IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TROY FROISETH,

OPINION and ORDER

Plaintiff,

05-C-470-C

v.

COUNTY OF LA CROSSE, WISCONSIN;
MIKE WEISSENBERGER; MARK WELANDER;
JAMES GEORGIEFF; TANYA DELAP; and
HEALTH PROFESSIONALS, LTD.,[1]

Defendants.

- -

In April 2004, two inmates at the La Crosse County jail assaulted plaintiff Troy Froiseth, who had been arrested and detained at the jail on a charge of marijuana possession. In this civil action for monetary relief under 42 U.S.C. § 1983 and Wisconsin law, plaintiff alleges that various officials at the La Crosse County jail violated his constitutional rights by failing to prevent the assault. He contends further that the jail officials failed to provide him

[1]In his complaint, plaintiff raised claims against a number of unnamed defendants. I have not included them in the caption because plaintiff never identified them by name and never served them with a copy of his complaint. Therefore, they are not parties to this lawsuit.

adequate medical care after the attack. Subject matter jurisdiction is present. 28 U.S.C. §§ 1331, 1367.

Presently before the court are three motions: (1) a motion for summary judgment filed by defendants County of La Crosse, Mike Weissenberger, Mark Welander, James Georgieff and Tanya Delap; (2) a motion filed by defendants County of La Crosse, Weissenberger, Welander, Georgieff and Delap to strike plaintiff's expert witness; and (3) defendant Health Professionals' motion for summary judgment. In an order dated April 4, 2006, I determined that several flaws in the parties' proposed findings of fact precluded the court from ruling on the motions and I ordered the parties to submit new proposed findings of fact that adhered to this court's summary judgment procedures. The parties have submitted new proposed findings.

For the reasons stated below, I will deny the motion to strike and grant the motions for summary judgment. Defendants' motion to strike will be denied because plaintiff does not cite the report of his expert witness, Frank Saunders, as support for any factual propositions. (Although plaintiff cites Saunders' declaration in support of his proposed findings of fact ##25 and 26, I have not included those proposed findings in the statement of undisputed facts because they are legal conclusions.) Defendant Health Professionals' motion for summary judgment will be granted because plaintiff concedes that defendant Health Professionals is not a proper defendant with respect to plaintiff's failure to protect

claim and his inappropriate medical care claim under Wisconsin law. (As will be seen, these are the only claims plaintiff has developed with any substance.). Defendants County of La Crosse, Weissenberger, Welander, Georgieff and Delap are entitled to summary judgment with respect to plaintiff's failure to protect claim because there is no evidence from which a reasonable jury could conclude that any of them were deliberately indifferent to a risk of assault to plaintiff. Plaintiff's attempts to inform jail officials that he felt threatened were wholly insufficient and he has failed to establish which of the defendants (if any) knew of his complaints. Defendants are entitled to summary judgment with respect to plaintiff's claim under Wis. Stat. § 302.38 because there is no evidence from which a reasonable jury could conclude that the medical care plaintiff received after he was assaulted was inappropriate. Defendants exercised the discretion accorded to them appropriately by relying on the opinions of a physician who was consulted after the assault. Judgment will be granted to defendants and the case will be closed.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Troy Froiseth is 21 years old and lives in Lindstrom, Minnesota. In February

2004, he was arrested for possession of marijuana. He was released on bond but was re-arrested on March 24, 2004, after violating the conditions of his release. He was detained at the La Crosse County jail.

Defendant Michael Weissenberger has been the Sheriff of La Crosse County since January 1999. Defendants James Georgieff, Mark Welander and Tanya Delap worked at the La Crosse County jail at the time plaintiff was assaulted. Defendant Health Professionals, Ltd. is an Illinois corporation that entered into a contract with defendant County of La Crosse to provide medical care to inmates at the jail.

B. Contract between La Crosse County Jail and Defendant Health Professionals, Ltd.

Under the terms of the contract between the jail and defendant Health Professionals, a nurse is on staff at the jail during 40 daytime hours each week. Dr. Brian Bohlmann, a board certified physician in internal medicine, is employed by defendant Health Professionals to provide medical care at fifteen county jails in Wisconsin. His duties include evaluating inmate complaints and providing back-up to the nursing and jail staff. Dr. Bohlmann visits the La Crosse County jail once each week, although the day of his visit each week varies. Each of the jails he visits can contact him through a pager he carries.

C. Administrative Confinement and Medical Care Policies

At all times relevant, defendant County of La Crosse had a policy in place to separate dangerous inmates from the general population. The policy provided as follows:

> Inmates may be placed in Administrative Confinement in order to ensure the safety and security of the jail staff and other inmates. Administrative confinement is defined as nonpunitive, segregated confinement of an inmate in his or her cell or other isolated area to ensure personal safety and security within the jail, solely because he or she is dangerous.

The procedure for placing an inmate in administrative confinement provided in part as follows:

> 1. A jailer may place an inmate in administrative confinement in a Receiving Cell, Medical Cell, or, if none of them are available, an empty cell in any other cell block, for the following [reasons]:
>
> * * * *
>
> h. If an inmate presents a substantial risk of physical harm to the inmate, another person, or property.

Administrative Confinement Policy 102.03 recognizes that inmates who pose a threat to others should be segregated.

The La Crosse County Sheriff's Department's policy concerning inmate medical care, in force at all times relevant to this case, provides in part:

> In order to ensure that the lives and health of inmates are safeguarded and to provide adequate medical and health care to inmates, emergency medical services shall be provided on a 24-hour basis. Inmates requiring medical care shall, if necessary, be conveyed to a hospital emergency room for such care. A Deputy/Jailer shall remain with the inmate during treatment in an emergency room.

D. Events of April 3-4, 2004

On April 3, 2004, two inmates in the La Crosse County jail named Cole Colbert and Kenny Stokes began arguing in the jail's "A" housing block. Colbert was disabled and used a cane to walk. At some point, Colbert and Stokes went into the bathroom and began to fight. Inmate Jessie Reid joined Stokes in beating up Colbert. At some point, plaintiff intervened and told the inmates to stop. Reid told plaintiff that he should "turn [his] head and walk away and not say anything otherwise the same would happen to [him]." Froiseth Dep., dkt. #25, at 11-12. Plaintiff perceived this as a direct threat. The fight ended with Stokes and Reid walking away and leaving Colbert on the ground.

A stack of inmate request forms sits on the window in the jail dorm area where inmates are free to pick them up and fill them out. Once completed, the requests are placed in a small mailbox and jail officials pick them up. Four or five hours after the fight, plaintiff filled out an inmate request form asking to be moved because he felt threatened and did not feel safe in his cell block because of certain inmates. In his request, plaintiff did not refer to any inmates by name and did not refer to the assault on Colbert. He did not indicate why he felt threatened. Plaintiff was clandestine in filling out the form because he did not want Reid to see him. He did not want to talk to any jail officials within sight of Reid because he feared reprisal. Plaintiff addressed his request to defendant Weissenberger and wrote the word "confidential" on it and folded it. He knew that by addressing his request to defendant

Weissenberger, a jail official who received the request would deliver it to him if possible. Plaintiff did not see any jail official pick up his inmate request. (He was not watching the drop box because he had never had any problems with inmate requests.) However, several hours after he completed the form, he saw that it was gone.

Defendant Welander worked at the jail as a "rover" on a 3 p.m. to 11 p.m. on April 3 and 4, 2004. His duties included receiving inmate request forms and watching over inmates through security cameras and by walking through the jail. Defendant Welander did not monitor the security cameras according to a set routine.

Defendants did not move plaintiff or inmates Reid and Jackson to administrative segregation after plaintiff submitted his request. Around 9:00 p.m. on April 4, plaintiff was in his cell having a discussion with an inmate named Donald Robinson. During the discussion, Reid appeared and began telling Robinson that he should "kick [plaintiff's] ass." Dep. of Troy Froiseth, dkt. #25, at 22:15. Robinson said that he did not want to fight with anyone. Plaintiff and Robinson finished their discussion, at which point plaintiff, lying on his bunk, turned to face the wall and began reading a book. Reid pulled plaintiff off his bunk and began kicking and hitting his left side and shoulder. At some point, an inmate named Elgin Jackson became involved as well. After about five or ten minutes, Jackson and Reid stopped beating plaintiff and left the room. Plaintiff climbed up to his bunk and began crying.

