NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 17, 2024*
Decided September 3, 2024

Before

THOMAS L. KIRSCH II, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2700

DIONTE NOWELS,
Plaintiff-Appellant,

v.

LINDA SCHNEIDER and MARY A. MOORE,
Defendants-Appellees.

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

No. 21-CV-89

Stephen C. Dries,
Magistrate Judge.

O R D E R

Dionte Nowels, a Wisconsin prisoner, was provided with what the prison characterized as a "medical restriction" to first-floor cells after a surgery left him on crutches. A correctional sergeant, Linda Schneider, ignored that restriction and placed Nowels in a second-floor cell. Later, when Nowels had to navigate those stairs while

* 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).

still recovering on his crutches, he tripped, fell down the stairs, and injured himself. He sued Schneider for deliberately disregarding his medical needs in violation of his Eighth Amendment rights. He also sued a nurse, Mary Moore, for deliberate indifference to the care he needed after his fall. *See* 42 U.S.C. § 1983. The district court entered summary judgment for Moore, but it ruled that the case against Schneider must go to trial. Shortly before trial, Schneider moved to dismiss the case for lack of prosecution after Nowels's lawyer abandoned the case. The district court ruled that Nowels was not personally at fault, but it would reassess the record against Schneider. Without providing Nowels an opportunity to respond to Schneider's motion to dismiss or its plan to reassess the record, the district court decided that the case did not warrant a trial after all and granted Schneider's motion to dismiss. We affirm summary judgment in favor of Moore because no evidence suggests that she ignored Nowels. But we vacate and remand the dismissal of the claim against Schneider.

Nowels had surgery for a tear in his knee ligament (his ACL) in June of 2019. Afterward, he participated in physical therapy and exercises for ten weeks. During this time and beyond, he had to use a knee brace and crutches, and a nurse restricted him to a "no stairs" cell on the first floor. Two months after the surgery, while still in a knee brace, on crutches, and restricted to "no stairs," Schneider required that Nowels climb stairs to a new cell assignment on the second floor. She did so despite knowing about the "no stairs" restriction and Nowels's protest that he did not feel safe climbing stairs to a higher floor. A few days after his assignment to the second-floor cell, Nowels fell down the stairs, injuring his head, neck, back, and knee. His surgeon then saw him remotely through telemedicine and thought that his knee seemed fine but needed to reevaluate him in a month.

From that point, Moore oversaw the treatment for Nowels's pain in his back, and knee. When Nowels complained of increasing pain and that his medicine was ineffective, Moore increased his dosages, added new medications, prescribed physical therapy, and ordered x-rays and a CT scan for his head. She also ordered an MRI on his spine, but about a month after the fall, she worried that Nowels was overstating his symptoms and cancelled both the MRI and a referral to his surgeon for a reevaluation. Later, though, she rescheduled the MRI. It showed multiple bulging discs and nerve effacement. She also set an appointment with the surgeon when she noticed fluid accumulating in Nowels's knee, which resulted from a new tear in his ACL. He eventually received another surgery to repair it.

This suit came next. In it, Nowels contends that Schneider violated his Eighth Amendment rights by deliberately ignoring the serious risk to his safety when she put him on the second floor despite knowing of the "no stairs" restriction. And Moore, he argues, deliberately ignored his pain by continuing treatment that she knew was ineffective and delaying the MRI and follow-up appointments with his surgeon.

The defendants moved for summary judgment, and the district court granted the motion for Moore only. It reasoned that Moore responded reasonably to Nowels's pain, and no evidence suggested that any delays worsened the condition of his knee. (It did not assess Nowels's supplemental state-law claim against Moore for malpractice. After summary judgment is granted, a district court typically relinquishes jurisdiction over state claims, *see Dietchweiler by Dietchweiler v. Lucas*, 827 F.3d 622, 631 (7th Cir. 2016), and Nowels says nothing on appeal about that claim, so we say nothing as well.)

Based on the "no stairs" restriction in place when Schneider made Nowels use the stairs, the district court initially ruled that Nowels presented a triable Eighth Amendment claim against Schneider. But as the trial date approached, Nowels's lawyer abandoned the case without notifying Nowels or the court, leading Schneider to move to dismiss the case for lack of prosecution. Then, without allowing Nowels to appear pro se or to respond to the motion to dismiss, the court granted Schneider's motion. Here is a timeline of events:

- March 1, 2022: The defendants move for summary judgment and file their briefs, proposed findings of fact, and evidence.
- June 7, 2022: Nowels, by his lawyer, files a response to the defendants' motion for summary judgment.
- December 1, 2022: The district court enters summary judgment for Moore but requires a trial for Schneider on Nowels's Eighth Amendment claim.
- December 7, 2022: The district court holds a status conference to discuss trial dates. Nowels's lawyer fails to attend and, subsequently, files nothing in preparation for trial.
- April 5, 2023: Nowels writes to the district court, stating that his lawyer has not been in touch with him and requesting a copy of the docket and the court's summary judgment order.
- July 5, 2023: Schneider moves to dismiss for failure to prosecute.
- July 6, 2023: Final pretrial conference. Nowels's lawyer does not attend. The district court concludes that Nowels's lawyer, but not Nowels personally, has abandoned the case and cancels the trial date.

- July 7, 2023: Nowels moves to proceed pro se and for another trial date. He explains that, for two reasons, he was unaware that his lawyer had failed to prosecute his case. First, he did not have free electronic access to the content of court's docket entries; he could see only the titles of the entries. And second, because he was represented by counsel, the court was not mailing the defendant's legal submissions to him. He learned of his lawyer's delinquency only when he was able to see the title "Motion to Dismiss" on the docket and was able to infer from the title of the filing that it was the defendant's submission.
- July 31, 2023: The district court denies Nowel's motion to proceed pro se and grants Schneider's motion to dismiss.

The district court's decision to deny Nowels's motion to proceed pro se and to grant Schneider's motion to dismiss has three features relevant to this appeal. First, when the court entered it on July 31, Nowels was still nominally represented by his absent counsel. Thus he could not personally respond to the motion to dismiss.

Second, Nowels moved to respond pro se on July 7, just two days after learning of his lawyer's abandonment and Schneider's motion to dismiss. But the court left his request unanswered until it decided to dismiss the case and deny his request. And it did so without affording him a chance to be heard on the motion to dismiss.

Third, in its order dismissing the case, the court blended two approaches, one for a motion to dismiss for failure to prosecute and one for summary judgment. The court began by identifying the factors used in connection with a motion to dismiss for failure to prosecute. These are the frequency and magnitude of the plaintiff's failure to comply with deadlines, the balance of responsibility between plaintiff and counsel, the effect of delays on the court's calendar, prejudice to the defendant, the merits of the case, and the effect of dismissal on the social objectives of the litigation. *See McMahan v. Deutsche Bank AG*, 892 F.3d 926, 931–32 (7th Cir. 2018). In its analysis of these factors, the court acknowledged that Nowels was not to blame for his lawyer's failure to prosecute, but that further delays would disrupt the court's calendar and require Schneider to reschedule her witnesses. With these considerations tied, the district court decided that "the merits of the case" was the dispositive factor. To assess this decisive factor, the court decided to reevaluate Schneider's earlier motion for summary judgment. Without input from Nowels, it decided that the expert testimony from Schneider showed that Nowels did not need a stair restriction and that the court should have entered summary judgment after all: "I now conclude that summary judgement should have been granted

in the defendant's favor and that dismissal for failure to prosecute is an appropriate sanction due to the weakness of the case and the inability to reschedule the case for trial without substantial prejudice to the defendant and her witnesses." The court did not discuss whether, as it had previously ruled, the "no stairs" restriction in Nowels's medical record created a genuine dispute of fact concerning whether Nowels needed a stair restriction.

On appeal Nowels first contests the summary judgment in favor of Moore. We review grants of summary judgment de novo. *Arce v. Wexford Health Sources Inc.*, 75 F.4th 673, 678 (7th Cir. 2023). Under the Eighth Amendment, Moore is entitled to summary judgment unless Nowels furnished evidence that could persuade a reasonable jury that Nowels had an objectively serious medical condition and that Moore knew of and deliberately ignored a substantial risk of harm. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Jones v. Matthews*, 2 F.4th 607, 612 (7th Cir. 2021). This standard "mirrors the recklessness standard of the criminal law." *Brown v. LaVoie*, 90 F.4th 1206, 1212 (7th Cir. 2024). Nowels maintains that Moore deliberately ignored his medical condition by continuing with medical treatment that Moore knew was ineffective and delaying the MRI and follow-up session with his surgeon. In an Eighth Amendment claim based on delayed treatment, summary judgment is warranted if the plaintiff has no evidence that the delay exacerbated an injury or prolonged pain. *Stockton v. Milwaukee Cnty.*, 44 F.4th 605, 615 (7th Cir. 2022).

