UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LYLE F. TRAXLER,

Plaintiff, Case No. 22-CV-760

v.

MARY MOORE, et al.,

Defendants.

DEFENDANT ERIC NELSON, M.D.'s BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE MERITS

FACTUAL BACKGROUND

PARTIES

Plaintiff Lyle Traxler, at all times in 2021, was a convicted prisoner in the custody of the Wisconsin Department of Corrections and the Wisconsin Prison System. (*NPFOF*, ¶ 4). At all times material to this lawsuit, Dr. Nelson was a physician licensed to practice medicine in the state of Wisconsin and was board-certified as an orthopedic surgeon by the American Board of Orthopedic Surgery. (*NPFOF*, ¶ 5-6). Dr. Nelson was employed by the Fond du Lac Regional Clinic at all times material when he saw and treated plaintiff Lyle Traxler for his non-healing tibia wound between October and December of 2021. (*NPFOF*, ¶ 7).

DR. NELSON'S INITIAL ENCOUNTER WITH LYLE TRAXLER

Dr. Nelson's initial contact with Lyle Traxler with reference to any complaint relating to his right leg occurred on October 11, 2021, when Dr. Nelson was asked by his colleague with the Fond du Lac Regional Clinic, Dr. Karen Reynolds, to provide an informal "curbside consult" for Mr. Traxler relative to a non-healing wound located on Traxler's right tibia. (*NPFOF*, ¶ 8).

DR. KAREN REYNOLDS OCTOBER 11, 2021 OFFICE VISIT WITH LYLE TRAXLER

On October 11, 2021, Lyle Traxler was seen for a wound care appointment at the Fond du Lac Regional Clinic by surgeon Karen Reynolds, MD. (*NPFOF*, ¶ 9). On that date, Lyle Traxler was a 61-year-old male who presented with a 10-month history of a non-healing wound, previously noted to be infected with MRSA, to the right pretibial area. (*NPFOF*, ¶ 10).

Prior to October 11, 2021, Lyle Traxler had undergone a bone biopsy which revealed the presence of osteomyelitis. (*NPFOF*, ¶ 11). On October 11, 2021, Dr. Reynolds discussed with Mr. Traxler the implications of chronic osteomyelitis. (*NPFOF*, ¶ 12). Dr. Reynolds explained to Mr. Traxler on October 11, 2021 that he was likely to be unable to heal his right tibial wound, even with prolonged administration of antibiotics. (*NPFOF*, ¶ 13). Dr. Reynolds counseled Mr. Traxler on October 11, 2021 that he could either choose to live with the chronic wound for the rest of his life, with the knowledge that the wound would likely never heal, or alternatively, he could choose to consider a below-the-knee amputation in order to resolve the infection and to prevent its spread. (*NPFOF*, ¶ 14).

OSTEOMYELITIS

Osteomyelitis is an infection located within a bone. (*NPFOF*, ¶ 15). Infections manifesting as osteomyelitis typically reach the bone by traveling either through the bloodstream or by spreading from nearby infected tissue, such as that surrounding the non-healing wound located on Mr. Traxler's right tibia on October 11, 2021. (*NPFOF*, ¶ 16). The most common treatment for osteomyelitis is surgery to remove portions of the bone that are infected or dead. (*NPFOF*, ¶ 17).

Once bone tissue has died due to infection, the dead bone tissue cannot be regenerated or replaced. (*NPFOF*, ¶ 18). One recognized treatment for osteomyelitis is amputation of the infected limb. (*NPFOF*, ¶ 19). When the bone tissue of a limb is significantly infected, amputation

is a recognized treatment, both for the purpose of removing dead bone and tissue, and further in order to prevent the infection from spreading, and thereby causing additional tissue death or damage to previously healthy adjoining tissue. (*NPFOF*, ¶ 20).

A patient, like Mr. Traxler, who exhibits an infected non-healing wound, in the presence of osteomyelitis, is unlikely to be able to heal the wound, even in the presence of prolonged administration of antibiotics. (*NPFOF*, ¶ 21). A patient exhibiting an infected non-healing wound with underlying osteomyelitis, like Mr. Traxler on October 11, 2021, has a choice between simply living with the constant presence of the wound which is unlikely to heal, or alternatively, to pursue amputation of the infected limb as a cure for the infection, and to prevent the spread of infection. (*NPFOF*, ¶ 22). If the patient elects to live with the infected and non-healing wound, there will necessarily exist an ongoing risk that the infection in the wound or in the bone may subsequently spread to adjoining uninfected tissue, thereby causing additional tissue or bone death. (*NPFOF*, ¶ 23).

DR. ERIC NELSON'S "CURBSIDE CONSULT" WITH PLAINTIFF TRAXLER AT THE REQUEST OF DR. REYNOLDS ON OCTOBER 11, 2021

With plaintiff Traxler in the office to see surgeon Karen Reynolds on October 11, 2021, Dr. Nelson was asked by his colleague, Dr. Reynolds, to view Mr. Traxler's wound on that date, and to provide an informal opinion to Mr. Traxler as a board-certified orthopedic surgeon, based upon Mr. Traxler's clinical presentation as of October 11, 2021. (*NPFOF*, ¶ 24). On October 11, 2021, at Dr. Reynolds' request, Dr. Nelson personally observed a non-healing wound located upon Mr. Traxler's right tibia. (*NPFOF*, ¶ 25). Also on that date, Dr. Nelson learned from Dr. Reynolds that Mr. Traxler had recently undergone a bone biopsy that had disclosed that Mr. Traxler suffered from osteomyelitis in the right tibia. (*NPFOF*, ¶ 26).

On October 11, 2021, the choice between opting to live with a chronic non-healing wound or, alternatively, electing to pursue a below-the-knee amputation in order to address the infection and prevent it from spreading, was presented to Lyle Traxler by Dr. Reynolds. (*NPFOF*, ¶ 27). Based upon Dr. Nelson's personal observation of the wound when requested by Dr. Reynolds to look at the wound on October 11, 2021, combined with the information that Dr. Nelson was given relating to Mr. Traxler's clinical picture on that date, including but not limited to the presence of chronic osteomyelitis in the right tibial region, Dr. Nelson agreed, in the exercise of his professional medical discretion, with the options that Dr. Reynolds had communicated to Mr. Traxler on October 11, 2021, and he so stated to Mr. Traxler. (*NPFOF*, ¶ 28).

On October 11, 2021, based upon the clinical picture that Dr. Nelson observed on that date, he recommended a below-the-knee amputation to Mr. Traxler in order to resolve the infection in the non-healing wound and the consequent infection in the bone, and to prevent further spread of the infection. (*NPFOF*, ¶ 29). Dr. Reynolds and Dr. Nelson advised Mr. Traxler to consider his options in light of the clinical picture that existed on October 11, 2021. (*NPFOF*, ¶ 29).

DR. NELSON'S SUBSEQUENT APPOINTMENT WITH LYLE TRAXLER ON OCTOBER 18, 2021

After Dr. Nelson's "curbside consult" with Mr. Traxler at the request of Dr. Reynolds on October 11, 2021, Dr. Nelson did not have any further contact with Mr. Traxler until October 18, 2021. (*NPFOF*, ¶ 30). On October 18, 2021, due to the unavailability of Dr. Reynolds, Dr. Nelson evaluated Mr. Traxler. (*NPFOF*, ¶ 31).

Dr. Nelson's "impression" of Mr. Traxler's clinical picture as of October 18, 2021 was that Mr. Traxler suffered from a "chronic non-healing wound involving the proximal medial pretibial area on the right with osteomyelitis of the right tibia." (*NPFOF*, ¶ 32). On October 18, 2021, Dr. Nelson was aware that Mr. Traxler was known to have a chronic non-healing wound on the

proximal medial pretibial area of his right leg; that the wound was known to involve MRSA; and that the patient had recently received a "bone biopsy" which had confirmed the presence of osteomyelitis in the right tibia. (*NPFOF*, ¶ 33).

During Dr. Nelson's October 18, 2021 consult with Mr. Traxler, Mr. Traxler communicated to Dr. Nelson his decision to proceed with a below-the-knee amputation of the right leg in order to address the infection in the non-healing wound on that limb. (*NPFOF*, ¶ 34). Dr. Nelson discussed the indications, alternatives, risks, benefits, anticipated outcome, and anticipated recovery time pertaining to a right below-the-knee amputation with Mr. Traxler during the consult on October 18, 2021, and Traxler communicated his understanding of these risks and benefits, and confirmed his desire to proceed with a below-the-knee amputation. (*NPFOF*, ¶ 35).

Mr. Traxler subsequently consented in writing to the proposed below-the-knee amputation. (*NPFOF* ¶ 36). Because the consented-to operation required institutional approval before it could proceed, Mr. Traxler was returned to his DOC medical providers for the completion of an institutional "history and physical" prior to surgery. (*NPFOF*, ¶ 37). Mr. Traxler was subsequently cleared for surgery, and presented to Waupun Memorial Hospital for the below-the-knee amputation procedure, to which he had previously consented, on November 17, 2021. (*NPFOF*, ¶ 38).

MR. TRAXLER REPEATEDLY EXPRESSES TO HIS DOC PROVIDERS HIS DESIRE FOR THE BELOW-THE-KNEE AMPUTATION TO PROCEED

On October 21, 2021, Lyle Traxler expressed to one of his treating DOC physicians, Dr. Sarah English, that he was "excited to get his amputation done and get moving with the therapy." (*NPFOF*, ¶ 39). On November 8, 2021, Lyle Traxler once again related to his DOC physician, Dr. Sarah English, that he was "ready to get this thing chopped off." (*NPFOF*, ¶ 40).

LYLE TRAXLER'S BELOW-THE-KNEE AMPUTATION PROCEDURE OF NOVEMBER 17, 2021

Both Dr. Nelson's preoperative diagnosis and his postoperative diagnosis on November 17, 2021 was "chronic right leg ulcer, infected with MRSA including osteomyelitis of the tibial shaft." (*NPFOF*, ¶ 41). The amputation surgery was completed without complication on November 17, 2021, and Mr. Traxler was taken to the anesthesia recovery room in stable condition on that date. (*NPFOF*, ¶ 42). The amputated lower right leg was sent to the Pathology Department as a pathologic specimen following its removal during surgery on November 17, 2021. (*NPFOF*, ¶ 43). The pathology results subsequently came back from the Pathology Department, and confirmed the presence of gangrenous changes in the presence of acute and chronic osteomyelitis in the amputated limb. (*NPFOF*, ¶ 44).

Following the completion of the successful below-the-knee amputation surgeryon November 17, 2021, Dr. Nelson communicated his postoperative instructions and recommendations to Mr. Traxler's DOC health care providers in his surgical note. (*NPFOF*, ¶ 45). Dr. Nelson's postoperative recommendations included:

> … He will remain on vancomycin for 24 hours. I am going to plan on giving him 6 weeks of Bactrim postop just for prophylaxis (his prior MRSA culture/sensitivity data shows sensitivity to Bactrim). The anticipation is that he will likely be medically stable in a day or two and safe for discharge back to the infirmary of the Department of Corrections. We will intend to leave the case stump in place for 3 weeks. At that time, the plan will then be for him to come to the orthopedic clinic Waupun to have the cast taken down and the sutures removed. I recommend that the DOC then get prosthetics involved essentially immediately thereafter to begin fitting the stump to accept a prosthesis.

(*NPFOF*, ¶ 46).

LYLE TRAXLER'S POSTOPERATIVE HOSPITAL RECOVERY AND DISCHARGE

Following the completion of the surgical procedure on November 17th, Dr. Nelson followed up with Mr. Traxler on November 18, 2021 while he recovered from the surgery in the

hospital. (*NPFOF*, ¶ 47). On November 18, 2021, Dr. Nelson prescribed gabapentin for Mr. Traxler's neuropathic pain, and continued his plan to have Traxler on an antibiotic, Bactrim DS, for six weeks postop for infection prophylaxis. Dr. Nelson also ordered repeat labs, and anticipated that Mr. Traxler would be medically ready for discharge to the DOC infirmary on the following day. (*NPFOF*, ¶ 48). On November 19, 2021, Mr. Traxler was discharged from Waupun Memorial Hospital, and returned to the care of to his DOC providers, following his below-the-knee amputation procedure. (*NPFOF*, ¶ 49).

