IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

PHILIP R. KLEIN,	§	
	§	
Plaintiff,	§	NO. 1:14-CV-00509-RC-ZJH
	§	
v.	§	
	§	
LAYNE WALKER,	§	
	§	
Defendant.	§	
	§	

REPORT AND RECOMMENDATION GRANTING DEFENDANT LAYNE WALKER'S MOTION FOR SUMMARY JUDGMENT BASED ON RES JUDICATA

This case is assigned to the Honorable Ron Clark, Chief United States District Judge, and assigned to the undersigned United States Magistrate Judge for pretrial management. Pending before the court is Defendant Layne Walker's "Motion for Summary Judgment Based on Res Judicata." Doc. No. 45. For the following reasons, the undersigned recommends that the motion be granted. Based upon a review of the state court action brought by Klein against Walker, the undersigned concludes that the state court's decision regarding Klein's 42 U.S.C. § 1983 claim constitutes a final judgment, and moreover, Klein treated the state court's decision as a final judgment. As such, Walker's motion for summary judgment predicated upon res judicata should be granted and Klein's remaining claims should be dismissed.

I. FACTUAL BACKGROUND

A. Parties

Plaintiff Philip Klein is a blogger and private investigator who has been involved in various civil actions with Walker in both state and federal court since 2013. Klein, in his capacity as a private blogger who reports on the events in the Jefferson County legal community,

among other matters, has posted articles accusing Walker and Walker's family of various instances of misconduct and abuse of official power. Walker allegedly retaliated against Klein for these articles, which forms the basis of both legal actions. At all times relevant to Klein's claims, Walker was a sitting judge in Texas's 252nd District Court of Jefferson County, a position from which he has subsequently resigned.

B. State Court Case

The circumstances surrounding Klein's initial state court action against Klein have largely been recited by the undersigned in prior reports. *See* Doc. Nos. 11, 35. They will be briefly recited again here. On November 27, 2013, Klein filed a lawsuit against Walker in the 136th District Court of Texas, alleging that Walker, in his official capacity, "pursued a course of retaliation" against Klein for disparaging Walker on his blog. Doc. No. 6, ex. 1. Klein sought relief in the form of a declarative judgment that his constitutional rights had been infringed, as well as an injunction blocking any criminal investigation against him. *Id*. Walker responded by filing a motion to dismiss, arguing that any alleged actions he took were in his judicial capacity, and are thus barred by both judicial and sovereign immunity. Doc. No. 6, ex. 2.

Shortly thereafter, Walker voluntarily retired from the bench. As a consequence, he filed a subsequent "Plea to the Jurisdiction and Motion for Summary Judgment Subject to a Plea to the Jurisdiction for Absolute and Qualified Immunity," restating his previous defenses, but further arguing that Klein's claims for declaratory and injunctive relief were moot because Walker was no longer a sitting judge. Doc. No. 6, ex. 4. On September 12, 2014, Klein amended his petition to non-suit his claims for declaratory and injunctive relief, instead pursuing only one claim: a free speech retaliation claim pursuant to 42 U.S.C. § 1983 against Walker for monetary damages. Doc. No. 6, ex. 5.

On September 23, 2014, the state court issued an order granting both Walker's motion to dismiss, as well his motion for summary judgment, thus dismissing Klein's case. Doc. No. 6, ex. 7. At the time the state court issued its order granting Walker's motions to dismiss, Walker had not filed any amended or additional motion to dismiss Klein's most recent § 1983 petition. The court's docket sheet notes a "Disposition Date" of September 23, 2014, and Klein did not appeal any of the state court's rulings. *Id*. A review of the state court record shows that the state court's September 23, 2014 order is, as of the date of this report, the final activity in Klein's state court action. *See* Doc. No. 45, ex. 2.

II. PROCEDURAL BACKGROUND

On October 9, 2014, roughly two weeks after the state court granted Walker's motions, Klein filed this case in the Eastern District of Texas. Doc. No. 1. Klein's "Original Complaint" asserted the same § 1983 free speech retaliation claim that he raised in state court. Again, Klein alleged that Walker retaliated against him for publishing disparaging articles about Walker on his blog.

On March 10, 2015, Walker filed a motion to dismiss, arguing that (1) Klein's claims are barred by res judicata; (2) Klein's case concerns actions taken in Walker's judicial capacity, and he is entitled to judicial immunity; and (3) Klein failed to plead an actionable § 1983 claim. Doc. No. 6. The undersigned filed a report and recommendation granting the motion because Klein failed to plead an actionable claim under § 1983, but recommended that Klein be permitted to amend his complaint to cure the deficiencies. Doc. No. 11. The court adopted the report and recommendation to the extent that Klein be permitted to amend his complaint. Doc. No. 13.

Consequently, Klein filed his First Amended Complaint on August 18, 2015. Doc. No. 16. Walker responded with an amended motion to dismiss, arguing that Klein failed to state a

claim on which relief could be granted, and in the alternative, that Klein's claims were barred by res judicata. Doc. No. 21. On June 10, 2016, the undersigned filed a report and recommendation granting Walker's motion in part and denying it in part, recommending that Klein be given one final opportunity to amend his complaint, while cautioning that no new claims should be raised in Klein's Second Amended Complaint. Doc. No. 35. In the same report, the undersigned recommended denying Walker's motion to dismiss on the basis of res judicata, concluding that the defense would be more proper in a motion for summary judgment. *Id*. The court adopted the report and recommendation on July 25, 2016. Doc. No. 51.

Although the report specified that Klein was to file his Second Amended Complaint within seven (7) days of the undersigned's report, the undersigned ultimately granted four separate requests for extensions of time before Klein ultimately filed his Second Amended Complaint on June 27, 2016. *See* Doc. No. 42. After Klein filed his Second Amended Complaint, Walker filed three separate responses: a Motion for Summary Judgment on the Merits (Doc. No. 46), a Motion to Strike and Dismiss Klein's Second Amended Complaint (Doc. No. 47), and a Motion for Summary Judgment Based on Res Judicata (Doc. No. 45).

III. LEGAL STANDARD

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any,

which it believes demonstrate the absence of a genuine issue of material fact." *Gellhaus v. Wal-Mart Stores, Inc.*, 769 F. Supp. 2d 1071, 1074 (E.D. Tex. 2011) (Crone, J.). This burden is not met by "merely mak[ing] a conclusory statement that the other party has no evidence to prove its case." *Inn Foods, Inc. v. Mida*, No. 6:06-cv-169, 2008 WL 2078965, at *2 (E.D. Tex. May 15, 2008) (Schneider, J.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986)); *see also Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 299 (5th Cir. 1999) (noting that if the moving party does not carry the burden at trial, to be entitled to summary judgment it "either must affirmatively offer evidence that undermines one or more of the essential elements of the plaintiffs' case, or must demonstrate that the evidence in the summary judgment record falls short of establishing an essential element of the plaintiffs' case").

"If the moving party fails to meet this initial burden, the motion must be denied regardless of the nonmovant's response." *PEC Minerals LP v. Chevron USA Inc.*, 737 F. Supp. 2d 643, 645 (E.D. Tex. 2010) (Schneider, J.), *aff'd sub nom. PEC Minerals LP v. Chevron U.S.A., Inc.*, 439 F. App'x 413 (5th Cir. 2011) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). "If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little*, 37 F.3d at 1069. The nonmovant's "burden is not satisfied with some 'metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* at 1075 (internal citations omitted). In the event of a dispute regarding the underlying facts supporting the motion, such "controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that an actual controversy exists." *Espinoza v. Cargill Meat Solutions Corp.*, 622 F.3d 432, 437-38 (5th Cir. 2010).