We agree with the district court that Nowels has not presented a triable case against Moore. When Nowels told Moore that his pain medicine was not relieving his pain, she responded with alternatives. She boosted his dosage, prescribed different medicine, and ordered x-rays, CT scans, and physical therapy. And Moore testified without contradiction that the painkillers and the physical therapy are the standard treatments for his pain condition. Further, no evidence suggests that Moore harmfully delayed the MRI or appointment with Nowels's surgeon. True, the MRI showed that he had bulging discs and nerve degeneration. But no medical evidence in the record suggests that receiving the MRI or seeing the orthopedic specialist sooner would have abated his pain faster.

That brings us to Nowels's challenge to the dismissal of his claim against Schneider, which had previously survived summary judgment, for lack of prosecution after Nowels's lawyer abandoned the case shortly before trial. We review for abuse of discretion dismissals for lack of prosecution. *McMahan*, 892 F.3d at 931.

In deciding to dismiss the case, the district court blindsided Nowels and abused its discretion in two ways, to Nowels's prejudice. First, the court abused its discretion by entertaining the motion to dismiss for lack of prosecution even though the court knew by the time it ruled on the motion to dismiss that Schneider had not served the motion on Nowels, only his lawyer, yet that lawyer had abandoned the case. We explained in *McMahan* that one purpose of serving a motion to dismiss on a plaintiff is to give the plaintiff notice of a possible dismissal and an opportunity to respond to the motion. *Id.* Further, because a plaintiff may be able to correct his lawyer's delinquency, we have expressly recommended (though not required) that district judges themselves warn unsophisticated clients of an impending dismissal. *Ball v. City of Chicago*, 2 F.3d 752, 756 (1993). Here, not only did Nowels not receive the motion to dismiss from Schneider, or a warning from the court of a possible dismissal, the court also never gave Nowels an opportunity to respond to that motion. For, it is undisputed, his lawyer had abandoned the case and the court barred Nowels himself from responding to the motion to dismiss when it rejected his motion to proceed pro se.

Second, the district court compounded the first problem when, in assessing the "probable merits" of the case, it sua sponte reconsidered the summary judgment victory Nowels had earlier achieved (though, to be clear, the court did not formally reopen the summary judgment proceedings). Although Nowels had received notice and a chance to respond when *Schneider* had earlier moved for summary judgment—a motion the court denied—Nowels did not receive that opportunity when *the court* sua sponte reconsidered that decision. Nowels was endeavoring to stay engaged with his case by writing the court and asking to proceed pro se. He should not have had his case dismissed for lack of merit abruptly and without warning to him.

In short, the district court's failure to provide Nowels with a reasonable opportunity to respond to Schneider's motion to dismiss, after his lawyer had abandoned the case through no fault of Nowels, was an abuse of discretion and prejudicial to Nowels. We thus VACATE and REMAND for further proceedings on Nowels's Eighth Amendment claim against Schneider; we otherwise AFFIRM.

KIRSCH, *Circuit Judge*, concurring in part and dissenting in part. I agree that summary judgment was properly granted in favor of Nurse Mary Moore. However, the majority errs in vacating the dismissal of Nowels's deliberate indifference claim against Linda Schneider. The district court acted well within its discretion when it concluded that the factors weighed in favor of dismissing Nowels's claim due to a failure to prosecute. In particular, the court properly determined that Nowels's claim lacked probable merit, in large part because Nowels had no evidence showing that his stairs restriction was medically necessary. The majority sends this case back to the district court to afford Nowels the opportunity to respond to the motion to dismiss. This is a waste of judicial resources. The record is already fully developed, and Nowels had his opportunity on appeal to inform us of how he would have responded had he been given the opportunity. But Nowels has nothing new to add to this case to show that his claim has merit—it does not. The law certainly does not require us to go down this inefficient path, and I see no need for it. Because I would affirm the dismissal of Nowels's claim against Schneider, I respectfully dissent.

As the majority correctly notes, we review a district court's dismissal for a failure to prosecute under Federal Rule of Civil Procedure 41(b) for an abuse of discretion. *McMahan v. Deutsche Bank AC*, 892 F.3d 926, 931 (7th Cir. 2018). And in determining whether to dismiss a case under Rule 41(b), district courts consider the following factors: (1) the frequency and magnitude of the plaintiff's failure to comply with court deadlines; (2) the apportionment of responsibility between the plaintiff and his counsel; (3) the effect of those failures on the court's calendar; (4) the prejudice to the defendant caused by the plaintiff's delays; (5) the probable merits of the suit; and (6) the consequences of dismissal for social objectives. *Id.* at 931–32.

The district court adequately considered these factors in its decision, focusing specifically on the apportionment of responsibility, the prejudice to the defendant, and the probable merits of the suit. The court acknowledged that the failure to prosecute was not Nowels's fault but noted the undue burden and cost that would be imposed on Schneider and her witnesses if the case remained. The court then turned to the probable merits factor. R. 76 at 4 ("The unfortunate situation described above has caused me to take a second look at the merits of the case to determine whether the case warrants salvaging and rescheduling."). The court did not, as the majority suggests, reassess summary judgment. Rather, the court recalled its denial of Schneider's motion for summary judgment but then reconsidered Nowels's likelihood of success "[s]hould he go to trial …." *Id.* at 5. The court walked through the mountain of evidence standing against Nowels, such as the expert testimony of his treating physician and physical

therapist, and compared it to the sparse evidence supporting his claim. Ultimately, because Nowels could only rely on his own testimony to convince a jury that his stairs restriction was medically necessary, the court correctly concluded that Nowels's case against Schneider was "subject to [] serious and ultimately fatal weaknesses." *Id.* at 6. Accordingly, the court dismissed the case.

The majority ignores the lack of merit to Nowels's case, choosing instead to focus on Nowels's lack of notice and hinging its conclusion that the district court abused its discretion on Nowels's inability to respond to Schneider's motion to dismiss. No doubt, the procedural circumstances of this case are unfortunate. Nowels's attorney abandoned him, and the district court denied Nowels's motion to proceed pro se. On a different record, reversal may have been warranted to allow Nowels the chance "to correct his lawyer's delinquency." *Ante*, at 6. But we have consistently held that the failure of a district court to afford a party notice and a reasonable opportunity to respond does not mandate reversal. See *Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 936 (7th Cir. 1996) ("[R]eversal is not required in every instance of procedural shortfall. Instead, a litigant … must show that notice and an opportunity to respond would have mattered.").

For instance, consider the analogous context where a district court sua sponte converts a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) to a motion for summary judgment under Federal Rule of Civil Procedure 56 without allowing the nonmovant the opportunity to supplement the evidentiary record. In those cases, we have concluded that the parties "should" be afforded prior notice and a reasonable opportunity to respond but that the failure to do so "will not necessarily mandate reversal unless 'the record discloses the existence of unresolved material fact issues,' or 'the parties represent that they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity.'" *Woods v. City of Chicago*, 234 F.3d 979, 992 (7th Cir. 2000) (quotation omitted). This practice is consistent with the basic principle that the party claiming error bears the burden of showing that prejudice resulted from that error. See *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); cf. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001) (noting that parties are usually freely granted leave to amend their complaints but affirming denial of leave to amend because any amendment would have been futile). Simply put, Nowels bears the burden of showing that the district court might have reached a different conclusion had he been allowed to respond to Schneider's motion to dismiss.

Nowels cannot meet his burden. Simply, there is nothing left for Nowels to add that would have aided the district court in its decision. Indeed, Nowels did not lose any opportunity to supplement the record because the record was already fully developed—the case had proceeded past summary judgment, and the parties were preparing for trial. More importantly, if Nowels did have anything new to add, this appeal was his opportunity to present it and explain how he would have persuaded the district court to refrain from dismissing his case. But Nowels's appellate brief simply regurgitates the evidence already in the record, which the district court properly considered. Nowels fails to show that his case has any merit, and allowing him to file a response will not change that inescapable fact. Further, even accepting the majority's position that the district court effectively reassessed summary judgment rather than the probable merits of the suit, that purported assessment would be correct—Nowels's case against Schneider should never have survived summary judgment in the first place, and Nowels's lack of any evidence in support of his claim mandates affirming its dismissal.

A framing of Nowels's case is helpful on this point. No one disputes that Nowels's torn ACL, including his recovery from the associated surgical repair, is an objectively serious medical condition. Similarly, the parties agree that Nowels had limited mobility. But that is not our inquiry. Nowels sued Schneider for forcing him to take the stairs. Thus, in assessing summary judgment, we only ask whether any reasonable jury could conclude, based on the evidence in the record, that Nowels had an objectively serious medical need to avoid the stairs based on his limited mobility. On this record, no reasonable jury could come to that conclusion.

It is beyond dispute that Nowels had no need to avoid the stairs. First, consider the ample expert testimony in support of this conclusion: testimony from (1) Nowels's treating physician, Dr. Eric Nelson; and (2) Nowels's physical therapist, Edward Rothbauer. Dr. Nelson testified, "In Mr. Nowel's [sic] case, I placed standard discharge instructions and recommendations for his plan of care post-surgery …." R. 55 at 2. Dr. Nelson then stated that an instruction to "avoid all stairs postop is not the standard of care for recovery and rehabilitation" after ACL surgery. *Id.* Even more on point, Dr. Nelson testified, "Restricting a patient from using stairs is not part of [the] standard discharge instructions" that he had issued to Nowels. Nowels's physical therapist, Rothbauer, corroborated Dr. Nelson, and he too specifically discussed Nowels's treatment. Setting aside that Nowels's physical therapy included stair training (which alone belies a need to avoid stairs), Rothbauer expressly testified that Nowels's recovery process was "typical" and that "[t]here would be no reason for Nowels to be unable to use stairs five weeks after his ACL surgery." R. 57 at 3–4. No doubt, then, the expert

testimony from Nowels's own treating physician and physical therapist shows that Nowels had no medical need to avoid the stairs.

Second, the stairs restriction itself does not serve as a medical record that genuinely disputes the expert testimony. Indeed, the district court reconsidered the evidentiary value of the stairs restriction and found "that there was no valid medical basis for a stair restriction in the first place." R. 76 at 4. The district court was correct. Nowels does not have testimony from the nurse who input the restriction, Nurse Brian Taplin, (or any medical professional for that matter) that supports a medical need for it. In fact, the only nurse to testify, Nurse Moore, stated that (1) she did not input a stairs restriction because the surgeon did not recommend one; (2) she defers to the physical therapist for the appropriate course of recovery from ACL surgery; (3) she had "no knowledge" as to why Nurse Taplin input the stairs restriction; (4) there is no note in Nowels's file explaining a need for the restriction; and (5) she received reports that Nowels was walking up and down stairs in his cell hall without crutches. R. 40 at 3–4.

The mere entry of the restriction into a database does not make it a serious medical necessity either, particularly on this record. As Nowels stated in his opening brief and in his declaration, he asked Nurse Moore for the stairs restriction himself because he did not feel safe using them, and she allegedly told him that she would grant the request. His personal request does not transform the restriction into a medical diagnosis. Further, Nowels's own account of how the restriction was put in place shows that he was never prescribed anything related to the use of stairs. Specifically, Nowels testified that Nurse Moore stopped Nurse Taplin as he walked by her office and asked him to enter the restriction because she was "super busy." R. 48 at 2. Thus, Nowels's testimony shows that Nurse Taplin, completely uninvolved in Nowels's medical treatment, entered the restriction on orders from Nurse Moore, who (again, according to Nowels) approved the restriction due to Nowels's request. This alone shows that the only medical evidence supporting Nowels's claim was in fact not based on any medical judgment at all. Moreover, the database where the restriction was input, the Wisconsin Integrated Corrections System, stores all types of information on how to handle specific inmates in the Wisconsin Department of Corrections, not just serious medical information. For instance, while the stairs restriction falls under a column labeled "Medical Need/Restriction," that alone does not create a genuine dispute for a reasonable jury on whether it was an objectively serious medical need, particularly when Nowels's other "medical needs" in that same column included ice and an extra pillow. R. 42-2 at 2–3.

"A serious medical condition is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). In this case, not only is there no diagnosis from a physician that Nowels needed a stairs restriction, Nowels's direct medical providers testified the exact opposite—that his specific condition did not require such a restriction. In light of that evidence, as well as evidence that he was walking up and down stairs without crutches and partaking in therapeutic stair training, no reasonable jury could conclude that it was obvious that Nowels had a serious medical need to avoid the stairs. Nonetheless, the majority imports merit to Nowels's claim based on a single data entry requested by Nowels himself that wholly fails to show why a stairs restriction would be medically necessary for his condition. That is improper. *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *St. Louis N. Joint Venture v. P&L Enters., Inc.*, 116 F.3d 262, 265 n.2 (7th Cir. 1997) ("Although the non-movant is entitled on a motion for summary judgment to have all reasonable inferences drawn in its favor, … the court is not required to draw unreasonable inferences from the evidence.").

Though Nowels was not given an opportunity to respond to Schneider's motion to dismiss, his response would not have added anything to change the outcome of the district court's probable merits (or summary judgment) analysis. The court had a fully developed record before it unequivocally favoring Schneider, and Nowels has not shown what else he would have submitted to aid the court in assessing the merits of his suit. Sending this case back to the district court to allow Nowels to file a response is a waste of time; this case should be over. Accordingly, I would affirm the district court's dismissal of Nowels's claim against Schneider.