DEVARGAS V. STATE EX REL. NEW MEXICO DEP'T OF CORS., 1981-NMCA-109, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981)

ANTONIO "IKE" DeVARGAS, Plaintiff-Appellee,
vs.
STATE OF NEW MEXICO, ex rel. NEW MEXICO DEPARTMENT OF CORRECTIONS, CLYDE O. MALLEY, EDWIN T. MAHR, MICHAEL HANRAHAN, JOHN DOES 1 through 10,
Defendants-Appellants.

No. 5062

COURT OF APPEALS OF NEW MEXICO

1981-NMCA-109, 97 N.M. 447, 640 P.2d 1327

October 01, 1981

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, GARCIA, Judge

Motion for Rehearing Denied October 20, 1981

COUNSEL

MARK C. MEIERING, RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A., Albuquerque, New Mexico, Attorneys for Appellants.

ROBERT SENA, Santa Fe, New Mexico, RICHARD ROSENSTOCK, Chama, New Mexico, PICKARD & SINGLETON, Santa Fe, New Mexico, Attorneys for Appellee.

JUDGES

Wood, J., wrote the opinion. I CONCUR: Mary C. Walters, J., Lewis R. Sutin, J., (Specially Concurring in the result only)

AUTHOR: WOOD

OPINION

*{*449}* WOOD, Judge.

{1} The incident on which the original complaint was based occurred on September 21, 1976. The incident, according to plaintiff, was a beating he received by employees of the Department of Corrections (named as John Doe defendants), while plaintiff was incarcerated at the penitentiary. The original complaint was filed July 6, 1977. The

amended complaint was filed approximately August 5, 1980 (the district court filing stamp cannot be read). The trial court denied defendants' motion to dismiss the amended complaint. We granted an interlocutory appeal. A determination of whether the trial court's ruling was correct involves: (1) whether a claim was stated under 42 U.S.C. § 1983 (hereinafter referred to as § 1983); (2) relation back of the amended complaint under R. Civ. Proc. 15(c); (3) the applicable statutes of limitation; (4) the John Doe claims in the original complaint. Because the issues differ as to the defendants, we discuss the defendants separately.

A. **The State and Its Department of Corrections**

{2} The original complaint sought damages from the State and its Department of Corrections under § 1983 for alleged deprivation of constitutional rights. Section 1983 applies to persons. The State and its Department of Corrections are not persons within the meaning of § 1983. **Williford v. People of California,** 352 F.2d 474 (9th Cir. 1965); **Taylor v. Mitzel,** 82 Cal. App.3d 665, 147 Cal. Rptr. 323 (1978). Not being subject to suit, the original complaint was a nullity as to the State and its Department of Corrections.

{3} The amended complaint did not seek relief from the State and its Department of Corrections under § 1983; thus this § 1983 claim was abandoned in the amended complaint. **Biebelle v. Norero,** 85 N.M. 182, 510 P.2d 506 (1973).

{4} The amended complaint sought damages against the State and its Department of Corrections under the Tort Claims Act. See § 41-4-12, N.M.S.A. 1978. The limitation period for such a claim is two years. Section 41-4-15, N.M.S.A. 1978. The claim made in the amended complaint was barred unless the amended complaint related back to the date of the original complaint. The original complaint being a nullity, there was no relation back. **Mercer v. Morgan,** 86 N.M. 711, 526 P.2d 1304 (Ct. App. 1974).

*{*450}* B. **Malley, Mahr and Hanrahan**

{5} These three defendants were named as defendants in the original complaint -- Malley as Warden of the Penitentiary; Mahr and Hanrahan as Secretaries of Correction. The original complaint does not assert that these three defendants had anything to do with the alleged beating. The original complaint alleged that Malley, as Warden, was responsible for the daily management of the penitentiary, and that Mahr and Hanrahan, as Secretaries of Correction, were responsible for the daily administration of the Department of Corrections.

{6} The original complaint sought damages from these three defendants under § 1983. The fact that these defendants had some administrative responsibility over the place where the alleged beating occurred, and over the John Does who allegedly did the beating, provides no basis for relief under § 1983. **Respondeat superior** does not apply to § 1983 claims seeking monetary damages. **Johnson v. Glick,** 481 F.2d 1028 (2d Cir. 1973); **Jennings v. Davis,** 476 F.2d 1271 (8th Cir. 1973). To state a claim

under § 1983, plaintiff must allege that the defendants deprived plaintiff of some constitutional right, privilege or immunity; that is, some personal responsibility is required. **Johnson v. Glick,** id.; **Clark v. People of State of Mich.,** 498 F. Supp. 159 (E.D. Mich., S.D. 1980). The original complaint did not assert any personal responsibility against these defendants for the alleged beating and, thus, failed to state a claim for relief. The original complaint was a nullity as to these three defendants.

