COURT OF APPEALS, STATE OF COLORADO **Court Address: 2 E. 14TH Ave.** **Denver, Colorado 80203** **(303) 861-1111**	
DISTRICT COURT, BOULDER COUNTY, COLORADO **Court Address: P.O. Box 4249** **Boulder, CO 80306** **(303) 441-3750** **Hon. Morris Sandstead, presiding** **Case No. 2007 CV 498, Division 2**	**▲ COURT USE ONLY ▲**
Plaintiff/Appellee: RENEE DULANY **v.** **Defendant/Appellant: LONGMONT POLICE DETECTIVE LAURA FAATZ, in her individual and official capacities.**	
Attorney for Appellee: Name: John McNamara, #19382 Address: John A. McNamara, P.C. 3131 S. Vaughn Way, Ste. 135 Aurora, CO 80014 Phone Number: (303) 376-6226 Fax Number: (303) 376-6224	Case Number: 2009 CA 667
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STATEMENT OF THE CASE

In 1996, Plaintiff-Appellee Renee Dulany was sexually assaulted by an unknown assailant in Dulany's grandmother's apartment in Longmont, Colorado. Dulany was able to give a partial description of the male assailant to Longmont Police and told different police officers different pieces of information. Laura Faatz was the Longmont Police Department Detective assigned to lead the sexual assault investigation. The Longmont police were able to obtain a DNA sample for the assailant as part of their investigation, but over time the Longmont Police did

not match the DNA sample with a specific person. The police did request a DNA sample from one of their suspects, the apartment complex manager, but his DNA did not match the assailant's DNA sample. In the meantime, Renee Dulany had given numerous tips to the police including the fact that she thought her assailant might be a man named Rudy that lived in the next building, but Faatz never followed up to have Rudy investigated and his DNA tested.

Over a period of ten years, Dulany suffered emotional distress while worrying about the rapist still being at large and having threatened to kill her. Dulany frequently checked with Faatz to see if there were new developments in the criminal investigation, and Faatz over several years reassured Dulany that all leads had been investigated and followed up and that a suspect's DNA had been tested and the results were negative. Finally, in 2006, the Colorado Department of Corrections contacted the Longmont Police to advise that there was a match of an inmate's DNA to the sex assailant who had attacked Renee Dulany ten years earlier- Rudy Gaytan. Tim Johnson, a Boulder Deputy District Attorney and a Longmont Police Detective Merkle went out to meet Renee Dulany and advise her of the resolution of her case. Dulany was quite distressed to learn that Detective Faatz had never tested Rudy Gaytan's DNA year's earlier or followed up on other

evidentiary leads. A summary of the facts is best found in Plaintiff's Proposed Order filed in the present case in November 2008.

Renee Dulany filed a statutory notice of claim with the proper authorities at the City of Longmont within 180 days of her discovery of Detective Faatz' failure to follow-up on many investigative leads, including the lack of a DNA test of Rudy Gaytan. Dulany later filed a lawsuit in Boulder County District Court alleging that Faatz caused negligent and intentional infliction of emotional distress by willfully wantonly and recklessly failing to follow up on the investigative leads Dulany had provided in the case. Defendant Faatz filed a motion to dismiss the lawsuit, arguing that Dulany's statutory notice of claim, filed pursuant to the Colorado Governmental Immunity Act, was untimely, and in the Opening Brief in this case, Faatz argues that the notice of claim should have been filed within 180 days of the date the crime was discovered and no arrest was made. The Boulder District Court held a Trinity hearing at Dulany's request, and over Faatz' objection, and made factual findings that Dulany did not discover her injury, thereby starting the 180-day period to file a notice of claim, until June 1, 2006, when Dulany learned the outcome of the criminal investigation. This appeal followed.

