

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

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I. STATEMENT OF THE CASE

This is the reply brief of the defendants in an appeal from an order denying a motion to dismiss predicated in part upon immunity defenses. App. at 409-428.

Plaintiffs base their entire statement of the case on an incorrect assertion as follows:

This action is the counterpoint to this Court's decision in *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003). In *Shaffer*, this Court upheld an award of damages in favor of a noncustodial parent, who was required to pay child support. Because Petitioners failed to preserve the child support judgment, the arrearage owed was not collectible due to the expiration of the statute of limitations. Therefore, the wages withheld by Petitioners to pay this arrearage had to be returned to this noncustodial parent. Thus, the noncustodial parent, who owed child support, had a valid cause of action against Petitioners for withholding income from him in connection with a child support judgment that Petitioners had rendered unenforceable by failing to preserve the judgment.

The present litigation seeks to obtain class action relief for the other side of this equation—the custodial parent and their children denied child support because Petitioners failed to preserve the child support judgment. . . . Petitioners owe Respondents, and those similarly situated, a duty to enforce child support orders and pursue any child support arrearage. The basis of this duty is statutory. Where a custodial parent applies to the Bureau of Child Support Enforcement (“BCSE”) (or its contractor) for its services in enforcing a child support order, the BCSE has the non-discretionary statutory duty to that parent to execute this service without negligence. Petitioners have utterly failed to do this, as represented by this Court's rulings in *Shaffer* and its progeny.

Respondents' Brief at 2-3. *Shaffer*, however, undermines, rather than supports, plaintiffs' attempted cause of action in this case.

First, the Court in *Shaffer* stated that the decision by BCSE to file an abstract of judgment in child support cases is discretionary, not mandatory:

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.

Id. at 65, 593 S.E.2d at 636 (emphasis supplied and footnote omitted).

Second, the Court in *Shaffer* did not hold that BCSE or anyone else was liable to the obligee or the obligee's child 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.

Third, the Court in *Shaffer* did not hold that BCSE or any other governmental entity, official, employee, or contractor lacked immunity from suit by an obligee or obligee's child; rather, the Court held that BCSE was not immune from liability to refund *to the obligor* funds wrongfully received pursuant to withholding barred by the statute of limitations: "the DHHR has a responsibility to refund to an obligor money collected in excess of what is owed by the obligor." Id. at 68, 593 S.E.2d at 639.

Fourth, 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 in *Shaffer* found any 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., there is no attorney/client relationship between obligees or obligee children and BCSE attorneys.

Finally, *none* of the common law immunities which are at issue in this case were at issue in *Shaffer*; rather, the only immunity issue decided was whether BCSE was "*constitutionally immune from suit*," id. at 68, 593 S.E.2d at 639 (emphasis supplied), and most importantly, *there was absolutely no discussion in Shaffer whatsoever about any liability on the part of BCSE or anyone else to Ms. Shaffer.*¹

¹ In fact, in *Shaffer*, "The circuit court found the BCSE jointly and severally liable for the repayment because it breached its duty to forward the withholdings to the proper party." Id. at 52, 593 S.E.2d at 633.

Indeed, the same Court that decided *Shaffer* twice rejected appeals from the dismissal of the same cause of action in the *Manns* case that is being asserted here, which plaintiffs make no meaningful effort to distinguish. This is not a case, like *Shaffer*, where the State was being asked to “refund to an obligor money collected in excess of what is owed by the obligor,” 215 W. Va. at 68, 593 S.E.2d at 639, much like the State would be liable to “refund” overpayments to a taxpayer. Rather, this is a case where plaintiffs are seeking “damages” from the State based essentially on a legal malpractice theory despite the fact that (1) the child support enforcement statute is explicit there is no attorney/client relationship and (2) many of the plaintiffs had their own private attorneys with whom they did have attorney/client relationships and who will be third-party defendants if this litigation is allowed to move forward.

