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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER,  
  
Plaintiff,  
  
v.  
  
MATTHEW CATE, et al.,  
  
Defendants.

No. C 09-2948 CW  
  
ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS AND  
MOTION FOR SUMMARY  
JUDGMENT

United States District Court  
For the Northern District of California

\_\_\_\_\_ /

On June 30, 2009, pro se Plaintiff Todd Ashker, an inmate housed in the Secured Housing Unit (SHU) at Pelican Bay State Prison (PBSP), filed this civil rights complaint against several Defendants. The Court, pursuant to 28 U.S.C. § 1915A, reviewed the complaint and the First Amended Complaint (1AC). See Docket Nos. 5 and 12. In its June 1, 2010 order reviewing the 1AC, the Court found the following causes of action to be cognizable:  
  
(1) an Eighth Amendment cause of action for deliberate indifference to serious medical needs against Defendants Dr. Michael Sayre, Family Nurse Practitioner (FNP) Sue Risenhoover, FNP Maureen McLean and Nurse James Flowers; and (2) a state law cause of action for negligence for breach of a professional duty of care against Defendants Dr. Sayre, FNP Risenhoover, FNP McLean,

1 Nurse Flowers, Nurse Pam Labans and Nurse R. Robinson.<sup>1</sup>  
2 Defendants move to dismiss all causes of action based on the  
3 doctrine of res judicata, move to dismiss the state causes of  
4 action against FNP McLean and Nurses Labans and Robinson for  
5 failure to exhaust state remedies and move for summary judgment of  
6 all causes of action based on Plaintiff's failure to raise a  
7 triable issue of material fact with regard to their merits.  
8 Plaintiff has filed an opposition and Defendants have replied.  
9 The motion was taken under submission and decided on the papers.  
10 For the foregoing reasons, the Court grants the motion.

11 BACKGROUND

12 On October 24, 1990, Plaintiff was shot by a PBSP guard and,  
13 as a result, sustained severe and permanently disabling injuries  
14 to his right forearm, wrist, hands and fingers, which cause him  
15 ongoing pain.<sup>2</sup> Plaintiff has brought several lawsuits against Dr.  
16 Sayre and other PBSP staff regarding their medical treatment of  
17 these injuries. The last lawsuit, Ashker v. Sayre, C 05-3759 CW,<sup>3</sup>  
18 resulted in a jury verdict, on May 22, 2009, in favor of Plaintiff

19 \_\_\_\_\_  
20 <sup>1</sup> Plaintiff identifies R. Robinson as a nurse. Defendants do  
21 not state that R. Robinson is not a nurse, but identify him with  
22 the title, "Mr." Because Defendants do not specifically state  
that this Defendant is not a nurse, the Court adopts Plaintiff's  
characterization of him as a nurse.

23 <sup>2</sup> Plaintiff verifies under penalty of perjury that the  
24 allegations in his 1AC are true and correct and requests that they  
25 be considered as evidence with his declaration. See Ashker Dec.  
26 at ¶ 30. Defendants do not object to this request. The Court  
accepts the factual allegations that are within Plaintiff's  
personal knowledge as admissible evidence.

27 <sup>3</sup> On June 18, 2007, Plaintiff filed a supplemental complaint  
28 in this case.

1 and against Dr. Sayre on the claims that Dr. Sayre knowingly  
2 disregarded Plaintiff's serious medical needs and was negligent in  
3 his treatment of Plaintiff. See Case No. C 05-3759 CW, Docket No.  
4 421, May 22, 2009 Jury Verdict. On June 30, 2009, approximately  
5 one month after the jury rendered its verdict in case number C 05-  
6 3759 CW, Plaintiff filed the instant action.

7 The following are the relevant facts in this case regarding  
8 each Defendant in the light most favorable to Plaintiff.

9 I. Dr. Sayre

10 Dr. Sayre is the PBSP Chief Medical Officer, responsible for  
11 the supervision of the PBSP medical staff, including FNP  
12 Risenhoover, who was Plaintiff's primary care provider (PCP) from  
13 March 2006 to December 19, 2008. See 1AC at ¶ 20.

14 On June 6, 2007, Plaintiff met with Dr. Sayre for treatment  
15 of his injured arm. Plaintiff told Dr. Sayre that he was  
16 experiencing serious arm pain and stomach issues, including  
17 chronic diarrhea which Plaintiff thought was caused by the non-  
18 steroidal anti-inflammatory drugs (NSAIDs) that FNP Risenhoover  
19 had prescribed for his pain. Plaintiff showed Dr. Sayre his  
20 forearm tendons, which Plaintiff said felt extremely tight and  
21 inflamed from use the previous day, and his wrists, which he said  
22 hurt all the time. Dr. Sayre, without carefully examining  
23 Plaintiff's forearm and wrist, stated, "Oh, that's just mild  
24 arthritis." Plaintiff also told Dr. Sayre that the pain  
25 associated with his ulna nerve felt worse and was so bad that it  
26 caused him sleep loss and that he was desperate for relief. Dr.  
27 Sayre said, "I'll look into it."

28

1 Plaintiff filed several 602 appeals, in which he complained  
2 that he was being prescribed the wrong pain medication and  
3 requested to be seen by a qualified specialist. On September 13,  
4 2007, Dr. Sayre denied Plaintiff's 602 appeal number 2007-11142;  
5 on December 27, 2007, he denied Plaintiff's 602 appeal number  
6 2007-11497; on December 2, 2008, he granted Plaintiff's request in  
7 602 appeal number 18-08-12852 for an examination by an independent  
8 specialist to determine the proper level of pain medication and  
9 denied Plaintiff's request for an immediate change in his pain  
10 medication. Although Dr. Sayre granted Plaintiff's request for an  
11 independent medical examination, Plaintiff was not examined by an  
12 independent physician or specialist.<sup>4</sup>

13 II. FNP Risenhoover

14 On June 20, 2007, Plaintiff saw FNP Risenhoover for treatment  
15 of his injured arm, hand and wrist. He showed her his hand and  
16 fingers which were swollen and purple in color. He also told her  
17 he had severe stabbing pain in his forearm and his nerve pain was  
18 worse. FNP Risenhoover prescribed NSAIDs, tylenol and elavil for  
19 the pain. Except for the elavil, these medications had been  
20 prescribed for Plaintiff in the past and Plaintiff informed FNP  
21 Risenhoover that they did not alleviate his arm and wrist pain and  
22 caused him stomach pain. Plaintiff told FNP Risenhoover that, out  
23 of desperation, he would try the elavil, even though in the past  
24 he had experienced bad side effects from it. After Plaintiff

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26 <sup>4</sup> On June 18, 2010, pursuant to the Court's Order for  
27 Specific Performance in case number C 05-3759 CW, Plaintiff was  
28 seen by an independent pain consultant. See Case No. C 05-2759  
CW, Docket No. 501.

1 began taking the elavil, he started to experience blurred vision  
2 and agitation. On July 19, 2007, Plaintiff was escorted to the  
3 clinic for his scheduled thirty-day follow-up visit with FNP  
4 Risenhoover, but he was taken back to his cell and denied this  
5 visit because custody staff observed that he appeared to be very  
6 agitated. The elavil prescription expired on July 20, 2007 and he  
7 was not seen again by FNP Risenhoover until August 14, 2007.  
8 Therefore, from July 20 to August 14, 2007, Plaintiff was without  
9 any medication for his nerve pain.

10 On August 2, 2007, Plaintiff was examined by a  
11 gastroenterologist, Dr. Martinelli,<sup>5</sup> who recommended that  
12 Plaintiff's medication regimen be changed from the NSAIDs to  
13 codeine-tylenol no. 3 to control pain and to relieve stomach  
14 problems. On August 14, 2007, Plaintiff saw FNP Risenhoover and  
15 explained Dr. Martinelli's recommendation to change his pain  
16 medication. FNP Risenhoover said that she had consulted with Dr.  
17 Sayre and that they would not follow Dr. Martinelli's  
18 recommendation. FNP Risenhoover maintained Plaintiff on the same  
19 pain medication regimen. On August 23, 2007, Dr. Martinelli told  
20 Plaintiff that his recommendation to switch to codeine-tylenol was  
21 not followed because of Plaintiff's history of drug abuse.

22 On August 30, 2007, Plaintiff was interviewed by FNP  
23 Risenhoover regarding Plaintiff's 602 Appeal number 07-11142. FNP  
24 Risenhoover said she'd been ordered to prescribe codeine-tylenol  
25 no. 3 as Plaintiff's pain medication, even though she believed  
26 Plaintiff did not need it. She also ordered ibuprofen, regular

27 \_\_\_\_\_  
28 <sup>5</sup> The parties do not provide Dr. Martinelli's first name.

1 tylenol, elavil and zantac. Plaintiff's thirty-day follow-up  
2 visit with FNP Risenhoover "was supposed to happen on September  
3 29, 2007." 1AC ¶ 57. However, she did not see him until October  
4 29, 2007, during which time he suffered unnecessary pain and  
5 discomfort because the pain medication was only effective for six  
6 hours and caused nausea, stomach cramps and lethargy. The side  
7 effects from the elavil became worse and the zantac and ibuprofen  
8 made his diarrhea and stomach pain worse. On October 29, 2007,  
9 Plaintiff saw FNP Risenhoover and she discontinued all medication  
10 except for 400 milligrams of ibuprofen and almacone antacid  
11 chewable tablets for stomach pain.

12 On December 20, 2007, at his next appointment with FNP  
13 Risenhoover, she prescribed 400 milligrams of ibuprofen per day,  
14 1300 milligrams of tylenol per day and one almacone tablet every  
15 other day. These medications continued to be ineffective in  
16 alleviating his hand and wrist pain and the stomach pain caused by  
17 the medication.

18 Between January 3, 2008 and December 19, 2008, Plaintiff saw  
19 FNP Risenhoover eight or nine times. On each occasion, she told  
20 him that she would only prescribe ibuprofen and tylenol for his  
21 pain. Plaintiff repeatedly informed FNP Risenhoover that these  
22 medications did not relieve his pain and caused him to have severe  
23 stomach problems. FNP Risenhoover never conducted a careful  
24 examination of Plaintiff's arm or hand and, on a few occasions,  
25 she falsely entered in Plaintiff's medical record that she had  
26 examined his arm. She falsely wrote in Plaintiff's medical record  
27 that he was not in pain and that, though his right grip strength  
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1 was mildly weaker than his left, his right finger and wrist range  
2 of motion was normal. 1AC at ¶ 84.