IV. ANALYSIS

In the previous report and recommendation to the court, the undersigned recommended that Klein's 42 U.S.C. § 1983 free speech retaliation claim be dismissed for failure to state a claim, while also permitting Klein one final opportunity to amend his complaint. At the same time, however, the undersigned also recommended that Walker resubmit his motion to dismiss based on res judicata as a motion for summary judgment based on the same defense, so that the undersigned would be permitted to look outside of the pleadings and examine the state court record to determine whether the parties treated the state court decision as final. Doc. No. 35, at 21. Thus, the primary matter before the undersigned is whether Klein's § 1983 claim is barred by res judicata.

"'Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action.'" *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).[1] Here, Walker argues that the state court's decision in his prior litigation with Klein bars Klein from raising his § 1983 claims in federal court. When a federal court considers the preclusive effect of a prior judgment in state court, the federal court applies the preclusion law of the state that rendered the judgment. *See Cox v. Nueces Cty., Texas*, 16-40141, 2016 WL 5888385, at *3 (5th Cir. Oct. 10, 2016); *see also Webb v. Town of St. Joseph*, 560 F. App'x 362, 365 (5th Cir. 2014). Because Klein brought his original lawsuit against Walker in

1. "The rule of res judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005). The present matter only concerns claim preclusion.

the 136th District Court of Jefferson County, Texas, the undersigned must apply Texas' doctrine of res judicata.[2]

Under Texas law, to establish res judicata, the claimant must show: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action." *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). As the state court litigation involved identical litigants to those proceeding in the present matter before the undersigned, only elements (1) and (3) must be examined.

A. The State Court Judgment is a Final Judgment on the Merits of Klein's § 1983 Claim

The element of res judicata that Klein primarily contests is whether a prior final judgment on the merits of his § 1983 claim has been entered by a court of competent jurisdiction. Specifically, Klein raises two arguments: first, the state court's dismissal of Klein's petition did not dispose of his § 1983 claim against Walker, and second, even if the state court's decision purports to dispose of his § 1983 claim, res judicata does not apply because the state court was not a court of competent jurisdiction to rule on the merits of his claim. Doc. No. 54, at 5-7.

Under Texas law, an order or judgment on the merits entered by the court before trial is final only if it "actually disposes of every pending claim and party or . . . it clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001); *see also Norris v. Hearst Tr.*, 500 F.3d 454, 462 (5th Cir. 2007) (applying *Lehmann* to determine whether a judgment was final for purposes of res judicata). Finality "must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of

2. Klein incorrectly states that the federal test for res judicata applies in the present matter. Doc. No. 54, at 1-2. *See Cox*, 2016 WL 5888385, at *3.

the parties." *Lehmann*, 39 S.W.3d at 203 (internal quotations omitted). As the Texas Supreme Court explained in *Lehmann*:

> [I]f the record reveals the existence of parties or claims not mentioned in the order, the order is not final. On the other hand, an order that expressly disposes of the entire case is not interlocutory merely because the record fails to show an adequate motion or other legal basis for the disposition. The record may help illumine whether an order is made final by its own language, so that an order that all parties appear to have treated as final may be final despite some vagueness in the order itself, while an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise.

Id. at 206. Thus, the appropriate starting point in analyzing whether Walker satisfies the finality element of res judicata is to examine the state court record after the court entered its order dismissing Klein's suit.

i. Both Klein and Walker Treated the State Court's Order Granting Walker's Motion to Dismiss as a Final Judgment

In the undersigned's previous report, both parties were encouraged to present the full and complete trial court record from Klein's initial state court action. *See* Doc. No. 35, at 20-21; *see also Lehmann*, 39 S.W.3d at 205-06 ("To determine whether an order disposes of all pending claims and parties, it may of course be necessary . . . to look to the record in the case"). Specifically, the undersigned indicated that "if Klein actually believed . . . that his § 1983 claim survived the state court's order, there must be some evidence that he continued to pursue that claim in state court. Otherwise, he clearly treated the court's order as final." Doc. No. 35, at 21; *see also Lehmann*, 39 S.W.3d at 203 (the finality of a judgment "must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties").