II. 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 the State and its contractor are liable to child support obligees when child support obligations cannot be enforced due to the application of statutes of limitation, even though (1) state law expressly provides that attorneys employed by the State do not have an attorney/client relationship with child support obligees; (2) there is no constitutional, statutory, or common law duty on the part of the State or its contractor to collect every child support obligation; (3) 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; (4) 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; and (5) the individualized circumstances of various obligees render inappropriate any class relief.

Governmental attorneys and contracted attorneys performing those same functions are protected from liability by various immunities, including (1) prosecutorial immunity 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.

Other courts have held that suits based upon alleged errors in the collection and/or enforcement of child support obligations are barred by doctrines of immunity.

In *Kennedy v. Georgia Dept. of Human Resources Child Support Enforcement*, 286 Ga. App. 222, 648 S.E.2d 727 (2007), where a child support obligee filed a class action against a state office of child support enforcement seeking damages due to the agency's alleged failure to collect child support, the court affirmed the dismissal of the suit on immunity grounds even though the agency obligees were required to sign contracts with the agency in which the agency promised to "provide necessary and appropriate services."

In *Joynes v. Meconi*, 2006 WL 2819762 at *7 (D. Del.), where an obligee sued a deputy attorney general in conjunction with the collection of child support obligations, the court granted the defendant's motion to dismiss and held that, "Prosecutors are afforded absolute immunity for all activities relating to judicial proceedings."

In *Jarallah v. Simmons*, 191 Fed. Appx. 918 at *3 (11th Cir. 2006), the court affirmed dismissal of a suit against a county prosecutor related to the collection of child support obligations stating that, "Jarallah's complaint alleged defendants initiated baseless charges

against him; however, initiating and pursuing a criminal prosecution falls within a prosecutor's duties and such functions are absolutely protected by prosecutorial immunity."

In *Kaplan v. LaBarbera*, 58 Cal. App. 4th 175, 180, 67 Cal. Rptr. 2d 903, 905 (1997), the court affirmed the dismissal of claims against a child support agency and its employees for actions taken in conjunction with the enforcement and collection of child support obligations, stating that, "[T]here is immunity from liability under section 1983 for prosecutors acting within the scope of their duties. . . . The immunity has been extended beyond criminal proceedings to cover other prosecutorial duties. . . . It has also been extended to cover those who assist the prosecutor in his duties."(citations omitted).

In *Avery v. Greenham*, 1999 WL 595409 at *2 (Minn. Ct. App.), the court reversed the failure to dismiss a suit by a child support obligor against a governmental entity and its employee arising from their official actions in the collection and enforcement of child support obligations, stating that, "Because the precise governmental conduct at issue-determining the amount of Avery's child support arrearages to be reported-is discretionary and therefore subject to official immunity, we hold that the trial court erred in failing to grant summary judgment in favor of appellants on Avery's negligence and IIED claims."

In *Walker v. Jefferson County*, 2003 WL 21505472 (Ohio Ct. App.), where a child support obligee brought suit against child support enforcement agencies and their employees arising from their alleged failure to collect child support, the court affirmed dismissal on immunity grounds holding that her claims were barred by common law and statutory immunities.

In *Powers v. Office of Child Support*, 173 Vt. 390, 795 A.2d 1259 (2002), a child support obligee brought suit against a child support agency and its employees asserting claims for breach of duty of effective representation, breach of contract, tortious interference with obligee's efforts

to mitigate damages, and fraud. The Vermont Supreme Court, applying the same legal principles adopted by this Court, held as follows:

Powers' claim against OCS is one of negligence, which is predicated upon OCS's breach of a statutory duty of care. Our decision in *Denis* requires that we determine whether such a duty exists. As noted above, she claims that OCS failed to adequately represent her interests in seeking enforcement of child support orders against her ex-husband. We agree with the trial court that our decision in *Noble* controls this issue, and, therefore, this case. In *Noble*, plaintiff brought an action against OCS, alleging that it had negligently failed to comply with its statutory duty to assist her and her children in enforcing a child support order. The lower court denied the State's motion for summary judgment on the basis of sovereign immunity, finding a private analog in the nature of a collection agency for the governmental function involved. On appeal we reversed, holding that OCS enforcement actions were "broadly discretionary" and served a variety of state policies and interests wholly apart from the collection of debts. We found OCS's duties to be "uniquely governmental" with no private analog in our common law and, therefore, the action against OCS was barred as a matter of law by the doctrine of sovereign immunity. *Noble*, 168 Vt. at 353, 721 A.2d at 124.

Applying the same reasoning, the same result attends here, notwithstanding the fact that this case differs from *Noble* in one respect. In *Noble*, the plaintiff was a recipient of public assistance (ANFC) who assigned her family's right to child support to DSW as a condition of receiving government benefits. . . . Because she was not receiving public assistance, she did not assign her rights to receive child support payments to OCS. Powers argues that because she was not on public assistance, her case differs from the situation presented in *Noble*. She argues that OCS functioned more as her private advocate or collection agency, with all the attendant legal obligations, rather than as a governmental body and that, therefore, the reasoning of *Noble* and the doctrine of sovereign immunity does not apply. As we did in *Noble*, here, too, we disagree.

Vermont's statutory scheme was not intended to benefit individual children and custodial parents, but was intended to benefit Vermont society as a whole. Vermont law does not create a specific duty owed by OCS to any particular groups of persons. . . . The purpose of OCS does not change depending upon whether or not the petitioner is receiving public assistance or whether the petitioner has assigned his or her rights to the agency. In neither case does the service provided by OCS flow to an individual, but instead it flows to the welfare of the state, its children, and its fisc. Because the duties of OCS are uniquely governmental with no private analog in our common law, Powers' suit is barred against the State and its agency by sovereign immunity. . . .

The existence of a duty is primarily a question of law. *Rubin v. Town of Poultney*, 168 Vt. 624, 625, 721 A.2d 504, 506 (1998) (mem.). Because we hold that Vermont law creates no specific duty owed by OCS to any particular person or

group of persons, Powers' allegations against the OCS employees named cannot satisfy the first necessary element of a cause of action in negligence. The requisite elements of the cause of action are familiar: the existence of a legally cognizable duty owed by the defendant to the plaintiff, breach of that duty, such breach being the proximate cause of plaintiff's injury, and actual damages. *Langle v. Kurkul*, 146 Vt. 513, 517, 510 A.2d 1301, 1304 (1986). Here, there is no duty owed to Powers as an individual by the employees of OCS for their work on behalf of the agency. As we noted in *Sorge v. State*, 171 Vt. 171, 762 A.2d 816 (2000), in a negligence case, the issues of immunity defenses do not become germane until it has been established that a defendant owes a plaintiff a duty of care that has been breached. *Id.* at 174, 762 A.2d at 818. Therefore, Powers could not prove an action for simple or gross negligence against the employees.

Id. at 1265-66 (citations and footnote omitted).²

In *Lerro v. New Jersey Dept. of Human Services, Div. of Family Development, Office of Child Support Services (OCSS)*, 2011 WL 903329 (N.J. Super.), the court recently affirmed the dismissal of a class action suit by a child support obligee against a child support enforcement agency based upon the agency's alleged failure to properly calculate interest on child support arrearages. As in Powers, the court determined that the child support laws protected the public as a whole and afforded no individualized causes of action:

The relevant statutes do not confer enforceable rights to individuals. The New Jersey Child Support Program Improvement Act (CSPIA), N.J.S.A. 2A:17-56.7a to -56.25, was enacted in response to the changes to the Social Security Act by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, §§ 300-95, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.A.), including changes to Title IV-D such as the child support registry. N.J.S.A. 2A:17-56.7b(a). Through the CSPIA, the legislature intended to maximize federal funding and incorporate and expand on the fundamental concepts of PRWORA. *Ibid.* In other words, CSPIA was enacted to ensure substantial compliance with the changes to Title IV-D so that the state would receive the maximum amount of federal funding under the program.

It follows that since an individualized right was not created under Social Security Act Title IV-D, an identical individualized right cannot be created under state law

² Even where plaintiffs alleged that agencies and their employees misdirected child support payments to their own use, not only did the court in *Strain v. Kaufman County Dist. Attorney's Office*, 23 F. Supp. 2d 698 (N.D. Tex. 1998), dismiss those claims on immunity grounds, it awarded attorney fees and costs to the defendants in defending those claims.

enacted to comply with the federal statute. Moreover, plaintiff does not offer any statutory or other authority to support her argument. Based on our review, we reject plaintiff's argument. . . .

We agree with the Law Division's ruling that because it is clear plaintiff does not have an individualized right to computer services through the federal and state statutes governing the State case registry, any claim by plaintiff to the contrary is unsustainable as a matter of law.

Id. at *7-8.

In *Walters v. Weiss*, 392 F.3d 306, 313 (8th Cir. 2004), the Eighth Circuit likewise affirmed the dismissal of a class action suit by custodial parents against state officials involved in the collection and enforcement of child support obligations, stating as follows:

To the extent that plaintiffs alternatively argue that § 657, read as a whole, creates an individually-enforceable federal right to strict compliance with its terms because the overall scheme is comprehensive and specific, we again disagree. Section 657 contains a series of related provisions focusing on the disbursement of child support payments to custodial parents, largely with the purpose of encouraging and helping parents who are receiving public assistance to return to work. It focuses on the relationships between different federal programs and provides guidelines for state agencies, but is not couched in mandatory terms. We therefore hold that § 657, read as a whole, does not create an individual right to distribution in strict compliance with its terms. See *Blessing*, 520 U.S. at 341, 117 S. Ct. 1353 (“[T]he provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.”). In sum, notwithstanding the issues left open by the Supreme Court in *Blessing*, plaintiffs' § 657 “strict compliance” claim in the present case fails for essentially the same reasons that the plaintiffs in *Blessing* failed to establish an individually-enforceable right to substantial compliance. Although it is possible that an individually-enforceable right may be derived from a specific provision of § 657, no such right has been “separated out” from the statutory scheme in the present case. . . .

Finally, in *Clark v. Portage County, Ohio*, 281 F.3d 602, 605-06 (6th Cir. 2002), the Sixth Circuit observed:

We conclude that the above-cited provisions do not provide the Plaintiff with an individual right to sue. Even assuming that the Plaintiff is an intended beneficiary of Title IV-D, a question we need not decide, the Plaintiff's claimed interests, like those of the plaintiffs in *Blessing*, are so vague and amorphous as to be beyond the competence of the judiciary to enforce on behalf of individuals. For example, the state plan requirements in § 654(4)(B) do not make it clear whether an individual right would arise based on the alleged inadequacy of the state plan's

wording or from a deficiency in the enforcement efforts of the agency. The lack of such parameters indicates that, regardless of whether the Plaintiff is an intended beneficiary of Title IV-D, Congress did not intend to give her a private right of action to challenge agency actions.

It is easy to see why that is the case. Under the Plaintiff's theory, the state agency would be hauled into federal court each time one of the millions of child support claimants is dissatisfied because the state has not collected child support payments. . . .³

Likewise, plaintiffs' regurgitation in this case of every general statute related to the enforcement of child support obligations provides no basis for a private cause of action. Otherwise, every general statute related to any governmental function, whether providing roads, education, or law enforcement, would likewise provide a foundation for a private cause of action. The Legislature could have created a system where BCSE pays child support every month and then attempts to collect from obligors, but it wisely recognized that some support obligations are simply not collectible and, accordingly, expressly disclaimed any attorney/client relationship.

There is simply no cause of action for "governmental malpractice" and the circuit court's denial of defendants' motion to dismiss is clearly contrary to law and, in particular, the law recently articulated in *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010), in which the Court reversed some of the same rulings by the same judge with one of the same attorneys representing plaintiffs in this case.

III. ARGUMENT

A. STANDARD OF REVIEW.

Plaintiffs agree that "Petitioners may bring this appeal under the collateral order doctrine, which allows interlocutory review in certain specific instances." Respondents' Brief at 2.

³ This immunity extends to private attorneys employed by child support enforcement agencies. See *Hand v. Mensh & MacIntosh, P.A.*, 718 So. 2d 234 (Fla. Ct. App. 1998)(law firm retained to assist in the collection of child support obligations was entitled to the same immunity as the agency).

Plaintiffs contend, however, that “this appeal is limited to the immunity defenses, as they are the only portions of the lower court’s ruling that fall within this Court’s decision in *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009).” *Id.* See also *Id.* at 5 (“[I]f this Court finds the immunity rulings are ripe for review, only the lower court’s rulings on these immunities are within the Court’s jurisdiction; the others are not subject to pendent appellate jurisdiction.”), 10 (same), and 20 (same). Plaintiffs’ contention has no merit.

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). Applying the three-factor *Cohen* test, the Court determined in *Robinson* that the collateral order doctrine applies to cases involving claims of immunity. 223 W.Va. at 832–833, 679 S.E.2d at 664–665. The Court did not hold in *Robinson* that interlocutory review is limited to immunity defenses.

Moreover, plaintiffs neglect to mention *Jarvis*, in which this Court stated, “Because the instant order denying a motion to dismiss is an interlocutory order that is predicated *in part* on qualified immunity, we find that the order is subject to immediate appeal under our holding in *Robinson*. We will review the order to dismiss under a *de novo* standard.” 227 W. Va. at 476, 711 S.E.2d at 546 (emphasis added). Accordingly, the Court in *Jarvis* addressed whether the circuit court erred by failing to hold that a plaintiff alleging retaliatory prosecution against the police must allege and prove lack of probable cause to prosecute and held that the circuit court should have dismissed plaintiffs’ retaliatory prosecution claim because they were unable to prove

the absence of probable cause in their criminal prosecutions (despite plaintiffs' contention, similar to those made in this case and adopted by the circuit court, that the issue of probable cause was a fact question that should be developed and presented to a jury). The Court also addressed whether the circuit court erred by holding that qualified immunity is not a defense to a claim for negligence and held that the circuit court should have dismissed plaintiffs' negligence claim based upon appellants' qualified immunity. Obviously, the Court's interlocutory review in *Jarvis* included, but was not limited to, immunity defenses.

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.

As argued in Petitioners' Brief, 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. In light of the cases cited by defendants that include civil proceedings, such as paternity actions, which are not criminal in nature, plaintiffs concede that "[p]rosecutorial immunity traditionally has applied to the criminal law context, but has, in many states and at the federal level, been extended to other, non-criminal, contexts." Respondents' Brief at 18. Plaintiffs attempt to distinguish this case on alleged grounds that "Petitioners did not actively do anything," but ignore their own discussion of a case included in defendants' authorities where immunity was recognized for "failure to prosecute." *Id* at 18.

Certainly, just as for judges, prosecutorial immunity does not extend to administrative tasks, such as employment decisions, but when the decision whether to prosecute a criminal, civil, or administrative proceeding vests with a government attorney, prosecutorial immunity

bars a claim arising from exercise of such discretion.⁴ Plainly, the manner in which governmental lawyers and their contractors determine when and how to institute and prosecute civil, criminal, and administrative proceedings is protected by prosecutorial immunity.

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.

Plaintiffs agree that “whether Petitioners violated a statutory duty is a question for a court of law, and not a jury.” Respondents’ Brief at 11. Plaintiffs contend, however, that the defendants did not submit materials, such as legislative history and BCSE internal policies, to the circuit court for review and that “the scope of a duty an actor owes to another . . . involves policy considerations” that present “unresolved factual issues” that have not been developed below. *Id.*

The only alleged duties identified in plaintiffs’ complaint are statutory and (1) all of those statutes expressly provide that the alleged duties are “discretionary” by their use of the term “may;” and (2) our Legislature has clearly established that *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.*⁵ Accordingly, discovery is

⁴ See *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (district attorney and chief deputy district attorney were entitled to absolute prosecutorial immunity in former prisoner’s § 1983 lawsuit alleging that their failure to institute system of information-sharing among deputy district attorneys regarding jailhouse informants, and failure to adequately train or supervise sharing of information concerning informants, supported cause of action).

⁵ W. Va. Code § 48-18-110 (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.*”); *Id.* at (c) (“An attorney employed by the bureau for child support enforcement or pursuant to a contract with the bureau for child support enforcement *may*

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. Indeed, courts from the United States Supreme Court to this Court have not only rejected plaintiffs' argument that a ruling on immunities should be deferred pending discovery, they have expressly held the one of the reasons for deciding the issues of immunities upon a motion to dismiss is the avoid placing the unnecessary burden of discovery on governmental entities, officers, and employees. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading immunity is entitled to dismissal before the commencement of discovery."); Syl. pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

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.

Like the rest of their response, plaintiffs' arguments regarding the liability of the State or its contractors for negligent acts, Respondents' Brief at 12-17, are simply contrary to West Virginia law. 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 *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995), for example, 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

not be appointed or act as a guardian ad litem or attorney ad litem for a child or another party.").

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.”

Obviously, the DNR officer in *Clark* was a State employee and there was insurance. Thus, plaintiffs’ argument that “the state may be held liable for negligence, to the extent of insurance coverage,” Respondents’ Brief at 12, has no merit. Indeed, this Court rejected this same argument made by the same counsel in *Jarvis*. All immunities exist independently of the State’s insurance policy, which preserves all statutory and common law immunity and has been deemed to waive only sovereign immunity.⁶ The plaintiffs cannot sue the State, its employees, and PSI, as agent for the State, for “negligence,” “breach of statutory duty,” “malpractice,” and “professional negligence,” because no such claims are cognizable under West Virginia law.

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.

Plaintiffs argue, and the circuit court held, that this Court’s decision in *J.H. v. Division of Rehabilitation Services*, 224 W. Va. 147, 680 S.E.2d 392 (2009), somehow supports their causes

⁶ Similarly, plaintiffs contend, and the circuit court held, that under *J.H.*, qualified immunity does not apply to a negligence action against the State and its officers and agents if “the plaintiff made no allegation ‘of any type of legislative, judicial, or administrative functions involving the determination of a fundamental governmental policy[.]’” Respondents’ Brief at 13. As already addressed in Petitioners’ Brief, *J.H.* is factually distinguishable and/or contrary to the holdings in *Clark*. Plaintiffs also argue, and the circuit court held, that “the holding of this Court in *Shaffer* demonstrates these Petitioners can be held liable for failing to preserve child support judgments.” *Id.* at 14. Again, as explained *supra*, 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* where the Legislature has expressly provided that the State has an obligation to refund wrongfully withheld child support payments. 215 W. Va. at 66, 593 S.E.2d at 637. Here, the Legislature has expressly provided to the contrary, i.e., there is no attorney/client or other relationship between obligees and BCSE attorneys.

of action 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.” Respondents’ Brief at 21. But *J.H.* involved alleged promises by a state agency regarding the security of residents of a rehabilitation facility and plaintiffs’ complaint in this case does not allege any of the four factors required to support the “special relationship” exception to the public duty doctrine under Syllabus Point 12 of *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

Likewise, as conceded by plaintiffs, the basis of their complaint is statutory, *id.* at 22, and as a matter of statutory law, when either BCSE or PSI takes action to enforce a child support order, it is acting on behalf of the State, not on behalf of the obligee. Thus, as already noted, discovery is unnecessary as it has been in the significant number of other cases dismissed at the initial pleading level under R. Civ. Proc. 12(b)(6) where claims were barred, as a matter of law, by constitutional, statutory, or common law immunities.

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.

Remarkably, plaintiffs contend that “if Ms. White and the other persons, whose similar claims already were paid off by Petitioners, had no claim as a matter of law, Petitioners would not have settled those cases.” Respondents’ Brief at 23. This is wholly irrelevant under the *Hurley* factors for determining when a State statute gives rise to a private cause of action.

The plaintiffs concede that “[t]he common thread that runs through all of these [private cause of action] cases is that the involved statutes all created some positive substantive right or duty. *Grady v. St. Albans*, 171 W. Va. 18, 22, 297 S.E.2d 424, 428 (1982).” Respondents’ Brief at 24. Here, the child support enforcement statute expressly provides that the alleged duties are

“discretionary” by their use of the term “may;” W. Va. Code § 48-18-105, and the Legislature has clearly established that *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.* W. Va. Code § 48-18-110. As in many other cases,⁷ there is simply no private cause of action under the child support enforcement statute as a matter of law, not fact, which would be inconsistent with the Legislative scheme and purpose of the relevant statutes.

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.

The plaintiffs, as did the circuit court, rely exclusively on *Richardson v. McKnight*, 521 U.S. 399 (1997), to argue that PSI is not entitled to the same immunities as the State. Respondents’ Brief at 6. In that case, employees of a private prison operating under a contract with the state, sought to invoke qualified immunity to shield them from liability against a § 1983 suit by a prisoner for alleged physical injuries. In deciding that immunity did not extend to privately employed prison officials, the Court stressed that they were performing administrative tasks with no ongoing direct state supervision and that the state had allocated the discretionary functions typically associated with prison administration to governmental officials. *Id.* at 409.

⁷ *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).

Moreover, the Court emphasized that its ruling that immunity did not apply to private persons was narrowly limited to the specific facts presented and § 1983 immunity. 521 U.S. at 413.

Less than two months ago, however, in *Filarisky v. Delia*, 132 S. Ct. 1657 (2012), the United States Supreme Court held that private parties hired by governmental entities are entitled to the same immunities as those entities.⁸ In *Filarisky*, the plaintiff sued a municipality, its fire department, and other individuals, including a private attorney hired to interview the plaintiff by the municipality. After discussing this nation's long history of the performance of governmental functions by private citizens, including President Lincoln's occasional service as an appointed prosecutor, the Court noted:

Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government actors involved in adjudicative activities, for example, were protected by an absolute immunity from suit. See *Bradley v. Fisher*, 13 Wall. 335, 347–348 (1872); J. Bishop, Commentaries on the Non-Contract Law § 781 (1889).

Id. at 1663-1664.

In addition to the traditional judicial and law enforcement functions frequently performed at common law by private citizens for which the common law recognized immunity, the Court further noted that at common law, including West Virginia common law, such immunity extended to private citizens performing other governmental functions. Id. at 1665. Although the narrow issue before the Court was whether the private attorney was entitled to qualified immunity in a Section 1983 action, it further observed:

⁸ Even though *Filarisky* eviscerates plaintiffs' reliance on *Richardson*, plaintiffs relegate it to a footnote, conceding "in *Filarisky*, where a private lawyer was hired by the city of Rialto, California, to investigate an employment issue involving a city firefighter, the United States Supreme Court held he had the right to assert qualified immunity." Respondents' Brief at 8.

We read §1983 “in harmony with general principles of tort immunities and defenses.” *Imbler*, 424 U. S., at 418. And we “proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.” *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). Under this assumption, immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.

Id. at 1665. As the Court further explained, “Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to “ensure that talented candidates [are] not deterred by the threat of damages suits from entering publicservice.” *Id.*

Finally, the Court noted the incongruity of a situation, as would be present in the instant case under plaintiffs’ arguments, whereby the susceptibility of agencies and individuals to suit performing identical functions would turn solely upon their status as public or private:

The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties. See *Richardson*, *supra*, at 411. Not only will such individuals’ performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation. This case is again a good example: If the suit against Filarsky moves forward, it is highly likely that Chief Wells, Bekker, and Peel will all be required to testify, given their roles in the dispute. Allowing suit under § 1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place.

Id. at 1666.

Clearly, whether child support collection is performed by the State or its contractors, discretionary governmental functions are being performed entitling both to immunity.

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.

Plaintiffs agree that “whether Petitioners violated a statutory duty is a question for a court of law, and not a jury.” Respondents’ Brief at 26. Again, however, Plaintiffs contend that the

defendants did not submit materials, such as legislative history and BCSE internal policies, to the circuit court for review and that “the scope of a duty an actor owes to another . . . involves policy considerations” that present “unresolved factual issues” that have not been developed below. *Id.*

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, plaintiffs 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. Plaintiffs also fail to address the fact that because of conflicts of interest between BCSE and child support recipients, 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. Because BCSE and PSI attorneys represent the State of West Virginia and not child support recipients, there is no attorney/client relationship, no common law or statutory duty, and no fiduciary or trust relationship and, thus, no cause of action.

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.

Plaintiffs contend that “before the parties have engaged in any discovery, determining whether or not punitive damages may even be warranted under the facts is premature.” Respondents’ Brief at 28. Discovery is obviously unnecessary where W. Va. Code § 55-17-1(a) specifically 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,” and W. Va. Code § 55-17-4(3) expressly provides, “Notwithstanding any other provisions of law to the contrary . . . [n]o government agency may be ordered to pay punitive damages in any action.” 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 to provide services that ordinarily would be provided by the State.

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.

Plaintiffs do not bother to defend defendants’ assignment of error on this issue, but rather argue “Respondents will be filing a motion requesting class certification when this case is remanded [and] will go into detail explaining why this case should be certified as a class action.” Respondents’ Brief at 29. The problem with this argument is that all of plaintiffs’ claims, including its class action claim, are susceptible to a motion to dismiss.⁹ The class proposed by plaintiffs in their complaint, on its face, does not satisfy the requirements for class relief, and the plaintiffs’ claims, on their face, are unsuitable for class relief where there is no statute imposing upon BCSE the affirmative obligation to seek the enforcement of all child support orders and individual class members are not similarly-situated.

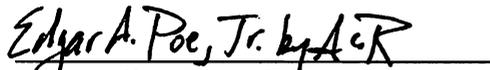
VI. CONCLUSION

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.

⁹ See, e.g., *Inter-Local Pension Fund GCC/IBT v. General Elec. Co.*, 2011 WL 4348049 (2nd Cir.) (affirming dismissal of complaint for class relief); *Alvarez v. Chevron Corp.*, 2011 WL 3850660 (9th Cir.) (affirming dismissal of complaint for class relief); *Hutchison v. Deutsche Bank Securities Inc.*, 647 F.3d 479 (2nd Cir. 2011) (affirming dismissal of complaint for class relief); *Duru v. HSBC Card Services, Inc.*, 411 Fed. Appx. 240 (11th Cir. 2011) (affirming dismissal of complaint for class relief).

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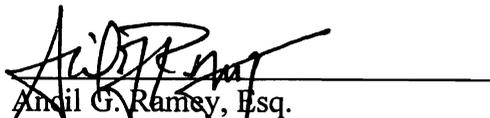
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2012, I served the foregoing REPLY BRIEF OF PETITIONERS by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed to counsel as follows:

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