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SUPREME COURT
of the
State of Connecticut

SC 20723

STATE OF CONNECTICUT

v.

MATTHEW AVOLETTA, ET AL.

Brief of the Plaintiff-Appellee
State of Connecticut
With attached appendix

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Statement of issues

A. Did the Appellate Court correctly determine that No. 17-4 of the 2017 Special Acts is an unconstitutional public emolument.

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I. Introduction

This appeal involves the legislature's latest effort to authorize an untimely claim against the State that the Superior and Appellate Courts repeatedly have held is both jurisdictionally barred by General Statutes § 4-148(a) and constitutionally barred by the public emolument clause of the Connecticut constitution, article first, § 1. This Court's longstanding public emoluments jurisprudence compelled the lower courts' decisions, and this Court should affirm them.

Section 4-148(a) establishes a one-year statute of limitations for all claims against the State brought to the Claims Commissioner. That limitations period is clear and categorical, and it applies to every claim against the State without exception. There is no longer any dispute that Defendants violated § 4-148(a) when they filed the claim at issue in 2007, and the Claims Commissioner properly dismissed the claim on that basis.

The sole question before this Court is whether the legislature constitutionally excused Defendants' violation of § 4-148(a) through Special Act 17-4 ("the Act"), which purports to authorize Defendants—and only these Defendants—to present their untimely claim to the Claims Commissioner. In the circumstances of this case, it did not. This Court repeatedly has held that the public emoluments clause precludes the legislature from authorizing untimely claims against the State without a legitimate public purpose. Those same cases make clear that the only legitimate public purpose in this context is if the State caused the untimely filing. In that limited circumstance, a legitimate public purpose exists because the benefit conferred by the special act remedies "an injustice done to that individual for which the state itself bears responsibility;" namely, the State's role in causing the default. *Kinney v. State*, 285 Conn. 700, 711 (2008).

Absent a showing that the State caused the default, however, a special act permitting an untimely claim against the State violates the public emoluments clause because it provides an exclusive private benefit to a single plaintiff that no other similarly situated litigants enjoy. That is true even if resolving the claim on its merits could lead to "substantial justice" or would "send[] a message" to state employees and thereby encourage accountable state government. *Id.* at 711-13; *Chotkowski v. State*, 213 Conn. 13, 17-19 (1989) ("*Chotkowski I*"). Indeed, resolution of all claims alleging misconduct by state actors would promise those same benefits, and yet the Act authorizes no other litigants to present their claims beyond the limitations period.

Defendants do not and cannot seriously argue that the State caused their default in 2007. The lower courts have therefore correctly held—on no less than four separate occasions—that the legislature's various efforts to authorize Defendants' untimely claim are unconstitutional, including most recently through the Act. This Court should follow its established precedents that compelled that conclusion and affirm the judgment.

II. Counterstatement of Facts

This litigation began when Defendants filed a claim on May 2, 2007 ("the 2007 claim"), alleging that the State is liable for injuries caused by allegedly unsafe conditions in the Torrington schools. The Claims Commissioner dismissed the 2007 claim because Defendants filed it outside the one-year statute of limitations. Defendants appealed to the legislature, which adopted Joint Resolution 11-34 ("the Joint Resolution") vacating the Commissioner's decision and purportedly authorizing Defendants to bring their untimely claim directly in Superior Court. The trial court dismissed that case on sovereign immunity grounds because the Joint Resolution was an unconstitutional public emolument that could not validly cure the

jurisdictional defect or waive sovereign immunity. *See generally* *Avoletta v. State*, No. HHDCV125036221, 2013 WL 2350751 at *6-9 (May 6, 2013) ("*Avoletta I*").

The Appellate Court affirmed. *Avoletta v. State*, 152 Conn. App. 177, 188-95 (2014) ("*Avoletta II*"). Applying established public emolument jurisprudence, the Appellate Court reiterated the principle that legislative efforts to permit untimely claims against the State survive scrutiny only if they "serve[] a legitimate public purpose . . . ." *Id.* at 194 (emphasis omitted). The Appellate Court further noted the established rule that "legislation seeking to remedy a procedural default for which the state is not responsible does not serve a public purpose and, accordingly, runs afoul of [the public emolument clause] . . . ." *Id.* at 194-95. Defendants did not argue in *Avoletta I* or *II* that the State caused them to violate the statute of limitations, because it did not do so. The Appellate Court therefore rightly concluded that the Joint Resolution was unconstitutional because it did not serve a legitimate public purpose. *Id.* This Court denied certification to appeal. *Avoletta v. State*, 314 Conn. 944 (2014) ("*Avoletta III*").

Despite their failure to identify a legitimate public purpose for letting their untimely 2007 claim proceed, and despite the trial and Appellate courts' conclusion that no such purpose exists, Defendants proceeded to file a second claim against the State on September 9, 2013 ("the 2013 claim"). (Pl. Exh. B). In it, Defendants sought damages for two separate claims: (1) they re-pled their previously dismissed 2007 claim based on "the original negligence of the State" relating to the alleged conditions in the Torrington schools; and (2) they pled a new "legislative negligence" claim against the legislature itself based on its failure to identify a public purpose in the Joint Resolution. The State moved to dismiss both aspects of the 2013 claim on a variety of grounds, including collateral estoppel, res judicata and

legislative immunity. (Pl. Exh. C). The Claims Commissioner agreed and dismissed the 2013 claim for reasons set forth in the State's motion. (Pl. Exh. D).

Defendants then sought the legislature's assistance again and submitted testimony in support of that effort. Although *Avoletta I* and *II* had put Defendants on clear notice about what a legitimate public purpose is in this context, nowhere in their testimony to the legislature did Defendants argue that the State prevented them from complying with the statute of limitations when filing the 2007 claim. (*See, e.g.,* Def. App. 72-87; Pl. Exh. E).

The legislature then passed the Act, which focuses exclusively on Defendants' original claim "initially filed . . . on May 2, 2007," and which again purports to authorize Defendants to pursue that claim despite Defendants' "failure to file a proper notice of claim . . . within the time limitations specified by [§ 4-148(a)] . . . ."[1] (CA 28-29).

Like the Joint Resolution before it, the Act did not articulate a legitimate public purpose for permitting Defendants' untimely claim to proceed. Specifically, the legislature did not find that the State prevented Defendants from complying with the statute of limitations.

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[1] The Act does not mention or purport to authorize Defendants' "legislative negligence" claim. Defendants nevertheless argued for the first time before the Appellate Court that the legislature *sub silentio* authorized that claim simply by reviewing the Claims Commissioner's dismissal of the 2013 claim under General Statutes §§ 4-158, 4-159 and 4-160. The Appellate Court properly rejected that baseless argument and this Court denied certification to appeal on it. *State v. Avoletta*, 212 Conn. App. 309, 331-35 (2022); *State v. Avoletta*, 343 Conn. 931 (2022). Any questions related to Defendants' legislative negligence claim are therefore not properly before the Court in this appeal.

The Act's sole reference to a public purpose is instead the conclusory statement that "there is a public purpose served by encouraging accountable state government through the full adjudication of cases involving persons who claim to have been injured by the conduct of state actors." (CA 28). That is not a legitimate public purpose in this context for all of the reasons discussed below. *See infra* at 14-22.

Despite that recurring constitutional deficiency, the Claims Commissioner responded to the Act by issuing a scheduling order requiring the State to litigate Defendants' untimely claim. Because the Claims Commissioner cannot assess the constitutionality of state statutes, the State brought this action seeking a declaratory judgment that the Act, like the Joint Resolution before it, is an unconstitutional public emolument. Defendants filed an Answer that included counterclaims, which the trial court dismissed on sovereign immunity grounds. *State v. Avoletta*, No. HHDCV176082066S, 2020 Conn. Super. LEXIS 108 (Super. Ct. Jan. 14, 2020) ("*Avoletta IV*") (CA 54-62).[2]

The trial court also granted the State's motion for summary judgment on its declaratory judgment claim. *State v. Avoletta*, No. HHDCV176082066S, 2020 Conn. Super. LEXIS 107 (Super. Ct. Jan. 14, 2020) ("*Avoletta V*") (CA 31-53). The trial court held that Defendants are collaterally estopped from challenging the timeliness of their 2007 claim and that the Act's attempted authorization of that claim is an unconstitutional public emolument. (CA 42-49). The trial court rejected Defendants' assertion that "encouraging accountable

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[2] The Appellate Court affirmed the dismissal of Defendants' counterclaims and this Court denied certification to appeal on that issue. *State v. Avoletta*, 212 Conn. App. 309, 336-39 (2022); *State v. Avoletta*, 343 Conn. 931 (2022).

state government" is a legitimate public purpose because the Act "does not permit any litigants other than the defendants to seek relief for injuries allegedly caused by state actors outside of the limitations period," and the legislature has therefore "granted the defendants alone a personal right not generally available to others similarly situated." (*Id.* at 43). The trial court also rejected Defendants' belated argument, raised for the first time below after years of litigation, that the Attorney General somehow prevented Defendants from complying with the statute of limitations by asking the State Department of Education ("SDE") to investigate and remediate the alleged conditions in the Torrington schools. (*Id.* at 45-49).

Defendants appealed to the Appellate Court, which affirmed again. *State v. Avoletta*, 212 Conn. App. 309 (2022) ("*Avoletta VI*"). The Appellate Court noted that Defendants conceded on appeal that their claim was untimely, and that the question was whether the legislature identified a legitimate public purpose for authorizing it. *Id.* at 324-25 and n.10. The Appellate Court again applied this Court's established precedents and held that the legislature's "mere declaration" that the Act serves a public purpose in "encouraging accountable state government" does not answer the question because "[t]he legislature cannot by mere fiat or finding, make public a truly private purpose." *Id.* at 325-26, quoting *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 259-60 (2009); *Kinney*, 285 Conn. at 712. As required by *Kelly* and *Kinney*, therefore, the Appellate Court conducted its own inquiry and held that the Act does not serve a legitimate public purpose because it authorizes only these Defendants to bring their untimely claim, and does not extend that benefit to other similarly situated litigants with untimely claims the resolution of which also would encourage accountable state government. *Id.* at 326-27. And because the State did not cause

Defendants' untimely filing, the Appellate Court held that the limited exception for "legislation seeking to remedy a procedural default for which the state is . . . responsible" does not apply. *Id.* at 328 and n.12.

This certified appeal followed.

III. Argument

A. Standard of Review

This Court exercises *de novo* review. *See Barton v. City of Norwalk*, 131 Conn. App. 719, 723 (2011).

B. The Act is an Unconstitutional Public Emolument

Section 4-148(a) unambiguously provides that "no claim shall be presented [to the Claims Commissioner] but within one year after it accrues." That clear and categorical rule deprives the Claims Commissioner of jurisdiction over late-filed claims. The only way a litigant can overcome this jurisdictional bar is to seek relief under General Statutes § 4-148(b), pursuant to which the legislature can authorize an untimely claim by passing a special act that includes "an express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose."

But compliance with the procedures in § 4-148(b) is not enough. This Court repeatedly has held that legislative efforts to let untimely claims proceed under § 4-148(b) also must comply with the public emoluments clause of the Connecticut constitution, article first, § 1. For the reasons discussed below, the Act does not satisfy that constitutional requirement because the State did not cause Defendants' default in 2007. There is therefore no legitimate public purpose for the legislature to excuse these Defendants' default while withholding that benefit from other similarly situated litigants. Its decision to do so provides a private benefit to these Defendants and nobody else, and that is a quintessential public emolument.

1. No matter how well intentioned they may be, Special Acts seeking to excuse violations of § 4-148(a) survive scrutiny under the public emoluments clause only if the State caused the default

"No enactment creating a preference can withstand constitutional attack if the sole objective of the General Assembly is to grant personal gain or advantage to an individual." *Kelly*, 290 Conn. at 260. Such laws improperly "grant[] to the plaintiff alone a personal right not generally available to others similarly situated," and there is "no basis" for sustaining the validity of laws that "creat[e] a privilege for a particular individual" to the exclusion of all others. *Id.* Such laws may be sustained only if they advance a legitimate public purpose. *Merly v. State*, 211 Conn. 199, 212-13 (1989).

This Court and the Appellate Court repeatedly have applied this principle to strike down legislation authorizing untimely claims against the State, whether by joint resolution or special act under § 4-148(b). *See, e.g., Kelly*, 290 Conn. at 256-260; *Kinney*, 285 Conn. at 709-16; *Chotkowski I*, 213 Conn. at 15-19; *Merly*, 211 Conn. at 212-15; *Avoletta II*, 152 Conn. App. at 192-95; *Morneau v. State*, 150 Conn. App. 237, 254-62 (2014). In doing so, this Court uniformly has held that "[o]ur state constitutional ban on awarding exclusive public emoluments . . . insists that . . . [§ 4-148(a)] must be applied uniformly to all claimants," and that the legislature may not pick and choose which litigants have to comply with that statute. *Chotkowski I*, 213 Conn. at 18-19 (quotation marks omitted). Where a special act allows a person to bring a suit that is barred by § 4-148(a), therefore, this Court has "ordinarily been unable to discern any public purpose sufficient to sustain the enactment." *Kinney*, 285 Conn. at 711, 713 (collecting cases).

More specifically, this Court repeatedly has held that "legislation seeking to remedy a [violation of § 4-148(a)] ***for which the state is not responsible*** does not serve a public purpose and, accordingly, runs afoul of article first, § 1, of the state constitution." *Kelly*, 290 Conn. at 258 (emphasis in original); *see Kinney*, 285 Conn. at 711, 715-16 and n.11 (collecting cases). In other words, the only circumstance in which the legislature constitutionally can authorize an untimely claim against the State is if the plaintiff demonstrates that the State caused the default; for example, when a state official misleads the plaintiff about the deadlines and procedures for filing a claim, or erroneously prepares and files the notice of claim on behalf of the claimant. *See Chotkowski v. State*, 240 Conn. 246, 261-62 (1997) ("*Chotkowski II*"), citing *Sanger v. Bridgeport*, 124 Conn. 183 (1938). In that limited circumstance, "a special act passed under § 4-148(b) will undoubtedly confer a direct benefit upon a particular claimant," but a legitimate public purpose exists because that particular benefit (allowing the untimely claim to proceed) remedies "an injustice done to that individual for which the state itself bears responsibility" (the State's responsibility in causing the default). *Kinney*, 285 Conn. at 711.

The Court has made clear that this is a narrow exception that is "restricted" to cases "wherein the passage of a special act is based upon the state's recognition of some role played by a government official in causing, or contributing to, the default" itself. *Id.* at 714-15. It is therefore irrelevant that the State allegedly caused the underlying injury upon which the claim is based. It is similarly irrelevant that "substantial justice could be realized" by resolving the time-barred claims on its merits. *Chotkowski I*, 213 Conn. at 17–19. Indeed, "[i]f the limitation of § 4-148(a) . . . could be set aside for the benefit of a particular person simply because the legislature viewed his claim as

meritorious, it would be difficult to justify enforcing the limitation to bar ***any*** claim against the state from being resolved solely on its merits." *Chotkowski I*, 213 Conn. at 18-19 (emphasis in original).

Simply put, no matter how "well intentioned" it may be, a special act that "benefits no member of the public other than the plaintiff" and "remedies a procedural default . . . for which the state itself bore no responsibility" is unconstitutional. *Kelly*, 290 Conn. at 257, 258; *Kinney*, 285 Conn. at 708-09.

2. The Act is an unconstitutional public emolument because there is no legitimate public purpose for excusing Defendants' default

Defendants no longer dispute that their 2007 claim was untimely, and the Act can therefore survive constitutional scrutiny only if the State caused Defendants' default. The State did not do so, and so the Act unconstitutional as a matter of law. The Court should reject Defendants' baseless arguments to the contrary.

a. The State did not cause Defendants' untimely filing

Although it is the sole basis upon which the Act theoretically could be sustained, Defendants' brief offers only a single conclusory and passing suggestion that the State caused their default. *See* Def. Br. at 43. The Court should not consider this abandoned and inadequately briefed argument, but if the Court chooses to consider the argument the Court should reject it on the merits.

i. Defendants have both abandoned and inadequately briefed any argument that the State caused their default

At various stages of this case, Defendants have belatedly advanced two theories for how the State purportedly caused their untimely filing in 2007: (1) the Attorney General somehow prevented Defendants from timely filing their claim by communicating to Defendants that the SDE had a duty to investigate and remedy any problems in the Torrington schools; and (2) the legislature somehow caused the default four years after the fact by failing to articulate a public purpose in the 2011 Joint Resolution. These arguments are abandoned and inadequately briefed on appeal, and the Court should not consider them.

First, Defendants have abandoned any argument that the Attorney General caused the default. Defendants first made that argument in the trial court below after years of litigation in other forums, and the trial court thoroughly addressed and rejected the argument because, among other things, "the Attorney General's statements . . . do not justify the defendants' decision to wait years to file a claim" that they clearly were aware of and could have pursued at any time. (CA 45-49). Defendants deliberately chose not to press this argument on appeal to the Appellate Court, and the Appellate Court therefore rightly concluded that Defendants had "abandoned" it. *Avoletta VI*, 212 Conn. App. at 328 n.12. This Court expressly has held that "a claim that has been abandoned during the initial appeal to the Appellate Court cannot subsequently be resurrected by the taking of a certified appeal to this court." *Grimm v. Grimm*, 276 Conn. 377, 393 (2005). That alone precludes consideration of this argument.

Second, to the extent Defendants seek to press either theory of causation before this Court, their arguments are inadequately briefed. The sole reference in Defendants' brief to any State role in causing the 2007 default is their conclusory, unsupported and unexplained assertion that "[t]he record and history show that the General Assembly clearly recognized at least 'some role' played by one or more government officials in causing, or contributing to, the default . . . ." Def. Br. at 43. Defendants make no effort to identify what parts of the "record and history" support that conclusion, what "role" the State purportedly played or which state actors played it, how the unidentified state actors supposedly "caused[ed]" or "contribut[ed] to" the default itself (as opposed to the underlying injury for which Defendants seek relief), or where and when the legislature "recognized" this purported role played by the State.[3] Nor do Defendants address or refute the Appellate Court's rejection of their second theory of State culpability based on the legislature's failure to identify a public purpose in the 2011 Joint Resolution. *See Avoletta VI*, 212 Conn. App. at 328-29.

Adequately briefing an argument requires far more: actual legal analysis, identification of facts, and citations to the record and relevant legal authorities. *Burton v. Dep't of Envtl. Prot.*, 337 Conn. 781, 801-06 (2021). Defendants provide none of it, and so the Court should not consider their arguments.

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[3] Defendants instead focus on the State's alleged role in causing the "injustice of failing to provide a safe and healthy school setting . . . ." Def. Br. at 43-44. That confuses the State's alleged role in causing the underlying injury that is the basis for the claim (which is not relevant) with the State's alleged role in causing the default itself (which is relevant but which Defendants nowhere discuss).

ii. Neither the Attorney General nor the legislature caused Defendants' default

To the extent the Court is inclined to consider Defendants' abandoned and inadequately briefed arguments, they lack merit and the Court should reject them.

As an initial matter, § 4-148(b) specifically requires the legislature to make an "express finding" about the public purpose upon which it relies. And yet a purported public purpose based on the State's supposed role in causing the default is nowhere mentioned—or even alluded to—in the Act. To the contrary, the clear and unambiguous text of the Act demonstrates that the legislature's sole public purpose was to "encourage accountable state government." Further, the record makes clear that Defendants never even argued before the legislature that the State caused their default. General Statutes §§ 1-2z and 4-148(b) preclude the Court from sustaining the Act based upon this unstated public purpose that was not raised before the legislature and that plainly was not the basis for its actions. *See, e.g., Kelsey v. Comm'r of Corr.*, 329 Conn. 711, 721 (2018); *Town of Branford v. Santa Barbara*, 294 Conn. 803, 813 (2010). That is especially true given that the Act is in derogation of sovereign immunity and therefore must be strictly and narrowly construed to encompass only that which the legislature expressly identified. *E.g., Smith v. Rudolph*, 330 Conn. 138, 144 (2018); *Envirotest System Corp. v. Comm'r of Motor Vehicles*, 293 Conn. 382, 388-89 (2009).

In any event, even if this theory of state culpability were available to Defendants despite its omission from the Act and despite Defendants' own abandonment and failure to adequately brief it on appeal, the Court should reject it because the State did not cause the default in 2007.

First, Defendants' argument that the legislature itself somehow caused the default by failing to articulate a public purpose in the Joint Resolution is frivolous. Defendants filed their claim on May 2, 2007, and it was untimely from its inception. The legislature did not pass the Joint Resolution until 2011. Whether the legislature's failure to articulate a legitimate public purpose in the 2011 Joint Resolution was negligent or not—it plainly was not, since no such public purpose exists—it could not possibly have retroactively caused Defendants' violation of § 4-148(a) in 2007. *Avoletta VI*, 212 Conn. App. at 328-29.

Second, Defendants told the trial court that they delayed filing their claim based on communications with the Attorney General in which he reassured Defendants that the SDE had a duty to investigate and remediate any environmental issues in the Torrington schools. (CA 45-49; *see* Def. App. 54-65). But as the trial court properly held, this Court's decisions in *Kelly* and *Kinney* foreclose that argument because the Attorney General's statements did not mislead Defendants about the procedures or time limit for filing their claim, or otherwise prevent Defendants from seeking timely relief with the Claims Commissioner had they been inclined to do so. Defendants' delay was instead a voluntary litigation choice that was in no way compelled—or even remotely suggested—by the Attorney General. There is no constitutional basis for the legislature to absolve Defendants of the consequences of that litigation choice.

