**NONPRECEDENTIAL DISPOSITION**
To be cited only in accordance with FED. R. APP. P. 32.1

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Submitted March 22, 2024*
Decided March 26, 2024

**Before**

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-2571

DAVID C. LEE WALTON,
*Plaintiff-Appellant*,

*v*.

VIRGINIA TRZEBIATOWSKI,
*Defendant-Appellee*.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 22-C-479

William C. Griesbach,
*Judge*.

**O R D E R**

David Walton, a Wisconsin prisoner, appeals the summary judgment in favor of a nurse who he alleges ignored his pain and delayed a neurology appointment in

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

violation of his Eighth Amendment rights. *See* 42 U.S.C. § 1983. In entering summary judgment, the district court reasoned that the nurse did not work at the prison during most of the relevant time, and for the time she was employed, a jury could not find that she ignored his condition. Because the court correctly concluded that no reasonable jury could find that the nurse was deliberately indifferent to Walton, we affirm.

We recite the facts in the light most favorable to Walton, the non-moving party. *See Arce v. Wexford Health Sources, Inc.*, 75 F.4th 673, 678 (7th Cir. 2023). Walton has occipital neuralgia, a neurological condition that causes throbbing pain in his head. In August 2021, a neurologist prescribed carbamazepine for the condition and suggested that they meet again in three months to discuss possibly adjusting the dosage. Walton transferred to Green Bay Correctional Institution in October 2021, and a week later he saw Virginia Trzebiatowski, a nurse, who reviewed his medical history and continued his prescription for carbamazepine.

Trzebiatowski was a semi-retired worker. She worked under term contracts with the prison. As part of her contract, she left her work with Green Bay in late December, the month after she saw Walton. She did not return until mid-April of the next year.

Walter wrote to the health unit several times. Shortly before Trzebiatowski's term ended in December, Walton asked (without directing his inquiry to any named person) whether the unit had scheduled a follow-up meeting with the neurologist, and he added that his head was in pain. Dissatisfied with the responses, which came from nurses other than Trzebiatowski, he repeated his requests and complaints in the months after Trzebiatowski left. A nurse replied that his advanced care provider would need to see him before referring him to a specialist and that scheduling constraints could delay a meeting with that provider. Walton asked who his provider was, and he was told, while Trzebiatowski was still out, that it was Trzebiatowski.

On the day that Trzebiatowski returned to the prison, Walton sued her. He alleged that, from the time she first saw him at Green Bay until he filed his suit, she had violated his Eighth Amendment rights by deliberately ignoring his complaints of pain and requests for a follow-up neurology appointment. Trzebiatowski moved for summary judgment. Because she filed her motion more than two months after the court's deadline for dispositive motions, her counsel also asked for leave to file it late, explaining that staff turnover had led to an inadvertent failure to note the filing deadline. Walton opposed the request for leave but did not assert any prejudice.

The court ruled on both requests. First it found that, by moving for summary judgment "as soon as possible" and causing no prejudice, Trzebiatowski's counsel had excusable neglect for the delay. *See* FED. R. CIV. P. 6(b); 16(b)(4). The court also granted the motion for summary judgment, explaining why no reasonable jury could find that Trzebiatowski had recklessly ignored Walton's condition: When she first met with Walton, she continued the neurologist's prescription for Walton's neuralgia, and no evidence showed that she saw Walton's written complaints about pain.

Walton's brief on appeal is deficient. It is almost an exact copy of his brief opposing summary judgment; thus it does not engage with the district court's decision and violates Rule 28(a)(8) of the Federal Rules of Appellate Procedure, with which even a pro se appellant must comply. *See Anderson v. Hardman*, 241 F.3d 544, 545–46 (7th Cir. 2001); FED. R. APP. P. 28(a)(8). We could dismiss his appeal for that reason, but we prefer to decide a case on the merits if we can. *See Boutros v. Avis Rent a Car Sys., LLC*, 802 F.3d 918, 924 (7th Cir. 2015). We can do so here.

We first address Walton's objection to the district court's extension of time for Trzebiatowski to move for summary judgment. Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure authorizes a court to extend any deadline "if the party failed to act because of excusable neglect." Courts have "wide latitude," *Nartey v. Franciscan Health Hosp.*, 2 F.4th 1020, 1024 (7th Cir. 2021), to assess excusable neglect, which we review for abuse of discretion, *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012). The relevant factors are the extent of, the reason for, and any prejudice from a delay, as well as the movant's good faith. *Id.* at 425–26. Here, the court was well within its discretion to find that, because counsel filed the motion "as soon as possible" and caused no prejudice through a modest delay attributable to inadvertence, the neglect in meeting the original deadline was excusable. The ruling is thus sound.

That brings us to the adverse summary judgment, which we review de novo, construing all facts in favor of Walton, the non-movant. *Arce*, 75 F.4th at 678. We agree with the district court that no reasonable jury could find that Trzebiatowski violated Walton's Eighth Amendment rights. To stave off summary judgment, Walton had to cite evidence that Trzebiatowski knew of and deliberately disregarded Walton's serious medical condition. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Stockton v. Milwaukee Cnty.*, 44 F.4th 605, 615 (7th Cir. 2022). This standard "mirrors the recklessness standard of the criminal law." *Brown v. LaVoie*, 90 F.4th 1206, 1212 (7th Cir. 2024). Walton cites no such evidence, and the record indicates the opposite. When Trzebiatowski first met Walton in November 2021, she immediately reviewed his medical history and

reasonably continued his prescription for relieving pain from his occipital neuralgia. Walton insists that she ignored the complaints of pain that he later sent to the health unit. But no evidence suggests that Trzebiatowski saw these before she stopped working at the prison a month later. The complaints that he submitted to the unit before her term ended in December were sent just before she left, were not addressed to her personally, and were answered by other nurses.

We recognize that, when Trzebiatowski was not at the prison, Walton continued to ask the health unit to schedule a neurology appointment to address his pain, and a nurse replied that Trzebiatowski was the provider he had to see to get an appointment with a specialist. But these facts cannot render Trzebiatowski culpable. Under § 1983, defendants may be liable only for conduct in which they are personally involved. *Stockton*, 44 F.4th at 619. No evidence suggests that during her absence Trzebiatowski had the authority to schedule Walton with a specialist. Further, Walton has not sued whoever told him that he needed to rely on an absent Trzebiatowski, and Trzebiatowski cannot be liable for tasks assigned to others during her absence. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009); *see also Hunter v. Mueske*, 73 F.4th 561, 566 (7th Cir. 2023).

AFFIRMED