

11-1783

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CYNTHIA KERNER**, guardian, on behalf of J.B. and R.B.;  
**LORI COON**, guardian, on behalf of B.C.;  
**ROBIN DANBERRY**, guardian, on behalf of B.B.;  
**KATHY COOPER**, guardian, on behalf of L.D. and C.D.;  
**CECILIA NASH**, guardian, on behalf of C.C. and J.C.;  
**LISA ROTH**, guardian, on behalf of A.C. and A.C.;  
and on behalf of all other children similarly situated,

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CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Plaintiffs,

v.

Civil Action No. 11-C-666  
Judge Zakaib

**MICHAEL J. LEWIS**, Secretary of the West  
Virginia Department of Health and Human Resources;  
**WEST VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES;**  
**WEST VIRGINIA SUPPORT ENFORCEMENT COMMISSION;**  
**GARRETT M. JACOBS**, Commissioner,  
West Virginia Bureau for Child Support Enforcement;  
**WEST VIRGINIA BUREAU FOR CHILD SUPPORT ENFORCEMENT,**  
and **POLICY STUDIES, INC.**, a Colorado Corporation,

Defendants.

### ORDER

On October 25, 2011, a hearing was held on the motion to dismiss filed by Defendants Michael J. Lewis, Secretary of the West Virginia Department of Health and Human Resources; West Virginia Department of Health and Human Resources ("DHHR"); West Virginia Support Enforcement Commission; Garrett M. Jacobs, Commissioner, West Virginia Bureau for Child Support Enforcement; West Virginia Bureau for Child Support Enforcement ("BCSE"); and Policy Studies, Inc. ("PSI"). Present at the hearing were Lonnie C. Simmons, Charles R. Webb, and Katherine H. Regan, counsel for Plaintiffs. Present for State Defendants were Edgar Allen Poe, Jr. and Elizabeth Kling, and present for Defendant Policy Studies, Inc., were Ancil G. Ramey and Jan L. Fox.

## **Introduction**

This action is the counterpoint to the West Virginia Supreme Court's decision in *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003). In *Shaffer* and its progeny, the West Virginia Supreme Court upheld the rights of noncustodial parents who had failed to pay their child support obligations, concluding where a child support judgment order had not been preserved, the BCSE was prohibited from withholding the noncustodial parent's means of income barred by the statute of limitations. The BCSE was accordingly ordered to return the improperly withheld money to the noncustodial parents.

Here, Plaintiffs seek to uphold the rights of the custodial parents—the individuals who depended on the now barred child support payments in order to provide for their children. Because the child support judgment orders were not preserved in each plaintiff's case, the Plaintiff class representatives have lost thousands of dollars in child support. Plaintiffs therefore seek compensation for the payments lost as a result of the statute of limitations. After considering the pleadings and argument of counsel, the Court makes the following findings of fact and conclusions of law:

## **Findings of Fact**

In addressing Defendants' motion to dismiss, the Court will construe the facts alleged in the complaint in the light most favorable to Plaintiffs and will assume all allegations are true. *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 158 (1978). A motion to dismiss should only be granted where it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claims. Syllabus Point 2, *Holbrook v. Holbrook*, 196 W. Va. 720, 474 S.E.2d 900 (1996). In a case where immunities are implicated, the case may be resolved on summary disposition

“unless there is a dispute as to the foundational or historical facts that underlie the immunity determination.” Syllabus Point 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). In applying this standard of review, the Court makes the following findings of fact:

1. Each Plaintiff class representative is a custodial parent of a child or children, who is owed child support from the noncustodial parent.
2. In each case, an order was entered requiring the noncustodial parent to pay a certain amount of child support each month.
3. Defendants West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, and Policy Studies, Inc., filed a motion in each case on behalf of the children seeking to determine the amount of child support in arrears.
4. However, each of these motions were filed subsequent to the West Virginia Supreme Court’s decisions in *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003), and its progeny. In those cases, the West Virginia Supreme Court found that where a child support judgment had not been preserved, the State Defendants and PSI could not collect child support in arrears that fell outside the statute of limitations.
5. In *Shaffer*, the West Virginia Supreme Court ordered the State Defendants to repay the noncustodial parents any money withheld that was barred by the statute of limitations.
6. In each case, the child support order was not preserved, and, pursuant to *Shaffer*, significant portions of the child support payments in arrears were barred by the statute of limitations. The individual amounts lost by Plaintiffs range from approximately \$2,593.89 to \$57,728.00. See Compl. at 9–16. The class representatives in total allege \$157,070.42 was lost in their cases. *Id.*

