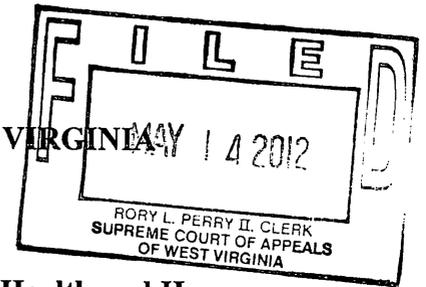


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent Cynthia Blackhurst Kerner had custody of the two children born during her marriage to Robert Blackhurst. Based upon the order issued by the Family Court of Jackson County, Respondent Kerner was entitled to receive regular child support payments from Mr. Blackhurst to care for their children. App. at 9, ¶ 39. Once Mr. Blackhurst got behind in his child support payments, actions were taken by Petitioner Bureau of Child Support Enforcement (“BCSE”) to have the arrearage converted into a judgment and collected. *Id.* at ¶¶ 40-41. However, the Family Court of Jackson County found the collection of the back child support owed was barred by the statute of limitations, pursuant to this Court’s analysis in *Shaffer v. Stanley*, 215 W.Va. 58, 593 S.E.2d 629 (2003) and *Hedrick v. Taylor*, 218 W. Va. 116, 624 S.E.2d 463 (2005). *Id.* at ¶ 42. As a result, Respondent Kerner and her two children lost the approximately \$58,000 in child support owed. *Id.* at ¶ 40.

Respondents allege that what happened to Respondent Kerner as well as the other named plaintiffs below was proximately caused by the actions and inactions of Petitioners. In an effort to recover these losses, a class action was filed in the Circuit Court of Kanawha County and the case was assigned to the Honorable Paul Zakaib, Jr.

In denying Petitioners’ motion to dismiss, the following findings of fact were made by the lower court:

1. Each Plaintiff class representative is a custodial parent of a child or children, who is owed child support from the noncustodial parent.
2. In each case, an order was entered requiring the noncustodial parent to pay a certain amount of child support each month.
3. Defendants West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, and Policy

Studies, Inc., filed a motion in each case on behalf of the children seeking to determine the amount of child support in arrears.

4. However, each of these motions were filed subsequent to the West Virginia Supreme Court's decisions in *Shaffer v. Stanley*, 215 W. Va. 58, 593 S.E.2d 629 (2003), and its progeny. In those cases, the West Virginia Supreme Court found that where a child support judgment had not been preserved, the State Defendants and PSI could not collect child support in arrears that fell outside the statute of limitations.
5. In *Shaffer*, the West Virginia Supreme Court ordered the State Defendants to repay the noncustodial parents any money withheld that was barred by the statute of limitations.
6. In each case, the child support order was not preserved, and, pursuant to *Shaffer*, significant portions of the child support payments in arrears were barred by the statute of limitations. The individual amounts lost by Plaintiffs range from approximately \$2,593.89 to \$57,728.00. *See* Compl. at 9–16. The class representatives in total allege \$157,070.42 was lost in their cases. App. at 411.

Generally, a lower court's order denying a motion to dismiss may not be appealed. However, Petitioners may bring this appeal under the collateral order doctrine, which allows interlocutory review in certain specific instances. Accordingly, 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).

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. After *Shaffer*, in at least four separate claims filed by custodial parents against Petitioners to recover child support lost because Petitioners failed to have the judgments preserved, Petitioners have recognized their obligations and have not hesitated to pay off those claims. Petitioners owe Respondents, and those similarly situated, a duty to enforce child support orders and pursue any child support in 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.

At this stage, little in this case has been factually developed. Petitioners attempt to pad the lack of record by citing to and including information regarding previous iterations of this action in 2009 and 2010, which have nothing to do with the current action. See Syllabus Point 3, *Riffle v. C. J. Hughes Construction Co.*, 226 W. Va. 581, 703 S.E.2d 552 (2010) (noting the consideration of materials outside the complaint at the motion to dismiss stage requires a further development of the record and the conversion of the 12(b) motion to a summary judgment motion). In fact, the 2009 iteration provides support for Respondents’ allegations, as Petitioner Policy Studies, Inc. (“PSI”)

prevented this case from being filed as it recognized its liability and paid the proposed plaintiff the damages she suffered as a result of PSI's negligence. Petitioners also attempt to pad the lack of a record by citing to *Manns v. McCann*, Civil Action No. 98-C-3010, a case previously decided by the circuit court below. App. at 86, 89. This Court has yet to rule on an action of this nature, and accordingly the circuit court was not bound by any precedent in issuing its order in this case. Moreover, *Manns* is distinguishable from the instant action. See App. at 311-12, 426-27. First, the circuit court's order in *Manns* was primarily based on the fact that the complaint had not been properly served. Second, it was decided before this Court's decision in *Shaffer*. Third, it involved a prior iteration of the statutes at issue in this case. Accordingly, the circuit court ruled *Manns* did not control this case and it opted to make a different decision that it had in *Manns*.

The lower court properly denied Petitioners' motion to dismiss, "based upon the applicable standard of review for a motion to dismiss and the lack of factual development at this early stage in the litigation, Defendants' motion to dismiss is denied on all grounds asserted." App. at 411.

II. SUMMARY OF ARGUMENT

Petitioners' brief is an exercise in obfuscation. Almost all the assignments of error misstate the circuit court's holding by expanding the breadth of the rulings. Contrary to Petitioners' assertions, many of the grounds they asserted in their motion to dismiss are still available to them subsequent to the development of the factual record.

Regardless of this Court's findings with respect to the governmental immunities asserted by the State Petitioners, Petitioner Policy Studies, Inc. ("PSI") is not entitled to sovereign or any other governmental immunity. It is a private corporation that has contracted with the State to fulfill a lengthy administrative task, and pursuant to United States Supreme Court precedent does not qualify

for immunity. *See Richardson v. McKnight*, 521 U.S. 399 (1997).

The circuit court’s rulings on the governmental immunity defenses, which may be asserted only by the State Petitioners, are based on the allegations asserted in the complaint and the lack of any factual development in this case. Accordingly, its ruling was not based on an issue of law and, therefore, these rulings are not ripe for review. In the alternative, if 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.

Respondents’ allegations are based on the duties statutorily assigned to Petitioners by the West Virginia Legislature. *See W. Va. Code*, Articles 18 & 19, Chapter 48. Respondents’ injuries arise from one particular assigned duty—child support enforcement. Where a custodial parent applies to the BCSE for its services and assistance with collecting child support parents, the BCSE has a non-discretionary obligation to properly execute this administrative action by utilizing the various administrative tools available to it, such as tax refund withholding. Because this duty is a rote execution of an administrative task, the State Petitioners are not entitled to absolute prosecutorial immunity. Further, under one line of cases issued by this Court, because this duty does not implicate a determination of a fundamental state policy, it is not barred by qualified immunity.¹ Respondents’ allegations are likewise not barred by the public duty doctrine. As with the immunity defenses, the lower court based its ruling on the allegations in the complaint and the lack of factual

¹For purposes of this interlocutory appeal, it is unnecessary to address or harmonize the different qualified immunity decisions issued by this Court, some which follow the federal court qualified immunity jurisprudence, most recently demonstrated in *City of St. Albans v. Botkins*, ___ W.Va. ___, 719 S.E.2d 863 (2011), and some of which do not. The issue as to when qualified immunity may be asserted by a governmental employee or entity is better left to be resolved with a fully developed record.

development. Moreover, even with the limited record, it is apparent Respondents' allegations fall within the "special relationship" exception.

In sum, the majority of Petitioners' assignments of error were properly denied by the circuit court due to the allegations in the complaint and the lack of factual development. Even where this was not the case, the statutes outlining the duties of the BCSE clearly support Respondents' allegations. Accordingly, the lower court's holding was properly decided, and Respondents respectfully urge this Court to affirm its order.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit this case does not fall under the criteria of Rule 18(a) of the Rules of Appellate Procedure. Instead, it should be set for oral argument under Rule 19 of the Rules of Appellate Procedure before it is decided. In light of the confusing areas of law implicated by the lower court's decision, Respondents respectfully submit this case is not appropriate for a memorandum decision.

IV. ARGUMENT

A. Defendant Policy Studies, Inc., A Private Corporation Which Contracted With The State, Is Not Entitled To Sovereign or any other Governmental Immunity

Petitioner PSI is not entitled to the governmental immunities asserted by the State Petitioners as it is a private entity that contracted with the State to perform a lengthy, independent administrative task.² PSI cites a string of cases in support of its argument it is entitled to the immunity defenses, most of which predate the United States Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997), a case Petitioner PSI failed to cite in its briefing to this Court, or the circuit court

²PSI is not a special prosecutor, and neither are the attorneys working at the BCSE. *See infra*, Part B.3.

below. Contrary to Petitioner PSI's assertion that "[i]t is well-settled that private parties under contract to perform governmental functions are entitled to the same immunities[,]" App. at 323, the United States Supreme Court concluded that not all private parties under contract are entitled to government immunities. *Richardson*, 521 U.S. at 408-09. The Court held:

The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity—absolute or qualified—a public officer should receive. And it *has never* held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction. Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production to waste disposal, to even mail delivery.

Id. (emphasis added).

In *Richardson*, the United States Supreme Court observed that several cases—those cited by Petitioner PSI in its briefing below and before this Court—were approaches to determining the immunities applicable to private sector defendants contrary to the approach the United States Supreme Court adopted in *Richardson*. *Id.* at 402 (citing *Williams v. O'Leary*, 55 F.3d 320 (7th Cir. 1995), *Eagon v. Elk City*, 72 F.3d 1480 (10th Cir. 1996)). In *Richardson*, the United States Supreme Court reviewed and affirmed *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996), a case Petitioners cite and heavily rely on. However, Petitioner PSI relies on this case because it misstates the holding of the Sixth Circuit case in its briefing—rather than affirming dismissal of a § 1983 case as PSI states in its brief, the Sixth Circuit affirmed the district court's decision finding the private correction officers **were not entitled to** qualified immunity. *See* Defs.' Reply ¶ 36, App. 324; Petitioners' Brief at 32; *McKnight*, 88 F.3d at 424; Court Order at App. 412-13.

In affirming the Sixth Circuit, United States Supreme Court rejected the notion that the private prison guards were entitled to qualified immunity, noting in the “context . . . in which a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms” immunity does not apply. *Richardson*, 521 U.S. at 413. PSI is a private, for-profit firm that won a contract with the State to, *inter alia*, assume the lengthy administrative task of “enforcing the child support rights of the children support judgments in [Kanawha and Clay] counties.” Compl. ¶ 13, App. at 4. In addition, as PSI has stated, Respondents were free to select alternative counsel if they chose. Clearly, PSI is in competition with other law firms. Moreover, as PSI has pointed out numerous times, its statutory tasks “are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms,” in this case, private law firms. *Richardson*, 521 U.S. at 412. For these reasons, it is not entitled to governmental immunities.³

Moreover, as this Court has stated, “[t]he policy which underlies sovereign immunity is to prevent the diversion of State monies from legislatively appropriated purposes.” *Shaffer v. Stanley*, 215 W. Va. 58, 68, 593 S.E.2d 629, 639 (2003) (quoting *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987)). In no way does the cause of action against Petitioner PSI threaten

³In *Filarsky v. Delia*, 566 U.S. ____ (2012), the United States Supreme Court reaffirmed this holding in *Richardson*. However, under the specific facts presented in *Filarsky*, 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. This holding was supported by the United States Supreme Court’s analysis of the common law and many historic examples where private lawyers were hired by public entities to perform various governmental tasks. The decision left open the question as to whether, under the facts, this private lawyer was immune.

the coffers of the State. Thus, Petitioner PSI should be treated the same as any other private corporation sued in any litigation. Last, Defendant PSI attempts to analogize its role to that of a guardian ad litem, which is entitled to judicial immunity. As the circuit court observed in its order: “A guardian ad litem is *court appointed*, and performs a role critical to the adjudication of cases relating to the best interests of a child. In contrast, Defendant PSI won a contract with the State to perform functions that could be performed by the BCSE, a State entity, or *private attorneys*.” App. at 413.

Petitioner PSI is not entitled to any governmental immunities, whether it be the sovereign immunity, the prosecutorial immunity, or the qualified immunity defense asserted by the State Petitioners, pursuant to the United States Supreme Court’s decision in *Richardson*. Accordingly, Respondents respectfully submit that Petitioners’ sixth assignment of error should be rejected, and the lower court’s ruling Petitioner PSI is not entitled to governmental immunities should be upheld.

B. The Only Issue on Appeal Are Governmental Immunity Defenses, And These Are Subject to Limited Review

In *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009), this Court held an otherwise unappealable interlocutory denial of a motion to dismiss is immediately appealable when predicated upon immunity defenses. “An interlocutory order would be subject to appeal under [the collateral order] 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.” *Robinson*, 223 W. Va. at 832, 679 S.E.2d at 644 (citations omitted). First, the lower court concluded that a dismissal of this action on the basis of qualified immunity was inappropriate based upon the allegations in the complaint and due to “the lack of factual

development at this early stage in the litigation.”⁴ Order, App. at 411. The United States Supreme Court held “a district court’s denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable ‘final decision’[.]” *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The circuit court’s conclusion regarding Petitioners’ “right not to *stand trial*” does not extinguish their right to re-assert the governmental immunity defenses at the summary judgment stage. *Id.* at 527. Accordingly, the lower court’s order does not “conclusively determine[] the disputed controversy[.]” *Robinson*, 223 W. Va. at 832, 679 S.E.2d at 644 (citations omitted). In fact, this Court held “there is a dispute as to the foundational or historical facts that underlie the immunity determination” an immunity issue is not ripe for summary disposition. Syllabus Point 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

If this Court disagrees, and finds the lower court’s ruling on the governmental immunity defenses to be ripe for review, only those findings are currently subject to the jurisdiction of this Court.⁵ *See, e.g., Johnson v. Jones*, 515 U.S. 304, 318 (1995) (noting that many courts find the exercise of “pendent appellate jurisdiction” is appropriate only in “exceptional circumstances” and for “compelling reasons” (citations omitted)); *Swint v. Chambers County Commission*, 514 U.S. 35, 41 (1995) (concluding a lower court’s ruling on non-qualified immunity grounds was improperly reviewed by the appellate court). Petitioners’ fourth, fifth, seventh, eighth, and ninth assignments

⁴Petitioners incorrectly characterize the lower court’s ruling as concluding “qualified immunity may not be raised at the pleading stage.” Petitioners’ Brief at 16. The lower court did not make such a sweeping, overly broad finding. Instead, the lower court held in *this* case, whether Petitioners are entitled to qualified immunity (and other grounds for dismissal) requires further factual development. Order, App. at 415.

⁵In an abundance of caution, Respondents will present their arguments against Petitioners’ other assignments of errors. Respondents still respectfully assert these other grounds are not ripe for review by this Court at this stage in the litigation.

are therefore improperly raised in the current petition to this Court.

1. Lower court was correct in denying qualified immunity

There are legitimate factual questions regarding the role played by Petitioners in enforcing child support and how Petitioners participate in the enforcement and preservation of child support judgments under the present statutory scheme. As Petitioners point out, the basis of Respondents' complaint is statutory. And Respondents agree the ultimate conclusion whether Petitioners violated a statutory duty is a question for a court of law, and not a jury. Syllabus Point 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). However, questions of law are often answered by looking at a more developed record. Here, materials such as legislative history, guidance documents developed by the BCSE for its employees, or internal rules employed by the BCSE could elucidate these issues. For example, under *W. Va. Code* § 48-18-105, entitled "General duties and powers of the Bureau for Child Support Enforcement" the BCSE is tasked with "establish[ing] policies and procedures for obtaining and enforcing support orders and establishing paternity according to this chapter." Petitioners have not submitted any such materials to the lower court for its review. In fact, in the case Petitioners cite to assert no further factual development is required to make a determination regarding duty, this Court noted "the scope of a duty an actor owes to another . . . also involves policy considerations underlying the core issue of the scope of the legal system's protection. Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Aikens*, 208 W. Va. at 497, 541 S.E.2d at 581 (citations and quotations omitted). None of this has been developed below. Fundamentally, in light of these unresolved factual issues, Petitioners' claims to qualified immunity should be denied due to the lack of a sufficient factual record.

Furthermore, as with sovereign immunity, Petitioner PSI is ineligible for qualified immunity. Each of these doctrines protects those individuals and entities that are public in nature. *See, e.g.*, Syllabus Points 8 & 9, *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996) (stating that public officials are entitled to qualified immunity). PSI is not a government entity, and its employees are not public officials. Its contract with the State does not transform the private company into a public entity that is entitled to qualified immunity. Thus, regardless of any factual questions with respect to qualified immunity as applied to the State Petitioners, PSI is ineligible for qualified immunity and Respondents' claims against it are not barred.

For the foregoing reasons, Respondents respectfully submit that Petitioners' second assignment of error should be rejected, and the lower court's ruling denying qualified immunity based upon the allegations in the complaint should be affirmed.

2. Respondents' negligence claim is not barred by qualified immunity

Petitioners next assert they cannot be held liable under any negligence theory. By no means do the various cases cited by Petitioners suggest that State defendants **can never** be held liable for negligence.⁶

This Court need look no further than *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983), as authority for the proposition that the state may be held liable for negligence, to the extent of the applicable insurance coverage. Negligence actions against State defendants or political subdivisions are litigated all the time. For example, in

⁶Again, Petitioners misstate the lower court's ruling. Rather than holding qualified immunity does not apply to actions alleging negligent failure on the part of the State to enforce the law, the lower court held that in certain cases, negligence claims are not barred.

Robertson v. Elliott, 2009 U.S. Dist. LEXIS 60934 (S.D. W. Va. 2009), although the individual police officers were dismissed based upon their assertion of qualified immunity, the remaining claim for negligence was permitted to proceed. Contrary to Petitioners' assertion that "no such negligence claims are cognizable under West Virginia law[.]" Petitioners' Brief at 18, this Court has, in fact, concluded that in certain instances a negligence claim against a State defendant can proceed. *See, e.g., J.H. v. W. Va. Division of Rehabilitation Services*, 224 W. Va. 147, 680 S.E.2d 392 (2009). In that case, finding that the plaintiff made no allegations "of any type of legislative, judicial, or administrative functions involving the determination of a fundamental governmental policy," this Court held that qualified immunity did not apply. *Id.*, 224 W. Va. at 157, 680 S.E.2d at 403; *see also* Syllabus Point 6, *Parkulo*, 199 W. Va. 161, 483 S.E.2d 507 (noting qualified immunity applies where the state actor is involved in "function[s] involving the determination of fundamental governmental policy."). Here, Petitioners' failure to timely pursue child support payments in arrearage does not fall within one of the categories outlined in *J.H.* *See infra*, Part B.3; *see also Shaffer*, 215 W. Va. at 65, 598 S.E.2d at 636.

Petitioners also spend time arguing this Court's holding in *J.H.* contradicts Syllabus Point 4 of *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). *See* Petitioner's Brief at 22-23. This is untrue. First, *J.H.* was decided *after* this Court issued *Clark*. Thus, this Court's holding in *J.H.* was written in the post-*Clark* world, and was found to comport with the Court's interpretation of the qualified immunity doctrine. Second, the various syllabus points Petitioners cite underline how *J.H.* comports with *Clark*. Syllabus Point 4, as Petitioners point out, covers public officers "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," while Syllabus Point 6 covers those state actors making

“discretionary judgments, decisions, and actions.” Both these syllabus points were included as syllabus points in *J.H. Syllabus Points 7 & 8, J.H.*, 224 W. Va. 147, 680 S.E.2d 392. Even more specifically, the holding of this Court in *Shaffer* demonstrates these Petitioners can be held liable for failing to preserve child support judgments.

Moreover, the efficient execution of the obligations and duties of the BCSE and PSI are important to the well-being of Respondents’ families. This Court recognized this in its decision in *Hairston v. Lipscomb*, 178 W. Va. 343, 359 S.E.2d 571 (1987), where the Court noted in the context of late payments of child support that “without court relief the problems of near starvation and financial desperation that [the plaintiff single mother] has encountered are likely to recur.” *Id.*, 178 W. Va. at 346, 359 S.E.2d at 573. In ordering the Child Advocate Office (the precursor to the BCSE) to make timely payments, the Court observed: “The receipt of moneys due obligees are not moneys due the State of West Virginia. The Child Advocate Office acts in a fiduciary capacity as a collector and distributor of money due to spouses, former spouses and children.” *Id.*, 178 W. Va. at 348, 359 S.E.2d at 576.

Petitioners focus on the language of *W. Va. Code* § 48-14-201 as support for their contention that the BCSE bears no responsibility or duty to Respondents. However, the duties and obligations of the BCSE—a phrase utilized several times throughout this Article—are outlined in Articles 18 and 19 of Chapter 48, “Bureau for Child Support Enforcement” and “Child Support Enforcement Attorney”, respectively.

The BCSE “is designated as the single and separate organizational unit within this State to administer the state plan for child and spousal support according to 42 U.S.C. § 654(3).” *W. Va. Code* § 48-18-101(a). The commissioner of the BCSE “shall employ a sufficient number of

employees . . . to provide for the effective and efficient operation of the [BCSE].” *W. Va. Code* § 48-18-103(b); *see also* Complaint ¶ 12, App. at 3. Further, the secretary has the authority transfer employees and resources to the BCSE “as may be necessary to fulfill the *duties and responsibilities* of the” BCSE. *W. Va. Code* § 48-18-103(c) (emphasis added). In *W. Va. Code* § 48-18-105, a provision entitled “General *duties and powers* of the Bureau for Child Support Enforcement”, the BCSE is granted power and authority to enable the BCSE to “carry[] out the policies and procedures for enforcing the provisions of this chapter.” (Emphasis added).

Moreover, for those custodial parents who have applied for and received services from the BCSE, “[a]ll support payments owed to [such] an obligee . . . *shall be paid to the [BCSE].*” *W. Va. Code* § 48-18-115. Thus, for these individuals, there is no other avenue but the BCSE for servicing of their child support orders. For those custodial parents not applicants to or users of the BCSE services already, they “may request that the support payments be made to the [BCSE].” *Id.* In these cases, the BCSE undertakes the same responsibilities as it does for those persons already receiving its services. In fact, it acts in a “fiduciary capacity” to these custodial parents. *Hairston*, 178 W. Va. at 348, 359 S.E.2d at 576. This is reflected in the section entitled “General provisions related to requests for assistance, recalculation of support amounts, preparation of petition and proposed orders.” Where a request for assistance is made to the BCSE, “[t]he *duties and actions directed or authorized* . . . shall be exercised by the employees and agents of the [BCSE] under the supervision and direction of [BCSE] attorneys” *W. Va. Code* § 48-18-201(c) (emphasis added); *see also* *W. Va. Code* § 48-18-201(d) (“In performing its duties under this section”). Attorneys for the BCSE are given duties under *W. Va. Code* § 48-19-103. Sub-section (f) states:

The [BCSE] attorney *shall pursue* the enforcement of support orders

through the withholding from income of amounts payable as support:
(1) *Without the necessity* of an application from the obligee in the case of a support obligation owed to an obligee to whom services are already being provided under the provisions of this chapter; and (2) On the basis of an application for services in the case of any other support obligation arising from a support order entered by a court of competent jurisdiction.

W. Va. Code § 48-19-103(f) (emphasis added). Where a relationship is created between the BCSE and an obligee, custodial parent, the BCSE and its attorneys have a duty and an obligation to properly pursue the enforcement of child support orders, an action which the BCSE has utterly failed to execute in a professional manner in the case of Respondents. Moreover, whether or not a custodial parent is represented by private counsel is irrelevant, for if an individual applies to the BCSE for aid in enforcing the order, the BCSE is compelled to fulfill its statutory duties to that individual.

Respondents note that much of their statutory analysis of the duties and obligations of the BCSE is similar to that of Petitioners as both agree the BCSE has an obligation and a duty to those custodial parents/obligees it has entered into an agreement to provide services. *See* Petitioners' Brief at 20, 21. However, Petitioners improperly extrapolate from this, reaching a ludicrous conclusion that because the BCSE does not owe an obligation to every single parent in the State of West Virginia, Respondents allegations fail. They do not. The BCSE has a duty, obligation, and "fiduciary" responsibility to each Respondent. Petitioners also spend a significant time discussing the BCSE's "administrative discretion". *Id.* at 20-22. This discretion is exercised *prior to* the formation of the BCSE's duty and fiduciary obligation to a custodial parent. Once that duty is formed, there is no discretion. Instead, the BCSE is told, by statute, that it "shall pursue" the enforcement of the child support orders. *W. Va. Code* § 48-19-103(f).

This is not an instance where a discretionary duty is being performed by a state actor. No judgment is exercised, and no discretionary decision is made regarding enforcing a child support order the BCSE has agreed to service. This is a rote performance of ensuring child support orders are not barred by statute of limitations. The choices for the BCSE are comply with your statutory obligations and enforce the child support order, or violate your statutory obligation and allow a child support order to lapse. Thus, this obligation falls under this Court's decision in *J.H.* There simply is no general prohibition against pursuing a negligence claim against State defendants. Moreover, as discussed *supra* a developed factual record is necessary to determine the scope of the duty owed by the State Petitioners, and the exact nature of the functions Petitioners failed to perform.

For the foregoing reasons, Respondents respectfully request this Court deny Petitioners' third assignment of error, and affirm the lower court's holding that in this case, at this stage of the litigation, qualified immunity does not bar Respondents' negligence claim.

3. Prosecutorial immunity is not available to petitioners

Petitioners contend the claims asserted against them are barred by prosecutorial immunity, citing a slue of cases and secondary authorities. Yet, despite this numerosity, not one of these authorities supports Petitioners' contention that prosecutorial immunity prevents this suit from moving forward.

Again, Petitioners misstate the lower court's ruling. Rather than ruling prosecutorial immunity applies only to criminal prosecutions, the lower court held that Petitioners' actions were "akin to an administrative error." App. at 415. The circuit court also recognized this Court's precedent in *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010), that "[p]rosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as,

initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process.” App. at 414 (quoting *Jarvis v. W. Va. State Police*, 227 W. Va. 472, 478 n.5, 711 S.E.2d 542, 549 n.5 (2010) (quoting *Mooney v. Frazier*, 225 W. Va. 378, 370 n.12, 693 S.E.2d 333, 345 n.12 (2010))). Prosecutorial 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. Even if prosecutorial immunity were extended into the civil action context in West Virginia, this doctrine would nevertheless be inapplicable in this case.

Petitioners cite cases from Maryland, Iowa, Michigan, and other states. Petitioners’ Brief at 12, n.8. In each of those cases, the prosecutors asserting absolute prosecutorial immunity as a defense were, in fact, prosecuting and making decisions in the prosecutorial context. For example, in *Gill v. Ripley*, 352 Md. 754, 724 A.2d 88 (1999), a prosecutor and his staff were sued for agreeing to dismiss a paternity suit, with prejudice, while in *Hanson v. Flores*, 486 N.W.2d 294 (Iowa 1992), the defendant county attorney was sued for her decision to allow a putative father to challenge paternity after he had previously stipulated to paternity. As argued below and agreed to by the court, in each of these cases, the attorney in question was *actively* pursuing the case but, for varying reasons, *actively* abandoned the pursuit of the claims. App. at 289, 414. In *Origel v. Washtenaw County*, 549 F. Supp. 792, 795 (E.D. Mich. 1982), a prosecutor was sued for failing to prosecute a paternity suit. Because the paternity suit fell within the prosecutor’s official duties, the prosecutor was entitled to absolute prosecutorial immunity. The court nevertheless recognized where a prosecutor was acting within his or her administrative or investigative actions, absolute prosecutorial immunity would not apply. Unlike *Origel*, this action is not about a paternity suit, but is instead about the lack of enforcement of an *already* existing judgment order—an administrative action by

the BCSE attorneys. This action falls outside absolute prosecutorial immunity.

In contrast, here, the agents employed by Petitioners did not actively do anything—until it was too late. This was not the result of an exercise of prosecutorial discretion—*e.g.*, a decision to *actively* abandon a claim through a stipulation—as was the case with the attorneys in *Gill* and *Hanson*. In fact, the judgment orders were later pursued for collection after they were barred by the statute of limitations. Even more striking, as will be developed in discovery, Petitioners have opted to settle at least four similar claims of other custodial parents whose claims for child support in arrears were barred as a result of a lack of action by Petitioners.

As the circuit court agreed, “[t]his behavior is more akin to an administrative error or, at best, a failure to enforce and execute the judgment orders.” App. at 289, 415; *see, e.g., Gill*, 352 Md. at 769–70, 724 A.2d at 96 (recognizing that absolute prosecutorial immunity applies only when the prosecutor’s actions fall within the judicial process—*i.e.* determining whether to commence prosecution, presenting evidence, filing charges, preparing and presenting a case; in all other instances, only qualified immunity applies). In fact, this Court, in *Shaffer*, recognized the BCSE’s administrative tools used to collect payments in arrearage, such as a tax offset, were “a purely administrative action initiated and carried out by executive agencies” and did “not involve a process of the court.” 215 W. Va. at 65, 598 S.E.2d at 636. Prosecutorial immunity is tied to the court process. *Jarvis*, 227 W. Va. at 478 n. 5, 711 S.E.2d at 548 n. 5. The BCSE was “not involve[d] [in] a process of the court[,]” but failed to execute its statutory duty to utilize the administrative tools at their disposal to enforce the child support orders. Accordingly, Petitioners are not entitled to absolute prosecutorial immunity.

Further, absolute prosecutorial immunity does not apply to private individuals. This doctrine

exists to protect public prosecutors, only. It therefore does not apply to Defendant PSI. *See Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120, 102 S. Ct. 2933, 73 L. Ed. 2d 1332 (1982). Thus, for the foregoing reasons absolute prosecutorial immunity is inapplicable to this action.⁷

For the foregoing reasons, Respondents respectfully request the Court reject Petitioners' first assignment of error, and affirm the circuit court's ruling that Petitioners are not entitled to absolute prosecutorial immunity.

C. The Circuit Court's Rulings With Respect To the Remaining Grounds Were Correct

Respondents reiterate their argument from above. Only the lower court's findings with respect to the governmental immunities are currently subject to the jurisdiction of this Court. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 318 (1995) (noting that many courts find the exercise of "pendent appellate jurisdiction" is appropriate only in "exceptional circumstances" and for "compelling reasons" (citations omitted)); *Swint v. Chambers County Commission*, 514 U.S. 35, 41 (1995) (concluding a lower court's ruling on non-qualified immunity grounds was improperly reviewed by the appellate court). Petitioners' fourth, fifth, seventh, eighth, and ninth assignments are therefore improperly raised in the current petition to this Court. However, in an abundance of caution, Respondents present their arguments against Petitioners' other assignments of error. Respondents still respectfully assert these other grounds are not ripe for review by this Court at this stage in the litigation.

⁷Petitioners also focus on the right of Respondents in this action to utilize non-BCSE counsel to pursue child support payments. Prosecutorial immunity is tied to the job function a prosecutor was executing at the time. Whether the prosecutor's representation was the exclusive avenue of representation for the injured party has no bearing on the applicability of absolute prosecutorial immunity.

1. The public duty doctrine is not applicable at this stage of this litigation

This Court has made it clear that questions regarding the duties owed by a defendant to a plaintiff raise factual issues best left to be resolved by the trier of fact. For example, in *J.H.*, the trial court granted the defendant's motion to dismiss based upon the public duty doctrine. In reversing this decision, this Court reiterated in Syllabus Point 12 of *J.H.*, the factual nature of the public duty doctrine and the special relationship exception:

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

(Emphasis added).

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

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

Here, Petitioners have not submitted any information regarding the internal policies the BCSE has developed pursuant to its statutory authority, or any other documents that elucidate the manner in which it executes its statutory obligation to custodial parents seeking the services of the BCSE to enforce child support orders.

Even with the limited development of facts at this stage of this litigation, the evidence supports the conclusion the BCSE does have a “special relationship” with Respondents, and have

breached its duty to Respondents. In Syllabus Point 12 of *Parkulo*, 199 W. Va. 161, 483 S.E.2d 507, this Court outlined what constitutes a special relationship:

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.

Here, the Legislature assigned the BCSE the statutory duty to enforce child support orders pursuant to Articles 18 and 19 of Chapter 48 of the West Virginia Code. Thus, the BCSE assumed an affirmative duty to act on behalf of those custodial parents that successfully requested the BCSE’s services. The BCSE clearly had notice that a failure to properly collect child support would harm obligees based on the very purpose the BCSE was created by the Legislature, and based on cases such as *Hairston, supra*, and *Shaffer, supra*. Further, for the BCSE to assume the statutory duty to enforce a child support order, the BCSE must already have been applied to for services by the custodial parents, necessitating direct contact between the BCSE and the custodial parent.⁸ Last, the BCSE, by statute, provides services to custodial parents who are owed child support. An obligee has the right to elicit these services by applying to the BCSE, and where those services are granted, the BCSE has the statutory obligation to fulfill those services. Contrary to Petitioners’ assertion,

⁸Petitioners cite the case of Ms. Hoover. First, Ms. Hoover is not a member of this case, and therefore the court order in her case is inapposite. Second, as discussed below before the circuit court and in this brief, whether an individual custodial parent has representation by a private attorney has no bearing on the duty owed by the BCSE. Respondents’ claims are based on the BCSE’s failure to collect child support and enforce a child support order. A custodial parent can utilize the services of the BCSE to collect child support, while maintaining private representation.

Respondents allege this in their complaint. The Complaint alleges a violation of a statutory duty the Petitioners owed to Respondents. As outlined above, *supra* Part B.2, the statutory duties of the BCSE and its attorneys are outlined in Articles 18 and 19 of Chapter 48. Therefore, these are incorporated into the Complaint. *See, e.g.*, Complaint ¶¶ 12, 15-19, App. at 3, 5 (using language contained in Articles 18 and 19 of Chapter 48).

For the foregoing reasons, Respondents respectfully urges this Court to deny Petitioners' fourth assignment of error, and affirm the lower court's ruling on the public duty doctrine.

2. *Whether there is a private cause of action requires further fact development*

Petitioners next argue there is no private cause of action available to Respondents under the applicable child support enforcement statutes. This assertion is belied by Petitioners' own actions in settling directly with Lisa White, who was the original plaintiff in the first iteration of this action, as well as several other similar cases raising similar claims previously settled by Petitioners. Once the parties are permitted to engage in discovery, these other cases will be made a part of this record.⁹ Presumably 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.

As a practical matter, this argument is similar to the various duties arguments raised above and similarly, the resolution of the question regarding the viability of the claims asserted by Respondents can be resolved only after the facts are developed and the circuit court has a fuller

⁹Because this interlocutory appeal is before the Court based upon the lower court's denial of Petitioners' motion to dismiss, the parties necessarily are restricted to the allegations made in the complaint. *See* Syllabus Point 3, *Riffle v. C. J. Hughes Construction Co.*, 226 W. Va. 581, 703 S.E.2d 552 (2010) (noting the consideration of materials outside the complaint at the motion to dismiss stage requires a further development of the record and the conversion of the 12(b) motion to a summary judgment motion).

understanding of the role played by Petitioners in enforcing child support orders. In Syllabus Point 1 of *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980) this Court stated:

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

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

As this Court has noted, “[t]he common thread that runs through all of these [private cause of action] cases is that the involved statutes all created some positive substantive right or duty.” *Grady v. St. Albans*, 171 W. Va. 18, 22, 297 S.E.2d 424, 428 (1982). Under Articles 18 and 19 of Chapter 48, the BCSE and its attorneys are charged with the duty to provide services to custodial parents who have applied. Among those services is the enforcement of child support orders and collection of child support in arrearage. *See supra*, Part B.2. Petitioners attempt to make distinctions by focusing on the BCSE’s statutory characteristics, obligations, and duties. However, these are red herrings, as they have little to no bearing on the issue of whether there is a private cause of action. For instance, the fact that BCSE receives a fee for its services does not negate the entity’s responsibility to supply these services in a non-negligent manner.

Further, many of the cases cited by Petitioners are inapposite as they were reached in different statutory contexts. In *Arbaugh v. Board of Education*, 214 W. Va. 677, 591 S.E.2d 235

(2003), a key factor in this Court's decision was the existence of criminal penalties for those individuals who failed to report suspected child abuse. Similar contexts existed with respect to the statutes examined in *Hill v. Stowers*, 224 W. Va. 51, 680 S.E.2d 66 (2009) (noting that the existence of criminal penalties and a statutorily created election dispute mechanism belied legislative intent to create an implied private cause of action); *Yourtee v. Hubbard*, 196 W. Va. 683, 474 S.E.2d 613 (1996) (concluding the plaintiff was outside the intended beneficiaries of the statute due to his own illegal behavior); *Adams v. Nissan Motor Corp.*, 182 W. Va. 234, 387 S.E.2d 288 (1989) (similar reasoning as in *Hill*); and *Machinery Hauling, Inc. v. Steel of West Virginia*, 181 W. Va. 694, 384 S.E.2d 139 (1989) (reasoning based on the nature of the statute, different in character from the one at issue here). Each of these circumstances is distinguishable from the statutes relevant to the instant case. Here, Respondents have no alternative remedy for the damages suffered as a result of Petitioners' negligence.

For the foregoing reasons, Respondents respectfully request this Court deny Petitioners' fifth assignment of error, and affirm the lower court's ruling regarding the private cause of action.

3. *The Circuit Court's ruling regarding the existence of any duty is correct*

Petitioners make a catch-all assignment of error, alleging the circuit court's ruling the existence of any duty is a question of fact, rather than a question of law. First, as they have throughout their brief, Petitioners misstate the lower court's rulings. The circuit court did not find that in all cases the various grounds Petitioners' asserted in its motion to dismiss require factual development, nor did it rule that it is for jury deliberation. Instead, the circuit court desired further factual development before making a ruling on these grounds. Accordingly, Petitioners may raise these grounds at the summary judgment stage. Second, this assignment of error is repetitious of the

various arguments already asserted by Petitioners, and there was no specific regarding the existence of any duty—the closest to this is the circuit court’s ruling on the public duty doctrine. In order to respond to this assignment of error, Respondents must necessarily repeat much of the argument already made in this brief.

First, the BCSE does not have a discretionary decision to make when faced with its statutory duty to pursue the collection and enforcement of child support orders. As Respondents stated above: The BCSE has a duty, obligation, and “fiduciary” responsibility to each Respondent. Any discretion BCSE has is exercised *prior to* the formation of the BCSE’s duty and fiduciary obligation to a custodial parent. Once that duty is formed, there is no discretion. Instead, the BCSE is told, by statute, that it “shall pursue” the enforcement of the child support orders. *W. Va. Code* § 48-19-103(f). This is not an instance where a discretionary duty is being performed by a state actor. No judgment is exercised, and no discretionary decision is made regarding enforcing a child support order the BCSE has agreed to service. This is a rote performance of ensuring child support orders are not barred by statute of limitations. The choices before the BCSE are comply with its statutory obligations and enforce the child support order, or violate its statutory obligation and allow a child support order to lapse.

Second (again, as already argued above), Respondents agree the ultimate conclusion whether Petitioners violated a statutory duty is a question for a court of law, and not a jury. Syllabus Point 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). However, questions of law are often answered by looking at a more developed record. Here, materials such as legislative history, guidance documents developed by the BCSE for its employees, or internal rules employed by the BCSE could elucidate these issues. For example, under *W. Va. Code* § 48-18-105, entitled “General

duties and powers of the Bureau for Child Support Enforcement” the BCSE is tasked with “establish[ing] polices and procedures for obtaining and enforcing support orders and establishing paternity according to this chapter.” Petitioners have not submitted any such materials to the lower court for its review. In fact, in the case Petitioners cite to assert no further factual development is required to make a determination regarding duty, this Court noted “the scope of a duty an actor owes to another . . . also involves policy considerations underlying the core issue of the scope of the legal system’s protection. Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.” *Aikens*, 208 W. Va. at 497, 541 S.E.2d at 581 (citations and quotations omitted).

Third, in asserting Petitioners owe a duty to Respondents, Respondents do not base this allegation on an attorney/client relationship between the Petitioners and the custodial parents seeking enforcement of child support orders. Instead, Respondents base this allegation on the statutory obligations and duties assigned to the BCSE, which Petitioners are obliged to fulfill on behalf of parents seeking child support when those parents have requested BCSE’s services. Therefore, much of Petitioners’ argument on this assignment of error has no basis. Moreover, this Court has already recognized the BCSE has a fiduciary obligation to the child support obligees as the BCSE, and Petitioners, are responsible for obtaining and distributing the child support owed. *Hairston, supra*. This obligation comports with this Court’s definition of 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[.]” *Lucas v. Fairbanks Capital Corp.*, 217 W. Va. 479, 484, 618 S.E.2d 488, 493 (2005). In fact, much of Petitioners’ argument is invalid, as it conflates the statutory duties with an attorney/client relationship. As Petitioners point out over and over, the

BCSE attorneys are prohibited from serving as an attorney for child support obligees. *W. Va. Code* § 48-18-110(b). This does not relieve the BCSE attorneys of their duties and obligations to Respondents. Accordingly, Respondents respectfully urge this Court to deny Petitioners seventh assignment of error.

4. Punitive damages may be available in this action

West Virginia Code § 55-17-4(3) has never been interpreted by this Court. It was addressed in *Lavender v. West Virginia Regional Jail & Correctional Facility Authority*, 2008 U.S. Dist. LEXIS 8162, *30 (S.D. W. Va. 2008), where the court concluded that as the state employees were “being sued in their individual capacities and not their official capacities . . . punitive damages [were] not prohibited under these sections.” At this time, before the parties have engaged in any discovery, determining whether or not punitive damages may even be warranted under the facts is premature. In the event the evidence demonstrates that Petitioners’ actions meet the standards for an award of punitive damages, consistent with *Pittsburgh Elevator*, such damages may be awarded against a State defendant to the extent of insurance coverage. Thus, to resolve this issue, the parties would need to examine the applicable insurance policy and determine whether the policy has a specific exclusion precluding a punitive damages awards. Petitioners have not presented the circuit court with any language in the insurance policy excluding punitive damages. Accordingly, the circuit court was correct to reject this ground at this time.

As for Defendant PSI, there is no statutory prohibition against awarding punitive damages against a private corporation. Therefore, Defendant PSI’s potential liability for punitive damages is neither governed by *W. Va. Code* § 55-17-4(3), nor limited to the extent of any insurance coverage.

For the foregoing reasons, Respondents respectfully request this Court to deny Petitioners’

eighth assignment of error, and affirm the lower court's ruling regarding punitive damages.

5. *Class certification is not ripe for review*

Petitioners generally assert this case is not appropriate for class action certification. Respondents will be filing a motion requesting class certification when this case is remanded to the circuit court. In this motion, Respondents will go into detail explaining why this case should be certified as a class action. Respondents argued for purposes of addressing this issue, the circuit court should wait for the parties to fully brief in detail the class action issues before deciding the merits of this claim. The circuit court agreed, as was its right.

Accordingly, Respondents respectfully urge this Court to deny Petitioners' ninth assignment of error, and affirm the lower court's ruling postponing a class certification decision until after the issue is fully briefed.

V. CONCLUSION

Respondents respectfully request that this Court find that it has no jurisdiction over Petitioners' assignments of error as the immunity decisions were not based on issues of law. In the alternative, Respondents respectfully request this Court find its jurisdiction is limited to the assignments of error related to the governmental immunity defenses. Respondents also respectfully request this Court affirm the Circuit Court of Kanawha County's rulings, and remand for further proceedings. In the alternative, because the Circuit Court denied the motion to dismiss on the basis of an insufficient factual record, Respondents respectfully request this Court remand with directions for additional briefing by the parties and development of a new set of findings and conclusions.

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*,

–By Counsel–



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Defendants Below, Petitioners,

v.

No. 11-1783

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.

Certificate of Service

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **RESPONDENTS' BRIEF IN OPPOSITION** was served on counsel of record by email and mail, on the 14th day of May, 2012, to the following:

Edgar Allen Poe, Jr.
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