ARGUMENT

Appellant Faatz argues that the trial court clearly erred when it determined that sexual assault victim Renee Dulany had no reason to know that Rudy Gaytan's DNA had not been tested by the Longmont Police Department prior to June 1, 2006, therefore this personal injury lawsuit against a local government employee, Longmont Police Detective Faatz, was untimely and should have been dismissed under the Colorado Governmental Immunity Act.. Appellant argues that "[l]ooking at undisputed facts in the record as a whole, it is further impossible to conclude that Ms. Dulany had no reason to know of the absence of DNA testing prior to June 1, 2006." (Record, Opening Brief, p. 17). However, after reviewing Appellant's lengthy brief, the most noticeable observation of the brief is a lack of a list of supporting facts, transcript citations, or documents cited within the brief to support the idea that there was no way, Boulder District Court Judge Sandstead, viewing the evidence presented as a whole, and in the light most favorable to the prevailing party, had no sufficient evidence to support his factual findings that Renee Dulany "possessed insufficient knowledge of the nature of the cause of her injuries until June 1, 2006."

ISSUE ONE: THE TRIAL COURT DID NOT CLEARLY ERR WHEN IT FOUND PLAINTIFF-APPELLEE HAD NO REASON TO KNOW THAT DETECTIVE LAURA FAATZ DID NOT INVESTIGATE AND CLEAR RUDY GAYTAN PRIOR TO JUNE 1, 2006?

The appellate treatise, Colorado Appellate Law and Practice, 2d ed., by Anne Whalen Gill, provides the following framework to analyze an appellate case when an appellant argues that the evidence does not support a trial court's findings of fact:

> In a civil case, the appellate Court hearing a sufficiency of the evidence challenge considers whether any rational trier of fact could have reached the same conclusion based on the evidence in the record. *When sufficiency of the evidence is challenged on appeal, the [appellate] court's task is to determine whether the evidence, viewed as a whole, and in the light most favorable to the prevailing party, is sufficient to support the jury's verdict.*
>
> . . . .
>
> The standard for an appellate court deciding a challenge to the sufficiency of the evidence in a civil case parallels the trial court's standard in deciding whether to direct a verdict or grant judgment notwithstanding

the verdict on a factual issue: 'A motion for directed verdict should not be granted unless the evidence compels the conclusion that a reasonable factfinder could not disagree and that no evidence or inference has been presented at trial upon which a verdict against the moving party could be sustained. . . . .

A single witness or document that supports the disputed verdict or finding is ordinarily sufficient to block a challenge that the disputed fact is not supported by sufficient evidence. Furthermore, direct evidence to support each finding is not required if the finder of fact could have drawn reasonable inferences to reach such a finding based on the evidence presented.

. . . Colorado cases do state that when deciding a claim that there is insufficient evidence to support the trial court's judgment, *the appellate court is obligated to search the record for sufficient evidence to support the trial court's findings.*

A. Gill, Colorado Appellate Law and Practice, 2d ed., §18.5, pp. 339-349 ((2007) (emphasis added).

In Trinity Broadcasting of Denver v. City of Westminster, 848 P.2d 916 (Colo. 1993), the Colorado Supreme Court addressed how a trial court should handle a

motion to dismiss alleging the lack of subject matter jurisdiction by a state court over an employee of a state subdivision, who is alleged to have committed a tort/personal injury. The Colorado Governmental Immunity Act, C.R.S.§24-10-101, et. seq., provides for immunity for government employees in certain circumstances and the Colorado Supreme Court employed a Rule 12(b)(1) subject matter jurisdiction analysis in deciding subject matter jurisdiction in Trinity, supra.

Colo.R.Civ.P. 12(b) provides in pertinent part as follows:

> **b) How Presented.** Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim upon which relief can be granted; (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or

more other defenses or objections in a responsive pleading or with any other motion permitted under Rule **12** or Rule 98.

The defense of lack of subject matter jurisdiction is never waived J. Grund & J. Miller, Colorado Practice, vol. 7, Personal Injury Practice, 2nd ed., p. 141 (West, 2000). "A defect in subject matter jurisdiction requires dismissal even if raised for the first time on appeals. Id. It is the better practice to raise such issues at the beginning of the litigation, since "any proceedings that follow a court's improper exercise of jurisdiction are a nullity and thus a waste of the parties' time and resources." Id. "Generally, in resolving motions to dismiss, the Court must accept the facts as stated in the complaint as true, and solely on the basis of such facts, decide whether, under any theory of law, a plaintiff is entitled to relief." See, Schlitters v. State, 787 P.2d 656 (Colo. App. 1989).

C.R.S. §24-10-108 provides as follows:

Except as provided in sections 24-10-104 to 24-10-106, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant. If a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend

discovery, except any discovery necessary to decide the issue of sovereign immunity, and shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

C.R.S. §24-10-109(2008) provides as follows:

(1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment, whether or not by a willful and wanton act or omission, shall file a written notice as provided in this section within one hundred eighty days after the date of the discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

(2) The notice shall contain the following:

(a) The name and address of the claimant and the name and address of his attorney, if any;

(b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;

(c) The name and address of any public employee involved, if known;

(d) A concise statement of the nature and the extent of the injury claimed to have been suffered;

(e) A statement of the amount of monetary damages that is being requested.

(3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. Such notice shall be effective upon mailing by registered mail or upon personal service.

"Generally, whether a claimant has filed a timely notice of claim that satisfies the requirements of § 24-10-109(1) presents a mixed question of law and fact that must be resolved by the trial court before trial. *Peterson v. Arapahoe County Sheriff*, 72 P.3d 440, 443 (Colo. App. 2003)." Masters v. Castrodale, 121 P.3d 362, 364 (Colo. App. 2005). "In making this determination, the trial court must employ the C.R.C.P. 12(b)(1) standard, under which the plaintiff bears the "relatively lenient" burden of demonstrating that notice was properly given. *See Finnie v. Jefferson County Sch. Dist. R-1*, 79 P.3d 1253, 1261 (Colo. 2003)." Id. "If the facts relating to immunity are in dispute, the court must hold an evidentiary hearing. *See Corsentino v. Cordova,* 4 P.3d 75 (Colo. 2003); *Trinity Broad. Of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 928 (Colo. 1993)." Id.

"Determination of when a claimant "discovers" he or she has been injured for purposes of the GIA generally involves a question of fact." Miller v. Campbell, 971 P.2d 261, 263 (Colo. App. 1998). "The GIA's "notice period places a burden on the injured party to determine the cause of the injury, to ascertain whether a governmental entity or public employee is the cause, and to notify the governmental entity within 180 days from the time when the injury is discovered." *Trinity Broadcasting of Denver, Inc. v. City of Westminster, supra; see also Grossman v. City & County of Denver,* 878 P.2d 125 (Colo. App. 1994)." Id. "The proper inquiry under the GIA is whether sufficient evidence exits to cause a reasonable person to know that he or she has been injured by the tortuous conduct of another." Id. "A claimant who relies on a physician's diagnosis should not be compelled to file suit before he or she is aware of the physician's wrongful conduct. *See Smith v. Winter*, 934 P.2d 885 (Colo. App. 1997)." Id. "*Trinity Broadcasting* established that the start of the notice period for injuries begins when an injury and *its cause* are discovered. *Trinity Broadcasting of Denver, Inc. v. City of Westminster, supra."* Id. "[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 prevent earlier discovery of the injury. Nor should patients be compelled to file suit before they are aware of the physician's

wrongful conduct. *See Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984)." Smith v. Winter, 934 P.2d 885, 887 (Colo. App. 1997). This is consistent with C.R.S. §24-10-109(2)'s requirement to identify the government actor causing the injury and a description of how the injury occurred.

In the present appeal, without coming out and saying so, the Appellant, Faatz, through her CIRSA attorneys, is try to get the Court of Appeals to issue a new or conflicting decision with the Court of Appeals prior decision in Smith v. Winter, 934 P.2d 885 (Colo. App. 1997). "[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 prevent earlier discovery of the injury. Nor should patients be compelled to file suit before they are aware of the physician's wrongful conduct. *See Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984)." Smith v. Winter, 934 P.2d 885, 887 (Colo. App. 1997). Appellant wants to take the current discovery rule for making a notice of claim- "*Trinity Broadcasting* established that the start of the notice period for injuries begins when an injury and *its cause* are discovered"- and cut it in half. Appellant wants to force a person injured by a government employee to be forced to report the claim when the injury is discovered, without THE WRONGFUL CONDUCT/CAUSE also being known. By doing this, the government self-insurance pool will make it that

much harder for plaintiffs injured by government employees to successfully sue the government employee, since injuries are frequently known prior to the government employee cause, and government employees tend to use their authority to conceal their mistakes, as in this case.

In the present case, nowhere does Appellant mention in her brief that Appellant withheld from Renee Dulany the identity of the suspects whose DNA had been tested and whose DNA had not been tested. Renee Dulany operated for years under the belief that Rudy Gaytan's DNA had been tested, when in fact, Dulany's landlord's DNA had been tested, but Gaytan's DNA was not tested.

Throughout Appellant's brief, Appellant persists in a steady drumbeat of statements that Renee Dulany knew she was injured and should have known that Gaytan's DNA had not been tested. By repeatedly saying in different ways that Renee Dulany had suspicions that Detective Faatz had not followed up on leads, Appellant Faatz tries to argue that as a result, Dulany should have known specifically that Faatz had not had Gaytan's DNA tested. The problem with this argument is that, like a patient relying on a doctor doing a necessary medical test, Renee Dulany relied on Appellant, the lead police detective investigating a sexual assault case, to have performed the DNA test on Gaytan, and had no specific information, or alternate way of finding out, that a test of Gaytan's DNA had not occurred, because Appellant Faatz was trying to keep the details of the

investigation confidential. Faatz even telephoned Dulany after a critical newspaper article to reassure Renee Dulany that everything possible to solve the case was being done. During her testimony at the Trinity hearing, Faatz herself testified that investigators do not identify to the victim each and every suspect that they are investigating; that Faatz did not give Renee Dulany the names of people she was investigating; that she would not have sent a note to Dulany identifying what suspects were being investigated; that when the police sent police reports to Renee Dulany, they were heavily redacted; that Faatz never told Dulany who had been eliminated as a suspect, though Faatz did tell Dulany that some unnamed people had been eliminated as suspects. (Record, Transcript of Faatz testimony, pp. 10-16, 53, 117).

The best summary of the evidence presented at the multi-part Trinity Hearing in this case is the (Proposed) Findings and Order Regarding Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), prepared by Plaintiff and filed on or about November 24, 2008. No testimony was ever presented by Detective Faatz to rebut Renee Dulany's testimony that, at first Dulany was told at the hospital that the police were not sure there would be any DNA evidence; then late in 1996, she was told that there was DNA evidence that was being checked in several ways; that Detective Faatz through 1997 and 1998 reassured Renee Dulany that the DNA was being tested and leads were being followed and that the leads take time to develop;

that eventually a suspect's DNA had been tested and was not a match; and that over years Faatz continued to reassure Dulany that Dulany's case was still open and being investigated. (Record, Transcript, page 103). In the present appeal, Appellant Faatz is really arguing that, even though Faatz concealed from Dulany whose DNA should have been tested, and even though Faatz continued to reassure Dulany the case was open and being investigated, when in reality no activity was taking place, Dulany should have known Faatz was lying to Dulany and because Dulany did not realize that until the Boulder District Attorney's office met with Dulany in June 2006, Dulany should have brought suit against Faatz at an unidentified and unspecified earlier date, and Faatz should be protected from suit under the Governmental Immunity Act.

ISSUE TWO: THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED PLAINTIFF-APPELLEE FIRST DISCOVERED HER INJURY TO THE SATISFACTION OF §24-10-109 ON JUNE 1, 2006?

Similarly in this issue, the Appellant tries to play a sleight of hand with the Court of Appeals on what the appropriate standard of review is for this issue. The issue, as stated by Appellant, is whether the trial court erred in determining the fact that Renee first discovered her injury, according to the requirements of C.R.S. §24-10-109(2) on June 1, 2006. The issue presented by Appellant in Issue Two is not

"whether a claimant has satisfied the CGIA timely notice requirement . . . a mixed question of law and fact." The appropriate standard of review here, as stated above in Issue One, is:

> The standard for an appellate court deciding a challenge to the sufficiency of the evidence in a civil case parallels the trial court's standard in deciding whether to direct a verdict or grant judgment notwithstanding the verdict on a factual issue: 'A motion for directed verdict should not be granted unless the evidence compels the conclusion that a reasonable factfinder could not disagree and that no evidence or inference has been presented at trial upon which a verdict against the moving party could be sustained.

A. Gill, Colorado Appellate Law and Practice, 2d ed., §18.5, pp. 339-349 ((2007).

With respect to when a plaintiff in a governmental immunity case has discovered his or her injury, the Colorado Court of Appeals has previously held that, "Determination of when a claimant "discovers" he or she has been injured for purposes of the GIA generally involves a question of fact." Miller v. Campbell, 971 P.2d 261, 263 (Colo. App. 1998). "The GIA's "notice period places a burden on the injured party to determine the cause of the injury, . . ." Id. "A claimant who relies on a physician's diagnosis should not be compelled to file suit before he or she is aware of the physician's wrongful conduct. *See Smith v. Winter*, 934 P.2d

885 (Colo. App. 1997)." Id. "*Trinity Broadcasting* established that the start of the notice period for injuries begins when an injury and *its cause* are discovered. *Trinity Broadcasting of Denver, Inc. v. City of Westminster, supra.*" Id. "[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 prevent earlier discovery of the injury. Nor should patients be compelled to file suit before they are aware of the physician's wrongful conduct. *See Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984)." Smith v. Winter, 934 P.2d 885, 887 (Colo. App. 1997). This is consistent with C.R.S. §24-10-109(2)'s requirement to identify the government actor causing the injury and a description of how the injury occurred.

In spite of this current case law and statutory provision, Appellant persists in arguing that the duty to make a notice of claim in a governmental immunity case arises when a person discovers their injury, not the injury AND that fact that a government employee or actor CAUSED the injury, and incorrectly cites Trinity Broadcasting for this proposition.. (Record, Opening Brief, page 19). To quote Gallagher,

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 **[**16]** she had been injured by a wrongful act. *Id.* 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. Id. Gallagher v. Univ. of N. Colo., 54 P.3d 386, 391(Colo. 2002) (quoting Trinity Broadcasting, 848 P.2d at 923).

Gallagher v. Univ. of N. Colo., 54 P.3d 386, 391(Colo. 2002) (quoting Trinity Broadcasting, 848 P.2d at 923).

In addition, Appellant Faatz also tries to perform a sleight of hand as to what the injury and cause of injury were in this case. Appellant tries to argue that "Ms. Dulany's discovery of her injury turns on when Ms. Dulany knew there was no arrest in her case" (Record, Opening Brief, p. 20). In fact the best description of Ms. Dulany's injury and how it was caused are found in the Complaint in this case:

35. C.R.S. §13-21-102 (2006) defines the term legal term "willful and wanton" as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or the rights and safety of others, particularly to the plaintiff."

36. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to follow up on and investigate the identification clues provided by Renee Dulany, regarding the man who raped her, in Renee Dulany's 911 call to the police.

37. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to follow up on and investigate the identification clues and statements made by Renee Dulany directly to Detective Faatz, regarding the man who raped her.

38. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to follow up on and investigate the identification clues and statements made by Renee Dulany directly to additional Longmont police officers, regarding the man who raped her.

39. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to write down or record the identification clues provided by Renee Dulany directly to Detective Faatz, regarding the man who raped her, in Renee Dulany's 911 call to the police.

40. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to follow up on and investigate the finger print clues left at the crime scene by the man who raped Renee Dulany.

41. Longmont Police Detective Laura Faatz acted in a willful and wanton manner, while on duty and in the scope of her employment with the Longmont Police Department, both leading and conducting the investigation into the rape of Renee Dulany, by failing to follow up on and investigate the DNA clues left at the crime scene by the man who raped Renee Dulany.

42. Longmont Police Detective Laura Faatz engaged in extreme and outreageous conduct in failing to fully investigate the clues provided to her and obtained by the Longmont Police Department in her investigation into the rape of Renee Dulany.

43. Longmont Police Detective Laura Faatz knew that her conduct was certain or substantially certain to cause Renee Dulany severe emotional distress.

44. Longmont Police Detective Laura Faatz engaged in the above-described conduct recklessly or with the intent to cause Renee Dulany severe emotional distress.

45. Renee Dulany was exposed to unreasonable risk of bodily harm because of the negligence of Laura Faatz to fully investigate the statements and clues associated with the rape of Renee Dulany, leaving the primary suspect out on the street, rather than arrested and in custody.

46. Renee Dulany suffered severe emotional distress as a result of Laura Faatz's conduct.

(Record, Complaint, 5/28/2007). Renee Dulany never discovered all the ways Detective Faatz had failed to follow-up on the sex assault investigation, and as a result injured Dulany, including the failure to test Gaytan's DNA against the DNA sample collected during the sex assault investigation, until after the sex assault crime was solved and Renee Dulany was told the case had been solved, which

occurred when the Boulder District Attorney and an alternate Longmont detective met with Dulany in June 2006.

The discovery of the injury in this case does not revolve around the lack of an arrest in the case. While the arrest of a person who knows he is innocent and being wrongfully arrested may start the 180-day time period in a wrongful arrest case, in the present case, Ms. Dulany was not arrested. Ms. Dulany had suspicions about who raped her, but those suspicions were not confirmed until a DNA test was performed and results and the specific name of the person tested were reported to Renee Dulany in June 2006. Renee Dulany was not aware until June 2006 that Appellant had not previously tested the DNA of the leading suspect in Dulany's awareness, Rudy Gaytan. Unlike a wrongful arrest case, Renee Dulany, the victim in a criminal case, did not have direct definite knowledge of who had truly committed the crime and whether that person had been improperly arrested. Comparing this case to a wrongful arrest case is an attempt to misdirect the Court. Dulany was relying on the police to find out who raped her. Following Appellant Faatz's argument, Renee Dulany would only have 180 days following the crime itself to make a notice of claim for wrongful conduct by a police officer, as the lack of an arrest would start the date the wrongful conduct by a police officer occurred. A plaintiff/claimant who believed police were willfully and wantonly negligent in failing to investigate a crime, would only have 180 days from the date of the crime

and lack of an immediate arrest, to make their claim, when the lack of an appropriate investigation would hardly have become apparent. The claim and resulting lawsuit against a police officer would get immediately dismissed because of the short period of time and lack of relevant facts supporting such a claim becoming known. Unlike a surgery, performed by a willful and wanton doctor, on a patient who will know shortly if they still have medical problems, the performance of a willful and wanton or reckless criminal investigation by a detective may or may not become immediately known by the victim, depending on how much the victim knows about the person who committed the crime. Crimes, as opposed to surgeries, are often committed by people concealing their identity, and the investigation itself is frequently shrouded in secrecy by the police. Appellant, through her argument, is essentially trying to persuade the Court of Appeals to adopt a bright line test of 180 days to file a claim against a willful and wanton police officer for failure to investigate, rather than have the Court of Appeals continue to follow its already existing "discovery rule" from Miller and Smith, without even providing the Court of Appeals with supporting facts to show that Judge Sandstead's factual finding was a factual finding that a reasonable factfinder could not have made and that no evidence or inference has been presented at trial upon which a verdict against the moving party [Faatz] could be sustained.

CONCLUSION

For the foregoing reasons, Plaintiff/Appellee Renee Dulany respectfully requests the Court of Appeals to find that there was sufficient evidence to support the trial court's findings that Renee Dulany did not discover the nature and cause of her injury, which was willfully and wantonly negligent investigation of her sexual assault, until the police and district attorney's office solved the case and announced their results to Dulany on June 1, 2006. When Appellant Faatz argues that a claim for willful and wanton and reckless behavior on the part of police officer investigating the case, resulting in negligent and intentional infliction of emotional distress to the victim of the crime, should have a 180 notice of claim starting the day that both a crime is known and no arrest is made, Appellant is trying to make the notice period for claims against police officers impossibly short by shortening the concept of discovery of an injury to discovery of a harm, rather than the current discovery standard of knowledge of both the harm and the cause of the harm. In addition, the record in this case contains many pieces of evidence supporting the trial court's finding that Renee Dulany only discovered her injury after June 1, 2006, as Appellant Faatz was concealing investigative facts concerning the crime before then.

Respectfully submitted this 23rd day of January, 2010.

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CERTIFICATE OF E-FILING

I hereby certify that, on January 23, 2009, I placed a true and accurate copy of the foregoing Answer Brief in the United States Mail, first-class postage prepaid, correctly addressed to:

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