#### **Conclusions of Law**

The Court has determined, based upon the applicable standard of review for a motion to dismiss and the lack of factual development at this early stage in the litigation, Defendants’ motion to dismiss is denied on all grounds asserted.

A.

**Defendant Policy Studies, Inc., a private corporation which**

**contracted with the State, is not entitled to any governmental immunities**

Defendant PSI contends that it is entitled to each of the governmental immunities asserted by the State Defendants on the basis that it is contractually performing governmental duties on behalf of the BCSE. PSI cites a string of cases in support of this contention. However, these cases all predate the United States Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997), which Defendant PSI failed to cite in its briefing to this Court. Contrary to Defendant PSI's assertion that "[i]t is well-settled that private parties under contract to perform governmental functions are entitled to the same immunities[.]" Defs.' Reply ¶ 25, the United States Supreme Court concluded that not all private parties under contract are entitled to government immunities. In the "context . . . in which a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms" immunity does not apply. *Richardson*, 521 U.S. at 413. PSI is a private, for-profit firm that won a contract with the State to assume a lengthy administrative task. In addition, as PSI has stated, Plaintiffs were free to select alternative counsel if they chose. Clearly, PSI is in competition with other firms, and it is not covered by governmental immunities.

In *Richardson*, the United States Supreme Court observed that several cases—those cited by Defendant PSI—were examples of approaches to determining the immunities applicable to private sector defendants that were different from the approach utilized by the United States Supreme Court and the Sixth Circuit, whose decision was under review. *Id.* at 402 (citing *Williams v. O'Leary*, 55 F.3d 320 (7th Cir. 1995), *Eagon v. Elk City*, 72 F.3d 1480 (10th Cir. 1996)). Defendant PSI in fact cites *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996). This case is not only the circuit court case that

the United States Supreme Court reviewed in *Richardson*, but Defendant PSI misstated the holding of the Sixth Circuit case—rather than affirming dismissal of a § 1983 case, the Sixth Circuit affirmed the district court’s decision finding the private correction officers were **not entitled to qualified immunity**. See Defs.’ Reply ¶ 36; *McKnight*, 88 F.3d at 424. The United States Supreme Court affirmed this decision.

Defendant PSI also cites dicta from *Blessing v. National Engineering & Contracting Co.*, 222 W. Va. 267, 664 S.E.2d 152 (2008), to support its assertion that “[a]ny claims against PSI, as a private contractor performing state functions, are also required to be expressly restricted to the limits of the State.’s insurance policy.” Defs.’ Mot. at 7. The dicta Defendant PSI lifts from *Blessing* only holds that when the State is sued and **there is no insurance coverage available**, the fact that the State has an agreement where it is to be indemnified by a private corporation is not the equivalent of having insurance coverage under *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). In no way does this equate a private contractor being afforded government immunities.

Last, Defendant PSI attempts to analogize its role to that of a guardian ad litem, which is entitled to judicial immunity. A guardian ad litem is *court appointed*, and performs a role critical to the adjudication of cases relating to the best interests of a child. In contrast, Defendant PSI won a contract with the State to perform functions that could be performed by the BCSE, a State entity, or *private attorneys*. Thus, Defendant PSI’s argument misstates the law and overlooks a key United States Supreme Court case. Defendant PSI is not entitled to any governmental immunities, whether it be the sovereign immunity, the prosecutorial immunity, or the qualified immunity defense asserted by the State defendants, pursuant to the United States Supreme Court’s decision in *Richardson*.

**B.**

**Prosecutorial immunity does not apply to this action**

Defendants contend that the claims asserted against them are barred by prosecutorial immunity. The West Virginia Supreme Court has explained that “[p]rosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process.” *Jarvis v. W. Va. State Police*, \_\_\_ W.Va. \_\_\_, 711 S.E.2d 542, 548 n.5 (2010) (quoting *Mooney v. Frazier*, 225 W. Va. 378, 93 S.E.2d 333, 345 n.12 (W. Va. 2010)).

To support their arguments, Defendants cite cases from Maryland, Iowa, Michigan, and other states. Defs.’ Mot. at 8 n.13. In *Gill v. Ripley*, 352 Md. 754, 724 A.2d 88 (1999), a prosecutor and his staff were sued for agreeing to dismiss a paternity suit, with prejudice, while in *Hanson v. Flores*, 486 N.W.2d 294 (Iowa 1992), the defendant county attorney was sued for her decision to allow a putative father to challenge paternity after he had previously stipulated to paternity. In each of these cases, the attorney in question was actively pursuing the case but, for varying reasons, actively abandoned the pursuit of the claims.<sup>1</sup>

In contrast, here, the agents employed by Defendants did not actively do anything—until it was too late. This was not the result of an exercise of prosecutorial discretion—*e.g.*, a decision to actively abandon a claim through a stipulation—as was the case with the attorneys in *Gill* and

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<sup>1</sup>The one case cited by Defendants where a case was dismissed for failure to prosecute, rather than an attorney’s decision to abandon a claim, was a paternity suit. *Origel v. Washtenaw Cnty.*, 549 F. Supp. 792, 795 (E.D. Mich. 1982). The court concluded that a paternity suit fell within the prosecutor’s official duties, but it recognized that where a prosecutor was acting within his or her administrative or investigative actions, absolute prosecutorial immunity would not apply. Unlike *Origel*, this action is not about a paternity suit, but is instead about the lack of enforcement of an *already* existing judgment order. Thus, this action falls outside absolute prosecutorial immunity.

*Hanson*. This behavior is more akin to an administrative error or, at best, a failure to enforce and execute the judgment orders. *See, e.g., Gill*, 352 Md. at 769–70, 724 A.2d at 96 (recognizing that absolute prosecutorial immunity applies only when the prosecutor’s actions fall within the judicial process—*i.e.* determining whether to commence prosecution, presenting evidence, filing charges, preparing and presenting a case; in all other instances, only qualified immunity applies). In fact, the West Virginia Supreme Court, in *Shaffer*, recognized that the administrative actions utilized by the BCSE to collect payments in arrearage, such as a tax offset, were “purely administrative action[s] initiated and carried out by executive agencies” and did “not involve a process of the court.” 598 S.E.2d at 636. Thus, for the foregoing reasons, absolute prosecutorial immunity is inapplicable to this action.

C.

**Qualified immunity is not applicable at this stage, and a negligence action may be maintained against the State**

Defendants next assert the claims asserted against them are barred by qualified immunity, citing *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (W. Va. 1996) and *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (W. Va. 1995). There are legitimate factual questions regarding the role played by Defendants in enforcing child support and how Defendants participate in the enforcement and preservation of child support judgments under the present statutory scheme. In light of these unresolved factual issues, Defendants’ claims to qualified immunity are denied due to the lack of a sufficient factual record. *See* Defs.’ Mot. at 10–13.

First, by no means does *Clark* suggest that State Defendants can never be held liable for negligence. *Pittsburgh Elevator* is an authority for the proposition that the state may be held liable

for negligence, to the extent of the applicable insurance coverage. Negligence actions against State Defendants or political subdivisions are litigated all the time. For example, in *Robertson v. Elliott*, 2009 U.S. Dist. LEXIS 60934 (S.D. W. Va. 2009), although the individual police officers were dismissed based upon their assertion of qualified immunity, the remaining claim for negligence was permitted to proceed. *See also, J.H. v. W. Va. Division of Rehabilitation Services*, 224 W. Va. 147, 680 S.E.2d 392, 403 (W. Va. 2009). Even more specifically, the holding of the West Virginia Supreme Court in *Shaffer* demonstrates these Defendants can be held liable for failing to preserve child support judgments.

Moreover, contrary to Defendants' assertion that "no such negligence claims are cognizable under West Virginia law[.]" Defs.' Mot. at 14, the West Virginia Supreme Court has, in fact, concluded that in certain instances a negligence claim is not barred by qualified immunity. *See, e.g., J.H.*, 224 W. Va. 147, 680 S.E.2d 392. In that case, finding that the plaintiff made no allegations "of any type of legislative, judicial, or administrative functions involving the determination of a fundamental governmental policy," the West Virginia Supreme Court held that qualified immunity did not apply. *Id.* at 402.

The alleged failure to timely pursue child support payments in arrearage could fall outside the categories outlined in *J.H.* *See supra, Part B; see also Shaffer*, 215 W. Va. at 65, 598 S.E.2d at 636. A developed factual record is necessary to determine the scope of the duty owed by the State Defendants, and the exact nature of the functions Defendants failed to perform. The West Virginia Supreme Court has concluded that where "there is a dispute as to the foundational or historical facts that underlie the immunity determination" an immunity issue is not ripe for summary disposition. *Hutchison* at Syllabus Point 1.

Plaintiffs have provided this Court with an extensive history of the qualified immunity defense in West Virginia. Originally, federal courts relied upon the ministerial act-discretionary act distinction. If the act was ministerial, there was no qualified immunity. If the act was discretionary, there was qualified immunity. As the West Virginia Supreme Court explained in *State v. Chase Securities, Inc.*, 188 W. Va. 356, 364, 424 S.E.2d 591, 599 (1992), where the ministerial act-discretionary act test was rejected and the objective test for qualified immunity was adopted:

As we have already noted, we find the discretionary-ministerial act distinction highly arbitrary and difficult to apply. Certainly, the United States Supreme Court has not made any attempt to explain this distinction in Section 1983 cases. Moreover, we find that this distinction is not needed in order to apply the general qualified immunity standard developed in *Harlow*: the official will not be personally liable for his or her official acts if it is shown that his or her conduct did not violate clearly established law of which a reasonable official would have known.

The Court recognizes that after *Chase*, the West Virginia Supreme Court has issued decisions addressing qualified immunity that are difficult to reconcile with the objective test applied in federal courts. However, regardless of whether the ministerial act-discretionary act test or the objective test is applied, the Court concludes at this stage in the litigation there simply are not enough facts developed for the Court to reach a final decision under either test. Therefore, Defendants' motion is denied.

**D.**

**Whether or not the public duty doctrine applies requires additional factual development**

Defendants raise multiple arguments, based upon the nature of any duties owed by Defendants to Plaintiffs. Specifically, Defendants assert that all of Plaintiffs' claims are barred by the public duty doctrine and that the special relationship exception does not apply. Defendants

further argue, in a separate section of their motion, that Defendants, in fact, do not owe any duties to Plaintiffs. Finally, in yet another section, Defendants claim they did not owe Plaintiffs any fiduciary duty.

Without going into any great detail regarding either the application of the public duty doctrine, the special relationship exception, or any duties or fiduciary duties owed by Defendants to Plaintiffs, the West Virginia Supreme Court has made it clear that questions regarding the duties owed by a defendant to a plaintiff raise factual issues best left to be resolved by a jury. For example, in *J.H.*, the trial court granted the defendant's motion to dismiss based upon the public duty doctrine. In reversing this decision, the West Virginia Supreme Court reiterated in Syllabus Point 12 of *J.H.*, the factual nature of the public duty doctrine and the special relationship exception:

“In cases arising under W. Va. Code § 29-12-5, the question of whether a special duty arises to protect an individual from a State governmental entity's negligence is **ordinarily a question of fact for the trier of facts.**” Syllabus Point 11, *Parkulo v. West Virginia Bd. Of Prob. and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

(Emphasis added).

In Syllabus Point 5 of *Robertson v. LeMasters*, 171 W. Va. 607, 301 S.E.2d 563 (1983), which is the quintessential decision defining duty under the law in this State, the West Virginia Supreme Court noted that questions of what duties are owed or were breached presented fact questions for the jury to decide:

“The questions of negligence and contributory negligence are for the jury when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them.” Syllabus Point 3, *Davis v. Sargent*, 138 W. Va. 861, 78 S.E.2d 217 (1953).

