitted) (emphasis added), *modified on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004).

¹⁰³ *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 166 n. 3, 539 S.E.2d 106, 109 n.3 (2000) (*quoting Eastern Associated Coal Corp. v. Doe*, 159 W. Va. 200, 210, 220 S.E.2d 672, 679 (1975)) (emphasis added). See Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 299 (3d ed. 2008) (stating “if the plaintiff offers no factual allegations, specific or general, demonstrating an injury in fact, the trial court should dismiss the complaint” for failure to allege standing).

¹⁰⁴ *Lujan*, 504 U.S. at 561 (internal quotation marks omitted) (cited with approval in *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821).

Wyeth's statements."¹⁰⁵ It also saw that the amended complaint here did not do so and that Plaintiffs had produced no evidence they had done so. The Circuit Court recognized that, in relying on the Act's remedial purpose to deny Wyeth's motion, its holding conflicted with West Virginia's constitutional requirement for standing: "[R]esolving any statutory ambiguity in this matter [in Plaintiffs' favor] goes against the standing requirement articulated in *Findley*."¹⁰⁶

Plaintiffs take the position that the Act should be interpreted as not requiring proof that they purchased HT based on Wyeth's representations. But Plaintiffs have never explained how they have standing to sue if Plaintiffs did not somehow, themselves directly or through their doctors indirectly, rely on Wyeth's allegedly deceptive conduct in prescribing HT. Apart from the Act, the West Virginia Constitution obliges Plaintiffs to plead and prove a "causal connection" between their losses and "the conduct forming the basis of the lawsuit." To establish such a causal link, Plaintiffs must allege—and when the time comes (and it has come) must prove—facts demonstrating that each of them purchased HT "as a result of," "because of," "in reliance on," or "under the influence of" Wyeth's allegedly deceptive acts.

The federal court in *Hillis v. Equifax Consumer Services, Inc.*¹⁰⁷ addressed this distinction in analyzing a federal consumer protection statute. As here, the plaintiff took the position that he "d[id] not need to establish that he saw or heard any representations" and that "once a defendant makes a misleading statement, liability attaches without regard to whether a plaintiff saw or heard the statement."¹⁰⁸ The court said that this position "raises profound

¹⁰⁵ Amended Certification Order at 42 (emphasis added).

¹⁰⁶ *Id.* at 42.

¹⁰⁷ 237 F.R.D. 491, 498 (N.D. Ga. 2006).

¹⁰⁸ *Id.*

standing concerns” because “if there was no evidence that Plaintiff saw or heard any of the representations alleged, there would be no injury to him, regardless of whether the representations may have been misleading or untrue to others.”¹⁰⁹ Similarly, in *Bertovich*, the District Court held that standing under the Act required the plaintiffs both to (i) identify the deceptive conduct to which they were exposed and (ii) show how the defendant’s conduct led to their injury. The *Bertovich* plaintiffs lacked standing because their complaint “fail[ed] to indicate which [allegedly deceptive marketing] practices . . . influenced their underage children to purchase and consume alcohol.”¹¹⁰

The amended complaint here likewise failed to allege facts that could establish the necessary causal connection; it parrots the “as a result of” language from the Act. More important, the record developed in four years of discovery reveals that Plaintiffs have failed to come forward with any facts showing a causal connection, direct or indirect, between their purchases and Wyeth’s marketing. On this undisputed record, they lack standing to maintain their lawsuit. This is not to say that all purchasers of HT lack standing, but only that these Plaintiffs do. Some future plaintiffs, who saw or heard some of the deceptive acts, or whose doctor prescribed a drug in reliance on, or having been influenced by, a deceptive practice, might well have standing to bring a claim under the Act. But these Plaintiffs, who can point to nothing, do not. And to resolve this case, this Court need go no farther than holding they do not.

The Circuit Court’s negative answer to the Certified Question nullifies the standing requirement. This Court should restore that requirement by answering the Certified Question, “Yes.”

¹⁰⁹ *Id.* at 498-99. The court ultimately concluded that the named plaintiff had standing only because he had seen some of the misrepresentations.

¹¹⁰ 2006 WL 2382273, at *9, *13.

The West Virginia Legislature crafted the Act to vest broad remedial powers in the Attorney General to stop deceptive practices without regard to whether those practices have or ever will cause injury in the State. At the same time, the Legislature created a cause of action for private citizens to seek redress for injuries they have suffered “as a result” of such deceptive practices. This legislative distinction comports with the role and duties of the Attorney General, an elected official with broad law enforcement and remedial powers who ultimately must answer to the electorate. And it comports with traditional notions of proximate cause and reliance that govern suits both at common law and under numerous statutes and that require the Plaintiffs to plead and prove a causal connection between the acts of which she complains and the injuries she claims to have suffered, whether by showing their doctors relied on the allegedly deceptive acts of Wyeth or that those acts influenced the doctors to prescribe HT in some way. Finally, applying the “as a result of” language of the Act according to its plain meaning so as to require plaintiff to plead and prove reliance or some related form of causation fulfills the threshold constitutional requirement of standing.

In this way, the Act fulfills its broad remedial purposes, addressing both the public’s interest in ending deceptive practices and vindicating the injured citizen’s right to seek damages caused by such practices. There exists no need, in light of this balanced and comprehensive legislative scheme, to distort constitutional principles of standing and torture the plain meaning of § 106 by permitting private parties who (and whose doctors) have not relied in any way on the alleged deceptive practices—indeed, who are ignorant of them—nevertheless to bring an action for damages. This result would not permit wrongdoers under the Act to go free. Purchasers of HT who can plead and prove that Wyeth’s alleged deceptive practices caused their losses would retain their claim for statutory damages and attorney’s fees, a powerful weapon for private

enforcement of the Act. This Court should restore the balance the Legislature struck by answering the Certified Question in the affirmative. If this Court answers the Certified Question in the negative, however, it should in that case declare the private damage remedy of § 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act unconstitutional under the facts of this case pursuant to Art. VIII, § 3 of the West Virginia Constitution, which limits the jurisdiction of the courts of West Virginia to actual controversies.

RELIEF FOR WHICH PETITIONERS PRAY

For the reasons described above, this Court should answer the Certified Question, “Yes!” It should then remand this action with instructions to the Circuit Court to dismiss Plaintiffs’ Amended Complaint and enter judgment for Petitioners Wyeth and Ketchum.

In the alternative, if this Court answers the Certified Question in the negative, however, it should declare the private damage remedy of § 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act unconstitutional under the facts of this case pursuant to Art. VIII, § 3 of the West Virginia Constitution and remand with instructions to the Circuit Court to dismiss Plaintiffs’ Amended Complaint and enter judgment for Petitioners Wyeth and Ketchum.

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WYETH and KETCHUM, INC.,

Petitioners,

v.

SHIRLEY WHITE, CATHY DENNISON, and
JENNY L. TYLER, on behalf of themselves
and a class of others similarly situated,

CIVIL ACTION NO. 04-C-127

Respondents.

CERTIFICATE OF SERVICE

I, Pamela Dawn Tarr, counsel for Defendant Wyeth, hereby certify that I have served the foregoing "Brief of Petitioner" upon all counsel of record by placing a copy thereof in the regular course of the United States mail, postage prepaid, this 15th day of January, 2010, addressed as follows:

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