{7} Apart from Claim II, which is discussed separately, the amended complaint made no claim against Mahr or Hanrahan. Except as stated in Claim II of the amended complaint, plaintiff has abandoned his claims against Mahr and Hanrahan. **Biebelle v. Norero,** supra.

{8} Apart from Claim II, the amended complaint asserts that Malley should have known that the employee-guards who allegedly beat plaintiff were not qualified to be guards, that Malley failed to take adequate action to remove these employees from their positions as guards and, generally, was negligent in his training, supervision and disciplining of these employees. Inasmuch as the claims against Malley in the original complaint were a nullity, the claims against Malley in the amended complaint did not relate back. **Mercer v. Morgan,** supra.

{9} Assuming, but not deciding, that the claims against Malley in the amended complaint were sufficient allegations of Malley's personal responsibility so as to state a claim under § 1983, the question is whether these claims, first asserted more than three years after the alleged beating, were barred under a statute of limitation.

{10} The parties agree that there is no federal statute of limitation governing claims under § 1983; thus, the controlling limitation period is the most appropriate one provided by state law. **Gipson v. Township of Bass River,** 82 F.R.D. 122 (D.N.J. 1979). An applicable state limitation period may be disregarded only if the state law is inconsistent with the Constitution and laws of the United States. "In order to gauge consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared." **Board of Regents v. Tomanio,** 446 U.S. 478, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980).

{11} The trial court ruled that the applicable limitation period was four years. This is incorrect. The four-year period, stated in § 37-1-4, N.M.S.A. 1978, applies only to actions "not * * * otherwise provided for".

{12} Section 37-1-8, N.M.S.A. 1978, provides a three-year limitation period for injury to the person. Plaintiff seeks damages for physical pain and discomfort, mental anguish, trauma, humiliation, embarrassment and medical bills, all allegedly resulting from a violation of his civil rights. Section 37-1-8, supra, is a more appropriate limitation period than § 37-1-4, supra.

{13} Section 41-4-15, supra, provides a two-year period for plaintiff's claims against *{*451}* Malley, a public employee. Plaintiff refers us to cases holding that the limitation

period under a tort claims act is not applicable to a claim under § 1983. We disagree with those decisions. Section 1983 provides liability for the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. Section 41-4-12, supra, provides for liability (by a waiver of immunity) for a deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. Liability under § 1983 and § 41-4-12, supra, is consistent, not inconsistent. Section 41-4-12, supra, is a more appropriate limitation period than § 37-1-4, supra.

{14} Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980), states that a § 1983 claim is not analogous to a cause of action brought under a state tort claims act because tort claims acts are based on state concepts of sovereign immunity alien to the purposes to be served by the Civil Rights Act. We disagree with this reasoning; New Mexico's Tort Claims Act is based on a waiver of immunity and such a waiver, as pointed out in the preceding paragraph, provides for liability for law enforcement officers which is consistent with the purposes of § 1983. The reasoning of **Gunther,** supra, is incorrect and is not to be followed.

{15} Either the three-year period of § 37-1-8, supra, or the two-year period of § 41-4-15, supra, is a more appropriate limitation period than the four-year period of § 37-1-4, supra. In our opinion, the two-year period is the applicable limitation period to plaintiff's claims against Malley under § 1983. However, a choice between the three-year and two-year period need not be made in this case; plaintiff's claims are barred under either period.

C. **John Doe Defendants**

{16} The original complaint asserted that the alleged beating was by John Does 1 through 10 who "at all times material hereto, [were] employed by the Department of Corrections * * * and are sued in their official capacity." The amended complaint added seven persons as parties and, to avoid the statute of limitations as to these seven, plaintiff argues that the amendment naming these parties relates back to the John Doe defendants of the original complaint.

{17} The requirements for relation back in this situation are stated in R. Civ. Proc. 15(c). For relation back to apply, the added party, within the limitation period, must know "or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Plaintiff's motion to amend, of July 30, 1980, alleged that each of the defendants added in the amended complaint "knew that but for the inability of the Plaintiff to identify him correctly, each said Defendant would have been sued in this cause of action as originally filed."

{18} There is nothing in this record supporting the statement made in plaintiff's motion. The original complaint identified the John Does as employees of the Department of Corrections. There is nothing indicating that plaintiff could not identify the seven added defendants within either a two-or-three-year limitation period, and nothing indicating that

the added defendants knew or should have known that there was a mistake as to their identity.

{19} The showing in this record is that plaintiff made little or no effort to identify the seven added defendants. In 1977, when the original complaint was filed, R. Civ. Proc. 4(a) authorized the issuance of summons within one year after the filing of the complaint. See § 21-1-1(4)(a), N.M.S.A. 1953 Comp. (Repl. Vol. 4). There is nothing indicating a summons was issued for any John Doe defendant. Section 21-1-1(4)(e)(5), supra, provided that service shall be made with reasonable diligence. This requirement, of service with reasonable diligence, was continued in the 1979 amendment to the rule; the requirement is in the last sentence of R. Civ. Proc. 4(e). See Judicial Pamphlet 5, page 8, N.M.S.A. 1978. There is nothing indicating **any** attempt to serve process on the John Doe defendants; thus, nothing was done through the device of process to identify persons known to be *{*452}* employees of the Department of Corrections. The record indicates that the earliest discovery undertaken by plaintiff was in October, 1979, more than three years after the incident giving rise to this lawsuit.

{20} Under the foregoing circumstances, relation back did not apply. Compare **Ames v. Vavreck,** 356 F. Supp. 931 (D. Minn. 1973). Another way of stating the result is that in the circumstances of this case, the filing of the original complaint, naming John Doe defendants, did not toll the running of the statute of limitation against the seven defendants added in the amended complaint. The reason is that the lack of reasonable diligence in proceeding against the John Doe defendants required a dismissal as to the John Does; the seven defendants added in the amended complaint became parties, for the first time, by the amended complaint. See **Dewey v. Farchone,** 460 F.2d 1338 (7th Cir. 1972).

{21} The seven defendants added by the amended complaint were Deputy Warden Montoya and guards Gonzales, Romero, Lynch, Peperas, Lujan and Padilla. At the time they were added as parties, the limitation period for a claim under § 1983, whether two or three years, had run. If the amended complaint seeks damages from these seven defendants under the state Tort Claims Act, the limitation period under that Act has also run.

D. **Claim II**

{22} Claim II of the amended complaint was against all defendants. This claim sought § 1983 relief on the basis of events occurring in September and October, 1976, **after** the incident of September 21, 1976. Being based on subsequent events, this claim did not relate back to the original complaint. **Raven v. Marsh,** 94 N.M. 116, 607 P.2d 654 (Ct. App. 1980). Claim II, asserted for the first time in August, 1980, was barred, whether the limitation period is two or three years.

{23} The order of the trial court is reversed and the trial court is directed to dismiss the amended complaint with prejudice.

{24} Defendants are to recover their appellate costs from plaintiff.

{25} IT IS SO ORDERED.

I CONCUR: Mary C. Walters, J., Lewis R. Sutin, J., (Specially Concurring in the result only)

SPECIAL CONCURRENCE

SUTIN, Judge (Specially Concurring).

{26} I concur in the result.

{27} This is an interlocutory appeal from an Order which denied defendants' motions to dismiss plaintiff's amended complaint growing out of an alleged assault and battery committed by defendants while plaintiff was an inmate of the state penitentiary.

{28} The chronology of events and proceedings follow:

(1) On September 21, 1976, plaintiff was incarcerated in the state penitentiary on which date the alleged assault and battery occurred.

(2) On July 6, 1977, plaintiff filed a complaint against State ex rel., The New Mexico Department of Corrections, Malley, the Warden, Mahr and Hanrahan, Secretaries of Corrections and John Does 1 through 10, based upon a violation of § 1983 of the Civil Rights Act of the United States Code.

(3) On August 12, 1977, defendants filed an answer, the third affirmative defense of which was to be treated as a motion to dismiss. The memorandum attached to the motion claimed that the State was not a "person" within the meaning of § 1983; that the "John Does" were not disclosed and were not served with process.

(4) On July 30, 1980, 3 years and 10 months after the alleged assault and battery and 3 years after the initial complaint was filed, plaintiff moved for leave to file an amended complaint under Rule 15 of the Rules of Civil Procedure because plaintiff had not been able to establish the identities of the various "John Does."

(5) Around August 5, 1980, plaintiff filed an amended complaint. Listed as additional defendants were "Gonzales, Romero, Lynch, Paperas, Lujan and Padilla... employed by the State of New Mexico as guards at the New Mexico State Penitentiary," and Montoya, Deputy Warden at the penitentiary.

(a) Claim I and Claim II were directed against additional defendants and Malley as Warden. These claims were based upon a deprivation of rights guaranteed by the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

(b) Claim III, excluding defendants Malley, Mahr and Hanrahan, was based upon assault and battery committed by the remaining defendants.

(c) Claim IV sued the State for a violation of the New Mexico Tort Claims Act.

(6) On September 18, 1980, defendants Montoya, Gonzales, Romero, Lynch and Lujan (Paperas and Padilla not having been served with process) moved to dismiss plaintiff's amended complaint based upon the statute of limitations and laches. Malley, Mahr and Hanrahan answered with nine defenses.

(7) On January 18, 1981, defendants moved to dismiss Claim II because it concerned events not a part of the original complaint and pleadings.

(8) On February 23, 1981, a final Order was entered. It denied the motion to dismiss the State as a party, and denied the motions to dismiss the individual defendants. The motions were denied on two grounds. The court found:

(a) the applicable statute of limitations is four years, and, thus, no bar to the amended complaint filed against the individual defendants, and,

(b) the amended complaint filed against the State relates back to the original complaint against the State since the original complaint was not null, void and ineffective with respect to the State.

A. **The initial complaint was a nullity and the amended complaint was a new cause of action.**

{29} Plaintiff's initial complaint sued the State of New Mexico ex rel. New Mexico Department of Corrections, Malley, as Warden of the penitentiary, Mahr and Hanrahan, Secretaries of the Department in their official capacities and John Does 1 to 10, for a deprivation of civil rights under 42 U.S.C. § 1983.

{30} Section 1983 reads:

Every **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof **to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,** shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [Emphasis added.]

{31} Stated concisely:

Every person who subjects plaintiff to the deprivation of any secured rights under color of state statute shall be liable to plaintiff.

{32} "To state a claim under the statute, a plaintiff must allege: (1) that the defendant was acting under color of State law at the time of the acts in question, and (2) that the defendant deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States...." **Zarcone v. Perry,** 434 N.Y.S.2d 437, 439 (1980). As to defendant Malley, Warden of the Penitentiary, plaintiff must allege and show more than mere authority by Malley over others who have violated plaintiff's right. Plaintiff must allege at least one specific act or omission of Malley which was a causative factor depriving plaintiff of his civil rights. **Clark v. People of State of Mich.,** 498 F. Supp. 159 (D. Mich. 1980).

{33} No allegations were made of any conduct of the Department, its secretaries or the warden that were related to the assault and battery committed by the "John Does" except that the "John Does" were employed by the Department.

{34} The complaint stated a claim against the "John Doe" defendants but not against the Department, the Secretaries or the Warden. Under § 1983, the doctrine of **respondeat superior** is not applicable. **Knipp v. Weikle,** 405 F. Supp. 782 (D. Ohio 1975); **Bolden v. Mandel,** 385 F. Supp. 761 (D. Md. 1974); **State v. Hall,** 411 N.E.2d 366 (Ind. App. 1980); **Privitera v. Town of Phelps,** 435 N.Y.S.2d 402 (1981).

{35} In addition, the State was not subject to suit under § 1983. **Taylor v. Mitzel,** 82 Cal. App.3d 665, 147 Cal. Rptr. 323 (1978); **State v. Hall, supra.** In **Taylor,** a civil rights suit was brought against the State, county and various public officials for damages allegedly arising from a wrongful denial of medical services. The court said:

The causes alleged as to the state insofar as they are founded upon asserted violations of the federal Civil Rights Act (42 U.S.C. § 1983, et seq.), are a nullity. A state cannot be sued as a "person" under the Act in circumstances such as alleged or shown here. [Id. 325.]

{36} This rule is uniform in the federal courts. **Florida Businessmen, Etc. v. State of Fla.,** 499 F. Supp. 346 (D. Fla. 1980); **Clark v. People of State of Mich.,** 498 F. Supp. 159 (D. Mich. 1980); **Stenson v. State of N.Y.,** 422 F. Supp. 38 (D. N.Y. 1976); **Duisen v. Administrator & Staff, Fulton St. Hosp.,** No. 1, Mo., 332 F. Supp. 125 (D. Mo. 1971). It is interesting to note that in a case arising in our federal district court, plaintiff admitted "that the Regents of the University of California are not a 'person' subject to suit under Section 1983." **Hansbury v. Regents of Univ. of Cal.,** 596 F.2d 944, 949 (Note 14) (10th Cir. 1979).

{37} Section 1983 did not pre-empt the jurisdiction of New Mexico courts. See, **Gonzales v. Oil, Chemical and Atomic Workers Int. U.,** 77 N.M. 61, 419 P.2d 257 (1966). Jurisdiction affords this State the right to interpret the meaning of the word "person" as it applies to claims under the Civil Rights Act. In **Rapp. v. New Mexico State Highway Department,** 87 N.M. 177, 178, 531 P.2d 225 (Ct. App. 1975) we said:

The New Mexico State Highway Commission is a constitutional state agency composed of appointed members who "shall have such power and shall perform such duties as may be provided by law." N.M. Const. Art. V, § 14. The State Highway Commission is not a "firm, association, copartnership, contractor or corporation," within the meaning of § 55-7-1. It is not a "person" within the meaning of § 55-7-2.

{38} We feel bound by **Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n,** 82 N.M. 405, 406, 482 P.2d 913, 914 (1971), which states:

There are many statutes in which neither the U.S. nor States of the Union are considered as a "person." When the legislature has wanted to include sovereigns or other governmental bodies in its statutes, it has known how to do so. * * *

{39} We have held that the Health and Social Services Department is not a "person" within the meaning of the Children's Code. **Matter of Doe,** 88 N.M. 632, 545 P.2d 491 (Ct. App. 1976).

{40} In New Mexico, under rules of statutory construction, "[t]he word 'person' may be extended to firms, associations and corporations.' **Rapp, supra,** [Id. 178]. It would require interpretive juggling to create a "person" out of a "state" for litigation purposes.

{41} We hold that the "State" is not a "person" under § 1983. The original complaint was a nullity with respect to the State to which an amended complaint cannot relate back. The trial court erred in holding that "the original complaint was not null, void and ineffective with respect to the State."

{42} Plaintiff claims the amended complaint which substituted named parties for "John Does" related back to the initial complaint because the former were employees of the State. Plaintiff is mistaken.

{43} The trial court ruled "that the amended complaint filed against **the State** relates back to the original complaint against **the State** since the latter complaint was not null, void and ineffective with respect to **the State."** [Emphasis added.] No reference was made in the Order to the "John Does" in the initial complaint because the "John Does" were included within the meaning of the "State." The original complaint filed "against the State" included the "John Does." The original complaint "with respect to **the State"** was null and void. The State included the "John Does." Since the complaint against the State is null and void, there is no complaint to which an amended complaint could relate back.

{44} Even though we treat the Order as holding that the named parties relate back to the "John Does," the Order is ineffective because there was noncompliance with Rule 15(c) of the Rules of Civil Procedure. It reads:

Whenever the claim... asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading,

the amendment relates back to the date of the original pleading. **An amendment changing the party** against whom a claim is asserted **relates back if the foregoing provision is** satisfied and, **within the period provided by law for commencing the action against him,** the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. [Emphasis added.]

{45} In the initial complaint, "John Does 1 through 10" which appeared in the caption only, were fictitious names of nonexistent parties. No allegations appeared that plaintiff could not ascertain the true names of the "John Does" nor was a summons issued with the words "real name unknown." Section 38-2-6, N.M.S.A. 1978. No process was issued or served on "John Does" and these fictitious names did not in fact become parties defendant.

{46} Mercer v. Morgan, 86 N.M. 711, 712, 526 P.2d 1304 (Ct. App. 1974) says:

We follow the general rule that a suit brought against a defendant who is already deceased is a nullity and of no legal effect.

A deceased is a nonexisting party. A fictitious name is also a nonexistent party. A suit brought against a defendant who is nonexistent is a nullity. There were in fact no parties defendant in the initial complaint.

Furthermore, **infra,** we shall point out that the amended complaint, which charged the known parties, was not brought "within the period provided by law for commencing the action against" the named parties.

When an initial complaint is a nullity, an amended complaint is a new action and Rule 15(c) of the Rules of Civil Procedure is not applicable. The limitation statute begins to run from the time of filing of the amended complaint. **Mercer v. Morgan, supra.**

B. **The amended complaint against individual named defendants is barred.**

{47} The amended complaint was filed around August 5, 1980. **Claims I and III** are directed against the individual defendants for assault and battery that occurred on September 21, 1976. Three years and ten months passed between the occurrence and the filing of the amended complaint.

{48} The trial court found that the "catch-all" limitation period applied; that "all other actions not herein otherwise provided for and specified [must be brought] within four years." Section 37-1-4, N.M.S.A. 1978. The trial court is mistaken. New Mexico has no statutory limitation period for assault and battery. The question is: Which New Mexico statute of limitations is most appropriate here? A "catch-all provision is not applied if the liability existed in any form at common law." **De Malherbe v. Intern. U. of Elevator**

Constructors, 449 F. Supp. 1335, 1344 (D. Cal. 1978). Liability for assault and battery existed at common law. Restatement of the Law, Torts 2d, 13, Comment (a); **Conway v. Reed,** 66 Mo. 346 (1877): 6 Am. Jur.2d, Assault and Battery 1 (1963). The use of the "catch-all" provision was erroneous.

{49} Congress did not establish a statute of limitations applicable to actions brought under § 1983 of the federal code. As a result, federal courts borrow the state law of limitations governing an analogous cause of action. **Board of Regents v. Tomanio,** 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980). We must apply the New Mexico limitations period for tort to torts most analogous to the conduct of defendants alleged in the amended complaint. **Wilkinson v. Ellis,** 484 F. Supp. 1072 (D.C. Pa. 1980).

{50} For a summary and comment upon the uncertainty of what statutes of limitations are applicable, see, Annot. **What Statute of Limitations is Applicable to Civil Rights Action Brought Under 42 USCS § 1983,** 45 A.L.R. Fed. 548 (1979); Brophy, **Statutes of Limitations in Federal Civil Rights Litigation,** 1976 Ariz. St. L.J. 97 (1976).

{51} For assault and battery, we have two periods of limitations to consider: (1) Section 41-4-15, N.M.S.A. 1978 of the "Tort Claims Act" and (2) Section 37-1-8, N.M.S.A. 1978 for "personal injury." The former is a two year limitation period and the latter is three years. Under either statute, the claim of assault and battery is barred.

{52} Generally, it has been held that the limitation period in a Tort Claims Act is not applicable in a case filed under § 1983. **Gunther v. Miller,** 498 F. Supp. 882 (D.C. N.M. 1980); **Donovan v. Reinbold,** 433 F.2d 738 (9th Cir. 1970); **Gipson v. Township of Bass River,** 82 F.R.D. 122 (D. N.J. 1979); **Rossiter v. Benoit,** 88 Cal. App.3d 706, 152 Cal. Rptr. 65 (1979); **Klein v. Springborn,** 327 F. Supp. 1289 (D. Ill. 1971); **Skrapits v. Skala,** 314 F. Supp. 510 (D. Ill. 1970); **Shouse v. Pierce County,** 559 F.2d 1142 (9th Cir. 1977).

{53} We have reviewed these cases and find no basic reason why the New Mexico Tort Claims Act limitation period should not be applied. The federal courts generally say what appears in **Shouse, supra:**

Because no federal statute of limitations has been enacted, the federal law has adopted those state limitations provisions which the federal court deems applicable to the federal cause of action. When we select the state statute from the available candidates, we try to choose that statute which applies to those state actions that resemble our Section 1983 action and that are sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions. [Id. 1146.]

{54} We applaud the avenues that federal courts travel to determine applicable state limitation periods. But federal courts do not dominate state courts. State courts have concurrent jurisdiction for the assertion of § 1983 claims. **Rosacker v. Multnomah County,** 43 Or. App. 583, 603 P.2d 1216 (1979). State courts determine the applicable limitation period. "The applicable limitation period is the one prescribed in the forum

state for suits seeking similar relief in state court." **Branden v. Texas A & M University System,** 636 F.2d 90, 92 (5th Cir. 1981).