Defendants Georgieff and Delap, who were working in the booking area that night, were called to plaintiff's area. They went to plaintiff's area with defendant Welander and a jail official named Belusa. Defendant Welander entered the "A" dorm and asked the inmates who had been fighting. A number of inmates pointed at Reid. Belusa took Reid out of the area and defendant Welander approached plaintiff, who was lying on his bunk with bed covers pulled over his head. He took plaintiff into the hall and asked him what had happened. (Before that night, defendant Welander did not know plaintiff and did not know that inmates Reid and Jackson were violent individuals.) Plaintiff was able to stand and walk to the hallway without assistance. He told defendant Welander that he was having trouble breathing and that he had pain in his wrist, chest and ribs. He was alert, his speech was clear and he was able to describe the attack and identify his attackers.

According to defendant Delap, plaintiff was whimpering and seemed to be upset. (Defendant Delap did not write a report of the incident and did not speak with plaintiff on April 4, 2004.) Defendant Welander did not notice any blood on plaintiff and did not notice whether plaintiff's clothes were ripped or torn. Also, he did not see any visible marks on plaintiff. Plaintiff did not have any blood around his midsection and he did not vomit. Defendant Welander had no medical training and did not attempt any kind of medical analysis of plaintiff. Instead, he turned plaintiff over to defendants Georgieff and Delap, who took him downstairs to the booking area and placed him in a medical cell. Plaintiff was

able to walk from the dorm area to the booking area by himself without any trouble. However, because plaintiff had complained of difficulty breathing and pain in his left side, defendant Georgieff had plaintiff lift his shirt while Georgieff looked at his abdomen for bruises or other signs of physical injury. Defendant Georgieff could not see any physical injuries, although plaintiff's speech appeared to be labored and raspy. Approximately fifteen to thirty minutes later, plaintiff requested a telephone to call his parents. Plaintiff called his mother and asked her to post his bail but she told him she did not have the money. During the night, plaintiff told jail officials that he was in pain and needed to go to the hospital.

Meanwhile, defendant Georgieff called Dr. Bohlmann for advice concerning plaintiff's condition. This was part of the Sheriff's Department's policies and procedures. In life threatening situations where a medical emergency is obvious, members of the La Crosse County Sheriff's Department may bypass the jail doctor and call an ambulance. However, on the basis of his observations of plaintiff, defendant Georgieff did not believe plaintiff's injuries were life threatening. He told Dr. Bohlmann that plaintiff had been attacked and was complaining of pain in his ribs and trouble breathing, although no visible signs of injury were apparent. Dr. Bohlmann prescribed 800 milligrams of ibuprofen for plaintiff's pain and told defendant Georgieff to contact him if plaintiff's condition changed. He stated that it was possible that plaintiff had a cracked rib but did not believe that hospitalization was necessary on the basis of the information defendant Georgieff had given him. (If Dr.

Bohlmann had known that plaintiff had sustained an injury to his spleen, he would have instructed jail staff to take plaintiff to the hospital. A lacerated spleen cannot be diagnosed with a physical examination; a CT scan or ultrasound is required. The jail does not have these machines.) Defendant Georgieff has no medical training and relied on Dr. Bohlmann for his assessment of plaintiff's condition. He gave plaintiff 800 milligrams of ibuprofen and checked on him at 10:30 p.m. and 10:45 p.m. At both times, plaintiff's ability to breathe and speak had improved.

Around 7:00 a.m. the next morning, an official named Mike Devine came on duty and checked on plaintiff, who indicated that he was experiencing a great deal of pain. Devine called a nurse who came and examined plaintiff. His blood pressure was 104/82 and his lung sounds were present and clear. In addition, the nurse reported that plaintiff's thorax and abdomen exhibited symmetry and that no grating or crackling noise was heard when she touched his thorax. However, she noted that his abdomen was soft and tender. After speaking with the nurse, plaintiff knew he needed to see a physician after his release. Devine returned later to tell plaintiff that a judge had ordered his release.

At around 10:00 a.m., plaintiff went to the emergency room at St. Francis/Franciscan Skemp Hospital. A CT scan was performed and plaintiff was diagnosed with a lacerated spleen. Plaintiff's doctor told him he could have surgery to remove his spleen or let it heal on its own. Plaintiff chose to forgo surgery and let his spleen heal. He was hospitalized for

a week and bedridden for a month because of his injury. He was prescribed morphine for his pain. His spleen healed on its own without any further medical intervention.

The monitoring of plaintiff in the jail's medical cell was consistent with the conservative plan of care he elected at St. Francis. No medical doctor or medical professional has told plaintiff that the delay in treatment from 11:00 p.m. on April 4 until midmorning on April 5 exacerbated his injuries in any way.

Before plaintiff was assaulted, defendant Georgieff did not know that plaintiff had made a request to be moved away from the inmates who assaulted him. Plaintiff never asked defendant Welander to move him or inmates Reid and Jackson and defendant Welander was not aware that plaintiff had made this request to anyone else in the Sheriff's Department. Defendant Delap was on vacation on April 3, 2004. Defendant Weissenberger was not at the jail on the evening of April 3, 2004 or on April 4, 2004. He did not receive a request form from plaintiff asking that he or inmates Reid and Jackson be moved to another cell block before plaintiff was assaulted. Defendant Weissenberger learned of the assault on plaintiff during the week of April 5, 2004. Defendant Weissenberger did not speak with Dr. Bohlmann about the incident.

OPINION

Before delving into the substance of plaintiff's claims, it is necessary to establish what

those claims are and who are the proper defendants for each claim. Plaintiff's complaint contains three counts. Count I alleges that "the named defendants" violated plaintiff's rights under the Eighth Amendment by failing to protect him from being assaulted by inmates Reid and Jackson. Cpt., dkt. #2, ¶ 36. Count II alleges that "the named defendants, through an official policy, custom, or usage, deprived plaintiff . . . of his constitutionally protected interests. . . . as a direct result of, and in response to, official training that they had received from the jail." Id., ¶ 38. Count III alleges that "the named defendants violated Wis. Stat. § 302.38(1)'s requirement that jail officials shall provide appropriate care or treatment to prisoners in need of such treatment." Id., ¶ 40. Nowhere in his complaint does plaintiff allege that the medical care he received after the assault violated his Eighth Amendment rights.

In his brief in opposition to summary judgment, plaintiff appears to raise several new claims. The following appears on the first page of his brief:

> The County Defendants failed to reasonably prevent Froiseth from suffering a beating at the hands of other jail inmates, and then, in combination with their contract health care provider, [defendant Health Professionals], failed to provide reasonably prompt medical attention for Froiseth's injury from the beating. Whether Defendants exhibited deliberate indifference in violating Plaintiff's rights presents genuine issues of material fact for trial.

Plt.'s Br., dkt. #36, at 1. Later, plaintiff sets out the deliberate indifference standard that governs Eighth Amendment claims alleging inadequate medical care. Id. at 5. To the extent

plaintiff is arguing that the medical care he received at the jail after the assault violated his Eighth Amendment rights, I will not consider his claim because he did not plead it in his complaint and did not seek leave to amend his complaint to add it. It would be unfair to defendants to allow plaintiff to argue an entirely new claim raised for the first time in opposition to the motions for summary judgment.

In addition, plaintiff contends in his opposition brief that defendants "were negligent in failing to provide prompt care." Plt.'s Br., dkt. #36, at 6. He contends that the "County jailers" had a special relationship with plaintiff and that defendant County of La Crosse is "liable for the common law torts of its employees through the doctrine of respondeat superior." Id. To the extent plaintiff is asserting a negligence claim against defendants, separate from his claim under Wis. Stat. § 302.38, I will not consider it because he did not plead it in his complaint.

This leaves the three claims plaintiff did identify in his complaint: failure to protect, unconstitutional policy or practice and the medical care claim under Wis Stat. § 302.38. Defendants argue they are entitled to summary judgment with respect to each of these claims. In his response brief, plaintiff argues that summary judgment is inappropriate with respect to his failure to protect and medical care claims. However, he does not mention an unconstitutional policy, practice or custom, much less develop an argument that the individual defendants' actions, or lack thereof, were undertaken pursuant to such a policy.

Because plaintiff did not develop his unconstitutional policy or practice claim in any meaningful way, he has waived it. Kinslow v. American Postal Workers Union, Chicago Local, 222 F.3d 269, 276-77 (7th Cir. 2000) (statute of limitations argument waived because not developed before district court); Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). Accordingly, I will address only plaintiff's failure to protect claim and his claim under Wis. Stat. § 302.38.

A. Failure to Protect

The Eighth Amendment requires prison officials to protect inmates from being assaulted by other inmates. Farmer v. Brennan, 511 U.S. 825, 833 (1994). At the time he was assaulted, plaintiff was detained at the La Crosse County jail because he had allegedly violated the conditions of his bond, which had been imposed after he was arrested for possession of marijuana. Because he was not serving a term of imprisonment pursuant to a criminal conviction, plaintiff was a pre-trial detainee. Accordingly, his failure to protect claim is analyzed under the due process clause of the Fourteenth Amendment, not the Eighth Amendment. Fisher v. Lovejoy, 414 F.3d 659, 661 (7th Cir. 2005); Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir. 1992); Anderson v. Gutschenritter, 836 F.2d 346, 349 (7th Cir. 1988) (quoting Matzker v. Herr, 748 F.2d 1142, 1150 (7th Cir. 1984) ("The Due Process

Clause 'protects pretrial detainees both from deliberate exposure to violence and from failure to protect when prison officials learn of a strong likelihood that a prisoner will be assaulted.'"). This distinction is of little practical importance, however, because the court of appeals has stated that the same standard for failure to protect claims applies whether the plaintiff is a prison inmate or a pre-trial detainee. Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005).

In Farmer, 511 U.S. at 847, the Supreme Court held that a prison official may be liable for failure to protect "only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." To sustain his failure to protect claim, plaintiff must prove that he was detained under conditions that posed a substantial risk of serious harm and that the individual defendants were deliberately indifferent to this risk. Brown, 398 F.3d at 910-13. (Plaintiff concedes in his response brief that defendant Health Professionals not a proper defendant with respect to this claim. Plt.'s Br., dkt. #36, at 4 n.1.)

Certainly, the beating plaintiff suffered at the hands of Reid and Jackson constitutes serious harm. Brown, 398 F.3d 910-11. However, as noted in Brown, the question is whether the *risk* that plaintiff would be beaten was substantial. This is a difficult question because case law does not state clearly when "a risk of inmate assault becomes sufficiently substantial." Id. at 911. In Brown, 398 F.3d at 911, the court of appeals stated that, in

addition to "risks so great that they are almost certain to materialize if nothing is done," Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004), the phrase "substantial risk" includes "risks attributable to detainees with known 'propensities' of violence toward a particular individual or class of individuals; to 'highly probable' attacks; and to particular detainees who pose a 'heightened risk of assault to the plaintiff.'"

In the present case I need not consider whether plaintiff faced a substantial risk of serious harm before Reid and Jackson assaulted him because defendants have not developed an argument on the point. Instead, they argue that they did not know about the risk plaintiff faced. This argument is directed at the second, subjective component of a failure to protect claim, the question of deliberate indifference.

Deliberate indifference is a state of mind akin to criminal recklessness. Norfleet v. Webster, 439 F.3d 392, 397 (7th Cir. 2006). It requires that a jail official know of and disregard a risk to a detainee's health or safety. Fisher, 414 F.3d at 662. A jail official does not "have to know the specifics of the danger" so long as he is aware of a "serious risk of harm in some form." Velez v. Johnson, 395 F.3d 732, 736 (7th Cir. 2005); see also Brown, 398 F.3d at 915 ("It is well settled that deliberate indifference may be found though the specific identity of the ultimate assailant is not known in advance of assault."). Deliberate indifference to the risk of assault by other detainees may be proved under two distinct theories.

First, a detainee may prove that jail officials acted with deliberate indifference by demonstrating the existence of a pervasive risk of harm to detainees from other detainees and a failure by prison officials to respond reasonably to that risk. Goka v. Bobbitt, 862 F.2d 646, 651 (7th Cir. 1988). In this case, there is no evidence that detainees assaulted each other at the jail frequently and that the individual defendants failed to take appropriate measures to stop the pattern of assaults. Compare Matzker v. Herr, 748 F.2d 1142, 1149 (7th Cir. 1984) (allegations that racial and sexual violence was common at jail and that sheriff failed to enforce inmate care and control rules sufficient to state deliberate indifference claim). Nor is there any evidence that plaintiff belonged to a group of detainees that had a history of being targeted for assault by other detainees. Compare Brown, 398 F.3d at 913-914; Lewis v. Richards, 107 F.3d 549, 553 (7th Cir. 1997); Walsh v. Mellas, 837 F.2d 789, 797 (7th Cir. 1988).

The second theory under which a detainee may establish deliberate indifference applies to situations in which there is no long-standing history of violence in an institution and in which there is no history of violence or threats against him or a group of detainees to which he belongs. Many assaults in jails and prisons grow out of disagreements and inflamed tempers that arise inevitably in these close-knit and often overcrowded quarters. These assaults are isolated incidents that can occur suddenly and without warning. In cases in which there is no pervasive risk of harm and no history of violence toward a detainee or

a group of detainees of which he is a member, the detainee must demonstrate that jail officials knew of a strong likelihood that he would be assaulted and failed to take protective measures. Pierson v. Hartley, 391 F.3d 898, 902 (7th Cir. 2004). There is no evidence in this case that any of the individual defendants witnessed the verbal exchange between plaintiff and Reid that occurred during the beating of Colbert. Therefore, the question of deliberate indifference turns on the efforts plaintiff made to warn defendants of the threat against him. E.g., Butera v. Cottey, 285 F.3d 601 (7th Cir. 2002).

It is undisputed that plaintiff filled out a written request form on April 3, 2004, in which he asked to be moved because he felt threatened and did not feel safe in the "A" housing block. However, it is also undisputed that plaintiff did not explain *why* he felt threatened. He did not mention Reid or Jackson or any other inmates by name in his request and did not indicate that Reid and Stokes had fought with Colbert or that Reid had threatened plaintiff when he attempted to intervene.[2] He did not write, even in general terms, that he feared being assaulted. Plaintiff may have feared the consequences of speaking out, but by not doing so, he failed to give jail officials notice of the threat he faced. A vague expression of fear unaccompanied by any specifics does not give jail officials the

[2]Plaintiff faults the "County Defendants" for not moving Reid and Jackson into administrative segregation after the incident with Colbert, but he has adduced no evidence showing that any of the defendants knew about the incident.

knowledge necessary to support a deliberate indifference claim. Butera, 285 F.3d at 605-06 (detainee failed to give sheriff "actual notice of a specific risk of serious harm" where he told jail officials only that he was scared and needed to be moved because he was "having problems in the [cell] block").

The parties dispute whether plaintiff made any other attempts to notify defendants that he felt threatened. Defendants proposed as fact that plaintiff spoke with jail officials on the night of April 3 and during the day on April 4 but did not tell any of them that he wanted to be moved out of the cell block. Plaintiff disputed the proposal, citing a declaration he executed on December 5, 2005, in which he stated that he "requested that the jailers either transfer me to a different cell block, or transfer Elton Jackson and Jesse Reid to a different cell block, on at least three occasions approximately 3-5 hours prior to my being beaten." Dec. of Troy Froiseth, dkt. #23, tab 4. Defendants contend that plaintiff's declaration contradicts testimony in his deposition, which was taken on December 27, 2005. In his deposition, plaintiff testified that he never told any of the guards that he wanted to be moved. Froiseth Dep., dkt. #25, at 16:22-18:1, 19:18-21. They argue that the "sham affidavit" rule precludes consideration of the statement in his declaration.

It is true that "courts do not countenance the use of so-called 'sham affidavits,' which contradict prior sworn testimony, to defeat summary judgment." United States v. Funds in Amount of Thirty Thousand Six Hundred Seventy Dollars, 403 F.3d 448, 466 (7th Cir.

2005); see also Cowan v. Prudential Ins. Co. of America, 141 F.3d 751, 756 (7th Cir. 1998). However, the rule is inapplicable here because plaintiff's declaration is dated three weeks before his deposition was taken. Therefore, I will accept plaintiff's version of the disputed fact, as I must. Hall v. Bennett, 379 F.3d 462, 464 (7th Cir. 2004) (on summary judgment factual disputes resolved in favor of nonmoving party).

Even if I accept plaintiff's contention that he asked "the jailers" to transfer him or Reid and Jackson to a different cell block three times in the hours before he was assaulted, plaintiff cannot fend off summary judgment with respect to his Eighth Amendment claim. To establish liability under § 1983, plaintiff must introduce evidence from which a jury could infer that each of the individual defendants was deliberately indifferent to the risk he faced. In other words, he must establish each defendant's personal involvement in the alleged Eighth Amendment violation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003).

In this case, there is no evidence that defendants Weissenberger, Welander, Georgieff or Delap had any knowledge that plaintiff was under any type of threat before he was assaulted. Although plaintiff addressed his written request to defendant Weissenberger, it is undisputed that defendant Weissenberger was not at the jail on the evening of April 3 or on April 4. In fact, defendant Weissenberger did not learn of the assault until the week of April 5, 2004. Plaintiff's argument that the written request gave defendant Weissenberger

constructive notice is a non-starter.

In addition, it is undisputed that plaintiff did not ask defendant Welander to move him or Reid and Jackson and that defendant Welander was not aware that plaintiff had made this request to any other jail official. It is undisputed that defendant Georgieff did not know that plaintiff had made a request to be transferred. It is undisputed that defendant Delap was on vacation on April 3, the day plaintiff submitted his written request. Further, it is undisputed that plaintiff wrote "confidential" on his request, which suggests that, assuming a jail official picked up his request, he or she set it aside for defendant Weissenberger.

Plaintiff's brief is filled with references to "County Defendants" and the "jailers." He does not identify any of the individual defendants by name in discussing his failure to protect claim. These unspecific references are insufficient to connect any of the individual defendants to the information plaintiff passed on in his written and verbal communications. Because plaintiff has not introduced any evidence linking his requests for transfer to any of the defendants, it is just as likely that the "jailers" who knew of plaintiff's written and verbal requests for a transfer are officials who are not named as defendants in this suit.

In sum, plaintiff's efforts to warn jail officials that he faced a threat of assault lacked sufficient detail and the undisputed facts indicate that each of the individual defendants was unaware that plaintiff had requested a transfer. On these facts, there is no basis for

concluding that any of the individual defendants (and, therefore, defendant County of La Crosse) was deliberately indifferent to any risk of assault he faced. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's failure to protect claim. This conclusion makes it unnecessary to consider whether the individual defendants are entitled to qualified immunity with respect to this claim.

B. Wis. Stat. § 302.38

Wis. Stat. § 302.38(1) states that if

> a prisoner needs medical or hospital care or is intoxicated or incapacitated by alcohol the sheriff, superintendent or other keeper of the jail or house of correction shall provide appropriate care or treatment and may transfer the prisoner to a hospital or to an approved treatment facility under [Wis. Stat.] § 51.45(2)(b) and (c), making provision for the security of the prisoner.

Plaintiff argues that the medical care provided to him after he was assaulted was inappropriate and therefore violated the statute. The individual defendants argue that the court should decline to exercise jurisdiction over this claim because plaintiff's federal claim will not survive summary judgment. A district court has discretion under 28 U.S.C. § 1367(c)(3) to decline to exercise supplemental jurisdiction over state law claims when it "has dismissed all claims over which it has original jurisdiction." Szumny v. American General Finance, 246 F.3d 1065, 1073 (7th Cir. 2001). Plaintiff's state law claim has been fully briefed and it presents no novel or complex issues of Wisconsin law. In this situation, it

would be a waste of state judicial resources to dismiss the claim without prejudice and require plaintiff to pursue it in state court. Therefore, I will address plaintiff's claim on its merits.

Defendant County of La Crosse and the individual defendants contend that summary judgment is appropriate with respect to this claim for two reasons. (In his response brief, plaintiff concedes that defendant Health Professionals is not a proper party with respect to this claim.) First, defendants contend that plaintiff has no evidence that the medical care he received after the assault was inappropriate. Second, they argue that they are entitled to immunity under Wis. Stat. § 893.80. Because there are no facts from which a reasonable jury could conclude that the treatment plaintiff received after the assault was inappropriate, I will grant the individual defendants' motion for summary judgment with respect to this claim. (Had plaintiff properly raised an Eighth Amendment claim concerning his medical care, it would not have survived my conclusion that plaintiff did not receive inappropriate medical care in violation of Wis. Stat. § 302.38.) I will not address their argument concerning Wis. