

1 On June 26, 2007, plaintiff was transferred from H.D.S.P. [High Desert State
2 Prison] to the Lassen Surgery Center . . . where defendant “Syerson” performed
3 and [sic] elective hemorrhoidectomy surgery on plaintiff.

4 Because defendant Syerson lacked the proper surgical equipment, after
5 surgery/during [sic] plaintiff developed significant bleeding, which resulted in
6 plaintiff being taken back to surgery at the Lassen Surgery Center, where plaintiff
7 had an examination of the hemorrhoidectomy wounds and multiple additional
8 sutures for hemostasis.

9 ***

10 Defendant Syerson by his actions, as described above . . ., acted negligently and
11 recklessly.

12 A reasonably competent surgeon would have been adequately prepared prior to
13 performing an intrusive surgery, however defendant Syerson failed to act as a
14 reasonably competent surgeon.

15 As a proximate cause of defendant Syerson’s actions, plaintiff suffered from
16 significant bleeding, anemia, anxiety, and bilateral pulmonary embolisms.

17 *Id.*

18 Plaintiff’s amended complaint, filed after defendant Syerson’s motion to dismiss, makes
19 the same allegations against him. ECF No. 22 at 5, 8.

20 Plaintiff has previously sued defendant Syerson, in a Lassen County Superior Court
21 complaint filed June 27, 2012. ECF No. 18-2 and exhibits thereto.² Plaintiff’s allegations against
22 defendant Syerson in the state case are identical to the allegations presented here. ECF No. 18-3
23 at 5-6, 9. The state court sustained defendant Syerson’s unopposed demurrer to that complaint,
24 concluding, “The cause of action for professional negligence is barred by Code of Civil Procedure
25 section 340.5 as tolled by Code of Civil Procedure section 352.1(a).” *Id.* at 77. The state court
26 dismissed plaintiff’s complaint as to defendant Syerson with prejudice on January 20, 2013. *Id.*
27 at 81.

28 /////

/////

² The court takes judicial notice of proceedings of plaintiff’s state court case. Fed. R. Evid. 201; *Cactus Corner, LLC v. U.S. Dept. of Agric.*, 346 F. Supp. 2d 1075, 1092 (E.D. Cal. 2004).

1 **II. Plaintiff's Amended Complaint**

2 Plaintiff filed an amended complaint on September 30, 2013, more than 21 days after
3 defendant Roche filed his answer (on July 18, 2013) and defendant Syerson filed his motion to
4 dismiss (on August 12, 2013). Because more than 21 days elapsed between the filing of the first
5 responsive pleading and the filing of the amended complaint, plaintiff must obtain leave of court
6 to amend. Fed. R. Civ. P. 15(a). The court will construe plaintiff's filing of the amended
7 complaint to contain an implicit request for leave to file it. So construed, the court grants leave to
8 amend and accepts the amended complaint filed on September 30, 2013 (ECF No. 22) as the
9 operative pleading in this case. *See* Fed. R. Civ. P. 15(a)(2). Defendant Roche shall respond to
10 the amended complaint within 14 days of the date of this order.³

11 **III. Defendant Syerson's Motion to Dismiss**

12 Defendant Syerson moves to dismiss plaintiff's claim against him, arguing that: (1)
13 plaintiff's claims are barred by res judicata; (2) plaintiff's claims are barred by the statute of
14 limitations; and (3) plaintiff has not stated facts sufficient to support claims of intentional
15 infliction of emotional distress and deliberate indifference to serious medical needs.

16 In screening this case, the court found that plaintiff stated a single cognizable claim
17 against defendant Syerson – for state law medical malpractice. ECF No. 7 at 3. While plaintiff's
18 complaint refers generally to intentional infliction of emotional distress and denial of adequate
19 medical care in violation of the Eighth Amendment, plaintiff's allegations regarding defendant
20 Syerson are solely allegations of professional negligence. ECF No. 1 (original complaint) at 7 &
21 ECF No. 22 (amended complaint) at 8 (“Defendant Syerson by his actions, as described above
22 . . . , acted negligently and recklessly. . . . Defendant Syerson failed to act as a reasonably
23 competent surgeon.”). Plaintiff does not allege that defendant Syerson was deliberately
24 indifferent to his serious medical needs; rather, plaintiff's deliberate indifference claims are

25
26 ³ Because it is concluded herein that defendant Syerson must be dismissed from this
27 action, Syerson need respond to the amended complaint only if the district judge assigned to this
28 action declines to adopt that recommendation. In that event, defendant Syerson shall respond to
the amended complaint within 14 days of such order declining to adopt the recommendation
contained herein.

1 directed solely to defendant Roche. ECF No. 1 at 7; ECF No. 22 at 8. Similarly, the complaint
2 does not make any claim that defendant Syerson intentionally inflicted emotional distress on
3 plaintiff. Accordingly, the court must only determine whether plaintiff’s malpractice claim
4 against defendant Syerson is precluded by his state court case or barred by the applicable statutes
5 of limitations.

6 **A. Res Judicata**

7 The doctrine of claim preclusion (sometimes referred to as “res judicata”) prevents a party
8 from relitigating claims that were or could have been raised in a prior action that was adjudicated
9 on the merits. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under 28 U.S.C. § 1738, federal courts
10 must accord the preclusive effect to state court judgments as would be accorded under the law of
11 that state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

12 In California, a final judgment in state court may preclude later proceedings based on the
13 same “cause of action,” which is defined as: (1) a primary right possessed by the plaintiff, (2) a
14 corresponding primary duty of the defendant, and (3) a harm done by the defendant consisting of
15 the breach of the primary right and corresponding duty. *Brodheim v. Cry*, 584 F.3d 1262, 1268
16 (9th Cir. 2009) (citing *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 762 (9th
17 Cir. 2003) and *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th
18 1053, 1065 (1998)). A prior case will bar a subsequent case raising the same cause of action
19 where: (1) the issues decided in the prior suit are identical to those in the subsequent suit, (2) the
20 first suit produced a final judgment on the merits, and (3) the party against whom the claim was
21 raised was a party or was in privity with a party to the prior suit. *Consumer Advocacy Group,
22 Inc. v. ExxonMobil Corp.*, 168 Cal. App. 4th 675, 685-86 (2008).

23 There can be no dispute that plaintiff’s cause of action against defendant Syerson in this
24 case is the same as the one he pursued in state court. The allegations and parties are identical.
25 The state case against defendant Syerson became final when the state court dismissed the
26 complaint with prejudice on January 30, 2013. Thus, the only real issue the court must determine
27 is whether a dismissal with prejudice on statute of limitations grounds constitutes a judgment “on
28

1 the merits” for purposes of res judicata. California courts have held that the termination of an
2 action for failure to comply with the limitations period is not “on the merits.” *E.g., Mid-Century*
3 *Ins. Co. v. Super. Ct.*, 138 Cal. App. 4th 769, 776 (2006) (“Termination of an action by a statute
4 of limitations is deemed a technical or procedural, rather than a substantive, termination.”).

5 Accordingly, defendant Syerson’s res judicata argument is without merit.

6 **B. Statute of Limitations**

7 Nevertheless, plaintiff’s action remains barred by the applicable limitations period, as the
8 state court determined. As noted above, plaintiff’s sole claim against defendant Syerson in this
9 case is a state-law malpractice claim. Accordingly, the court applies the California limitations
10 rules applicable to such claims. *See Notrica v. Bd. of Supervisors*, 925 F.2d 1211, 1215 (9th Cir.
11 1991). California Code of Civil Procedure § 340.5 governs malpractice cases, and provides:

12 In an action for injury or death against a health care provider based upon such
13 person’s alleged professional negligence, the time for the commencement of
14 action shall be three years after the date of injury or one year after the plaintiff
discovers, or through the use of reasonable diligence should have discovered, the
injury, whichever occurs first.

15 This limitations period begins to run once a patient knows, or by reasonable diligence should
16 have known, that she has been harmed by professional negligence. *Artal v. Allen*, 111 Cal. App.
17 4th 273, 279 (2003). A patient has “presumptive knowledge” of injury “when the patient’s
18 reasonably founded suspicions have been aroused, and she has actually become alerted to the
19 necessity for investigation and pursuit of her remedies.” *Id.* (internal quotation marks omitted).

20 A few tolling principles extend the one-or-three-year period of § 340.5 in this case. First,
21 Code of Civil Procedure § 352.1 tolls the limitations period for two years for prison inmates.
22 *Jones v. Blanas*, 393 F.3d 918, 927 n.5 (9th Cir. 2004). Second, the limitations period is tolled
23 while the prisoner completes the mandatory exhaustion process. *Brown v. Valoff*, 422 F.3d 926.
24 942-43 (9th Cir. 2004).⁴

25 /////

26
27 ⁴ It is not disputed here that plaintiff did not provide notice of his suit to defendant
28 Syerson within 90 days of the expiration of the limitations period, so there is no extension of the
limitations period pursuant to California Code of Civil Procedure § 364(d).

1 An attachment to plaintiff's complaint shows that plaintiff exhausted his claim against
2 defendant Syerson on February 26, 2008. ECF No. 1 at 24-25. The Director's Level appeals
3 reviewer summarized plaintiff's administrative complaint as follows:

4 ////

5 It is the appellant's position that he had a hemorrhoidectomy at a community
6 medical clinic in Susanville; and, alleges when he woke up, medical staff were
7 standing over him asking him questions, such as the date, who was the president
8 and what day it was. The appellant claims that something went wrong during the
9 surgery and alleges he had a second procedure that caused him to bleed out,
10 coming close to death. As a result, the appellant alleges he now has a pulmonary
embolism; is in very poor health; and, must take medication every day to thin his
blood. The appellant is requesting that all medical persons, personnel and doctors
and the Susanville medical clinic and hospital be held financially responsible for
medical malpractice and attempted murder, negligence and incompetence in the
first degree.

11 *Id.* at 24; *see also Harvey v. Jordan*, 605 F.3d 681, 683 (9th Cir. 2010) (“[A] prisoner exhausts
12 the grievance process when he completes the third level [of review].”). In addition to showing
13 the date of exhaustion, the third-level appeal decision shows that plaintiff was aware of his
14 malpractice claim before February 26, 2008. Accordingly, plaintiff had one year from that date,
15 under § 340.5, plus two years under § 352.1 to file this action. The complaint in this action was
16 signed on November 5, 2012, which is deemed the filing date for statute of limitations purposes.
17 *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009). Because more than three years elapsed
18 between the beginning of the limitations period and the filing of this action, plaintiff's claim
19 against defendant Syerson is time-barred.

20 **IV. Order and Recommendation**

21 For the reasons stated above, the court hereby ORDERS that:

- 22 1. Plaintiff's September 30, 2013 amended complaint (ECF No. 22) is construed as a
23 motion for leave to amend and, so construed, is granted. The September 30, 2013 is
24 now the operative complaint in this action. Defendant Roche shall respond to the
25 amended complaint within 14 days of the date of this order.
- 26 2. The Clerk of Court shall randomly assign a district judge to this action.

27 ////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

It is further RECOMMENDED that defendant Syerson’s August 12, 2013 motion to dismiss (ECF No. 18) be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 18, 2014.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE