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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Appeal from the District Court, Boulder County Honorable Morris W. Sandstead, Jr., District Court Judge Case No. 2007 CV 498 Plaintiff-Appellee: **RENEE DULANY** v. Defendant-Appellant: **LONGMONT POLICE DETECTIVE LAURA FAATZ, in her individual and official capacities.**	▲ COURT USE ONLY ▲ Case Number: 2009 CA 667

Attorney for Defendant-Appellant:
Thomas J. Lyons, #8381
Lance E. Shurtleff, #34340
Devi C. Yorty, #36775
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202
Phone: 303-628-3300
Facsimile: 303-628-3368
Email: lyonst@hallevans.com
shurtleffl@hallevans.com
yortyd@hallevans.com

REPLY BRIEF OF APPELLANT LONGMONT POLICE DETECTIVE LAURA FAATZ

Appeal from judgment entered on March 3, 2009 in civil action No. 07-CV-498 in the District Court for Boulder County, the Honorable Morris W. Sanstead, Jr. presiding.

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SUMMARY OF ARGUMENT

This is not the case of a claimant who should have suspected a government actor may have caused her wrongful injury more than 180 days before noticing her claim. Here, there is no uncertainty: Plaintiff-Appellee Renee Dulany ("Ms. Dulany") openly accused Defendant-Appellant Detective Laura Faatz ("Detective Faatz") of wrongfully investigating a crime to Ms. Dulany's detriment in 2002. Yet, Ms. Dulany submitted no notice of claim until 2006. In so doing, Ms. Dulany hampered a public entity's ability to promptly remediate the compounding damages for which Ms. Dulany now sues – exactly the conduct § 24-10-109 precludes. *See, e.g.*, ***Awad v. Breeze***, 129 P.3d 1039, 1041 (Colo. App. 2005) (stating 180-day requirement permits public entities to promptly investigate and remediate dangerous situations).

The trial court's order allowing Ms. Dulany's claims to proceed applies incorrect law to unfounded facts. As a matter of fact, the trial erred clearly. Under any legal standard, it impossible to conclude Ms. Dulany in 2002 lacked reason to know Detective Faatz had not cleared Rudy Gaytan ("Gaytan") through DNA testing. (No. 24020986, hereinafter "Order," at 3.) Even more important, as a matter of law it does not matter whether Ms. Dulany knew specifically whether or not Detective Faatz cleared Gaytan with DNA or other evidence. Colorado

Revised Statute § 24-10-109 permits no person who is indisputably[1] aware of a wrongful injury possibly caused by a public entity to sit upon her claim for more than 180-days awaiting substantiation of cause. Prompt notice leads to prompt investigation and remediation. As a result, "[f]or purposes of the CGIA, . . . the 'notice period is triggered when a claimant has *only discovered* that he or she has been wrongfully injured'" and expires "if she waits to discover the cause of her injury before filing . . . ." ***Gallager v. Bd. of Trs.***, 54 P.3d 386, 391 (Colo. 2002) (quoting and adding emphasis to ***Trinity Broadcasting of Denver, Inc. v. City of Westminister***, 848 P.2d 916, 923 (Colo. 1993)).

As soon as Ms. Dulany accused Detective Faatz of incorrectly investigating her case, she had 180 days to submit a notice of claim. She waited four years. The trial court applied the wrong legal standard to unsupported facts. Ms. Dulany's Complaint must be dismissed.

[1] As in Detective Faatz's Opening Brief, Detective Faatz assumes for the purpose of this appeal only that Ms. Dulany's contentions regarding erroneous investigation are true. Nothing in this Reply Brief should be taken as an unqualified admission of any wrongdoing or any fact whatsoever.

ARGUMENT

I. *The trial court clearly erred when it found that Plaintiff-Appellee Renee Dulany had no reason to know Defendant-Appellee Detective Laura Faatz had not investigated and cleared Rudy Gaytan prior to June 1, 2006.*

A. Standard of Review. Ms. Dulany and Detective Faatz do not disagree on the standard of review applicable to Detective Faatz's first issue on appeal. "Unless clearly erroneous, [appellate courts] will defer to the trial court's findings of fact. When determining whether a plaintiff has complied with the requirements of section 24-10-109(1), the relevant facts include but are not necessarily limited to the persons, dates, and documents associated with the plaintiff's alleged injury and filing of written notice." ***Mesa County Valley Sch. Dist. No. 51 v. Kelsey***, 8 P.3d 1200, 1204 (Colo. 2000). Because plaintiffs bear the burden of proving jurisdiction, "the trial court will not construe inferences in favor of the plaintiff." ***Gallagher***, 54 P.3d at 391.

* * *

Whether or not the trial court's legal conclusion regarding the quantum of information necessary to start § 24-10-109's deadline was correct, its Order contains clear factual error, *i.e.*, Ms. Dulany "had no reason to know that Gaytan had not been investigated and cleared" prior to June 1, 2006. (Order at 3.) Although Ms. Dulany may have possessed incomplete information from which it

was possible to reason Gaytan's DNA had been tested, it is indisputable that Ms. Dulany possessed incomplete information from which she could – and possibly should – have made no such assumption.

Simply because Ms. Dulany assumed Gaytan was a redacted name on police reports regarding DNA testing does not mean Ms. Dulany had no reason to know otherwise. Quite the contrary, according to Ms. Dulany's testimony at her *Trinity* hearing and documented complaints in 2002, Ms. Dulany found the same police reports from which she assumed Detective Faatz tested Gaytan's DNA to be incomplete and misleading. In her own words, she "didn't have all the information," "felt like things were being withheld from" her, and "withholding of things seemed to be causing some confusion as to whether the investigation was complete or not." (No. 25679930, Tr. of Hearing Oct. 14, 2008 at 30; Def's Proposed Findings at 11.) Ms. Dulany even complained about not receiving all information regarding DNA testing. (No. 25679930, Tr. of Hearing Oct. 14, 2008 at 32.) From these statements alone, it is undeniable that Ms. Dulany had reason to suspect, and in fact did suspect, Detective Faatz's investigation was incomplete and DNA testing inadequate. Ms. Dulany also believed she lacked sufficient information from which to make any definite assumption. Concluding from these facts Ms. Dulany had no reason to know Gaytan was not "investigated and

cleared" is clearly erroneous. (*See* Order at 3.) Ms. Dulany admittedly had reason to know. She simply assumed otherwise.

Moreover, although it is true that prior to 2006 no police representative informed Ms. Dulany which suspects were cleared via DNA – and specifically that Gaytan had not been cleared via DNA – the record in no way supports any misleading information sufficient to allow Ms. Dulany to not follow up her continued belief that Gaytan was her assailant. Under § 24-10-109, a party "is not allowed to ignore evidence which would cause a reasonable person to know that he or she has been injured by the tortious conduct of another." ***Trinity Broadcasting of Denver, Inc***, 848 P.2d at 926-27. Ms. Dulany believed Gaytan was her assailant until 2006. (No. 25679930, Tr. of Hearing Sept. 30, 2008 at 37-38.) No police representative ever informed Ms. Dulany that Gaytan's DNA was tested and cleared. (Pl's Proposed Findings at 6; No. 25679930, Tr. of Hearing March 25, 2008 at 174, 179-80, 183; No. 25679930, Tr. of Hearing Sept. 30, 2008 at 36, 146, 148; No. 25679930, Tr. of Hearing Oct. 14, 2008 at 19, 23.) Ms. Dulany believed Detective Faatz failed to follow up on leads Ms. Dulany provided in 2002. (No. 25679930, Tr. of Hearing Oct. 14, 2008 at 165.) Ms. Dulany had sufficient information to suspect, and investigate via a notice of claim, the clearance (or lack of clearance) for Gaytan long before 2006.

The trial court clearly erred when it concluded Ms. Dulany possessed no information from which to conclude Gaytan was not exonerated years before 2006. The record is replete with undisputed proof of information Ms. Dulany possessed that would have led a reasonable person to conclude Gaytan was not cleared or, in the very least, decide she could not assume Gaytan was cleared. The trial court's order must be reversed.

II. The trial court erred when it determined Plaintiff first discovered her injury to the satisfaction of § 24-10-109 on June 1, 2006.

A. Standard of Review: Ms. Dulany incorrectly asserts the trial court's legal conclusions are reviewed for clear error. Appellate courts "review the district court's factual findings for clear error and its legal conclusions de novo." ***Hamon Contrs., Inc. v. Carter & Burgess, Inc.***, Nos. 07CA0987, 07CA0988 & 07CA2342, Colo. App. LEXIS 715 at*41-42 (Colo. App. Apr. 30, 2009); *accord* ***Awad***, 129 P.3d at 1043.

* * *

As a matter of law, the trial court and Ms. Dulany incorrectly conclude Ms. Dulany had to have been aware of both her injury and its cause prior to submitting a notice of claim under § 24-10-109, C.R.S. (2009). Even if medical malpractice suits brought under the CGIA, a claimant need only know of her injury and its wrongful nature prior to commencing § 24-10-109's 180-day limitation period. If

she is not misled regarding the existence of a potentially wrongful injury, § 24-10-109's time limitation commences running. The distinction between the accrual of a tort's statute of limitation and § 24-10-109's notice requirements must be maintained and the trial court's order reversed.

In spite of any assertion to the contrary, § 24-10-109's time limitation does not accrue in the same manner as a tort's statute of limitation. *The specific cause of a claimant's injury need not be known*:

> In torts, the 'discovery of the injury' rule is that a statute of limitations does not begin to run until the plaintiff knew or should have known through the exercise of reasonable diligence that she had been injured by a wrongful act. However, the concept of accrual of a tort encompasses the idea that the plaintiff must not only discover the injury but also the cause of the injury. For purposes of the CGIA, we said the notice period is triggered when a claimant has only discovered that he or she has been wrongfully injured. . . .

Gallagher v. Bd. of Trs., 54 P.3d 386, 391 (Colo. 2002) (internal citations and quotations omitted). Even in medical malpractice actions brought under the CGIA, a patient is required to file a notice of claim when she is aware she is wrongfully injured regardless of knowing her injury's cause:

> The GIA notice period is triggered when claimants discover or should have discovered *they have been wrongfully injured*.
>
> [I]n medical malpractice claims, patients who rely on their physicians' diagnosis of permanent injury should not be barred from suit because their trust in the physicians prevented earlier discovery of the *injury*.

> Nor should patients be compelled to file suit before they are aware of the physician's *wrongful conduct*.

Smith v. Winter, 934 P.2d 885, 887 (Colo. App. 1997) (emphasis added). A plaintiff need only know her injury was potentially caused by the wrongful conduct of another in order to commence her 180-day time limitation:

> *Trinity Broadcasting* established that the start of the notice period for injuries begins when an injury and its cause are discovered. Defendant argues that the trigger for the notice period established by *Trinity* does not apply in cases of death. Rather, he asserts that the notice period begins at the time of death, with no regard for the time of discovery that the cause may have been the tortious conduct of another. We conclude that the trigger for the 180 days in cases of death is the same as in all injuries.
>
> Plaintiffs asserted in their affidavits that they had relied on defendant's assurances that the surgery had gone satisfactorily and that decedent's death resulted from complications following the surgery. Thus, reasonable persons in plaintiffs' position may not have known at the time of death that decedent's death *was possibly caused by the tortious conduct of another*.

Miller v. Campbell, 971 P.2d 261, 263 (Colo. App. 1998).

In this matter, Ms. Dulany was not unaware of her injury or lacking any belief that such injury was wrongfully caused in 2002. Unlike a medical malpractice plaintiff who was informed her foot condition following surgery would correct as she healed and, hence, she was not actually injured, Ms. Dulany complained to both Detective Faatz and the press in 2002 that she was injured and Detective Faatz's incomplete investigation was to blame. Ms. Dulany further was

not satisfied with redacted police reports provided to her and expressed extreme displeasure at information withheld from her. Ms. Dulany believed she was injured and believed such injury was wrongfully caused in 2002. Section 24-10-109 does not tolerate Ms. Dulany's decision to await specific confirmation of an alleged causative flaw in Detective Faatz's investigation prior to submitting a notice of claim.

Such a conclusion is in accord with the purpose of § 24-10-109: to allow public entities to investigate a claimant's suspicions and remediate future harms. "The purpose of the notice is not to set a trap for the unwary, but rather to allow a public entity to promptly investigate and remedy dangerous conditions, to foster prompt settlement of meritorious claims, to make necessary fiscal arrangements to cover potential liability, and to prepare for defense of claims." ***Jefferson County Health Servs. Ass'n v. Feeney***, 974 P.2d 1001, 1003 (Colo. 1998) (citing ***Woodsmall v. Regional Transp. Dist.***, 800 P.2d 63, 68 (Colo. 1990); ***Antonopoulos v. Town of Telluride***, 187 Colo. 392, 398, 532 P.2d 346, 349 (1975)). Ms. Dulany waited until she believed she knew every element of her claim before filing its notice. However, Colorado's General Assembly intended § 24-10-109 to allow public entities to investigate claims long before claimants can present a *prima facie* case in court. This purpose is not served when claimants

such as Ms. Dulany, who suspected wrongdoing so strongly she brought her claims to the press, are allowed to sit upon claims for several years and then sue for damages accrued during their delay.

The trial court's order must be reversed and this matter remanded for the dismissal of Ms. Dulany's claims. Ms. Dulany possessed sufficient information to conclude – and actually believed – Detective Faatz wrongfully caused her injury in 2002 and before. She filed no notice of claim until 2006. Section 24-10-109 bars her case.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Detective Laura Faatz respectfully requests this Court reverse the trial court's March 3, 2009 Order and determine, as a matter of law, CGIA § 24-10-109, C.R.S. (2008), jurisdictionally bars Plaintiff-Appellee Renee Dulany's present action.

Dated this 8th day of February, 2010.

Respectfully submitted,

Original signature on paper document filed with the clerk

*s/Devi C. Yorty*_____
Devi C. Yorty, #36775
HALL & EVANS, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202
(303) 628-3300
ATTORNEYS FOR
DEFENDANT-APPELLANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of February 2010, the original **REPLY BRIEF OF APPELLANT LONGMONT POLICE DETECTIVE LAURA FAATZ** in paper format and CD-Rom were hand delivered to the Clerk of this Court, and a copy was either served electronically via Lexis/Nexis or served via E-Mail or U.S. Mail as indicated, on the following:

Attorneys for Plaintiff-Appellee:
John McNamara, Esq.
John A. McNamara, P.C.
3131 S. Vaughn Way, Suite 135
Aurora, CO 80014

Original signature on paper document filed with the clerk

s/Cynthia K. Huff
Legal Secretary