Consequently, due to the factual nature of the public duty doctrine, the special duty exception, or the question of what duties, fiduciary or otherwise, are owed by Defendants to Plaintiffs, Defendants' motion to dismiss on the various arguments exploring the duties owed is denied.

E.

**More factual development is needed to determine  
whether there is a private cause of action**

Defendants next argue there is no private cause of action available to Plaintiffs under the applicable child support enforcement statutes. This argument, similar to the various duties arguments raised above, can be resolved only after the facts are developed and the Court has a fuller understanding of the role played by Defendants in enforcing child support orders. W. Va. Code § 48-18-105(2).

In Syllabus Point 1 of *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980) the West Virginia Supreme Court stated:

The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

Here, no additional facts are needed to ascertain that Plaintiffs are members of the class for whom the statute was enacted. However, no record has been developed by either party regarding the other three categories, making a final determination at this stage of the litigation improper.

As the West Virginia Supreme Court has noted, “[t]he common thread that runs through all of these [private cause of action] cases is that the involved statutes all created some positive substantive right or duty.” *Grady v. St. Albans*, 171 W. Va. 18, 22, 297 S.E.2d 424, 428 (1982). The different assertions Defendants make regarding BCSE’s statutory obligations and duties have little to no bearing on the issue of whether there is a private cause of action. For instance, the fact that BCSE receives a fee for its services does not negate the entity’s responsibility to execute its obligations without negligence. Moreover, while the statute at issue does create powers and authority, they are powers and authority to carry out the obligation to enforce the provisions of the relevant chapter. *See* Defs.’ Mot. at 20. The provision itself is entitled “General *duties* and powers of the Bureau for Child Support Enforcement.” W. Va. Code § 48-18-105 (emphasis added).

At this stage, it is impossible to tell exactly what Defendants were required to do pursuant to W. Va. Code § 48-18-105(2). Concluding there is not an implied private cause of action at this stage in the litigation would be premature without further factual development regarding the scope

of Defendants' duties in enforcing the child support orders.<sup>2</sup> For this reason, the Court denies Defendants' motion to dismiss.

F.

**The fraud allegations have been pleaded with the required specificity**

Defendants contend the allegations of fraud, which only involve Plaintiff Kathy Cooper and all other similarly situated persons, are not pleaded with sufficient particularity. To maintain a fraud action, a plaintiff must establish the following essential elements:

“(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.”  
*Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E.737 (1927).

Syllabus Point 1, *Lengyel v. Lint*, 280 S.E.2d 66 (W. Va. 1981).

The critical allegation is paragraph number 58, which reads:

On or about 2009 the Defendants, West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement and Defendant PSI, apparently aware that they had failed to renew the May 22, 1998 judgment and that they had potential liability as a result

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<sup>2</sup>Further, many of the cases cited by Defendants to support their assertion that there is no private cause of action were reached in different statutory contexts. In *Arbaugh v. Board of Education*, 591 S.E.2d 235 (W. Va. 2003), a key factor in the West Virginia Supreme Court's decision was the existence of criminal penalties for those individuals who failed to report suspected child abuse. Similar contexts existed with respect to the statutes examined in *Hill v. Stowers*, 680 S.E.2d 66 (W. Va. 2009) (noting that the existence of criminal penalties and a statutorily created election dispute mechanism belied legislative intent to create an implied private cause of action); *Yourtee v. Hubbard*, 474 S.E.2d 613 (W. Va. 1996) (concluding the plaintiff was outside the intended beneficiaries of the statute due to his own illegal behavior); *Adams v. Nissan Motor Corp.*, 387 S.E.2d 288 (W. Va. 1989) (similar reasoning as in *Hill*); and *Machinery Hauling, Inc. v. Steel of West Virginia*, 384 S.E.2d 139 (W. Va. 1989) (reasoning based on the nature of the statute, different in character from the one at issue here). Each of these circumstances are distinguishable from the statute relevant to the instant case. Here, Plaintiffs have no alternative remedy for the damages suffered as a result of Defendants' alleged negligence.

thereof, presented to Kathy L. Cooper a release of line [*sic.*, should be lien] which set forth, the judgment was “paid in full”, which was and is not true. At no time did Defendants BCSE/PSI advise Ms. Cooper that the statute of limitations had expired and that she could not collect the judgment. This action by the Defendants constitutes fraud.

The fraud allegation is stated clearly, specifically, and succinctly. If the alleged facts are true, Defendants gave Plaintiff Kathy L. Cooper a form to sign asserting her judgment had been paid in full when, in reality, Defendants had failed to preserve the child support judgment, rendering it impossible for Plaintiff to collect. Furthermore, contrary to Defendants’ suggestions, the concealment of the truth can form the basis of a fraud claim. *See generally Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998).

Defendants argue “a Family Court ruled on September 25, 2008, that her arrearage claim was barred by a statute of limitations and, once that order was entered, liens that were filed in October 2005 on the underlying judgment had to be released as a matter of law.” Defs.’ Mot. at 33. The reference to a September 25, 2008 order is not included in the complaint nor have Defendants produced a copy of such order. Regardless of the truth of this assertion, whether or not Defendants have a legal defense to this fraud allegation is different than arguing the allegations in the amended complaint are not sufficiently specific. Accordingly, Defendants’ motion to dismiss the fraud claim is denied.

#### H.

#### **Factual issues preclude dismissing any of the claims as being barred by the applicable statutes of limitations**

Defendants highlight certain claims and assert they are barred by the applicable statute of limitations as a matter of law. The West Virginia Supreme Court recently has reasserted how the

application of the statute of limitations under the discovery rule is a factual issue that cannot be resolved through a motion to dismiss. In *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), the West Virginia Supreme Court clarified its application of the discovery rule, adopted a fact based discovery rule that ordinarily cannot be resolved as a matter of law, and specifically reversed *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992), and its progeny. Specifically, in Syllabus Point 5 of *Dunn*, the West Virginia Supreme Court held:

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the potential cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. ***Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of fact that will need to be resolved by the trier of fact.***

(Emphasis added).

At this stage in the litigation, where the parties have not engaged in any discovery, dismissing any of the claims as a matter of law based upon the statute of limitations is premature and

inappropriate. Accordingly, Defendants' motion to dismiss on the basis of the statute of limitations is denied.

I.

**The complaint clearly provides Defendants with sufficient notice of several legitimate causes of action**

Defendants seek to have this Court apply the more onerous civil pleadings standard adopted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The West Virginia Supreme Court consistently has held a complaint merely needs to meet the notice pleadings standard and in footnote 4 in *Roth v. DeFelicecare, Inc.*, 226 W. Va. 214, 700 S.E.2d 183 (2010), the West Virginia Supreme Court acknowledged its allegiance to notice pleading, rather than the more stringent standard required in pleading complaints in federal court. Defendants point to the West Virginia Supreme Court's decision in *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009). However, in that case the West Virginia Supreme Court briefly referenced the holdings of *Twombly* and *Ashcroft v. Iqbal* 129 S. Ct. 1937 (2009) in a footnote to explain the additional holding in *Iqbal* that the West Virginia Supreme Court was specifically not adopting in *Robinson*. *Robinson*, 679 S.E.2d at 669 n.24. The allegations in the complaint, which are quite detailed, provide Defendants with the fair notice required under West Virginia law.

J.

**Plaintiffs do have standing to sue on their behalf as well as on behalf of their children**

Defendants claim that Plaintiffs, who are the custodial parents of the children, who would be the beneficiaries of the child support lost as a result of Defendants' actions, cannot file these claims on behalf of Plaintiffs as well as their children. While Defendants are correct that the issue

of standing is critical to a court's jurisdiction, nevertheless the legal significance of this argument is not clear. It makes no difference if the claims are filed on behalf of Plaintiffs, who were entitled to receive child support payments to care for their children, or on behalf of Plaintiffs' children, who benefit from these payments. Defendants seem to be making a technical statutory argument that the child support owed is payable to the parent, rather than the children. Simply because the child support statutes make the payments to the parent of the child does not mean that the parent, who is unable to collect child support because Defendants failed to preserve the judgment, is precluded from suing Defendants on their own behalves as well as on behalf of their children.

