

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1783

**MICHAEL J. LEWIS, Secretary, 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, authorized to do business in West Virginia,**

*Defendants Below, Petitioners*

vs.

**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,**

*Plaintiffs Below, Respondents*

---

Hon. Paul Zakaib, Jr., Judge  
Circuit Court of Kanawha County  
Civil Action No. 11-C-666

---

**BRIEF OF PETITIONERS**

*Counsel for DHHR Petitioners*

Edgar Allen Poe, Jr., Esq.  
WV Bar No. 2924  
Pullin, Fowler, Flanagan, Brown & Poe PLLC  
901 Quarrier Street  
Charleston, WV 25301  
Telephone (304) 344-0100  
[epoe@pffwv.com](mailto:epoe@pffwv.com)

*Counsel for PSI Petitioner*

Ancil G. Ramey, Esq.  
WV Bar No. 3013  
Hannah C. Ramey, Esq.  
WV Bar No. 7700  
Steptoe & Johnson PLLC  
Post Office Box 2195  
Huntington, WV 25722-2195  
Telephone (304) 526-8133  
[ancil.ramey@steptoe-johnson.com](mailto:ancil.ramey@steptoe-johnson.com)

*Counsel for Respondents*

Charles R. Webb, Esq.  
WV Bar No. 4782  
The Webb Law Firm, PLLC  
108 ½ Capitol Street, Suite 201  
Charleston, WV 25301  
Telephone (304) 344-9322  
[rusty@rustywebb.com](mailto:rusty@rustywebb.com)

*Counsel for Respondents*

Lonnie C. Simmons, Esq.  
WV Bar No. 3406  
DiTrapano, Barrett & DiPiero PLLC  
604 Virginia Street, East  
Charleston, WV 25301  
Telephone (304) 342-0133  
[lonnie.simmons@dbdlawfirm.com](mailto:lonnie.simmons@dbdlawfirm.com)

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE .....	1
III.	SUMMARY OF ARGUMENT.....	8
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	10
V.	ARGUMENT .....	11
	A. Standard of Review .....	11
	B. The circuit court’s ruling that prosecutorial immunity only applies to criminal prosecutions and not to “administrative actions” is contrary to law and should be reversed .....	12
	C. The circuit court’s ruling that qualified immunity may not be raised at the pleading stage is contrary to law and should be reversed .....	16
	D. The circuit court’s ruling that qualified immunity does not apply to actions alleging negligent failure on the part of the State to enforce the law is contrary to law and should be reversed .....	18
	E. The circuit court’s ruling that the public duty doctrine may not be raised at the pleading stage is contrary to law and should be reversed.....	24
	F. The circuit court’s ruling that whether there is a private cause of action under a statute is not a question of law, but a question of fact, is contrary to law and should be reversed.....	28
	G. The circuit court’s ruling that a private contractor performing governmental functions is not entitled to governmental immunity is contrary to law and should be reversed .....	31
	H. The circuit court’s ruling that the existence of a duty in this case is a question of fact, rather than a question of law, is contrary to law and should be reversed.....	34
	I. The circuit court’s ruling that the State can be subjected to punitive damages is contrary to W. Va. Code § 55-17-4(3) and should be reversed .....	37
	J. The circuit court’s ruling that class certification is not an issue at the pleading stage is contrary to law and should be reversed.....	38

VI. CONCLUSION .....40

TABLE OF AUTHORITIES

**Cases**

*Adams v. Nissan Motor Corp.*,  
182 W. Va. 234, 387 S.E.2d 288 (1989) .....28

*Aikens v. Debow*,  
208 W. Va. 486, 541 S.E.2d 576 (2000) ..... 17, 27, 34

*Arbaugh v. Bd. of Educ.*,  
214 W. Va. 677, 591 S.E.2d 235 (2003) .....28

*Benson v. Kutsch*,  
181 W. Va. 1, 380 S.E.2d 36 (1989) .....24

*Butz v. Economou*,  
438 U.S. 478 (1978) ..... 14

*Cart v. Marcum*,  
188 W.Va. 241, 423 S.E.2d 644 (1992) .....39

*Chee v. Washtenaw County, Mich.*,  
2008 WL 2415374 (E.D. Mich.).....33

*Clark v. Dunn*,  
195 W. Va. 272, 465 S.E.2d 374 (1995) ..... 19, 20, 22, 23

*Cleavinger v. Saxner*,  
474 U.S. 193 (1985) .....31

*Clifford v. Marion County Pros. Atty.*,  
654 N.E.2d 805 (Ind. App. 1995) ..... 13

*Doe v. West Virginia Department of Health and Human Resources*,  
Kanawha County Civil Action No. 97-C-193, appeal refused,  
*Doe v. West Virginia Department of Health and Human Resources*,  
No. 992756 (W. Va. February 15, 2000).....32-33

*Duerscherl v. Foley*,  
681 F. Supp. 1364 (D. Minn. 1987), aff'd, 845 F.2d 1027 (8th Cir. 1988) ..... 13, 15

*Eagon v. Elk City*,  
72 F.3d 1480 (10<sup>th</sup> Cir. 1996) .....32

<i>Eldridge v. Gibson</i> , 332 F.3d 1019 (6 <sup>th</sup> Cir. 2003) .....	31
<i>Ellison v. Wood &amp; Bush Co.</i> , 153 W. Va. 506, 170 S.E.2d 321 (1969) .....	33
<i>Elmore v. State Farm Mut. Auto. Ins. Co.</i> , 202 W. Va. 430, 504 S.E.2d 893 (1998) .....	37
<i>Ewing v. Board of Educ.</i> , 202 W. Va. 228, 503 S.E.2d 541 (1998) .....	12
<i>Falls v. Union Drilling Inc.</i> , 223 W. Va. 68, 672 S.E.2d 204 (2008) .....	17
<i>Gill v. Ripley</i> , 352 Md. 754 (1999) .....	13, 15
<i>Graham v. Beverage</i> , 211 W. Va. 466, 566 S.E.2d 603 (2002) .....	39
<i>Hanson v. Flore</i> , 486 N.W.2d 294 (Iowa1992) .....	13, 15
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818 (1982) .....	19
<i>Hawkins v. West Virginia Dept. of Public Safety</i> , 223 W. Va. 253, 672 S.E.2d 389 (2008) .....	16-17
<i>Hill v. Stowers</i> , 224 W. Va. 51, 680 S.E.2d 66 (2009) .....	28
<i>Horowitz v. State Board of Medical Examiners of the State of Colorado</i> , 822 F.2d 1508 (10 <sup>th</sup> Cir 1987) .....	15
<i>Hurley v. Allied Chemical Corp.</i> , 164 W. Va. 268, 262 S.E.2d 757 (1980) .....	28, 30
<i>Hutchison v. City of Huntington</i> , 198 W. Va. 139, 479 S.E.2d 649 (1996) .....	16
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976). .....	13, 14

<i>Jarvis v. West Virginia State Police,</i> 227 W. Va. 472, 711 S.E.2d 542 (2010) .....	2, 8, 11, 12, 22, 40
<i>J.H. v. W. Va. Division of Rehabilitation Services,</i> 224 W. Va. 147, 680 S.E.2d 392 (2009) .....	22, 27
<i>Johnson v. Granholm,</i> 662 F.2d 449 (6th Cir. 1981), cert. denied, 457 U.S. 1120 (1982).....	13
<i>Jeffrey v. Dept. of Public Safety,</i> 204 W. Va. 41, 511 S.E.2d 152 (1998) .....	12
<i>Kaplan v. LaBarbera,</i> 58 Cal. App. 4th 175 (Cal. App. 1997) .....	13
<i>Kurzawa v. Mueller,</i> 732 F.2d 1456 (6th Cir.1984).....	15, 33
<i>Lucas v. Fairbanks Capital Corp.,</i> 217 W. Va. 479, 618 S.E.2d 488 (2005) .....	37
<i>Machinery Hauling, Inc. v. Steel of West Virginia,</i> 181 W. Va. 694, 384 S.E.2d 139 (1989) .....	28
<i>Malachowski v. City of Keene,</i> 787 F.2d 704 (1st Cir.), cert denied, 107 5. Ct. 107 (1986) .....	14
<i>McGhan v. Kalkaska Co. Dept. of Human Services,</i> 2009 WL 2170151 at *12 (W.D. Mich.) .....	33
<i>McKnight v. Rees,</i> 88 F.3d 417 (6 <sup>th</sup> Cir. 1996) .....	32
<i>Miller v. Bd. of Educ.,</i> 210 W. Va. 147, 556 S.E.2d 427 (2001) .....	39
<i>Moss v. Tennessee Dep't of Human Servs.,</i> 2008 WL 4552421 (M.D. Tenn.).....	33
<i>Origel v. Washtenaw County,</i> 549 F. Supp. 792 (E.D. Mich. 1982) .....	13, 15
<i>Parkulo v. Bd. of Probation and Parole,</i> 199 W. Va. 161, 483 S.E.2d 507 (1996) .....	12, 18, 24, 25

<i>Pittsburgh Elevator Co. v. W. Va. Bd. Of Regents,</i> 172 W. Va. 743, 310 S.E.2d 675 (1983) .....	33
<i>Porter v. Grant County Bd. of Educ.,</i> 219 W. Va. 282, 633 S.E.2d 38 (2006) .....	17
<i>Perdue v. S. J. Groves &amp; Sons Co.,</i> 152 W. Va. 222, 161 S.E.2d 250 (1968) .....	33
<i>Robinson v. Pack,</i> 223 W. Va. 828, 679 S.E.2d 660 (2009) .....	11
<i>Sewell v. Gregory,</i> 179 W. Va. 585, 371 S.E.2d 82 (1988) .....	34
<i>Shaffer v. Stanley,</i> 215 W. Va. 58, 593 S.E.2d 629 (2003) .....	23
<i>State v. Chase Securities, Inc.,</i> 188 W. Va. 356, 424 S.E.2d 591 (1992) .....	17
<i>State ex rel. Arrow Concrete Co. v. Hill,</i> 194 W. Va. 239, 460 S.E.2d 54 (1995) .....	11
<i>Tucker v. Dept. of Corrections,</i> 207 W. Va. 187, 530 S.E.2d 448 (1999) .....	24
<i>Walden v. Wishengrad,</i> 74 F.2d 149 (2d Cir. 1984) .....	14
<i>Williams v. O'Leary,</i> 55 F.3d 320 (7th Cir.), cert. denied, 516 U.S. 993 (1995).....	31
<i>Worley v. Beckley Mechanical, Inc.,</i> 220 W. Va. 633, 648 S.E.2d 620 (2007) .....	39
<i>Wrenn v. West Virginia Dept. of Transp., Div. of Highways,</i> 224 W. Va. 424, 686 S.E.2d 75 (2009) .....	16
<i>Yoak v. Marshall University Bd. of Governors,</i> 223 W. Va. 55, 672 S.E.2d 191 (2008) .....	17
<i>Yourtee v. Hubbard,</i> 196 W. Va. 683, 474 S.E.2d 613 (1996) .....	28

**Statutes**

W. Va. Code § 29-12-5..... 12, 18, 24, 25

W. Va. Code § 55-17-1(a) ..... 37

W. Va. Code § 55-17-4(3)..... 1, 37

W. Va. Code § 48-14-201..... 21

W. Va. Code § 48-18-105..... 29

W. Va. Code § 48-18-108(b)..... 29

W. Va. Code § 48-18-108(c) ..... 29

W. Va. Code § 48-18-108(d) ..... 29-30

W. Va. Code § 48-18-110 (previously W. Va. Code § 48A-2-21(b))..... 26, 30, 34- 35

W. Va. Code § 48-18-115..... 20, 30

W. Va. Code § 48-18-126(a) ..... 30

**Rules**

R. App. P. 5(h)..... 10

R. App. P. 19 ..... 10

R. Civ. Proc. 12(b)(6) ..... 11, 16

R. Prof. Cond. 1.7(a)..... 36

**Secondary Sources**

2 Am. Jur. 2d *Administrative Law* § 589 (2009) ..... 12

63C Am. Jur. 2d *Prosecuting Attorneys* § 4 (2009) ..... 12, 14

BLACK’S LAW DICTIONARY 523 (7th ed. 1999)..... 37

*Suit Calls Agency Negligent in Lost Child Support Case,*  
Charleston Daily Mail, January 6, 2010 ..... 2

## **I. ASSIGNMENTS OF ERROR**

1. The circuit court's ruling that prosecutorial immunity only applies to criminal prosecutions and not to "administrative actions" is contrary to law and should be reversed.
2. The circuit court's ruling that qualified immunity may not be raised at the pleading stage is contrary to law and should be reversed.
3. The circuit court's ruling that qualified immunity does not apply to actions alleging negligent failure on the part of the State to enforce the law is contrary to law and should be reversed.
4. The circuit court's ruling that the public duty doctrine may not be raised at the pleading stage is contrary to law and should be reversed.
5. The circuit court's ruling that whether there is a private cause of action under a statute is not a question of law, but a question of fact, is contrary to law and should be reversed.
6. The circuit court's ruling that a private contractor performing governmental functions is not entitled to governmental immunity is contrary to law and should be reversed.
7. The circuit court's ruling that the existence of a duty in this case is a question of fact, rather than a question of law, is contrary to law and should be reversed.
8. The circuit court's ruling that the State can be subjected to punitive damages is contrary to W. Va. Code § 55-17-4(3) and should be reversed.
9. The circuit court's ruling that class certification is not an issue at the pleading stage is contrary to law and should be reversed.

## **II. STATEMENT OF THE CASE**

This is an appeal by the defendants from a circuit court order entered on November 28, 2011, denying a motion to dismiss predicated upon immunity defenses. App. at 409-428. The

underlying suit was brought by plaintiffs complaining that defendants failed to renew child support judgments, causing those judgments to eventually become time-barred. App. at 1-19.

This Court rejected an appeal of the dismissal of a nearly identical suit, App. at 69-84, several years ago styled *Jackie Sue Manns. et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070, App. at 86 and 89, and even though the law has remained unchanged in the interim, the circuit court in this action denied defendants' motion to dismiss, instead adopting legal arguments this Court just rejected in *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010). Essentially, what the circuit court has done in this case is overrule this Court's opinion in *Jarvis*, incorporating in its order arguments taken verbatim from the unsuccessful plaintiffs' briefs in *Jarvis*. App. 355-395.

Previously, in November 2009, plaintiffs' counsel had provided pre-suit notice of a nearly identical suit, App. 204-217, but because payment was made by defendant, Policy Studies, Inc. ("PSI"), to the proposed plaintiff of the damages claimed in that suit it was never filed, demonstrating these cases can never serve as the basis for any class relief because of their individualized nature.

After plaintiffs' counsel's first suit was mooted, they attempted to amend that complaint with the same named plaintiffs as in this case, App. at 92-113, but their amended complaint was dismissed by Judge Kaufman on September 1, 2010, without prejudice, due to failure to comply with statutory pre-suit notice provisions. App. at 115-116. As plaintiffs' counsel has publicly stated, the failure to provide notice was deliberate,<sup>1</sup> in spite of his knowledge of the mandatory nature of this requirement.

---

<sup>1</sup> *Suit Calls Agency Negligent in Lost Child Support Case*, Charleston Daily Mail, January 6, 2010 ("Originally, Webb said he had intended to file the class action suit on behalf of another plaintiff other than Hoover. However, the attorney said once he gave the DHHR the

At that juncture, it appeared that the matter was concluded, but plaintiffs filed yet another suit on April 25, 2011, nearly eight months later, App. at 1-19, asserting essentially the same claims as in both their dismissed complaint, App. 92-113, and in the amended complaint in *Jackie Sue Manns. et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070, App. at 138-146, which the same judge in this case dismissed, App. at 69-84, and an appeal from which this Court rejected twice, App. at 86 and 89.

Although plaintiffs had nearly eight months between the dismissal of their last suit and the filing of the new action, the present complaint is riddled with errors.

For example, the complaint contains sentence fragments referencing non-existent defendants: “A Defendant BCSE attorney, upon request of any individual shall undertake to secure support for the individual;” App. at 5 (¶ 17), “A Defendant BCSE attorney shall pursue the enforcement of child support orders through the withholding from income of amounts payable as support;” App. at 5 (¶ 18), and “That as a direct and proximate result of . . . legal malpractice, professional negligence, and negligence committed by the Defendants.” App. at 10-16 (¶¶ 45, 50, 55, 60, 66, and 73).

These allegations against attorneys employed by defendants are remnants of plaintiffs’ previous suit, App. at 92-113, but still form the heart of their present action even though our Legislature has clearly provided there is absolutely no attorney/client relationship between those attorneys and child support obligees.

As with their previous complaint, the new complaint spends its first five pages describing the parties, and in particular, BCSE, App. at 2-5 (¶¶ 1-19), and the paragraphs describing BCSE

---

legally mandated 30-day notice of his intent to file suit, the department credited that person’s account for the back child support payments. Webb decided to move ahead with the suit naming Ms. Hoover as the class representative instead.”).

do nothing more than quote verbatim from statutory provisions which describe the general duties and powers of BCSE and its attorneys.

The gravamen of the new complaint is the same as the old complaint and the complaint in *Jackie Sue Manns. et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070, i.e., plaintiffs failed to receive various amounts of child support because it was determined that a portion of those payments were time-barred. App. at 1.

Instead of outlining the necessary “who, what, where, when,” that would provide respondents the opportunity to know what they each allegedly did wrong, the complaint instead spends countless pages stating what BCSE is and stating its discretionary powers and authority.

The only factual assertions against BCSE are that family judges or circuit judges ruled in plaintiffs’ cases that a portion of a delinquent child support claim was time-barred. The complaint then makes an unexplained leap of logic to an allegation that plaintiffs were harmed by BCSE’s “negligence, breach of fiduciary duty, breach of trust, and fraud.”<sup>2</sup>

In the original complaint,<sup>3</sup> the family court orders were attached reflecting that (a) the plaintiff was represented before the Family Judge by her own private attorney; (b) BCSE was

---

<sup>2</sup> Moreover, aside from a brief description in the “Parties” section, the complaint fails to mention defendant, Policy Studies, Inc. (“PSI”) at all, leaving unanswered the questions of (a) do plaintiffs allege that PSI had any actual involvement in their cases; (b) what actions, if any, did PSI undertake in plaintiffs’ cases; (c) what duties, if any, do plaintiffs allege that PSI had to them; and (d) what, if anything, did PSI do to violate those unspecified duties. And, at least with respect to plaintiff, Cynthia Kerner’s claims, her domestic relations case shuttled back and forth between the Circuit Court of Jackson County, where it began, and the Circuit Court of Kanawha County, where the obligor occasionally could be located, with both Bureau of Child Support Enforcement (“BCSE”) and PSI attorneys representing the interests of the State, but she fails to specify which attorneys she contends violated which duties to her.

<sup>3</sup> App. at 148-181. Ultimately, however, the order in the original plaintiff’s case was set aside pursuant to a reconsideration motion, and the plaintiff was awarded a judgment for all of the payments to which she is entitled. App. at 183-202. It is for this very reason there can never be a class action involving these types of claims as the requirements of commonality and

adverse to her because it was seeking to recoup payments made by the State to her; and (c) the judgment was entered not solely in her favor, but also in favor of the State.

These same attributes also apply to one or more of the plaintiffs in the new action since (a) some were represented by their own private attorneys; (b) BCSE were adverse to some of the plaintiffs because it was seeking to recoup payments made by the State to those respondents; and (c) judgments were entered not solely in their favor, but also in favor of the State.

Plaintiffs attempt to state the following claims collectively against the defendants: (i) breach of statutory duty;<sup>4</sup> (ii) negligence;<sup>5</sup> (iii) breach of fiduciary duty; (iv) breach of trust;<sup>6</sup> and (v) fraud.

