STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DOROTHY MacPHEE,

Plaintiff,

vs.

KOOTENAI HOSPITAL DISTRICT,

Defendant.

Case No. **CV 2014 3356**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KOOTENAI HOSPITAL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Kootenai Hospital District's motion for summary judgment.

Kootenai Hospital District is a governmental entity doing business as Kootenai Health and Kootenai Clinic, LLC in Kootenai County, State of Idaho. Complaint, p. 1 ¶ II; Kootenai Hospital District's Answer and Affirmative Defenses, p. 1 ¶ 3. Kootenai Clinic, LLC was formerly named Kootenai Heart Clinics, LLC. Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, Exh. B. On December 13, 2011, the Certificate of Organization for Kootenai Heart Clinics, LLC was filed with the Secretary of State of the State of Idaho. *Id.* The Certificate of Organization for Kootenai Heart Clinic, LLC designates the member or manager of Kootenai Heart Clinic, LLC as Kootenai Hospital District. *Id.*, Exh. A. An Amendment to Certificate of Organization was filed October 18, 2012, amending the name of the company from

Kootenai Heart Clinics, LLC to Kootenai Clinic, LLC. Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, Exh. B. This was the only change made to the original Certificate of Organization. *Id.*

Kootenai Hospital District owns and operates a medical office located at 1701 Lincoln Way, Coeur d'Alene, Idaho. Complaint, p. 1 ¶ II; Kootenai Hospital District's Answer and Affirmative Defenses, p. 1 ¶ 3. The logo for Kootenai Health can be found on a sign outside the office building and on the door to enter the office. Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, Exhs. C, D.

Dr. James Pataky is an employee of Kootenai Hospital District that works at the 1701 Lincoln Way office. Complaint, pp. 1-2 ¶¶ II-III; Kootenai Hospital District's Answer and Affirmative Defenses, pp. 1-2 ¶¶ 3-4. In 2012, Craig MacPhee was a patient of Dr. Pataky. Complaint, p. 2 ¶ IV; Kootenai Hospital District's Answer and Affirmative Defenses, p. 2 ¶ 5. On September 14, 2012, Mr. MacPhee's wife, Plaintiff Dorothy MacPhee (hereinafter "MacPhee"), accompanied her husband to Dr. Pataky's office for an appointment. *Id.* As MacPhee was entering Dr. Pataky's office she fell and sustained injuries. Complaint, p. 2 ¶ IV. There are two (2) doors at the entrance of Dr. Pataky's office. Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. E, p. 26, LL. 2-12, p. 28, Ll. 3-15. On September 14, 2014, both doors were propped open with large rocks. *Id.* MacPhee alleges she tripped over one of those rocks, fell and sustained injuries. Complaint, p. 2 ¶ IV. There is no dispute that the entryway of Dr. Pataky's office is owned and maintained by Kootenai Hospital District. Complaint, p. 2 ¶ V; Kootenai Hospital District's Answer and Affirmative Defenses, p. 2 ¶ 6.

MacPhee served Kootenai Hospital District with notice of her tort claim on December 13, 2013, about 456 days after the accident. Affidavit of JP. Diener in

Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 4. ¶ 17; Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, p. 3 ¶ 7. This is beyond the 180-day limit set forth under I.C. § 6-906.

On April 21, 2014, MacPhee initiated the instant negligence action by filing her Complaint against Kootenai Hospital District.

On November 13, 2014, Kootenai Hospital District moved for summary judgment. In support of its motion it filed "Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment"; "Defendant Kootenai Hospital District's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment"; the "Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment"; the Affidavit of Bonnie Warwick in Support of Motion for Summary Judgment"; "Excerpts of the Deposition of Dorothy MacPhee"; and "Excerpts of the Deposition of John MacPhee". On February 12, 2015, MacPhee filed "Plaintiff's Response to Defendant's Motion for Summary Judgment" and the "Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment". On February 18, 2015, Kootenai Hospital District filed "Defendant Kootenai Hospital District's Reply Memorandum in Support of Motion for Summary Judgment". On February 18, 2015, Kootenai Hospital District also filed "Defendant Kootenai Hospital District's Motion to Strike All or Portions of the Affidavit of JP. Diener Filed in Response to Defendant's Motion for Summary Judgment; Memorandum in Support".

