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Connecticut Society of Eye Physicians
Connecticut ENT Society
Connecticut Urology Society
The Connecticut Dermatology and Dermatologic Surgery Society

Before the Judiciary Committee
On April 1, 2013

H.B. No. 6687 AN ACT CONCERNING CERTIFICATES OF MERIT

and

S.B. No. 1154 AN ACT CONCERNING THE ACCIDENTAL FAILURE OF SUIT STATUTE

Good Morning Senator Coleman, Representative Fox and distinguished members of the Judiciary Committee. My name is David Emmel, M.D. and I am a practicing board certified ophthalmologist in Wethersfield Connecticut. I am the immediate past president and a co-chair of the legislative committee of the Connecticut Society of Eye Physicians. I am joined today by my colleague, Andrew Packer, M.D., who is a board certified ophthalmologist and retina specialist who practices in Harford and some of the surrounding communities. Dr. Packer is a past president of the Connecticut Society of Eye Physicians and a former councilor of the American Academy of Ophthalmology. We are here today on behalf of over 1000 physicians in Ophthalmology, Ear Nose and Throat, Dermatology, and Urology and all of our patients presenting testimony opposing HB 6687 An Act Concerning Certificates of Merit and SB 1154 An Act Concerning The Accidental Failure of Suit Statute.

I am before you once again to oppose changes to Public Act 05-275, an act that passed in 2005 that laid the foundation for tort reform in the hope of retaining practicing physicians in the state of Connecticut by stabilizing rampant malpractice inflation. This Act wisely set a standard for defining the qualifications necessary for the writer of a Certificate of Merit, the filter designed to separate non-meritorious lawsuits from those with merit, retarding the forward progress of cases with no prospects for success in court. Today that same act is under attack by two bills that for all intents and purposes are one and the same; their goal is to eliminate Public Act 05-275 of all effectiveness, and that is why we are combining our testimony on these two bills.

HB 6687, An Act Concerning Certificates of Merit is the same bill that suffered unprecedented defeat last year in the House and returns this year unchanged by the passage of time. It took two entire years of the testimony, debate and negotiations for the Connecticut Trial Attorneys to identify a single case that demonstrated the alleged failure of the Certificate of Merit statutes to achieve their intended purpose. That case is the Bennett case, a case that the CTLA last year assured you would never see a courthouse because it would never pass the test of the "Accidental Failure of Suit" statute. But I am here to tell you today that the Bennett case is scheduled for trial. It is particularly telling and ironic that Mr. Bennett's attorney has chosen not to retain the original certificate writer. When the Bennett case goes to trial in July it will be with a certificate writer who practices in the same specialty as the defendant, and who will therefore provide more compelling evidence, because the jury will understand that the expert truly knows what the standard of care is for that particular specialty. In point of fact, Public Act 05-275 has compelled the attorney to hire a witness capable of providing the best possible case for negligence on the part of his treating physician.

The CTLA would have you believe that the Certificate of Merit is a deeply flawed and a prohibitive barrier, but in fact it is a simple and workable system that is in the best interests of both defendants and plaintiffs. It is a

fact that under the current system, nearly 90% of the lawsuits that make it past the Certificate of Merit and into court are won by the defense. This is compelling evidence that the Certificate of Merit barrier is not too stringent.

The current system owes its simplicity to a significant compromise made by physicians in 2005, the expunging of the name of the writer of the certificate. That means that the only acceptable challenge to a Certificate of Merit is whether or not the writer practices in the same specialty and has the same board certification as the defendant. The decision process is straightforward and does not require unique expertise, an in-depth study, consultation or a hearing. The changes requested by the Connecticut Trial Attorneys will create circumstances where the defense attorney may legitimately need a hearing to sort out the qualifications of the certificate writer. The Connecticut Trial Attorneys minimize this issue, imputing that an expert qualified to testify during the trial is equivalent to the expert who writes the certificate of merit, but this is simply not true. The expert who appears during the trial is subject to cross examination with ample opportunity to expose expert witnesses who are not qualified to judge the standard of care, whereas the expert who writes the certificate has had his or her name expunged and is not available for examination by the defense.

Public Act 05-275 was hoped to be a foundation for tort reform. It is hardly the full expression of what physicians wanted then or continue to need now. The Affordable Care Act is intended to re-invent and revitalize American healthcare to restore its utility, cost effectiveness and accessibility. This pivotal act and other Federal laws will dramatically alter how physicians interact with patients, insurers, and other health care providers & institutions. Physicians have already experienced loss of freedom and increased risk as mandates and requirements with financial penalties continue to multiply. Through all this change the trial bar lawyers have kept all of their prerogatives and now come to you asking for more. Unfortunately, the constant threat of lawsuits is already a substantial drain on the health care system. The New York Times reported a recent study finding that "on average doctors spend more than four years of their career – more time than they spend in medical school – working through one or more lawsuits. Certain specialists were more vulnerable than others. Neurosurgeons, for example, averaged well over ten years, more than a quarter of their professional lives embroiled in lawsuits."

It is apparent that increased numbers of lawsuits with little chance of success will be a significant drain on the healthcare system at a time when more patients will need to be served, but there is a another compelling reason to reject this measure. Over-burdening the courts will only serve to slow the resolution of cases with merit, increasing legal costs for everyone, and forcing those with legitimate claims to wait longer for restitution.

Meaningful tort reform is in the best interests of doctors and patients, and we urge you to oppose HB 6687, An Act Concerning Certificates of Merit, and any other legislation that attempts to weaken the tort reform legislation of 2005.

S.B. No. 1154 AN ACT CONCERNING THE ACCIDENTAL FAILURE OF SUIT STATUTE

By adding language to section 1(a) of section 52-592 that specifically allows for re-filing of a lawsuit under the accidental failure of suit statute if "or because the action has been dismissed pursuant to subsection (c) of section 52-190a" the attorneys of the Connecticut Trial Bar Association seek "to amend the accidental failure of lawsuit statute to expressly include any medical negligence claim that was dismissed because the plaintiff failed to obtain the written opinion of a similar health care provider". The effect of this legislation would be to reverse the decision of the Supreme Court in Bennett vs. New Milford Hospital that established that the only reasonable standard for the writer of the certificate of merit is a health care provider from the same

specialty as the defendant. Senate bill 1154 effectively eliminates that need, since the plaintiff would have ready recourse to the accidental failure of suit statute, and no need to be fastidious in the effort to obtain an appropriate writer of the certificate of merit. It would also reverse the Supreme Court decision in Plante vs. Charlotte Hungerford Hospital establishing that dismissals based on failures of the certificate of merit may be re-filed after the statute of limitations has expired utilizing the accidental failure of suit statute if, and "only if the failure was caused by a simple mistake or omission, rather than egregious conduct or gross negligence attributable to the plaintiff or his attorney".

No one disputes that these changes would make it easier to for lawsuits to proceed; the whole point of the Medical Malpractice Act of 2005 was to provide relief to the courts and physicians from the very same mechanisms embodied in this bill that were responsible for escalating medical malpractice awards at that time, driving malpractice insurance premiums up; and doctors out of practice, and filling court dockets with cases of dubious merit. Public Act 05-275 has had a salutary effect on the malpractice situation in Connecticut, adding stability to the process. Public Act 05-275 also facilitated the process of initiating a malpractice suit by making the certificate of merit process precise, well defined, and not subject to challenge except under the very limited circumstances of the misuse of a specialist. Actual practice has shown that problems with the certificate of merit are rarely invoked in the attempt to halt a lawsuit. Bennett vs. New Milford Hospital proves this point. The plaintiff in that case has succeeded in applying the accidental failure of suit statute and will have his day on court.

I am certain that no one would disagree that the actions of plaintiff's attorney in Plante vs. Charlotte Hungerford were perfect examples of egregious conduct and gross negligence since the attorney did not make even a superficial effort to obtain a qualified certificate writer, let alone one who met the definition of the Connecticut statutes. Senate bill 1154 would have the effect of legitimizing that sort of behavior since all failures of the certificate of merit would be eligible for re-filing. As a physician who bears the responsibility for the consequences of hundreds of critical decisions daily, all of which are made under the duress of time, I find it shocking and disturbing that anyone would consider changing the statutes to permit gross negligence and egregious conduct on the part of an attorney to go unpunished and unnoticed.

Clogging the legal system with "do over" cases will only result in delays for those with legitimate claims who would be forced to wait longer for redress under the over-burdened system. If the General Assembly of the state of Connecticut wishes to improve the accidental failure of suit statute, they should leave the existing language as it is and add a provision that compels the court or the plaintiff's attorney to notify their clients of their right to sue attorneys who seek to re-file using the accidental failure of suit statute as a cover for egregious conduct or gross negligence.

In closing we urge you to look closely at these two bills to see them for what they are, an unprecedented attempt to bestow unique privileges upon plaintiff's attorneys at the expense of the function, cost and integrity of the entire health care system. It is the wrong time – and the wrong reason – to further burden patients and providers.

Thank you for allowing us this time to present this testimony.

Respectfully,

David K. Emmel, M.D.

Andrew J. Packer, M.D.