IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSE SOTO,

Plaintiff,

v.

DALIA SULIENE, LILLIAN TENEBRUSCO, CAPTAIN MORGAN, JANEL NICKEL, STEVE HELGERSON, C.O. HAAG and NURSE KIM CAMPBELL,

Defendants.

OPINION AND ORDER

11-cv-567-slc

In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Jose Soto is proceeding on an Eighth Amendment claim that defendants Dalia Suliene, Lillian Tenebrusco, Captain Morgan, Janel Nickel, Steve Helgerson, C.O. Haag and Nurse Kim Campbell failed to provide him with adequate medical treatment for his feet. Dkt. 5. Before the court are the parties cross motions for summary judgment, dkts. 33 and 54, as well as Soto's motion for leave to file an amended complaint, dkt. 117.

Starting with the last motion, I am denying Soto's motion for leave to file an amended complaint. This lawsuit is in its final stages, headed toward trial in the next several months. Allowing Soto to amend his complaint to add new claims requiring additional discovery would unfairly prejudice defendants.

With respect to the parties' summary judgment motions, I am granting defendants' motion and denying Soto's motion on the claims against defendants Suliene, Tenebrusco, Campbell, Helgerson and Nickel because a jury could not reasonably conclude that any of these defendants acted with deliberate indifference to Soto's serious medical needs.

I am denying both parties' motions with respect to the claims against defendants Haag and Morgan because there are genuine issues of material fact related to the claims against them that a jury will have to resolve at trial. As a result, the parties will proceed to trial on Soto's claims that (1) Morgan acted with deliberate indifference to Soto's serious medical needs in denying him arch supports while he was in segregation between March and September 2011; and (2) Haag acted with deliberate indifference in repeatedly denying Soto's requests for a new pair of segregation shoes when he knew that Soto's shoes had fallen apart. Because we do not currently have a trial date on the schedule, at the end of this order I have provided a series of dates on which the court is available to hold a jury trial and I am allowing both sides to advise the court which of these dates work for them, after which the court will set the trial date along with the other dates and deadlines necessary for trial preparation.

Next, the court must address an evidentiary dispute regarding proposed facts on the summary judgment motions. Soto has proposed several findings of fact that are based on Soto's May 2011 interview/information requests to which his psychologist, Dr. Kurt Schwebky, responded in writing. *See* Pl. Exhs. 39-40. Defendants have objected to Soto's attempt to introduce the written statements of Dr. Schwebky for the truth of the matter asserted in the statements because Dr. Schwebky has not submitted his own testimony and he is not a defendant in this action. Defendants are correct. Because Schwebky's statements constitute hearsay, they are not admissible and cannot be used to support the facts proposed by Soto. *See* Fed. R. Ev. 801. In any event, Dr. Schwebky's reports of his conversations with Lillian Tenebrusco and Dr. Dalia Suliene would not add much, if anything to the admissible evidence: he was a go-between on conversations that Soto already was having directly with these two defendants.

For the purpose of deciding the motions for summary judgment, I find from the parties' submissions that the facts set out below are material and undisputed:

FACTS

I. The Parties

Plaintiff Jose Soto was an inmate housed at the Columbia Correctional Institution (CCI) in Portage, Wisconsin from October 18, 2010 until his transfer to the Wisconsin Resource Center on September 19, 2011. He was placed in administrative confinement at CCI in November 2010.

Defendant Dr. Dalia Suliene is employed by the Wisconsin Department of Corrections (DOC) as a physician in the Health Services Unit (HSU) at CCI. She attends to the medical needs of inmates, diagnosing and treating illness and injuries and arranging for professional consultation when warranted. Dr. Suliene also helps supervise the development and implementation of treatment protocols and patient flow charts.

Defendant Lillian Tenebrusco was employed by the DOC as the health service manager in the HSU at CCI from August 16, 2010 until June 2011. Her duties included managing and supervising health care services, developing procedures, monitoring care plans, preparing required reports and acting as a liaison with other disciplines, institution units and community health care providers. The health services manager collaborates with the primary care physician, dentist, psychiatrist and specialists serving as consultants to the Bureau of Health Services (BHS) to provide health care in an efficient and effective manner. While the primary care physician and dentist are responsible for the professional management of medical and dental services, the health service manager provides overall administrative support and direction for the unit.

Tenebrusco also monitored nursing practice documentation in medical records and responded to inquires from the institution complaint examiner concerning inmate complaints about their medical care. From time to time, Tenebrusco also reviewed and responded to written interview and information requests from inmates about their health care.

Defendants Steve Helgerson and Kim Campbell were registered nurses employed in the HSU at CCI during the incidents in question. Helgerson retired on March 4, 2012. As registered nurses, they were responsible for providing skilled nursing care to incarcerated individuals in infirmary and ambulatory care situations. They also provided emergency care for major and minor conditions to prevent untimely illness or death and performed nursing assessments on patients.

Defendant Janel Nickel is employed by the DOC as the security director at CCI. She is responsible for all security activities within CCI and the development, implementation and monitoring of overall institution goals, policies and procedures as part of the institution's management team. Nickel also oversees the central control, armory, towers, perimeter, program areas, visiting, reception, training, mail and property areas of the institution.

Defendant Donald Morgan is employed by the DOC as an administrative captain at CCI. In that role, he acts as the assistant to the security director and supervises captains, lieutenants and other correctional staff at CCI. Morgan also shares responsibility for the ongoing safety, supervision and treatment of inmates housed at CCI. At all times relevant to this action, he was the unit manager for the two segregation buildings where Soto was housed, making it his responsibility to know and stay up-to-date on the medical restrictions of the inmates housed in those buildings.

Defendant Travis Haag is a correctional officer at CCI, and in that capacity, he supports unit staff by maintaining security and safety and performing general tasks within the various housing units.

II. Soto's Medical Treatment (Claims against defendants Suliene, Tenebrusco, Helgerson and Campbell)

Soto has a history of fallen arches as well as surgeries to his feet. In the past, various institutions, including CCI, have permitted him to use his own arch supports or have issued him arch supports. Although he was allowed arch supports while housed in the DS-2 segregation building at CCI in 2007 and 2008, defendants denied him arch supports during his stay in DS-2 between October 2010 and July 2011. According to Defendant Dr. Suliene, HSU used to stock arch supports to provide to inmates at no charge. However, HSU policies changed sometime in 2010, and items such as arch supports, shoe inserts and knee and ankle sleeves became available only through the canteen for purchase by inmates. (Although Soto disputes this fact, the affidavits that he cites in support do not state that HSU actually provided the arch supports to inmates.)

Inmates at CCI may ask to see HSU staff by submitting a health services request (HSR). If an inmate believes that he needs to be seen right away, then he may be allowed to go to "sick call," where a nurse will determine at that time whether the inmate should be seen by a doctor.

CCI has a "special needs committee," that provides guidelines for reviewing requests by inmates for medical restrictions and requests to possess certain items, including "comfort items." Comfort items are items that are not an actual medical need but may be deemed appropriate for an inmate to possess for other reasons. With regard to specific requests by inmates, the special

needs committee will provide input about the need for the item requested, the inmate's activities and how the item may impact institution policies and practices. If applicable, the committee recommends a length of time that the item or restriction will be provided to an inmate. Security staff at CCI still must examine all items requested by inmates for possible security concerns and may disallow possession of an item if it does not meet the safety requirements of the unit where the inmate is housed.

In December 2010, Soto began experiencing sharp pains in his feet due to his shoes having no arches or supports. From October 2010 to September 19, 2011, Soto regularly went to the law library, recreation and weekly visits; had four off-grounds medical appointments; and attended conduct report and administrative confinement hearings. These activities required Soto to walk hundreds of feet to each location while wearing orange "segregation shoes," which have no arch support and were falling apart. During that time, Soto repeatedly submitted HSRs and verbally reported to defendants that he had pain, bruises, swelling, a limp, sore ankles, hip pain and pain in his knees. Dr. Suliene admits that fallen arches can cause pain, bruises, swelling, knee and hip pain and problems with alignment.

Here is a summary of Soto's complaints to HSU and the response that he received, if any:

- November 29, 2010: Soto submitted an HSR requesting that his arch supports be re-issued. A nurse responded by scheduling an appointment for Soto with Dr. Suliene in January 2011. When Soto saw Dr. Suliene on January 3, 2011, he complained of stomach pain. (The parties dispute whether Soto also complained about foot pain at that appointment.)

- March 8, 2011: Soto submitted an HSR asking for soft cushion shoes with arches because CCI had allowed him to have them in the past in segregation at his own expense. The next day, Dr. Suliene informed Soto that he could purchase arch supports from the canteen and advised him to follow the DOC rules for those supports.

- March 10, 2011: Soto submitted an HSR stating that the canteen did not sell arch supports and that he could not purchase them from catalogs while he was in segregation. Dr. Suliene forwarded the request to defendant Tenebrusco, who told Soto on March 11 that he needed to follow DOC policy for shoes and property.

- March 15, 2011: Soto wrote a letter asking for soft-soled shoes. The next day, Tenebrusco responded that the physician had reviewed his request and determined that Soto did not have a need for orthopedic shoes. She also informed Soto that HSU was not authorized to provide shoes to inmates for non-medical reasons.

- March 18, 2011: Soto explained in a letter that he had been ordered soft-soled shoes in the past and could not afford them through the canteen or a catalog. Tenebrusco responded on March 21, 2011, stating that she had made an appointment for him to see the physician and to follow the current physician recommendation of wearing the shoes allowed by security.

- March 25, 2001: Soto saw Dr. Springs for a variety of issues and asked him to approve his requests for arch supports and soft-soled shoes. Dr. Springs noted that Soto's requests related to comfort issues and deferred resolution to facility staff. He also noted in an order that it would be appropriate for Soto to follow up with either Dr. Suliene or the special needs committee about his request for either arch supports or soft-soled shoes.

- April 11, 2011: Dr. Suliene saw Soto and discussed shoe inserts with him. At the conclusion of the appointment, she informed Soto that he could get shoe inserts from the canteen. She noted that Soto's shoes did not require special orthotics. (The parties dispute whether Dr. Suliene examined Soto's feet at this appointment.) In an order entered on the same day, Dr. Suliene wrote that Soto could have arch supports or shoe inserts from the canteen as needed while he was housed at CCI. She also entered a medical restriction allowing Soto to have the arch supports.

- April 16, 2011: Soto wrote to HSU asking that a restriction be issued to allow him to purchase shoes with "soft cushion and bubbles." Defendant Helgerson responded that Soto could review his records for any information needed and asked Soto if he wanted a nursing assessment.

- April 18, 2011: Tenebrusco wrote to Soto in response to Soto's various correspondences and informed him that he had an upcoming HSU appointment where he could address his concerns.

- April 27, 2011: The special needs committee denied Soto's request for arches and soft-soled shoes because Dr. Suliene had informed Soto that he could purchase arch supports from the canteen as needed.

- May 3, 2011: Soto submitted two HSRs about his about his feet "hurting" him and wanting arch supports. In response to the HSR about arch supports, defendant Kim Campbell stated that HSU does not provide arch supports and told Soto to order them when he was released from segregation. (The parties dispute whether Campbell had any knowledge about how long Soto was going to be in segregation status.)

- May 5, 2011: Tenebrusco wrote to Soto and explained that if shoes or arch supports were prescribed, then Soto could request that HSU issue them or order them from the canteen as allowed by security.

- May 6, 2011: Soto submitted an HSR stating that Tenebrusco informed him that arch supports would be issued if they had not been already. Helgerson responded that there was no such order.

- May 17, 2011: Soto submitted an HSR stating that his feet, ankles, knees and hips were in a lot of pain because his segregation shoes were flat and hard and he did not have arch supports. Dr. Suliene referred Soto's request to the special needs committee.

- May 18, 2011: Soto submitted an HSR stating that "My feet are now bruising on inside and so painful I'm in bed most of the day. My ankles are swelling and painful. I need my arch or state shoe restriction." (The parties dispute whether an appointment was made for Soto to be seen at HSU.)

- May 21, 2011: Soto submitted another HSR regarding his painful feet. Helgerson responded that he was sorry and that HSU would attempt to see him on May 23, 2011.

- May 22, 2011: Soto submitted an HSR stating that defendant Morgan would not allow him to have arch supports in segregation and asking that he be issued a medical restriction for his shoes. The HSR was referred to the special needs committee.

- May 31, 2011: Soto submitted an HSR describing his pain and bone abnormalities due to his lack of arches and asked to be issued shoes or arches. On June 1, 2011, Dr. Suliene responded with "noted."

- June 2, 2011: Soto wrote Tenebrusco about not having arch supports. (The parties dispute whether Tenebrusco responded to him.)

(The parties generally dispute whether Soto was allowed to order arch supports at his own expense between June 3 and September 19, 2011. Dr. Suliene avers that on June 3, 2011, she wrote an order specifically stating that an exception should be made for Soto to allow him to have shoe inserts in his shoes while at segregation. According to Dr. Suliene, she only then had become aware that security policy prevented inmates from ordering comfort items from catalogs or the canteen while in segregation. Her June 3, 2011 order was intended to assist Soto in purchasing arch supports at his own expense regardless of his status in segregation. Soto contends that Dr. Suliene never issued this order and that Dr. Suliene knew that in order to get shoes or arch supports in segregation, an inmate needed a medical restriction. According to Soto, five other inmates were issued such restrictions.)

On July 18, 2011, Dr. Suliene saw Soto for various complaints, including complaints about his sore feet. (The parties dispute whether defendants provided Soto with any treatment or alternative measures to alleviate his pain and injuries. Dr. Suliene avers that her July 18, 2011 examination of both of Soto's feet showed no swelling, no ulcerations, a good range of motion in both ankles, and good pulses in his feet. According to Dr. Suliene, Soto's feet had superficial visible small veins that were noticeable in the instep area under the skin, but the veins were asymptomatic in appearance and had no swelling. Because Dr. Suliene's exam showed no new findings from her previous exams of Soto's feet, she felt no new treatment was warranted. Defendants allege that Soto became upset and disrespectful and continued his disruptive behavior after Dr. Suliene left. Soto avers that his feet were badly bruised and swollen to the point that they were black, blue, yellowish green and painful. Although he admits becoming upset, he denies being disruptive.)

III. Actions of Defendants Morgan, Nickel and Haag

Between March and May of 2011, defendant Morgan took Soto out of his cell a few times to discuss Soto's medical restriction for arches, the pain and injuries to Soto's feet and Soto's asthma and breathing issues. Morgan recalls Tenebrusco telling him that plaintiff did not have a medical need for arch supports and that plaintiff did not have to walk around very much due to his segregated status.[1]

On May 3 and 5, 2011, Soto submitted interview/information requests informing defendant Morgan that HSU had issued him a medical restriction for arch supports and asking whether Morgan was going to deny him the ability to purchase the arch supports while he was in segregation. Morgan responded on May 9, 2011, informing Soto that at that time, he was not allowed to purchase the arch supports from canteen while he was in DS-2. Morgan also stated that the special needs committee would review his request.

On May 9, 2011, Soto submitted a request to Morgan stating that HSU had told him that he could order arch supports through the canteen, but that the arch supports were only offered through a catalog. Soto inquired as to whether or not Morgan was going to deny him the ability to purchase the arch supports through the catalog even though he had a medical restriction in place. On May 10, 2011, Morgan responded that he had spoken with Tenebrusco, the HSU Manager, and per DOC policy, arch supports were not allowed in DS-2. Morgan told Soto that he would be able to order them once he was back in general population.

[1] Although the specific evidence on which Soto relies in proposing this fact does not relate to the subject of the proposed finding of fact, he correctly points out in his affidavit that defendants admit in their answer to the amended complaint that Morgan recalls Tenebrusco making such a comment.

Between October of 2010 and September 2011, there was no written DOC or CCI policy stating that inmates in DS-2 were not allowed to possess arch supports. Not later than July 2011, five other inmates housed in segregation at CCI were allowed to possess special tennis shoes or arch supports: On July 4, 2011, inmate Luis Ramirez averred that he has "an order" for shoes and arch supports and can have those items in segregation. On July 3, 2011, inmate Jimmie Joshua averred that he is in segregation and is allowed to wear black tennis shoes. Although he received a medical restriction on December 6, 2010, stating that Dr. Suliene was allowing him black state tennis shoes and arch supports, the restriction did not mention segregation. Also in July 2011, inmate DaRen Morris averred that he has been in segregation since March 15, 2011 and received a medical restriction to wear black state tennis shoes. Jackie Carter averred in July 2011 that he was allowed to wear black tennis shoes in segregation at CCI.

On May 15, 2011, Soto submitted an interview and information request to defendant Nickel, asking her to approve arch supports for him in segregation. Nickel responded on May 16, 2011 that Morgan already had addressed his concerns.

On May 18, 2011, Soto asked Morgan in a written request for the specific reason that he was not being allowed arch supports in segregation. Morgan did not respond to this request because he already had addressed the issue with Soto.

(The parties dispute whether Suzanne Soto, Veronica Soto, Elsie Vargas and Teresa Santiago contacted Nickel and Morgan by telephone to request that they allow them to purchase and send Soto his arch supports because he was in pain and had bruised feet. All four aver that they were told no and that Soto would have to deal with it until he was released from segregation in two to five years. The parties also dispute whether Haag refused to contact the HSU on May 20, 2011 about Soto's complaints of foot pain or told Soto that "I'm not dealing

with this shit." They also dispute whether Soto repeatedly asked Haag to issue him new shoes while in segregation. Soto alleges that the soles of his shoes were separating from the tops of his shoes.)

On numerous occasions between October 2010 and September 2011, Soto complained about his mail being given to the wrong person and disposition papers, conduct reports, legal routes and other institutional mail not being delivered to him in DS-2. (The parties specifically dispute whether Morgan issued a memorandum to Soto on June 3, 2011, informing Soto that Dr. Suliene believed that there was a medical necessity for him to have arch supports in segregation. They also dispute whether Morgan told Soto that he could order and purchase arch supports from one of the property catalogues and contact Officer James to review the catalogues and place his order.)

At no time between June 3, 2011 through September 19, 2011 did Soto purchase arch supports from the CCI property catalog. On June 6, 2011, Soto attended a hearing at which Morgan could have informed him that he had been granted permission to order arch supports. However, Morgan never verbally told Soto that he could order arch supports.

Arch supports cost approximately $21.00. Soto had sufficient funds in his prison trust account between May 30 and September 19, 2011 to cover that amount. However, earlier in May 2011, Soto was indigent for a period of time when he had requested HSU to provide him with arch supports.

Soto was transferred to Wisconsin Resource Center on September 19, 2011 for medical and mental health treatment following a suicide attempt and hunger strike. Soto avers that he attempted suicide partially because defendants had denied him arch supports and treatment for his foot injuries.

ANALYSIS

I. Motion to Amend

Soto seeks leave to amend his complaint to "include related issues stemming from violations in [his] original complaint [and] not exhausted at [the] time of filing." Dkt. 117. Under Fed. R. Civ. P. 15(a)(2), a plaintiff seeking leave to amend his complaint beyond the initial stages of a case and without the opposing party's consent must obtain the court's leave, which should be given "freely . . . when justice so requires." In determining whether this standard is met, courts consider a number of factors, including whether the amendment would be futile or cause unfair prejudice or whether the party waited too long to ask for the amendment. *Foman v. Davis*, 371 U. S. 178, 182 (1962); *Sound of Music v. Minnesota Mining & Manufacturing Co.*, 477 F.3d 910, 922-23 (7th Cir. 2007). Except in unusual circumstances, once a case as been fully briefed on a motion for summary judgment, it is too late for a plaintiff to seek to amend his complaint. Granting leave to amend at that point prejudices defendants. *See Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861-62 (7th Cir. 2001) (court did not err in denying motion to amend complaint when defendant had already filed motion for summary judgment). At this late date, after both sides have filed dispositive motions, it would inappropriate to allow Soto to amend his complaint. Accordingly, his motion will be denied.

II. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to

permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

III. Eighth Amendment

Soto alleges that, although he regularly complained of foot pain and injury and made numerous requests to be issued arch supports or soft-soled shoes between November 2010 and July 2011, the defendants failed to examine his feet, failed to offer any treatment, and failed to provide him with access to arch supports or soft-soled shoes. To survive defendants' motion for summary judgment, Soto must present evidence supporting the conclusion that he had an "objectively serious medical need" and that a particular defendant was aware of his serious medical need and was "deliberately indifferent" to it. *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)). Defendants challenge Soto's ability to establish either element of his Eighth Amendment claim.

With respect to the first element, a medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and

suffering when treatment is withheld, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, *Cooper v. Casey*, 97 F.3d 914,916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Relying on the testimony of defendant Suliene, defendants contend that Soto did not have a serious medical need and characterize his problem as "mild foot discomfort." In support of her opinion, Suliene avers that Soto did not discuss his foot pain during his January 3, 2011 appointment with her; Dr. Springs did not order arch supports during Soto's March 25, 2011 appointment; her April 11, 2011 examination of Soto's feet did not reveal any objective criteria indicating serious foot pain; and Soto did not order arch supports after he was permitted to do so on June 3, 2011. Defendants may be correct. Other than Soto's own testimony, there is no evidence in the record to support Soto's contention that he suffered from significant pain, bruising, swelling, misalignment or an inability to walk.

That being said, Soto has shown that he has a documented history of foot pain that has required multiple surgeries; he avers that although he consistently complained of foot pain and injury, none of the medical defendants ever examined his feet during the period in question; and claims that he never received the June 3, 2011 memorandum granting him approval to order arch supports in segregation. Further, Dr. Suliene acknowledges that fallen arches can cause at least some of the symptoms Soto describes, including pain, bruises, swelling, knee and hip pain and problems with alignment. For the purpose of resolving defendants' motion for summary judgment, I must view all facts and inferences in the light most favorable to Soto. *Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals, Inc.*, 591 F.3d 876, 882 (7th Cir. 2010). If a reasonable jury believed Soto's version of events, the jury could conclude that he had a serious

medical need for almost a year. However, even if a reasonable jury could conclude that Soto had a serious medical need, Soto still must show that the defendants acted with deliberate indifference to that need.

A plaintiff proves deliberate indifference by demonstrating that a prison official knows of a substantial risk of harm to an inmate and "either acts or fails to act in disregard of that risk." *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012) (citing *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011)). When the defendant is a medical professional who has provided some treatment to the plaintiff, the question is whether that treatment was constitutionally adequate. *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008). To prove that it was not, plaintiff must show that the treatment was "so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." *Arnett*, 658 F.3d at 751 (quoting *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)). Allegations of medical malpractice or negligence—even "gross negligence"—are insufficient to meet the deliberate indifference standard. *Farmer*, 511 U.S. at 836. Likewise, mere disagreement with a doctor's medical judgment is not enough to prove deliberate indifference in violation of the Eighth Amendment. *Berry v. Peterman,* 604 F.3d 435, 441 (7th Cir. 2010) (citing *Estelle*, 429 U.S. at 106)(citation omitted)); *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003).

Delays in treatment for a serious medical issue also may constitute deliberate indifference if such a delay "exacerbated the injury or unnecessarily prolonged an inmate's pain." *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) (citing *Estelle*, 429 U.S. at 104-05). So long as the medical condition is sufficiently painful, delays in medical treatment that unnecessarily prolong or exacerbate pain are actionable even without a showing that the delay aggravated the underlying condition. *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008); *see also Jones v.*

Simek, 193 F.3d 485, 490 (7th Cir. 1999). "Even a few days' delay in addressing a severely painful but readily treatable condition suffices to state a claim of deliberate indifference." *Smith v. Knox County Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012).

I will apply this legal template to the facts found above to determine whether any defendant is entitled to summary judgment in his or her favor:

A. Dr. Suliene

The undisputed facts show that Soto first raised the issue of needing arch supports in an HSR submitted on November 29, 2010. Defendant Suliene saw him a few weeks later on January 3, 2011, but the parties dispute what if anything occurred at that appointment with respect to Soto's foot complaints. Soto next asked for shoes with arch supports on March 8, 2011, and Suliene responded the next day, telling Soto that he could purchase arch supports from the canteen. When Soto informed HSU on March 10 that he could not purchase arch supports while in segregation, Suliene referred the request to defendant Tenebrusco, who told Soto that he would have to follow DOC policies. Soto saw Dr. Suliene again on April 11, 2011. Although the parties dispute whether Suliene examined Soto during that visit, they agree that Suliene issued an order and medical restriction authorizing Soto to get arch supports. Apparently, Suliene's order was ineffective because security staff continued to deny Soto permission to purchase arch supports while in segregation, citing DOC policy.

Between April 16 and June 3, 2011, Soto submitted numerous HSRs related to increasing foot pain and injury. Suliene referred Soto's May 22 HSR to the special needs committee. Although Suliene claims that she issued a second order on June 3, clarifying that Soto be allowed arch supports while in segregation, Soto avers that he never received it. He also never ordered

arch supports while at CCI. There is no evidence in the record that Soto filed any further HSRs prior to his departure from CCI in September 2011. However, he did see Suliene on July 18, 2011. The parties dispute whether Suliene examined his feet at that appointment.

Even assuming that Suliene never examined Soto's feet during the three documented appointments, there is no evidence that a physical exam would have made any difference in how Suliene would have chosen to treat Soto. Apart from arch supports or special shoes, Soto has not identified any other treatment or medical intervention that could or should have been provided. It is undisputed that Suliene at least discussed his foot problem at his April and July appointments and twice instructed him to purchase arch supports (once in March and again in April).

Although it turns out that Soto could not follow Dr. Suliene's instructions, that was not her fault. It is undisputed that security personnel refused to allow Soto to order the arch supports because he was in segregation. If security personnel had allowed it, Soto could have purchased arch supports as early as March 2011. Dr. Suliene cannot be held liable for the actions of other correctional employees outside her direction and control.

It is a "well-established principle of law that a defendant must have been 'personally responsible' for the deprivation of the right at the root of a § 1983 claim for that claim to succeed." *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866, 869 (7th Cir. 2011); *see also Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). The Court of Appeals for the Seventh Circuit has made clear that "[p]ublic officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job." *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). Soto seems to claim that Suliene should have known to specify that

he would be able to wear arch supports in segregation because she had issued orders for other inmates in segregation to have arch supports. However, there is no evidence that Suliene made segregation-specific requests for these inmates. In fact, the medical restriction produced by one of these inmates did not mention segregation at all.

Under the above circumstances, no reasonable jury could find that Suliene's actions were "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate a complete abandonment of medical judgment." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (finding that refusal to provide soft soled shoes did not violate Eighth Amendment even though plaintiff previously had a prescription for them).

B. Lillian Tenebrusco

Soto alleges that Tenebrusco failed to arrange proper medical care as the health services unit manager after he wrote her several times about needing arch supports for his foot pain. However, there is insufficient evidence from which a jury could conclude that she personally acted with deliberate indifference by preventing Soto from obtaining medical treatment or arch supports. *Burks*, 555 F.3d at 593-94 (liability depends on defendant's own individual actions and not those of others).

On March 9, 2011, Dr. Suliene had informed Soto that he could purchase arch supports from the canteen and advised him to follow the DOC rules for ordering those supports. The next day, Soto wrote to HSU, explaining that the canteen did not sell arch supports and that he could not purchase them from catalogs while he was in segregation. Dr. Suliene forwarded the HSR to Tenebrusco, who repeated Dr. Suliene's earlier direction that Soto follow DOC policy for shoes and property. Similarly, in response to Soto's March 15, 2011 letter asking for soft-

soled shoes, Tenebrusco referred to the physician's previous denial of the shoes. When Soto persisted in his request for shoes, Tenebrusco scheduled him for a physician appointment. Tenebrusco also promptly responded to Soto's April 2011 correspondence by stating that Soto had an upcoming HSU appointment. The parties disagree over whether Tenebrusco ever responded to Soto's June 2, 2011 request for arch supports; however, this is the only disputed act or omission by Tenebrusco.

The facts found above show that Tenebrusco did not ignore Soto's requests for assistance: she either repeated the instructions that Dr. Suliene had given or scheduled him for an appointment with HSU. She cannot be held liable for relying on Dr. Suliene's medical judgment. *See id*. at 595 (prison officials "entitled to relegate to the prison's medical staff the provision of good medical care" and "no prisoner is entitled to insist that one employee do another's job"). Even assuming that Tenebrusco failed to respond to Soto's final request for arch supports, that isolated incident would not amount to more than negligence on Tenebrusco's part. *See Gutierrez*,111 F.3d at 1375 (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992)) ("A finding that a defendant's neglect of a prisoner's condition was an 'isolated occurrence,' . . . or an 'isolated exception' . . . to the defendant's overall treatment of the prisoner ordinarily militates against a finding of deliberate indifference.").

Soto argues that Tenebrusco personally involved herself in his medical care when she told Morgan that Soto did not have a medical need for arch supports and that Soto did not have to walk around too much because he was in segregation. Soto alleges that this occurred in March 2011, but that fact is disputed. Drawing all inferences in Soto's favor, even if Tenebrusco made these statements at this time, she was relaying Dr. Suliene's medical conclusions to Morgan. Assuming Soto's timeline is correct, this conversation took place around the time that Dr.

Suliene had responded to Soto about ordering arch supports and Soto saw Dr. Springs. Without any further evidence that Tenebrusco ever was in a position to be personally responsible for Soto's medical care, or actually reached her own independent medical conclusion with respect to Soto's conclusion, or even regularly provided direct patient care to inmates, she cannot be held liable for failing to treat Soto. Accordingly, Tenebrusco is entitled to summary judgment.

C. Steve Helgerson

Defendant Helgerson had three interactions with Soto related to his foot complaints. On April 16, 2011, Soto wrote to HSU claiming that he had a restriction for special shoes. In response, Helgerson told Soto that he could review his medical records and asked Soto whether he wanted a nursing assessment. On May 6, 2011, Soto submitted an HSR claiming that Tenebrusco had informed him that arch supports would be issued. Helgerson responded, noting that there was no such order. On May 21, 2011, Soto submitted and HSR stating that his feet were painful. Helgerson responded that he was sorry and informed him that somebody would try and see him on May 23, 2011.

Soto does not dispute that Helgerson responded to his HSRs in the above manner but claims that Helgerson falsely informed him that he had no medical restriction and made no attempt to schedule the May 23 appointment. In support of his accusations, Soto asserts that Helgerson has a history of distorting and fabricating reports, pointing to a 2007 progress note in which Helgerson stated that Soto refused an examination but then noted in the same sentence, "after thorough exam . . ."

I agree with defendants that it is unreasonable to conclude from one errant progress note that Helgerson has a history of lying, let alone that Helgerson lied to Soto. Further, it is

undisputed that on May 5, 2011, Tenebrusco told Soto that if shoes or arch supports were prescribed, then Soto could request that HSU issue them or order them from the canteen as allowed by security. As Helgerson reported, Tenebrusco never stated that HSU definitely would issue the arch supports, only that Soto could ask for them. Although it does not appear that Helgerson could arrange for Soto to be seen on May 23, that one failure to act cannot be seen as deliberate indifference, especially given the facts that Helgerson was otherwise responsive and Soto had seen Dr. Suliene the month before and again in July. *See Gutierrez*,111 F.3d at 1375. At most, Helgerson might be deemed to have acted negligently. This is not enough to establish an Eighth Amendment violation. Accordingly, defendant Helgerson is entitled to summary judgment on Soto's claim against him.

D. Kim Campbell

Soto's only complaint against defendant Campbell is that in response to Soto's May 3, 2011 HSRs about being in pain and needing arch supports, she failed to schedule him an appointment and simply wrote that HSU does not provide arch supports and told Soto to order them when he was released from segregation. However, Campbell responded promptly and correctly informed Soto of CCI's policy, which generally required inmates to purchase their own arch supports. To the extent that Campbell breached any duty to schedule an appointment for Soto, there is nothing in the record to suggest that this error was intentional or deliberate. In fact, her response was consistent with Dr. Suliene's medical restriction issued on April 11, 2011, allowing Soto to purchase arch supports from the canteen as needed. As with Helgerson, Campbell at most could be deemed to have acted negligently, and her one-time failure to schedule a physician appointment when Soto had been seen recently by Dr. Suliene) does not

amount to deliberate indifference. As a result, Campbell is entitled to summary judgment on the claim against her.

E. Janel Nickel

Soto alleges that defendant Nickel knew that Morgan was denying him arch supports as early as April 11, 2011 but failed to step in to correct the problem as Morgan's supervisor. Generally speaking, a defendant may not be held liable simply because she supervised others who violated a plaintiff's rights. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Burks*, 555 F.3d at 593-94 ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.").

Soto provides only two examples of specific actions that Nickel took in denying him arch supports. First, Soto submitted a May 15, 2011 interview and information request to Nickel, asking her to approve arch supports for him in segregation. Nickel responded on May 16, 2011 that Morgan already had addressed his concerns. Although Nickel personally responded to the request, her response makes clear that she had delegated the responsibility for dealing with Soto's requests to Morgan and was deferring to his judgment. Even if Morgan acted unconstitutionally in denying Soto's requests, Nickel cannot be held liable for his actions merely because she supervised him.

Second, Soto alleges that his family members contacted Nickel by telephone to request that she allow them to purchase and send Soto his arch supports because he was in pain and had bruised feet. According to the family members, Nickel told them no and that Soto would have to deal with it until he was released from segregation in two to five years. Even accepting these statements as true for the purposes of summary judgment, such statements do not in themselves

show that Nickel prevented Soto from ordering arch supports from the canteen or a catalogue, as Dr. Suliene had instructed him to do. At most, Nickel denied Soto's family the opportunity to purchase the arch supports for him.

Accordingly, given the lack of evidence of Nickel's direct involvement in denying Soto arch supports, she is entitled to summary judgment.

F. Travis Haag

Soto alleges that on May 20, 2011, defendant Haag refused to contact HSU regarding his complaint that his feet were in pain and told Soto that "I'm not dealing with this shit." Defendants dispute both allegations, contending that this never happened.

It is undisputed that inmates may ask to see HSU staff by submitting an HSR. If the inmate feels he needs to be seen right away, then he may be allowed to go to "sick call," which means that a nurse determines whether the inmate should be seen by a doctor. It is unclear whether Soto was asking Haag for permission to go to sick call but there is no indication in the record that Soto was experiencing an emergency situation that required immediate attention. His foot pain was ongoing and long-standing. Further, the undisputed facts show that Soto was able to contact HSU the very next day, meaning that Haag did not block Soto's access to medical care in any significant or meaningful way. Because a reasonable jury could not find that Haag acted with deliberate indifference to Soto's medical needs, he is entitled to summary judgment on this particular claim.

The parties also dispute whether Haag refused to provide Soto with new shoes in segregation, despite Soto's repeated requests due to the soles separating from the tops of the shoes he had. Defendants concede that, given the factual dispute between the parties, we may

need a jury to determine whether Haag actually refused to issue Soto new shoes at Soto's request. I agree. There is no evidence that Haag actually knew that Soto's fallen arches constituted a serious medical need, or that issuing him a new pair of segregation shoes would address that particular need. However, there is at least an issue of fact as to whether Haag knew that Soto had a functioning pair of shoes, something that a reasonable jury could find denied him the "minimal civilized measure of life's necessities," *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), or created a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (prison officials "must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates"). Therefore, Haag is not entitled to summary judgment on Soto's claim that Haag denied Soto a new pair of segregation shoes.

G. Donald Morgan

Defendants also concede that there are genuine issues of material fact with respect to Soto's deliberate indifference claim against Morgan. The parties agree that defendant Morgan became aware of Soto's foot problems by March 2011 when he started discussing the matter with Soto. In March and April 2011, Dr. Suliene provided Soto with medical restrictions for arch supports, which she said should be purchased through the canteen or catalogue. However, Morgan denied Soto's requests to purchase arch supports in May 2011, citing DOC policy, even though there was no written policy preventing Soto from having arch supports in segregation. If Soto's foot condition constituted a serious medical need—an issue that is disputed in this case—then it is possible that a reasonable jury could find that Morgan acted with deliberate

indifference to that need when he ignored Dr. Suliene's orders and declined to allow Soto to have arch supports in segregation.

Further complicating matters are the disputed facts surrounding events that allegedly occurred in June 2011. Dr. Suliene avers that on June 3, 2011, she wrote an order specifically stating that an exception should be made for Soto to allow him to have shoe inserts while in segregation. Morgan claims that after discussing the matter with Dr. Suliene, he issued a memorandum dated June 3, 2011, specifically allowing Soto to purchase arch supports from a property catalogue while in segregation. Soto avers that he never received such a memorandum and, therefore, never ordered the arch supports. As defendants point out, if Morgan did deliver the memo to Soto, then Soto could not make a credible argument that he had a serious medical need because Soto failed to order arch supports after being authorized to do so. On the other hand, if Soto never received a memorandum from Morgan, then a reasonable jury could infer that no such memo was written and that Morgan disregarded Suliene's medical orders in March, April and June 2011, with deliberate indifference to Soto's serious medical need. (As indicated above, if Soto did not have a serious medical need, then even Morgan's intentional refusal to allow Soto arch supports in segregation would not rise to the level of a violation of Soto's constitutional rights under the Eighth Amendment). Accordingly, defendant Morgan is not entitled to summary judgment on the claim that he denied Soto arch supports in segregation between March and September 2011.

ORDER

IT IS ORDERED that:

(1) Plaintiff Jose Soto's motion for leave to file a second amended complaint (dkt. 117) and motion for summary judgment (dkt. 54) are DENIED.

(2) Defendants' motion for summary judgment (dkt. 33) is DENIED with respect to these claims by plaintiff:

(A) Defendant Donald Morgan acted with deliberate indifference to Soto's serious medical need in denying him arch supports in segregation between March and September 2011; and

(B) Defendant Travis Haag denied Soto's repeated requests for new shoes in segregation.

(3) Defendants' motion for summary judgment (dkt. 33) is GRANTED in all other respects. The clerk of court is directed to enter judgment in favor of defendants Dalia Suliene, Lillian Tenebrusco, Janel Nickel, Steve Helgerson and Nurse Kim Campbell and dismiss them from this case.

(4) The following dates are available on the court's calendar to try this case:

May 13, 2013	July 1, 2013
May 28, 2013 (Tuesday)	July 8, 2013
June 24, 2013	July 22, 2013

Not later than February 21, 2013, the parties are to notify the court as to their availability and any preferences among these dates.

Entered this 7th day of February, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge