

Re: House Joint Resolution No. 69, LCO No. 2774
Judiciary Committee, Hearing date: March 21, 2011
Appeal from Decision of the Claims Commissioner, File No. 22110
Claimant: James L. Krasowski

**Written testimony of James L. Krasowski,
in opposition to HJR 69 and in support of his Appeal**

To the Honorable Judiciary Committee and the Honorable General Assembly:

I respectfully request that this honorable Committee accept this written statement, as my testimony in opposition to House Joint Resolution 69 and in support of my Appeal from the decision of the Claims Commissioner. On January 28, 2011 a member of your committee staff (Tasha) stated that she would inform my attorney when a public hearing was scheduled on my appeal. I relied upon this promise. I have now learned that the public hearing on the above resolution was scheduled for March 21, without any notification to me or my attorney.

I respectfully submit that the Claims Commissioner erred in his ruling that my claim was not filed within the time required by law. This ruling is contrary to well-established Connecticut law, as will be explained below.

If this precedent is permitted to stand, it will result in the filing of a multitude of premature and unnecessary claims against the State of Connecticut, based on alleged medical errors which can and will be corrected through subsequent medical treatment, because claimants will be forced to file their claims before the consequences of a medical decision can be known. These claims will result in unnecessary legal costs to the Office of the Claims Commissioner, the Office of the Attorney General (which must

investigate and defend each claim), and the claimants who received medical care from any State agency or State employee. These premature and unnecessary claims, while patients are still receiving medical care, will also undermine the physician-patient relationship, prevent physicians and other State employees from remedying the effects of correctable medical errors, and seriously reduce the quality of medical care provided by the State.

This ruling is also inequitable and unfair, in that it treats recipients of State-provided medical care differently from all other medical patients. This ruling requires patients who receive their medical from the State to recognize possible medical errors, and the consequences of those errors, while they are still receiving medical treatment from the physician who committed the act or omission in question, or still receiving treatment at the facility where the questionable act or omission occurred. For valid reasons, explained below, Connecticut law has long established that the time limit for commencing a medical malpractice claim does not begin while the patient is receiving continuing care from the very medical provider who committed the act or omission of alleged malpractice.

I was treated with Klonopin, a powerful medication for the treatment of epilepsy, anxiety and panic attacks, from approximately 2004 through late 2007. The State of Connecticut treated me with Klonopin for more than one year, from May 2006 through late 2007, while I was a patient-inmate at Garner CI. Garner is a hybrid correctional and medical institution, which provides

"care and treatment for adult male offenders with significant mental health issues . . . [t]hrough a collaboration with . . . the University of Connecticut, Correctional Managed Health Care, . . . [using] [i]ndividualized treatment plans. . . . The staff at the facility, both custody and mental health,

operates through an integrated team approach which insures a continuity of custody, care, treatment and control."¹

I received Klonopin under the care and supervision of Dr. Lazgrove, who was acting in the course of his employment by the State and in a State institution. In late 2007 Dr. Lazgrove ordered that my Klonopin treatment be discontinued over a two week period. This is substantially shorter than the accepted time period for removing a patient from Klonopin.² This overly-rapid withdrawal caused a massive epileptic seizure, causing me to fall to the floor and severely injure both my shoulders.

Appropriately, the State continued and continues to provide me with medical treatment, both for my anxiety and panic disorder and for the injuries caused by this seizure and fall, while I remain in State custody. Despite medical treatment, my shoulders remain impaired today.³

My claim was filed with the Office of the Claims Commissioner in January 2010, in reliance upon Connecticut statutes and well-established judicial interpretation of those statutes. As will be explained below, my claim was filed within the time limited by statute, and should be evaluated and decided on its merits.

¹Dept. of Correction website, www.ct.gov/doc/cwp/view.asp?a=1499&q=265410.

²See, e.g., U.S. National Library of Medicine, National Institutes of Health website, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682279.html>. Specific medical evidence concerning this patient will be offered at the hearing or trial of this claim, if this Committee permits this case to proceed to a hearing or trial.

³These injuries are documented in the patient's medical records, which will be introduced at the hearing or trial in this case, if this Committee permits this case to proceed to a hearing or trial.

Connecticut statutes establish two distinct time limits for filing claims against the State of Connecticut. Conn. Gen. Stat. §4-148 (a) provides, in pertinent part:

"[N]o claim shall be presented under this chapter but within **one year** after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury is sustained or discovered or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than **three years** from the date of the act or event complained of." (Emphasis added.)

There is no dispute that my claim was presented less than three years from the date of the act or event complained of. The sole issue considered by the Commissioner was whether my claim was filed within one year after my claim accrued. The Commissioner decided this issue without any evidence, and I respectfully submitted that he decided incorrectly.

The Connecticut Supreme Court construed §4-148 in the context of a medical malpractice claim in the case of *Lagassey v. State*, 268 Conn. 723, 846 A.2d 831 (2004). The Court noted the close similarities between §4-148 and §52-584, which governs personal injury negligence claims, including medical malpractice, against private defendants. The Supreme Court held that the same legal principles govern when the time periods in the two statutes commenced.⁴ The Supreme Court further held that when the time period commenced was a question of fact, so that the motion to dismiss in that case should have been denied. Because the Claims Commissioner granted a motion to dismiss in my case, before **any** evidence could be introduced, the Commissioner did not and could not evaluate the evidence applicable to my case. I submit that the evidence in my case will clearly show that the one year statute of

⁴ The time periods in the two statutes are not equal. Section 52-584 permits an action to be brought within two years of discovery, while §4-148 allows only one year. The decision in *Lagassey* did not displace this distinction, but equates commencement of the one year period in §4-148 with commencement of the two year period in §52-584.

limitations was tolled (commencement of the time period was legally delayed), so that my claim was filed well within the one year statute of limitations.

There are two well-established legal doctrines which will toll, or delay the commencement of, the statute of limitations in medical malpractice cases: The continuing treatment doctrine and the continuing course of conduct doctrine. It is not uncommon for medical malpractice cases to involve or implicate both doctrines. *Grey v. Stamford Health System, Inc.*, 282 Conn. 745, 753 (2007). The application of both doctrines is "conspicuously fact-bound, and although they are analytically separate and distinct, their relevance to any particular set of circumstances...may overlap." *Blanchette v. Barrett*, 229 Conn. 256, 276 (1994).

In my case, both doctrines apply. The continuing treatment doctrine is more easily shown. The elements of the continuing treatment doctrine are set forth in *Grey v. Stamford Health System, Inc.*, 282 Conn. 745 (2007):

"[T]o establish a continuous course of treatment for purposes of tolling the statute of limitations in medical malpractice actions, the plaintiff is required to prove: (1) that he or she had an identified medical condition that required ongoing treatment or monitoring; (2) that the defendant provided ongoing treatment or monitoring of that medical condition after the allegedly negligent conduct, or that the plaintiff reasonably could have anticipated that the defendant would do so; and (3) that the plaintiff brought the action within the appropriate statutory period after the date that treatment terminated. As we previously have recognized, the determination that any of these elements exists is 'conspicuously fact-bound.'" *Id.* at 754-55, citation omitted.

These elements were re-affirmed in *Martinelli v. Fusi*, 290 Conn. 347 (2009).

In my case, the medical evidence will prove (and the State, represented by the Attorney General's Office, is unlikely to dispute) that I had identified medical conditions which required both ongoing treatment and monitoring. Indeed, this is why I was

assigned to Garner CI, and why I was receiving Klonopin. The State continued to provide both ongoing treatment and monitoring of that medical condition after the seizure episode described above, pursuant to the State's legal obligation to provide medical care for inmates. Finally, this claim was filed within one year of such continuing medical treatment and/or monitoring. Indeed, I am still receiving medical treatment provided by the State.

In the context of a motion to dismiss, the State (represented by the Attorney General's Office) had the legal burden of disproving these elements. The State made no attempt to do so.

Although the forgoing is sufficient to show that the motion to dismiss should have been denied, the statute of limitations in my case was also tolled by the continuing course of conduct doctrine. The Connecticut Supreme Court discussed this doctrine in *Sherwood v. Danbury Hosp.*, 252 Conn. 193, 203-04 (2000). In that case, the Court held that "in order to find a continuing course of conduct that may toll the statute of limitations, there must be *evidence of the breach of a duty that remained in existence after commission of the original wrong related to the breach.*" *Id.* at 203 (emphasis added). Later, in *Witt v. St. Vincent's Medical Center*, the Court clarified the test and distilled it down to three prongs. 252 Conn. 363 (2000). After *Witt*, it is clear that a plaintiff seeking to prove that the continuing course of conduct doctrine serves to toll the statute of limitations must prove (1) the defendant committed an initial wrong; (2) the defendant owed a continuing duty to the plaintiff that was related to the original wrong; and (3) the defendant continually breached that ongoing duty. *Id.* at 370. The *Witt* test was re-affirmed in *Martinelli v. Fusi*, 290 Conn. 347 (2009).

In my case, all three prongs of the *Witt* test for continuing course of treatment are satisfied. First, Dr. Lazgrove, violated accepted standards of medical care in discontinuing my medication (Klonopin) too rapidly. Second, it is beyond dispute the State had a continuing legal duty to provide me with medical treatment, so long as I remain incarcerated. This duty is clearly related to the original action, in two ways: The Respondent had a continuing duty to treat my anxiety/panic disorder and other medical conditions which predated the original negligence, and the Respondent also had a continuing duty to treat the injuries caused by the seizure. Third, the Respondent continually breached this ongoing duty, by failing to provide medical care in accordance with accepted standards.

Again, the State (represented by the Attorney General's Office) had the legal burden of disproving these elements for its motion to dismiss. Again, the State made no attempt to do so.

The decision by the Claims Commissioner in my case did not even mention, much less discuss or apply, the foregoing legal doctrines. This decision by the Claims Commissioner, ignoring well-established legal precedents, calls for corrective action by this honorable Committee and the honorable General Assembly, in the interest of justice and (as discussed above) to prevent unnecessary and burdensome claims from being brought against the State in future cases.

These well-established tolling doctrines have not, and will not, expose the State of Connecticut to open-ended liability. As discussed above, "no claim [against the State] shall be presented more than **three years** from the date of the act or event

complained of.” Conn. Gen. Stat. §4-148 (a).⁵ This time limitation is not subject to tolling, and sets an absolute, outer limit upon the time that a claim may be filed. It is undisputed that this three year time limitation was satisfied in my case.

I respectfully ask that this honorable Committee and the honorable General Assembly do one of the following, in the interest of justice:

(1) authorize me to bring my claim in the Superior Court, pursuant to Conn. Gen. Stat. §4-159 (b)(1)(B)(ii); or

(2) remand my claim to the Claims Commissioner, with direction to accept that my case was filed on time, and to proceed in accordance with the usual procedures in such cases, pursuant to Conn. Gen. Stat. §4-159 (b)(4).

In either event, my claim will then be decided on its merits, based upon the medical and other evidence to be presented and in accordance with law.

Respectfully submitted,

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⁵Conn. Gen. Stat. §52-584 imposes a similar, three-year outside limit for personal injury and medical malpractice claims against private defendants.