In *Kelly*, the plaintiff claimed that his default should be excused because he detrimentally relied on post-operative "reassurances" by state actors about his alleged injury. 290 Conn. at 260. Regardless of what impact those reassurances had on the claimant's litigation choices, this Court rejected the argument because the reassurances did not mislead the plaintiff about the statute of limitations or the claim filing process, and did not prevent him from seeking timely relief. This

Court therefore held that there was no constitutional basis for the legislature to excuse the untimely filing. *Id.*

Similarly, in *Kinney* the plaintiff "chose to pursue her claim against the state only through administrative and judicial proceedings" instead of by "filing a claim with the claims commissioner as her first course of action or concurrently with her pursuit of administrative and judicial remedies." 285 Conn. at 715. This Court held that authorizing the untimely claim in such circumstances "would eliminate for her alone the consequences of her litigation choice" without extending that benefit to others "who either made a similar erroneous litigation choice or who mistakenly believed that exhaustion of administrative and judicial remedies was required before filing a claim . . . ." *Id.* That was especially true given that there was "no allegation that any state official misinformed the plaintiff that she had to exhaust these remedies prior to filing a claim . . . ." *Id.* at 715-16 and n.11.

Kelly and *Kinney* are dispositive. As an initial matter, Defendants' own statements reveal that they knew of their cause of action by June 2003, when they left the Torrington schools due to the alleged conditions and the health problems they allegedly caused. (Def. App. 54; *see id.* at 54-55, 62, 64-65). Defendants' communications with the Attorney General did not even begin until February 12, 2004, (*id.* at 54), and could not have impacted Defendants' decision to delay filing their claim during the preceding nine months.

Further, and more importantly, even after the communications began, the Attorney General's "reassurances" to Defendants about the SDE's duty to investigate any unsafe conditions in the Torrington schools are irrelevant under *Kelly* because they did not mislead Defendants about the procedures and requirements for filing their claim and did not prevent Defendants from complying with § 4-148(a) had they been inclined to do so. Indeed, the Attorney General said

nothing about any claim for money damages against the State at all, much less about the proper time and manner in which Defendants had to file such a claim if they wanted to pursue it. (*See id.* at 57, 64).

Rather, the record makes clear that Defendants voluntarily chose to seek relief through other avenues before filing their claim with the Claims Commissioner, first through the administrative procedures at the school and the SDE and, when that failed in 2005, by asking the Attorney General to intervene outside of the administrative and judicial process. (*See id.* at 56-65, 66, 69, 75, 82). As in *Kinney*, the legislature cannot excuse the consequences of Defendants' voluntary litigation choice not to pursue their claim for damages with the Claims Commissioner before or concurrently with those other remedies.[4]

b. The public purposes identified in the Act and in Defendants' brief are not legitimate public purposes in this context

Rather than seriously arguing that the State caused their default, Defendants primarily assert that other legitimate public

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[4] As the trial and Appellate courts noted in *Avoletta I* and *II*, Defendants' claim was untimely even if their cause of action did not accrue until after they exhausted their administrative remedies, since that occurred in 2005 and Defendants did not file their claim until 2007. *Avoletta II*, 152 Conn. App. at 190-92. Thus, even if the legislature theoretically could excuse untimely filings based on a litigant's choice to pursue administrative remedies first, it could not constitutionally do so here because Defendants' pursuit of those remedies could not have impacted their more than one-year delay in filing their claim after administrative relief had been denied.

purposes justify the Act. Despite this Court's explicit statements to the contrary in *Kelly*, *Kinney*, and *Chotkowski I*, Defendants assert that this Court has "not specifically limit[ed]" the existence of a legitimate public purpose for excusing noncompliance with § 4-148(a) "to cases where a government official caused a procedural default in the filing of an untimely claim." Def. Br. at 34. They further argue that it is the legislature's sole prerogative to distinguish a public from a private purpose, that the legislature identified three public purposes in the Act, and that this Court must defer to those legislative pronouncements. *See id.* at 23-24, 29-33, 36-38, 40-41.

None of that accurately reflects the law. This Court consistently has held that the "legislature cannot by mere fiat or finding, make 'public' a truly 'private' purpose." *Kinney*, 285 Conn. at 712 (quotation marks omitted). The courts therefore have a constitutional obligation to independently scrutinize the legislature's asserted purpose to ensure that it is truly "public" and thus a valid basis upon which the legislature could grant the exclusive benefit conferred. The legislature's "findings and statements" about what is or is not "public" or "legitimate" "cannot be binding" in that regard, and they "do[] not change the pertinent inquiry for the court." *Id.*

This Court has applied this principle and already has determined what is (and is not) a valid public purpose in this context. It has held, repeatedly and categorically, that "legislation seeking to remedy a [violation of § 4-148(a)] for which the state is not responsible ***does not serve a public purpose*** and, accordingly, runs afoul of article first, § 1 . . . ." *Kelly*, 290 Conn. at 258 (emphasis altered). The Court also has explicitly held that the public purpose exception is "restricted" to cases in which the special act is "based upon the state's recognition of some role played by a government official in causing, or contributing to, the default." *Kinney*, 285 Conn. at 711, 714-16 and

n.11. This Court cannot have been clearer, and its precedents preclude the notion that any other public purpose exists in this context.

In any event, even if this Court had not limited the public purpose exception to procedural defaults caused by state action, the purported public purposes identified in the Act and Defendants' brief independently fail for other reasons.

i. Encouraging accountable state government is not a legitimate public purpose for excusing Defendants' default

The only public purpose identified in the Act is to "encourag[e] accountable state government" through the full adjudication of claims against the State. But however "well intentioned" that goal may be, *Kinney*, 285 Conn. at 708-09, as a matter of law it is not a valid basis for overcoming the public emoluments clause because it applies equally to all litigants and would be achieved by resolving all claims against the State on their merits. And yet the Act applies only to these Defendants without extending its benefits to other similarly situated litigants with untimely claims the resolution of which also might encourage government accountability. The legislature's assertion of this purported purpose is thus nothing more than an improper attempt "by mere fiat" to "make public" what plainly is an exclusive and private benefit conferred on these Defendants and nobody else. *Kelly*, 290 Conn. at 260; *Kinney*, 285 Conn. at 710 n.9. That is unconstitutional.

Indeed, a different conclusion effectively would exempt legislation enacted under § 4-148(b) from scrutiny under the public emoluments clause. The legislature could assert the same vague public purpose for every special act passed under the statute, empowering it to invent and bestow private exceptions to § 4-148(a) for favored litigants at its discretion. That flies in the face of every public

emolument case this Court has decided and would eviscerate the public emoluments clause, the whole purpose of which is to prevent the legislature from picking and choosing who must comply with § 4-148(a) by "insist[ing] that . . . [the statute] must be applied uniformly to all claimants." *Chotkowski I*, 213 Conn. at 18-19 (quotation marks omitted); *see also id.* (holding that asserted public purpose in resolving claims on their merits not legitimate because, if it were, "it would be difficult to justify enforcing [§ 4-148(a)] to bar ***any*** claim against the state from being resolved solely on its merits") (emphasis in original).

Kinney is again dispositive on this point. The public purpose advanced in *Kinney* was to "send[] a message to all government employees" and "encourag[e]" them to develop a better "work ethic" and to be more "productiv[e]" and "diligent." 285 Conn. at 711-13. There is no principled basis to distinguish that purpose from the far more abstract purpose of "encouraging accountable state government" stated in the Act. And this Court rejected the purpose in *Kinney* precisely because "the beneficial effect of the special act applies to no member of the public other than the plaintiff" and neither "excuses other persons similarly situated from complying with the statutory limitations nor provides circumstances under which such persons may be excused." *Id.* at 714. The exact same is true here.

ii. The Act does not promote good health for school children, and even if it did, that is not a basis for authorizing Defendants to bring an untimely claim for money damages

Defendants next assert that the legislature also was motivated by a desire to ensure that children in the state's public school system are in good health. Def. Br. at 31. The Court should reject that argument for three reasons.

First, this purported purpose is nowhere stated in the Act, which makes no mention of the public school system generally, the environmental conditions in any particular public school or district, or any ongoing concern with the state of student health at this or any other time. For all of the reasons discussed above, therefore, §§ 1-2z and 4-148(b) preclude the Court from sustaining the Act based on this purported public purpose that plainly was not the basis for the legislature's actions. *See supra* at 17.

Second, even if the text were ambiguous and thus not dispositive, a legislative intent to promote this unstated public health purpose cannot be implied from the Act's operation or effects either. To the contrary, the Act does not purport to advance public health in any way: it does not require the SDE or any town or school to investigate the environmental conditions in any school or district; identify environmental problems that may exist; create a plan to remediate any problems that may be identified; identify any particular students suffering health issues related to any purported environmental conditions; or provide or assist with treatment for those students. If the legislature was concerned about ongoing issues with student health in public schools it could and would have done those or any number of other things to identify and correct any purported issues. But the legislature did none of that. It instead adopted a special act whose sole effect is to excuse Defendants' own litigation errors and authorize them to bring a retroactive claim for money damages based on alleged conduct that occurred 10 years previously. That does not improve student health in the State's public schools in any way, whether now or in the future.

Third, and most importantly, even if the Act had the salutary and prospective public health benefits Defendants claim, that does not make it constitutional because, again, such effects would be achieved

by permitting ***all*** litigants with untimely claims to pursue them. And yet the Act provides that benefit only to these Defendants and nobody else. No matter how Defendants or the legislature characterize it, then, the sole purpose and effect of the Act is to provide these litigants with an exclusive and private benefit that no other similarly situated litigants enjoy. That is a quintessential public emolument.[5]

iii. Ensuring that claims are adjudicated on their merits is not a legitimate public purpose

Finally, the Court should reject Defendants' argument that the purpose of the Act is to ensure that all claims are adjudicated on their merits. Def. Br. at 32-33. First, that is neither the purpose nor the effect of the Act, which on its face is limited to these Defendants and does not authorize the "full adjudication" of any other untimely claim against the State. Indeed, Defendants in effect are suggesting that the legislature *sub silentio* repealed § 4-148(a) in its entirety, as the whole

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[5] Defendants argue at length that their goal in seeking the Act was to prevent other children from being subjected to poor conditions in school. *See generally* Def. Br. at 16-29. But the only relief Defendants sought was the authorization of their own untimely claim for money damages, not the authorization of other individuals' untimely claims or any tangible actions by the State to identify and remediate any purported issues. In fact, Defendants presented no evidence that any school anywhere in the state had unsafe conditions when the Act was adopted. In any event, the constitutional analysis focuses on what the legislature actually authorized and not on Defendants' subjective intent. And Defendants' goals do not change the purely private nature of the benefit the legislature bestowed and Defendants received.

purpose of that statute is to prevent the full adjudication of claims against the State when they are untimely. That was not the legislature's intent, and it is not what the legislature did.

Second, this Court explicitly has held that "legislation cannot survive a constitutional challenge under article first, § 1, if it excuses a party's failure to comply with a statutory notice requirement simply because the noncompliance precludes consideration of the merits of the party's claim." *Lagassey v. State*, 268 Conn. 723, 734 (2004). Permitting the full adjudication of this single untimely claim, which is all the Act purports to do, is therefore not a legitimate public purpose as a matter of law.

IV. Conclusion

The Court should affirm the judgment of the Appellate and Superior Courts.

Respectfully submitted,

PLAINTIFF STATE OF CONNECTICUT

WILLIAM TONG
ATTORNEY GENERAL

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SUPREME COURT
of the
State of Connecticut

SC 20723

STATE OF CONNECTICUT

v.

MATTHEW AVOLETTA, ET AL.

Party Appendix for
Plaintiff-appellee State of Connecticut

Appendix Table of Contents

Avoletta v. State

Superior Court of Connecticut, Judicial District of Hartford At Hartford

May 6, 2013, Decided; May 6, 2013, Filed

HHDCV125036221

Reporter
2013 Conn. Super. LEXIS 1049 *; 2013 WL 2350751

Peter J. Avoletta et al. v. State of Connecticut

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Affirmed by Avoletta v. State, 152 Conn. App. 177, 98 A.3d 839, 2014 Conn. App. LEXIS 358 (Aug. 12, 2014)

Motion denied by State v. Avoletta, 2018 Conn. Super. LEXIS 876 (Conn. Super. Ct., Apr. 27, 2018)

Decision reached on appeal by State v. Avoletta, 2022 Conn. App. LEXIS 162 (Conn. App. Ct., May 10, 2022)

Prior History: A, P, J v. State, 2012 Conn. Super. LEXIS 4221 (Conn. Super. Ct., June 29, 2012)

Core Terms

special act, untimely, public purpose, right to sue, quotation, marks, authorize, vacate, commissioner's decision, sovereign immunity, joint resolution, limitations period, motion to dismiss, emolument, attended, one year, circumstances, limitations, subject matter jurisdiction, state constitution, private school, present case, plaintiffs', claimant, reasons, rights

Case Summary

Overview

HOLDINGS: [1]-The state's motion to dismiss was granted because the legislature erred by allowing the parents to file suit directly against the state, when the appellate court had determined that their action was untimely, the legislature provided the parents a right unavailable to other parties; [2]-While the legislature was not required to enact a special act when vacating the claims commissioner's dismissal of the matter, allowing the parents with an untimely claim to circumvent Conn. Gen. Stat. § 4-148(b) without any explanation or public purpose, constituted a public emolument since the action was untimely.

Outcome
Motion to dismiss granted.

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] Subject Matter Jurisdiction, Jurisdiction Over Actions

A motion to dismiss tests whether, on the face of the record, the court is without jurisdiction. When a court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. The motion to dismiss admits all facts which are well pled, invokes the existing record and must be decided upon that alone. In determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.

Governments > State & Territorial
Governments > Claims By & Against

HN2[] State & Territorial Governments, Claims By & Against

The doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under Connecticut case law. The practical and logical basis of the doctrine of sovereign immunity is today recognized to rest on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property. Exceptions to this doctrine are few and narrowly construed under Connecticut jurisprudence.

Governments > State & Territorial
Governments > Claims By & Against

HN3[] State & Territorial Governments, Claims By & Against

In the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so. When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions. Even in cases where the claims commissioner denies or dismisses a claim, the Connecticut statutes provide that the Connecticut General Assembly may, in certain circumstances, provide the plaintiff such a right. *Conn. Gen. Stat. §§ 4-158*, *4-159*.

Governments > State & Territorial
Governments > Legislatures

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN4[] State & Territorial Governments, Legislatures

A "resolution" is defined by the legislature as a statement by the Connecticut General Assembly that is not law. Used to approve nominations or labor contract, place constitutional amendments on the ballot, or express the legislature's collection opinion. In comparison, a "special act" is defined as a law that has a limited application or is of limited duration, not incorporated into the Connecticut General Statutes. Practically speaking, the difference is that a special act must be signed by the governor demonstrating that it is more than merely expressing the legislature's collective opinion.

Administrative Law > Judicial Review > Reviewability > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] Judicial Review, Reviewability

Conn. Gen. Stat. § 4-148(a) limits the jurisdiction of the claims commissioner by stating that, except as provided in *subsection (b)* of this section, no claim shall be presented under this chapter but within one year after it accrues. Such an untimely claim deprives the commissioner of subject matter jurisdiction. However, *Conn. Gen. Stat. § 4-148(b)* provides that such a claim may be revived. Specifically, the statute provides that the Connecticut General Assembly may, by special act, authorize a person to present a claim to the Claims Commissioner after the time limitations set forth in *subsection (a)* of this section have expired if it deems such authorization to be just and equitable and makes an express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose. Such a finding shall not be subject to review by the Superior Court.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Governments > State & Territorial
Governments > Claims By & Against

HN6[] Agency Adjudication, Review of Initial Decisions

When the legislature disagrees with the claims commissioner's decision to dismiss or deny a claim against the state, the procedure for vacating such a decision is outlined in *Conn. Gen. Stat. §§ 4-158*, *4-159*. *Conn. Gen. Stat. § 4-158* states that any person who has filed a claim for more than $7,500 may request the Connecticut General Assembly to review a decision of the Claims Commissioner (1) ordering the denial or dismissal of the claim pursuant to *subdivision (1)* of *subsection (a)* of this section, including denying or dismissing a claim that requests permission to sue the state. *Conn. Gen. Stat. § 4-159(b)* states that the Connecticut General Assembly shall: (1) with respect to a decision of the Claims Commissioner ordering the denial or dismissal of a claim pursuant to *Conn. Gen. Stat. § 4-158(a)(1)*: (A) confirm the decision; or (B) vacate the decision and, in lieu thereof, (i) order the payment of the claim in a specified amount, or (ii) authorize the claimant to sue the state.

Governments > Legislation > General Overview

HN7[] Governments, Legislation

It can be assumed that where the legislature requires itself to act in a particular way, it knows how to do this.

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN8[] Types of Statutes, Special Legislative Acts

The legislative history of *Conn. Gen. Stat. § 4-159* makes clear that the legislature may act either by resolution or special act.

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN9[] Types of Statutes, Special Legislative Acts

When reviewing the decision of the claims commissioner and granting the right to sue in Superior Court, the legislature may act either by resolution or special act.

Administrative Law > Judicial Review > Reviewability > General Overview

Constitutional Law > State Constitutional Operation

Governments > State & Territorial
Governments > Claims By & Against

HN10[] Judicial Review, Reviewability

Conn. Const. art. I, § 1 states that no man or set of men are entitled to exclusive public emoluments or privileges from the community. Regarding the right to present a claim to the claims commissioner via *Conn. Gen. Stat. § 4-148(b)*, even where the court ordinarily does not have a right to review the findings of the claims commissioner or legislature, the court must review the action for to ensure it is constitutionally sound. *Conn. Gen. Stat. § 4-148(b)* would be constitutionally infirm to the extent that it were construed to shield from judicial review a legislative determination that its enactment meets the requirements of *Conn. Const. art. I, § 1*. The same is true of *Conn. Gen. Stat. § 4-159*.

Administrative Law > Judicial Review > Reviewability > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Governments > Legislation > General Overview

Governments > Legislation > Statute of Limitations > Governmental Entities

HN11[] Judicial Review, Reviewability

Regarding the constitutionality of a state resolution, in order for a plaintiff (suing the state) to prevail, it is sufficient to show that her claim was not untimely as a matter of law; in order for the defendant to prevail, it has to be determined that the legislature's action furthers no public purpose, which necessarily is predicated upon a determination that the plaintiff's claim was untimely as a matter of law. In other words, the court must first

determine if the matter was untimely. If the matter was not untimely, the plaintiffs will succeed in defeating the motion to dismiss because they will not have been granted a right unavailable to any other person. If the matter was untimely, the court must then determine whether there was any public purpose for the legislature's action. If there was not, the resolution will be ruled unconstitutional as violating *Conn. Const. art. I, § 1*.

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > Legislation > Statute of Limitations > Time Limitations

HN12[] State & Territorial Governments, Claims By & Against

Conn. Gen. Stat. § 4-148(a) states that no 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." *Conn. Gen. Stat. § 52-584*, which contains the limitation period for actions seeking damages for personal injury generally, informs the interpretation of *Conn. Gen. Stat. § 4-148(a)*. *Conn. Gen. Stat. § 52-584* provides in relevant part: No action to recover damages for injury to the person caused by negligence or by malpractice of a physician, surgeon, or hospital shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.

Governments > Legislation > Statute of Limitations > Governmental Entities

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Repose > General Overview

HN13[] Statute of Limitations, Governmental Entities

A plain reading of *Conn. Gen. Stat. §§ 4-148(a)* and *52-584* reveals that the statutes are alike in most material respects. Both statutes provide that the limitation period begins to run when a plaintiff either sustains or discovers the injury or, in the exercise of reasonable care, should have discovered the injury, and both statutes contain a three year period of repose. The only material differences in the two statutes are that *Conn. Gen. Stat. § 4-148(a)* allows for a one-year limitation period while *Conn. Gen. Stat. § 52-584* allows for a two-year limitation period, and *Conn. Gen. Stat. § 4-148(a)* relates only to actions against the state brought under *Conn. Gen. Stat. ch. 53*. Both *Conn. Gen. Stat. §§ 4-148(a)* and *52-584* state that the limitation period begins to run on the date when the plaintiff discovers or should have discovered the injury. In this context, it has been repeatedly stated that an injury occurs when a party suffers some form of actionable harm. Actionable harm may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another. In this regard, the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run; a party need only have suffered some form of actionable harm.

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Torts > ... > Statute of Limitations > Tolling > General Overview

HN14[] Tolling, Discovery Rule

The statute of limitations may be tolled, in the proper circumstances, under either the continuous course of conduct doctrine or the continuing treatment doctrine. The continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are

premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied. However, the continuing course of conduct doctrine has no application after the plaintiff has discovered the harm.

Administrative Law > Judicial Review > Reviewability > General Overview

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

HN15 **Judicial Review, Reviewability**

Notwithstanding a claimant's failure to comply with the limitation period set forth in Conn. Gen. Stat. § 4-148(a) when filing a complaint against the state, Conn. Gen. Stat. § 4-148(b) allows the Connecticut General Assembly to pass a special act authorizing an untimely claim if it finds "compelling equitable circumstances" and "public purpose." Although Conn. Gen. Stat. § 4-148(b) provides that such finding shall not be subject to review by the Superior Court, special acts passed in this manner are subject to review nonetheless under the public emoluments clause contained in article Conn. Const. art. I, § 1. In reviewing whether an act of the legislature is a public emolument, the court must explore whether there is any conceivable justification for this challenged legislation from the public viewpoint.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN16 **Judicial Review, Standards of Review**

What constitutes a public purpose is primarily a question for the legislature, and its determination should not be reversed by the court unless it is manifestly and palpably incorrect. In determining whether a special act serves a public purpose, a court must uphold it unless there is no reasonable ground upon which it can be sustained. Thus, if there be the least possibility that the special act will be promotive in any degree of the public welfare, a court is bound to uphold it against a constitutional challenge predicated on Conn. Const. art. I, § 1.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN17 **Judicial Review, Standards of Review**

Regarding special acts, although a broad view of the legislative goals that may constitute a public purpose has been taken, because the elements of a public purpose vary as much as the circumstance in which the term is appropriate, each case must be determined on its own peculiar facts. In general, however, an act serves a public purpose under Conn. Const. art. I, § 1, when it promotes the welfare of the state or when the principal reason for the appropriation is to benefit the public. Furthermore, an enactment will be deemed to serve a valid public purpose, even though it confers a direct benefit upon a particular individual, if it remedies an injustice done to that individual for which the state itself bears responsibility. In such circumstances, the benefit conferred upon a private party by the legislature may be viewed as incidental to the overarching public interest that is served in remedying an injustice caused by the state.

Judges: **[*1]** David M. Sheridan, J.

Opinion by: David M. Sheridan

Opinion

MEMORANDUM OF DECISION

Before the court is the defendant State of Connecticut's motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction. For the reasons set forth herein, the motion is granted.

I. FACTUAL BACKGROUND

In their complaint, the plaintiffs allege that the defendant failed to provide Peter and Matthew Avoletta a free appropriate public education in a safe setting in violation of their rights under the federal and state constitutions and under numerous state statutes.

Specifically, the plaintiffs allege the following. From August 1999 through June 2002, Peter attended Torrington Middle School, and from August 2002 through June 2003, he attended Torrington High School. From August 1997 through June 2003, Matthew attended Torrington Elementary School. The plaintiffs allege that at all relevant times, the defendant failed to ensure that Torrington Middle School and Torrington High School were properly maintained. The plaintiffs allege that those buildings incurred water leaks, bacteria, mold, dampness, and poor indoor air quality.

As a result of the poor conditions, Peter and Matthew suffered physical ailments. In 2003-04, **[*2]** Peter was diagnosed with irreversible lung disease from which he still suffers. As a result, during the 2003-04 school year, Peter received homebound instruction from Torrington High School. For the 2004-05 and 2005-06 school years, the plaintiffs requested that Peter be placed in an out of district public or private school, rather than return to Torrington High School. Torrington did not acquiesce to this request and Peter's parents placed him in a private school at their own expense from August 2004 through his graduation in June 2006.

As to Matthew, it is alleged that prior to entering the Torrington Elementary School, he suffered allergies only to animals. In October 1999, he was diagnosed with reactive airway disease, allergic rhinitis, sinusitis and asthma. That same month he suffered pneumonia. In December 1999, he was diagnosed with allergic rhinoconjunctivitis, asthma and with being "extremely reactive to multiple inhalants including tree, grass pollens, dust mites, and quite severely reactive to mold." In March 2003, Matthew was diagnosed with perennial/seasonal allergic rhinitis and asthma. Matthew's physician recommended that the environment in the Middle School, to which **[*3]** Matthew was to enter in August 2003, was hostile to a child with Matthew's conditions and that Matthew's attendance at Torrington Middle School was "medically contraindicated." From August 2003 through his graduation in June 2010, Matthew attended a private school. The plaintiffs now seek reimbursement for tuition and costs for the private education.

II. SUMMARY OF PROCEEDINGS

On May 2, 2007, the plaintiffs filed a notice of claim to the claims commissioner alleging essentially the same facts presently before the court. Following a motion for summary judgment by the state, which included multiple grounds, the claims commissioner dismissed the claim, stating: "This claim seeks to address matters occurring more than one year prior to the date of the filing . . . The Commissioner lacks subject matter jurisdiction. The claim is dismissed because it was filed outside of the statutorily prescribed one-year time limit."

Subsequently the plaintiffs, pursuant to *General Statutes §4-158*, sought review of the claims commissioner's decision from the legislature, stating that the commissioner incorrectly ruled on their case. The plaintiffs sought either a monetary award or the right to present a claim **[*4]** to the claims commissioner. In the alternative, the plaintiffs sought a special act, pursuant to §4-148(b), declaring that the despite the claim's untimeliness, the plaintiffs should be granted the right to sue the state.

On May 27, 2011 and June 8, 2011 respectively, the house and senate voted unanimously to approve House Joint Resolution 11-34, which states, in relevant part: "Resolved by this Assembly: . . . Sec. 2. That the decision of the Claims Commissioner, file numbers 21101, 21102 and 21103 of said commissioner, ordering the dismissal of the claims against the state in excess of seven thousand five hundred dollars of Joanne Avoletta, Peter J. Avoletta and Matthew Avoletta, is vacated and the claimants are authorized to institute and prosecute to final judgment an action against the state to recover damages as compensation for injury to person or damage to property, or both, allegedly suffered by the claimants as set forth in said claims. Such action shall be brought not later than one year from the date of the final adoption by the General Assembly of this resolution."

On May 10, 2012, the plaintiffs instituted this action. On July 30, 2012, the defendant filed this motion to **[*5]** dismiss on the ground that the plaintiffs' claims are barred by the doctrine of sovereign immunity. The state argues that the joint resolution that gave the plaintiffs the right to sue was not done in accordance with proper legislative procedure. The state further argues that, even if the resolution was validly executed, it is constitutionally infirm as a public emolument.

III. DISCUSSION

A. Motions to Dismiss Based on Sovereign Immunity

HN1[] "A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light . . . In this regard, a court must take the facts to be

those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." **[*6]** (Citations omitted; internal quotation marks omitted.) *Dayner v. Archdiocese of Hartford, 301 Conn. 759, 774, 23 A.3d 1192 (2011)*.

HN2[⬆] "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Housatonic R.R. Co. v. Comm'r of Revenue Servs., 301 Conn. 268, 274, 21 A.3d 759 (2011)*. "The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law . . . [T]he practical and logical basis of the doctrine [of sovereign immunity] is today recognized to rest . . . on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citations omitted; internal quotation marks omitted.) *Markley v. Dep't of Pub. Util. Control, 301 Conn. 56, 65, 23 A.3d 668 (2011)*.

HN3[⬆] "In the absence of a statutory waiver of sovereign immunity, the plaintiff **[*7]** may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so." (Citations omitted; internal quotation marks omitted.) *DePietro v. Dep't of Pub. Safety, 126 Conn. App. 414, 418, 11 A.3d 1149*, cert. granted on other grounds, *300 Conn. 932, 17 A.3d 69 (2011)*, appeal withdrawn, June 26, 2012. "When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim . . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions." (Internal quotation marks omitted.) *Cox v. Aiken, 278 Conn. 204, 212 n.11, 897 A.2d 71 (2006)*. Even in cases where the claims commissioner denies or dismisses a claim, our statutes provide that the General Assembly may, in certain circumstances, provide the plaintiff such a right. See *General Statutes §§4-158*, *4-159*.

B. Necessity for **[*8]** a Special Act

The parties in the present case first dispute whether the joint resolution passed by the General Assembly granting the plaintiffs the right to sue the state is a valid exercise of legislative power. The state argues that under *General Statutes §4-148(b)*, if the legislature seeks to grant a right to sue in a case where the plaintiff has not filed a notice with the claims commissioner within the statute of limitations prescribed by the statute, the legislature may only grant such permission by a special act in which the legislature specifically describes why the plaintiff is entitled to the right to sue. Here, this was not accomplished. The plaintiffs argue that the legislature was not acting pursuant to *§4-148(b)*, but rather *§4-159*, which does not require a special act.

The threshold issue before the court is: When the legislature vacates a decision of the claims commissioner to dismiss a claim because the claim is untimely, is the legislature required to pass a special act?

At the outset, the court notes the difference between a "resolution" and a "special act." ***HN4***[⬆] A resolution is defined by the legislature as: "[a] statement by the General Assembly that is not law. Used to **[*9]** approve nominations or labor contract, place constitutional amendments on the ballot, or express the legislature's collection opinion." Rules and Precedents of the General Assembly of Connecticut (Rev. to January 9, 2013).

In comparison, a special act is defined as "[a] law that has a limited application or is of limited duration, not incorporated into the Connecticut General Statutes." *Id*. Practically speaking, the difference is that a special act must be signed by the governor demonstrating that it is more than merely expressing the legislature's collective opinion.

In determining what was required of the legislature in the present case, the court has reviewed the plaintiffs' submission to the legislature. In their request for legislative review the plaintiffs asked for relief under multiple statutes. The plaintiffs asked the legislature to find that the plaintiffs' claims were not time-barred and vacate the claims commissioner's decisions and either authorize payment to the plaintiffs or authorize them to

bring suit in Superior Court. This relief is sanctioned by §4-159(b). In the alternative, the plaintiffs prayed that even if the legislature found that the claims were time-barred, **[*10]** the legislature should enact a special act and allow the plaintiffs to resubmit their claims to the commissioner. This relief is sanctioned by §4-148(b).

If the legislature determined that the claims were untimely, its actions would be governed by HN5[] §4-148, which limits the jurisdiction of the claims commissioner by stating, in relevant part: "(a) Except as provided in subsection (b) of this section, no claim shall be presented under this chapter but within one year after it accrues . . ." As noted by the claims commissioner in the present case, such an untimely claim deprives the commissioner of subject matter jurisdiction. However, §4-148(b) provides that such a claim may be revived. Specifically, the statute says, "(b) The General Assembly may, by special act, authorize a person to present a claim to the Claims Commissioner after the time limitations set forth in subsection (a) of this section have expired if it deems such authorization to be just and equitable and makes an express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose. Such a finding shall not be subject to review by the Superior Court."

It is of note that, **[*11]** when the legislature finds an action untimely, the plain language of the statute requires that (1) the legislature must act by special act and (2) the legislature may only allow the party to submit their claim to the claims commissioner. Nothing in this statute allows the legislature to grant a right to sue where it concludes that the matter is untimely. Because it can be assumed that the legislature is aware of the requirements of its own statute, the court concludes that the legislature did not intend to act under authority of §4-148(b), because the legislature used a resolution and authorized the plaintiffs to file suit in Superior Court. Therefore, while the resolution itself does not state the reasons for its passage and its legislative history also fails to illuminate the legislature's thinking on this issue, the necessary conclusion is that the legislature disagreed with the claims commissioner's legal conclusion as to the timeliness of the action.

HN6[] When the legislature disagrees with the commissioner's decision to dismiss or deny a claim, the procedure for vacating such a decision is outlined in §§4-158, 4-159. *Section 4-158* states, in relevant part: "Any person who has filed **[*12]** a claim for more than seven thousand five hundred dollars may request the General Assembly to review a decision of the Claims Commissioner (1) ordering the denial or dismissal of the claim pursuant to *subdivision (1) of subsection (a)* of this section, including denying or dismissing a claim that requests permission to sue the state . . ." Section 4-159(b), states, in relevant part: "The General Assembly shall: (1) With respect to a decision of the Claims Commissioner ordering the denial or dismissal of a claim pursuant to *subdivision (1) of subsection (a) of section 4-158*: (A) Confirm the decision; or (B) Vacate the decision and, in lieu thereof, (i) order the payment of the claim in a specified amount, or (ii) authorize the claimant to sue the state . . ."

While the statute does not specifically state whether this must be accomplished by special act or resolution, HN7[] it can be assumed that where the legislature requires itself to act in a particular way, it knows how to do this. The court need look no further than §4-148(b) to see that in certain circumstances, the legislature does require a special act. To the extent that a plain reading of the statute does not clarify this issue, the **[*13]** court necessarily turns to HN8[] the legislative history of §4-159, which makes clear that the legislature may act either by resolution or special act. Specifically, during the discussion of alterations to the statute, this issue was discussed with the legislature confirming that either method was acceptable. See 32 H.R. Proc., Pt. 22, 1989, Sess., p. 7694. Subsequently, an amendment was offered to require the legislature to act by special act. *Id*., 7696. The amendment was defeated. *Id*., 7701. Therefore, HN9[] when reviewing the decision of the claims commissioner and granting the right to sue in Superior Court, the legislature may act either by resolution or special act.

Based on the foregoing the court concludes that, in the case of these plaintiffs, when presented with all of the procedural options before it, the legislature chose to grant the plaintiffs the right to sue under authority of §4-159(b). In doing so, the court must infer that the legislature found fault with the claims commissioner's legal conclusions, did not find the action untimely, and therefore did not need to pass a special act to grant the plaintiffs the right to sue.

This conclusion is supported by two recent Superior Court **[*14]** cases in which the court has entertained the validity of resolutions. In Morneau v. State, Superior Court, judicial district of Middlesex, Docket No. CV 12 5008157, 2012 Conn. Super. LEXIS 3106 (December 21, 2012, Domnarski, J.), the legislature acted in the same manner, passing a resolution and granting the

plaintiff the right to sue after the claims commissioner had dismissed the matter. The court entertained that resolution, though ultimately found it unconstitutional. The same occurred in *Brouillard v. State, Superior Court, judicial district of Middlesex, Docket No. CV 11 6004226, 2012 Conn. Super. LEXIS 1477* (June 4, 2012, Holzberg, J.). In *Brouillard*, the court referred the legislature's action as a special act, but it is apparent that the authorization to sue was given via, "Resolution No. 101," which was a joint resolution, not a special act. As with *Morneau*, the court in *Brouillard* ultimately found that the resolution was constitutionally infirm, but entertained the resolution as a proper method of granting the right to sue.

For the forgoing reasons, under the facts and circumstances of the present case, the legislature was within its rights to grant the right to sue via a joint resolution.

C. Public Emolument

The second issue before **[*15]** the court is: Even though the legislature may vacate a decision of the claims commissioner to dismiss the matter by the passage of a resolution, is such a resolution constitutionally proscribed as a public emolument?

HN10[⬆] Article first, §1, of our state constitution states, in relevant part: "[N]o man or set of men are entitled to exclusive public emoluments or privileges from the community." In reviewing a case in which the legislature granted the right to present a claim to the claims commissioner via §4-148(b), our Supreme Court noted that, even where the court ordinarily does not have a right to review the findings of the claims commissioner or legislature, the court must review the action for to ensure it is constitutionally sound. As the Supreme Court stated, "§4-148(b) would be constitutionally infirm to the extent that it were construed to shield from judicial review a legislative determination that its enactment meets the requirements of article first, §1, of our state constitution." *Kinney v. State, 285 Conn. 700, 712, 941 A.2d 907 (2008)*. The same is true of §4-159. This conclusion is supported by the previously mentioned Superior Court rulings of *Morneau v. State, supra, Superior Court, Docket No. 12 5008157, 2012 Conn. Super. LEXIS 3106* **[*16]** and *Brouillard v. State, supra, Superior Court, Docket No. 11 6004226, 2012 Conn. Super. LEXIS 1477*, both of which used the §4-148(b) standard for constitutionality when ruling on resolutions analogous to the present case.

When reviewing the resolution the court notes that, ***HN11***[⬆] "in order for the plaintiff to prevail, it is sufficient to show that her claim was not untimely as a matter of law; in order for the defendant to prevail, we must determine that [the legislature's action] furthers no public purpose, which . . . necessarily is predicated upon a determination that the plaintiffs claim was untimely as a matter of law." (Citation omitted.) *Lagassey v. State, 268 Conn. 723, 736, 846 A.2d 831 (2004)*. In other words, the court must first determine if the matter was untimely. If the matter was not untimely, the plaintiffs will succeed in defeating the motion to dismiss because they will not have been granted a right unavailable to any other person. If the matter was untimely, the court must then determine whether there was any public purpose for the legislature's action. If there was not, the resolution will be ruled unconstitutional as violating article first, §1.

Therefore the court must **[*17]** begin with a discussion of whether the action was untimely. ***HN12***[⬆] *Section 4-148(a)* state, in relevant 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." Our Supreme Court has stated: "*General Statutes §52-584*, which contains the limitation period for actions seeking damages for personal injury generally, informs our interpretation of §4-148(a). *Section 52-584* provides in relevant part: No action to recover damages for injury to the person . . . caused by negligence . . . or by malpractice of a physician, surgeon . . . [or] hospital . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ***HN13***[⬆] A plain reading **[*18]** of §§4-148(a) and 52-584 reveals that the statutes are alike in most material respects. Both statutes provide that the limitation period begins to run when a plaintiff either sustains or discovers the injury or, in the exercise of reasonable care, should have discovered the injury, and both statutes contain a three year period of repose. The only material differences in the two statutes are that §4-148(a) allows for a one year limitation period while §52-584 allows for a two year limitation period, and §4-148(a) relates only to actions against the state brought under chapter 53 of the General Statutes . . .

"Both §§4-148(a) and 52-584 state that the limitation period begins to run on the date when the plaintiff discovers or should have discovered the injury. In this context, we have repeatedly stated that an injury occurs when a party suffers some form of actionable harm." (Citations omitted; internal quotation marks omitted.) Lagassey v. State, supra, 268 Conn. 738-39. "[A]ctionable harm may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another **[*19]** . . . In this regard, the harm complained of need not have reached its fullest manifestation in order for the limitation period to begin to run; a party need only have suffered some form of actionable harm." (Emphasis in original; internal quotation marks omitted.) Kelly v. University of Connecticut Health Center, 290 Conn. 245, 254, 963 A.2d 1 (2009).

Here, the plaintiffs' claims are all based in the fact that Peter and Matthew Avoletta were denied a fair and appropriate public education. The plaintiffs undisputedly discovered a harm by the time Peter and Matthew were taken out of the Torrington public schools. Peter received homebound education in 2003-04 and attended private school thereafter. Matthew attended private school from 2003-04 until his graduation. Regardless of the specific dates of these actions, the plaintiffs were clearly aware of the school conditions far more than a year before the May 2, 2007 filing with the claims commissioner.

The plaintiffs contend, however, that they were unaware of harm caused by the state until a later date. The plaintiffs acknowledge that, in 2005, upon the local school district's denial of their claim for alternative school placement under **[*20]** the federal Individuals with Disabilities Education Act (IDEA), the state department of education and state office of protection and advocacy advised the plaintiffs to seek review of the school district's denial. The denial was confirmed after review, apparently also in 2005. The plaintiffs allege that the state did not, at that time, advise the plaintiffs that they could further appeal. The plaintiffs allege that they were unaware of this right for review until they hired private counsel in 2006. They argue, therefore, that they were not aware they had an actionable claim until after they hired counsel. The date of the actionable harm cannot be delayed until the plaintiffs acquired counsel. Even if the date of the harm is as late as the state's failure to advise the plaintiffs of their rights in 2005, the 2007 filing with the claims commissioner was untimely.

The plaintiffs contend that the continuous course of conduct doctrine tolls the statute of limitations. The plaintiffs reliance on this doctrine is misplaced. ***HN14***[↑] "[T]he statute of limitations . . . may be tolled, in the proper circumstances, under either the continues course of conduct doctrine or the continuing treatment doctrine **[*21]** . . . The continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied." (Citations omitted; internal quotation marks omitted.) Martinelli v. Fusi, 290 Conn. 347, 355-56, 963 A.2d 640 (2009). However, "the continuing course of conduct doctrine has no application after the plaintiff has discovered the harm." (Internal quotation marks omitted.) Mollica v. Toohey, 134 Conn.App. 607, 39 A.3d 1202 (2012). Because the plaintiffs discovered the harm far more than one year prior to filing their action, the continuous course of conduct doctrine does not apply.

HN15[↑] "Notwithstanding a claimant's failure to comply with the limitation period set forth in subsection (a), §4-148(b) . . . allows the General Assembly to pass a special act authorizing an untimely claim if it finds 'compelling equitable circumstances' and 'public purpose.' Although §4-148(b) provides that '[s]uch finding shall not be subject to review by the Superior Court,' special acts passed in this manner are subject to review nonetheless under the public emoluments clause contained **[*22]** in article first, §1, of the state constitution." Lagassey v. State, supra, 268 Conn. 733. In reviewing whether an act of the legislature is a public emolument, "[the court] must explore whether there is any conceivable justification for this challenged legislation from the public viewpoint." (Internal quotation marks omitted.) Id., 735.

HN16[↑] "[W]hat constitutes a public purpose is primarily a question for the legislature, and its determination should not be reversed by the court unless it is manifestly and palpably incorrect . . . In determining whether a special act serves a public purpose, a court must uphold it unless there is no reasonable ground upon which it can be sustained . . . Thus, if there be the least possibility that [the special act] will be promotive in any degree of the public welfare . . . we are bound to uphold it against a constitutional challenge predicated on article first, §1 [of the state constitution]." (Internal quotations marked omitted.) Kelly v University of Connecticut Health Center, supra, 290 Conn. 258.

HN17[] "Although [our Supreme Court has] taken a broad view of the legislative goals that may constitute a public purpose . . . [b]ecause the elements of a public **[*23]** purpose vary as much as the circumstance in which the term is appropriate, each case must be determined on its own peculiar facts . . . In general, however, we have found that an act serves a public purpose under article first, §1, when it promote[s] the welfare of the state . . . or when the principal reason for the appropriation is to benefit the public . . . Furthermore, an enactment will be deemed to serve a valid public purpose, even though it confers a direct benefit upon a particular individual, if it remedies an injustice done to that individual for which the state itself bears responsibility . . . In such circumstances, the benefit conferred upon a private party by the legislature may be viewed as incidental to the overarching public interest that is served in remedying an injustice caused by the state." (Citations omitted; internal quotation marks omitted). *Chotkowski v. State, 240 Conn. 246, 259-60, 690 A.2d 368 (1997)*.

Here, the plaintiffs have been granted two rights not otherwise given to the public. First, the plaintiffs have been given the right to pursue an untimely claim. Second, because the legislature did not find the claim untimely, the plaintiffs have been given **[*24]** the right to pursue this suit in Superior Court without receiving a decision on the merits from the claims commissioner as would have occurred if the legislature correctly concurred with the claims commissioner's decision regarding timeliness and either upheld the commissioner's decision or chose to use §4-148(b) to send the matter back to the commissioner for further proceedings.

In the joint resolution, the legislature has offered no public purpose for granting the plaintiffs such rights. The resolution says only that the plaintiffs may sue. The legislative history does nothing more to illuminate a public purpose. On March 21, 2011, the plaintiff, Joanne Avoletta, testified before the judiciary committee seeking a reversal of the claims commissioner's decision based on the ground that new case law aided her cause. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 11, 2011 Sess., pp. 3295-97. The plaintiff also submitted a written letter and a letter from her attorney. *Id.*, pp. 3551-55. Nowhere in this testimony is there any discussion of the statute of limitations issue. The joint favorable report of the judiciary committee summarized the testimony and noted that the legislature **[*25]** should vacate the commissioner's decision without offering further support for this decision. See Judiciary Committee Joint Favorable Report, concerning House Joint Resolution No. 11-34, entitled Resolution Concerning the Disposition of Certain Claims Against the State Pursuant to Chapter 53 of the General Statutes. Discussion of the joint resolution was held on May 27, 2011 in the House of Representatives and on June 8, 2011 in the Senate. See 54 H.R. Proc., Pt. 16, 2011 Sess., p. 5410-13; 54 S. Proc. Pt. 22, 2011 Sess. p. 7038, 7176-78, 7182-83. On neither occasion was there any specific discussion of the plaintiffs' claims or the reasons for which the commissioner's decision would be vacated or stated any way in which these plaintiffs had been prejudiced by the government in such a way that they should be exempt from the ordinary statute of limitations.

Allowing the plaintiffs to file suit directly in this matter, when this court has determined that their action was untimely provides them a right unavailable to other parties. While the legislature need not enact a special act when vacating the claims commissioner's dismissal of the matter, allowing a plaintiff with an untimely claim **[*26]** to circumvent §4-148(b) without any explanation or public purpose, constitutes a public emolument when the action is untimely.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss is granted.

BY THE COURT,

Sheridan, J.

End of Document

EXHIBIT B

Deborah G. Stevenson
Attorney-At-Law

DGS

FILE no: 23418

Education Law
Constitutional Law
Litigation

Appellate Law
Public Policy Law
Administrative Law

August 28, 2013

RECEIVED
SEP 9 2013
OFFICE OF CLAIMS COMMISSIONER
STATE OF CONNECTICUT

PAID
SEP 9 2013
$50

Claims Commissioner
165 Capitol Avenue
Suite 123
Hartford, CT 06106

Notice of Claim of Joanne Avoletta, Peter Avoletta, and Matthew Avoletta against the State of Connecticut – Refiled Claim of Peter Avoletta

My clients, Joanne Avoletta, and her two sons, Peter and Matthew Avoletta, who, during all relevant time periods, lived at 13 School Street in Torrington, CT, do hereby formally re-file their claim against the State of Connecticut, and the State's hereinafter named agents, originally filed on August 13, 2013 and received by the Claims Commissioner on August 16, 2013, for the injuries done to them as more particularly described below.

The relevant facts and information are:

1. The mailing address for Joanne, Peter, and Matthew Avoletta is: 13 School Street, Torrington, CT;

2. Undersigned counsel, Deborah G. Stevenson, P.O. Box 704, Southbury, CT 06488, Juris # 416740, represents them in this matter (see attached appearance);

3. The claim is that the claimants suffered losses, well over $5000,00, directly resulting from the negligence of the State, as described and documented by the court, Sheridan, J., in its May 6, 2013 Memorandum of Decision in a legal action filed by the claimants against the State, with the State's permission, in Docket #HHD-CV12-5036221 (see attached);

4. In granting the claimants permission to sue the State, the legislature stated, "the decision of the claims commissioner…ordering the dismissal of the claims against the state…is vacated and the claimants are authorized to institute and prosecute to final judgment an action against the state to recover damages in compensation for injury to person or damage to property, or both, allegedly suffered by the claimants as set forth in said claims";

5. In its May 6, 2013 decision, while acknowledging that the State granted the right of the claimants to sue the State for the State's prior negligence, the court, however,

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dismissed the lawsuit in its entirety, holding that the legislature failed to articulate what the "public purpose" was in granting the claimants the right to sue" the State.

6. Therefore, as a result of the State's now documented gross negligence in failing to articulate its "public purpose" in granting the claimants the right to sue, the claimants seek relief: (1) for the original negligence of the State amounting to at least $167,302.00 in actual damages, punitive damages, plus costs, and attorney fees; (2) actual and punitive damages, plus costs, and attorney fees for the subsequent negligence of the State for its failure to articulate; and (3) any other legal and equitable relief deemed appropriate.

7. Should the claims commissioner deny the claimants' just claim, they seek permission to sue the State for the appropriate relief.

Yours truly,

Deborah G. Stevenson

EXHIBIT C

FILE NO. 23416

MATTHEW AVOLETTA *Complainant*	:	STATE OF CONNECTICUT
v.	:	OFFICE OF THE CLAIMS COMMISSIONER
STATE OF CONNECTICUT *Respondent*	:	NOVEMBER 19, 2014

FILE NO. 23417

JOANNE AVOLETTA *Complainant*	:	
v.	:	
STATE OF CONNECTICUT *Respondent*	:	

FILE NO. 23418

PETER AVOLETTA *Complainant*	:	
v.	:	
STATE OF CONNECTICUT *Respondent*	:	

MOTION TO DISMISS

The State of Connecticut hereby moves to dismiss these three identical claims by Matthew Avoletta, Peter Avoletta, and Joanne Avoletta (hereinafter the "claimants"). The claimants are seeking monetary damages or, in the alternative, permission to sue the State, for the legislature's alleged negligent drafting of a joint resolution that would have allowed the claimants to sue the State, but which the Appellate Court recently held was an unconstitutional

public emolument. See Avoletta v. State, 152 Conn. App. 177, cert. denied, __ Conn. __ (Nov. 12, 2014)(Ex. A). The result is that the claimants are alleging that the State, through the legislature, has a duty to provide them with a private right that the Appellate Court has already held that the legislature cannot constitutionally provide. Because this claim is barred by (1) principles of res judicata and collateral estoppel; and (2) legislative immunity, none of the claimants has a just and equitable claim against the State. Dismissal is therefore warranted.

FACTUAL BACKGROUND

The present claims before the Claims Commissioner are brought by two brothers, Peter and Matthew Avoletta, and their mother, Joanne Avoletta. Each of the claimants' claims is identical and arises out of the claimants' unsuccessful seven-year effort to bring untimely claims against the State. The history of the litigation is described in the Appellate Court's decision in Avoletta v. State, 152 Conn. App. 177, cert. denied, __ Conn. ___ (Nov. 12, 2014), which dismissed the claimants' suit against the State. As the Appellate Court explains, the claimants filed claims with the Claims Commissioner on May 2, 2007, alleging that the State had failed to provide Peter and Matthew Avoletta with free appropriate public educations. Id. at 180. The Commissioner dismissed the claims for lack of subject matter jurisdiction because they concerned matters occurring more than one year prior to the date of filing and were therefore untimely. Id. at 180.

The claimants thereafter sought legislative review of the Claims Commissioner's decision. Avoletta, 152 Conn. App. at 180. According to the claimants, they testified at a public hearing before the Judiciary Committee and explained the public policy that they believed supported their claims. Avoletta v. State, HHD-CV-12-5036221, Plaintiffs' Memorandum in

Objection to Defendant's Motion to Dismiss, p. 33 (Sept. 14, 2012)[Doc. No. 117.00](Ex. B hereto). Following the hearing, the claimants "submitted an additional statement to the Judiciary Committee, urging the Committee to base its decision, in part, on [a recent Connecticut Supreme Court case] and its importance to the public policy of this state." Id. at 35. In response, on May 31, 2011, the Connecticut General Assembly adopted Joint House Resolution 11-34, "Resolution Concerning the Disposition of Certain Claims Against the State Pursuant to Chapter 53 of the General Statute" (the "Resolution"). Id. at 181. Section 2 of the Resolution vacated the Claims Commissioner's dismissal of the claimants' claims and authorized the claimants to bring suit against the State for damages. Id.[1] The Resolution did not make an express finding that authorization to sue the State beyond the one year time limitation was supported by compelling equitable circumstances and would serve a public purpose. Based on the authority of the Resolution, the claimants sued the State. Id.

The State moved to dismiss the suit, arguing, among other claims, that the Resolution was an unconstitutional public emolument that violated article first, § 1, of the Connecticut constitution because it provided the claimants with a private benefit that did not serve a public purpose. Avoletta, 152 Conn. App. at 181. The claimants opposed the motion and, once again,

---

[1] Specifically, § 2 of the Resolution stated that:

> That a decision of the Claims Commissioner, file numbers 21101, 21102 and 21103 of said commissioner, ordering the dismissal of the claims against the state in excess of seven thousand five hundred dollars of Joanne Avoletta, Peter J. Avoletta and Matthew Avoletta, is vacated and the claimants are authorized to institute and prosecute to final judgment an action against the state to recover damages as compensation for injury to person or damage to property, or both, allegedly suffered by the claimants as set forth in said claims. Such action shall be brought no later than one year from the date of the final adoption by the General Assembly of this resolution.

Joint House Resolution 11-34, § 2 (May 31, 2011).

had the opportunity in their briefs and at oral argument to articulate any possible public purpose that the Resolution might serve.

On May 6, 2013, the Superior Court granted the State's motion to dismiss, holding that: (1) the claimants' claims to the Claims Commissioner were untimely; and (2) the Resolution granting the claimants the right to bring suit on untimely claims was an unconstitutional public emolument because it provided the claimants with a private benefit that did not serve a public purpose. Avoletta v. State, HHD-CV-12-5036221, 2013 WL 2350751 (Conn. Superior Ct. May 6, 2013)(Ex. C). On August 12, 2014, the Appellate Court affirmed the trial court's decision. Avoletta v. State, 152 Conn. App. 177, cert. denied, __ Conn. ___ (Nov. 12, 2014). In its decision, the Appellate Court held not only that the Resolution as written lacked a public purpose, but also that the General Assembly, given the evidence before it, could not reasonably have concluded that the Resolution served a public purpose. On November 12, 2014, the Supreme Court denied the claimants' petition for certification.

In the present claims before the Commissioner, the claimants allege that the legislature's failure to articulate a public purpose when it adopted the Resolution constituted gross negligence. (Claim ¶ 6). They seek relief "(1) for the original negligence of the State amounting to at least $167,302 in actual damages, punitive damages, plus costs, and attorney fees; (2) actual and punitive damages, plus costs and attorney fees for the subsequent negligence of the State for its failure to articulate; and (3) any other legal and equitable relief deemed appropriate." (Id. ¶ 6). Because the claimants' claims are barred by principles of res judicata, collateral estoppel, and legislative immunity, and thus are not just and equitable claims, they should be dismissed.

STANDARD OF REVIEW

Under the common law doctrine of sovereign immunity, "the state cannot be sued without its consent." Miller v. Egan, 265 Conn. 301, 313 (2003), quoting Horton v. Meskill, 172 Conn. 615, 623 (1977). "When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim." Krozser v. City of New Haven, 212 Conn. 415, 421 (1989), cert. denied, 493 U.S. 1036 (1990); see also Conn. Gen. Stat. §§ 4-141 to 4-165b. Because the Claims Commissioner's statutory authority operates "in derogation of sovereignty," claims brought pursuant to these statutes "should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed." Id. (internal quotation marks omitted); C.R. Klewin Northeast, LLC v. State, 299 Conn. 167, 175 (2010).

ARGUMENT

I. THE CLAIMANT'S CLAIMS ARE NOT JUST AND EQUITABLE BECAUSE THEY ARE BARRED BY PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The claimants' claims should be dismissed based on principles of res judicata and collateral estoppel because they seek relief based on arguments that are effectively foreclosed by the Appellate Court's decision in Avoletta v. State, 152 Conn. App. 177, cert. denied, __ Conn. ___ (Nov. 12, 2014). In essence, the claimants are arguing that they are entitled to relief because there was a "public purpose" for granting them the private right to bring an untimely claim that, if the legislature had articulated it, would have rendered the Resolution constitutional. Because the Appellate Court in Avoletta rejected the argument that any such purpose existed, the issue cannot be relitigated and the claimants' claims are barred.

Res judicata and collateral estoppel are "related ideas on a continuum." Powell v. Infinity Ins. Co., 282 Conn. 594, 600 (2007). "The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." Id. "If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or which might have been made." Id. "[C]ollateral estoppel, or issue preclusion prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim." Id. (ellipses omitted). "The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate." Id. at 601.

In Avoletta v. State, 152 Conn. App. 177, cert. denied, __ Conn. ___ (Nov. 12, 2014), the Appellate Court held that the Resolution granting the claimants the private right to bring an untimely claim against the State was an unconstitutional public emolument because it did not serve a public purpose. Under article first, § 1, of Connecticut constitution, a legislative act that grants an individual a private benefit that is not otherwise available to the public must serve a public purpose. Id. at 194. The courts have "ordinarily been unable to discern any public purpose" in allowing a person to bring suit on an otherwise untimely claim. Id. at 195.

The Court in Avoletta not only held that the Resolution was unconstitutional because it lacked a public purpose, but also expressly *rejected* the claimants' argument that there was a

public purpose that the General Assembly had overlooked. Although the claimants argued that "the General Assembly reasonably could have concluded that the resolution served a public purpose, given the evidence before it," the Court was "not persuaded." Avoletta, 152 Conn. App. at 193. In other words, it is not that the legislature somehow failed to "properly" authorize suit against the State; rather, the legislature could not, consistent with the Connecticut constitution, authorize suit.

Because the claimants had a full and fair opportunity to litigate the question whether there was a public purpose that could support the Resolution, and the Court nonetheless determined that there was not, the claimants cannot now relitigate that issue. In the absence of any possible public purpose for the Resolution, the legislature could not constitutionally have adopted it. Because the General Assembly had no duty to adopt a Resolution that it could not constitutionally adopt, and cannot now be held liable for breach of that non-existent duty, the claimants' claims are meritless and should be dismissed.

II. THE CLAIMANT'S CLAIMS ARE BARRED BY LEGISLATIVE IMMUNITY.

The claimants' claims should be dismissed for the further reason that they are barred by absolute legislative immunity.

The Speech or Debate Clause in article third, § 15, of the Connecticut constitution, grants the legislative branch and its members absolute immunity from liability and suit for conduct occurring within the sphere of "legitimate legislative activity." Office of the Governor v. Select Committee of Inquiry, 271 Conn 540, 560-563 (2004). "[T]he primary purpose of the speech or debate clause . . . is to protect legislative independence, thereby furthering the principle of the separate of powers." Id. at 565. Because there is little law on the scope of Connecticut's Speech

or Debate Clause, the Connecticut Supreme Court looks for guidance to federal caselaw construing the speech or debate clause of the U.S. Constitution, which Connecticut's clause closely resembles. Id. at 560.

"[T]he immunity conferred by the . . . speech or debate clause is limited to conduct occurring within the sphere of legitimate legislative activity." Office of the Governor, 271 Conn. at 563. Whether conduct constitutes "legitimate legislative activity" does not depend on the legality or legitimacy of the conduct, but rather on whether it is legislative, as opposed to administrative, in nature. Office of the Governor, 271 Conn. at 567 (the fact that legitimate legislative activity might result in collateral constitutional harm "does not allow [the court] to force [that activity] to grind to a halt"); see also Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 510 (1975)("Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes").

"[O]nce it is determined that members [of the legislature] are acting within the 'legitimate legislative sphere' the clause is an absolute bar to interference" by the courts. Office of the Governor, 271 Conn. at 563; Traylor v. Gerratana, 148 Conn. App. 605, 611 (2014). This absolute bar applies regardless of whether the relief sought is monetary or equitable, Supreme Court v. Consumers Union, 446 U.S. 719, 731 (1980), and regardless of whether the defendants are individual legislators or the legislative body as a unit. See Supreme Court of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 733-734 (1980)("there is little doubt that if the [state legislature] had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code . . . the defendants in that

suit could successfully have sought dismissal on the grounds of absolute legislative immunity"); D'Amato v. Government Admin. & Elections Comm., CV-05-4012032, 2006 WL 786503 (Conn. Superior Ct. Mar. 9, 2006)(absolute legislative immunity barred claims for injunctive and declaratory relief against Government Administration and Elections Committee for issuing legislative subpoenas)(Ex. D); Leyfert v. Commonwealth of Pennsylvania House of Representatives, Civ. A.05-4700, 2005 WL 3433995 (E.D. Pa. Dec. 13, 2005)(absolute legislative immunity barred claims for monetary, declaratory, and injunctive relief against state house and senate for enactment of tax statutes)(Ex. E).

The enactment of legislation is precisely the type of "legitimate legislative activity" that is protected by absolute legislative immunity. See, e.g., Doe v. McMillan, 412 U.S. 306, 324 (1973)("[t]he business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating"); Newdow v. Congress of the U.S., 435 F. Supp. 2d 1066, 1075 (E.D. Cal. 2006), aff'd sub. nom. Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010)("[t]he enactment of legislation and its subsequent publication is squarely within the sphere of legitimate legislative activity . . . Therefore, the Legislative Branch defendants are entitled to Speech and Debate Clause immunity"). Because, in the present case, the acts of drafting and adopting the Resolution were unquestionably "legitimate legislative activity," the General Assembly is absolutely immune from suit regardless of whether its conduct was negligent, which it clearly was not. When absolute immunity applies, dismissal is warranted. See, e.g., Claim of Gregory Bolduc, No. 21412, Dismissal of Claim (Nov. 21, 2008)(claims for erroneous arrest by the court, State's Attorney and judge dismissed based on absolute immunity)(Ex. F); Claim of Bruce King, No.

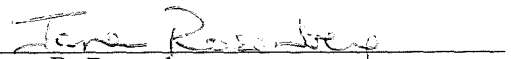
21025, Memorandum of Decision (May 18, 2007)(claim for improper apportionment complaint by Attorney General dismissed based on absolute immunity)(Ex. G).

CONCLUSION

For all of the foregoing reasons, the claims of Peter, Matthew, and Joanne Avoletta should be dismissed.

THE RESPONDENT
STATE OF CONNECTICUT

GEORGE JEPSEN
ATTORNEY GENERAL

BY: 

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, first class postage prepaid, this 19th day of November, 2014 to:

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EXHIBIT D

STATE OF CONNECTICUT
OFFICE OF THE CLAIMS COMMISSIONER
165 CAPITOL AVENUE, ROOM 123
HARTFORD, CT 06105

MATTHEW AVOLETTA	:	**FILE: NO. 23416**
JOANNE AVOLETTA		**FILE: NO. 23417**
PETER AVOLETTA		**FILE: NO. 23418**
	:	
v.		
	:	
STATE OF CONNECTICUT	:	**MAY 1, 2015**

ORDER

The Respondent's Motion to Dismiss dated November 19, 2014 is hereby GRANTED for reasons set forth in Motion and Memorandum of Law. The matter is ordered dismissed from the docket of the Claims Commission.

BY ORDER OF THE COMMISSIONER

Tamat
CLERK

EXHIBIT E

Deborah G. Stevenson
Attorney-At-Law

Education Law
Constitutional Law
Litigation

Appellate Law
Public Policy Law
Administrative Law

February 24, 2017

TESTIMONY OF ATTORNEY DEBORAH G. STEVENSON IN SUPPORT OF RAISED BILL 817

On behalf of the Avolettas, thank you for raising this bill and we urge all members of this Committee to SUPPORT its adoption.

Its adoption is necessary not only to fairly compensate the Avolettas, but also to send a clear message to the State Department of Education, and to local public school districts across the state, that the State must provide a free appropriate public education to all students in a safe school setting, especially to those students who are disabled.

In this case, you have in the record an abundance of information and background. Suffice it to say that the Avoletta children became disabled while attending the Torrington Public School District's horrendously moldy school buildings over a period of years. As a direct result of the School District's failure to maintain a safe school setting, the Avoletta children suffered irreversible lung damage, asthma, and other debilitating conditions. Their conditions were so debilitating, that their physicians told them they could no longer attend those school buildings, for fear that their conditions would grow even worse.

When, on the advice of the physicians, the Avolettas sought a different placement for the children in a safe school setting, the local school district refused to provide it. The Avolettas then sought help from the State Department of Education, but that Department refused to compel the school district to act.

The Avolettas sought assistance from the Attorney General, who told the Commissioner of Education that; local school boards are agents of the State in carrying out the educational interests of the State, including providing proper maintenance of facilities and a safe school setting;

it was the Commissioner's responsibility to hold the Torrington Board of Education *accountable* on an ongoing basis to provide a safe school setting;

and the Commissioner of Education should direct the Torrington Board of Education to take appropriate corrective action to provide a safe environment for students who have health problems that may be exacerbated by unsafe conditions in their school buildings.

The Avolettas relied on the Attorney General and the Commissioner of Education to follow through on this directive, and to compel the Torrington Public School District to provide a safe environment for their children, who already were severely disabled by the District's failures.

They waited for that corrective action, but it never came.

The Avolettas then began a decade long battle to obtain just compensation through administrative and judicial means. Ultimately, they sought compensation from the Claims Commissioner, but when this legislature allowed them the right to sue, the Attorney General argued that despite that permission, the Avolettas' case should be dismissed for failure of the legislature to articulate the public purpose in allowing them to sue.

Raised Bill 817 corrects that defect. Adoption of the bill will finally allow the Avolettas to have a hearing before the Claims Commissioner to ask simply for fair compensation and to send a message to other boards of education across the state that when they fail to provide a safe school setting to disabled children, they will be held accountable.

Again, thank you for your time, your support of this bill, and your efforts on behalf of the Avolettas and all of the disabled children in this state.

Respectfully submitted,

Attorney Deborah G. Stevenson

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Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on October 4, 2022:

(1) a copy of the brief and party appendix has been sent electronically to each counsel of record listed below in compliance with § 62-7, except for counsel of record exempt from electronic filing pursuant to § 60-8, to whom a paper copy was sent;

(2) the brief and party appendix being filed with the appellate clerk are true copies of the brief and party appendix that were submitted electronically pursuant to subsection (f) of this section;

(3) the brief and party appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, unless the brief is filed pursuant to § 79a-6;

(4) the e-brief contains 6,318 words;

(5) the brief complies with all provisions of this rule; and

(6) no deviations from this rule were requested/approved.

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/s/ Michael K. Skold
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Deputy Solicitor General