Contained in his motion for summary judgment, Walker includes a certified copy of the trial court record in the state court case brought by Klein. Doc. No. 45, ex. 2. While there is no "final judgment" in the record, the state court's order dismissing Klein's claim on September 23,

2014 is the final case activity. There is no notice of appeal; there is no motion for reconsideration. After a review of the full and complete state court record, it appears that Klein merely filed a carbon copy of his state court suit in this court a few weeks after the state court's dismissal order. *See* Original Complaint, Doc. No. 1; *cf.* Second Am. Pet., Doc. No. 6, ex. 5.

Klein attempts to circumvent controlling law and his own conduct by arguing that because the state court decision did not "dispose of all pleadings . . . [as it] did not indicate finality." Doc. No. 54, at 8. Specifically, Klein argues that because he amended his state court petition to only contain his § 1983 claim *after* Walker filed his motions for summary judgment, the state court could not possibly have disposed of Klein's § 1983 claim by granting Walker's motion for summary judgment. *Id*. at 7. Moreover, Klein contends that the state court order dismissing his claim did not "state with unmistakable clarity that it was a final judgment, dismissal with prejudice, and that [Klein] take nothing." *Id*. at 8.

First, even if Klein is correct that the state court's order only resolved issues related to Walker's immunity from Klein's declaratory and injunctive relief claims under the Texas Constitution, and not his § 1983 claim, "res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that *could have been* litigated in the prior action." *Amstadt*, 919 S.W.2d at 652 (emphasis added).

The case of *Flores v. Edinburg Consolidated Independent School District* is instructive. 741 F.2d 773 (5th Cir. 1984). There, the administratrix of the estate of a deceased student, Flores, brought suit in state court against the school district and woodshop teacher of the school Flores attended, alleging negligence that resulted in a severe hand injury. *Id*. at 775. The defendants were granted summary judgment on the basis of sovereign immunity, and Flores chose not to appeal the state court's ruling. *Id*. A year later, Flores brought suit against the same

parties in federal court, this time alleging a § 1983 claim arising from the same hand injury. Although the teacher was again granted summary judgment, on the basis of qualified governmental immunity, Flores secured a judgment against the school district. *Id*.

On appeal, the Fifth Circuit reversed the district court's judgment against the school district, holding that Flores' § 1983 claim was precluded by the earlier state court dismissal, even though the plaintiff had only raised state law torts in the prior case. *Id*. at 779. As the *Flores* Court explained:

> [I]f the pleading of a different legal theory would have induced the court to decide a particular issue in the first action, the issue is plainly one which, with the use of diligence, might have been tried in the former action. Diligence is, in brief, a key determinant of the applicability of the res judicata bar to any particular case.

Id. at 776. The court emphasized that the "plaintiffs, by acting diligently, could have brought all of their claims in the original suit in the Texas courts. Consequently, a successive suit grounded in the same operative facts cannot now be maintained." *Id*.; *see also Berkman v. City of Keene*, 3:10-CV-2378-B, 2011 WL 3268214, at *3 (N.D. Tex. July 29, 2011) ("Despite being fully aware of the City's immunity argument, and having several opportunities to amend his pleadings, Berkman failed to act diligently and raise the takings issue [which might have overcome immunity]. Thus, the claim is barred by res judicata, and the Court finds summary judgment in favor of the City is appropriate").

The parallels of *Flores* to the present action are striking. In both instances, the same underlying facts gave rise to a state court, then a federal court action. In *Flores*, a teacher's alleged negligence resulted in a student's hand injury, prompting a state court negligence claim, and then a federal court § 1983 claim. Here, Klein's blogging about Walker's judicial activity allegedly provoked Walker's retaliatory behavior, prompting a state court action initially requesting injunctive and declaratory relief, followed by an amended state court action alleging §

1983 violations, and finally resulting in a federal court § 1983 action. The case for a dismissal based upon res judicata is even stronger here than in *Flores* because Klein actually pursued his § 1983 claim in state court whereas in *Flores*, the plaintiff asserted his § 1983 claim for the first time in federal court.

Second, even if Klein is correct that the state court did not explicitly dismiss Klein's § 1983 claim in its order,[3] where a party *treats* an order as final *by its conduct*, a court may infer that the party considered the order as a final judgment. *See Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 277 ("Finality 'must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties'") (internal citations omitted). For example, in *M.O. Dental Lab v. Rape*, the Texas Supreme Court held that an order granting summary judgment was final despite the fact that it did not dispose of claims pending against one of the named defendants. 139 S.W.3d 671, 673-75 (Tex. 2004). After inspecting the district court record, the Texas Supreme Court noted that the plaintiff had never served that same defendant and apparently did not intend to serve that defendant. *Id*. at 674-75. Thus, while the order did not, by its terms, dispose of claims against that defendant, the order was nevertheless final, noting that "an order . . . that all parties appear to have treated as final may be final despite some vagueness in the order itself." *Id*. (quoting *Lehmann*, 39 S.W.3d at 206).

3. The primary authorities upon which Klein relies to indicate when a court's order granting summary judgment is not final, *Guajardo v. Conwell* and *Lehmann v. Har-Con Corp*., both involve instances where the court used a "Mother Hubbard" clause when granting a motion for summary judgment. *See Guajardo v. Conwell*, 46 S.W.3d 862, 863-64 (Tex. 2001); *see also Lehmann*, 39 S.W.3d at 203-04 (a "Mother Hubbard" clause in a court's order contains language indicating that "all relief not expressly granted is denied," or essentially those words). Because of the catch-all nature of a Mother Hubbard clause, both the *Guajardo* and *Lehmann* Courts needed to closely analyze the trial court's order granting summary judgment in order to determine whether the order was actually intended to be final. No such clause is present in the state court's order granting Walker's motion for summary judgment. *See* Doc. No. 6, ex. 6. Furthermore, neither the *Guajardo* nor *Lehmann* Courts required a Mother Hubbard clause for an order granting a motion for summary judgment to constitute a final judgment. *See Lehmann*, 39 S.W.3d at 200 ("a judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language").

Third, the state court's dismissal order technically dismissed Klein's only pending claim: his § 1983 claim. Although the state court's order does not specify the grounds on which it granted Walker's two motions, the court's order dismissing Klein's action granted both Walker's "Plea to the Jurisdiction and Motion for Summary Judgment Subject to a Plea to the Jurisdiction for Absolute and Qualified Immunity," as well as his "Motion to Dismiss for Lack of Subject Matter Jurisdiction," the latter of which sought dismissal based on judicial and sovereign immunity.[4] At the time the state court issued its order granting Walker's motions, the only live claim pending before the court was Klein's § 1983 claim, as Klein had non-suited all other outstanding claims in his Second Amended Petition. Second Am. Pet., at ¶ C. Under Texas law, the effect of a non-suit is to terminate claims from the moment the non-suit is filed, but it does not affect any other pending claim for affirmative relief. *See Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011); *Klein v. Hernandez*, 315 S.W.3d 1, 4 (Tex. 2010); *see also Santerre v. Agip Petroleum Co., Inc.*, 45 F. Supp. 2d 558, 571 (S.D. Tex. 1999) ("the plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief") (citing TEX. R. CIV. P. 162).

Thus, because Klein's § 1983 claim was the only claim pending at the time the state court granted Walker's motion to dismiss and motion for summary judgment based on judicial and sovereign immunity, that judgment was final and on the merits. If Klein believed that Walker needed to file an amended motion to dismiss that more precisely addressed the merits of Klein's § 1983 claim, the appropriate forum to raise such an objection was in state court. He did not, and

4. Walker's "Defendant's Plea to the Jurisdiction and Motion for Summary Judgment Subject to a Plea to the Jurisdiction for Absolute and Qualified Immunity," which the court also granted, raised the additional argument that Klein's claims for declaratory and injunctive relief were moot because Walker had recently resigned from the bench. (Doc. No. 6, ex. 4.) A dismissal based on mootness is not a ruling on the merits. *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999). However, because the court granted Walker's first "Motion to Dismiss for Lack of Subject Matter Jurisdiction," which did not raise the mootness argument, the court must have also accepted Walker's immunity defenses.

he cannot now change his position simply because it benefits him to do so. *See In re Denar Restaurants, LLC,* 09-044427RFN11, 2010 WL 2403039, at *10 (N.D. Tex. June 11, 2010) ("Even if there were some vagueness as to the intent of the judicial acts of Judge Evans, the vagueness would be overcome by the fact that all parties treated the judgment as final and appealable").

ii. The State Court's Order was on the Merits of Klein's § 1983 Claim

In the alternative, Klein asserts that the state court's order is not a prior final judgment on the merits of his § 1983 claim because "[d]ismissal based on lack of jurisdiction can never be on the merits (beyond the precise jurisdictional question decided, over which a court always has jurisdiction)." Doc. No. 54, at 9. Stated another way, Klein argues that because the state court granted Walker's "Plea to the Jurisdiction and Motion for Summary Judgment Subject to a Plea to the Jurisdiction for Absolute and Qualified Immunity" and his "Motion to Dismiss for Lack of Subject Matter Jurisdiction," then the state court must not have been a court of "competent jurisdiction" for purposes of res judicata.

This reflects a misunderstanding of the function of a plea to the jurisdiction under Texas law. In Texas, a plea to the jurisdiction is a procedural device in which a defendant may assert immunity from suit. *See Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004) ("sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction"). Under both Texas and federal law, however, an order on a motion for summary judgment on the basis of immunity is a ruling on the merits. *See Donley v. Hudsons Salvage, L.L.C.*, 517 F. App'x. 216, 219 (5th Cir. 2013) (res judicata barred arrestee from bringing § 1983 claim against a town mayor where arrestee's prior § 1983 claim against magistrate judge stemming from the same incident was barred due to

judicial immunity); *Flores*, 741 F.2d at 775 (under Texas law, "a summary judgment on grounds of sovereign immunity is a judgment on the merits for purposes of res judicata"); *Caro v. City of Dallas*. 3:15-CV-1210-L, 2016 WL 397084 (N.D. Tex. Feb. 1, 2016), at *7 (dismissing Title VII claim brought by plaintiff as barred by res judicata, where plaintiff's initial suit was dismissed in state court pursuant to defendant-city's plea to the jurisdiction); *see also Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004) (prior dismissal on a plea to the jurisdiction constituted final judgment on the merits for res judicata purposes).

A nearly identical argument to Klein's was recently raised—and rejected—in *Caro v. City of Dallas*. There, a former city employee alleged gender discrimination and retaliation claims against her former employer, the city of Dallas. 2016 WL 397084 at *2. The City responded by filing a plea to the jurisdiction, arguing that the former employee's claims "did not fall within the limited waiver of the City's governmental immunity from suit . . . and, thus, the court lacked subject matter jurisdiction to entertain the lawsuit." *Id*. Much like Klein, while the City's plea to the jurisdiction was pending, the former employee amended her complaint to allege a Title VII gender-related retaliation claim, as well as claims under the ADA. *Id*. After filing her amended complaint, but before the City filed any additional response to the supplemental Title VII claim, the state court granted the plea to the jurisdiction and dismissed all of the former employee's pending claims. *Id*.

The former employee did not appeal the ruling in state court, instead filing a separate action in federal court, again alleging violations of Title VII and the ADA. *Id*. In finding that her claims were barred by res judicata, the *Caro* Court first observed that the claims in federal court were nearly identical to those raised in her state court action, and arose from the same nucleus of operative facts. *Id*. at *5, 9. Next, the *Caro* Court analyzed the function of the state

court's grant of the City's plea to the jurisdiction, which in this case, served to prove that "Plaintiff could not state a prima facie claim of gender discrimination or retaliation," such that she could overcome the City's claim of governmental immunity. *Id*. at *7-8. Much like Klein in his response to Walker's motion for summary judgment, the *Caro* Plaintiff argued that the state court could not have been one of competent jurisdiction because in granting the City's plea to the jurisdiction, the state court found that it lacked subject matter jurisdiction. *Id*. at *8. The court rejected this argument, finding that the argument emphasized "form over substance" in the state court's order, and further reasoning that:

> As [Plaintiff] filed her claims in state court, this court simply cannot understand why she now contends that the state court was not one of competent jurisdiction. No one can seriously assert that the state district court was not a court of competent jurisdiction. A court has the inherent authority to determine whether it has jurisdiction to entertain an action. The state court necessarily had to determine whether [Plaintiff] had set forth sufficient allegations or evidence to establish a prima facie case regarding her claim of discrimination and retaliation.

Id. at *7-8 (internal citations omitted). Thus, because the former employee's ADA and Title VII claims were pending when the state court granted the City's plea to the jurisdiction on the basis of governmental immunity, her federal court claims arose from the same nucleus of operative facts as her state law claims, and the state court was a court of competent jurisdiction that ruled on the merits of her claims, her federal court action was barred by res judicata. Klein's circumstances are indistinguishable from the Plaintiff in *Caro*, and accordingly, his claims should be adjudicated in the same manner.

In conclusion, the state court's granting of Walker's motion for summary judgment and plea to the jurisdiction on the basis of judicial immunity constitutes a ruling on the merits of Klein's § 1983 claim. As established above, Klein did not appeal the state court's ruling that his action was barred on the grounds of judicial immunity. The state court's September 23, 2014 order reflects the last case activity in Klein's state court action. Klein cannot merely attempt to

relitigate the same claims he initially brought in state court again in a different forum. As such, Walker satisfies the first element of res judicata, as he has established that a court of competent jurisdiction issued a final judgment on the merits of his § 1983 claim.

B. Klein's § 1983 Claim Rises from the Same Nucleus of Operative Facts as Those that Gave Rise to His State Court Lawsuit

The third and final element in determining whether a claim is precluded from being relitigated is whether a litigant's second legal action is based upon the same claims or arises from the same operative facts as those alleged in the first legal action. The Texas Supreme Court applies a "transactional" approach to res judicata, which "prevents the relitigation of a finally-adjudicated claim and related matters that should have been litigated in a prior suit." *State & Cty. Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001) (citing *Barr*, 837 S.W.2d at 628). Under the transactional approach, a judgment in an earlier suit "precludes a second action by the parties . . . not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." *Barr*, 837 S.W.2d at 630 (internal quotations omitted).

A "transaction" is to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit and whether their treatment as a trial unit conforms to the parties' expectations. The critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*." *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 396 (5th Cir. 2004) (emphasis in original); *see also Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 798-99 (Tex. 1992).

Klein's two actions are based on the same nucleus of operative facts. Both his state and federal court lawsuits involve Walker's alleged retaliation against Klein for his exercise of his

First Amendment rights. For instance, Klein's Second Amended Petition in state court and his Second Amended Complaint in this court largely involve the same factual allegations:

- Klein published criticisms of Walker on his blog, and in response, Walker retaliated against Klein. Second Am. Pet., at ¶¶ E-G, U; Second Am. Compl., Doc. No. 42, at ¶ 5.
- Klein published allegations of Walker's misuse of the Indigent Defense Fund, and in return, Walker initiated a criminal investigation of Klein. Second Am. Pet., at ¶¶ I-L, S-T; Second Am. Compl., at ¶¶ 65-68, 105.
- Walker ordered Klein's employees to vacate his courtroom during a custody dispute before Walker. When Klein's employees did not comply, Walker targeted Klein for retribution. Second Am. Pet., at ¶ H; Second Am. Compl., at ¶ 78.
- Klein alleged that Walker misused funds from the Jefferson County Indigent Defense Fund, further motivating Walker to retaliate against Klein. Second Am. Pet., at ¶¶ I-J; Second Am. Compl., at ¶ 122.
- Klein's agent attempted to serve Walker with a lawsuit while Walker was conducting court business from the bench. In retaliation, Walker initiated a criminal investigation of Klein's agent, as well as Klein himself. Second Am. Pet., at ¶¶ O-R; Second Am. Compl., at ¶¶ 100-02.

Indeed, Klein does not dispute that his state court and federal court actions arise from the same nucleus of operative facts, instead claiming that "[d]iscussion of similar facts does not mean the plaintiff litigated the claims in a previous suit." Doc. No. 54, at 2.

It is not necessary for purposes of res judicata that both cases involve the exact same sequence of events, even though that appears to be the case here. Rather, the question is whether the claims asserted in this case *could have been brought* in the state court case. *See Amstadt*, 919 S.W.2d at 652. Failure to diligently litigate all potential claims does not undermine a judgment's preclusive effect, and under the transactional approach to res judicata, "a subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence[] could have been raised in a prior suit." *Barr*, 837 S.W.2d at 631. Indeed, under Texas claim preclusion law, even claims that were not actually raised in the initial state court action are still barred from being raised in a subsequent suit if they could have been raised in the

initial action. *See Cox*, 2016 WL 5888385, at *4 (where two civil service employees could have raised First Amendment claims in their state court action alleging retaliatory employment actions, but failed to do so, those two employees were barred on res judicata grounds from raising their First Amendment claims in a subsequent federal court suit).

Here, the circumstances are even more pronounced than those just recently decided by the Fifth Circuit. Unlike the plaintiffs in *Cox v. Nueces County, Texas*, Klein raised his Constitutional claims in state court, and the state court rendered a final judgment on those claims. Indeed, the same nucleus of operative facts remains the same as in Klein's state court action, and therefore, a final judgment on the merits in his earlier case would have preclusive effect in this case against the same defendant. *See Flores*, 741 F.2d at 779 (holding that res judicata barred the plaintiff's § 1983 claims that were based on the same "operative facts" as the plaintiff's prior case in Texas court, even though the only claim asserted in the prior case was the tort of negligence).

Thus, because the state court was a court of competent jurisdiction that issued a final judgment on the merits of Klein's original claim, and his present complaint arises from the same nucleus of operative facts as that which gave rise to his original state court action as the same party in the present complaint, Klein's § 1983 claim is barred by res judicata.

In the final portion of his response, Klein asserts that even if res judicata does apply, "the Texas tolling statute allows refiling in a court of proper jurisdiction within 60 days, which Klein did. Federal courts apply [s]tate tolling rules." Doc. No. 54, at 11. As this is the entirety of Klein's argument with respect to a "tolling rule," the undersigned is left to guess as to the statute to which Klein refers. It appears to be section 16.064 of the Texas Civil Practice and Remedies Code, which provides that the period between filing an action and the date of filing the same

action a second time "suspends the running of the applicable statute of limitations for the period if: (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed . . . and (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE ANN. § 16.064. Even granting Klein the significant benefit of the doubt in assuming that the argument he intended to make is that because he filed his § 1983 claim in federal court within sixty days of the state court's dismissal of the same claim, then the Texas Civil Practice and Remedies Code permits him to move forward with said claim, this has absolutely nothing to do with whether his claim is barred by res judicata. Filing within the prescribed time allotted by the applicable statute of limitations does not save a claim from being precluded by a prior court's dismissal of the same matter.

V. RECOMMENDATION

It is recommended that Walker's "Motion for Summary Judgment Based on Res Judicata" should be granted. Klein's 42 U.S.C. § 1983 claim should be denied as being precluded by the state court's previous judgment.

VI. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) (Supp. IV 2011), each party to this action has the right to file objections to this report and recommendation. Objections to this report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen days after being served with a copy of this report; and (4) be no more than eight pages in length. *See* 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(2); LOCAL RULE CV-72(c). A party who objects to this report is entitled to a de novo determination by the United States District Judge of those proposed findings and recommendations to which a

specific objection is timely made. *See* 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this report, within fourteen days of being served with a copy of this report, bars that party from: (1) entitlement to de novo review by the United States District Judge of the findings of fact and conclusions of law, *see Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED this 17th day of October, 2016.

Zack Hawthorn
United States Magistrate Judge