3 On December 20, 2008, Plaintiff was examined by Dr. Carl  
4 Shin, the pain specialist who testified for Defendants in case no.  
5 C 05-3759 CW. Dr. Shin noted that the range of motion of  
6 Plaintiff's right arm, hand, fingers and wrist were abnormal and  
7 his grip strength was very weak. He also noted that Plaintiff's  
8 arm brace did not fit correctly and was not adequate for his  
9 needs. Dr. Shin recommended that Plaintiff be fitted for a proper  
10 arm brace, that he see a wrist specialist and that his pain  
11 medication be changed to tramadol. 1AC at ¶ 93. Dr. Sayre and  
12 FNP Risenhoover did not follow any of Dr. Shin's recommendations.

13 On March 26, 2009, Plaintiff met with Dr. Claire Williams, a  
14 PBSP doctor. Dr. Williams carefully examined Plaintiff's right  
15 arm and hand, noting weakness and limited range of motion. Dr.  
16 Williams prescribed codeine-tylenol no. 3, twice per day, 650  
17 milligrams of regular tylenol every six hours, zantac twice per  
18 day and sucralfate four times a day for stomach discomfort.  
19 Plaintiff's symptoms improved with this combination of  
20 medications. However, as of May, 2009, the medications had lost  
21 their effectiveness. Plaintiff submitted several requests to see  
22 a doctor, and was told "he was on the list."

23 III. Nurse Flowers

24 Nurse Flowers acted as a "gatekeeper" between Plaintiff and  
25 FNP Risenhoover. On at least nine occasions Plaintiff made  
26 requests to Nurse Flowers to see FNP Risenhoover for treatment of  
27 his pain and stomach symptoms. Nurse Flowers classified  
28

1 Plaintiff's symptoms and complaints as "routine," which caused  
2 long delays in Plaintiff being treated by FNP Risenhoover.

3 IV. Family Nurse Practitioner McLean

4 As PBSP Health Care Manager, FNP McLean reviewed the care  
5 inmates received, and supervised, trained and evaluated other PBSP  
6 medical staff. Plaintiff's Ex. G, Health Care Manager Duty  
7 Statement. FNP McLean knew about Plaintiff's serious medical  
8 problem and the inadequacy of the medication FNP Risenhoover was  
9 prescribing for him. On October 17, 2007, FNP McLean reviewed  
10 Plaintiff's 602 appeal number 07-11142 and affirmed Dr. Sayre's  
11 response, which indicated that FNP Risenhoover's medical treatment  
12 of Plaintiff was appropriate and there was no justification for an  
13 investigation. On January 24, 2008, FNP McLean affirmed Dr.  
14 Sayre's determination of Plaintiff's 602 appeal number 07-11497.  
15 On January 8, 2009, FNP McLean adopted Dr. Sayre's determination  
16 of Plaintiff's 602 appeal number 18-08-12852 which granted  
17 Plaintiff's request to be seen by an independent doctor and denied  
18 his request to have an immediate change in his medication.<sup>6</sup>

19 V. Nurse Labans and Nurse Robinson

20 Nurses Labans and Robinson knew that information in  
21 Plaintiff's medical record that he had abused drugs was false, but  
22 they refused Plaintiff's requests to change it. On March 19,  
23 2008, Nurses Labans and Robinson denied Plaintiff's January 14,  
24 2008 602 appeal number 08-11738.

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26 \_\_\_\_\_  
27 <sup>6</sup> In its order screening the complaint, the Court found that  
28 a different claim against FNP McLean, based on her denial of  
Plaintiff's 602 appeal concerning an allegedly false entry in his  
medical record, did not state a cognizable claim.



DISCUSSION

I. Motion to Dismiss

A. Legal Standard

A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are not taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal

1 "without contradicting any of the allegations of [the] original  
2 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
3 Cir. 1990).

4 B. Res Judicata

5 Defendants argue that, because there was a final judgment in  
6 case no. C 05-3759 CW, and the other elements of res judicata are  
7 met, Plaintiff's causes of action against Dr. Sayre are barred.

8 "Res judicata bars a suit when 'a final judgment on the  
9 merits of an action precludes the parties or their privies from  
10 relitigating issues that were or could have been raised in that  
11 action.'" ProShipLine Inc. v. Aspen Infrastructures Ltd., 594  
12 F.3d 681, 688 (9th Cir. 2010). Res judicata applies "when there  
13 is '(1) an identity of claims; (2) a final judgment on the merits;  
14 and (3) identity or privity between parties.'" Id.

15  
16 Plaintiff does not dispute that there was a final judgment on  
17 the merits in case number C 05-3759 CW, or that he and Dr. Sayre,  
18 were parties in both lawsuits. Instead, he argues that there is  
19 no identity of claims because the events in this lawsuit occurred  
20 after June 18, 2007, when he filed a supplemental complaint in the  
21 first lawsuit.  
22

23 To determine whether an identity of claims exists, a court  
24 considers four factors: "(1) whether the two suits arise out of  
25 the same transactional nucleus of facts; (2) whether rights or  
26 interests established in the prior judgment would be destroyed or  
27 impaired by prosecution of the second action; (3) whether the two  
28

1 suits involve infringement of the same right; and (4) whether  
2 substantially the same evidence is presented in the two actions."  
3 Id. (citation omitted; emphasis in original). "Whether two suits  
4 arise out of the 'same transactional nucleus' depends upon  
5 'whether they are related to the same set of facts and whether  
6 they could conveniently be tried together.'" Id. (quoting W.  
7 Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992)) (emphasis  
8 in original). However, the rule that a judgment is conclusive as  
9 to every matter that could have been asserted does not apply to  
10 new claims that arise while the first action was being litigated.  
11 Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750  
12 F.2d 731, 739 (9th Cir. 1984). Thus, res judicata does not bar  
13 litigation of claims based on events that occurred after the  
14 filing of the complaint in the first lawsuit. Curtis v. Citibank,  
15 N.A., 226 F.3d 133, 139 (2nd Cir. 2000) (cited in Adams v.  
16 California Dep't of Health Servs., 487 F.3d 684, 693 (9th Cir.  
17 2007)). However, if the parties litigated claims arising from  
18 events that occurred after the filing of the complaint or the  
19 supplemental complaint, then the res judicata bar would encompass  
20 them. Los Angeles Branch NAACP, 750 F.2d at 740.

21  
22  
23 There is no dispute that the claims in both cases involved  
24 infringement of the same right: Plaintiff's constitutional right  
25 to receive adequate medical treatment for his serious medical  
26 condition and his state law right to receive an acceptable level  
27 of medical care. There is no dispute that the claims in both  
28

1 actions arise out of the same transactional nucleus of facts, that  
2 is, Plaintiff's medical treatment and the medication prescribed  
3 for the pain in his injured arm and wrist. In response to  
4 Plaintiff's argument that his claims arose after he filed a  
5 supplemental complaint in his previous case, Defendants cite  
6 evidence of Plaintiff's medical condition after the date of his  
7 supplemental complaint that Plaintiff presented to the jury at his  
8 trial.  
9

10 The following post-June 2007 evidence was presented in case  
11 number C 05-3795 CW.

12 On May 12, 2009, toward the end of his trial, Plaintiff  
13 testified as follows:

14 Ever since I was taken off tramadol on 9/27/06, I have been  
15 in a lot more pain and discomfort, whereas before being taken  
16 off tramadol, my pain level was generally around a three. . .  
17 Since going back to NSAIDs and tylenol, my pain level has  
18 been around a seven depending on use. All writing is painful  
19 for me in the wrist joint, fingers, inner forearm, . . . This  
20 pain effects [sic] my ability to sleep. And it's affected my  
21 ability to concentrate and focus on tasks, like drafting  
22 legal documents and writing letters. I dread having to do  
23 any writing, but still must generally do some writing every  
24 day regarding legal issues, personal issues, maintaining  
25 contact with wife, family, friends, correspondence courses,  
26 etc.

27 [A]ll writing is a very slow, painful process for me and the  
28 200 milligrams of ibuprofen and tylenol 13 milligrams per day  
does not work for this pain. . . . And I have had to take a  
lot more around 1200 milligrams of ibuprofen and 1300  
milligrams of Tylenol per day for the past -- between I would  
say October and April of this year in order to do the legal  
writing that I have had to do and get a bit more sleep  
including an unbelievable amount to prepare for this trial  
right here.

1 At the expense of my stomach, which has felt a lot worse,  
2 taking superfed (phonetic) a day. Superfed is a medication  
3 that coats your stomach. It's given -- I am taking four a  
4 day of that now.

5 Skilling Dec., C 05-3795 CW Trial Transcript (TR) May 12, 2009 at  
6 387-90.

7 Plaintiff also testified about his March 26, 2009 examination  
8 by Dr. Williams, describing the medications Dr. Williams  
9 prescribed for him and how the medications affected his arm and  
10 wrist pain and his stomach. TR at 390-91. In questioning Dr.  
11 Sayre, Plaintiff stated, "Dr. Sayre, isn't it true that during the  
12 time -- at the time period in question '06, '07, '08, I had not  
13 had any nerve conduction tests done since 2001?" TR at 884. Dr.  
14 Sayre responded, "If you say so." TR at 884. Also, at his trial,  
15 Plaintiff questioned Dr. Cory Weinstein, his expert witness, who  
16 had examined Plaintiff several time during the years 2000 through  
17 2009. At the trial, Dr. Weinstein testified about his medical  
18 findings regarding Plaintiff's arm and his recommended treatment  
19 plan. TR at 459-528. Dr. Carl Shin, Defendant's medical expert,  
20 examined Plaintiff in December 2008. Dr. Shin was questioned on  
21 direct and cross-examination by Plaintiff about his medical  
22 findings regarding Plaintiff's condition in 2008. TR at 932-1014.

23 This testimony placed in issue Plaintiff's medical condition  
24 and Dr. Sayre's conduct up to the date of the trial.

25 Further, at the 2009 trial, the jury instruction on  
26 compensatory damages told the jury to consider Plaintiff's "loss  
27 of enjoyment of life experienced and which with reasonable  
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1 probability will be experienced in the future," and Plaintiff's  
2 "physical pain and suffering experienced and which with reasonable  
3 probability will be experienced in the future." Case C 05-3759  
4 CW, Docket No. 416, Final Jury Instructions at 8.

5 The jury was not instructed to limit its consideration of the  
6 evidence to those events which occurred prior to June 2007. Thus,  
7 the jury considered evidence of Plaintiff's medical condition  
8 through May 12, 2009, the date of his trial testimony, and  
9 considered Plaintiff's future physical pain and suffering and loss  
10 of enjoyment of life as damages beyond that date.

11 In this case, Plaintiff's claims against Dr. Sayre arise from  
12 events that took place from June 2007 through December 2008,  
13 before the jury rendered its verdict in case number C 05-3759 CW.  
14 Therefore, all of these claims and the resulting damages were  
15 considered by the jury and included in its verdict. Thus, there  
16 is an identity of claims in the two cases.

17 Plaintiff argues that res judicata does not apply because his  
18 present claims against Dr. Sayre were not administratively  
19 exhausted during the pendency of his previous case and, thus, he  
20 could not have asserted them at that time. Although  
21 administrative exhaustion is a requirement before a prisoner's  
22 civil rights claim can be filed in federal court, the jury would  
23 not have known about this requirement. Based on the evidence  
24 presented at trial and the jury instructions, the jury was  
25 deciding Plaintiff's claims through May 2009 and damages based  
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1 upon those claims. Thus, res judicata applies even if Plaintiff's  
2 claims against Dr. Sayre were unexhausted at the time of the  
3 trial.

4 Although Plaintiff does not dispute that there is privity  
5 between Dr. Sayre and the other Defendants in this case, the Court  
6 examines whether privity exists.

7 Privity exists among parties when there is a sufficient  
8 commonality of interest such that they are so closely aligned in  
9 interest that one is the virtual representative of the other.

10 Nordhorn v Ladish Co., Inc., 9 F.3d 1402, 1405 (9th Cir. 1993).

11 Characteristics demonstrating such representation include a close  
12 relationship, an identity of relevant interests, substantial  
13 participation in the prior lawsuit and tactical maneuvering that  
14 would benefit both parties. Irwin v. Mascott, 370 F.3d 924, 930  
15 (9th Cir. 2004).

16  
17 In regard to FNP Risenhoover, Plaintiff acknowledges that the  
18 claims against her and Dr. Sayre are "intertwined" because,  
19 "although FNP Risenhoover was Ashker's primary care provider from  
20 2006-2008, she did so under the direct supervision, guidance, and  
21 direction of Dr. Sayre." Pl.'s Opp. at 10; Pl.'s Ex. G, Duties of  
22 PBSP Nurse Practitioner. FNP Risenhoover was a defendant in the  
23 prior lawsuit; Plaintiff voluntarily dismissed with prejudice all  
24 claims against her on February 25, 2009, before his case against  
25 Dr. Sayre went to trial. Based upon Plaintiff's evidence and  
26 acknowledgment that the claims against FNP Risenhoover are  
27  
28

1 intertwined with those against Dr. Sayre, and that there is a  
2 close relationship and an identity of interests between them,  
3 there is privity between them such that the res judicata bar that  
4 applies to Dr. Sayre's claims also bars the claims against FNP  
5 Risenhoover.

6 The remaining Defendants argue that Dr. Sayre represented  
7 their interests in the previous litigation because he was sued in  
8 his role as PBSP Chief Medical Officer and, even though he was the  
9 only Defendant left at trial, the trial included evidence of  
10 Plaintiff's treatment by all PBSP medical providers. Because, as  
11 discussed below, the Court rules in favor of these Defendants for  
12 other reasons, it does not address whether there is privity  
13 between them and Dr. Sayre.  
14

15 C. Lack of Exhaustion of State Law Causes of Action

16 Defendants argue that the state law causes of action against  
17 FNP McLean and Nurses Labans and Robinson should be dismissed as  
18 unexhausted because Plaintiff failed to submit claims against them  
19 to the California Victim Compensation and Government Claims Board  
20 within six months of the incidents giving rise to the claims.  
21

22 Pursuant to the California Tort Claims Act (CTCA), Cal. Gov't  
23 Code §§ 900 et seq., a personal injury claim against a public  
24 employee must be filed with the Board within six months after the  
25 date of the event that gave rise to the claim. Cal. Gov't Code  
26 § 911.2(a). Compliance with the CTCA filing requirement is  
27 mandatory; failure to file a claim within the requisite time  
28



1 period is a bar to future tort suits. Hernandez v. McClanahan,  
2 996 F. Supp. 975, 977 (N.D. Cal. 1998). A claim is deemed  
3 received by the Board when the claimant deposits it in the mail.  
4 Cal. Gov't Code § 915.2.

5 Plaintiff's proof of service for his claim to the Board  
6 indicates that, on October 9, 2008, he gave it to prison officials  
7 to be mailed. Therefore, the claim is deemed to be filed on  
8 October 9, 2008. Plaintiff's claim to the Board was brought  
9 against all named Defendants in this case. Roman Dec., Ex. B. On  
10 November 24, 2008, the Board sent Plaintiff a letter informing him  
11 that his claim was "being accepted only to the extent it asserts  
12 allegations that arise from facts or events that occurred during  
13 the six months prior to the date it was presented." Id. at 1. In  
14 the same letter, the Board indicated that, because of the  
15 complexity of Plaintiff's claims, it believed that the court  
16 system was the appropriate forum for resolving them. Id. On  
17 December 26, 2008, the Board sent Plaintiff a letter informing him  
18 that his claim had been rejected on December 18, 2008.

19 Because Plaintiff filed his claim on October 9, 2008, it  
20 exhausts only causes of action based on facts or events which  
21 occurred up to six months previous to this date, that is, on or  
22 after April 9, 2008.

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25  
26 1. FNP McLean

27 Plaintiff's state law claim against FNP McLean is based on  
28 the allegations that, on October 17, 2007, January 24, 2008 and

1 April 8, 2008, she affirmed Dr. Sayre's decisions regarding three  
2 602 appeals that Plaintiff had filed. 1AC at ¶¶ 57, 77. Because  
3 these events occurred before April 9, 2008, Plaintiff's state law  
4 causes of action against FNP McLean based upon them is  
5 unexhausted.

6 2. Nurse Labans

7 Plaintiff's state law claim against Nurse Labans is based  
8 upon the allegations that, on March 19, 2008, she denied his 602  
9 appeal and told him that "the drug abuse history" notation in his  
10 medical record was based on his use of tramadol for many years and  
11 that there would be no change in this notation in his medical  
12 record. 1AC at ¶¶ 73-75. Because this occurred before April 9,  
13 2008, this cause of action is unexhausted.  
14

15 3. Nurse Robinson

16 Plaintiff's only allegation against Nurse Robinson is that,  
17 on March 19, 2008, he, along with Nurse Labans, denied one of  
18 Plaintiff's 602 appeals which requested that the "drug abuse"  
19 notation in Plaintiff's medical record be expunged. Because this  
20 occurred before April 9, 2008, the cause of action is unexhausted.  
21

22 Plaintiff argues that these causes of action are exhausted  
23 because, in his claim to the Board, he notified it that his claims  
24 constituted continuing violations. He also argues that the Board  
25 failed to inform him that his claim was late and, if he had known  
26 this, he would have taken corrective action.  
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1           The continuing violation theory generally is applied to a  
2 continuing policy and practice on an organization-wide basis.  
3 Green v. Los Angeles County Superintendent of Schs., 883 F.2d  
4 1472, 1480 (9th Cir. 1989). The plaintiff must show that the  
5 policy or practice operated at least in part within the  
6 limitations period. Id. A plaintiff may also show a continuing  
7 violation by alleging a series of related acts, one or more of  
8 which falls within the limitations period. Id. However, a  
9 continuing impact from past violations does not give rise to a  
10 continuing violation. Knox v. Davis, 260 F.3d 1009, 1013 (9th  
11 Cir. 2001). In other words, when a plaintiff learns of the  
12 allegedly wrongful act, he or she is on notice that his or her  
13 rights have been violated and the statute of limitations is deemed  
14 to have commenced at that time. Id. at 1014.

15  
16           Plaintiff cannot survive a timeliness challenge by claiming a  
17 continuing violation on the part of FNP McLean, Nurse Labans or  
18 Nurse Robinson because all of their conduct at issue occurred  
19 outside of the limitations period.

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21           Furthermore, in its November 24, 2008 letter to Plaintiff,  
22 the Board did inform him that his claim was only accepted for  
23 events that occurred within the six months prior to the date it  
24 was presented to the Board. Therefore, Plaintiff was on notice  
25 that any claim based on events before the six month cutoff was not  
26 accepted by the Board and was not exhausted.  
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1 Defendants' motion to dismiss the state law causes of action  
2 against FNP McLean, Nurse Labans and Nurse Robinson for lack of  
3 exhaustion is granted.

4 II. Summary Judgment

5 A. Legal Standard

6 Summary judgment is properly granted when no genuine and  
7 disputed issues of material fact remain, and when, viewing the  
8 evidence most favorably to the non-moving party, the movant is  
9 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
10 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
11 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
12 1987).

13  
14 The moving party bears the burden of showing that there is no  
15 material factual dispute. Therefore, the court must regard as  
16 true the opposing party's evidence, if supported by affidavits or  
17 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
18 815 F.2d at 1289. The court must draw all reasonable inferences  
19 in favor of the party against whom summary judgment is sought.  
20 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
21 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
22 F.2d 1551, 1558 (9th Cir. 1991).  
23

24 Material facts which would preclude entry of summary judgment  
25 are those which, under applicable substantive law, may affect the  
26 outcome of the case. The substantive law will identify which  
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1 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
2 242, 248 (1986).

3 Where the moving party does not bear the burden of proof on  
4 an issue at trial, the moving party may discharge its burden of  
5 production by either of two methods. Nissan Fire & Marine Ins.  
6 Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.  
7 2000).

8 The moving party may produce evidence negating  
9 an essential element of the nonmoving party's  
10 case, or, after suitable discovery, the moving  
11 party may show that the nonmoving party does not  
12 have enough evidence of an essential element of  
13 its claim or defense to carry its ultimate  
14 burden of persuasion at trial.

15 Id.

16 If the moving party discharges its burden by showing an  
17 absence of evidence to support an essential element of a claim or  
18 defense, it is not required to produce evidence showing the  
19 absence of a material fact on such issues, or to support its  
20 motion with evidence negating the non-moving party's claim. Id.;  
21 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
22 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If  
23 the moving party shows an absence of evidence to support the non-  
24 moving party's case, the burden then shifts to the non-moving  
25 party to produce "specific evidence, through affidavits or  
26 admissible discovery material, to show that the dispute exists."  
27 Bhan, 929 F.2d at 1409.  
28

1 If the moving party discharges its burden by negating an  
2 essential element of the non-moving party's claim or defense, it  
3 must produce affirmative evidence of such negation. Nissan, 210  
4 F.3d at 1105. If the moving party produces such evidence, the  
5 burden then shifts to the non-moving party to produce specific  
6 evidence to show that a dispute of material fact exists. Id.  
7

8 If the moving party does not meet its initial burden of  
9 production by either method, the non-moving party is under no  
10 obligation to offer any evidence in support of its opposition.  
11 Id. This is true even though the non-moving party bears the  
12 ultimate burden of persuasion at trial. Id. at 1107.

13 B. Deliberate Indifference to Serious Medical Needs

14 Plaintiff's Eighth Amendment cause of action is based on the  
15 fact that he has the serious medical condition of a permanently  
16 disabled right arm and wrist which causes him constant pain. He  
17 claims that Defendants have treated him with deliberate  
18 indifference by not providing him with the proper pain medication.  
19

20 The treatment a prisoner receives in prison and the  
21 conditions under which he is confined are subject to scrutiny  
22 under the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 31  
23 (1993). Deliberate indifference to serious medical needs violates  
24 the Eighth Amendment's proscription against cruel and unusual  
25 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin  
26 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
27 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136  
28

1 (9th Cir. 1997) (en banc). A determination of "deliberate  
2 indifference" involves an examination of two elements: the  
3 seriousness of the prisoner's medical need and the nature of the  
4 defendant's response to that need. Id.

5 A prison official is deliberately indifferent if he knows  
6 that a prisoner faces a substantial risk of serious harm and  
7 disregards that risk by failing to take reasonable steps to abate  
8 it. Farmer, 511 U.S. at 837. The prison official must not only  
9 "be aware of facts from which the inference could be drawn that a  
10 substantial risk of serious harm exists," but he "must also draw  
11 the inference." Id. If a prison official should have been aware  
12 of the risk, but was not, then the official has not violated the  
13 Eighth Amendment, no matter how severe the risk. Gibson v. County  
14 of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).  
15

16 In order for deliberate indifference to be established,  
17 therefore, there must be a purposeful act or failure to act on the  
18 part of the defendant and resulting harm. McGuckin, 974 F.2d at  
19 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404,  
20 407 (9th Cir. 1985). Neither a finding that a defendant's actions  
21 are egregious nor that they resulted in significant injury to a  
22 prisoner is required to establish a violation of the prisoner's  
23 federal constitutional rights. McGuckin, 974 F.2d at 1060, 1061.  
24 Deliberate indifference may be shown when prison officials deny,  
25 delay or intentionally interfere with medical treatment, or in the  
26 way in which prison officials provide medical care. Id. at 1062  
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1 (delay of seven months in providing medical care during which  
2 medical condition was left virtually untreated and plaintiff was  
3 forced to endure "unnecessary pain" sufficient to present  
4 colorable § 1983 claim).

5 "A difference of opinion between a prisoner-patient and  
6 prison medical authorities regarding treatment does not give rise  
7 to a § 1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th  
8 Cir. 1981). Similarly, a showing of nothing more than a  
9 difference of medical opinion as to the need to pursue one course  
10 of treatment over another is insufficient, as a matter of law, to  
11 establish deliberate indifference. Toguchi v. Chung, 391 F.3d  
12 1051, 1058-60 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242  
13 (9th Cir. 1989).  
14

15 Defendants concede, for the purposes of this motion, that the  
16 condition of Plaintiff's arm constitutes a serious medical need.  
17 Therefore, whether Plaintiff has raised a triable issue of fact to  
18 preclude summary judgment on this cause of action depends on the  
19 evidence of each Defendant's response to that need.  
20

21 Because Plaintiff's state law negligence cause of action is  
22 based on the same allegations as his Eighth Amendment cause of  
23 action, the Court reviews them together.  
24

25 C. Dr. Sayre and FNP Risenhoover

26 As discussed above, the causes of action against Dr. Sayre  
27 and FNP Risenhoover are barred by res judicata. Thus, there is no  
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1 need to address whether they are entitled to summary judgment on  
2 the causes of action against them.

3 D. FNP McLean

4 The evidence against FNP McLean is that she denied several of  
5 Plaintiff's 602 appeals. FNP McLean's denial of Plaintiff's 602  
6 appeals may have delayed a change in Plaintiff's pain medication.  
7 However, this alone is not sufficient to amount to evidence that  
8 she was deliberately indifferent to Plaintiff's serious medical  
9 need.  
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11 Plaintiff also submits evidence that, on January 8, 2009, FNP  
12 McLean affirmed Dr. Sayre's decision to grant in part Plaintiff's  
13 602 appeal. The decision denied Plaintiff's request to have his  
14 medication changed, but granted his request to be examined by an  
15 independent doctor. Although Plaintiff states that he was never  
16 seen by an independent doctor, he was subsequently examined by Dr.  
17 Williams, a PBSP staff doctor, who changed Plaintiff's pain  
18 medication to his satisfaction. FNP McLean's January 8, 2009  
19 affirmation of Dr. Sayre's decision does not demonstrate  
20 deliberate indifference to Plaintiff's medical needs.  
21

22 Plaintiff also argues that FNP McLean is liable based upon  
23 her supervisory duties. However, a supervisor generally "is only  
24 liable for constitutional violations of his subordinates if the  
25 supervisor participated in or directed the violations, or knew of  
26 the violations and failed to act to prevent them." Taylor v.  
27 List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may also  
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1 be held liable if he or she implemented "a policy so deficient  
2 that the policy itself is a repudiation of constitutional rights  
3 and is the moving force of the constitutional violation." Redman  
4 v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en  
5 banc).

6 Plaintiff does not submit evidence that FNP McLean  
7 participated in or directed any constitutional violations by her  
8 subordinates or that she implemented a policy that was the moving  
9 force behind any constitutional violations. Therefore,  
10 Defendants' motion for summary judgment of the causes of action  
11 against FNP McLean is granted.  
12

13 E. Nurse Flowers

14 The evidence against Nurse Flowers is that, on many  
15 occasions, he classified Plaintiff's complaints of arm, wrist and  
16 stomach pain as "routine" and as a result Plaintiff experienced  
17 long delays in obtaining appointments to see FNP Risenhoover.  
18 However, the evidence shows that, over the period of time that FNP  
19 Risenhoover was Plaintiff's PCP, he saw her many times. That  
20 Nurse Flowers characterized Plaintiff's complaints as "routine"  
21 does not amount to evidence of deliberate indifference or  
22 negligence. Therefore, summary judgment is granted in favor of  
23 Nurse Flowers on Plaintiff's Eighth Amendment and negligence  
24 causes of action.  
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1 F. Qualified Immunity

2 Defendants argue that the doctrine of qualified immunity  
3 shields them from liability on Plaintiff's causes of action.

4 The defense of qualified immunity protects "government  
5 officials . . . from liability for civil damages insofar as their  
6 conduct does not violate clearly established statutory or  
7 constitutional rights of which a reasonable person would have  
8 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A  
9 defendant may have a reasonable, but mistaken, belief about the  
10 facts or about what the law requires in any given situation.  
11 Saucier v. Katz, 533 U.S. 194, 205 (2001). The threshold question  
12 in qualified immunity analysis is: "Taken in the light most  
13 favorable to the party asserting the injury, do the facts alleged  
14 show the officer's conduct violated a constitutional right?" Id.  
15 at 201. A court considering a claim of qualified immunity must  
16 determine whether the plaintiff has alleged the deprivation of an  
17 actual constitutional right and whether such right was "clearly  
18 established." Pearson v. Callahan, 555 U.S. 223, 231 (2009).  
19 Where there is no clearly established law that certain conduct  
20 constitutes a constitutional violation, the defendant cannot be on  
21 notice that such conduct is unlawful. Rodis v. City & County of  
22 San Francisco, 558 F.3d 964, 970-71 (9th Cir. 2009). The  
23 relevant, dispositive inquiry in determining whether a right is  
24 clearly established is whether it would be clear to a reasonable  
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1 defendant that his conduct was unlawful in the situation he  
2 confronted. Saucier, 533 U.S. at 202.

3 On these facts, viewed in the light most favorable to  
4 Plaintiff, Defendants FNP McLean and Nurse Flowers<sup>7</sup> prevail as a  
5 matter of law on their qualified immunity defense because the  
6 Court has found no Eighth Amendment violation. However, even if a  
7 constitutional violation had occurred with respect to Plaintiff's  
8 Eighth Amendment cause of action, in light of clearly established  
9 principles at the time of the incident, FNP McLean and Nurse  
10 Flowers could have reasonably believed that their respective  
11 behavior, reviewing Plaintiff's 602 appeals and characterizing  
12 Plaintiff's symptoms as routine, were lawful.

14 CONCLUSION

15 Based upon the foregoing, Plaintiff's causes of action  
16 against Dr. Sayre and FNP Risenhoover are barred by res judicata;  
17 Plaintiff's state law causes of action against FNP McLean and  
18 Nurses Labans and Robinson are dismissed for failure to exhaust  
19 state remedies; summary judgment is granted in favor of FNP McLean  
20 on the Eighth Amendment cause of action; and summary judgment is  
21 granted in favor of Nurse Flowers on the Eighth Amendment and  
22 negligence causes of action. The clerk of the court shall enter a  
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27 <sup>7</sup> The claims against Dr. Sayre and FNP Risenhoover are barred  
28 by res judicata. Plaintiff does not bring any constitutional  
claims against Nurses Labans and Robinson.

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separate judgment in favor of Defendants. All parties shall bear their own costs of litigation.

IT IS SO ORDERED.

Dated: March 30, 2012



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CLAUDIA WILKEN  
United States District Judge