The complaint also seeks class certification, but describes the dramatically different set of circumstances for the six plaintiffs, amply demonstrating that they lack the commonality, typicality, and adequacy of representation required. Specifically, the suit proposes the following class: “All children whose child support obligation was or is being collected in the Courts of the State of West Virginia by Defendant BCSE and who were or are beneficiaries of child support judgments and whose judgments for child support have been terminated or reduced by the applicable statute of limitations.” App. at 6.

---

typicality can never be satisfied where some of the members of the putative class may have individualized remedies depending upon the circumstances of their cases.

<sup>4</sup> The complaint does not identify in Count I which statute or statutes defendants allegedly violated, App. at 16-17 (Count I), perhaps because the relevant statutes provide that defendants owed no duty to plaintiffs, which, of course, is what the circuit court correctly ruled in *Jackie Sue Manns. et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070.

<sup>5</sup> The complaint does not identify in Count II which common law duty defendants allegedly violated, App. at 17 (Count II), perhaps because DHHR did not exist at common law.

<sup>6</sup> Defendants are completely unfamiliar with such a tort and believe that it simply restates a cause of action for breach of fiduciary duty and is therefore duplicative.

In 2002, however, the same judge as in this case dismissed a similar class action styled *Jackie Sue Manns, et al. v. Ronnie Z. McCann*, Civil Action No. 98-C-3070, which was “an action on behalf of a class of obligees . . . whose cases were taken in and not timely pursued . . . for breach of statutory duty resulting in tremendous loss of child support and other damages to the plaintiffs and thousands of children and obligors as a result of defendants’ actions . . . .” App. at 138.

In that previous suit, by order dated February 13, 2002, the court determined that a suit against the State arising from its alleged failure to renew child support judgments causing them to be time-barred was precluded by prosecutorial immunity (“This absolute immunity has also been extended to public officials who exercise prosecutorial powers, such as attorneys who prosecute child abuse, neglect, delinquency and paternity proceedings”); qualified immunity (“Clearly the manner in which the child advocate attorneys went about collecting child support from delinquent fathers is a matter of discretion . . . Accordingly, all the defendants are entitled to a qualified immunity from liability for claims such as the plaintiffs”); and the public duty doctrine (“Clearly there was no ‘assumption’ of an affirmative duty on the part of defendants in the present action. . . . The plaintiffs cannot rely on the special relationship exception to the public duty doctrine. Accordingly, the defendants are immune from all of the plaintiffs’ claims.”). App. at 78, 80-81, 82-83. As previously noted, two attempts at appeal from the circuit court’s dismissal order in *Manns* were rejected by this Court. App. at 86, 89.

Accordingly, defendants in this case filed a motion to dismiss on grounds that, on its face, the complaint should be dismissed for the following substantive reasons: (1) it is barred because monetary damages sought are not restricted to the limits of the State’s insurance policy; (2) it is barred by prosecutorial immunity as State attorneys cannot be held liable for acts

performed in the exercise of discretion; (3) it is barred by qualified immunity because the collection of child support obligations is a discretionary executive function; (4) it is barred because suit may not be maintained against the State for negligence in the performance of functions involving judgment; (5) it is barred by the public duty doctrine because there was no “special relationship” between the State and the plaintiffs some of whom were represented by private counsel; (6) it is barred by the absence of any attorney/client relationship or other common law duty as the Legislature has expressly provided that BCSE attorneys represent the State and not the “interests” of anyone else; (7) it is barred by the absence of any fiduciary duty because the interests of the BCSE attorneys and child support recipients are conflicting; (8) it is barred because there is no express or implied cause of action against the State or its contractors under the child support enforcement statute; (9) it is barred because there was never any attorney/client relationship between any of the plaintiffs and any BCSE or PSI attorney; (10) it is barred because there is no allegation that there was any reliance upon a false representation made with the intention of deceit; (11) it is barred because many of the claims are, on their face, time-barred; (12) it is barred because, on its face, it fails to state any cause of action upon which relief may be awarded; (13) it is barred by an absence of standing independent from the issue of mootness; (14) it is barred because, on its face, it cannot satisfy the requirements for class relief; (15) it is barred, on its face, because punitive damages may not be recovered against the defendants; and (16) it is barred because the same judge had already dismissed a nearly identical case and the dismissal was affirmed by the rejection of two separate efforts to appeal the dismissal to this Court. App. at 25-26.

In their response to the motion to dismiss, plaintiffs noted that (1) the name of the agency enforcing child support payments has changed and (2) the place in the Code where the relevant

statute is located has changed, App. at 311, but neither the change in the name of the agency or the statutory reference are substantive in nature.

Plaintiffs also argued that “many of the grounds relied upon by the circuit court in *Mann* have been called into question,” *id.*, but about one-third of plaintiffs’ response was taken from plaintiffs’ appellate brief in *Jarvis*, App. at 362-395, in which this Court rejected those same legal arguments, calling into question not the grounds relied upon by the same judge in 2002 in dismissing *Manns*, but plaintiffs’ counsel’s legal arguments in *Jarvis* and in the instant case. App. at 397-407.

In a complete about-face, the circuit court (1) ignored its rulings in the nearly identical *Manns* case, App. at 69-84, and an appeal from which this Court rejected twice, App. at 86 and 89; (2) ignored the law recently articulated in *Jarvis*; and (3) denied defendants’ motion to dismiss based upon numerous erroneous legal conclusions as set forth in defendants’ assignments of error.

### III. SUMMARY OF ARGUMENT

The underlying suit is against the State and its contractor by six child support obligees seeking class certification of liability claims based upon the theory that although (1) state law expressly provides that attorneys employed by the State do not have an attorney/client relationship with child support obligees; (2) child support obligees sign acknowledgments that attorneys employed by the State do not have an attorney/client relationship with those obligees; (3) many child support obligees and the State have adverse interests in child support collection proceedings; and (4) many child support obligees employ their own private counsel for purposes of collecting and enforcing child support obligations, the State and its contractor are nonetheless

liable to child support obligees when child support obligations cannot be enforced due to the application of statutes of limitation.

Moreover, although the circumstances among plaintiffs and other obligees differ, including (1) some obligees are represented by private counsel who assume an attorney/client responsibility to enforce child support orders and others are not; (2) some obligees have directed the State and its contractor not to take enforcement actions due to their representation by private counsel and others have not; (3) some obligees have elected to pursue their own remedies and others have not; (4) some obligees actively cooperate and others refuse to cooperate or actively impede child support collection efforts; (5) some obligees have assigned their right to receive support to the State in return for certain governmental benefits and others have not; and (6) individualized circumstances giving rise to various defenses including the discovery rule, infancy and insanity, the continuing tort doctrine, fraudulent concealment, and others, plaintiffs are seeking certification of a statewide class of all obligees, regardless of individual circumstances, where all or any portion of a child support judgment has been determined to be time-barred.

The State and its contractor filed a motion to dismiss due to the existence of a number of immunities including (1) prosecutorial immunity because governmental and contracted attorneys performing prosecutorial functions are protected from liability based upon decisions regarding which matters are to be prosecuted and in what manner; (2) qualified immunity because not only did the alleged acts and/or omissions of petitioners not violate any clearly established law, it was consistent with state law, which affords them discretion; and (3) the public duty doctrine because failure to enforce the law generally cannot form the basis for governmental liability in the absence of a special duty founded upon individualized promises and each obligee knows there is

no attorney/client relationship because state law expressly so provides and each obligee agrees, in writing, that no such relationship exists.

The State and its contractor also noted that (1) there is no constitutional duty on the part of the State or its contractor to collect every child support obligation; (2) there is no statutory duty on the part of the State or its contractor to collect every child support obligation; (3) there is no common law duty on the part of the State or its contractor to collect every child support obligation; (4) there is no private cause of action under the child support statute because the statute is discretionary, not mandatory, and provides there is no attorney/client relationship; (5) there is no fiduciary and/or trust relationship between the State and its contractor with child support obligees when the statute and their written agreements expressly provide there is no attorney/client relationship; (6) private contractors performing governmental functions are entitled to the same immunities as governmental actors performing those same functions; and (7) the individualized circumstances of various obligees render inappropriate any class relief.

Even though this Court's law is clear and, in particular, the law recently articulated in *Jarvis*, in which the Court reversed some of the same rulings by the same judge with one of the same attorneys representing respondents in this case, the circuit court nevertheless denied defendants' motion to dismiss and it is from that ruling that this appeal is taken.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to R. App. P. 5(h), "[T]he Court will: (1) decide the case on the merits without oral argument; or (2) set the case for oral argument and then decide the case on the merits . . . ." Defendants respectfully submit that this case should be set for oral argument under R. App. P. 19 before it is decided on the merits and then the Court should reverse the circuit court's order as in

the recent case of *Jarvis*, in which the Court reversed some of the same rulings by the same judge with one of the same attorneys representing respondents in this case.

## V. ARGUMENT

### A. STANDARD OF REVIEW

“Ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rules of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable.” Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E.2d 54 (1995). This case, however, involves a circuit court’s denial of a motion to dismiss predicated upon immunity defenses, and such orders are immediately appealable. See *Jarvis*, supra (appeal of denial of motion to dismiss on immunity grounds); *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009).<sup>7</sup> The standard of review of a circuit

---

<sup>7</sup> This Court explained in *Robinson*, 223 W. Va. at 832, 679 S.E.2d at 664, that under the “collateral order” doctrine set forth by the United States Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), “[a]n interlocutory order would be subject to appeal under this doctrine if it ‘(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the actions, and (3) is effectively unreviewable on appeal from a final judgment.’” (Citations omitted). Accordingly, this Court explained why the collateral order doctrine applies to cases involving claims of immunity:

[B]ecause a ruling denying the availability of immunity fully resolves the issue of a litigant’s obligation to participate in the litigation, the first factor of *Cohen* is easily met. As to the second factor which focuses on whether the immunity ruling resolves significant issues separate from the merits, there is little question that the claim of immunity is conceptually distinct from the merits of the plaintiff’s claim that his or her rights have been violated....

The final factor of the *Cohen* test requires us to consider whether a qualified immunity ruling is effectively unreviewable at the appeal stage. Postponing review of a ruling denying immunity to the post-trial stage is fruitless ... because the underlying objective in any immunity determination (absolute or qualified) is immunity from suit. Traditional appellate review of a qualified immunity ruling cannot achieve the intended goal of an immunity ruling: the right not to be subject to the burden of trial. As a result, the third factor of *Cohen* is easily met.

*Robinson*, 223 W.Va. at 832–833, 679 S.E.2d at 664–665 (citations omitted).

court's denial of a motion to dismiss is *de novo*. *Jarvis*, 227 W. Va. at 476, 711 S.E.2d at 546; Syl. pt. 4, *Ewing v. Board of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998).

**B. THE CIRCUIT COURT'S RULING THAT PROSECUTORIAL IMMUNITY ONLY APPLIES TO CRIMINAL PROSECUTIONS AND NOT TO "ADMINISTRATIVE ACTIONS" IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

In Syllabus Point 5 of *Parkulo v. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996), the Court held, "If the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W. Va. Code § 29-12-5 *expressly grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract.*" (emphasis supplied).

In accordance with this legislative grant, the Board of Risk and Insurance Management has preserved for all State entities all common law immunities, which would include judicial immunity, quasi-judicial immunity, prosecutorial immunity, qualified immunity, and the public duty doctrine. *See Jeffrey v. Dept. of Public Safety*, 204 W. Va. 41, 45, 511 S.E.2d 152, 156 (1998)("the State's insurance contract contains the following language: 'It is a condition precedent of coverage under the policies that the additional insured does not waive any statutory or common law immunity conferred upon it.'").

It is well-settled that government attorneys are immune from suits by citizens who are dissatisfied with the outcome of litigation in which those citizens' interests might be implicated.<sup>8</sup>

---

<sup>8</sup> *See* 63C Am. Jur. 2d *Prosecuting Attorneys* § 4 (2009)("As long as the prosecutor acts within the scope of his or her duties and, therefore, in an official capacity, he or she is immune from liability, even though the prosecuting attorney has acted willfully or maliciously. Prosecutors receive absolute immunity from suit for decisions involving whether to bring charges and the performance of litigation-related duties . . .")(footnotes omitted); 2 Am. Jur. 2d *Administrative Law* § 589 (2009)("those officials who are responsible for the decision to initiate

If a citizen complains to the local prosecutor that a neighbor is committing assaults by placing the citizen in fear for his or her immediate safety and the prosecutor refuses to bring charges, the citizen cannot sue the prosecutor or his or her office if a battery is later committed on the citizen by the neighbor. If a citizen complains to an attorney in an agency regulating the environment that a neighboring property owner is polluting the citizen's land and the attorney refuses to seek criminal or civil relief, the citizen cannot sue the attorney or the agency if the citizen is allegedly injured in person or damaged in property by the pollution. If either citizen wants relief from his or her neighbor, he or she is not dependent on the prosecutor or the agency attorney to secure; rather, the citizen is free to hire his or her own attorney to file suit against the neighbor for assault or nuisance. Likewise, child support recipients are not dependent upon

---

or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision, because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal.”)(footnote omitted); *see also Gill v. Ripley* 352 Md. 754 (1999)(In an action filed by a mother, individually and as guardian and next friend of her daughter, against various state agencies who represented the state in a paternity action, the Court held that “The public policy considerations that justify the extension of absolute prosecutorial immunity with respect to criminal actions apply equally to these actions as well.”); *Hanson v. Flores*, 486 N.W.2d 294 (Iowa 1992)(In undertaking its role to collect child support “A county attorney must be permitted to pursue support claims with the confidence that he or she will not be the subject of a suit by a disgruntled litigant, on either side, in the support case. The state’s interest in fostering active support collections, from a policy standpoint, is certainly as compelling as its interest in encouraging a prosecutor to adequately train and supervise an assistant as in the *Hike* case, which recognized prosecutorial immunity. The district court properly applied the doctrine of prosecutorial immunity here in granting summary judgment for the defendants.”); *Origel v. Washtenaw County*, 549 F. Supp. 792 (E.D. Mich. 1982)(the mother of a child born out of wedlock sued the prosecutor who had filed a paternity action that was later dismissed for lack of prosecution. The action was brought under 42 U.S.C. § 1983. Based on *Imbler v. Pachtman*, *supra*, 424 U.S. 409, the court held that the defendant was protected by absolute prosecutorial immunity and dismissed the complaint); *Johnson v. Granholm*, 662 F.2d 449 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982); *Duerscherl v. Foley*, 681 F. Supp. 1364 (D. Minn. 1987), *aff’d*, 845 F.2d 1027 (8th Cir. 1988); *Kaplan v. LaBarbera*, 58 Cal. App. 4th 175 (Cal. App. 1997); *Clifford v. Marion County Pros. Atty.*, 654 N.E.2d 805 (Ind. App. 1995).

BCSE attorneys to seek child support payments and, indeed, in this case, the original plaintiff hired her own private attorney.<sup>9</sup>

Indeed, as the same judge held in the nearly identical *Manns* case but inexplicably ignored in this case, “The United States Supreme Court has held that a state prosecutor has absolute immunity for the initiation and of a criminal prosecution including presentation of the State’s case at trial. *Imbler v. Pachtman*, 424 U.S. 409, 96 5. Ct. 984, 47 L. Ed. 2d 128 (1976).” App. at 77 (¶ 17).

“As long as the prosecutor acts within the scope of his or her duties and, therefore, in an official capacity, he or she is immune from liability, even though the prosecuting attorney has acted willfully or maliciously. Prosecutors receive absolute immunity from suit for decisions involving whether to bring charges and the performance of litigation-related duties.” 63C Am. Jur. 2d *Prosecuting Attorneys* § 4 (2009).

The circuit court ruled in this case that such prosecutorial immunity extends only to criminal prosecutions even though the same underlying judge stated in the nearly identical *Manns* case but inexplicably ignored in this case, “In *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 89 (1978), the United States Supreme Court extended the same immunity to agency attorneys.” App. at 77 (¶ 17).

Indeed, as noted by the same judge in *Manns*, “This absolute immunity has also been extended to public officials who exercise prosecutorial powers, such as attorneys who prosecute child abuse, neglect, delinquency and paternity proceedings. *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.) [cert. denied], 107 5. Ct. 107 (1986); *Walden v. Wishengrad*, 74 F.2d 149 (2d

---

<sup>9</sup> Moreover, some of the new plaintiffs, including Cynthia Kerner, hired their own private attorneys.

Cir. 1984); *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984); *Duercherl v. Foley*, 682 F. Supp 1364 (D. Minn. 1987) aff'd 845 F.2d 1027 (8th Cir. 1988)." App. at 77 (¶ 18).<sup>10</sup>

In *Manns*, the same judge noted, "The Court in *Horowitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (C.A. 10 (Colo.) 1987) utilized the three part test that the Supreme Court devised in *Butz* to determine whether an executive agency official is entitled to absolute immunity: '(1) the officials' functions must be similar to those involved in the judicial process, (2) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (3) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct. The test is satisfied in the present case.'" App. at 78 (¶ 20). As in *Manns*, this three-part test is also satisfied in this case.

First, the complaint alleges:

Defendant BCSE, is vested with the following power and authority . . . . To undertake directly, or by contract, activities to obtain and enforce support orders . . . . To undertake directly, or by contract, activities to collect . . . support payments . . . . To contract for professional services . . . to provide representation for the Bureau and the State in administrative or judicial proceedings brought to obtain and enforce support orders . . . . To ensure that the activities of a contractor . . . are carried out in a manner consistent with attorneys' professional responsibilities . . . . To contract for collection services . . . to collect and disburse amounts payable as support . . . . To establish and maintain procedures under which expedited

---

<sup>10</sup> See also *Gill v. Ripley*, 352 Md. 754 (1999)(in an action filed by a mother, individually and as guardian and next friend of her daughter, against various state agencies who represented the state in a paternity action, the court held, "The public policy considerations that justify the extension of absolute prosecutorial immunity with respect to criminal actions apply equally to these actions as well."); *Hanson v. Flores*, 486 N.W.2d 294 (Iowa 1992)(in undertaking its role to collect child support "A county attorney must be permitted to pursue support claims with the confidence that he or she will not be the subject of a suit by a disgruntled litigant, on either side, in the support case. The state's interest in fostering active support collections, from a policy standpoint, is certainly as compelling as its interest in encouraging a prosecutor to adequately train and supervise an assistant as in the *Hike* case, which recognized prosecutorial immunity. The district court properly applied the doctrine of prosecutorial immunity here in granting summary judgment for the defendants."); *Origel v. Washtenaw County*, 549 F. Supp. 792 (E.D. Mich. 1982)(defendant protected by absolute prosecutorial immunity in suit by mother where paternity action was dismissed for lack of prosecution).

processes, administrative or judicial, are in effect for obtaining and enforcing support orders . . . .”

App. at 4-5 (¶ 14). These are functions similar to those involved in the judicial process, such as prosecutors and other legal enforcement officers.

Second, just as parties may be dissatisfied with the prosecution, non-prosecution, or allegedly negligent prosecution of other criminal, civil, and administrative proceedings, disappointed parties are likely to file suits for damages. App. at 78 (¶ 20).

Finally, as the same underlying judge noted in *Manns*, sufficient safeguards exist in the regulatory framework of the Bureau of Child Support Enforcement to control unconstitutional conduct. App. at 78 (¶ 20).

Because plaintiffs’ claims are barred by prosecutorial immunity, the circuit court’s failure to grant defendants’ motion to dismiss was contrary to law and should be reversed.

**C. THE CIRCUIT COURT’S RULING THAT QUALIFIED IMMUNITY MAY NOT BE RAISED AT THE PLEADING STAGE IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

This Court has held, “We believe that in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 657 (1996). This is because “very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” *Id.* at 148, 479 S.E.2d at 658.