{55} Section 1983 creates a tort claim directed "to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." In New Mexico, "The Tort Claims Act... [is] the exclusive remedy against a governmental entity or public employee **for any tort** for which immunity has been waived...." Section 41-4-17(A), N.M.S.A. 1978. The district court has exclusive original jurisdiction for any claim under the Tort Claims Act. Section 41-4-18(A). "When liability is alleged against any public employee... **for a violation of**... **any rights, privileges or immunities secured by the constitution and laws of the United States**.... the governmental entity shall provide a defense...." [Emphasis added.] Section 41-4-4(C). Law enforcement officers are public employees, § 41-4-3(E), and are denied immunity for "liability for personal injury, bodily injury... resulting from **assault, battery**... violation of... **deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States**... when caused by law enforcement officers while acting within the scope of their duties." [Emphasis added.] Section 41-4-12. "Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in... injury.... Section 41-4-15(A). The emphasized language, **supra,** is equivalent to a statutory provision which reads:

"... As used in ORS 30.260 to 30.300, 'tort' includes any violation of 42 U.S.C. section 1983."

Rosacker, supra [603 P.2d 1217].

{56} The date of the occurrence was September 21, 1976. The amended complaint was filed about August 5, 1980, just short of four years thereafter.

{57} When we speak in terms of a state law of limitation governing an analogous cause of action, the Tort Claims Act has specifically provided a limitation period for assault and battery which is analogous to that stated in the amended complaint. We decline to follow **Gunther, supra,** a federal New Mexico district court opinion to the contrary.

{58} Another analogous limitation statute which has been held applicable is § 37-1-8, N.M.S.A. 1978. It provides that "for an injury to the person [an action must be brought] within three years." **Walden, III, Inc. v. Rhode Island,** 576 F.2d 945 (1st Cir. 1978), 45 A.L.R. Fed. 543 (1979); A.L.R. Fed. 563, 6; **Skousen v. Nidy,** 90 Ariz. 215, 367 P.2d 248 (1962) (assault and battery); **Rosales v. Lewis,** 454 F. Supp. 956 (D. Iowa 1978) (excessive force); **Taylor v. Mitzel, supra; Polite v. Diehl,** 507 F.2d 119 (3d Cir. 1974) (assault and battery); **Wilkinson, supra** (assault and battery); **Paschall v. Mayonea,** 454 F. Supp. 1289 (D.C. N.Y. 1978).

{59} Claims I and III of the amended complaint are barred by the statute of limitations.

{60} Claim IV is based upon the Tort Claims Act. **Claim IV** is directed to the liability of the defendant State of New Mexico ex rel. Department of Corrections, a governmental agency within the meaning of the Tort Claims Act; that the State employed the defendants as penitentiary guards who committed assault and battery upon plaintiff, and the State is liable to plaintiff as a result of the acts committed by its employees. It cannot be reasonably gainsaid that when a defendant is sued under the Tort Claims Act, the most analogous statute of limitations is that stated in the Tort Claims Act. It is applicable. The limitation period is two years. Section 41-4-15. This claim also falls by the wayside because the State is not a "person" and cannot be sued as a party defendant.

{61} Claim II does not set forth any deprivation of rights "secured by the constitution and laws." It alleges that the individual defendants supplied the district attorney with false information which caused the district attorney to attempt to indict plaintiff, but the grand jury refused to indict plaintiff on any charge. As a result, "Plaintiff suffered mental anguish, embarrassment and humiliation, damage to his reputation as a political leader in Rio Arriba County and in the State of New Mexico and in violation of his civil rights."

{62} "First, mere claims of emotional distress, harassment, mental anguish, humiliation, or embarrassment are not actionable under the Civil Rights Act." **Taylor v. Nichols,** 409 F. Supp. 927, 936 (D. Kan. 1976).

{63} This claim does not show any deprivation of civil rights. If it can be labeled a defamation claim, it does not implicate any federally protected rights and is therefore not cognizable under the Civil Rights Act. Not every tort recognized under state law is sufficient to pass the constitutional threshold as to allow the maintenance of an action under § 1983. **Brainerd v. Potratz,** 421 F. Supp. 836 (D. Ill. 1976); **Ray v. Time, Inc.,** 452 F. Supp. 618 (D. Tenn. 1976); **Williams v. Gorton,** 529 F.2d 668 (9th Cir. 1976).

{64} Having been deprived of no rights secured under the United States Constitution, plaintiff had no claim cognizable under § 1983.

{65} In any event, this claim would be barred by the three year limitation period."An action for protection of reputational interest would be governed by the... limitation period provided... for suits claiming injury done to the person of another." **Braden, supra** [636 F.2d 93].

