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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Karen Christina Reeves,)
)
 Plaintiff,)
 vs.)
 City of Show Low, et al.,)
 Defendants.)

No. CV-08-8157-PCT-PGR

ORDER

The gist of the plaintiff’s allegations in this action is that excessive force was used upon her during an incident in which defendant Justin Fellows, a City of Show Low police officer, in the presence of defendant Sergeant Brian Swanty, an Arizona Department of Public Safety officer, used a Taser on her while she was handcuffed. Pending before the Court is the Motion to Dismiss (doc. #12) filed by defendants State of Arizona, the Arizona Department of Public Safety (“DPS”), and Sergeant Swanty (collectively the “State defendants”.) The motion, filed pursuant to Fed.R.Civ.P. 12(b)(6), seeks the dismissal of all of the federal civil right claims and related state tort claims raised against the State and the DPS, and the dismissal of the state law tort claims raised against Sergeant Swanty. Having reviewed the parties’ original and supplemental memoranda in light of the allegations of the complaint, the Court finds that the motion to dismiss should be

1 granted as set forth herein.

2 The State defendants argue that the complaint should be dismissed
3 as to the State and the DPS in part because (1) the claims are barred by the
4 Eleventh Amendment; (2) the State is not a “person” for purposes of 42 U.S.C.
5 § 1983, and (3) the DPS is a non-jural entity. All three defenses are meritorious
6 as a matter of law and the plaintiff does not argue otherwise in her response - she
7 in fact concedes that all of her claims against the State and the DPS are barred
8 by the Eleventh Amendment. Her sole argument is that the claims against these
9 defendants should be dismissed without prejudice, whereas the state defendants
10 argue that these defendants should be dismissed with prejudice.

11 The Court agrees with the State defendants that the plaintiff’s § 1983
12 claims against the State and the DPS must be dismissed with prejudice because
13 a § 1983 claim cannot, as a matter of law, be maintained in either federal or state
14 court against a state or an arm of a state. See Pittman v. Oregon, Employment
15 Dept., 509 F.3d 1065, 1072 (9th Cir.2007). The Court also agrees that all of the
16 state claims against the DPS must also be dismissed with prejudice because the
17 DPS is not a jural entity subject to suit under Arizona law. The Court, however,
18 agrees with the plaintiff that the state law claims against the State must be
19 dismissed without prejudice because the Eleventh Amendment sovereign
20 immunity doctrine does not apply in state court.¹ See Freeman v. Oakland Unified

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23 The State defendants argue for the first time in their reply that the
24 non-§ 1983 claims raised against the State should be dismissed with prejudice
25 because refiling them in state court would be futile for various reasons, including:
26 (1) the plaintiff’s Notice of Claim gave insufficient notice of her state law claims;
(2) the plaintiff fails to allege a prima facie case for common-law tort claims; (3)
the plaintiff’s claims are based on an unrealistic and unfounded standard of care;
and (4) that the plaintiff’s claims are speculative. The State defendants do not,

1 School District, 179 F.3d 846, 847 (9th Cir.1999) (Court ordered that a claim
2 barred in federal court by the Eleventh Amendment be dismissed without
3 prejudice so that it could be re-filed in a court of competent jurisdiction.)

4 The State defendants also argue that the state law claims against them are
5 precluded under Arizona's Notice of Claim statute, A.R.S. § 12-821.01.² One
6 argument raised in their motion-related memoranda is that the plaintiff did not
7 properly serve her notice of claim on Sergeant Swanty.

8 Arizona's notice of claim statute, A.R.S. § 12-821.01(A), provides in part
9 that "[p]ersons who have claims against ... a public employee shall file claims with
10 the person or person authorized to accept service for the ... public employee as
11 set forth in the Arizona rules of civil procedure within one hundred eighty days
12 after the cause of action accrues." The failure to properly serve the required
13 notice of claim on the individual public employee defendant prior to suit requires
14 the dismissal of the suit against that defendant. Lee v. State, 182 P.3d 1169,
15 1171 (Ariz.2008) ("If a claimant fails to file the notice of claim as required, the
16 claim is barred.")

17 Since the State defendants do not dispute the issue, the Court accepts for
18 the purpose of resolving the motion to dismiss that the plaintiff mailed the notice
19 of claim to Sergeant Swanty using the post office box address of the Phoenix
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21 however, cite to any case law requiring such issues to be resolved by this Court
22 when state claims are dismissed pursuant to the Eleventh Amendment, and the
23 Court declines to reach them.

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25 Because the Court is dismissing the state law claims against the State
26 and the DPS on other grounds, it concludes that this issue is pertinent only as to
Sergeant Swanty.

1 office of the DPS, and sent a facsimile copy of the notice to Sergeant Swanty
2 using a DPS fax number, and that the mailed copy was not returned as
3 undeliverable by the U.S. Postal Service and that the faxed copy was
4 successfully transmitted to the DPS telephone number to which it was sent. The
5 acceptance of those facts, however, is not sufficient to establish that the plaintiff
6 has met her burden of establishing proper service of the notice of claim. The
7 initial, and decisive, issue here is not whether service of a notice of claim may be
8 accomplished through the regular mail, it can, see Lee v. State, 182 P.3d at 1173
9 (“We hold that a filing under A.R.S. § 12-821.01(A) may be accomplished through
10 the regular mail, and that proof of mailing is evidence that the governmental entity
11 received the notice[.]”) nor whether Sergeant Swanty at some point actually
12 received the mailed notice or the faxed copy, see Falcon v. Maricopa County, 144
13 P.3d 1254, 1256 (Ariz.2006) (Actual notice and substantial compliance do not
14 excuse failure to comply with the statutory requirements of § 12-821.01(A)), but
15 whether the plaintiff’s attempt to individually serve Sergeant Swanty by sending
16 the notice of claim to him through the Phoenix DPS office was statutorily proper.
17 The Court concludes as a matter of law that it was not.

18 Pursuant to § 12-821.01, a notice of claim must be filed with a person
19 authorized by the Arizona Rules of Civil Procedure to accept service. Under Rule
20 4.1(d), service on an individual means either personal service, service at the
21 individual’s dwelling house or usual place of abode through a person of suitable
22 age and discretion then residing therein, or service through an agent authorized
23 by appointment or by law to receive service. The plaintiff’s attempted service on
24 Sergeant Swanty through the DPS Phoenix office does not satisfy any of these
25 requirements. See DeBinder v. Albertson’s, Inc., 2008 WL 828789, at *3 (D.Ariz.
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1 March 26, 2008) (Court dismissed state law claims against police officer
2 Clevinger due to the plaintiffs' failure to properly comply with the service
3 requirement of A.R.S. § 12-821.01 because the notice of claim directed to Officer
4 Clevinger was merely sent by certified mail to the Bullhead City Police
5 Department to the attention of Officer Clevinger.) Because the plaintiff failed to
6 properly file her notice of claim with Sergeant Swanty, the Court will dismiss all of
7 the state law claims raised against him with prejudice. Therefore,

8 IT IS ORDERED that the Motion to Dismiss (doc. #12), filed by defendant
9 State of Arizona, the Arizona Department of Public Safety, and Sergeant Brian
10 Swanty, is granted pursuant to Fed.R.Civ.P. 12(b)(6) as follows: (1) all federal
11 claims alleged in the Complaint against the State of Arizona and the Arizona
12 Department of Public Safety are dismissed with prejudice; (2) all state law claims
13 alleged in the Complaint against the State of Arizona are dismissed without
14 prejudice; (3) all state law claims alleged in the Complaint against the Arizona
15 Department of Public Safety are dismissed with prejudice; and (4) all state law
16 claims alleged in the Complaint against defendant Sergeant Brian Swanty are
17 dismissed with prejudice.

18 IT IS FURTHER ORDERED that all claims alleged in the Complaint against
19 defendant Spouse Swanty and defendant Spouse Fellows are dismissed without
20 prejudice pursuant to Fed.R.Civ.P. 4(m).

21 IT IS FURTHER ORDERED that the remaining parties shall file an
22 Amended Joint Case Management Report no later than May 26, 2009.³

23 IT IS FURTHER ORDERED that the Scheduling Conference shall be held
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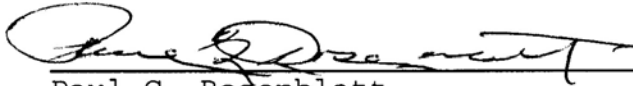
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26 The parties are directed to review the Court's order entered on March
3, 2009 (doc. #16).

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on **Monday, June 8, 2009, at 11:30 a.m.** in Courtroom 601.

DATED this 27th day of April, 2009.



Paul G. Rosenblatt
United States District Judge