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

XAVIER HARDIN,

Plaintiff,

v.

WILLIAM McCREEDY, RICK HAEN, STEVE SCHUELER, KELLY SALINAS, LT. BERG, JAMES LABELLE, WELCOME ROSE and ISMAEL OZANNE,

Defendants.

OPINION AND ORDER

10-cv-22-slc

In this prisoner civil rights suit under 42 U.S.C. § 1983, plaintiff Xavier Hardin contends that defendants violated the Eighth Amendment by failing to protect him from injuring himself on a metal cabinet clasp in his cell when he had a seizure. He also seeks to bring state negligence claims against defendants for the same conduct. Before the court are the parties' cross motions for summary judgment (dkts. 22 and 33); Hardin's motion to dismiss defendants Kelly Salinas, James Greer, James LaBelle, Welcome Rose and Ismael Ozanne voluntarily (dkt. 34 at 12); and Hardin's motion for an extension of time to file a reply brief and amend his complaint (dkt. 42).

Hardin filed his motion for summary judgment on November 29, 2010. Defendants' response was due on December 29 and Hardin's reply was due on January 10, 2011. Defendants filed their response brief on December 16, 2010. Dkt. 40. In a motion dated January 18, 2011 but filed on January 24, Hardin requested an extension of his January 10 deadline and permission to amend his complain to correct a pleading deficiency with respect to his notice of claim. Hardin states that he did not received defendants' opposition brief before January 10 because he had been placed on a probation hold in the Kenosha County jail on December 25, 2010 and the inmate assisting him was not able to send him a copy in time. I am

denying Hardin's request for an extension. Hardin fails to explain why he did not receive his copy of defendants' brief, which was mailed to him on December 16, *before* he was incarcerated on December 25. Further, Hardin did not attempt to contact the court about his situation until January 18, 2011, several weeks after he was supposed to have received defendants' response and over a week after his own reply was due. Although Hardin may not have received the response brief until January 10, he knew it was due by December 29, 2010.

Hardin's request to amend his complaint to plead compliance with Wisconsin's notice of claim statute, Wis. Stat. § 893.82(3), is denied as moot. As discussed below, because Hardin submitted a copy of his notice of claim, I was able to address defendants' concerns about its sufficiency.

I am granting Hardin's request to dismiss defendants Salinas, LaBelle, Rose and Ozanne. The court already had dismissed Hardin's claims against defendant Greer for failure to state a claim. *See Screening Ord.,*, dkt. 5.

With respect to the summary judgment motions, I find that Hardin has failed to adduce sufficient evidence from which a reasonable jury could find that defendants acted with deliberate indifference to a substantial risk of serious harm. Therefore, defendants' motion for summary judgment will be granted and Hardin's motion for summary judgment will be denied with respect to the federal claims and all of the state law negligence claims, except those against defendant Lt. Berg. I find that Hardin failed to provide an adequate notice of his state claims against defendants Steve Schueler, William McCreedy and Rick Haen. Because the statute is jurisdictional, this court does not have the authority to decide those claims and must dismiss them. I decline to exercise supplemental jurisdiction over Hardin's remaining negligence claim

against Berg under 28 U.S.C. § 1367 because the disposition of that claim is not clear from the court record. The claim will be dismissed without prejudice to Hardin refiling it in state court.

I find the following facts proposed by the parties to be material and undisputed:[1]

FACTS

Plaintiff Xavier Hardin has been incarcerated at Kettle Moraine Correctional Institution (KMCI) since March 24, 2009.

The defendants all were employed by the Wisconsin Department of Corrections (DOC) at KMCI during the incidents in question. Defendant Grant Berg is a lieutenant who supervises correctional officers and correctional sergeants, arranges work schedules, makes rounds, responds to emergencies and ensures that staff and inmates adhere to DOC and institution policies. Defendant Steven Schueler was the KMCI Security Director. Defendant Rick Haen is the building and grounds superintendent whose responsibilities include planning and directing the buildings and grounds maintenance program; maintaining and repairing all security systems, HVAC systems, electrical locking systems, building systems, telephone system, utilities, equipment and appliances; and supervising construction at the institution. Defendant William McCreedy is the manager of the Health Services Unit (HSU) who oversees the delivery of medical services to inmates and provides administrative support to physicians and other HSU staff. Former defendant Kelly Salinas is an inmate complaint examiner (ICE) and serves as the custodian of inmate complaints. She has access to institutional records related to the inmates.

[1] Many of these facts are derived from incident reports or progress notes prepared by prison officials who interviewed other staff members. Although the second-hand statements technically are hearsay, neither party has objected to them, so I have considered them when finding facts.

Hardin was known to suffer from seizures and had been provided by DOC with a protective helmet to wear. Hardin, however, did not always wear the helmet because he thought it was too tight; when he arrived at KMCI from Dodge Correctional Institution in March 2009, Hardin was recovering from facial injuries incurred during a seizure when Hardin was not wearing his helmet. McCreedy met with Hardin upon his arrival at KMCI to discuss these injuries and Hardin's spotty use of his helmet. McCreedy offered Hardin a helmet with a face shield, but Hardin did not want to wear it. McCreedy arranged for KCMI's laundry to loosen the fit of Hardin's current helmet; Hardin agreed to wear it all the time if it was not too tight.

Also, KMCI maintenance staff began renovating and adjusting Hardin's room further to ensure his safety during seizures. In April 2009, Joe Tischendorf, a KMCI repair worker, prepared the following work orders:

> (1) April 1: A request from a captain that padding be strapped to Hardin's lower bunk bed and television stand. The work was completed on April 2, 2009.
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> (2) April 12: A request from a sergeant that Hardin's bed posts be padded because he had cut his head on one of them during a seizure. The work was completed on April 14, 2009.

Following two meetings in early June 2009 with McCreedy and a security supervisor, Tischendorf prepared a work order to install additional foam padding on Hardin's lower bunk rails and TV stand edges. Also in June 2009, Tischendorf met with McCreedy and a captain and prepared a work order to install padding on Hardin's upper bunk rails and posts, ladder rails and steps. All of this work was completed later in June 2009.

On July 22, 2009, an inmate told James Gleason, a correctional sergeant, that he had just seen Hardin on the floor of his cell and it looked like he was having a seizure. Gleason went to

Hardin's cell and found Hardin lying on the floor with a small cut below his right eye and blood running down his cheek. Gleason asked Hardin what he had been doing; Hardin responded that he had been standing on a ladder, cleaning off the top of his wall-mounted locker, even though he was on a low-bunk restriction at that time.

Gleason radioed for help and activated his body alarm, and notified the control center that HSU needed to assess Hardin's injury. Berg, four other correctional officers and a nurse arrived to assist. Hardin was escorted to the HSU, then sent to the local hospital for treatment. (The parties dispute whether Hardin was wearing his helmet at the time of this accident and they dispute the seriousness of the cut on his face.) Following this incident, Schueler advised Haen that he wanted Tischendorf to make additional modifications to Hardin's cell (which presumably included removing or padding the locker latch).[2]

On August 5, 2009, Hardin filed Inmate Complaint Number KMCI-2009-17356, in which he complained that he was injured on July 22, 2009 as a result of not having an appropriate seizure helmet. Salinas investigated Hardin's allegations. She interviewed McCreedy, who reported his conversations with Hardin upon Hardin's arrival at the institution and the steps McCreedy had taken to re-fit Hardin's helmet and to pad his room. McCreedy informed Salinas that he had followed up with maintenance staff to ensure that modifications had been made in Hardin's room, and that HSU staff had followed up with Hardin, who stated that his helmet fit well and he was wearing it all the time. (The parties dispute whether McCreedy had maintenance recheck Hardin's room from time-to-time).

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[2] This presumption is based on what McCreedy later told Salinas during her investigation of the second incident, as set forth in her reports, set forth below at 7. This after-the-fact averment is vague, but Hardin has not challenged it.

On August 5, 2009, Salinas recommended that Hardin's complaint be dismissed with the modification that HSU meet with Hardin regarding a helmet change. On August 7, 2009, Salinas's recommendation was accepted by James LaBelle, an inmate complaint examiner reviewer. Although Hardin had the opportunity to appeal that decision to the corrections complaint examiner, Salinas's records indicate that he did not do so.

On August 8, 2009, Nurse Robinson was called to the gym after Hardin had a suspected seizure while lifting weights. Upon arrival, she discovered that he was not wearing his helmet. Hardin admitted that he doffed his helmet when he lifted weights.

According to an incident report completed by Berg on August 11, 2009, Sergeant Lefeber was informed by another inmate that Hardin yelled for help from his room. After arriving at Hardin's cell, Lefeber noticed blood on Hardin's right cheekbone, below his eye. She telephoned staff in the control center and advised them that Hardin appeared to have had a seizure and had a cut below his eye. Hardin was coherent and stated that he hit his head on the wall locker clasp. Berg and another officer arrived at the cell and escorted Hardin to the HSU. From there, he was sent to the local hospital for treatment. Berg contacted the KMCI maintenance department and asked them to remove the locker clasp.

On August 12, 2009, Haen submitted a work order requesting that the lock clasp and latches on the wooden cabinet doors in Hardin's cell be removed. The work was completed that same day. On August 13, 2009, Hardin was seen by McCreedy in the HSU to be fitted for a new helmet with a face shield. McCreedy provided Hardin with instructions for use and instructed him to call HSU if the helmet needed adjustment.

On August 19, 2009, Hardin filed Inmate Complaint Number KMCI-2009-18571, in which he complained that KMCI had displayed medical negligence as a result of his injuring himself a second time, in a similar manner, while allegedly having a seizure. In the course of her investigation into Hardin's complaint, Salinas again contacted McCreedy, who indicated that he had met with Hardin and maintenance staff in Hardin's room after Hardin's arrival at KMCI. McCreedy said that all areas that needed to be padded or removed were noted, but that the lock clasp was not identified by anyone as a possible hazard. McCreedy also told Salinas that after Hardin had been injured the first time, on July 22, 2009, McCreedy believed that unit staff or a security supervisor had notified maintenance to remove the lock clasp.

After Hardin was seen in HSU on August 11, 2009, McCreedy called maintenance and spoke with Haen, who assured him that the locker clasp had been removed. McCreedy advised Salinas that every effort had been made to render the environment safe for Hardin. Hardin had been told that if at any time he saw any area that needed to be altered, he should notify unit staff so they could attend to it as quickly as possible.

On August 25, 2009, Salinas recommended that the complaint be dismissed. LaBelle adopted her recommendation on August 26, 2009. Hardin appealed the decision to Corrections Complaint Examiner Welcome Rose on August 31, 2009. On September 8, 2009, after a review of the relevant incident reports, medical progress notes and information from Haen, Rose recommended that the complaint be dismissed. In her recommendation, Rose stated that it was apparent that institution staff had taken measures to ensure Hardin's safety in his room, including the August 12, 2009 removal of the lock clasp. Rose's recommendation was accepted on behalf of the secretary on October 24, 2009.

On September 16, 2009, Nurse Robinson was called to Hardin's cell to assess him after a reported seizure. Upon arrival, she reviewed his medical log which revealed that he had not been taking his seizure medication consistently. When asked why, Hardin stated that they made him sick to his stomach. He was directed to inform HSU if he was having problems, not simply stop taking his medications. Nurse Robinson made arrangements to have the medication times adjusted in order to alleviate Hardin's upset stomach.

OPINION

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the admissible evidence presented by the nonmoving party must be believed and all reasonable inferences must be drawn in the nonmovant's favor. However, a party that bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The applicable substantive law will dictate which facts are material. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). Further, a factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Roger Whitmore's Auto. Servs., Inc. v. Lake County, Ill.*, 424 F.3d 659, 667 (7th Cir. 2005). The court's function in a summary judgment motion is not to weigh the

evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007).

II. Failure to Protect

Hardin alleges that defendants were deliberately indifferent to his health and safety when they failed to insure that the clasp on his wall cabinet was removed or properly padded. The Eighth Amendment to the United States Constitution requires prison officials to "'take reasonable measures to guarantee the safety of the inmates'" and protect them from "substantial risk[s] of serious harm," even risks of self-harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)); *see also Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006); *Woodward v. Correctional Medical Services*, 368 F.3d 917, 928 (7th Cir. 2004); *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002). Failure to do so constitutes deliberate indifference and violates an inmate's Eighth Amendment rights. *Cavalieri v. Shepard*, 321 F.3d 616, 620-21 (7th Cir. 2003) (prison officials have duty to protect inmates from self-harm); *Sanville*, 266 F.3d at 734.

In order to prove his claim, plaintiff must show that: (1) he faced a substantial risk of serious harm or had a serious medical need; (2) each defendant knew of that risk or was aware of facts from which substantial risk of serious harm could be inferred and drew that inference; and (3) each defendant disregarded that risk nonetheless. *Brown v. Budz*, 398 F.3d 904, 913 (7th Cir. 2005) (citing *Farmer*, 511 U.S. at 838); *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). Ordinarily, a metal cabinet clasp does not present "an excessive risk to inmate health or

safety," *Farmer*, 511 U.S. at 837, but in this case, Hardin suffers from a seizure disorder that places him at greater risk of injury than other inmates. *Frost v. Agnos*, 152 F.3d 1124, 1129 (9th Cir. 1998) (otherwise ordinary slippery surface posed excessive risk of serious harm where prison officials aware prisoner's use of crutches resulted in repeated falls and injuries on shower floor). It also is undisputed that prison officials were aware of Hardin's seizure disorder and the risk of injury it posed.

The dispute is whether defendants disregarded the risk to Hardin by failing to take reasonable measures to protect him from harm. Hardin does not—cannot—dispute that prison officials modified his room to reduce the risk that he would injure himself during a seizure. They put padding on the rails and posts of his bunk beds and on the hard edges of his TV stand. They gave Hardin a better-fitting helmet. However, they did not notice the clasp on Hardin's wall cabinet. On July 22, 2009, Hardin injured himself on that clasp during a seizure. The clasp was supposed to be removed, but it was not; just a few weeks later, Hardin hit it *again* during a seizure and cut his face a second time. The clasp was removed the next day.

It would be possible from these facts for a jury to conclude that KMCI employees breached a duty of care to Hardin, which would constitute negligence, *see Gil v. Reed*, 535 F.3d 551, 557 (7th Cir. 2008). But negligence, even gross negligence, does not establish Eighth Amendment liability. A defendant's actions must be intentional or criminally reckless. *Farmer*, 511 U.S. at 837. "Indeed, an officer who actually knew of a substantial risk to a detainee's safety is free from liability 'if [he] responded reasonably to the risk, even if the harm ultimately was not averted, because in that case it cannot be said that [he was] deliberately indifferent.'" *Fisher v. Lovejoy*, 414 F.3d 659, 662 (7th Cir. 2005) (quoting *Peate*, 294 F.3d at 882). "The test

of deliberate indifference ensures that the mere failure of the prison official to choose the best course of action does not amount to a constitutional violation." *Id.* What Hardin must show is that individual defendants were actually aware of a substantial risk of harm to Hardin's health or safety, yet failed to take appropriate steps to protect him from the specific danger. *Klebanowski v. Sheahan*, 540 F.3d 633, 639 (7th Cir. 2008).

After Hardin injured himself the first time on the metal lock, defendants certainly would have been aware of the risk that it could pose to Hardin. It seems that they intended to modify the clasp but then did not promptly follow through. Within weeks, Hardin injured himself again on that same clasp. At the Rule 56 stage, can this court say as a matter of law that defendants' failure to pad or remove the locker latch in a timely manner does not rise to the level of deliberate indifference? A review of some cases involving known risks to an inmate's safety helps answer this question.

In *Peate*, 294 F.3d 879, the plaintiff inmate was attacked twice in one day by another inmate, who thwacked him with a mesh laundry bag filled with rocks gathered from the prison yard. The defendant correctional officer disarmed the attacker and led him away; according to plaintiff, the defendant then *returned* the empty to the attacker, who promptly refilled it with rocks and attacked plaintiff a second time. *Id.* at 881. This allegation sufficed to prevent summary judgment. Although the officer could not be held liable for failing to prevent the first attack, that attack gave him actual personal knowledge of the danger to plaintiff if he re-armed the attacking inmate, yet he purportedly re-armed him anyway, and sure enough, a second attack promptly occurred. *Id.* at 883.

In *Townsend v. Fuchs*, 522 F.3d 765 (7th Cir. 2008), the court found summary judgment inappropriate in a prisoner's conditions of confinement case in which the prisoner alleged that when he complained to an officer about a wet, moldy mattress in TLU, the officer declined to provide a new mattress because then the prison would have to provide a new mattress to every prisoner in TLU. Neither the prisoner nor the officer had proffered evidence beyond his own testimony that either directly corroborated their respective stories or completely refuted the competing version of events. Thus, the court held that the dispute over whether the officer knew about the prisoner's cell conditions came down to a classic swearing contest that could be resolved only by the jury assessing the credibility of the two men. *Id.* at 774. Worth noting is that in plaintiff's version of events, the defendant intentionally declined to address plaintiff's concerns.

In *Morgan v. Morgensen*, 465 F.3d 1041, 1047 (9th Cir. 2006), the court employed the Ninth Circuit's "danger-plus" doctrine to hold that a prisoner's Eighth Amendment claim survived summary judgment when a prison supervisor ordered an inmate to continue operating a machine that both men knew was dangerous, and the machine then injured the prisoner: the "danger" was the safety hazard, the "plus" was the compulsion of the supervisor's order. *Id.* The court found that a reasonable prison official would or should have understood that compelling an inmate to continue operating defective and dangerous prison work equipment would violate the Eighth Amendment. *Id.* As in *Peate* and *Townsend*, the defendant had allegedly acted recklessly by knowingly putting the plaintiff into a dangerous situation.

In each of the above-cited cases (*Peate*, *Townsend* and *Morgan*), there was evidence from which a jury reasonably could infer that the prison official knowingly had put (or had kept) a

prisoner in the path of a known danger. In each case, the prison official made a conscious decision not to address the known safety risk at issue, despite knowing that the risk continued. In the instant case, however, the defendants had acted responsibly by doing everything they could think of to keep plaintiff safe. Their mistake was slow or incomplete follow-through, which no reasonable juror could find to be intentional or reckless. The undisputed facts show that over several months, prison officials took great care to ameliorate the dangers that hard surfaces posed to Hardin during his seizures. They also offered to supply Hardin with a safer protective helmet with a face shield (which Hardin refused to wear), and they placed him on a low-bunk restriction (which Hardin ignored). From the evidence presented (almost all of which is undisputed), the only reasonable conclusion is that defendants' failure to fix the metal clasp after Hardin hit it the first time was an unintentional oversight. In fact, it is undisputed that Schueler ordered additional modifications to Hardin's cell after the first injury. The Eighth Amendment requires prison officials to act responsibly under the circumstances that confront them but it does not require them to act flawlessly. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir. 2008).

Neglecting to follow through quickly on a plan to eliminate a safety hazard is different from rearming an inmate with a bag of rocks, refusing to replace a wet, moldy mattress, or ordering a prisoner to continue operating a dangerous machine. There is no doubt that Hardin's second facial cut could have been prevented if defendants had not dropped the ball on padding or removing the locker latch, but a reasonable jury could not infer from the evidence that any of the defendants acted (or failed to act) intentionally or recklessly. Absent sufficient evidence

that any of the defendants were indifferent to a serious risk of harm to Hardin, defendants are entitled to summary judgment on Hardin's constitutional claims against them.

IV. State Law Claims

A. Notice of Claim

Defendants assert that they are entitled to summary judgment on Hardin's state law negligence claims because he has failed to comply with Wisconsin's notice of claim statute, § 893.82. The statute requires a plaintiff to file a notice with the attorney general's office before commencing a civil action "against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties." Wis. Stat. § 893.82(3). The notice must be filed within 120 days of the event causing the alleged injury and must state "the time, date, location and the circumstances of the event giving rise to the claim for the injury" as well as "the names of persons involved, including the name of the state officer, employee or agent involved." *Id.* Strict compliance with the notice of claim statute is a condition precedent to bringing a civil action against a state officer or employee. *Kellner v. Christian*, 197 Wis. 2d 183, 195-96, 539 N.W.2d 685, 690 (1995); *see also* Wis. Stat. § 893.82(2m) ("No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section."); *Newkirk v. Wisconsin Dept. of Transportation*, 228 Wis. 2d 830, 837, 598 N.W.2d 610, 613 (Ct. App. 1999 ("strict compliance with § 893.82(5), stats., is required in all cases"); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984). If a plaintiff fails to comply strictly with the notice of claim requirements, the court must dismiss his or her claims, regardless whether the

state employee had actual notice or was prejudiced by the lack of notice. *J.F. Ahern Co. v. Wisconsin State Bldg. Commission*, 114 Wis. 2d 69, 81, 336 N.W.2d 679, 685 (1983); *Carlson v. Pepin County*, 167 Wis. 2d 345, 357, 481 N.W.2d 498, 503 (Ct. App. 1992).

In their summary judgment brief, defendants note that Hardin failed to plead whether he had filed a notice of claim with respect to his state claims. In response, Hardin submitted a copy of the notice of claim that he had filed on December 2, 2009. Dkt. 36, Exh. 23. Defendants contend that the notice has several deficiencies. First, they assert that only the claim form is sworn and not the attached typewritten sheets entitled "Statement of Claim." *See* § 895.82(5) (requiring sworn statement). However, a review of the claim form shows that Hardin wrote "See Attached Statement!!!" in the box entitled "Statement of Circumstances Giving Rise to the Claim." As such, Hardin has complied with the requirement that his statement be sworn.

Next defendants argue that because Hardin's notice of claim was filed more than 120 days after the July 22, 2009 incident, his notice was untimely with respect to the injury that he sustained as a result of that incident. I agree. But Hardin's notice *is* timely with respect to the incident that occurred on August 11, 2009.

Finally, defendants point out that the notice fails to identify the specific time that the August incident occurred; of the remaining defendants, it does not name defendant Schueler; and does not provide an adequate statement of the circumstances giving rise to the claims against the other defendants. Although Hardin's notice does not identify the exact time on August 11, 2009 that he fell on the metal clasp, he describes the incident in detail, providing defendants ample notice of the actions that he is challenging and enabling the state to investigate the claims. *See West v. Macht*, 235 F. Supp. 2d 966, 972 (E.D. Wis. 2002) (holding

same with respect to notice of claim identifying a seclusion period continuing until "October 27 and possibly beyond"). However, Hardin's failure to identify defendant Schueler is fatal to his claims against Schueler. Without that identifying information, it would be impossible for the state adequately to investigate Hardin's claims. Similarly, Hardin's notice is insufficient regarding the circumstances giving rise to his claims against defendants McCreedy and Haen. In the notice, Hardin states only that "after the second injury on 8-11-09, HSU manager William McCreedy and Superintendent Haen had the [clasp] removed at approximately 10:00a.m." That statement fails to describe how McCreedy and Haen were negligent. In fact, the most plausible inference is that those individuals resolved the safety risk at issue. Therefore, I am granting summary judgment on Hardin's state negligence claims against defendants Schueler, McCreedy and Haen. This leaves Hardin's negligence claims against Berg.

B. Supplemental Jurisdiction

Because I am dismissing all of Hardin's federal claims, I must consider whether it would be proper to allow him to proceed on his remaining state law negligence claims against Berg and Ozanne. The only ground for jurisdiction would be supplemental jurisdiction under 28 U.S.C. § 1367. Under § 1367(c)(3), a federal district court may decline to exercise supplemental jurisdiction over state law claims once federal claims have been dismissed. "[T]he general rule is that, when all federal-law claims are dismissed before trial, the [supplemental] claims should be left to the state courts." *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994). If judicial economy, convenience, fairness and comity warrant retaining supplemental jurisdiction, a district court may nevertheless do so. *Hansen v. Board of Trustees*, 551 F.3d 599,

607 (7th Cir. 2008). For example, a court may retain jurisdiction when "substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort." *Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1347-48 (7th Cir. 1986). Also, the court may retain jurisdiction if the disposition of the state law claim is clear. *Khan v. State Oil Co.*, 93 F.3d 1358, 1366 (7th Cir. 1996) (if correct disposition of supplemental claims is clear, considerations of economy favor retaining jurisdiction).

After reviewing the record before the court, I cannot say that the disposition of the state law claims is clear. Hardin has adduced evidence that Berg was aware of the risks posed by the metal clasp following the July 2009 incident and failed to act to correct the problem until after Hardin injured himself a second time on the clasp in August 2009. The negligence standard is significantly easier to satisfy than the Eighth Amendment, *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006), so Hardin's failure to succeed on his Eighth Amendment claims does not doom his claim for negligence. Even so, it is not clear whether Hardin can establish negligence against Berg by a preponderance of the evidence, or whether there are countervailing comparative negligence issues here that a jury would need to consider. In sum, I conclude that it would be inappropriate to resolve the claim in this court in light of § 1367(c)(3).

ORDER

IT IS ORDERED that:

(1) Plaintiff Xavier Hardin's request to dismiss defendants Salinas, LaBelle, Rose and Ozanne is GRANTED;

(2) Hardin's motion for an extension of time to file a reply brief and for leave to amend his complaint is DENIED (dkt. 42);

(3) Defendants' motion for summary judgment (dkt. 22) and Hardin's motion for summary judgment (dkt. 33) are GRANTED IN PART and DENIED IN PART:

> (A) Defendants' motion is GRANTED and Hardin's motion is DENIED with respect to Hardin's federal § 1983 claims against defendants McCreedy, Haen, Schueler and Berg;
>
> (B) Defendants' motion is GRANTED and Hardin's motion is DENIED with respect to Hardin's state law negligence claims against defendants McCreedy, Haen and Schueler. The claims are DISMISSED WITH PREJUDICE for failure to comply with Wis. Stat. § 893.82; and
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> (C) Defendants' motion is DENIED and Hardin's motion is GRANTED with respect to the negligence claim against defendant Berg because I decline to exercise supplemental jurisdiction over that claim under 28 U.S.C. § 1367(c)(3). The claim is DISMISSED WITHOUT PREJUDICE to Hardin refiling it in state court;

(4) The clerk of court is directed to enter judgment accordingly and to close this case.

Entered this 1st day of February, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge