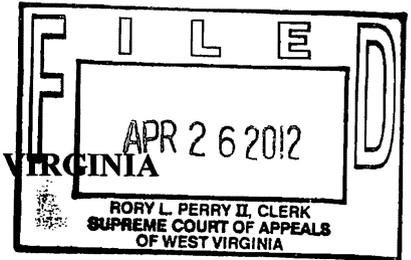


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES;
THE WEST VIRGINIA OFFICE OF
BEHAVIORAL HEALTH SERVICES; THE
WEST VIRGINIA BUREAU FOR MEDICAL SERVICES; and THE
WEST VIRGINIA OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,
Defendants below, Petitioners,**

vs.

S.Ct. Docket No. 11-1616 1701

**GREGORY PAYNE, individually
and as Executor of the Estate of
CRAIG ALLEN PAYNE, and
BETTY JO PAYNE, individually,
Plaintiffs below, Respondents.**

RESPONDENT'S BRIEF

William C. Forbes, Esquire (WVS B ID#1238)
W. Jesse Forbes, Esquire (WVSB ID#9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wcforges@forbeslawwv.com
E-mail: wjforbes@forbeslawwv.com
***Counsel of Record for Respondents, Plaintiffs below,
GREGORY PAYNE, individually and as
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RESPONDENTS' BRIEF

Introduction

Now, come the Respondents, Plaintiffs below, Gregory Payne and Betty Jo Payne, by counsel, William C. Forbes, and W. Jesse Forbes, Forbes Law Offices, PLLC, and hereby file their brief in response to this appeal. Gregory and Betty Jo Payne are the distraught parents of Craig Allen Payne, whose horrific, tragic and wrongful choking death occurred on February 12, 2007, as a result of being improperly being fed a hot dog by an untrained health care worker at DEAF, which was not prepared in accordance with Respondents' sons medical needs, and upon which Craig choked to death. (Appx 15-17). Respondents' son suffered from severe cerebral palsy, which made it impossible for him to feed, bathe or clothe himself, and he was incapable of eating solid food. (App'x 15). Respondents' maintain that the DHHR petitioners, herein, had a special relationship with Respondents' son, as a result of his participation in the West Virginia State Title XIX MR/DD Waiver Program, and Respondents' son's participation therein as a client of the behavioral health care center at DEAF, and that incumbent with said special

relationship, the DHHR petitioners owed Respondents' son special duties to ensure that the standard of care that he received at DEAF posed no risk to the life, health and safety of Craig Allen Payne, and that petitioners breached these special duties to Respondents' son by allowing the horrific, inadequate, substandard health care to continue at DEAF, despite their knowledge of these abhorrent deficiencies of care at DEAF, when petitioners had a mandatory duty to warn said facility's clients, and/or a duty to close said facility prior to the death of Respondents' son.

The duty owed by the DHHR Petitioners in this case was not one owed to the general public; rather, the duty of the Petitioners here was to a specific, defined group of individuals with certain severe disabilities, and to Craig Payne, the decedent, himself. Craig Payne attended the DEAF through the West Virginia State Title XIX MR/DD Waiver Program. In order to get their son into the Waiver Program, the Respondents had to contact the DHHR Petitioners and its Behavioral Health Services division and go through petitioners' application process. Through the Waiver program, the Respondents sent their son to the DEAF facility with the understanding that he would be cared for by the facility, which was regulated, licensed, supervised and controlled by the DHHR, petitioners herein. The Respondents rightly had an expectation that the duty to care for Craig Payne would be fulfilled. Clearly, the duty the Petitioners had to Craig Payne was not one owed to the general public, but a duty created through an agreement between the parties when Craig enrolled in the Title XIX Waiver Program and further an agreement perpetuated by the DHHR's petitioners' payment for Craig Payne to attend the program through D.E.A.F. at their facility in Nitro, West Virginia. The DHHR Petitioners then went to the lengths to oversee, license and supervise the facility. This duty was not one to the general public but to a specialized group and individually to the decedent, Craig Allen Payne.

III. ASSIGNMENTS OF ERROR

1. Petitioner's assignments of error are based upon the flawed premise that the actions of the DHHR defendants below were somehow discretionary duties owed to the general public as a whole, when nothing could be further from the truth. Petitioners actions and inactions with respect to the continued licensing of the grossly substandard care of the DEAF facility, involved decisions and mandatory duties on the part of petitioners that affected the life safety, and welfare of a highly specialized segment of severely mentally and physically disabled individuals which included Respondent's deceased son. The very legislative purpose of the governing licensing statutes and regulations is to protect such severely disabled individuals from the risk of harm and death from inadequate and substandard care and to refuse or revoke the license of facilities such as DEAF that pose a serious threat to the life, safety and well-being of its clients, and therefore petitioners actions in continuing to license DEAF violated the spirit and whole legislative purpose of said laws, as well as violating the petitioners' own specific licensing requirements under W.Va. CSR § 64-11-1 et. seq., and Respondents presented more than sufficient evidence to raise a genuine issue of material fact upon the petitioners' violations of said regulations, their undertaking of additional affirmative monitoring duties, and the existence of a special relationship between petitioners and Respondents' son. (Supp. A.R. pp. 1-61, App'x 57-61; App'x 98-103; App'x App'x 341-352, App'x 93-94, App'x 242-244;) Further, petitioners had a **non-discretionary mandatory** duty to close said DEAF facility, as the same posed a substantial and serious risk to the life, health and safety of the clients at said facility, such as Respondents' son, and the petitioners grossly violated said duty in allowing the substandard care at DEAF to continue by failing to revoke said facility's license when petitioners knew or should have known that these serious and substantial deficiencies in the quality of the care provided had not been

corrected as petitioners had undertaken additional affirmative monitoring of said facility as presented below. (Supp. A.R. pp. 1-61; App'x 12-103; Appx. 57-61 and 98-103; App'x 242-244; Appx' 188-199; App'x 341-352, App'x 245-246). Petitioners' actions and failures to act were an oppressive and malicious dereliction of duty that directly and proximately led to the death of Craig Allen Payne, and the same cannot be countenanced under a theory of qualified immunity. Thus, petitioners' decisions and inactions were undertaken by defendants in violation of the very legislative purpose of the licensing laws said defendants were sworn to uphold and enforce, and therefore, Petitioner's are not entitled to qualified immunity, and the Circuit Court appropriately ruled against Petitioner's motion for summary judgment in accordance with the correct standard of law.

2. The trial court applied the correct standard of applicable qualified immunity law in its well-reasoned opinion, and its analysis of the facts and evidence before the court regarding the special relationship exception to the public duty doctrine, and properly denied defendant's motion for summary judgment as the special relationship exception is a question of fact that must be determined by the jury. Syl. Pt. 10, *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (W.Va. 1996); and Syl. Pt. 12, *J.H. V. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (W.Va. 2009). Respondents presented ample evidence to support the existence of a special relationship between petitioners and the respondent's son, which creates a genuine issue of material of fact for the jury to determine whether or not petitioners breached the special duty they owed to the decedent. (App'x 242-244, Supp. A.R. pp. 1-61; App'x 57-61; App'x 98-103; App'x 92-94) Accordingly, the trial court's order should be affirmed upon this appeal.

III. STATEMENT OF THE CASE

No error has occurred in the trial court's ruling, and therefore, the trial court's Order Denying the Defendants' Motion for Summary Judgment should be affirmed upon this appeal, allowing this matter to proceed to trial. The trial court correctly determined as a matter of law that petitioners, are not entitled to qualified immunity in this matter, and that genuine issues of material fact exist relating to petitioners special relationship duties to the decedent, which must be determined by a jury at trial. (Order at App'x p. 6-9) The very nature of the MR/DD Program and behavioral health centers such as DEAF, and the Respondents' son participation in the same and receiving care at a State licensed behavioral health care facility, created a special relationship between petitioners and Respondents' son, and therefore special duties on the part of petitioners inherent in said special relationship. (App'x 188-199) Respondents below submitted a wealth of exhibits that contained documentary evidence from the DHHR Petitioners' own business records in objection and resistance to the motion for summary judgment,(See Supp. A.R. pp. 1-61), which were considered by the trial court, and mentioned in its November 10, 2011, Order. (See Order, Appendix p. 8, parag's. a, b; Supp. A.R. pp. 1-61). However, petitioners neglected to include said documentary evidence in the Appendix Record for this Court's consideration upon this appeal, and such exhibits, together with the other exhibits of record, were the basis of the trial court's proper determination that genuine issues of material fact exist herein, are highly relevant to this Honorable Court's decision as to whether the trial court's ruling should be upheld, and therefore, said evidence should be considered upon this appeal. (Supp. A.R. pp.1-61). Said documentary evidence was instrumental in the trial court's determination that petitioners are not entitled to qualified immunity, that a special relationship existed between petitioner's and Respondents' son, that petitioners may have committed violations of the licensing laws and regulations, that petitioners undertook additional affirmative

monitoring duties at DEAF, and therefore, genuine issues of material fact exist as appropriately determined in trial court's decision to deny summary judgment. (App'x 1-10). Respondents properly filed said records below as documentary evidence with the trial court and stamped received by the Circuit Clerk on March 25, 2011, as a pleading labeled "Plaintiff's Supplemental Exhibits in Opposition to DHHR's Motion for Summary Judgment," which included the following business records of petitioners: 1) Exhibit A, DEAF Deficiency synopsis of deficiencies cited between 2000-2006; 2) Exhibit B, April 3, 2006, letter from Director of OBHS of DHHR to Pat Black, Executive Director of DEAF; 3) Exhibit C, "Rhodes Pleadings," In re DEAF, "Strategic Plan for Meeting Requirements of Memorandum of Understanding;" Exhibit E, Revocation Order and supporting documentation April 2006 [which includes March 16, 2006 OHFLAC Statement of Deficiencies and Plan of Correction].(See Supp. A.R. pp. 1-61). This documentary evidence highlights the petitioners' numerous violations of the licensing regulations of W.Va. CSR § 64-11-1 et seq., by providing ample evidence that given all DEAF's pre-existing deficiencies and total non-compliance in correcting said deficiencies, and petitioners' knowledge of the same and petitioners affirmative actions in undertaking additional monitoring duties, makes it abundantly clear that the petitioners failed to perform their mandatory duty to close said facility prior to the death of Respondents' son. (Supp. A.R. 1-61). This documentary evidence, in addition to the other evidence of record, was manifestly sufficient to withstand petitioners' motion for summary judgment, as said documentary evidence **raises genuine issues of material fact** as to whether or not petitioners' violated the licensing provisions of W.Va. CSR§ 64-11-1, et seq., by failing to close the DEAF facility prior to the death of Respondents' son, and whether or not petitioners' failure to close said facility prior to the decedent's death, constituted a breach of the petitioner's special duties owed to Respondents'

son, and whether such breach was the proximate cause of Craig Payne's wrongful death, for which Respondents should recover damages, and thus due to the existence of these genuine issues of material fact the trial court properly denied the petitioners' motion for summary judgment.

Petitioner's brief provides a lengthy procedural history which correctly tracks the proceedings below, however, their complaints about the delays in the trial court's ruling on petitioners' motion for summary judgment in no way entitles them to the relief requested upon this appeal. The trial court correctly denied said motion in accordance with the applicable law governing governmental immunities, and based upon the documentary evidence from petitioners' own records that were presented by Respondents, (Order, App'x 6-9, Supp.A.R. pp. 1-61, App'x 245-246, App'x 93-94, Appx 343-345), the facts and circumstances of Respondents/Plaintiffs' cause of action herein (App'x 12-103), and the supporting evidence, facts, discovery, pleadings, and documentation presented to the trial court by Respondents in opposition to petitioner's motion, and said Order should be affirmed upon this appeal.

Petitioner's brief and their motion for summary judgment below completely ignores the fact that the licensing laws and regulations under which they operate were designed to prevent the operation of grossly substandard care facilities such as DEAF, and said statutes and regulations were further designed to protect the severely disabled individuals, such as Respondents' son, who receive care from said facilities, and therefore, the petitioners actions and inactions in continuing to license DEAF utterly failed to comply with the whole legislative purpose of such statutes and regulations. Petitioners' brief further ignores that the Respondent did allege specific violations of the law below, and the Respondents' citations to petitioners numerous violations of the licensing provisions of W.Va.CSR 64-11-1, et seq. appear of record

herein. (Appendix p. 346-347, 348, 341-352). Petitioners' violations of W.Va. CSR 64-11-1 et seq. were properly considered by the trial court below in determining that petitioners are not entitled to qualified immunity herein. (Order, Appendix p. 6, paragraph 5). Respondents below alleged specific violations of the applicable provisions of W.Va. CSR 64-11-1, which raise genuine issues of material fact that must be considered by a jury, as to whether petitioners' violation of said licensing provisions constituted a breach of their special duties to Respondents' son. (Appendix p. 346-347, 348). One specific citation, therein, illuminates the petitioners' mandatory duties and their breach of said duties in continuing to license DEAF as follows:

“CSR 64-11-4.1.f.4 A provisional license shall be issued when a Center seeks a renewal license, and a Center is not in substantial compliance with this rule **but does not pose a significant risk to the rights, health and safety of a consumer.**” (App'x 347)

The clear language of this one provision alone, indicates that the DEAF facility should have been closed by Petitioners as mandated by law, rather than the Petitioners continually issuing said facility a license, provisional or otherwise, as the language indicates that when a facility such as DEAF **poses a significant risk to the rights, health and safety of a consumer, that petitioners are MANDATED NOT to issue said facility a license.** Thus, Petitioners actions in continuing to license DEAF violated this provision and others of W.Va. CSR 64-11-1, and the trial court properly determined that a genuine issue of material fact was raised thereby. (App'x p.6). The DHHR OHFLAC March 16, 2006 Survey and/or Statement of Deficiencies, (Supp. A.R. pp.25-61), submitted below showed that **petitioners knew DEAF WAS NOT** in substantial compliance with W.Va. CSR §64-11-1 et. seq., and further said survey indicated that **petitioners knew the serious deficiencies in care at DEAF presented a significant risk the health life and safety of its consumers such as Respondents' son,** (Supp. A.R. 25-61); and yet

petitioners still continued to license said facility, thereby violating petitioners' own licensing regulation cited above, and cited below in Respondents pleadings to the trial court. (Appendix 346-347, 348, 341-352, Supp. A.R. 1-61). The language of 64-11-4.1.f.4 combined with the other evidence of record shows that the petitioners abandoned the legislative licensing regulations, and breached their special duties to Respondents' son by continuing to license the DEAF facility, and violated the CSR licensing regulations, because the petitioners knew said facility posed a significant risk to the rights health and safety of its consumers, and specifically to Respondents' son. What weight to give the petitioners violation of W.Va. CSR 64-11-1, et seq. must be considered by the trier of fact in determining whether or not petitioners breached their special duties to Respondents' son.

Respondents cause of action against the petitioner's arose out of the wrongful and inexcusable death of their son, Craig Allen Payne on February 12, 2007, which was caused due to petitioners negligence and gross dereliction of duty as well as violation of law, W.Va. CSR 64-11-1, et seq., in failing to close the DEAF facility at which their son received day services prior to Craig's death. (App'x pp. 12-103). Craig Allen Payne suffered from severe cerebral palsy, which made it impossible for him to feed himself or take care of himself, and DEAF was negligently allowed a license by petitioners to provide such care to Craig and provide medical, day care, and health services to Craig Allen Payne, when said facility was not properly trained or staffed, nor should it have been licensed by Petitioners to continue to provide such services. Craig Allen Payne was not a member of the general public, but instead was a member of a highly vulnerable segment of the population with severe mental and physical disabilities, who was owed a special duty of care from petitioners, which petitioners violated and breached. After decedent's death, the petitioner's finally revoked DEAF's license, and in that revocation Order dated March

7, 2007, the DHHR acknowledges that “DEAF has a history of non-compliance as indicated by the situation involving extremely serious deficiencies posing a significant threat to clients which occurred in March 2006.” (App’x p. 93, 96). This evidence was presented below and successfully argued by Respondents to show that petitioners knew of the serious deficiencies at death for almost a year prior to the choking death of Respondents son, but did nothing to correct said deficiencies, thereby creating a genuine issue of material fact as to whether petitioners failures in this regard constituted a breach of the special duties owed to Respondents’ son. In Respondents’ pleadings in opposition to the motion for summary judgment, (App’x 249-265, 341-352), Respondents cite extensively from the petitioners’ March 16, 2006 statement of deficiencies, (Supp. A.R. 25-61), which was riddled with substandard citations of DEAF for improper healthcare training, inadequate staffing, failure to follow IPPs, and numerous other violations for which petitioners should have closed the facility, as said deficiencies placed DEAF’s clients and specifically Craig Payne at serious risk of harm and death. (Supp. A.R. pp. 1-61, Appx. 249-265 and 341-352). The petitioner’s March 2007 Order, (App’x 93-94), which revoked DEAF’s license *after* Respondents’ son’s death, is further evidence of record, which also acknowledges that petitioners undertook affirmative duties to more closely monitor the DEAF facility as those duties are outlined in the Memorandum of Understanding signed in April, 2006, (Supp. A.R. pp. 14-21, and 9-11) and OHFLAC’s issuance of a provisional license pursuant to that memorandum. (Id.) Respondents raised these affirmative duties which petitioners through OHFLAC had affirmatively undertaken, as further evidence before the trial court, that creates a genuine issue of material fact, as to whether petitioners had breached the special duties the petitioners owed to Respondents’ son by petitioners’ obvious failures in maintaining these additional oversight and monitoring duties that they affirmatively undertook.

(Supp. A.R. 9-11, 14-21,) It is patently obvious that OHFLAC failed to monitor DEAF to ensure that the March 2006, (Supp. A.R. 25-61), extremely serious and dangerous deficiencies that threatened the life and safety of its consumers like Respondents' son were corrected, as the severe risks of death and harm still existed at said facility on the date of Craig Allen Payne's death, several months after the petitioners granted them yet another license, when Respondents son died on February 12, 2007, therefore, the petitioners actions in continuing to license DEAF should be considered by the trier of fact as to whether said actions were a breach of the petitioners' special duties owed to Respondents' son. The petitioners' acknowledgement of DEAF's history of non-compliance, which posed a significant threat to severely disabled persons, (App'x 93-94), such as decedent herein indicates that petitioners should have revoked DEAF's license prior to the tragic death of Craig Allen Payne, and petitioners failure to do so is a gross violation of its mandatory duties under W.Va. CSR 64-11-1 et. seq., and further constitutes a breach of the special relationship duty that exists between petitioners and severely disabled persons such as decedent. If the petitioners had revoked the license of the DEAF facility as it was mandated to revoke the same by the applicable laws and regulations governing such revocations, Craig Allen Payne would have been receiving care elsewhere and would most likely still be alive today as he was only 22 at the time of his wrongful death.

The person who was feeding Craig Allen Payne a hot dog on the date of his death, was a convicted felon, who was not authorized nor properly trained to care for Mr. Payne, nor aware of the proper feeding protocol for Craig, and when Craig started to choke, none of the staff on duty was properly trained in the Heimlich maneuver, which could have saved his life. (App'x 15-19) Petitioners, the DHHR were aware that the DEAF facility had a history of understaffing and inadequate healthcare training, (Supp. A.R. pp. 1-61) had repeatedly cited said facility to correct

these problems (Supp. A.R. pp. 1-61), and said facility continually ignored the DHHRs direction in this regard; however, due to the DHHR's failure in overseeing said facility under petitioners' license thereof and refusal to close said facility despite its continual non-compliance to correct such problems, said facility was allowed to continue to operate by petitioners, and as a direct and proximate result Craig Allen Payne died. It was the DHHR's job, and mandatory duty to close facilities such as DEAF when said facilities posed a substantial risk to the health, life and safety of its clients, and the DHHR failed to perform said mandatory duty, thus they are not entitled to the defense of qualified immunity.

The DHHR petitioners were charged by law, W.Va. CSR § 64-11-1 et seq., with overseeing behavioral health day service providers, such as D.E.A.F., who provided health and medical care to severely mentally and physically disabled individuals, such as Craig Allen Payne, and the petitioners' failure to do so in accordance with applicable laws governing their responsibilities in this regard, directly and proximately resulted in the death of Respondents' son, Craig Allen Payne, for which gross dereliction of duty Respondents are entitled to recover from petitioners. Petitioners admit in their brief that the DHHR closed the D.E.A.F. facility **after** the death of and because of the death of Craig Allen Payne due to the grossly inadequate and substandard health and safety conditions as said facility; however, petitioners ignore that ***their failure to close said facility prior*** to Mr. Payne's death was a gross and oppressive dereliction of duty, was in violation of the very legislative purpose of the laws and regulations for closing and licensing said facilities W.Va. CSR 64-11-1 et seq.; was a breach of their special duty towards severely mentally and physically disabled individuals, and specifically a breach of their special duty towards Craig Allen Payne, and that the existence of said special duty and any breach thereof is an exception to the public duty doctrine which this Honorable Court has held must be

determined by a jury, and as appropriately determined by the trial court in its Order denying the petitioners motion.

Respondents utilized the day services of D.E.A.F. because the Petitioners had failed to notify the Respondents and other clients of said facility that the facility was woefully understaffed; petitioners failed to inform respondents that the staff was improperly trained, petitioners failed to inform Respondents that said facility had a history of non-compliance with Federal and State laws and regulations; failed to notify Respondents of the substantial risks to the health and safety of their son at said facility; and Petitioners utterly failed to close said facility prior to Craig Allen Payne's death when Petitioners were mandated by law to do so, due to the history of non-compliance that posed a substantial danger to the health and life of the facilities severely disabled clients, and specifically Craig Allen Payne. The DHHR's April 3, 2006, letter of record herein, sent by petitioners to DEAF indicates that an affirmative duty existed to notify clients of DEAF of the serious deficiencies at said facility so that clients could seek alternative care. (A.R. 245-246). Petitioners knew the DEAF facility had a history of non-compliance, which placed their clients at substantial risk to their health and life, as the DHHR petitioners had repeatedly cited said facility to correct said non-compliance, but instead of closing said facility due to the substantial and severe risks to the welfare and life of its clients like Craig Allen Payne, and the facility's failure to correct the non-compliance at direction of petitioners, the petitioners still continued to allow said facility to operate, in violation of their own regulations as closure was mandated under W.Va. CSR § 64-11-1 et seq. which mandated the facility's closure prior to Craig Allen Payne's death.

The WVA's reports of May 3, 2007, and August 14, 2007, were attached as evidentiary exhibits to the Respondents' Amended Complaint. (App'x 57-61, 98-103). The WVA's

findings and conclusions therein were based upon the WVA's investigation into the death of Craig Allen Payne, and the WVA's conclusion that the Petitioners were negligent are soundly based upon the findings from said investigation, which further uncovered Medicaid fraud that petitioners' monitoring had failed to uncover (App'x 102). Therefore, WVA's conclusion that the DHHR petitioners continual provisional licensing of said facility despite its non-compliance constituted negligence had ample supporting evidence and documentation. (WVA Reports, App'x 57-61, 98-103). Moreover, the weight and credibility to be given the evidence from the WVA must be determined by the trier of fact, and not by the trial court upon a motion for summary judgment. Furthermore, Tovli Simiryon's testimony cited by petitioner in its brief was taken out of the context in which it was made, and the fact that the investigation was not of the DHHR itself, in no way diminishes the WVA's findings and conclusions in said reports and in Simiryon's testimony that the DHHR was negligent in its licensing and oversight duties of the DEAF facility, and that Craig Payne's death was preventable. (Appendix p. 212-218, p. 242-244). Again, the weight and credibility of this evidence and testimony is for a jury to decide, however, the WVA reports (App'x 57-61, 98-103), Simiryon's deposition testimony (App'x 212-218, 242-244), the documentation presented by Respondents' from the petitioner's March 2006 statement of deficiencies (Supp. A.R. pp. 25-61), the DHHR petitioners' Strategic Plan for Meeting Requirements of Memorandum of Understanding (Supp. A.R. pp. 14-17) and the DHHR Petitioners' April 2006 Memorandum of Understanding (Supp. A.R. pp. 20-21), DHHR petitioner's April 3, 2006 to Pat Black of DEAF (App'x 245-246), which documentary evidence showed that in April of 2006, petitioners had undertaken extra monitoring of DEAF (Supp. A.R. pp. 14-21), due to the serious, extensive and dangerous substandard and inadequate health care provided by DEAF as petitioners' found in the March 2006 statement of deficiencies (Supp. A.R.

25-61), all of this evidence of record constitutes an overabundance of evidence that supports a special relationship and additional affirmative duties undertaken by petitioners, which was more than sufficient to raise genuine issues of material fact such as to withstand the motion for summary judgment, and therefore, the trial court appropriately denied the petitioners' motion for the same.

IV. SUMMARY OF ARGUMENT

The public duty doctrine and its "special relationship" exception apply to W.Va.Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract. Syl. 10, *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996)

Petitioners have not cited to any provision of their insurance contract which expressly waives the special relationship exception to the public duty doctrine, and therefore, the same applies upon this appeal, and Respondents presented more than sufficient evidence to raise a genuine issue of material fact as to whether such a special relationship existed between petitioners and respondents' son, such as to defeat summary judgment, and submit this question of fact to the jury.

Petitioners are not entitled to qualified immunity, as the petitioners' failure to close the DEAF facility and revoke DEAF's license prior to the death of Respondents' son constituted an oppressive and ongoing violation of the licensing regulations of W.Va. CSR 64-11-1 et seq., as petitioners had a **mandatory** duty to close said facility under said regulations, and failed to do so. Qualified immunity does not apply to the **mandatory** duties of petitioners to close such behavioral health care facilities such as DEAF, when serious risks of death and harm to the health and safety of clients like Respondents son, exist, and petitioners knew that DEAF was not in substantial compliance with the health and safety regulations, (Supp. A.R. 1-61), and that such

dangerous threats existed, and still failed to close said facility prior to decedent's death.

Petitioners are not immune from suit for failures to perform mandatory duties. Furthermore, since Plaintiffs seek damages only to the extent of the limits of insurance coverage held by the Petitioners, the normal constitutional immunities are inapplicable to the Petitioners. See, e.g, *Syllabus Point 2, Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983); *Syl. Pt. 1, Eggleston v. West Virginia Dept. of Highways*, 189 W.Va. 230, 429 S.E. 2d 636 (1993); *Parkulo v. West Virginia Department of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d. 507 (1996). Moreover, petitioners arguments unfairly diminish or conveniently ignore the substantial documentary and testimonial evidence presented below, and the totality of evidence and pleadings as a whole of record, which amply supports the existence of a special relationship between the decedent and petitioners, thereby negating the public policy doctrine and raising genuine issues of material fact as to whether petitioners breached their special duties to respondents' son, as appropriately determined by the trial court in its order denying summary judgment, which references said documentary evidence of Respondents. (Order, App'x.7, 8-9)

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a), of the West Virginia Revised Rules of Appellate Procedure, a Rule 19 oral argument is necessary upon this appeal, within the discretion of this Honorable Court, as the petitioners' assignments of error allege error in the application of existing law. However, this Court has authoritatively determined that the issue of whether a special relationship exists such as to defeat the public policy doctrine, has been held by this Court as ordinarily presenting a question of fact for the trier of fact by this Court. *J.H. v West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009).

Respondents feel oral argument may assist the Court in the decisional process, in determining that the trial court properly denied summary judgment in this matter, and that the trial court's order should be affirmed by the decision of this Court.

VI. ARGUMENT

The Plaintiffs herein seek damages only to the extent of the limits of insurance coverage held by the defendants, and therefore the general constitutional immunities of the State and its agencies are inapplicable to the defendants in this matter. "Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State." Syl. Pt. 2, *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 636 (1993), and Syl. Pt. 2, *J.H. v West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009); Syl. Pt. 1, *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (W.Va. 1997). Additionally, the defendants are not entitled to the traditional immunity as this Court has recognized as follows:

W.Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy 'shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits. Syl. Pt. 2, *Parkulo, supra*, Citing Syl. Pt. 1, *Eggleston v. West Virginia Dept. of Highways*, 189 W.Va. 230, 429 S.E.2d 636 (1993).

Furthermore, petitioners' ongoing licensing of DEAF constituted violations of the clearly established laws governing said licensing pursuant to WVa. CSR 64-11-1, et seq., and a reasonable official would have known that the continual issuance of licenses to DEAF violated said regulations. Further, petitioners' actions and inactions in this regard were grossly

oppressive to the rights of Respondents' son to be safe from serious harm and death at DEAF, and petitioners' failure to close the DEAF facility as **mandated** under W.Va. CSR 64-11-1, et seq., proximately resulted in the death of Respondents' son.

A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va. Code, 29-12A-1, et seq., is entitled to qualified immunity for official acts **if the involved conduct did NOT VIOLATE** clearly established laws of which a reasonable official would have known. **There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.** To the extent that State ex rel. Boone National Bank of Madison v. Manns, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled." Syl. Pt. 8, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996) citing to Syllabus, State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1992).

Thus, under this authority and an examination of the evidence upon the whole record, petitioners are not entitled to qualified immunity in this matter under the above-cited authority, as their continual licensing of the substandard, inadequate, and dangerous health care at DEAF was oppressive and malicious in denying Respondents' son adequate and safe health care at DEAF, and therefore, summary judgment was properly denied below.

Although Respondents submit that the manifest weight of the evidence supports the Respondents' claims herein and would most certainly sway a jury in Respondents' favor, the manifest weight of the evidence, is not the applicable test of the documentary and testimonial evidence of record for purposes of summary judgment, in order to defeat summary judgment Respondents must, and have herein submitted evidence that is sufficient to raise genuine issues of material fact for the trier of fact, i.e. the jury, and the evidence of record is sufficient to raise genuine issues of material fact. Respondents' numerous pleadings in opposition to summary judgment, which contain citations to evidence of record therein, (App'x, 188-200, 222-248, 249-266, 341-352), Respondents documentary exhibits from petitioners' own records (Supp. A.R. pp. 1-61, App'x 62-91, App'x 245-246; 92-94, 247-248), Respondents' amended complaint (App'x

12-56, attached exhibits 56-103), the WVA Reports (App'x 57-61, 98-103), the DHHR's own business records relating to the serious health care deficiencies at DEAF that posed serious and significant threats to the lives of its clients prior to decedents' death, (Supp. A.R. pp. 1-61, and App'x 245-246), petitioners' acknowledgment of duty to notify clients on part of DEAF(App'x 245-246); and the totality of documentary and testimonial evidence of record (Depo, testimony App'x 212-218, 222-248), clearly raises genuine issues of material fact in this matter as to whether or not a special relationship existed between petitioners and Respondents' son, such as to defeat the public duty doctrine; whether or not petitioners breached the special duties inherent to such special relationship; whether or not petitioners violated their mandatory statutory and regulatory duties under W.Va. CSR 64-1-11 et seq.; whether petitioners failure to close said the DEAF facility prior to the death of Respondents' son violated their mandatory statutory and regulatory duties under W.Va. CSR 64-1-11; whether the petitioners' undertaking of additional affirmative duties to monitor the DEAF facility (Supp. A.R. p. 9-11, 14-21), which petitioners dispute that they undertook additional monitoring duties, thereby in itself creating a genuine issue of material fact, and then failing to follow through with said additional affirmative monitoring duties constituted a breach of said duties entitles Respondents to recovery; and whether such grossly oppressive and negligent failure to close said facility was the proximate cause of Respondents' son's death and thereby caused damages to Respondents—all of which genuine issues of material fact must be determined by a jury, and thus summary judgment was properly denied by the trial court. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial" *Syl. Pt. 3, Painter v. Peavey*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994). Petitioners' assertion that none of this overwhelming evidence of record

constitutes concrete evidence is ludicrous, offensive, and misleading. The Circuit Court, herein, properly applied the applicable immunities authorities and summary judgment authorities of this Honorable Court to the Respondents' abundant and ample evidentiary evidence, cited herein, pleadings for and against summary judgment, and amended complaint, and the record as a whole, and appropriately determined that Respondents' had presented sufficient evidence as to the existence of a special relationship between petitioners and Respondents' son, as to raise a genuine issue of material fact that must be determined by the jury, not the court, sufficient to withstand summary judgment, and such determination should be upheld upon this appeal. The existence of a special duty has been addressed by this Honorable Court as follows:

“[i]n 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.” *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009), citing Syl. Pt. 10 *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). (*emphasis supplied herein*).

The trial court herein cites to this applicable authority relating to special relationships and special duty as an exception to the public policy doctrine, and cites to the evidence presented by Respondents in this regard in its Order denying summary judgment. (App’x 8-9). Therefore, petitioners’ assertions that the trial court somehow applied the wrong standard of law, and failed to reference the evidence of Respondents are without merit.

A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and *any doubt as to the existence of such issue is resolved against the movant for such judgment.* Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syl. pt. 4, *Kelley v. City of Williamson*, 221 W. Va. 506, 655 S.E.2d 528 (2007).

Petitioners did not satisfy this burden below, Respondents submitted abundant evidence which supported the existence of a special relationship and the additional affirmative monitoring duties

undertaken by petitioners (Appx 245-246, Supp. pp. A.R. 1-61), and therefore, the trial court properly determined that genuine issues of material fact exist, thereby precluding summary judgment. (App'x 1-9). The evidence of record is overwhelmingly sufficient to raise genuine issues of material fact as to additional affirmative monitoring duties undertaken by petitioners of DEAF, and the existence of a special duty between petitioners and Respondents' son, however, based upon the above-cited authority if there is any doubt as to the existence of such genuine issues of material fact, said doubt should be resolved in Respondents favor upon this appeal.

“Supreme Court of appeals reviews circuit court’s grant of summary judgment de novo, and applies the same standard as the circuit court, **reviewing all facts and reasonable inferences in the light most favorable to non-moving party.**” *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872. (*emphasis supplied herein*). Although the court’s review herein is of the trial court’s **proper denial** of summary judgment, the same standard applies upon this appeal, and respondents are the non-moving party.

Thus, petitioners’ brief further diminishes the standard of review this Court employs in a motion for summary judgment, as the evidence and pleadings of record are to be taken as a whole, and considered in the light most favorable to the non-moving party, such as Respondents herein, and should only be granted when there is no triable issue of material fact and no rational trier of fact could find in favor of the non-moving party on the evidence of record. Such is not the case herein, as a rational and reasonable jury could find in favor of Respondents, and therefore, the trial court properly denied summary judgment.

A. Standard of Review

“Supreme Court of Appeals may affirm a circuit court’s decision on a summary judgment motion on any adequate ground, even if it is other than one on which circuit court actually relied.” *Williams v. Precision Coal, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W.Va. 1995). This civil action was brought

against petitioners subject to W.Va. Code §29-12-5, therefore the special duty exception to the public policy doctrine applies upon this appeal:

The public duty doctrine and its "special relationship" exception apply to W.Va.Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract. Syl. 10, *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996);

The petitioners cannot and do not cite to any express provision in its insurance policy which expressly waives the "special relationship" exception to the public duty doctrine, and therefore, said special relationship exception applies herein, and Respondents have presented significant evidence which supports such relationship, such as to raise a genuine issue of material fact for the jury, as properly determined by the trial court below.

"[i]n 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." Syl. Pt. 10, *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009), citing Syl. Pt. 10 *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). (*emphasis supplied herein*).

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. *Parkulo, supra*, Syl. Pt. 12.

There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that State ex rel. Boone National Bank of Madison v. Manns, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled." Syl. Pt. 8, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Thus, the petitioners are not entitled to qualified immunity herein, as their actions in the continual licensing of DEAF was so grossly oppressive to the rights of Respondents' son, as well as wanton and reckless, as to defeat such immunity. Moreover, the trial court appropriately,

under this authority, determined that Respondents had made sufficient allegations and presented sufficient and ample evidence of these four requirements as to raise a genuine issue of material fact as to whether said special relationship existed between petitioners and Respondents' son, which must be determined by a jury, and the trial court's order should be affirmed upon this appeal.

B. Interlocutory Appeals

Respondents do not dispute that petitioners have the right to make this interlocutory appeal; however, Respondents submit that the trial court properly denied summary judgment herein, as the evidence of record creates genuine issues of material fact as to whether a special relationship existed such as to defeat the public duty doctrine advanced by petitioners, and that this Court's *de novo* review of the record as a whole, will clearly show that genuine issues of material fact exist that defeat all theories of petitioners' immunity, and therefore, the trial court's order which appropriately denied summary judgment should be affirmed upon this appeal.

C. Summary Judgment Standard

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "This Court reviews *de novo* the denial of a motion for summary judgment..." Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (W.Va. 2002).

In syllabus point four of *Aetna Casualty*, this Court explained: "If there is no genuine issue as to any material fact summary judgment should be granted **but such judgment must be denied if there is a genuine issue as to a material fact.**" *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). (*emphasis supplied herein*).

Additionally, this Honorable Court still reviews the entire record in the light most favorable to the non-moving party, and credibility determinations and the weighing of evidence is not the

court's responsibility upon a motion for summary judgment, and a genuine issue of material fact has been discussed by this Court as follows:

"Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present **where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.**" Syl. Pt. 5 of *Kelly v. City of Williamson*, Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). (*emphasis supplied herein*).

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Respondents have submitted ample evidence herein which satisfied the applicable burden as to the existence of genuine issues of material fact on the special relationship exception of W.Va. Code §29-12-5, and the evidence of record could most certainly sway a jury in Respondents' favor, therefore the trial court's denial of summary judgment was entirely proper, and the trial court's order should be affirmed upon this appeal.

D. TRIAL COURT COMMITTED NO ERROR IN ITS ANALYSIS OF QUALIFIED IMMUNITY AND NO ERROR OCCURRED IN ITS ANALYSIS OF THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE. Trial Court Properly Denied Summary Judgment on the doctrine of qualified immunity, and no error has occurred. Petitioners are NOT entitled to qualified immunity herein. DHHR Petitioners were clearly INCOMPETENT in failing to close the DEAF facility prior to Respondents' son's death. Special relationship and inherent special duties raised by such relationship is ordinarily a question of fact for the jury, and Respondents have submitted abundant evidence in support of such a special relationship as to defeat the public duty doctrine. There is no provision of the petitioners insurance contract which expressly waives the special relationship exception to the public duty doctrine.

The public duty doctrine and its "special relationship" exception apply to W.Va.Code § 29-12-5 actions against the State and its instrumentalities, unless the doctrine is expressly waived or altered by the terms of the applicable insurance contract. Syl. 10, *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996);

There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that State ex rel. Boone National Bank of Madison v. Manns, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled." Syl. Pt. 8, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Furthermore, the evidence of record from the WVA Report of August 14, 2007, also indicates that petitioners failed to correct Medicaid fraud that was occurring at the DEAF facility, and that such fraud negatively impacted the health care provided to consumers such as Respondents' son because untrained employees were allowed to provide care to him. (App'x 101-102, 98-103), and said allegations are further made against petitioners in Respondents' amended complaint. (App'x 49-51). Moreover, Petitioners knew that the horrific, substandard, and grossly inadequate health care provided at DEAF, had been ongoing for years prior to decedent's DEAF, (Supp. A.R. pp. 1-61, Supp. A.R. p. 26; Appx. 93-94.), and petitioners knew that such grossly inadequate health care posed serious threats to the lives and safety of DEAF's consumers, and thus petitioners' failure to close said facility constituted an oppressive, wanton and reckless, and malicious imposition of a dangerous situation onto DEAF's consumers, who were severely mentally and physically disabled, and specifically Respondents' son, which due to their severe mental and physical disabilities said consumers were helpless to correct without petitioners aid in correcting said dangerous conditions by closing said facility under the licensing provisions of W.Va. CSR 64-11-1 et. seq.

Interestingly, a quote from Petitioners' brief also serves to **destroy** their assertion of qualified immunity herein. At p. 12 of said brief, petitioners cite as follows: "Qualified immunity protects 'all **but the plainly incompetent** or those who knowingly violate the law.'" (emphasis supplied herein), *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Herein petitioners are guilty of both plain incompetence and violations of the

licensing provisions of W.Va. CSR 64-11-1 et seq. Since the DHHR petitioners were clearly **plainly incompetent** in continuing to license DEAF as shown by said facility's extensive deficiencies that posed serious threats to the life and safety of its clients, and the evidence of record that petitioners were aware of these substantial and significant threats to the life and safety of clients at DEAF (Supp. A.R. pp. 1-61), and therefore, petitioners are not entitled to qualified immunity herein. (Supp. A.R. pp. 1-61) Respondents submit that the evidence presented below overwhelmingly shows that petitioners' continual licensing of DEAF, and petitioners failure to close said facility prior to Respondents son's death was plainly incompetent, as well as being a violation of its mandatory duties to close said facility under the clearly established law of W.Va. CSR 64-11-1, et seq. as shown by the documentary evidence of record that clearly shows that petitioners were aware of the seriously substandard and inadequate health care conditions which posed significant and dangerous threats to the lives and safety of its clients like the decedent. (Supp. A.R. pp. 1-61). Petitioners below argued that no special relationship existed between petitioners and Respondents son, and that the public duty doctrine provided shielded them in this action (App'x 117- 122); however, their brief upon this appeal appears to abandon these arguments in a return to an exclusive qualified immunity analysis. Therefore, this court should consider that "[a]lthough review of the record from summary judgment proceeding is *de novo*, Supreme Court of Appeals will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion..." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

Respondents have submitted substantial evidence of record that shows a special relationship existed under the four conditions of *Parkulo, supra*, and therefore inherent special

duties arose between petitioners and Respondents' son, which mandate that the existence of said special relationship be submitted to the jury, as the existence of a special relationship is ordinarily a question for the trier of fact. *J.H. v. West Virginia Div. of Rehabilitation Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009), citing Syl. Pt. 10 *Parkulo v. West Virginia Bd. of Prob. And Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). (*emphasis supplied herein*). Petitioners cannot and do not point to any express language in their insurance contract which expressly waives the special relationship exception to the public duty doctrine, and therefore, the said exception applies to this civil action under W.Va. Code §29-12-5, under the authority of *Parkulo, supra*.

- 1. Plaintiffs/ Respondents HAVE MADE SUFFICIENT EVIDENTIARY SHOWING OF SPECIAL RELATIONSHIP EXCEPTION TO WITHSTAND petitioners' motion for summary judgment. Respondents HAVE Presented Substantial and Significant Evidence Showing That A Clearly Established Constitutional and Statutory Right Has been Violated, and that the special relationship exception applies herein thereby negating any immunity under the public policy doctrine.**

There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that State ex rel. Boone National Bank of Madison v. Manns, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled." Syl. Pt. 8, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

Although Respondents have not attempted to hold liable any specific officer or agent of the DHHR petitioners, in *Parkulo, supra*, the Supreme Court recognized the following comment from the *Restatement (Second) of Torts* Section 895D: "[D]uties or obligations may be placed on the government that are not imposed on the officer, and statutes sometimes make the government liable when its employees are immune." *Restatement (Second) of Torts* Section 895D, cmt. J, in part (1979). *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

The applicable licensing and regulatory provisions of W.Va. CSR § 64-11-1 et seq. were promulgated on or about April 13, 2000, and have been effective since July 1, 2000, thereby

constituting clearly established law at the time of Respondents' son's death on February 12, 2007. Said provisions were also designed to prevent abuse and neglect at facilities like DEAF, W.Va. CSR § 64-11-3.27, et seq. Neglect, and §64-11-3.1 Abuse et seq. Respondents' son had a clearly established constitutional right to live and be safe from harm at the State licensed behavioral health care facility of DEAF, said licensing being the petitioners' mandatory responsibility, and the very purpose of said legislative licensing and regulation being to prevent such seriously dangerously inadequate and substandard care under W.Va. CSR 64-11-1 et seq. Furthermore, Respondents' son had a statutory right to be protected from neglect, harm, and death under the statutory regulations of W.Va. CSR §64-11-1, et seq., § 64-11-3.27; §64-11-4, et seq., 64-11-8, et seq., which were designed to prevent such neglect, harm and death from substandard, inadequate and dangerous health care at such facilities, and the petitioners' failure to close the DEAF facility violated Respondents' son right to live, and petitioners' failure to close said facility prior to the decedent's death further violated petitioners mandatory duty to close said facility for its substantial and horrific non-compliance with the licensing regulations was a violation of the licensing regulations of W.Va. CSR 64-11-1, et seq. which required its closure before such a tragic accident occurred. The very purpose of these licensing regulations is to close facilities such as DEAF that are not in substantial compliance with the health and safety requirements under CSR 64-11-1, and to keep substandard and inadequate facilities such as DEAF from posing substantial dangers to the health and safety of its consumers, like Respondents' son. Furthermore, petitioners allowed the horrific, dangerous, and inadequate health care conditions at DEAF to continue despite the provisions of W.Va.CSR 64-11-4, et. seq. which mandated its closure, and thus petitioners further violated this State's abuse and neglect statutes of the West Virginia Code, which have been clearly established for years.

The licensing regulations of W.Va. CSR 64-11-1, et seq. were designed to prevent substandard and grossly inadequate health care as well as abuse and neglect by behavioral care facilities such as DEAF, and said provisions mandate that the Petitioners revoke the licenses of facilities such as DEAF when said facilities are not in substantial compliance with said regulations, and their non-compliance poses significant risks to the health, safety and well-being of its consumers. W.Va. CSR 64-11-4, et. seq., 64-11-4.1.f.1, 64-11-4.1.f.2, 64-11-4.f.1, 64-11-4.1.f.2 These provisions are replete with the language, that in order for such licenses to issue, centers such as DEAF must be in substantial compliance with the regulations, and must not pose significant risks to the health and safety of the consumers of such centers. Respondents' son was such a consumer, and the Respondents presented more than sufficient evidence below to withstand petitioners' motion for summary judgment on petitioners' gross and oppressive violation of said licensing regulations by continuing to afford DEAF a license, despite petitioners knowledge of the substantial and repeated **NON-compliance** of DEAF with the regulations, and petitioners knowledge that said **non-compliance and serious deficiencies in the standard of care posed a significant risk to the health, safety and well-being of its clients.** (A.R. 93-94; Supp. A.R. pp. 1-61; App'x 341-352). Moreover, petitioners had undertaken additional affirmative monitoring duties of DEAF due to these dangerous and inadequate health care conditions, and petitioners failed to ensure that the grossly inadequate and dangerous conditions had been corrected. (Appx 245-246, Supp. A.R. pp. 9-11, pp. 14-21).

Petitioners arguments in this regard, completely ignore the overabundance of documentary evidence presented below that shows that DEAF was NOT in substantial compliance with said regulations, (Supp. A.R. pp. 1-61, 25-61), that petitioners knew it was NOT (Supp. A.R. pp. 1-61), that petitioners undertook additional affirmative duties to correct the

serious, extensive and dangerous non-compliance (Supp. A.R. pp. 9-11, pp. 14-21, App'x 245-246), and petitioners failure to follow through on these additional affirmative duties as evidenced by the fact that the substantial history and repeated non-compliance and dangerous conditions still existed at the time of decedent's death, and this history of non-compliance and dangerous conditions were acknowledged in petitioners March 2007, Order which finally, albeit too late revoked DEAF's license (App'x 93-94), as the dangerous and inadequate training and health and safety measures were allowed to continue at DEAF, resulting in the death of Respondents son. (Supp. A.R. pp. 1-61). W.Va. CSR 64-11-4.1.f.4.

2. PETITIONERS DUTY TO CLOSE THE DEAF FACILITY PRIOR TO RESPONDENT'S SON'S DEATH WAS MANDATORY, NOT discretionary, and therefore qualified immunity does NOT apply. Petitioners' failure to close said facility constituted a violation Respondents son's rights under the provisions of W.VA. CSR 64-11-1, et. seq, which are specifically set forth therein at W.Va. 64-11-8, et seq. **DHHR's employees made non-discretionary decisions that violated the very legislative purpose of the licensing laws by allowing DEAF to continue to operate**

Petitioners' arguments that their duty to close the DEAF facility was somehow discretionary, is without merit as evidenced by the language of the licensing provisions themselves. W.Va. CSR 64-11-1 et seq. Petitioners arguments only focus on convenient portions of said language, and completely ignore, the fact that the express language within said regulations mandates that licenses must not be renewed or issued when facilities such as DEAF **pose significant risk to the rights, health and safety of a consumer and are not in substantial compliance with said regulations.** W.Va. CSR 64-11-4.1.f.4 reads as follows:

"CSR 64-11-4.1.f.4 A provisional license shall be issued when a Center seeks a renewal license, and a Center is not in substantial compliance with this rule BUT does not pose a significant risk to the rights, health and safety of a consumer." (App'x 347)

Thus, this language shows that the petitioners' issuance of a provisional license is **predicated** upon such facilities **NOT** posing a significant risk to the rights, health and safety of a consumer,

and the grossly inadequate health care conditions at DEAF DID pose such dangerous risks to the life health and safety of its consumers, and Respondents' son, **therefore, petitioners had no authority to issue the license. Petitioners' issuance of said license thus violated the clearly established law of this provision CSR 64-11-4.1.f.4.** The Petitioners' own records of record herein show that the petitioners knew the woefully inadequate health care conditions and inadequate health care training at DEAF were grossly inadequate **and posed a significant risk to the rights, health and safety of all of its consumers** as reflected in the petitioners' DHHR OHFLAC March 16, 2006, Statement of Deficiencies, (Supp. A.R. pp. 25-61), therefore, under CSR 64-11-4.1.f.4, they were mandated **not** to issue a provisional license to DEAF, but petitioners did so anyway, thereby violating the clearly established law of this provision. Respondents' cited extensively from said Statement of Deficiencies below, to show that petitioners' knowledge of these continued extremely dangerous conditions had existed for years, and should have prevented petitioners from issuing a license to DEAF. (App'x 341-352). Moreover, petitioners' March 16, 2006, Statement of Deficiencies indicates that these seriously dangerous and inadequate health care conditions had existed since August 10, 2005, for which petitioners cited DEAF, (Supp. A.R. p. 26), and still had not been corrected by DEAF, therefore, petitioners should never have renewed DEAF's license as it was maliciously oppressive to the health life and safety of Respondents' son for them to do so. (Supp. A.R. p.26, 25-61: App'x 341-352). After issuing said provisional license, the petitioners undertook additional affirmative monitoring duties of DEAF, specifically petitioners were supposed to make weekly inspections of the DEAF facility to ensure the plan of correction was being followed, and the petitioners failed to do so.

Petitioners arguments about inspections and when such should be undertaken and that petitioners undertook the same, are also without merit, as said argument ignores the evidence of record that

petitioners had undertaken additional affirmative monitoring duties at DEAF (Supp. A.R. 1-61, 9-11, 14-21; App'x 245-246), due to DEAF's serious and substantial deficiencies which posed significant risks to the rights health and safety of its consumers, and the very lives of said consumers such as Respondents' son. (Sup. A.R. 25-61). Similarly, the petitioners' citation of W.Va. CSR 64-11-4.1.f.2, does not aid their cause, as they ignore the following language that appears after the word shall:

“Following an application review, and any onsite inspection and plans of correction, the Secretary shall, IF THERE IS SUBSTANTIAL COMPLIANCE WITH THIS RULE issue a license in one of (1) of three categories....”(emphasis supplied herein). W.Va. CSR §64-11-4.1.f.2.

The DHHR Petitioners' March 2006, Statement of Deficiencies clearly indicates that DEAF was **NOT in substantial compliance with the regulations, (Supp. A.R. pp. 25-61), therefore, petitioners should never have issued DEAF the license under the provisions of W.Va. CSR 64-11-4.1.F.2.** Thus, from this language, it is abundantly clear that the authority to issue a license is **predicated** on the facility being in substantial compliance with the regulations, DEAF was not, therefore, petitioners actions in issuing DEAF a license violated this provision of this clearly established law. Furthermore, petitioners completely ignore that in their own April, 2006 memorandum of understanding and strategic plan of correction the DHHR petitioners undertook additional affirmative monitoring duties (Supp. A.R. pp. 9-11, 14-21, App'x 245-246), and petitioners still failed to correct the serious threats and danger to the lives and safety of Respondents son after undertaking these additional duties, and their failure to follow through that resulted from the grossly inadequate health care training and conditions that existed at DEAF. Petitioners should have reasonably known of these longstanding provisions of regulatory law, which precluded the issuance of any type of license to DEAF, instead they chose to ignore and violate these clearly established laws of W.Va. CSR 64-11-1 et seq. Petitioners' violations

of these clearly established laws, defeats their claims to qualified immunity herein. Petitioners are not entitled to qualified immunity herein.

E. Trial Court Applied the Correct Standard of Qualified Immunities Law, The Special Duty Exception, and Summary Judgment Authority in West Virginia as the same existed on the date of its decision, November 10, 2011. TRIAL COURT APPLIED THE CORRECT STANDARD OF LAW AND PROPERLY DENIED PETITIONER'S MOTION FOR SUMMARY JUDGMENT, AND SAID ORDER SHOULD BE AFFIRMED UPON THIS APPEAL.

Petitioners' reliance on *Botkins v. St. Albans*, 719 S.E.2d 863 (W.Va. 2011), is completely misplaced and thoroughly misleading, and totally inapplicable to the trial court's decision herein. Said decision in *Botkins, supra*, is further completely inapplicable to this Honorable Court's review of the trial court's decision herein. This Honorable Court's decision in *Botkins, supra*, was not filed until November 23, 2011, which is some 13 days **after** the trial court issued its denial of petitioners summary judgment motion, the trial court's order having been entered on November 10, 2011. Furthermore, the facts in *Botkins* bear absolutely no resemblance to the facts and circumstances in Respondents' case at bar, and moreover, there was no issue of a special relationship exception to the public duty doctrine raised therein.

VII. CONCLUSION

Petitioners are not entitled to qualified immunity herein, petitioners' committed violations of clearly established law, and the special relationship exception to the public duty doctrine applies herein, and genuine issues of material fact exist as to the existence of a special relationship existed between petitioners and Respondents' son, and whether or not petitioners breached the inherent duties thereof, which must be determined by a jury, therefore, the denial of summary judgment must be affirmed herein.

WHEREFORE, for all the foregoing reasons and based upon the authorities cited herein, Respondents pray that this Honorable Court will AFFIRM the trial court's order, as the trial

court properly and in accordance with applicable immunities and summary judgment authorities correctly denied petitioners' motion for summary judgment herein.

Respectfully submitted,

**GREGORY PAYNE, individually
and as Executor of the Estate of
CRAIG ALLEN PAYNE, and
BETTY JO PAYNE, individually,
Plaintiffs below, Respondents.**

William C. Forbes, Esquire (WVS B ID#1238)
W. Jesse Forbes, Esquire (WVSB ID#9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wcforges@forbeslawwv.com
E-mail: wjforbes@forbeslawwv.com
*Counsel of Record for Respondents, Plaintiffs below,
GREGORY PAYNE, individually and as
Executor of the Estate of
CRAIG ALLEN PAYNE, and
BETTY JO PAYNE, individually.*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES;
THE WEST VIRGINIA OFFICE OF
BEHAVIORAL HEALTH SERVICES; THE
WEST VIRGINIA BUREAU FOR MEDICAL SERVICES; and THE
WEST VIRGINIA OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,
Defendants below, Petitioners,**

vs.

S.Ct. Docket No. 11-1616

**GREGORY PAYNE, individually
and as Executor of the Estate of
CRAIG ALLEN PAYNE, and
BETTY JO PAYNE, individually,
Plaintiffs below, Respondents.**

CERTIFICATE OF SERVICE

I, William C. Forbes, Esq., Forbes Law Offices, PLLC, counsel of record for the Respondents, Plaintiffs below, hereby certify that a true and exact copy of the foregoing "Respondent's Brief" was duly served upon counsel of record for the petitioners, by depositing the same in the first class U.S. mail, postage pre-paid, on this the 26th day of April, 2012, addressed as follows:

M. Andrew Brison, Esq.
Joshua R. Martin, Esq.
Allen, Kopet & Associates, PLLC
P.O. Box 3029
Charleston, WV 25331
Counsel of Record for Petitioners



William C. Forbes, Esquire (WVSB#1238)
W. Jesse Forbes, Esquire (WVSB# 9956)
Forbes Law Offices, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wcforges@forbeslawwv.com
E-mail: wjforbes@forbeslawwv.com