C. **The limitation statute was not tolled.**

{66} We have searched for some basis upon which the statute of limitations might be tolled. We find none.

{67} The three year limitation period for personal injury is not tolled while a plaintiff is assaulted and battered during his incarceration. **Musgrave v. McManus,** 24 N.M. 227, 173 P. 196 (1918); Annot. **Imprisonment of Party to Civil Action as Tolling Statute of Limitations,** 77 A.L.R.3d 735 (1977).

{68} Neither is the statute tolled when the names of defendants are unknown and not properly pled in the initial complaint.

{69} Section 38-2-6, N.M.S.A. 1978 provides that to amend a complaint when the true names are discovered, "The plaintiff in such case must state in his complaint that he could not ascertain the true name, and the summons must contain the words, 'real name unknown.'" Plaintiff did not comply with these mandatory duties. The purpose of this statute is to provide plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. **Motor City Sales v. Superior Court of Kern County,** 31 Cal. App.3d 342, 107 Cal. Rptr. 280 (1973).

{70} Plaintiff's initial complaint made no reference to "John Does 1 through 10." It did allege that "[a]ll remaining Defendants [excluding Mahr, Malley and Hanrahan] are now, and at all times material hereto, [were] employed by the Department of Corrections, State of New Mexico, and are sued in their official capacity." This allegation was a reference to defendants "John Does 1 through 10" and identified them except by their true names. But plaintiff did not allege "that he could not ascertain the true name," and no summons was issued as to "John Does I through 10."

{71} Mandatory requirements must be met before plaintiff can claim the benefits of the statute. **Stephens v. Berry,** 57 Cal. Rptr. 505 (1967). These benefits are denied plaintiff.

D. **The warden and deputy warden were not subject to suit.**

{72} Plaintiff's amended complaint alleged that defendants Malley, as Warden, and Montoya, as Deputy Warden, knew or should have known that these penitentiary guards were not qualified or emotionally suited and failed to remove them or otherwise prevent them from violating constitutional rights; that they acted in a grossly negligent and/or reckless manner.

{73} There was no allegation that these defendants personally participated in the alleged assault and battery or were even aware of it. The doctrine of **respondeat superior** is inapplicable in actions brought under 42 U.S.C. § 1983. The complaint must allege that a named defendant personally subjected plaintiff to a deprivation of constitutional rights or caused the conduct complained of or, in some manner, participated in the allegedly unlawful actions of an employee or subordinate officer. **Knipp v. Weikle, supra; Bolden v. Mandel, supra.**

{74} Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) held that a claim against a sheriff resulting from incarceration of the wrong person due to negligent mistaken identification was not cognizable under § 1983. The Court of Appeals held that the sheriff had a duty to exercise due diligence in making sure that the person arrested and detained was actually the person sought. In reversing, the Court said:

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.... [F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. [61 L. Ed. 443.]

{75} Negligent conduct on the part of Malley and Montoya, public employees, was not sufficient upon which to base a claim under § 1983.

{76} For these reasons, plaintiff's complaint should be dismissed with reference to Malley and Montoya.

{77} The Order of the trial court is reversed. This case is remanded to the district court to vacate its Order which denied defendants' motion to dismiss plaintiff's amended complaint and enter judgment that plaintiff's complaint be dismissed with prejudice.

{78} Plaintiff shall pay the costs of this appeal.

OPINION

ON MOTION FOR REHEARING

SUTIN, Judge.

{79} I would grant the Motion for Rehearing upon one point.

{80} DeVargas' Motion for Rehearing states "that Defendant Malley never claimed that plaintiff's Claim I was barred by the statute of limitations.... that defendant Malley was not a party to this appeal."

{81} The "Application for Interlocutory Appeal states:

The individual Defendants by their attorney... petition the... Court of Appeals to grant an interlocutory appeal....

{82} The application is signed by the attorney for defendants Montoya, Romero, Gonzales, Lynch, Peparas, Lujan and Padilla. Malley was not mentioned.

{83} The application also stated "the State of New Mexico by the Attorney General petition... to grant an interlocutory appeal...." The relator is the Department of Corrections. Malley, as warden, was a state officer separate from this Department.

{84} The challenge made by DeVargas involves a jurisdictional issue. This is a serious question that deserves the consideration of this Court.

SUTIN, J., specially concurs in the result only.