“[T]he ultimate question of qualified or statutory immunity is ripe for summary disposition,” *id.* at 149, 479 S.E.2d at 659, which judge’s earlier decision in *Manns* and similar cases demonstrate can be done at the initial pleading level under R. Civ. P. 12(b)(6).<sup>11</sup> Indeed, in

---

<sup>11</sup>See, e.g., *Wrenn v. West Virginia Dept. of Transp., Div. of Highways*, 224 W. Va. 424, 686 S.E.2d 75 (2009)(affirming dismissal of suit on sovereign immunity grounds); *Hawkins v.*

*Jarvis*, in which plaintiffs’ counsel made the same immunity arguments as in this case, this Court reversed the failure to grant a motion to dismiss.

In paragraph 14 of the complaint, it states, “Defendant, BCSE, is vested *with the following power and authority . . .*” (emphasis supplied). App. at 4. Thus, there is no reason for “a developed factual record . . . to determine the scope of the duty owed by the State Defendants” as plaintiffs argued, App. at 291, and the circuit court held, App. at 416, because the basis of plaintiffs’ complaint is statutory.

There also is nothing more fundamental than the proposition that “duty” is a matter of law, not a matter of fact. See Syl. pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 500, 541 S.E.2d 576, 590 (2000)(“The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.”).

Accordingly, discovery is obviously as unnecessary in this case as it has been in the significant number of other cases dismissed where claims were barred, as a matter of law, by constitutional, statutory, or common law immunities.

Because immunities may be raised and determined at the pleading stage, the circuit court’s failure to grant petitioners’ motion to dismiss was contrary to law and should be reversed.

---

*West Virginia Dept. of Public Safety*, 223 W. Va. 253, 672 S.E.2d 389 (2008)(affirming dismissal of suit on immunity grounds); *Falls v. Union Drilling Inc.*, 223 W. Va. 68, 672 S.E.2d 204 (2008)(affirming dismissal of suit on immunity grounds); *Yoak v. Marshall University Bd. of Governors*, 223 W. Va. 55, 672 S.E.2d 191 (2008)(affirming dismissal of suit on immunity grounds); *Porter v. Grant County Bd. of Educ.*, 219 W. Va. 282, 633 S.E.2d 38 (2006)(directing dismissal of suit on immunity grounds); *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992)(affirming dismissal of complaint on Rule 12(b)(6) motion based upon finding of immunity).

**D. THE CIRCUIT COURT’S RULING THAT QUALIFIED IMMUNITY DOES NOT APPLY TO ACTIONS ALLEGING NEGLIGENT FAILURE ON THE PART OF THE STATE TO ENFORCE THE LAW IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

State agencies and their officials and employees are immune from suit when the challenged conduct involves the exercise of discretionary functions. Related to the doctrine of qualified immunity is the principle that no cause of action for negligence lies against the State or its officers or employees arising from performance of discretionary functions, including when and under what circumstances to pursue the collection or enforcement of child support payments.

In Syllabus Point 6 of *Parkulo v. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996), this Court held, “Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W. Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function *and for the exercise of an administrative function involving the determination of fundamental governmental policy.*” (emphasis supplied).

In Syllabus Point 7 of *Parkulo*, this Court held, “The common-law immunity of the State in suits brought under the authority of W. Va. Code § 29-12-5 (1996) with respect to judicial, legislative, and executive (or administrative) policy-making acts and omissions is absolute and extends to the judicial, legislative, and *executive (or administrative) officials when performing those functions.*” (emphasis supplied).

In Syllabus Point 8 of *Parkulo*, this Court quoted its single Syllabus in *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992), that: “A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29 12A 1, et seq., is entitled to qualified immunity from personal liability for official acts *if the involved conduct did not violate clearly established laws of which a reasonable official would*

*have known.* There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.”

And, in developing a test for qualified immunity consonant with these purposes, this Court in *Chase* used the following standard developed by the Supreme Court of the United States in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982): “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 188 W. Va. at 362, 424 S.E.2d at 598.

In *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995), for example, the Court held that a DNR officer was entitled to qualified immunity when he accidentally discharged a suspect’s gun while disarming him, holding in Syllabus Point 4 that, “If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.”

More specifically, in Syllabus Point 5 of *Clark*, the Court held, “A conservation officer employed by the West Virginia Department of Natural Resources is a public officer and official entitled to the benefit of the doctrine of qualified or official immunity.”

The Court further recognized in Syllabus Point 6 of *Clark* that, “In the absence of an insurance contract waiving the defense, *the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, et seq., and*

*against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.”*

Where the suit in *Clark* involved the allegedly negligent disarming of a suspect by a DNR office, the Court stated, “We conclude that *the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Natural Resources, a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, et seq., and against Officer Dunn, an officer of that department.*” 195 W. Va. at 279-280, 465 S.E.2d at 381-82.

In this case, paragraph 14 of the complaint states, “Defendant, BCSE, is vested *with the following power and authority . . .*” (emphasis supplied). App. at 4. Although the complaint also references claims for negligence, fiduciary duty, breach of trust, and fraud, no source of any duty supporting those causes of action is identified other than statute. App. at 17-18 (Counts II, III, and IV). The only statute cited in the complaint is W. Va. Code § 48-18-115 which states, “All support payments owed to an obligee *who is an applicant for or recipient of the services of the bureau for child support enforcement shall be paid to the bureau for child support enforcement.* Any other obligee owed a duty of support under the terms of a support order entered by a court of competent jurisdiction *may request that the support payments be made to the bureau for child support enforcement.* In such case, the bureau for child support enforcement shall proceed to receive and disburse such support payments to or on behalf of the obligee as provided by law.” (emphasis supplied).

Thus, the statute does not provide, as respondents contend, that “BCSE has had the *exclusive authority and responsibility for the establishment, modification, enforcement, collection and distribution of child support in West Virginia since 1995.* Indeed . . . *all support*

*payments owed to a child who is owed child support must be paid to and through the BCSE, or, in Kanawha and Clay Counties, through PSI.”* App. at 5 (¶ 15) (emphasis supplied).

First, BCSE has no authority for the “establishment” of child support, which is the function of the Family Courts. Second, BCSE has no authority for the “modification” of child support, which is the function of Family Courts. Third, BCSE does not have the “exclusive authority” for the “enforcement, collection and distribution of child support;” rather W. Va. Code § 48-14-201 provides: “When an obligor is in arrears in the payment of support which is required to be paid by the terms of an order for support of a child, *an obligee* or the bureau for child support enforcement *may file an abstract of the order giving rise to the support obligation* and an ‘affidavit of accrued support,’ setting forth the particulars of such arrearage and *requesting a writ of execution, suggestion or suggestee execution.*” (emphasis supplied).<sup>12</sup> Finally, all obligors are not required to make payments to BCSE; rather, only those obligors for whom the obligee has sought or received the services of BCSE are required to make their payments to BCSE.

Whether BCSE or PSI takes action for the modification or collection of child support depends upon (a) whether the obligee has requested or received services from BCSE and (b) whether BCSE makes a discretionary determination, under the unique circumstances of each particular case, to take action.

This discretionary determination may take into consideration, among numerous and varying other factors, the limited availability of resources, the lack of cooperation or hostility of the obligee, the representation of the obligee by private counsel, and the unlikelihood of

---

<sup>12</sup> Obligees are perfectly free, as did some of the plaintiffs in this case, to hire their own counsel to pursue the establishment, modification, enforcement, and collection of child support, including filing an abstract of orders giving rise to support obligations and requesting writs of execution, suggestion, or suggestee execution.

collection based upon other circumstances, such as the unavailability of information regarding the present circumstances of the obligee, the obligor, or the age of the original judgment.

Accordingly, any suit by an obligee involving the exercise of that administrative discretion is barred by the doctrine of qualified immunity, and the plaintiffs simply cannot sue the State, its employees, and Policy Studies Inc., as agent for the State, for “negligence,” “breach of statutory duty,” “malpractice,” and “professional negligence,” as referenced in the Complaint, because no such negligence claims are cognizable under West Virginia law.

Plaintiffs’ counsel argued, and the circuit court held, that “the state may be held liable for negligence, to the extent of the applicable insurance coverage.” App. at 415-416. But this Court rejected this same argument made by the same counsel in *Jarvis*, supra at 482, 711 S.E.2d at 552, as follows: “We have carefully reviewed the appellees’ arguments urging this Court to revisit our law on qualified immunity in claims of negligence, and we decline to do so. Therefore, we find pursuant to Syllabus Point 6 of *Clark v. Dunn* that the appellants have qualified immunity from claims of simple negligence under the facts of this case.”<sup>13</sup> Accordingly, we conclude that the circuit court’s ruling that qualified immunity is not available to the appellants as a defense to the appellees’ negligence claims is in error. Consequently, we reverse that ruling.”

Similarly, plaintiffs argued, and the circuit court held, that under *J.H. v. W. Va. Division of Rehabilitation Services*, 224 W. Va. 147, 680 S.E.2d 392, 402 (2009), qualified immunity does not apply to a negligence action against the State and its officers and agents if “the plaintiff

---

<sup>13</sup> In *Clark v. Dunn*, where the suit involved the allegedly negligent disarming of a suspect by a DNR officer, the Court stated, “We conclude that the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Natural Resources, a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-1, et seq., and against Officer Dunn, an officer of that department.” *Id.* at 279-280, 465 S.E.2d at 381-82. Obviously, the DNR officer in *Clark* was a State employee and there was insurance for the DNR in place.

made no allegation ‘of any type of legislative, judicial, or administrative functions involving the determination of a fundamental governmental policy[.]’ App. at 416. Again, this is (1) completely contrary to Syllabus Point 4 of *Clark v. Dunn* that, “If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby;” (2) completely contrary to Syllabus Point 6 of *Clark v. Dunn*, that “the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency . . . and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer;” and (3) completely contrary to the result in *Clark v. Dunn* that the Department of Natural Resources and its officer were entitled to qualified immunity against a claim of mere negligence after the officer accidentally discharged a suspect’s gun while disarming him. In other words, qualified immunity barred a claim of negligence against a state agency and its officer in *Clark v. Dunn*, which obviously did not involve “any type of legislative, judicial, or administrative functions involving the determination of a fundamental governmental policy.”