**K.**

**Whether the claims raised are suitable for class relief  
will be addressed with the class certification motion**

Defendants generally assert this case is not appropriate for class action certification. This is a matter for review at the class certification stage of this proceeding. The reasons Defendants list for dismissal of the class claim are the very same reasons already considered, and denied, by this Court, for lack of factual development. As with the majority of the other grounds asserted by Defendants, to grant dismissal on this ground would be premature.

**L.**

**State Defendants can be held liable for punitive damages  
to the extent of insurance coverage**

Defendants' argument is that punitive damages cannot be awarded against the State, pursuant to W. Va. Code § 55-17-4(3), which provides that "no government agency may be subject to awards

of punitive damages in any judicial proceeding.” This statute has never been interpreted by the West Virginia Supreme Court.<sup>3</sup>

At this time, before the parties have engaged in any discovery, determining whether or not punitive damages may even be warranted under the facts is premature. In the event the evidence demonstrates that Defendants’ actions meet the standards for an award of punitive damages, consistent with *Pittsburgh Elevator*, such damages may be awarded against a State defendant to the extent of insurance coverage. Thus, to resolve this issue, the parties would need to examine the applicable insurance policy and determine whether the policy has a specific exclusion precluding a punitive damages awards. Since Defendants have not presented the Court with any language in the insurance policy excluding punitive damages, this ground is rejected at this time.

M.

***Manns v. McCann* does not preclude this suit**

Defendants contend that these issues have been litigated before, and rejected by the West Virginia Supreme Court, citing *Jackie Sue Manns, et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070.

First, many of the grounds relied on by the circuit court in *Mann*, including the various immunity grounds, were an addendum to the main ground for dismissal—the fact that the complaint had not been properly served. Unlike in *Manns*, maintaining the various immunity defenses as the sole basis for dismissal is a poor foundation. As discussed in the preceding sections of this Order,

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<sup>3</sup>The statute was addressed in *Lavender v. West Virginia Regional Jail & Correctional Facility Authority*, 2008 U.S. Dist. LEXIS 8162, \*30 (S.D. W. Va. 2008), where the court concluded that as the state employees were “being sued in their individual capacities and not their official capacities . . . punitive damages [were] not prohibited under these sections.”

the facts in this case are insufficiently developed to rule on the complex issues of governmental immunity with the necessary clarity. The need for additional factual development in this case is clear before these issues can be decided as there are “dispute[s] as to the foundational or historical facts that underlie the immunity determination.” *Hutchison* at Syllabus Point 1.

Moreover, the legal landscape relevant to this action is quite different than the landscape in existence at the time *Manns* was decided. The statute at issue in *Manns*, W. Va. Code § 48A-3-3, has since been repealed, and involved a failure to act by the Child Advocates Office. The instant action is brought pursuant to a different statute, and involves a different State entity. In addition, *Manns* was decided prior to the West Virginia Supreme Court’s decision in *Shaffer*, which recognized a cause of action against Defendants on behalf of the parent who failed to pay child support. The ground of Defendants’ various defenses now occur in a different legal landscape, which warrants further development. Further, the current statute, W. Va. Code § 48-18-105, is entitled “General duties and powers of the Bureau for Child Support Enforcement.” Based on the larger context provided by the statute title, each of the powers and authorities established under W. Va. Code § 48-18-105, are created to provide the BCSE with the necessary authority to execute its duties. Thus, more factual development regarding the scope of BCSE’s obligations is needed.

Accordingly, for the foregoing reasons, *Manns* does not control this case, and dismissing the case at this stage is premature.

### **Conclusion**

For the foregoing reasons, Defendants’ Motion to Dismiss is **DENIED**. The objection and exception of all Defendants are noted.

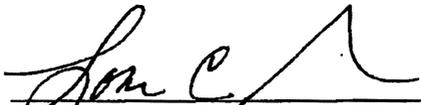
The Clerk is ordered to mail a certified copy of this **ORDER** to all counsel of record.

ENTERED this 18<sup>th</sup> day of November, 2011.

NOV 20 2011

  
Honorable Judge Paul Zakaib, Jr.

Presented by:

  
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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT, 28<sup>th</sup>  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF NOVEMBER, 2011  
  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK