**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

JULY 31, 1997

**NOTICE**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**No. 96-2460**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**TALIB AMIN AKBAR,**

**PLAINTIFF-APPELLANT,**

**V.**

**MICHAEL W. DONART, SHERIFF OF BROWN COUNTY, WISCONSIN, LAUREN O'CONNER, BROWN COUNTY SECURITY DETENTION AND HUGH JANSSEN, LIEUTENANT OF B.C.S.D.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Talib Akbar appeals a summary judgment that dismissed his 42 U.S.C. § 1983 lawsuit against the county sheriff and other county officials. His lawsuit sought damages for injuries he allegedly suffered while a

resident of the county jail. Akbar claimed damage from poor ventilation in his cell block, substandard medical care, and delayed mail delivery. On appeal, Akbar makes several arguments: (1) the trial court should have granted him a default judgment, improperly letting county officials file a late answer; (2) the trial court wrongly failed to issue a scheduling order for the trial; (3) the summary judgment denied him his right to a jury trial; and (4) the trial court had insufficient grounds to dismiss Akbar's lawsuit by summary judgment. We reject Akbar's arguments and therefore affirm the trial court's summary judgment.

The trial court correctly granted county officials summary judgment if there was no dispute of material fact and they deserved judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Akbar's complaint had no merit on its face as a § 1983 action, and county officials were therefore entitled to summary judgment as a matter of law. First, to state a valid § 1983 claim, he needed to show that the defendants were carrying out an official municipal policy, *see* ***Bryan County Commrs. v. Brown***, 117 S. Ct. 1382, 1388 (1997), or that they acted with "deliberate indifference" to health or safety, with unnecessary and wanton infliction of pain, or with an otherwise sufficiently culpable state of mind under the Eighth Amendment. *See* ***Farmer v. Brennan***, 511 U.S. 825, 834 (1994). Akbar made no such allegations concerning the ventilation and medical care; his complaint alleged nothing more than common law negligence. Second, jailers have considerable freedom in the processing of prisoners' mail. *See* ***Wolff v. McDonnell***, 418 U.S. 539, 575-77 (1974); ***United States v. Williams***, 951 F.2d 853, 856 (7th Cir. 1992). Akbar alleged nothing that fell outside this necessary mail processing freedom; he based his damage claim on a *de minimus* one-day delay in mail delivery. In short,

Akbar's lawsuit had no substance, and therefore, none of Akbar's claimed procedural violations affected his substantial rights. *See* § 805.18, STATS.

Moreover, Akbar's procedural arguments also have no merit. First, the trial court rightfully extended the time for defendants' answer. Their delay involved clerical error, not bad faith, and it did not unfairly prejudice Akbar. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 468, 326 N.W.2d 727, 735 (1982). The trial court had discretion to find excusable neglect. *See* ***Riggs Marine Serv., Inc. v. McCann***, 160 Wis.2d 846, 850, 467 N.W.2d 155, 157 (Ct. App. 1991). In addition, the trial court could deny a default judgment, regardless of excusable neglect, if Akbar's pleadings were without merit. *See* ***Davis v. City of Elkhorn***, 132 Wis.2d 394, 398-99, 393 N.W.2d 95, 97 (Ct. App. 1986). Akbar's pleadings were meritless. Also, the trial court had no duty to issue a scheduling order for a trial; its summary judgment ruling made such matters moot. *See* ***City of Racine v. J-T Enter. of Amer., Inc.***, 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974). Last, the summary judgment did not violate Akbar's right to a jury trial; unless there is a dispute of material fact, litigants have no right to a jury trial. *See* ***Matter of Shirley J.C.***, 172 Wis.2d 371, 377, 493 N.W.2d 382, 385 (Ct. App. 1992); *see also* ***Poller v. CBS, Inc.***, 368 U.S. 464, 467 (1967). In short, we have no basis to overturn the trial court's summary judgment.

*By the Court*.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.