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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VICKI MORIN,	)	3:16-cv-00145-HDM-VPC
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	

Before the court is the defendant United States' ("defendant") motion to dismiss (ECF No. 7). Plaintiff Vicki Morin ("plaintiff") has opposed (ECF No. 8), and defendant has replied (ECF No. 9).

Plaintiff filed her complaint in this action on March 15, 2016. The complaint asserts a claim of negligence against defendant under the Federal Tort Claims Act. Plaintiff alleges that from 1982 to 1986, she worked in a building at the end of the active runway at the Naval Air Station in Fallon, Nevada, and that during that time she was "literally bathed in jet fuel routinely

1 dumped by the Navy jet aircraft on their approach to landing."  
2 (ECF No. 1 (Compl. at 2)). In 2001, plaintiff was diagnosed with a  
3 malignant plasmacytoma of the brain, which she asserts was caused  
4 by the jet fuel. She underwent surgery to remove the tumor and no  
5 further treatment followed. (ECF No. 8 (Opp. at 2)). Although  
6 plaintiff was asymptomatic for more than a decade, in 2015 the  
7 plasmacytoma was "discovered to have returned" or "reoccurred."  
8 (ECF No. 1 (Compl. at 3 & 6); ECF No. 8 (Opp. at 5)).

9 In 2003, plaintiff filed suit against defendant for allegedly  
10 causing the tumor that was discovered in 2001 ("2003 Complaint").  
11 The court granted defendant summary judgment on the grounds that  
12 plaintiff had failed to present admissible evidence that jet fuel  
13 had caused her tumor. The complaint in this action asserts that  
14 "[t]he facts and circumstances of exposure in this case are  
15 identical to those" of plaintiff's 2003 suit. (ECF No. 1 (Compl.  
16 at 2)). In fact, except for those sections discussing the  
17 reoccurrence of the tumor in 2015, the complaints are identical.

18 Defendant moves to dismiss the instant complaint on the  
19 grounds of res judicata. Defendant argues that the judgment in the  
20 2003 action bars plaintiff's relitigation of the same claim in this  
21 case.

22 "Res judicata, or claim preclusion, prohibits lawsuits on 'any  
23 claims that were raised or could have been raised' in a prior  
24 action." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir.  
25 2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d  
26 708, 713 (9th Cir. 2001)). Res judicata applies if there is: "(1)  
27 an identity of claims; (2) a final judgment on the merits; and (3)  
28 identity or privity between parties.'" *Id.*

1           There is no question that privity exists as the parties in  
2 this case are identical to the parties in the 2003 case. And  
3 plaintiff does not contest that the grant of summary judgment to  
4 defendant in the 2003 case operated as a final judgment on the  
5 merits. The res judicata inquiry thus hinges on whether there is  
6 an identity of claims.

7           The Ninth Circuit applies four factors to determine whether  
8 there is an identity of claims:

9           (1) whether rights or interests established in the prior  
10 judgment would be destroyed or impaired by prosecution of  
11 the second action; (2) whether substantially the same  
12 evidence is presented in the two actions; (3) whether the  
13 two suits involve infringement of the same right; and (4)  
14 whether the two suits arise out of the same transactional  
15 nucleus of facts.

16           *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d  
17 1139, 1150 (9th Cir. 2011). The last factor is the most important.  
18 *Id.*

19           The first three factors are easily met here. The prior  
20 judgment established that the defendant was not liable for causing  
21 the plaintiff to develop a malignant plasmacytoma of the brain when  
22 the defendant allegedly deposited jet fuel near plaintiff's place  
23 of employment between 1982 and 1986. Allowing this action to  
24 proceed would clearly impair defendant's right to be free of  
25 liability for that claim. Because the facts and circumstances of  
26 exposure in this case are identical to the 2003 case, substantially  
27 the same evidence would be presented in both actions.<sup>1</sup> And because

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28           <sup>1</sup> Even were plaintiff to seek to introduce additional evidence of  
causation in this case, res judicata would still apply. See *Gospel Missions  
of Am. v. City of Los Angeles*, 328 F.3d 548, 558 (9th Cir. 2003) ("An  
action that merely alleges new facts in support of a claim that has gone to  
judgment in a previous litigation will be subject to claim preclusion.");

1 this case, like the 2003 case, involves the plaintiff's claimed  
2 entitlement to damages for a malignant plasmacytoma of the brain  
3 allegedly caused by defendant's dumping of jet fuel between 1982  
4 and 1986 at the Fallon Naval Air Station, this suit involves  
5 infringement of the same right as asserted in the 2003 case.

6 Turning to the fourth factor, it is undisputed that - as to  
7 the defendant's actions - this suit and the 2003 complaint arise  
8 out of the same transactional nucleus of facts. The complaint does  
9 not allege any tortious conduct by defendant that occurred after  
10 the 2003 complaint. In fact, plaintiff's complaint explicitly  
11 states that "[t]he facts and circumstances of exposure in this case  
12 are identical to those" of her 2003 suit. (ECF No. 1 (Compl. at  
13 2)). Nonetheless, plaintiff asserts that the fourth factor is not  
14 satisfied because her injury in this case is separate and distinct  
15 from the injury she alleged in the 2003 complaint.

16 Courts have recognized in limited circumstances an exception  
17 to res judicata where the plaintiff's current complaint alleges a  
18 separate and distinct disease or condition from that asserted in an  
19 earlier action. See *Norfolk & W. R.R. Co.*, 538 U.S. 135, 152-52  
20 (2003); *Daley v. A.W. Chesterton, Inc.*, 37 A.3d 1175 (Pa. 2012);  
21 *Poosh v. Phillip Morris USA, Inc.*,<sup>2</sup> 250 P.3d 181 (Cal. 2011);  
22 *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 649 & n.3 (Tex.  
23 2000). The exception has primarily been recognized in asbestos  
24 cases. Plaintiff alleges for the first time in her answering brief

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26 *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982).

27 <sup>2</sup> *Poosh* actually involves the statute of limitations rather than res  
28 judicata, but many courts have applied the separate disease or condition  
doctrine in both contexts.

1 that the tumor discovered in 2015 is genetically, immunologically,  
2 and environmentally distinct from the tumor discovered in 2001 and  
3 is thus a separate and distinct condition. Defendant argues that  
4 in the cases plaintiff cites, it was of central importance that the  
5 diseases or conditions were completely different, and that because  
6 both of plaintiff's complaints involve the same condition - a  
7 malignant plasmacytoma of the brain - the exception does not apply.

8 Plaintiff raises the separate and distinct condition exception  
9 for the first time in her opposition to the motion to dismiss,  
10 citing in support of her assertion a declaration from Vera S.  
11 Byers, MD., PhD. (See Opp. Ex. 2). But Ms. Byers' assertions are  
12 not part of plaintiff's complaint. Instead, the complaint alleges  
13 that the tumor discovered in 2001 has "returned" or "reoccurred."  
14 This allegation cannot be squared with a conclusion that the tumors  
15 are separate and distinct as it is an allegation that the tumors  
16 are, in fact, the same. Plaintiff has therefore not alleged a  
17 separate and distinct disease or condition, and the exception does  
18 not apply.

19 Thus, for the reasons set forth above the court concludes, in  
20 considering the allegations in plaintiff's complaint, the claims in  
21 plaintiff's current complaint are identical to his claims in her  
22 2003 complaint.

23 As there is privity, a final judgment on the merits, and an  
24 identity of claims, res judicata bars plaintiff's complaint in this  
25 case. Plaintiff's additional arguments as to why res judicata  
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1 should not apply are unavailing.<sup>3</sup> Accordingly, the defendant's  
2 motion to dismiss is (#7) is **GRANTED**, and plaintiff's complaint is  
3 hereby **DISMISSED**. The dismissal is without prejudice.

4 IT IS SO ORDERED.

5 DATED: This 15th day of August, 2016.

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UNITED STATES DISTRICT JUDGE

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27 <sup>3</sup>Particularly, *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 504  
28 (2d Cir. 2014) and *Storey Const. Inc. v. Hanks*, 224 P.3d 468, 477 (Idaho  
2009), both cited by plaintiff, are inapposite.