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March 28, 2013

VIA COURIER
Senator Eric D. Coleman, Co-Chair
Representative Gerald M. Fox, Co-Chair
Joint Committee on Judiciary
Legislative Office Building, Room 2500
Hartford, CT 06106

Re: Raised Bill No. 6687, An Act Concerning Certificates of Merit
Raised Bill No. 1154, An Act Concerning The Accidental Failure of Suit Statute

Dear Senator Coleman, Representative Fox and Members of the Committee:

Enclosed for the consideration of the Committee, is written testimony prepared on behalf of the Stamford Hospital, regarding Raised Bill No. 6687, An Act Concerning Certificates of Merit and Raised Bill No. 1154, An Act Concerning The Accidental Failure of Suit Statute.

Thank you for your time and consideration.

Respectfully Submitted,

Eric J. Stockman

Enclosures

TESTIMONY OF THE STAMFORD HOSPITAL

SUBMITTED TO THE JUDICIARY COMMITTEE
Monday, April 1, 2013

RAISED BILL No. 6687, An Act Concerning Certificates of Merit
RAISED BILL No. 1154, An Act Concerning The Accidental Failure Of Suit Statute

The Stamford Hospital ("TSH") hereby submits testimony concerning **Raised Bill No. 6687, An Act Concerning Certificates of Merit** (hereinafter "Raised Bill 6687") and **Raised Bill No. 1154 An Act Concerning Accidental Failure Of Suit Statute** (hereinafter "Raised Bill 1154"). For the following reasons, TSH opposes the Raised Bills.

Eight years ago Connecticut law makers decided that they needed to address the widespread withdrawal of physicians -- and the insurance companies that insure them -- from the state. Medical providers and insurance companies alike were being driven from the state by high insurance premiums, fueled by rising litigation costs. See Judiciary Testimony April 8, 2005 (005406). Many indicated that if significant tort reform was not implemented, they had no interest in continuing to do business here. See Judiciary Testimony April 8, 2005 (005396). It was deemed by many to be a health care crisis.

As a result of this and other concerns, Public Act 05-275, "An Act Concerning Medical Malpractice", was passed. PA 05-275 was the subject of lengthy debate and numerous public hearings. Physicians, insurance companies, and both plaintiff and defense bars voiced their opinions. PA 05-275 addressed those concerns in comprehensive fashion. It required that: 1) an attorney filing suit attach to the complaint a written opinion of an expert in the field of medicine; 2) the expert rendering the opinion be a "similar healthcare provider" to the defendant(s); and, 3) he/she provide a "detailed basis for the formation" of the opinion that there "appeared to be evidence of medical negligence." It contained a dismissal provision if a plaintiff failed to attach a written report that met the terms of the statute to the initial complaint. PA 05-275 also addressed the concerns of the plaintiff's bar, in that it permitted: 1) the written opinion to be submitted anonymously and without any opinion regarding causation; and 2) the time frame for performing such investigation to be extended for up to 90 days after the Statute of Limitations had expired.

One of the issues extensively discussed at the hearing before the Judiciary Committee was the fact that at that time the statutory scheme did not adequately ensure that an attorney filing a medical malpractice action had a reasonable basis to bring the claim. It was noted that the bill considered at that time and ultimately passed by the legislature was necessary to "help eliminate some of the more questionable and meritless claims." Senator Kissel remarked that

the purpose of attaching a physician's report to the Complaint was "so that . . . defense counsel can review the nuts and bolts of what's in there [the claim] and make a reasonable determination. . . . I think that's a great reform, as opposed to the current attorney just sort of signing off in good faith."

In the experience of TSH, the key component of PA 05-275 is the pre-litigation inquiry. Less than a handful of cases filed against TSH in the last 8 years have been dismissed for insufficiency of the written report. But statewide, PA 05-275 has resulted in a 10%-20% reduction in the overall number of medical malpractice lawsuits filed in the last 8 years. The import is clear: when plaintiff's lawyers follow the terms of the statute, their lawsuits are overwhelmingly likely to remain in the system until they are addressed on their merits. But importantly, requiring a plaintiff to seek out experts who are objectively familiar with the standards that govern the care rendered by a given defendant probably reduces the number of frivolous suits that find their way into the courthouse without such a requirement. If experts in the same field as a defendant do not think there is a violation of the standard of care, then a plaintiff cannot obtain a written opinion letter, a suit cannot be filed, and the costs of a vexatious claim are avoided. That is, simply put, the way it should work, and the way it does work.

With the Raised Bills, the plaintiff's bar now seeks to undo entirely the protections afforded by PA 05-275. If passed, they would eviscerate the comprehensive scheme established by PA 05-275 (as codified under C.G.S. Section 52-184c and C.G.S. Section 52-190a). Raised Bill 6687 changes the requirement that a "similar healthcare provider" author the pre-litigation expert opinion to a watered down requirement that the author be a "qualified" health care provider; and allows an action that was not properly filed under the statute to be remedied within 60 days of dismissal of the action. *In combination with Raised Bill 1154, which codifies dismissal under 52-190a as subject to the savings provisions of the Accidental Failure of Suit statute, there will be virtually no chance that a case will ever be subject to a final dismissal for failure to perform a pre-suit good faith inquiry.* If these changes are enacted, they would effectively eliminate the protections afforded to healthcare providers under Section 52-190a while leaving intact the corresponding concessions given to the plaintiff's bar. It returns medical malpractice litigation to a time when the subjective opinion of a lawyer was all that was necessary to file a lawsuit against a physician or hospital. Indeed, passage of the Raised Bills will have the effect of extending the Statute of Limitations on medical malpractice actions by months if not years, adding all the savings provisions of both Raised Bills to the current Statute (plus the 90 day extension for ostensibly performing the good faith pre-suit inquiry).

Importantly, Section 52-190(a) has already been narrowed by a number of recent judicial decisions. For example, the Connecticut Supreme Court has already greatly truncated the time frame in which a defendant can challenge the sufficiency of the written opinion, recently holding that a Motion to Dismiss under the statute must be filed within 30 days of the defendant's official appearance in the action, or the ability to challenge the sufficiency of the written opinion is waived. See Morgan v. Hartford Hospital, 301 Conn. 388 (2011). The Court has also largely taken the teeth out of the dismissal provision of the statute, holding

that a suit dismissed under the statute may qualify for re-filing under Connecticut's Accidental Failure of Suit Statute, thereby giving the plaintiff a proverbial second bite at the apple barring gross negligence or other egregious conduct. See Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011).

The proposed changes nullify the protections of the current statute. The most alarming is that the Raised Bills take away any meaningful enforcement mechanism for the pre-litigation investigation; indeed, it essentially eliminates the need for a pre-litigation investigation altogether, was the *raison d'etre* of PA 05-275. Instead, it allows a plaintiff 60 days from dismissal to remedy any failure to attach the written opinion of the "qualified" expert. As drafted, Raised Bill 6687 can be interpreted to allow a plaintiff to conduct the pre-litigation investigation after the suit is commenced. (Even the statutory regime in place prior to 2005 required a good faith inquiry *before* the suit was filed.)

Raised Bill 6687 also eliminates the requirement under Section 52-190a(a)(1) that the author of the opinion be a "similar healthcare provider", which under the current state of the law means that the author must actively practice in or, in the case of a board certified defendant, be board certified in the same specialty as the defendant. Instead of this objective requirement, Raised Bill 6687 allows the opinion of a "qualified" healthcare provider (as defined under C.G.S. Section 52-584c, which essentially governs the admissibility of testimony at trial). See SB 243, Section (a)(4)(d). The result is objectionable for three reasons: First, the inquiry ceases to be objective, in that under the current statutory scheme defendant medical providers – and reviewing courts -- can determine with relative certainty that a "similar healthcare provider" is in fact a similar provider who has knowledge of and experience in the standards of care that govern the conduct of the defendant. Instead, the Raised Bill encourages plaintiff's attorneys to retain reviewing experts who may not be board certified or objectively qualified in a defendant's field of expertise. In other words, if the defendant is a neurosurgeon, plaintiff's counsel is no longer required to obtain the opinion of a neurosurgeon, but rather can obtain an anonymous opinion from any medical provider – a neurologist, internist, emergency room physician – if that physician subjectively asserts that he/she is familiar with the standards of care that govern the care at issue. The Raised Bill has the effect of allowing such an "expert" to issue a written opinion even if they may or may not know or practice the standards that actually govern the care and treatment at issue.

Second, Raised Bill 6687 impairs the ability of defendants to challenge the sufficiency of the written opinion. Under the Raised Bill, a defendant trying to mount such a challenge would likely need a full blown hearing -- akin to the process undertaken immediately prior to or during a trial, where the trial court conducts a hearing to determine whether a disclosed expert is sufficiently qualified to render opinions before the jury. This type of protracted process is costly and would likely sap judicial resources, which in Connecticut are already stretched perilously thin.

Third, the requirement of anonymity under Section 52-190a(a)(2) would of necessity need to be abridged if the qualifications of the "qualified" provider are to be challenged. A defendant cannot mount any meaningful challenge to the qualifications of the purported

expert, especially in a hearing on the motion to dismiss, if it does not have access to the purported expert's identity. If Raised Bill 6687 is passed without modification in this regard, it would produce incongruous results.

For the foregoing reasons, The Stamford Hospital opposes the Raised Bills, and urges the Committee to reject this latest attempt – the third in the last three years --- to eliminate the current protections afforded to medical providers under C.G.S. Section 52-190a. As proposed, the Raised Bills dismantle all the protections that were won in 2005, and returns Connecticut to an environment where frivolous lawsuits against medical providers are once again protected if not condoned.

Thank you for your consideration of our position.

The Stamford Hospital

By: _____

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