Oral argument was held on February 26, 2015. At the beginning of oral argument, the Court heard argument on Kootenai Hospital District's Motion to Strike Portions of the Affidavit of JP. Diener Filed in Response to Defendant's Motion for Summary Judgment filed February 18, 2015. Kootenai Hospital District objected to three photographs taken by John MacPhee (MacPhee's son) claiming that as they were

attached to an affidavit of plaintiff's counsel, they lacked foundation as to John MacPhee's personal knowledge of those three photographs. This Court agrees. However, an Affidavit of John MacPhee was filed February 24, 2015, two days before hearing, wherein John MacPhee testified he took those photographs and when he took them. The Court denied the motion to strike. The Court then heard argument on Kootenai Hospital District's Motion for Summary Judgment. At the conclusion of the hearing, the Court took the motion under advisement. For the reasons set forth below, the Court grants the motion for summary judgment brought by the Kootenai Hospital District.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

If an action is being tried without a jury, "[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). If the Idaho Supreme Court reviews the decision of a judge serving as fact finder, it "[e]xercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those

inferences." *Id.* (citing *Intermountain Forest Management*, 136 Idaho at 236, 31 P.3d at 924).

III. ANALYSIS.

Kootenai Hospital District first argues it is undisputed that any unsafe condition did not cause MacPhee's fall (Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, pp. 4-5), and secondarily argues MacPhee failed to give timely notice under I.C.§ 6-906. Because the Court finds the notice issue to be dispositive, it will be discussed first.

A. MacPhee's Claim Under the Idaho Tort Claim Act is Barred for Failure to Comply with the Statutory Time Limit Prescribed by Idaho Code § 6-906.

MacPhee's claim under the Idaho Tort Claims Act is absolutely barred for failure to timely comply with the 180 day notice requirement. The Idaho Tort Claims Act, Idaho Code § 6-901, *et seq.*, governs claims against governmental entities. A "governmental entity" includes state and political subdivisions. I.C. § 6-902(3). A "political subdivision" is defined as:

> [A]ny county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation. As used in this act, **the terms "county" and "city" also mean state licensed hospitals** and attached nursing homes established by counties pursuant to chapter 36, title 31, Idaho Code, or jointly by cities and counties pursuant to chapter 37, title 31, Idaho Code.

I.C. § 6-902(2). (bold added). Based on the plain language of Idaho Code § 6-902(2), Kootenai Hospital District is a political subdivision and the claims MacPhee seeks to bring against it are governed by the Idaho Tort Claims Act.

Pursuant to Idaho Code § 6-906,

> All claims against a political subdivison [subdivision] arising under the provisions of this act and all claims against an employee of a political

> subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within **one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered**, whichever is later.

I.C. § 6-906 (bold added). The language "reasonably should have been discovered" has been interpreted by the Idaho Supreme Court as "knowledge of facts which would put a reasonably prudent person on inquiry . . . and will start the running of the [180 days]." *Mitchell v. Bingham Memorial Hosp.,* 130 Idaho 420, 423, 942 P.2d 544, 547(1997) (quoting *McQuillen v. City of Ammon,* 113 Idaho 719, 722, 747 P.2d 741, 744 (1987)). "The statute does not begin running when a person fully understands the mechanism of the injury and the government's role, but rather when he or she is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident." *Mallory v. City of Montpelier*, 126 Idaho 446, 448, 885 P.2d 1162, 1164 (Ct. App. 1994). "[T]he failure to file a claim within the 180-day time limit acts as a bar to any further action." *Id*.

Kootenai Health District maintains MacPhee failed to properly file a notice of tort claim within 180 days from the date her claim arose. Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 6. It is undisputed that MacPhee's "claim arose" on September 14, 2012, at Kootenai Clinic. *Id*., p. 7; Complaint for Damages, p. 2 ¶ IV. However, the issue is when did MacPhee have knowledge of facts which would put a reasonably prudent person on inquiry?

Kootenai Hospital District contends that on September 14, 2012, the Idaho Secretary of State was in possession of public records identifying Kootenai Hospital District as the member/manager of Kootenai Clinic, LLC. Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 7. They also

claim "[a]t the time of the incident, the Kootenai Clinic had a sign outside of its office which contained the business mark used by Kootenai Hospital. The Kootenai Clinic office also had an inscription on the outside of the glass door which contained the business mark used by Kootenai Hospital." *Id.* (internal citations omitted). According to Kootenai Hospital District, "[b]etween the sign outside Kootenai Clinic, the inscription on the doorway entering the Kootenai Clinic, and the public records documents on file with the Secretary of State of Idaho, Plaintiff had notice that the Kootenai Clinic was essentially owned and operated by Kootenai Hospital District." *Id.* Moreover, Kootenai Hospital District contends an inquiring phone call to Kootenai Clinic, LLC would have identified the ownership interests of Kootenai Clinic, LLC. *Id.*, p. 8. Kootenai Hospital District claims that MacPhee failed to exercise due diligence in investigating the ownership interest of Kootenai Clinic, LLC and is now statutorily barred by Idaho Code § 6-906 from asserting her claim against Kootenai Hospital District. *Id.*

In response, MacPhee argues notice was promptly given to Kootenai Hospital District upon learning of its role in this case. Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 5. Specifically, she maintains:

> At no point prior to the disclosure by defendant's counsel that defendant was the owner of the property, and that defendant was a governmental agency, did Plaintiff understand that the government was in any way involved. Further she had no reason to believe that her husband's doctor, James Pataky, was a government employee or in any way associated with the government.

Id., pp. 5-6. She further argues it would be a miscarriage of justice and highly prejudicial to have her claim dismissed on a purely technical ground. *Id.*, p. 6.

Based on the evidence presented by Kootenai Hospital District, it appears that if MacPhee contacted the Secretary of State for the State of Idaho on September 14, 2012, and inquired about Kootenai Clinic, LLC, she would have discovered the

Amendment to Certificate of Organization, filed October 18, 2012. Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, Exh. B. This document would have informed her that Kootenai Clinic, LLC was originally named Kootenai Heart Clinics, LLC, and amended to Kootenai Clinic, LLC on October 18, 2012. *Id.* The Amendment to Certificate of Organization would have also informed her that the Certificate of Organization for Kootenai Heart Clinics, LLC was originally filed on December 13, 2011, and that Kootenai Clinic, LLC was not adding or deleting the names and/or addresses of the managers or members. *Id.* A reasonably prudent person would have inquired about the original Certificate of Organization referenced to by the Amendment. The Certificate of Organization for Kootenai Heart Clinic, LLC designates the member or manager of Kootenai Heart Clinic, LLC as Kootenai Hospital District.[1] *Id.*, Exh. A.

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[1] In this case, neither party has provided the operating agreement or told this Court the legal significance of Kootenai Health District being the manager or member of Kootenai Heart Clinic, LLC. Idaho Code § 30-6-102 provides definitions relevant to limited liability companies. Of importance are the following definitions:

> (10) "Manager" means a person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in section 30-6-407(3), Idaho Code.
> (11) "Manager-managed limited liability company" means a limited liability company that qualifies under section 30-6-407(1), Idaho Code.
> (12) "Member" means a person that has become a member of a limited liability company under section 30-6-401, Idaho Code, and has not dissociated under section 30-6-602, Idaho Code.
> (13) "Member-managed limited liability company" means a limited liability company that is not a manager-managed limited liability company.

I.C. § 30-6-102. The Court notes that in a manager-managed LLC following rules apply:

> (a) Except as otherwise expressly provided in this chapter, any matter relating to the activities of the company is decided exclusively by the managers.
> (b) Each manager has equal rights in the management and conduct of the activities of the company.
> (c) A difference arising among managers as to a matter in the ordinary course of the activities of the company may be decided by a majority of the managers.
> (d) The consent of all members is required to:
>
> > (i) Sell, lease, exchange or otherwise dispose of all, or substantially all, of the company's property, with or without the good will, outside the ordinary course of the company's activities;
> > (ii) Approve a merger, conversion or domestication under part 10 of this chapter;
> > (iii) Undertake any other act outside the ordinary course of the company's activities; and

However, Kootenai Hospital District has not directed the Court to any evidence that demonstrates Dr. Pataky was associated with Kootenai Clinic, LLC or operating the medical office located at 1701 Lincoln Way under the name Kootenai Clinic, LLC on September 14, 2012. There is no evidence indicating what information about Kootenai Clinic, LLC, if any, was posted at Dr. Pataky's office on September 14, 2012. There is no evidence indicating what information about Kootenai Clinic, LLC was posted at Dr. Pataky's office during the180 day statutory period what MacPhee was required to give Kootenai Hospital District notice of her tort claim. There is no evidence before this Court that Dr. Pataky billed Craig MacPhee for his medical procedures under the name Kootenai Clinic, LLC. The photographic evidence attached to the Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment does not depict the name Kootenai Clinic, LLC anywhere. Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, Exhs. C, D. There is no evidence before this Court that explains why a reasonable person would contact the Secretary of State of the State of Idaho and inquire about Kootenai Clinic, LLC in relation to this case.

(iv) Amend the operating agreement.

I.C. § 30-6-407(3). In a member-managed LLC, the following rules apply:

(a) The management and conduct of the company are vested in the members.
(b) Each member has equal rights in the management and conduct of the company's activities.
(c) A difference arising among members as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members.
(d) An act outside the ordinary course of the activities of the company may be undertaken only with the consent of all members.
(e) The operating agreement may be amended only with the consent of all members.

I.C. § 30-6-407(2).

In this case, the operating agreement has not been made a part of the record. It is unclear from the documents provided whether Kootenai Clinic, LLC is member-managed or manager managed by Kootenai Hospital District or whether there are more than one members of the LLC. The Operating Agreement should set forth the rights, responsibilities, and powers of Kootenai Hospital District. *See* I.C. § 30-6-110(1).

Despite that, there is evidence in the record before this Court that convinces the Court that MacPhee should have discovered Kootenai Hospital District's role in this case no later than on January 11, 2013. Counsel for MacPhee attests:

> On January 11, 2013 . . . I conducted my own internet research regarding Dr. Pataky, and as of January 2013, there was nothing that came up in a Google search of his name that indicated he was anything other than a solo practitioner physician, and I found nothing to link him to Kootenai Health or Kootenai Hospital District. Attached as Exhibit "I" are the first two pages returned of a Google search conducted on February 11, 2015; there is nothing that jumps out in any of those search results that links Dr. Pataky to Kootenai Health or Kootenai Hospital District.

Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 2-3 ¶ 12. The Google search results for "Dr. James Pataky" contained in Exhibit I attached to the Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment contains nine (9) search results, images for "Dr. James Pataky", and a map of his office location. Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. I. The bottom two (2) search results contain the following information:

> Dr. James Pataky, MD – Health – US News & World Report
> health.usnews.com > Doctors ▾ U.S. News & World Report ▾
> **Dr. James Pataky** is an internist in Coeur d'Alene, ID. Dr. Pataky admits patients at Kootenai Health.
>
> Dr. James Pataky, MD – Coeur D Alene [sic], ID | Internal Medicine
> www.doximity .com > States > Idaho > Coeur D Alene [sic] Doximity ▾
> **Dr. James Pataky**, MD is a board certified internist in Coeur D Alene [sic], Idaho. He is affiliated with Kootenai Medical Center.

Id. (bold in original, underline added). Despite MacPhee's claim, this is evidence that should have directed her to inquire with Kootenai Medical Center and/or Kootenai Health about the nature of Dr. Pataky's association with those entities, and how those entities were owned and were doing business. While there is no evidence that these specific results were displayed when counsel ran his Google search on January 11,

2013, MacPhee is offering them as evidence to indicate the quality of information counsel's search result produced on January 11, 2013, in support of her argument that there was a lack of evidence linking Dr. Pataky to Kootenai Health or Kootenai Hospital District in January 2013. This evidence, while not conclusive of what search results for Dr. James Pataky would have produced on January 11, 2013, is also not evidence that supports MacPhee's position that she acted reasonably when taking steps to determine whether Dr. Pataky was employed by a governmental agency.

Moreover, the two photographs attached as Exhibits C and D to the Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, depict the logo for Kootenai Health. The first photo is a sign outside Dr. Pataky's office which has the logo used by Kootenai Health. *Id.*, Exh. C. The second is a photo of the door to enter Dr. Pataky's office, which also has the logo used by Kootenai Health. *Id.*, Exh. D. As stated above, Idaho Code § 6-902 provides that a "political subdivision" includes "state licensed hospitals". Idaho Code 6-902(2). Kootenai Health is a state licensed hospital, and thus a political subdivision. As a political subdivision, it is a "governmental entity" that falls under the purview of the Idaho Tort Claims Act. I.C. § 6-902(3).

On September 14, 2012, the Kootenai Health logo was present on and in front of Dr. Pataky's office. *Id.*, p. 3, ¶¶ 5, 6. The presence of these logos put MacPhee on notice on September 14, 2012, that she should inquire with Kootenai Health and/or Dr. Pataky to see if and how Dr. Pataky was connected to Kootenai Health and Kootenai Hospital District. There is no indication in the record before this Court that she did so.

As such, the Court finds that there were facts in existence on September 14, 2012, at the time of the injury, that were available to MacPhee that would have caused

a reasonably prudent person to further inquire *at that time* about Dr. Pataky's association with Kootenai Health and, by extension, Kootenai Hospital District.

MacPhee was significantly injured, she crushed her right shoulder which required surgery (arthroplasty), a three day hospitalization followed by a rehabilitation hospital. Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 4. She has residual problems from this injury. *Id.,* p. 5. Thus, immediately after the accident MacPhee knew there was a cause for the accident (the rock holding the doors open), knew where the rocks were located (at the business she was entering), knew she was injured and would likely need to hold the entity responsible for placing the rock responsible for her damages. Accordingly, on September 14, 2012, there were facts in existence that would have caused a reasonably prudent person to further inquire about Dr. Pataky's association with Kootenai Health and Kootenai Hospital District.

However, giving MacPhee the fullest benefit of all doubt, the Court finds the absolute latest date the 180-day period would begin to run was the date she retained an attorney to represent her for her damages, January 11, 2013. On that date MacPhee's attorney, JP. Diener, signed a fee agreement with John MacPhee, who had power of attorney for Dorothy MacPhee, who then became his client. Affidavit of JP. Diener, p. 2, ¶ 12. As mentioned above, the attachment JP. Diener attaches to his own affidavit shows Dr. Pataky is "**affiliated**" with Kootenai Medical Center. Even failing to see what is capable of being seen (that Dr. Pataky is affiliated with Kootenai Medical Center), which is what JP. Diener claims made him think Dr. Pataky was a sole practitioner, it would still be incumbent upon JP. Diener to contact Dr. Pataky's office (or have a paralegal or investigator make such contact), to find out who the owner of the premises was, the exact name of that owner, and the registered agent. In mid-January, JP. Diener still had two months left to figure out who owned the premises, and if it was

owned by a government entity, to provide the notice of MacPhee's tort claim within the 180-day limit under I.C. § 6-906. Instead, over four months transpired from January 11, 2013, the date JP. Diener entered into a fee agreement with his client, to the date JP. Diener first wrote to Dr. Pataky on April 15, 2013. *Id.,* p. 4, ¶ 16. JP. Diener gave the reason for that more than four month delay, "As most attorneys would likely agree, there is little that can be done while the client treats, and all I could do was stay updated on her case and gather her medical records." *Id.,* p. 4, ¶ 16. The Court disagrees with that conclusion (that little can be done while the client treats), but agrees with the factual assertion, that little *was* done while the client treats.

More incredible than the four-month delay in writing the letter is what happened *after* JP. Diener sent his April 15, 2013, letter to Dr. Pataky…apparently *nothing*. JP. Diener states, "I heard nothing from Dr. Pataky or anyone else in response to my April 15, 2013 letter." *Id.* Next, JP. Deiner states, "On November 20, 2013, I sent to Dr. Pataky another letter, this one more detailed and making an offer of settlement." *Id.,* ¶ 17. From April 15, 2013, to November 20, 2013, more than seven months, MacPhee's counsel apparently did nothing to determine the status of the property owner, other than to write a second letter to Dr. Pataky.

MacPhee did not serve Kootenai Hospital District, the governmental entity doing business as Kootenai Health, LLC, until December 13, 2013, 456 days after the accident, well beyond the 180 day limit required by I.C. § 6-906. Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 4. ¶ 17; Affidavit of Shari Hendrickson in Support of Motion for Summary Judgment, p. 3 ¶ 7. As such, MacPhee's claim is barred by Idaho Code § 6-609.

On January 11, 2013, JP. Diener knew his now new client MacPhee was injured and had been damaged. Indeed, JP. Diener knew no later than early October 2012, within a few weeks after the accident, that MacPhee had been injured and required surgery, as John MacPhee called and told JP. Diener such facts. *Id.,* p. 2. ¶ 10. While the exact extent of those injuries and the exact extent of those damages might not have been known on January 11, 2013, the fact that MacPhee was injured and those injuries required surgery, hospitalization, and rehabilitation, was beyond any doubt. Any attorney hired to seek recompense for those damages would have known that a lawsuit needed to be filed against someone or some entity and that it may take some effort to find out the person or entity which must be named as the defendant. Any attorney would know that most statutes of limitation and repose start from a known date, and in tort law it is the date of the accident or injury. Some statutes of limitation have a discovery exception as to when a reasonable person should have known certain things, but there is no statute of limitation that this Court is aware of which allows for a tolling based upon when injury becomes stable and stationary and damages become fixed and certain. MacPhee did not make such a claim in her briefing, but repeatedly made such claim at oral argument. This Court finds the absolute latest the 180-day period under I.C. § 6-906 could be tolled was January 11, 2013. That 180-day period ran, at the latest, on July 10, 2013. The tort claim was filed December 13, 2013, about five months after that period had expired.

In her briefing, MacPhee focused her argument against summary judgment on her claim that it was too difficult for her to have found out the business was owned by Kootenai Hospital District. Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 5-6. The Court has addressed those claims above. At oral argument, counsel for MacPhee raised an additional argument.

MacPhee argued at oral argument that because *the full extent* of MacPhee's injuries were not known, the 180 day period had not yet begun to run. Indeed, at oral argument, JP. Diener stated that within the first six months after the accident it was unknown that MacPhee's injuries were "permanent". Counsel for MacPhee argued that to have filed any sooner than they did (456 days after the accident) was "impossible" because they did not know the extent of her damages. The case cited for this proposition by counsel for MacPhee was *Doe v. Durtschi,* 110 Idaho 466, 716 P.2d 1238 (1986), and the quote at oral argument given by counsel for MacPhee was that MacPhee was not "fully apprised as to the extent of those damages." The problem is, that is not what *Doe v. Durtschi* says. The Idaho Supreme Court in *Durtschi* wrote:

> Obviously, a *claim* is not necessarily discovered the instant the *injury or damages* occur. The claimant only knows of his or her claim against the governmental entity and the 120-day [now 180-day] limit only begins to run after the claimant becomes fully apprised of not only the injury or damages, but also of the governmental entity's role. * * * The critical date was not and is not the date of injury, but is the date of reasonable discovery of the claim.

110 Idaho 466, 474, 716 P.2d 1238, 1246. (italics in original). The word "extent" is not used by the Idaho Supreme Court, it was grafted on by MacPhee's attorney. A plain reading of this passage shows that the period "... begins to run after the claimant becomes fully apprised of not only the injury or damages, but also the governmental entity's role." This means fully apprised of the "fact" that there has been an "injury or damage", not the exact "extent" of those injuries or those damages. This is borne out by the next portion of the above passage which reads: "The critical date was not and is not the date of injury, but is the date of reasonable discovery of the claim." *Id.* It does not say the "reasonable discovery of the extent of the claim", it says "reasonable discovery of the claim." In the present case, there is no reason why MacPhee should

not have reasonably discovered she had a "claim" on the date of injury, and in any event, there is absolutely no reason why MacPhee should not have reasonably discovered she had a claim when she entered into an attorney fee agreement with JP. Diener.

MacPhee also relies on *Trosper v. Raymond,* 99 Idaho 54, 55, 577 P.2d 33, 34 (1978), to argue that the date MacPhee should have reasonably discovered her claim against Kootenai Hospital District is a question of material fact that is inappropriate for determination on summary judgment. Specifically, MacPhee argues:

> Determining when a governmental entity's interest in property reasonably should have been discovered is a question of material fact which, by its very nature, is inappropriate for determination on a motion for summary judgment. *Id.* citing *Trosper v. Raymond*, 99 Idaho 54 (1978).
>
> Idaho Case law makes clear that it is improper to dismiss a matter on summary judgment on the basis of failure to give timely notice under the Idaho Tort Claims Act.

Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 5. That is an accurate quote from *Trosper* and while that quote was reiterated in *Durtschi* (110 Idaho 466, 474, 716 P.2d 1238, 1246), *Trosper* is distinguishable from the instant case. In *Trosper*, parents of a man who drowned in a gravel excavation pond brought a wrongful death action against the property owner. In response to their complaint, the property owners notified the plaintiffs that they had leased the gravel excavation property to Canyon County. The response was sent over a year after the incident occurred. The Court found there was a question of material fact concerning whether the plaintiffs should have reasonably discovered the claim against the country property prior to the expiration of the statutory period because there was no indication that the existence of the lease agreement was apparent or a matter of public record.

Unlike *Trosper,* the association of Kootenai Health with Dr. Pataky's office was not hidden. Moreover, since *Trosper*, the Idaho Supreme Court has consistently ruled that summary judgment is appropriate when there is an absence of material fact concerning whether the plaintiff reasonably should have discovered her claim against a governmental entity and failed to file such claim within the statutory period. *See Mitchell v. Bingham Memorial Hosp.,* 130 Idaho 420, 942 P.2d 544 (1997); *Kramer v. Cent. Highway Dist*., 126 Idaho 722, 726, 889 P.2d 1112, 1116 (1995); *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). Finally, while *Trosper* and *Durtschi* state that when a government's interest in property should be discovered is a question of material fact not appropriate for summary judgment, the present case is not a jury trial; it is a trial to the Court. As mentioned above, if an action is being tried without a jury, "[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). The Court has not been pointed to any additional evidence which could be presented at trial as to when MacPhee should have reasonably discovered her injuries were caused by a governmental entity. In this case, there are no conflicts between the possible inferences to be made by the undisputed evidence. The Court as the trier of fact, based on the undisputed evidence before it, must grant summary judgment to Kootenai Hospital District because MacPhee's claim under the

Idaho Tort Claims Act is absolutely barred for failure to timely comply with the 180-day notice requirement.

B. Construing All Disputed Facts and Drawing All Reasonable Inferences in MacPhee's Favor, there are Genuine Issues of Material Fact as to Kootenai Hospital District's Negligence.

While the Court finds no genuine issue of material fact remains as to whether the 180 day statutory limit imposed by Idaho Code § 6-906 should have been tolled, at least beyond January 11, 2013, which results in summary judgment in favor of Kootenai Hospital District, the Court will address the negligence issues raised by Kootenai Hospital District in its motion for summary judgment. This is because the Court indicated at oral argument that there was likely a dispute of material fact on this issue.

The elements a plaintiff must establish for a claim in negligence are: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011) (citing *Hansen v. City of Pocatello,* 145 Idaho 700, 702, 184 P.3d 206, 208 (2008)). A sufficient showing must be made to establish the essential elements of negligence that a party will have to prove at trial in order to survive summary judgment. *Jones v. Starnes*, 150 Idaho 257, 259-60, 245 P.3d 1009, 1011-12 (2011) (citing *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)).

"Idaho courts have maintained that the duty of owners and possessors of land is determined by the status of the person injured on the land (*i.e.,* whether the person is a invitee, licensee or trespasser)." *Ball v. City of Blackfoot*, 152 Idhao 673, 677, 273 P.3d 1266, 1270 (2012) (citing*, Rehwalt v. American Falls Reservoir, Dist. No. 2,* 97 Idaho 634, 636, 550 P.2d 137, 139 (1976)). An invitee is a person "who enters upon the

premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner." *Id.* (citing *Wilson v. Bogert,* 81 Idaho 535, 347 P.2d 341 (1959)). The duty owed by a landowner to an invitee is "to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id.* (citing *Bates v. Eastern Idaho Regional Medical Center,* 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988)). It is undisputed that MacPhee was an invitee and Kootenai Health District owed her a duty "to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id.*; Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 4; Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 7.

MacPhee argues that "the placement of the rock [in the entranceway of Dr. Pataky's office] was most certainly a breach of that duty." Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 7. In support of this she notes that ninety percent (90%) of Dr. Pataky's patients are geriatric and "it is common sense to know that geriatric patients often have mobility and sight issues. Placing a large rock or piece of cement in an entryway that geriatric patients will be using to access is a clear failure of the defendant to keep the premises in a reasonably safe condition." *Id.* Kootenai Hospital District does not respond to MacPhee's claim that it breached its duty to her by placing the rock in the entryway of Dr. Pataky's office. It is undisputed by Kootenai Hospital District that a rock was placed at the entryway to Dr. Pataky's office. Defendant Kootenai Hospital District's Statement of Undisputed Facts in Support of Motion for Summary Judgment, p. 2 ¶ 4. Since Kootenai Hospital District has failed to present evidence disputing whether it breached its duty to keep the premises in a reasonably safe condition, construing the evidence in the light most favorable to

MacPhee and drawing all reasonable inferences in her favor, the Court finds a dispute of material fact exists on this issue.

Kootenai Hospital District focuses its motion on whether MacPhee presented evidence that the unsafe condition was the cause of MacPhee's fall. Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 5; Defendant Kootenai Hospital District's Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Relying on the deposition testimony of Bonnie Warwick, Kootenai Hospital District argues MacPhee's fall was caused by stubbing her toe, not a rock propping open the door to Dr. Pataky's office. Specifically, Kootenai Hospital District claims:

> Bonnie Warwick (the one eye witness who actually saw the cause of the fall) testifies she observed the Plaintiff walking into Dr. Pataky's office in an unsteady fashion and that Plaintiff simply stubbed her toe on the ground as she was walking into the office, thereby causing her to fall. SOF ¶¶ 3-4. Lastly Bonnie Warwick testifies that she observed that this irregularly shaped rock which was propping the doorway open to Dr. Pataky's office had nothing to do with why the Plaintiff fell that day.

Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 5. This argument misstates the evidence. Bonnie Warwick actually testifies that the rock or piece of concrete was not present in the entryway to Dr. Pataky's office, holding the doors open, at the time MacPhee fell. Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. E, p. 18, Ll. 21-25, p. 42, Ll. 19-21, p. 51, Ll. 15-16. Rather, she testifies that the entryway doors to the office were closed. *Id.*, p. 42, Ll. 19-21. This is in direct contradiction with the testimony offered by MacPhee of Alta Heanne Schadel, an employee at Dr. Pataky's office who was sitting at the reception desk when MacPhee fell. *Id.*, Exh. A, p. 23, Ll. 15-23. Ms. Schadel testified that both doors to Dr. Pataky's office were propped open by large rocks and that she was the person who

propped the doors open. *Id.*, p. 26, LL. 7-12, p. 28, Ll. 3-15. Dr. Pataky also testified that a piece of cement was propping open the inner door at the time MacPhee fell. *Id.*, Exh. B, p. 48, Ll. 17-18.

Kootenai Hospital District also argues "Plaintiff cannot present any competent evidence to dispute the testimony of Bonnie Warwick that Kootenai Health's actions in placing the rock which propped open a door had nothing to do with what caused Plaintiff to fall" because she has no recollection of what caused her to fall. Defendant Kootenai Hospital District's Memorandum in Support of Motion for Summary Judgment, p. 5. MacPhee testified that while she could not recall what she tripped over, she tripped over "something substantial". Affidavit of JP. Diener in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. D, p. 26, Ll. 19-21.

Construing all disputed facts and drawing all reasonable inference in favor of MacPhee, disputed issues of material fact remain as to whether Kootenai Hospital District's conduct was the cause of MacPhee's injury. On that issue alone, summary judgment would not lie. Again, notice under I.C. § 6-906 is dispositive.

IV. CONCLUSION.

For the reasons set forth above, the Court grants Kootenai Hospital District's Motion for Summary Judgment based on I.C. § 6-906. The Court finds the period for which MacPhee should have reasonably known facts which would have put a reasonable person on inquiry that she was injured on the premises of a governmental entity, was tolled to no later than January 11, 2013. Thus, the 180-day period ran, at the latest, on July 10, 2013. The tort claim was filed December 13, 2013, about five months after that period had expired.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED Kootenai Hospital District's Motion for Summary Judgment is GRANTED based on MacPhee's failure to comply with the 180-day notice requirement of I.C. § 6-906 which this Court finds was tolled to no later than January 13, 2-013, and expired on July 10,2 013, making MacPhee's filing on December 13, 2013, untimely and barred.

Entered this 3rd day of March, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
JP. Diener	509 744-3436	Mark A. Ellingsen	208 667-8470

_____
Jeanne Clausen, Deputy Clerk