Plaintiffs also argued, and the circuit court held, that “the holding of the West Virginia Supreme Court in *Shaffer* [*v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003)] demonstrates these Defendants can be held liable for failing to preserve child support payments.” App. at 416. But this Court did not hold in *Shaffer* that BCSE or anyone else was liable to the obligee for child support payments; rather, the Court held that BCSE was liable *to the obligor* when it “received \$32,796.60 from Mr. Stanley’s Workers’ Compensation award by means of income withholding.”

*Id.* at 66, 593 S.E.2d at 637. It was only because the Legislature has expressly provided that the State has an obligation to refund wrongfully withheld child support payments that the Court found liability: “It is clear from the above that the Legislature has manifested an intent that the BCSE repay funds which were improperly withheld from an obligor's income.” Here, of course, the Legislature has expressly provided to the contrary, i.e., it has expressly provided that there is no attorney/client or other relationship between obligees and BCSE attorneys.

Because plaintiffs’ claims are barred by qualified immunity, the circuit court’s failure to grant defendants’ motion to dismiss was contrary to law and should be reversed.

**E. THE CIRCUIT COURT’S RULING THAT THE PUBLIC DUTY DOCTRINE MAY NOT BE RAISED AT THE PLEADING STAGE IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

“The public duty doctrine,” as defined by the Court in Syllabus Point 1 of *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989), “is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes.” Affirming the award of summary judgment in a case where an apartment dweller had sued a city for failing to conduct inspections that, the tenant contended, would have revealed fire code violations, the Court held in Syllabus Point 2 of *Benson*, that “A municipality may not be held liable because of the failure of its employees to inspect premises to determine if there are violations of fire or building codes.”

In Syllabus Point 10 of *Parkulo*, the Court held, “The public duty doctrine and its ‘special relationship’ exception apply to W. Va. Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract.” In *Tucker v. Dept. of Corrections*, 207 W. Va. 187, 530 S.E.2d 448 (1999), the Court held that the State has not waived the public duty doctrine in its insurance policy.

In *Parkulo*, the Court explained that the “public duty doctrine” is a doctrine which, independent of the constitutional doctrine of governmental immunity, holds, in its common law form, that a recovery for negligence may be had against the State or a governmental agent, officer or employee, acting in a non-fraudulent, non-malicious or non-oppressive manner, ***only if the State had a “special relationship” with the party injured, that is, only if the duty which was negligently breached was owed by the State to the particular person seeking recovery.***

The Court in *Parkulo* further outlined what must be shown in order to establish the “special relationship” sufficient to avoid the effect of the public duty doctrine:

The four requirements for the application of the “special relationship” exception to W. Va. Code § 29-12-5 cases are as follows: (1) An assumption by the state governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the state governmental entity’s agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity’s agents and the injured party; and (4) that party’s justifiable reliance on the state governmental entity’s affirmative undertaking.

Syl. pt. 12, *Parkulo*, supra. The complaint in this case alleges none of these factors, probably because to do so would obviously completely defeat plaintiffs’ counsel’s efforts to secure class certification.

First, the complaint does not allege that any of the defendants through promises or actions undertook any affirmative duty to act on any of the plaintiffs’ behalf and, indeed, the actions of the original plaintiff and some of the new plaintiffs in procuring their own attorneys would completely undermine such assertion.

Second, the complaint does not allege that the defendants had knowledge that their inaction could lead to harm, again because the plaintiffs were free to and some of them made

representations to BCSE that they were independently seeking enforcement of the subject child support obligations.

Third, the complaint does not allege direct contact between any of the defendants and the plaintiffs, and the Family Court order in Ms. Hoover's case indicates that BSCE attorney was appearing solely on behalf of the State, while Ms. Hoover appeared by her own attorney, which happens with some frequency and undermines not only plaintiffs' entire cause of action, but their attempt at class action relief.

Finally, the complaint does not allege that the plaintiffs were justifiably relying upon BSCE's or PSI's affirmative undertaking on their behalf – which, in any event, neither undertook – and, as noted, plaintiffs cannot allege detrimental reliance because they were represented by their own counsel.

Moreover, as a matter of statutory law, when either BCSE or PSI takes action to enforce a child support order, they are acting on behalf of the State, not on behalf of the obligee.

West Virginia Code § 48-18-110<sup>14</sup> expressly states, the employees of the child support enforcement division “*represent the interest of the state or the division and not the interest of any other party. . . . [A]ny attorney who provides services for the child support enforcement division is the attorney for the state of West Virginia and that the attorney providing those services does not provide legal representation to the applicant.*” (emphasis supplied).

As the same judge held in the nearly identical *Manns* case but inexplicably ignored in this case, no special relationship can exist between BCSE or PSI and child support obligees when state law specifically provides there is no relationship. App. at 82-83 (¶ 29).

---

<sup>14</sup> As previously noted, the location of this statute was changed in 2002 from W. Va. Code § 48A-2-21(b).

Plaintiffs argued, and the circuit court held, that this Court's decision in *J.H. v. W. Va. Division of Rehabilitation Services*, *supra*, somehow supports their causes of action or supports denial of defendants' motion to dismiss because "the question of whether a special duty arises to protect an individual from a State government entity's negligence is ordinarily a question of fact for the trier of facts." App. at 418. But *J.H.* involved alleged promises by a state agency regarding the physical security of residents of a rehabilitation facility which was deemed to satisfy, at the pleading stage, the elements of the "special relationship exception" to the public duty doctrine. As previously noted, however, the plaintiffs' complaint does not allege any of the four factors required to support the "special relationship" exception to the public duty doctrine, does not involve allegations of individualized promises to any of the plaintiffs and, moreover, obviously does not involve an alleged promise regarding the plaintiffs' physical security.

As already noted, in paragraph 14 of the complaint, it states, "Defendant, BCSE, is vested *with the following power and authority . . .*" (emphasis supplied). App. at 4. Thus, there is no reason for "a developed factual record . . . to determine the scope of the duty owed by the State Defendants," as plaintiffs argued, App. at 291, and the circuit court held, App. at 416, because the basis of the plaintiffs' complaint is statutory.

There also is nothing more fundamental than the proposition that "duty" is a matter of law, not a matter of fact. *Aikens v. Debow*, *supra*, at Syl. Pt. 5 ("The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.").

Accordingly, discovery is obviously as unnecessary in this case as it has been in the significant number of other cases dismissed where claims were barred, as a matter of law, by constitutional, statutory, or common law immunities.

Because plaintiffs' claims are barred by the public duty doctrine, the circuit court's failure to grant defendants' motion to dismiss was contrary to law and should be reversed.

**F. THE CIRCUIT COURT'S RULING THAT WHETHER THERE IS A PRIVATE CAUSE OF ACTION UNDER A STATUTE IS NOT A QUESTION OF LAW, BUT A QUESTION OF FACT, IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

In Syllabus Point 1 of *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980), our Court held, "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, it is clear that, as in many other cases,<sup>15</sup> there is simply no private cause of action under the child support enforcement statute as

---

<sup>15</sup> *Hill v. Stowers*, 224 W. Va. 51, 680 S.E.2d 66 (2009)(upholding dismissal of complaint based upon legal analysis of subject statute; no private cause of action arising from alleged violation of election statutes, which would usurp legislative scheme); *Arbaugh v. Bd. of Educ.*, 214 W. Va. 677, 591 S.E.2d 235 (2003)(decided on certified question of law; based upon examination of relevant statutes, private cause of action arising from alleged violation of child abuse reporting statute would be inconsistent with Legislative scheme and purpose of statute); *Yourtee v. Hubbard*, 196 W. Va. 683, 474 S.E.2d 613 (1996)(no private cause of action arising from alleged violation of unattended motor vehicle statute); *Adams v. Nissan Motor Corp.*, 182 W. Va. 234, 387 S.E.2d 288 (1989)(no private cause of action to impose civil penalties under lemon law statute); *Machinery Hauling, Inc. v. Steel of West Virginia*, 181 W. Va. 694, 384 S.E.2d 139 (1989)(no private cause of action under extortion statute).

a matter of law, not fact, which would be inconsistent with the Legislative scheme and purpose of the relevant statutes.

First, the child support enforcement statute imposes no statutory obligations: “In carrying out the policies and procedures for enforcing the provisions of this chapter, the bureau shall have the following power and authority . . . .” W. Va. Code § 48-18-105.

Second, the child support enforcement statute allows BCSE to collect a governmental fee for its services from applicants for its services: “Except for those persons applying for services provided by the Bureau for Child Support Enforcement who are applying for or receiving public assistance from the Division of Human Services or persons for whom fees are waived pursuant to a legislative rule promulgated pursuant to this section, all applicants shall pay an application fee of twenty-five dollars.” W. Va. Code § 48-18-108(b).

Third, the child support enforcement statute allows BCSE to collect governmental fees from child support recipients: “Fees imposed by state and federal tax agencies for collection of overdue support shall be imposed on the person for whom these services are provided. Upon written notice to the obligee, the Bureau for Child Support Enforcement shall assess a fee of twenty-five dollars to any person not receiving public assistance for each successful federal tax interception.” W. Va. Code § 48-18-108(c).

Fourth, the child support enforcement statute allows BCSE to collect attorney fees, under certain circumstances, from the obligor:

In any action brought by the Bureau for Child Support Enforcement, the court shall order that the obligor shall pay attorney fees for the services of the attorney representing the Bureau for Child Support Enforcement in an amount calculated at a rate similar to the rate paid to court-appointed attorneys paid pursuant to section thirteen-a, article twenty-one, chapter twenty-nine of this code and all court costs associated with the action: Provided, That no such award shall be made when the court finds that the award of attorney’s fees would create a substantial financial hardship on the obligor or when the obligor is a recipient of

public assistance. Further, the Bureau for Child Support Enforcement may not collect such fees until the obligor is current in the payment of child support. No court may order the Bureau for Child Support Enforcement to pay attorney's fees to any party in any action brought pursuant to this chapter.

W. Va. Code § 48-18-108(d).

Fifth, as noted, the Legislature has made clear that BCSE and PSI attorneys do not represent anyone other than the State of West Virginia. W. Va. Code § 48-18-110.

Sixth, BCSE is not the recipient of all child support payments, but receives child support payments only under limited circumstances:

All support payments owed to an obligee who is an applicant for or recipient of the services of the bureau for child support enforcement shall be paid to the bureau for child support enforcement. Any other obligee owed a duty of support under the terms of a support order entered by a court of competent jurisdiction may request that the support payments be made to the bureau for child support enforcement. In such case, the bureau for child support enforcement shall proceed to receive and disburse such support payments to or on behalf of the obligee as provided by law.

W. Va. Code § 48-18-115.

Seventh, BCSE is not required to review child support orders except in limited, specified circumstances: "Either parent or, if there has been an assignment of support to the department of health and human resources, the bureau for child support enforcement shall have the right to request an administrative review of the child support award in the following circumstances . . . ."

W. Va. Code § 48-18-126(a).

Finally, the Legislature has not expressly provided for any private cause of action under the child support enforcement statute.

Obviously, whether a private cause of action exists under a statute is not a question of fact, as the circuit court ruled, but a question of law and because plaintiffs failed to satisfy the requirements under *Hurley*, the circuit court's ruling should be reversed.

**G. THE CIRCUIT COURT’S RULING THAT A PRIVATE CONTRACTOR PERFORMING GOVERNMENTAL FUNCTIONS IS NOT ENTITLED TO GOVERNMENTAL IMMUNITY IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

Defendant PSI, as a private contractor and agent of the State performing governmental functions, is entitled to the same immunities afforded to the State.

Private attorneys appointed as special prosecutors do not lose their immunity. *Eldridge v. Gibson*, 332 F.3d 1019 (6<sup>th</sup> Cir. 2003)(private attorneys, who were appointed as special prosecutors in criminal prosecution against former state prisoner, and who simultaneously represented crime victim in civil action against prisoner, were entitled to immunity).

This is because the United Supreme Court has “followed a ‘functional’ approach to immunity law.” *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985)(stating that “our cases clearly indicate that immunity analysis rests on functional categories” rather than “on the status of the defendant”)(citation omitted).

Consequently, courts have held that private parties under contract to perform governmental duties are entitled to qualified immunity.

In *Williams v. O’Leary*, 55 F.3d 320, 323-24 (7<sup>th</sup> Cir.), cert. denied, 516 U.S. 993 (1995), for example, the court held that medical director and staff physician of the Stateville Correctional Center in Illinois were entitled to qualified immunity even though each was an employee of Correctional Medical Systems, a private company contracting with the state to provide medical services at state correctional facilities. The *Williams* court held that “[t]he instant case clearly falls within the class of cases in which qualified immunity may be raised by a private defendant.” *Id.* at 324. The court believed that the fact that the defendant was “performing duties that would otherwise have to be performed by a public official who would clearly have qualified immunity” weighed in favor of granting qualified immunity to the private defendant. *Id.* (citation omitted).

In *Eagon v. Elk City*, 72 F.3d 1480, 1490 (10<sup>th</sup> Cir. 1996), the Tenth Circuit likewise reaffirmed its rule that “a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself.” (citation omitted). One of the defendants in *Eagon* was a private party in charge of granting or denying applications for Christmas displays in a city park in Elk City, Oklahoma pursuant to a city council resolution. The lawsuit arose out of the denial of an application for a Christmas display. On appeal, the court addressed whether the private party defendant was entitled to assert a qualified immunity defense for her actions. Ultimately, the Tenth Circuit believed that qualified immunity protected the private defendant’s actions, concluding that the defendant “was performing a government function pursuant to a government request,” and therefore was entitled to qualified immunity for her actions. *Id.* at 1490.

In *McKnight v. Rees*, 88 F.3d 417, 423 (6<sup>th</sup> Cir. 1996), the Sixth Circuit affirmed the dismissal of an inmate’s suit against a warden and correctional officers who were employees of a private company which had a contract with the State of Tennessee, stating that, qualified immunity extends to “*a private party acting under a government contract fulfilling a governmental function; parties fulfilling statutorily mandated duties under a contract.*” (emphasis supplied and citation omitted).

Finally, in West Virginia, a suit against a private entity, Children’s Home Society, Inc., doing business as the Davis Child Center, and its employees, under contract with the Department of Health and Human Resources, were held to be entitled to the same immunity as their governmental co-defendants. *Doe v. West Virginia Department of Health and Human*

*Resources*, Kanawha County Civil Action No. 97-C-193, appeal refused, *Doe v. West Virginia Department of Health and Human Resources*, No. 992756 (W. Va. February 15, 2000).

Just as a guardian ad litem appointed by a circuit court to perform its judicial functions enjoy that court's immunity, see *McGhan v. Kalkaska Co. Dept. of Human Services*, 2009 WL 2170151 at \*12 (W.D. Mich.); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir.1984); *Moss v. Tennessee Dep't of Human Servs.*, 2008 WL 4552421, at \* 13 (M.D. Tenn.); *Chee v. Washtenaw County, Mich.*, 2008 WL 2415374 at \* 4 (E.D. Mich.), a company contracted by the State to perform its governmental functions enjoys the State's immunity.

Here, whether child support collection is performed by the State or its contractors, prosecutorial functions are being performed entitling both the State and its contractors to immunity.<sup>16</sup>

Because the complaint for non-prosecution of child support obligations was barred by prosecutorial immunity, qualified immunity, and the public duty doctrine, the circuit court's failure to grant defendants' motion to dismiss was contrary to law and should be reversed.

---

<sup>16</sup> In their response to defendants' motion to dismiss, plaintiffs referenced the case of *Ellison v. Wood & Bush Co.*, 153 W. Va. 506, 170 S.E.2d 321 (1969), App. at 286-287. That case, however, was decided well before *Pittsburgh Elevator Co. v. W. Va. Bd. Of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). Moreover, all that case did was to restate the law in Syllabus Point 4 of *Perdue v. S. J. Groves & Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968), which held, "Corporations which are employed as independent contractors by the state road commission to construct a portion of a public highway may be held liable for damage proximately caused to the property of landowners by their negligence or by their use of explosives for blasting in the performance of the highway construction under the construction contract with the state road commission, and in an action by the landowners for recovery of damages thus proximately caused to their property, the independent contractors are not entitled to governmental immunity from liability." Obviously, the instant case does not involve the use of inherently dangerous explosives by an independent contractor and defenses other than sovereign immunity are raised to which courts have routinely held contractors are entitled.

**H. THE CIRCUIT COURT’S RULING THAT THE EXISTENCE OF ANY DUTY IS A QUESTION OF FACT, RATHER THAN A QUESTION OF LAW, IS CONTRARY TO LAW AND SHOULD BE REVERSED.**

Other than referencing statutes which clearly make the decision to pursue the collection and enforcement of child support orders discretionary and provide that, when doing so, BCSE attorneys represent the State and not obligees, respondents identify no source of any constitutional, statutory, common law, or contractual duty on the part of any of the defendants that would support their causes of action.

“From the earliest days of law school, prospective attorneys are taught that the three elements of every tort action are the existence of a legal duty, the breach of that duty, and damage as a proximate result.” *Sewell v. Gregory*, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988). “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” *Aikens v. Debow*, supra at Syl. Pt. 5. Here, none of the defendants owed the plaintiffs any duty.

The flaw in plaintiffs’ logic is that it supposes there is an attorney/client relationship between BCSE and/or PSI attorneys and child support obligees.

Our Legislature has clearly established that BCSE attorneys DO NOT REPRESENT CHILD SUPPORT OBLIGEEES; BUT RATHER, SOLELY REPRESENT THE STATE OF WEST VIRGINIA. Specifically, W. Va. Code §§ 48-18-110(b) and (c) provide:

(b) An attorney employed by the bureau for child support enforcement or employed by a person or agency or entity pursuant to a contract with the bureau for child support enforcement ***represents the interest of the state or the bureau and not the interest of any other party.*** The bureau for child support enforcement ***shall***, at the time an application for child support services is made, ***inform the applicant that any attorney who provides services for the bureau for child support enforcement is***

*the attorney for the state of West Virginia and that the attorney providing those services does not provide legal representation to the applicant.*

(c) An attorney employed by the bureau for child support enforcement or pursuant to a contract with the bureau for child support enforcement *may not be appointed or act as a guardian ad litem or attorney ad litem for a child or another party.*

(emphasis supplied). The Legislature cannot have made itself any clearer: NEITHER BCSE ATTORNEYS NOR ANY ATTORNEYS PROVIDING SERVICES UNDER CONTRACT WITH THE BCSE HAVE ANY ATTORNEY/CLIENT RELATIONSHIP WITH ANYONE OTHER THAN THE STATE OF WEST VIRGINIA. Of course, there are many reasons for this.

First, BCSE and obligees have a conflict of interest. For example, the order attached to the original complaint in the previous case states, “KIMBERLY HOOVER and the subrogee, State of West Virginia are awarded judgment . . . in the total amount of \$13,439.28 . . . .” App. at 148-181. A conflict clearly existed because most of the support in question was assigned to the State by Ms. Hoover. Other plaintiffs, likewise, received State assistance and, therefore, the interests of BCSE and those plaintiffs were adverse.

Second, BCSE and PSI attorneys solely represent the State. For example, in this case, the order attached to the original complaint in the previous case unequivocally specifies, “On October 27, 2009, came the West Virginia Department of Health and Human Resources, BUREAU OF CHILD SUPPORT ENFORCEMENT by Jennifer C. Shomo, *its attorney*, and came KIMBERLY HOOVER, in person and *by counsel*, ARIELLA SILBERMAN, ESQUIRE,” App. at 148-181, who is a private attorney with the firm of Kay, Casto & Chaney. *Id.* Orders entered in the cases of other plaintiffs likewise indicate that (a) the BCSE or PSI attorney

represented the State, not the plaintiff and/or (b) the plaintiff was represented by her own private attorney.<sup>17</sup>

Finally, because of the conflicts in interest between BCSE and child support recipients, like Ms. Hoover and other plaintiffs in the complaint, it would be a violation of the Rules of Professional Conduct for BCSE or PSI attorneys to represent both the State of West Virginia and child support recipients. See R. Prof. Cond. 1.7(a) (“A lawyer shall not represent a client if the representation of that client will be directly adverse to another client.”).

Because BCSE and PSI attorneys represent the State of West Virginia and not child support recipients, there is no attorney/client relationship and, because there is no attorney/client relationship, there is no common law or statutory duty, and because there is no common law or statutory duty, there can be no cause of action.

In addition to claims of negligence, professional negligence, and professional malpractice, plaintiffs also assert claims of breach of fiduciary duty and something called “breach of trust,” which is the same as breach of fiduciary duty. If defendants did not represent obligees, as the Legislature has provided, and indeed, as those attorneys are sometimes adverse to obligees, including the collection of fees for wrongful receipt or diversion of child support payments, there certainly could have been no fiduciary or trust relationship. As the Legislature has made clear, there is no attorney/client relationship between BCSE/PSI attorneys and child support recipients, and, therefore, there can be no breach of any duty, fiduciary or otherwise.

---

<sup>17</sup> Of course, if this Court does not reverse the circuit court’s order and remand for dismissal of the case, defendants will proceed with a third-party complaint against every law firm and attorney who represented either these individual plaintiffs or, if certification occurs, every class member. If anyone had an obligation to ensure that child support orders for these plaintiffs or class members were not time-barred by inaction *it was the private attorneys retained by these plaintiffs or class members*, who were not relieved of any obligation by statute and who did not have an inherent conflict of interest.

The Court has “defined a fiduciary duty as “[a] duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person. It is the highest standard of duty implied by law [.]”<sup>18</sup> Obviously, without the attorney/client relationship, which erroneously was asserted by the plaintiffs, there is nothing upon which to support any fiduciary or trust relationship between the plaintiffs and the defendants. Because there is no attorney/client relationship between the defendants and the plaintiffs and, thus, there can be no breach of any duty, fiduciary or otherwise, the circuit court’s failure to grant defendants’ motion to dismiss was contrary to law and should be reversed.

**I. THE CIRCUIT COURT’S RULING THAT THE STATE CAN BE SUBJECTED TO PUNITIVE DAMAGES IS CLEARLY CONTRARY TO W. VA. CODE § 55-17-4(3) AND SHOULD BE REVERSED BY THIS COURT.**

The complaint seeks an award of punitive damages which are precluded by statute.

Specifically, W. Va. Code § 55-17-1(a) provides, “The Legislature further finds that protection of the public interest is best served by clarifying that no government agency may be subject to awards of punitive damages in any judicial proceeding.” W. Va. Code § 55-17-4(3) further states, “Notwithstanding any other provisions of law to the contrary . . . [n]o government agency may be ordered to pay punitive damages in any action.”

---

<sup>18</sup> *Lucas v. Fairbanks Capital Corp.*, 217 W. Va. 479, 484, 618 S.E.2d 488, 493 (2005) (“We previously have defined a fiduciary duty as “[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law [.]” *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting Black’s Law Dictionary 625 (6th ed. 1990)). See generally BLACK’S LAW DICTIONARY 523 (7th ed. 1999) (‘A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).’).”

As previously noted, this prohibition against the award of punitive damages against the State also applies to its officers, employees, and agents, including those who contract with the State to provide services that ordinarily would be provided by the State.

Because the State and its officers, employees, and agents, including those who contract with the State to provide governmental services that ordinarily would be provided by the State, may not be subject to awards of punitive damages in any judicial proceeding, the circuit court's failure to grant defendants' motion to dismiss was contrary to law and should be reversed.

**J. THE CIRCUIT COURT'S RULING THAT CLASS CERTIFICATION IS NOT AN ISSUE AT THE PLEADING STAGE IS CLEARLY CONTRARY TO LAW AND SHOULD BE REVIEWED AND REVERSED BY THIS COURT.**

The class proposed by the plaintiffs in the complaint, on its face, does not satisfy the requirements for class relief: "All children whose child support obligation was or is being collected in the Courts of the State of West Virginia by Defendant BCSE and who were or are beneficiaries of child support judgments and whose judgments for child support have been terminated or reduced by the applicable statute of limitations." App. at 6 (¶ 23).<sup>19</sup>

As noted, BCSE "represents the interest of the state or the bureau and not the interest of any other party," including the "beneficiaries of child support judgments."

Obligees or custodial parents are often represented, as in this case, by their own private attorneys, who have no conflict of interest, and as those attorneys, unlike BCSE attorneys, could be held liable for professional malpractice, because they enjoy an attorney/client relationship, there can never be the commonality and typicality required for class relief.

---

<sup>19</sup> The defendants' motion to dismiss was not intended to be exhaustive as to the defenses to the plaintiff's request for class relief; but rather, was only intended to illustrate some of the many impediments presented.

There is no statute imposing upon BCSE the affirmative obligation to seek the enforcement of all child support orders; rather, BCSE is given discretion to determine under what circumstances it seeks such enforcement.

Individual class members are not similarly-situated. Some class members may have assigned their rights to receive support to the State in return for AFDC or TANF benefits. Some class members may have allowed the two-year statute of limitations on their claims to elapse. Some class members may have refused to cooperate and frustrated the defendants' efforts to collect payments. Some class members may have directed the defendants not to take action because they had their own private attorneys. Some class members may have filed their own actions, either pro se or by their counsel. Finally, a number of legal defenses that toll the running of statutes of limitation, including the discovery rule,<sup>20</sup> infancy and insanity,<sup>21</sup> the continuing tort doctrine,<sup>22</sup> fraudulent concealment,<sup>23</sup> and others might arise for some, but not all where the child support obligor asserts the affirmative defense of the ten-year statute of limitations.

---

<sup>20</sup> Syl. pt. 1, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992) (“Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the ‘discovery rule,’ the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.”).

<sup>21</sup> Syl. pt. 3, *Worley v. Beckley Mechanical, Inc.*, 220 W. Va. 633, 648 S.E.2d 620 (2007) (“The general purpose of W. Va. Code § 55-2-15 (1923) is to toll the commencement of the running of the statute of limitations so that the legal rights of infants and the mentally ill may be protected.”).

<sup>22</sup> Syl. pt. 11, *Graham v. Beverage*, 211 W. Va. 466, 566 S.E.2d 603 (2002) (“Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.”).

<sup>23</sup> Syl. pt. 4, *Miller v. Bd. of Educ.*, 210 W. Va. 147, 556 S.E.2d 427 (2001) (“The general statute of limitations contained in W. Va. Code § 55-2-12(b) is tolled with respect to an undiscovered wrongdoer by virtue of fraudulent concealment when the cause of action accrues during a victim’s infancy and the injured person alleges in his or her complaint that the wrongdoer fraudulently concealed material facts. The statute begins to run when the injured

Because of these differences among child support recipients, which have been demonstrated by the failure of plaintiffs' counsel, on two separate occasions, to be able to maintain suits with his original plaintiffs, the requisites for class relief cannot be met. Because the plaintiffs' claims, on their face, are unsuitable for class relief, the circuit court's failure to grant defendants' motion to dismiss was contrary to law and should be reversed.

## VI. CONCLUSION

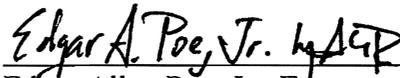
Defendants respectfully request that this Court apply the statutes providing that there is no attorney/client relationship between attorneys employed by the Bureau of Child Support Enforcement and child support obligees; reaffirm its precedent in *Jarvis* and other immunity cases; reverse the judgment of the Circuit Court of Kanawha County; and remand with directions for dismissal of plaintiffs' complaint.

---

person knows, or by the exercise of reasonable diligence should know, the nature of his or her injury, and determining that point in time is a question of fact for the jury. However, pursuant to W. Va. Code § 55-2-15, no case may be brought after twenty years from the time the right accrues.”).

**MICHAEL J. LEWIS, Secretary, 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; and WEST VIRGINIA BUREAU FOR CHILD SUPPORT ENFORCEMENT**

By Counsel



Edgar Allen Poe, Jr., Esq.

WV State Bar No. 2924

Pullin, Fowler, Flanagan, Brown & Poe, PLLC

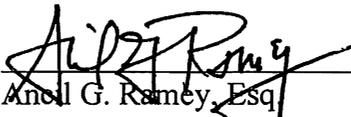
901 Quarrier Street

Charleston, WV 25301

Telephone (304) 344-0100

**POLICY STUDIES INC.**

By Counsel



Annd G. Ramey, Esq.

WV State Bar No. 3013

Hannah C. Ramey, Esq.

WV State Bar No. 7700

Steptoe & Johnson, PLLC

Post Office Box 2195

Huntington, WV 25722-2195

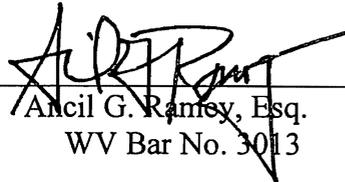
Telephone (304) 526-8133

**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2012, I served the foregoing BRIEF OF PETITIONERS by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to counsel as follows:

Charles R. Webb, Esq.  
WV Bar No. 4782  
The Webb Law Firm, PLLC  
108 ½ Capitol Street, Suite 201  
Charleston, WV 25301  
*Counsel for Respondents*

Lonnie C. Simmons, Esq.  
WV Bar No. 3406  
DiTrapano, Barrett & DiPiero PLLC  
604 Virginia Street, East  
Charleston, WV 25301  
*Counsel for Respondents*

  
Ancil G. Ramsey, Esq.  
WV Bar No. 3013