DR. NELSON'S FINAL FOLLOW-UP APPOINTMENT WITH LYLE TRAXLER ON DECEMBER 7, 2021

Dr. Nelson subsequently saw Mr. Traxler on one final occasion, for an office appointment on December 7, 2021, in follow-up to his below-the-knee amputation. (*NPFOF*, ¶ 50). On that date, Dr. Nelson performed a physical examination upon Mr. Traxler's leg, and noted that his stump had healed with a nice cosmetic appearance, and that his sutures could be removed that day. (*NPFOF*, ¶ 51). Dr. Nelson's "impression" as of December 7, 2021 was that Mr. Traxler was experiencing his best-case scenario following the below-the-knee amputation on the right that he had undergone on November 17th. (*NPFOF*, ¶ 52). Dr. Nelson's recommendation for Mr. Traxler's continued care was included in Nelson's December 7, 2021 progress note, and reads:

> I recommend that the DOC get prosthetics involved to begin the process of shaping the stump and fitting it for a prosthesis. No further scheduled follow-up in the orthopedic clinic is required at this time.
>
> (*NPFOF*, ¶ 53).

Following Dr. Nelson's office appointment with Mr. Traxler on December 7, 2021, Mr. Traxler was never subsequently referred by the Department of Corrections to see Dr. Nelson again. (*NPFOF*, ¶ 54). Dr. Nelson was never subsequently provided with any medical records pertaining to Traxler, nor was Dr. Nelson ever contacted by any of Mr. Traxler's health care providers, up to

the present date. (*NPFOF*, ¶ 54). At no time did Dr. Nelson have any contact with any of Mr. Traxler's health care providers on any occasions not explicitly mentioned in Dr. Nelson's Declaration. (*NPFOF*, ¶ 55).

LYLE TRAXLER'S MEDICAL CARE WAS OVERSEEN AND DIRECTED BY THE DOC AT ALL TIMES IN 2021

In 2021, all of Dr. Nelson's appointments and orthopedic consults with Mr. Traxler were scheduled by his DOC medical care providers. (*NPFOF*, ¶ 56). At all times in 2021, when Mr. Traxler was discharged from Dr. Nelson's care following each office appointment, Traxler was returned in each instance to the care and supervision of the Department of Corrections and its employed health care providers. (*NPFOF*, ¶ 57). Once Mr. Traxler was discharged following an office appointment with Dr. Nelson, and returned to the care of his Department of Corrections medical care providers, Dr. Nelson had no further control over the care provided to Traxler unless Traxler was specifically referred back to Dr. Nelson by the Department of Corrections. (*NPFOF*, ¶ 58).

Any medical "plan" that Dr. Nelson devised in conjunction with my care of Mr. Traxler in 2021 was considered a "recommendation" by the DOC, and such "recommendation" might or might not be implemented, or might be changed by the inmate's DOC medical providers at the sole discretion of those providers. (*NPFOF*, ¶ 59). Dr. Nelson never received a request from Mr. Traxler, nor any authorization from the Department of Corrections, to see, assess, or treat Mr. Traxler relative to his non-healing wound on the left tibia or his below-the-knee amputation at any time other than those specific instances identified in Dr. Nelson's declaration. (*NPFOF*, ¶ 60). At no time prior to October 11, 2021 was Dr. Nelson ever asked to provide any consultation, care or treatment to Mr. Traxler relative to his non-healing wound on the right tibia or proposed below-

the-knee amputation. (*NPFOF*, ¶ 61). At no time did Dr. Nelson ever refuse to see Mr. Traxler, or refuse in any way to render care or treatment to Traxler. (*NPFOF*, ¶ 62).

DR. NELSON'S CARE AND TREATMENT OF LYLE TRAXLER WAS AT ALL TIMES PERFORMED WITHIN THE STANDARD OF CARE

All of the care and treatment that Dr. Nelson rendered to Lyle Traxler at any time, met the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances at all times material, including but not limited to all consultations and recommendations and all care that Dr. Nelson rendered on any of the dates identified in his Declaration. (*NPFOF*, ¶ 63).

DR. NELSON'S RELATIONSHIP WITH THE STATE OF WISCONSIN

At no time has Dr. Nelson ever been employed by the state of Wisconsin, nor by the Wisconsin Department of Corrections. (*NPFOF*, ¶ 64). At no time has Dr. Nelson ever personally entered into a contract with the Wisconsin Department of Corrections to render medical care to inmates of the Wisconsin Department of Corrections, nor has his employer, the Fond du Lac Regional Clinic. (*NPFOF*, ¶ 65). At no time has Dr. Nelson ever seen or treated a patient, including but not limited to plaintiff Traxler, upon the premises of any prison or other facility owned or operated by the state of Wisconsin or by the state of Wisconsin Department of Corrections. (*NPFOF*, ¶ 66). At no time in 2021 was Dr. Nelson ever given, nor did he ever accept, responsibility for managing the continuing prison medical care of any DOC inmate upon whom he was asked to consult or to treat, nor was Dr. Nelson ever asked to "replace" or otherwise "take over" the general medical care and oversight of Mr. Traxler or any other DOC incarcerated inmate. (*NPFOF*, ¶ 67). None of Dr. Nelson's medical conclusions or treatment plans for Mr. Traxler, at any time, were influenced by Traxler's status as a prisoner under the supervision of the Wisconsin Department of Corrections. (*NPFOF*, ¶ 68). None of Dr. Nelson's conclusions or

treatment plans for Mr. Traxler would have changed in any way had Mr. Traxler presented to him as a private patient, rather than as an inmate in the custody of the Wisconsin Department of Corrections. (*NPFOF*, ¶ 68).

DR. NELSON'S PROPOSED FINDINGS OF FACT TO THE PLAINTIFF

On February 2, 2023, pursuant to Federal Rule of Civil Procedure 36, Dr. Nelson promulgated a set of Requests for Admission, accompanied by Interrogatories and Requests for Production of Documents, to plaintiff Traxler. *See Declaration of Jason J. Franckowiak*, Ex. A. This set of written discovery requests was mailed to plaintiff Traxler at his prison facility, Oshkosh Correctional Institution, on February 2, 2023. *See Decl. of JJF*, Ex. B. Under FRCP 36, plaintiff Traxler then had 30 days within which to respond to Dr. Nelson's Requests for Admission, or each of those requests is to be deemed admitted. FRCP 36(a)(b).

Plaintiff Traxler never responded to Dr. Nelson's initial set of Requests for Admission. *See Decl. of JJF*, ¶ 4. The propositions advanced in each of Dr. Nelson's Requests for Admission must therefore be taken as admitted by the Court in addressing the merits of the instant Motion for Summary Judgment. *See* FRCP 36(b). The propositions admitted by plaintiff Traxler as a result of his failure to respond to Dr. Nelson's Requests for Admission, are set forth in Dr. Nelson's Proposed Findings of Fact 69-104, filed herewith.

PLAINTIFF TRAXLER HAS NOT IDENTIFIED IN DISCOVERY ANY OPINION FROM AN ORTHOPEDIC SURGEON OR OTHER EXPERT WHO CAN SUPPORT HIS CLAIM THAT DR. NELSON WAS "DELIBERATELY INDIFFERENT" TO HIS MEDICAL NEEDS

The Requests for Admission served upon plaintiff Traxler on February 2, 2023 by Dr. Nelson, included the following requests:

> **REQUEST NO. 32:** Admit that no physician has opined to Lyle Traxler that Dr. Eric Nelson failed to meet the standard of care applicable to a reasonable orthopedic

surgeon under the same or similar circumstances, in his care and treatment of Lyle Traxler at any time.

REQUEST NO. 33: Admit that no physician has opined to Lyle Traxler that Dr. Nelson was deliberately indifferent to Lyle Traxler's medical needs at any time.

REQUEST NO. 34: Admit that Lyle Traxler has not identified any physician or other qualified expert who can opine at trial that Dr. Nelson failed to meet the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances at any time while rendering any medical care or treatment to Lyle Traxler.

REQUEST NO. 35: Admit that Lyle Traxler has not retained any physician or other qualified expert to render an opinion at trial that Dr. Nelson's care and treatment of Lyle Traxler failed to meet the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances at any time.

REQUEST NO. 36: Admit that Lyle Traxler has not identified any physician or other qualified expert who can opine at trial that Dr. Nelson was deliberately indifferent to any medical need of Lyle Traxler at any time.

REQUEST NO. 37: Admit that Lyle Traxler has not retained any physician or other qualified expert to render an opinion at trial that Dr. Nelson was "deliberately indifferent" to any medical need of plaintiff Lyle Traxler at any time.

See Dr. Nelson's Requests for Admissions, *Decl. of JJF*, Ex. A, Requests 32-37.

Dr. Nelson's Requests for Admission were accompanied by a set of Interrogatories, which requested that Traxler, to the extent that any of his answers to Requests for Admission 32-37 was not an unequivocal admission, identify any qualified physician or other expert whom Traxler claims to have identified or retained in support of his "deliberate indifference" claims against Dr. Nelson. *See* Dr. Nelson's Second Set of Interrogatories, *Decl. of JJF*, Ex. A.

Plaintiff Traxler did not respond to any of Dr. Nelson's written discovery requests. *Decl. of JJF*, ¶ 4. Plaintiff Traxler has neither identified nor retained any physician who can provide an opinion in support of plaintiff's contention that Dr. Nelson either fell below the standard of care in his treatment of Lyle Traxler, or that Dr. Nelson was ever "deliberately indifferent" to any of Traxler's medical needs.

Dr. Nelson was entitled to promulgate Requests for Admission and Interrogatories to the plaintiff in the normal course of discovery, and plaintiff's status as a pro se prisoner of the

Wisconsin Department of Corrections did not relieve him from his obligation as a litigant in this lawsuit to properly respond to written discovery requests as required by the Federal Rules of Civil Procedure.

SUMMARY JUDGMENT STANDARD

Summary judgment must be rendered "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." FRCP 56(a). The party seeking summary judgment bears the responsibility of informing the court of the basis for the motion and identifying the parts of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." *Id*. at 324. When the motion is properly supported, the nonmoving party must go beyond the pleadings and, by citing affidavits or "depositions, answers to interrogatories, and admissions on file" designate "specific facts showing that there is a genuine issue for trial." *Id*. A mere "scintilla of evidence" will not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The Seventh Circuit has often referred to summary judgment as the "put up or shut up" moment in litigation. *Goodman v. NSA, Inc.*, 621 F. 3d 651, 654 (7th Cir. 2010). Not all disputes of fact preclude summary judgment. Instead, "the requirement is that there be no genuine issue of material fact". *Anderson*, supra, at 248. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id*. As to genuineness, the nonmoving party "must produce … evidence that creates a fair doubt; wholly speculative assertions will not suffice." *Bongam v. Action Toyota, Inc.*, 14 F. App.'x 275, 280 (4th

Cir. 2001). "A motion for summary judgment may not be defeated by evidence that is merely colorable" or "is not sufficiently probative." *M&M Medical Supplies and Services, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F. 2d 160, 163 (4th Cir. 1993). Thus, a nonmoving party cannot "create a genuine dispute of fact through mere speculation." *Emmett v. Johnson*, 532 F. 3d 291, 297 (4th Cir. 2008).

ARGUMENT

I. PLAINTIFF'S DELIBERATE INDIFFERENCE CLAIM AGAINST DR. NELSON MUST BE DISMISSED BECAUSE DR. NELSON WAS NOT ACTING UNDER "COLOR OF LAW" IN RENDERING CARE AND TREATMENT TO PLAINTIFF LYLE TRAXLER.

A. A Deliberate Indifference Claim Brought Under 28 USC § 1983 is Only Viable if Asserted Against an Individual Operating Under "Color of Law."

When a plaintiff brings a § 1983 claim against a defendant who is not a government official or employee, the plaintiff must show that the private entity acted under color of state law. *West v. Atkins*, 487 U.S. 42, 49-50, 108 S. Ct. 2250 (1988). This requirement is an important statutory element because it sets the line of demarcation between those matters that are properly federal and those matters that must be left to the remedies of state tort law. *Rodriguez v. Plymouth Ambulance Service*, 577 F.3d 816, 822 and 822 (7th Cir. 2009). At its most basic level, the state action doctrine requires that a court find such a "close nexus between the state and the challenged action" that the challenged action "may be fairly treated as that of the state itself." *Rodriguez*, supra, at 823.

In determining whether a defendant who is not a government official or employee acted "under color of law," the Seventh Circuit has recognized that the analysis must begin with *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L.Ed.2d 40 (1988). *Rodriguez*, supra, at 824. In *West*, the United States Supreme Court did not rely on the particular contractual arrangement that the physician had with the state, but, rather, the Court emphasized the function of the physician.

Rodriguez, supra, at 825. A court's focus must thus be on the particular function of the medical care provider in the fulfillment of the state's obligation to provide health care to incarcerated persons. *Id*. at 825.

West v. Atkins, supra, requires that the functional analysis ought to focus on the relationship among the state, the health care provider and the prisoner. *Rodriguez*, supra, at 826. *West* also requires that one of the factors that must be weighed in assessing that trilateral relationship, is the setting in which the medical care is rendered. *Id*. The Supreme Court's admonition in *West* is intended to remind reviewing courts to assess the degree to which the professional decisions made in rendering the care are influenced by the status of the patient as a prisoner and the directives of the state, as the ultimate responsible party for the prisoner's health care, with respect to the manner and the mode of care. *Id*. at 827. Giving significant weight to the degree to which the work of the private medical provider is controlled or influenced by the state simply acknowledges the general concern, in any state action analysis, that the degree of state control or coercion is a very significant factor in determining whether the private individual's actions can be "fairly attributable to the state." *Id*. at 827.

The Supreme Court's ruling in *West v. Atkins* directs that the contractual relationship between the state and the medical care provider should not be the focus of the court's inquiry, but it is nevertheless a factor in determining whether the private health care provider has entered into a relationship with the state and the prisoner on a voluntary basis. *Rodriguez*, supra, at 827. There is no basis in the Supreme Court's caselaw for concluding that a private entity can be burdened with the responsibilities of the state for the care of its prisoners, unless the entity assumes that responsibility voluntarily. *Id*.

The Supreme Court in *West v. Atkins* did not focus simply on the relationship of the private medical provider to the state, but also considered the relationship of the private provider to the prisoner. *Rodriguez*, supra, at 828. In doing so, the Supreme Court meant to emphasize that, in order to be liable as the state for the provision of medical services, the private provider must have a direct, not an attenuated, relationship with the prisoner-patient. *Id*. To the degree that a private entity does not replace, but merely assists the state in the provision of health care to prisoners, the private entity's responsibility for the level of patient care becomes more attenuated, and it becomes more difficult to characterize its actions as the assumption of a function traditionally within the exclusive province of the state. *Id*.

B. Dr. Nelson was not Operating Under "Color of Law" at Any Time Material to the Allegations of the Complaint.

Dr. Nelson was employed at all times between October and December 2021 by the Fond du Lac Regional Clinic. (*NPFOF*, ¶ 7). He was never employed by the state of Wisconsin or by the Wisconsin Department of Corrections. (*NPFOF*, ¶ 64). Dr. Nelson was never personally under contract with the Department of Corrections to render care to inmate patients in the custody of the DOC, nor was his employer – the Fond du Lac Regional Clinic. (*NPFOF*, ¶ 65). Dr. Nelson never consulted upon an inmate or treated an inmate upon the premises of any prison or other facility owned or operated by the state of Wisconsin or by the Department of Corrections. (*NPFOF*, ¶ 66).

Dr. Nelson's treatment plans for Mr. Traxler were not influenced in any way by the status of Mr. Traxler as a prisoner of the Department of Corrections, and Dr. Nelson's medical opinions and treatment plans would not have changed if Mr. Traxler had been a private patient, rather than a DOC inmate. (*NPFOF*, ¶ 68). At no time in 2021 did Dr. Nelson ever accept responsibility for managing the continuing medical care of any DOC inmate, including Mr. Traxler, nor was he ever

asked to "replace" or to otherwise "take over" the medical care and continuing medical oversight of any DOC-incarcerated patient, including Mr. Traxler. (*NPFOF*, ¶ 67). The factors discussed by the Seventh Circuit in the *Rodriguez* case, supra, mitigate against a conclusion that Dr. Nelson was a "state actor" at the time that he rendered consultation and care to Mr. Traxler. Because Dr. Nelson was not "acting under color of law" when he treated Mr. Traxler at any time, plaintiff's "deliberate indifference" claim against Dr. Nelson must be dismissed as a matter of law on this basis, alone.

II. PLAINTIFF'S EIGHTH AMENDMENT "DELIBERATE INDIFFERENCE" CLAIM AGAINST DR. NELSON MUST ALSO BE DISMISSED AS A MATTER OF LAW BECAUSE THAT CLAIM IS UNSUPPORTED BY EVIDENCE SUFFICIENT TO SUSTAIN AN ALLEGATION OF "DELIBERATE INDIFFERENCE" ON THE PART OF DR. NELSON.

A. "Deliberate Indifference" Standard on Plaintiff's Eighth Amendment Claim.

The test to determine whether a prison official acted with "deliberate indifference" is a subjective one. "A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Snipes v. Detella*, 95 F. 3d 586, 590 (7th Cir. 1996). An official's failure to alleviate a significant risk that he should have perceived but did not, cannot be condemned as the infliction of punishment, and thus falls outside the Eighth Amendment. *Id*. To raise an Eighth Amendment issue, the infliction of punishment must be deliberate or otherwise reckless in the criminal sense, which means that the Defendant must have committed an act so dangerous that his knowledge of the risk can be inferred or that the Defendant actually knew of an impending harm easily

preventable. *Id*. Mere negligence or even gross negligence does not constitute deliberate indifference. *Id*.

The Eighth Amendment is not a vehicle for bringing claims for medical malpractice. Id. Medical decisions that may be characterized as "classic examples of matters for medical judgment", such as whether one course of treatment is preferable to another, are beyond the amendment's purview. *Id*. at 591.

Extreme deprivations are required to make out a condition of confinement claim. *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 1995 (1992). Even admitted medical malpractice does not give rise to a constitutional violation. *Norfleet v. Webster*, 439 F. 3d 392, 396 (7th Cir. 2006). To infer deliberate indifference on the basis of a physician's treatment decision, the decision must be so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment. *Id*. Deliberate indifference indicates a culpable state of mind, something akin to criminal recklessness, which requires that the defendant be aware of and disregard an excessive risk of serious harm to the inmate. *Id*. at 397. Deliberate indifference is "something approaching a total unconcern for the Plaintiff's welfare in the face of serious risks, or a conscious, culpable refusal to prevent harm." *Duane v. Lane*, 959 F. 2d 673, 677 (7th Cir. 1992). This total disregard for a prisoner's safety is the "functional equivalent of wanting harm to come to the prisoner." *McGill v. Duckworth*, 944 F. 2d 344, 347 (7th Cir. 1991).

B. Medical Providers, Like Dr. Nelson, are Entitled to Deference when Making Medical Decisions.

Medical professionals like Dr. Nelson are entitled to deference in making treatment decisions unless no minimally competent professional would have so responded under the circumstances:

> Claims of deliberate indifference to medical needs are examined differently depending on whether the defendants in question are medical professionals or lay persons…. Medical professionals … are "entitled to deference in treatment decisions unless no minimally competent professional would have so responded under (the) circumstances" at issue. … When a medical professional acts in his professional capacity, he "may be held to have displayed deliberate indifference only if the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible did not base the decision on such a judgment." …

McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013).

As the Seventh Circuit also noted in *Zaya v. Sood*, 836 F.3d 800 (7th Cir. 2016):

> By definition a treatment decision that's based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment. A doctor who claims to have exercised professional judgment is effectively asserting that he lacked a sufficiently culpable mental state, and if no reasonable jury could discredit that claim, the doctor is entitled to summary judgment.

Zaya, supra, at 805.

C. Mere Disagreement by a Patient, or Even Disagreement Between Physicians, Over Medical Care Provided to a Patient Does Not Constitute Evidence of "Deliberate Indifference" Under the Eighth Amendment.

It is not enough to survive summary judgment on a "deliberate indifference" claim for a plaintiff to assert mere disagreement with the medical decisions made by a defendant physician, or disagreement between medical professionals as to what constitutes appropriate care in a given case. This maxim has been repeatedly addressed by the Seventh Circuit and by numerous district courts within the Seventh Circuit.

DeJesus v. Godinez, 720 Fed. Appx. 766; 2017 W.L. 6539380 (7th Cir. 2017) was a federal civil rights lawsuit brought under 42 U.S.C. § 1983 by plaintiff Hector DeJesus, an Illinois prisoner. DeJesus alleged that defendant Wexford and its staff, which provided medical services at his prison, were deliberately indifferent to his injuries after he was beaten by his cell mate. The

Seventh Circuit, in upholding summary judgment, addressed plaintiff's argument that the district judge had abused her discretion in denying his motions for a court-appointed expert:

> And even if an appointed expert had disagreed about what the x-rays showed with respect to the cause of DeJesus's pain, disagreement among doctors, without evidence that one is not exercising medical judgment, is not evidence of deliberate indifference. …

DeJesus, supra, at 772. *See also*, *Norfleet v. Webster*, 439 F.3d 392 (7th Cir. 2006) ("… even admitted medical malpractice does not give rise to a constitutional violation …. Accordingly, we have held that a difference of opinion among physicians on how an inmate should be treated cannot support a finding of deliberate indifference").

In *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 (7th Cir. 1996), a detainee confined to an acute care inpatient psychiatry unit committed suicide by asphyxiating himself with a plastic bag. In bringing suit, plaintiff produced an expert, Dr. Davis, who opined that the use of plastic bags on the inpatient unit created a substantial risk of serious harm to patients like Cole. *Id.* at 260. He further opined that the defendants did not adhere to a professional standard of medical care by failing to remove Cole, failing to object to the presence of the plastic bags, and by failing to monitor him more closely. *Id*.

The Seventh Circuit upheld summary judgment in favor of the defendant health care providers, despite the opinions offered by plaintiff's expert:

> … Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference. … Dr. Davis simply disagrees with Dr. Butler regarding the likelihood that Cole would attempt to commit suicide.
>
> …
>
> When faced with treatment of an individual in state custody, a medical professional must consider conflicting rights. … Where these conflicting rights intersect is a matter of medical judgment. In making this judgment, the medical professional

> must balance the need for treatment against competing concerns – i.e., preventing unnecessary treatment, the need for freedom from unnecessary restraint, etc. …
>
> … If the decision is made by a professional, it is presumptively valid. …

Estate of Cole, supra, pp 261-262.

In *Lloyd v. Moats*, 721 Fed. Appx. 490; 2017 WL 6728519 (7th Cir. 2017) plaintiff, an Illinois prisoner, alleged that defendants misdiagnosed the cause of his foot pain, unreasonably delayed diagnostic testing, and inadequately treated him. *Id*. at 492. The Seventh Circuit affirmed summary judgment, noting:

> Finally, neither Lloyd's disagreement with his doctors nor any disagreement among the doctors, establishes deliberate indifference in this case. Plainly Lloyd disagrees with the course of action that Dr. Moats and Nurse Wall took in treating his foot pain, and also with their diagnosis of its cause; … but Lloyd's disagreement is irrelevant. …, a prison physician's decision to reject another doctor's treatment recommendation in favor of his own "does not amount to deliberate indifference where both recommendations are made by qualified medical professionals" and the prison doctor's decision is made for a medical reason. … As long as Dr. Moats used medical judgment – and there is no evidence he did not – he was free to devise his own treatment plan. …

Lloyd, supra, at 494-495.

Plaintiff's allegations against Dr. Nelson make it clear that Mr. Traxler (from his perspective as a layperson without any medical training) subjectively "disagrees" with Dr. Nelson's professional medical determinations and treatment plans relative to his amputation. The law is clear, however, that such "disagreement" is not sufficient to establish or support a claim for "deliberate indifference" under the Eighth Amendment.

D. Plaintiff's Eighth Amendment Claim Against Dr. Nelson is Unsupported by Evidence Sufficient to Establish "Deliberate Indifference."

Dr. Nelson's first interaction with plaintiff Traxler relative to his non-healing right tibia wound with underlying osteomyelitis, occurred on October 11, 2021, when Dr. Nelson was asked by his colleague, surgeon Karen Reynolds, M.D., to provide an informal "curbside consult" for

Mr. Traxler, as a board-certified orthopedic surgeon. (*NPFOF*, ¶ 8). Dr. Nelson examined the non-healing wound on Mr. Traxler's right tibia, considered the available clinical information that revealed the presence of chronic osteomyelitis in the patient's right limb, and rendered an opinion on October 11, 2021 that was consistent with the opinion relayed to Mr. Traxler by his treating surgeon, Dr. Reynolds, regarding the treatment of non-healing wounds in the context of the presence of osteomyelitis. (*NPFOF*, ¶ 28).

Dr. Nelson next saw Mr. Traxler about one week later, on October 18, 2021, where he explained the risks and benefits of a proposed below-the-knee amputation procedure to Mr. Traxler, and Mr. Traxler communicated consent to proceed with the below-the-knee amputation procedure. (*NPFOF*, ¶ 35, 36). Dr. Nelson concurred with Dr. Reynolds as of October 18, 2021 that Mr. Traxler's non-healing tibia wound was not going to heal even with prolonged antibiotics, and as a result, absent an amputation of the limb, the risk of the spread of infection from the non-healing wound and the underlying osteomyelitis would always be present. (*NPFOF*, ¶ 27-29, 32). Plaintiff Traxler expressed to Dr. Nelson on October 18, 2021 that he understood the risks and benefits of the proposed below-the-knee amputation surgery, and further indicated to Dr. Nelson that he wished to proceed with that procedure. (*NPFOF*, ¶ 35).

The below-the-knee amputation surgery was subsequently approved by Mr. Traxler's DOC health care providers, and Mr. Traxler consistently expressed to his DOC providers his preference to proceed with the below-the-knee amputation. (*NPFOF*, ¶ 39). The below-the-knee surgery eventually went forward on November 17, 2021, consistent with Mr. Traxler's signed consent, and the procedure was completed without complication. (*NPFOF*, ¶ 82).

In the hospital after the completion of the procedure, Dr. Nelson attended to Mr. Traxler's needs. He ordered pain medications when requested, and further ordered a course of antibiotics to

prophylactically address any surgical infection. (*NPFOF*, ¶ 48). Mr. Traxler's recovery proceeded consistent with the best-case scenario for his clinical condition. (*NPFOF*, ¶ 52).

By the time that Dr. Nelson saw Mr. Traxler for the final time on December 7, 2021, the healing of his amputation site was essentially complete, and Mr. Traxler was ready for a prosthetic fitting. (*NPFOF*, ¶ 53). Dr. Nelson examined the surgical site at his last appointment with Mr. Traxler, and subsequently discharged Traxler from further orthopedic follow-up, absent a subsequent change in condition. (*NPFOF* ¶ 53).

As an initial matter, in failing to respond to Dr. Nelson's initial set of Requests for Admission, Mr. Traxler has admitted a number of propositions, including all of the following:

- The recommendations made by Dr. Nelson to Mr. Traxler at the October 18, 2021 clinic visit were made by Dr. Nelson in the exercise of his medical discretion. (Request No. 6, *Decl. of JJF*, Ex. A).
- In arriving at his diagnoses on October 18, 2021 and in making the treatment recommendations to Lyle Traxler that he did on that date, Dr. Nelson exercised reasonable medical judgment. (Request No. 7, *Decl. of JJF*, Ex. A).
- On October 18, 2021, in seeing Lyle Traxler and rendering medical care and/or treatment to him on that date, Dr. Nelson complied at all times with the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances. (Request No. 8, *Decl. of JJF*, Ex. A).
- At no time on October 18, 2021 was Dr. Nelson deliberately indifferent to Lyle Traxler's medical needs. (Request No. 9, *Decl. of JJF*, Ex. A).
- The operative procedure performed by Dr. Eric Nelson on November 17, 2021 was completed on that date without complication. See Exhibit B, attached. (Request No. 13, *Decl. of JJF*, Ex. A).
- Lyle Traxler's claim against Dr. Eric Nelson alleging "deliberate indifference" in the instant lawsuit arises out of the below-the-knee amputation procedure performed by Dr. Nelson on November 17, 2021. (Request No. 14, *Decl. of JJF*, Ex. A).
- The intraoperative steps taken by Dr. Nelson during the below-the-knee amputation procedure on November 17, 2021 were taken by Dr. Nelson in the exercise of his medical discretion. (Request No. 16, *Decl. of JJF*, Ex. A).
- In performing the below-the-knee amputation procedure on November 17, 2021, Dr. Nelson at all times exercised reasonable medical judgment. (Request No. 17, *Decl. of JJF*, Ex. A).

- In performing the below-the-knee amputation procedure on November 17, 2021, Dr. Nelson complied at all times with the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances. (Request No. 18, *Decl. of JJF*, Ex. A).
- At no time on November 17, 2021 was Dr. Nelson deliberately indifferent to Lyle Traxler's medical needs. (Request No. 19, *Decl. of JJF*, Ex. A).
- The diagnoses, conclusions, and recommendations offered by Dr. Nelson at the December 7, 2021 office visit were made by Dr. Nelson in the exercise of his medical discretion. (Request No. 23, *Decl. of JJF*, Ex. A).
- At all times on December 7, 2021, in seeing and rendering diagnoses and treatment to Lyle Traxler, Dr. Nelson exercised reasonable medical judgment. (Request No. 24, *Decl. of JJF*, Ex. A).
- On December 7, 2021, Dr. Nelson complied at all times with the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances. (Request No. 25, *Decl. of JJF*, Ex. A).
- At no time on December 7, 2021 was Dr. Nelson deliberately indifferent to Lyle Traxler's medical needs. (Request No. 26, *Decl. of JJF*, Ex. A).

See Dr. Nelson's First Set of Requests for Admission to the Plaintiff, RFAs 6-9, 13-14, 16-19, and 23-26, *Decl. of JJF*, Ex. A. Given these established propositions, no reasonable jury could conclude that Dr. Nelson was "deliberately indifferent" to any serious medical need of plaintiff Traxler. Moreover, plaintiff Traxler has identified no physician or other expert who can contest these admitted propositions. Summary judgment is therefore appropriate and necessary in this case.

Even in the absence of these admissions by plaintiff Traxler, however, summary judgment is still necessary in this instance. In order to establish that Dr. Nelson is responsible on a claim for "deliberate indifference" under the Eighth Amendment, the plaintiff must go further than simply alleging or establishing that Dr. Nelson's medical decisions and treatment plans failed to meet the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances. Instead, the plaintiff must offer proof to substantiate that Dr. Nelson's medical decisions and treatment plans fell "so far afield of accepted professional standards as to raise the

inference that those decisions and diagnoses were not actually based upon Dr. Nelson's medical judgment at all." *See Norfleet*, supra, at 396.

Mr. Traxler, however, cannot even establish that Dr. Nelson's care failed to meet the standard of care applicable to a reasonable orthopedic surgeon, much less can he establish that Dr. Nelson's treatment decisions in Mr. Traxler's case fell "so far afield of accepted professional standards as to raise an inference that Dr. Nelson's treatment decisions were not in fact actually based upon a medical judgment." Plaintiff has identified no orthopedic surgeon or other expert qualified who can render testimony on the standard of care, nor has Mr. Traxler pointed to any document that contains any opinion from a qualified orthopedic surgeon to even suggest that any of Dr. Nelson's professional medical decisions, or any of the care rendered by Dr. Nelson to Mr. Traxler were not entirely medically appropriate, much less that any of Dr. Nelson's medical decisions or treatment fell "so far afield of accepted professional standards as to raise the inference that they were not actually based upon a medical judgment."

Dr. Nelson saw Mr. Traxler for the non-healing wound on his right tibia with underlying osteomyelitis on two occasions prior to performing a below-the-knee amputation at the request of Mr. Traxler, and on one occasion subsequent to the performance of the amputation procedure. Dr. Nelson never refused to see Mr. Traxler at any time. Moreover, there is no evidence that any of Dr. Nelson's treatment decisions, nor any actions taken by him at any of his office appointments with Mr. Traxler, fell below the standard of care applicable to a reasonable orthopedic surgeon under the same or similar circumstances, much less that any of Dr. Nelson's treatment decisions fell "so far afield of accepted professional standards as to raise an inference that they were not actually based on a medical judgment." The records confirm that Dr. Nelson explained Mr. Traxler's options to him, fully disclosed to Mr. Traxler the risks versus the benefits of the proposed

treatment, and was attentive to Mr. Traxler's post-surgery pain complaints and post-surgery needs. Dr. Nelson also offered reasonable and appropriate follow-up care instructions to Mr. Traxler's DOC care providers.

There is simply no evidence sufficient to raise any inference that Dr. Nelson's medical decisions and recommendations related to Mr. Traxler's non-healing right tibia wound with underlying osteomyelitis at any time were not entirely medically appropriate. Plaintiff has identified no orthopedic surgeon capable of opining that Dr. Nelson, as a board-certified orthopedic surgeon, should have rendered any treatment for Mr. Traxler's non-healing right tibia wound with underlying osteomyelitis other than what he did. For example, there is no testimony (much less expert testimony) in the record to establish that a below-the-knee amputation was not an appropriate medical treatment modality in light of Mr. Traxler's non-healing right tibia wound with underlying osteomyelitis. Nor is there any testimony or evidence to suggest that there was a better or more effective treatment for plaintiff Traxler's clinical condition in October of 2021.

It is further clear from the record that not only did Mr. Traxler not voice any objection to proceeding with the below-the-knee amputation, but it was actually his choice to proceed with the procedure, after having been fully informed by Dr. Nelson of the risks and benefits of the procedure. There is thus no evidence in the record to suggest that the recommendation for a below-the-knee amputation, the decision to proceed with that amputation, and the completion of the procedure itself, were not all entirely appropriate and consistent with the standard of care. Additionally, there is no expert medical testimony in the record to suggest that any of Dr. Nelson's subsequent recommendations or treatment plans were not also entirely medically appropriate and consistent with the standard of care in all respects.

Moreover, even if Mr. Traxler were somehow able to produce evidence that some different or additional treatment modality other than the amputation of his leg would have been appropriate for him, such evidence would not support a claim for "deliberate indifference." Mere negligence or even gross negligence cannot constitute deliberate indifference. *Snipes v. Detella*, 95 F.3d 586, 590 (7th Cir. 1996).

Mr. Traxler has not provided evidence sufficient to support a viable "deliberate indifference claim" against Dr. Nelson under the Eighth Amendment. Medical providers like Dr. Nelson are entitled to deference when exercising medical discretion, or when making medical decisions, and Mr. Traxler's mere disagreement (from his layperson's perspective) with medical decisions or recommendations made by Dr. Nelson does not constitute evidence of "deliberate indifference" under the Eighth Amendment. Summary judgment in favor of Dr. Nelson on plaintiff's Eighth Amendment "deliberate indifference" claim is therefore necessary.

CONCLUSION

The parties now sit perched upon the precipice of summary judgment. Discovery has been concluded, and the plaintiff has reached the "put up or shut up" point in his lawsuit. Gone is the point in time where plaintiff's unsubstantiated allegations from a layperson's perspective are sufficient to allow the plaintiff to continue his pursuit of a claim under the Eighth Amendment against Dr. Nelson. Now, the plaintiff must finally put forth adequate proof, including but not limited to, expert testimony, that would be sufficient to survive summary judgment. The plaintiff has not done this relative to Dr. Nelson.

Summary judgment must be granted, and Dr. Nelson hereby requests an order of the Court granting to him summary judgment on each and every one of plaintiff's claims asserted against him in this lawsuit.

Dated this 5th day of June, 2023.

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