

TO MEMBERS OF THE JUDICIARY COMMITTEE
RE: DENIS GAUTHIER and MARY GAUTHIER
CLAIM NOS. 22076 and 22077
PUBLIC HEARING AGENDA – MARCH 21, 2011
H.J. NO. 58
REQUEST FOR PERMISSION TO SUE

The Claimants, Denis Gauthier and Mary Gauthier, hereby request permission to sue the State of Connecticut after a dismissal of their claims for the following reasons:

1. The Notices of Claim filed on behalf of the Claimants clearly set forth a claim against the State of Connecticut for the failure of the street lighting for which a private individual could be liable in similar circumstances. (See attached Exhibit 1)

2. The Commissioner based upon the allegations set forth in the Notices of Claim clearly has jurisdiction pursuant to Connecticut General Statutes 1-141 et seq.

3. The sole factual support for the Respondent's Motion to Dismiss which was granted by the Commissioner is a very limited affidavit from an employee of the Respondent which fails to set forth the source of the affiant's knowledge and/or his authority concerning the averments in the affidavit.

4. Even if the unsupported averment suggesting that responsibility for the street lighting has been transferred to CL&P, the affidavit fails to address whether the State, by agreement or otherwise, had on the date of injury any continuing authority/responsibility in connection with CL&P for CL&P actions or inactions (as an agent of the State) for the failure of the street lighting.

5. Concern over the Affiant's knowledge and/or authority is heightened by the fact that in response to a Freedom of Information Request filed on behalf of the Claimants at least two (2) individuals, separate and distinct from the Affiant, Jon H. Andrews, have, in the past, responded underscoring the Claimant's concern about the depth of the Affiant's knowledge.

6. The Claimants' attorney, Gary D. Constant, has sent a Freedom of Information Request to the City of Bristol in which the City of Bristol indicates that it is the State's responsibility to maintain lights on Route 229.

7. The absence of an affidavit from Connecticut Light & Power supporting the averment that the State had no responsibility for the failure of the street lighting is troublesome and underscores the need for discovery in this matter before any action on the Motion to Dismiss should have been taken.

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8. The Respondent has attempted to re-characterize the Claimants' claim as a highway defect claim. Claimants are allowed to plead their claim as they see fit not as the Respondent would like. **The Claimants have not set forth a claim for a highway defect.** (See attached Exhibit 1)

9. Claimants by their articulation of their claim (See Exhibit 1) have set forth facts which would specifically preclude the Claimants from pursuing a claim under the statutory provisions of Connecticut General Statutes §13a-144, the so-called highway defect statute, as it is clear that the State's actions or inactions are only a "substantial factor" in causing the injuries suffered by the Claimants and are not the "sole proximate cause" as required by Connecticut General Statute §13a-144. **This matter, therefore, is not otherwise authorized by law as suggested by the Commissioner and Respondent.**

10. **The Claimants allege the actions or inactions of the State rather than specifying a highway defect.** The claim results from the actions or inactions of State of Connecticut employees, agents or servants.

In Spinella v State, 12 Conn. app. 449 (1987) the Court held on similar facts

We note that General Statutes 4-160, under which the claims commissioner may grant permission to sue the state, does not contain the same explicit restriction over the claims that the commissioner is allowed to hear that is set forth in General Statutes 4-142. Even if we assume, however, that 4-160 contains an implicit limitation restricting the claims commissioner from granting permission to sue the state with respect to claims that are "otherwise" . . . authorized by law"; General Statutes 4-142(2); we would find no merit to the state's claim in this instance. General Statutes 13a-144, which the state claims would have authorized the plaintiff's negligence claim, provides that a person may bring suit against the state if that person is injured "through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk . . ." **The plaintiff's negligence claim, however, was not related to a defective highway, bridge, or sidewalk but was related solely to the conduct of the bridge operator.** [fn3] Cf. Comba v. Ridgefield, 177 Conn. 268, 270, 413 A.2d 859 (1979). **The trial court, therefore, properly concluded that the plaintiff could not bring a claim for the bridge operator's negligence under General Statutes 13a-144,**

and that the claims commissioner had jurisdiction over the plaintiff's negligence claim.

The circumstances underlying the Gauthier claims are comparable to those set forth in Spinella.

11. As articulated in the Claimants Notice of Claim dated December 8, 2009 they have clearly set forth a claim which must be brought to the Office of the Claims Commission for permission to sue as it is not "otherwise authorized by law". Again this claim is not "otherwise authorized by law" for the reasons as stated in paragraph 10 hereof.

12. The decision of the Commissioner in **Estates of Ludger and Germaine Bouffard** are clearly distinguishable from the present matter. The Claimants in **Estates of Ludger and Germaine Bouffard** articulated their claim as "the accident was caused by a defective traffic light unit" and they did "not dispute that [their] claim may be brought as a "highway defect action" The present Claimants have factually not alleged their claim as being caused by a defect and **do not** agree that their claim may be brought as a highway defect action.

13. Further, the very principles of statutory construction which the Commission recites with approval in Estate of Bouffard i.e. that Connecticut General Statutes §13a-144 is in derogation of sovereign immunity and therefore must be construed in the narrowest possible fashion is contradicted by asserting that "street lights" are a potential source of a highway defect. Connecticut General Statute §13a-144 makes no mention of "street lights" as being considered a "defective highway, bridge or sidewalk". The attempt by the State to re-characterize the fundamental nature of this claim as a highway defect without proper factual or legal support is an attempt to improperly broaden the scope of Connecticut General Statutes §13a-144.

Any attempt by the State to include "street lights" as a highway defect within the ambit of Connecticut General Statutes § 13a-144 would be an unwarranted and improper expansion of the statute and would not be permissible.

14. Connecticut General Statutes §4- 141 et seq. were enacted giving broad jurisdiction limits to the Claims Commissioner. Connecticut General Statutes 4-141 et seq. are remedial in nature and should be given liberal interpretation to accomplish these ends.

15. As previously indicated when deciding a motion to dismiss the Commissioner must construe the facts most favorably to the Claimant.

Neither party in this case sought to introduce facts outside of the record on the motion to dismiss. "{W}hen a motion to dismiss does not seek to introduce facts outside of the record it is equivalent to our former motion to erase and admits all well pleaded facts, the complaint being construed most favorably as to the plaintiff. Brewster v. Brewster, 152

Conn. 228, 233, 206 A.2d 106 (1964).” American Laundry Machinery, Inc. v. State, 190 Conn. 212, 217, 459 A.2d 1031 (1983).

The State has not submitted any affidavit or other evidence which would set forth facts which could be used to characterize this claim as being a permissible claim pursuant to Connecticut General Statute §13a-144. For example, a copy of the required Notice of Claim filed upon the Commissioner of Transportation or a suit filed by the Claimant against the Commissioner of Transportation would be an example of such evidence. **No such evidence has been offered in this case.** Absent such evidence the Commissioner is confined to the facts set forth in the Claimants’ Notice of Claim which must be construed in a fashion favorable to the Claimants. The Notice of Claims contains no reference to highway defect but rather references the action or inaction of State employees. (see Paragraph 10 hereof)

16. Further, the Claimants have set forth facts and have identified both **negligence and nuisance** as a basis for liability. **Nuisance is not a basis for liability under Connecticut General Statutes §13a-144 and on this basis alone the State’s Motion to Dismiss should have failed** as such an action would not be “otherwise authorized by law” Murphy v. Ives, 151 Conn. 259, 196 A.2d 596 (1963)

17. The Respondent’s Motion to Dismiss which was based upon subject matter jurisdiction could have been filed at any time prior to the Claim Commissioner’s decision on this matter. The Motion to Dismiss was filed and decided before any discovery could take place. As no discovery had taken place, the Motion to Dismiss should have been denied at the time it was filed.

The Claimants seek a full and fair judicial determination of the facts and law applicable to an evaluation of their claims.

CLAIMANTS – DENIS GAUTHIER and
MARY GAUTHIER

BY



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EXHIBIT 1

Basis for Claim:

The State of Connecticut, acting through its servants, agents and/or employees negligently:

1. Maintained and inspected the streetlights on King Street, Bristol, Connecticut including, but not limited to, the lights on CL&P poles 8543 and 8541;
2. Failed to make proper and timely inspections, repairs or replacements of the streetlights on King Street including the subject street lights;
3. Failed to provide, inspect and maintain all poles, sensors, lamps, brackets, luminaries and all other related equipment or streetlights located on King Street including the subject streetlights.

Further, the State of Connecticut, acting through its servants, agents and/or employees created a public nuisance by failing to:

1. Maintained and inspected the streetlights on King Street, Bristol, Connecticut including, but not limited to, the lights on CL&P poles 8543 and 8541;
2. Failed to make proper and timely inspections, repairs or replacements of the streetlights on King Street including the subject street lights;
3. Failed to provide, inspect and maintain all poles, sensors, lamps, brackets, luminaries and all other related equipment or streetlights located on King Street including the subject streetlights.

The actions or inactions of the State of Connecticut, acting through its servants, agents and/or employees resulted in the street lights on CL&P poles 8543 and 8541 not operating on December 9, 2009 resulting in conditions which were a substantial factor in Michael Ferraro's vehicle striking Mr. Gauthier and causing the injuries to Mr. Gauthier as set forth herein.

As a direct result of the above-stated actions or inactions, Denis Gauthier, on December 9, 2009, while crossing King Street (Route 229) was struck by a motor vehicle driven by Michael C. Ferraro) and suffered injuries.