UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT MAESHACK, Plaintiff, v. AVENAL STATE PRISON, et al., Defendants. _____/	1:06-cv-00011-AWI-GSA-PC FINDINGS AND RECOMMENDATIONS, RECOMMENDING MOTION TO DISMISS BY DEFENDANTS HARBINSON AND McINTYRE BE GRANTED, WITH PREJUDICE, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, BASED ON THE DOCTRINE OF RES JUDICATA (Doc. 38.) OBJECTIONS, IF ANY, DUE IN 30 DAYS

Findings and Recommendations on Motion to Dismiss By Defendants Harbinson and McIntyre

Plaintiff Robert Maeshack ("plaintiff"), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on December 22, 2005, at the Sacramento Division of the United States District Court for the Eastern District of California. (Doc. 1.) On January 5, 2006, the case was transferred to the Fresno Division of the Eastern District. (Doc. 5.) This action now proceeds on plaintiff's amended complaint filed on March 16, 2007, against defendants MTA Harbinson, Dr. McIntyre, Dr. Weed, and Dr. Sweetland for denial of adequate medical care in violation of the Eighth Amendment, and for medical malpractice under state law.[1] (Doc. 17.)

[1] All other claims and defendants were dismissed by the Court on January 13, 2009. (Doc. 25.)

On May 6, 2009, defendants Harbinson and McIntyre ("Defendants") filed a motion to dismiss plaintiff 's claims against them, based on the doctrine of res judicata, and for failure to state a claim upon which relief may be granted under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). (Doc. 38.) Plaintiff filed an opposition to the motion on September 4, 2009. (Doc. 55.) Defendants did not file a reply to the opposition.

I. LEGAL STANDARDS

A. Rule 12(b)(6)

"The focus of any Rule 12(b)(6) dismissal . . . is the complaint," Schneider v. California Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), which must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ," Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)); Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969. Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," Iqbal, 129 S.Ct at 1949 (citing Twombly, 550 U.S. at 555), and courts "are not required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

B. Res Judicata

The doctrine of res judicata bars the re-litigation of claims previously decided on their merits. Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1051 (9th Cir. 2005).[2] Under the doctrine of claim preclusion, a final judgment on the merits of an action precludes the parties or persons in privity with them from litigating the same claim that was raised in that action and all claims arising out of the same transaction or occurrence. See Taylor v. Sturgell, 128 S.Ct. 2161, 2171 (2008);

[2]The Supreme Court recently clarified that the terms "claim preclusion" and "issue preclusion" are collectively referred to as "res judicata." Taylor v. Sturgell, 128 S.Ct. 2161, 2171 (2008).

Rest.2d Judgments § 18. "The elements necessary to establish *res judicata* are: '(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.'" Headwaters, Inc., 399 F.3d at 1052 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.2d 1064, 1077 (9th Cir. 2003)). "[T]he doctrine of res judicata (or claim preclusion) 'bars all grounds for recovery which *could have been* asserted, whether they were or not, in a prior suit between the same parties ... on the same cause of action.'" Costantini v. Trans World Airlines 681 F.2d 1199, 1201 (9th Cir. 1982) (quoting Ross v. IBEW, 634 F.2d 453, 457 (9th Cir. 1980) (emphasis added)).

When determining, for res judicata purposes, whether a present dispute concerns the same claims as did prior litigation, the Ninth Circuit considers: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts", which is the most important factor. Headwaters, Inc., 399 F.3d at 1052.

The related doctrine of collateral estoppel, or issue preclusion, provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." U.S. v. Bhatia, 545 F.3d 757, 759 (9th Cir. 2008) (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)). Both doctrines apply to criminal and civil proceedings, and both require privity between the parties. Bhatia, 545 F.3d at 759 (citing U.S. v. Cejas, 817 F.2d 595, 598 (9th Cir. 1987) and see In re Schimmels, 127 F.3d at 881(noting that, under res judicata, "parties or their privies" may be bound by a prior judgment); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir.1980) (requiring identity or privity between parties for collateral estoppel to apply)).

A defendant relying on res judicata or collateral estoppel as a defense must plead it as an affirmative defense. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 350, 91 S.Ct. 1434, 1453 (1971). However, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised," Arizona v. California, 530 U.S. 392, 416, 120 S.Ct. 2304, 2318 (2000), provided that the

parties have an opportunity to be heard prior to dismissal, Headwaters, Inc., 399 F.3d at 1055. "As a general matter, a court may, sua sponte, dismiss a case on preclusion grounds 'where the records of that court show that a previous action covering the same subject matter and parties had been dismissed.'" Id. at 1054-1055 (quoting Evarts v. W. Metal Finishing Co., 253 F.2d 637, 639 n. 1 (9th Cir. 1058)).

C. Eighth Amendment Medical Claim

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). A prison official does not act in a deliberately indifferent manner unless the official "knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994). "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by "a purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused by the indifference." Id. (citing McGuckin, 974 F.2d at 1060).

"[T]he existence of an injury that a reasonable doctor would find important and worthy of comment or treatment, . . . the presence of a medical condition that significantly affects an individual's daily activities, and . . . the existence of chronic or substantial pain" are indications of a serious medical need. Doty v. County of Lassen, 37 F.3d 540, 546 n.3 (9th Cir. 1994) (citing McGuckin, 974 F.2d at 1059-1060, overruled on other grounds, WMX Techs., Inc., 104 F.3d at 1136 (en banc)); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000).

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"Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d, 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer, 511 U.S. at 837). "'If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.'" Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).

II. RELEVANT PROCEDURAL HISTORY

Court records show that plaintiff filed three separate actions largely concerning the same defendants and claims.

Case Number 1:06-cv-00065 (Maeshack v. Avenal State Prison, et al.)

Plaintiff filed the complaint commencing this action on December 23, 2005, at the Sacramento Division of the United States District Court for the Eastern District of California, case number 2:05-cv-2607-MCE-PAN-PC. Plaintiff brought claims pursuant to 42 U.S.C. § 1983 for violation of his rights to adequate medical care under the Eighth Amendment, against defendants Avenal State Prison, Medical Technical Assistant ("MTA") Harbinson, Lieutenant Smith, and Appeals Coordinator Grazier, for denial of medical treatment for a rat bite plaintiff received on April 23, 2004. On January 19, 2006, the case was transferred to the Fresno Division of the Eastern District and opened as case number 1:06-cv-00065-AWI-SMS-PC. On September 12, 2006, the Court consolidated this case with case 1:06-cv-01025 AWI-SMS-PC, closing case 1:06-cv-00065-AWI-SMS-PC. (Doc. 14.) The consolidated action then proceeded under case number 1:06-cv-01025-AWI-SMS-PC, which is described next.

Case Number 1:06-cv-01025 (Maeshack v. Greenough, et al.)

Plaintiff filed the complaint commencing this action on August 7, 2006, pursuant to 42 U.S.C. § 1983, for violation of his rights to adequate medical care under the Eighth Amendment, against defendants Dr. Greenough (CMO) and Arnold Schwarzenegger, for denial of medical treatment for a rat bite received by plaintiff on April 23, 2004. On September 12, 2006, upon plaintiff's motion, the Court consolidated this case with case 1:06-cv-00065-AWI-SMS-PC. (Docs.

5, 6.) The consolidated action then proceeded under case number 1:06-cv-01025-AWI-SMS-PC, against defendants Dr. Greenough (CMO), Arnold Schwarzenegger, Avenal State Prison, MTA Harbinson, Lieutenant Smith, and Appeals Coordinator Grazier.

On September 21, 2006, plaintiff filed the First Amended Complaint. (Doc. 7.) On July 10, 2008, the court dismissed the First Amended Complaint with leave to amend. (Doc. 8.) On September 15, 2008, plaintiff filed the Second Amended Complaint. (Doc. 11.) In the Second Amended Complaint, plaintiff named MTA H. Harbinson , CCII G. Grazier, Lieutenant Smith, Dr. Weed, and Dr. McIntyre as defendants.

On November 25, 2008, the case was reassigned to District Judge G. Murray Snow ("Judge Snow") for all further proceedings. (Doc. 12.) On January 16, 2009, Judge Snow dismissed the Second Amended Complaint pursuant to 28 U.S.C. § 1915A(b)(1), for failure to state a claim, without leave to amend, terminating the entire action. (Doc. 14.) With regard to the allegations against MTA Harbinson and Dr. McIntyre, Judge Snow found that plaintiff failed to provide information about the nature and severity of his injuries, making it impossible for the Court to determine whether he was denied treatment for serious medical needs. Judge Snow also found that plaintiff failed to describe what injury, if any, resulted from MTA Harbinson's or Dr. McIntyre's failure to provide him with medical care.

Plaintiff's Allegations and Claims Against MTA Harbinson in Case 1:06-cv-01025

Plaintiff alleged in the Second Amended Complaint that on April 23, 2004, while he was incarcerated at Avenal State Prison, he was bitten by a mouse or rat. Plaintiff alleges that he informed H. Harbinson, an MTA at Avenal State Prison, that he had been bitten, and Harbinson refused all treatment for plaintiff's serious medical condition, in violation of Penal Code section 2652 and the Eighth Amendment of the United States Constitution.

Plaintiff's Allegations and Claims Against Dr. McIntyre in Case 1:06-cv-01025

Plaintiff alleged in the Second Amended Complaint that on April 23, 2004, while he was incarcerated at Avenal State Prison, he was bitten by a mouse or rat. Plaintiff alleges that on or about December 13, 2005, Dr. McIntyre, a physician at the Sierra Conservation Center in Jamestown ("SCC"), refused to provide medical treatment to plaintiff's serious medical condition. Plaintiff

claimed that Dr. McIntyre's refusal to provide medical treatment violated section 2652 of the Penal Code and the cruel and unusual punishment clause of the Eighth Amendment.

Case Number 1:06-cv-00011-AWI-GSA-PC (Maeshack v. Avenal State Prison, et al.)

Plaintiff filed the complaint commencing this action on December 22, 2005, at the Sacramento Division of the United States District Court for the Eastern District of California, case number 2:05-cv-2599-LKK-DAD-PC. Plaintiff brought claims pursuant to 42 U.S.C. § 1983 for violation of his rights to adequate medical care under the Eighth Amendment pursuant to 42 U.S.C. § 1983, against defendants Avenal State Prison, MTA Harbinson, Lieutenant Smith, and Appeals Coordinator Mr. Grazier, for denial of medical treatment for a rat bite plaintiff received on April 23, 2004. (Doc. 1.) On January 5, 2006, the case was transferred to the Fresno Division of the Eastern District and opened as case number 1:06-cv-00011-AWI-LJO-PC. On February 20, 2007, the Court issued an order requiring plaintiff to either file an amended complaint or notify the Court in writing that he did not wish to file an amended complaint and pursue the action and instead wished to voluntarily dismiss the case. (Doc. 15.) On February 26, 2007, due to the elevation of Magistrate Judge Lawrence J. O'Neill to District Judge, the case was reassigned from District Judge Anthony W. Ishii to District Judge Lawrence J. O'Neill, and from Magistrate Judge Lawrence J. O'Neill to Magistrate Judge Dennis L. Beck, as case number 1:06-cv-00011-LJO-NEW(DLB)-PC. (Doc. 16.)

On March 16, 2007, plaintiff filed the First Amended Complaint against defendants MTA Harbinson, Lieutenant Smith, Appeals Coordinator Grazier, Dr. Weed, Dr. McIntyre, Dr. Sweetland, and Chief Medical Officer ("CMO") Greenough. (Doc. 17.) On October 12, 2007, the case was reassigned from Magistrate Judge Dennis L. Beck to Magistrate Judge Gary S. Austin, as case number 1:06-cv-00011-LJO-GSA-PC. (Doc. 19.) The Court screened the First Amended Complaint pursuant to 28 U.S.C. § 1915A and found that plaintiff stated cognizable claims only against defendants Harbinson, Weed, McIntyre, and Sweetland, on his Eighth Amendment medical care claim and his state law medical malpractice claim. (Doc. 21.)

On November 21, 2008, the Court issued an order requiring plaintiff either to file a Second Amended Complaint or to notify the Court in writing that he did not want to file an amended complaint and instead wished to proceed on the First Amended Complaint on the claims found

cognizable by the Court. Id. On December 15, 2008, plaintiff filed written notice that he did not wish to file an amended complaint and was willing to proceed with the claims found cognizable by the Court. (Doc. 22.) On January 27, 2009, the Court directed the U.S. Marshal to serve process upon defendants Harbinson, Weed, McIntyre, and Sweetland. (Doc. 28.) On April 28, 2009, defendant Weed filed a motion to dismiss. (Doc. 36.) On May 6, 2009, defendants McIntyre and Harbinson filed a motion to dismiss. (Doc. 38.) On June 12, 2009, the U.S. Marshal filed a return of service unexecuted as to defendant Sweetland. (Doc. 48.) Defendant Sweetland has not appeared in this action.

Plaintiff's Allegations and Claims Against MTA Harbinson in Case 1:06-cv-00011

Plaintiff alleges in the First Amended Complaint that on April 23, 2004, while he was incarcerated at Avenal State Prison, he was bitten by a mouse or rat on his right hand. Plaintiff alleges that he complained to C/O Deagon about a mouse/rat bite, and C/O Deagon informed MTA Harbinson, an MTA at Avenal State Prison. Plaintiff alleges he showed MTA Harbinson his bitten and swollen right hand, with blood on it, and his left leg. Plaintiff alleges MTA Harbinson walked away, refusing plaintiff medical assistance, without regard to plaintiff's pain and suffering, and without considering the possible long term ill effects on plaintiff's health. Plaintiff alleges he was left in pain. Plaintiff claims that MTA Harbinson violated his rights under the cruel and unusual punishment clause of the Eighth Amendment.

Plaintiff's Allegations and Claims Against Dr. McIntyre in Case 1:06-cv-00011

Plaintiff alleges in the First Amended Complaint that on April 23, 2004, while he was incarcerated at Avenal State Prison, he was bitten by a mouse or rat on his right hand. Plaintiff alleges that on December 23, 2005 at 10:00 a.m., he was interviewed at SCC on December 23, 2005 by Dr. McIntyre, a doctor at SCC, and explained to Dr. McIntyre about the mouse/rat bite and the possible infection/disease associated with the incident. Plaintiff alleges that Dr. McIntyre ordered skull x-rays and prescribed 800 mg Ibuprofen and Prilosec, but did nothing to relieve the swelling or to abate the pain that plaintiff continues to suffer. Plaintiff claims that Dr. McIntyre violated his constitutional rights to adequate medical care.

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III. MOTION TO DISMISS

Defendants bring a motion to dismiss this action against them, based on the doctrine of res judicata, and to dismiss this action against defendant McIntyre for failure to state a claim against him under Rule 12(b)(6).[3] Defendants argue that this action against them must be dismissed because in the complaint for this action (1:06-cv-00011-AWI-GSA-PC)("Case 0011"), plaintiff raises the same claims against them him as found in the complaint for plaintiff's consolidated action (1:06-cv-01025-AWI-SMS-PC)("Case 1025") which was dismissed by Judge Snow on January 19, 2009 on the merits, for failure to state a claim. Defendant McIntyre also argues that the complaint against him in Case 0011 must be dismissed based on plaintiff's failure to state a claim against him for inadequate medical treatment under the Eighth Amendment.

In opposition, plaintiff argues that Defendants' argument basing res judicata on Judge Snow's order is flawed, because Judge Snow's order is barred by res judicata. Plaintiff presents evidence that on November 21, 2008, the Court issued an order in Case 0011 finding that plaintiff's complaint states cognizable claims for relief under section 1983 against MTA Harbinson and Dr. McIntyre for inadequate medical care under the Eighth Amendment. Plaintiff argues that the earlier November 21, 2008 order in Case 0011 finding cognizable claims bars Judge Snow's subsequent January 19, 2009 order in Case 1025 finding failure to state a claim. Plaintiff also argues that Defendants' theory of res judicata is inapplicable because Case 0011 was filed before Case 1025, and Case 1025 should have been "swallowed up" by Case 0011 prior to Judge Snow's holding, making any such holding moot.

IV. DISCUSSION

The Court has thoroughly reviewed the First Amended Complaint for Case 1025 and the Second Amended Complaint for Case 0011. Both complaints were filed by the same plaintiff, Robert Maeshack, CDC# C-15018, a state prisoner who was incarcerated at Avenal State Prison. Both complaints name MTA Harbinson, an MTA employed at Avenal State Prison, and Dr.

[3] In the motion to dismiss, Defendants use the term "res judicata" to mean "claim preclusion," and the term "collateral estoppel" to mean "issue preclusion."

McIntyre, a doctor employed at SCC, as defendants. There is no dispute between the parties that Robert Maeshack, MTA Harbinson and Dr. McIntyre are the same persons named in both complaints. Therefore, the requirement of privity between the parties is satisfied.

Both complaints allege that on April 23, 2004, while he was incarcerated at Avenal State Prison, plaintiff was bitten by a mouse or rat. Both complaints allege that MTA Harbinson was informed that plaintiff had been bitten, yet refused medical assistance to plaintiff, despite a serious medical condition. Plaintiff claims in both complaints that MTA Harbinson violated his rights under the Eighth Amendment. Both complaints allege that in December 2005, Dr. McIntyre failed to provide adequate medical treatment for the rat/mouse bite suffered by plaintiff. Plaintiff claims in both complaints that Dr. McIntyre violated his constitutional rights under the Eighth Amendment. Although the allegations against Defendants are not identical in both complaints, the Court finds that plaintiff has raised the same claims or causes of action against Defendants in both actions. Since the doctrine of res judicata bars all grounds for recovery which *could have been* asserted on the same cause of action, whether they were or not, it is of no consequence that plaintiff varies the facts in the two complaints.[4] Both of the lawsuits did "arise out of the same transactional nucleus of facts," Defendants' alleged denial of adequate medical treatment to plaintiff for a mouse or rat bite. Plaintiff's variation of facts does not establish that the two lawsuits arise out of a different "transactional nucleus of facts." The other criteria for finding a single cause of action are also met. Clearly, Defendants' freedom from liability for inadequate medical treatment to plaintiff, established in Case 1025, would be impaired if Case 0011 is permitted to go forward. Plaintiff did not offer any evidence in Case 0011 which he did not possess when he brought Case 1025; the two cases were originally filed only one day apart on December 22 and 23, 2005. Finally, the two suits involve infringement of the same right; both lawsuits seek damages from Defendants for violation of

[4] Plaintiff describes symptoms – swelling, pain, suffering, and possibility of infection/disease – in Case 0011, whereas he omits such description in Case 1025. In Case 0011, plaintiff alleges he informed C/O Deagon about the mouse/rat bite, who then informed MTA Harbinson, whereas in Case 1025 plaintiff appears to allege that he informed MTA Harbinson directly. He also alleges in Case 0011 that Defendants violated Penal Code section 2652, which is not under consideration here except as a fact in support of plaintiff's federal claims. The date of plaintiff's meeting with Dr. McIntyre is not exactly the same in both complaints, as Defendants point out, but both complaints allege a meeting in December 2005. And finally, the complaint in Case 0011 alleges Dr. McIntyre ordered skull x-rays and prescribed medications for plaintiff, whereas in Case 1025, plaintiff alleges Dr. McIntyre refused him all medical care.

plaintiff's constitutional right to adequate medical care. Thus, the causes of action against Defendants involved in both lawsuits is identical for purposes of res judicata.

The final question is whether the judgment in Case 1025 was a judgment on the merits. In Judge Snow's order of January 16, 2009, he amply reviewed plaintiff's Second Amended Complaint in Case 1025 and determined that plaintiff failed to state a cause of action against any of the defendants for violation of his rights to adequate medical care under the Eighth Amendment. With regard to MTA Harbinson and Dr. McIntyre, Judge Snow found that plaintiff failed to provide information about the nature and severity of his injuries, which made it impossible for the Court to determine whether plaintiff had serious medical needs. Judge Snow also found that plaintiff failed to describe what injury, if any, resulted from MTA Harbinson's and Dr. McIntyre's failure to provide him with medical care. Thus, the judgment in Case 1025 was a judgment on the merits.

Plaintiff's arguments are without merit because the Court's November 21, 2008 order in Case 0011 finding cognizable claims was not a judgment on the merits, and because the court is not required under Rule 42 to consolidate actions pending before the court where such actions involve a common question of law or fact.[5] Fed. R. Civ. P. 42(a).

Based on this analysis, the Court finds that defendants MTA Harbinson and Dr. McIntyre have demonstrated that the doctrine of res judicata prohibits the re-litigation of plaintiff's claims against them in Case 0011, which were previously decided on their merits in Case 1025. In light of this finding, the Court shall not reach Defendants' argument that plaintiff fails to state a claim against Dr. McIntyre in Case 0011 for violation of his rights under the Eighth Amendment.[6]

V. Conclusion and Recommendation

For the reasons set forth herein, IT IS HEREBY RECOMMENDED that defendants MTA Harbinson's and Dr. McIntyre's motion to dismiss plaintiff's claims against them, filed May 6, 2009,

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[5] Rule 42(a) provides, "When actions involving a common question of law or fact are pending before the court, it *may* order a joint hearing or trial of any or all of the matters in issue in the actions; it *may* order all the actions consolidated; and it *may* make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Fed. R. Civ. P. 42(a) (emphasis added).

[6] In addition, if the federal claims against Defendants are dismissed, the state malpractice claims against Defendants shall also be dismissed for lack of jurisdiction. 28 U.S.C. § 1367(c)(3).

be GRANTED, and defendants MTA Harbinson and Dr. McIntyre be DISMISSED from this action, with prejudice, for plaintiff's failure to state a claim against them, based on the doctrine of res judicata.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these Findings and Recommendations, plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **January 25, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE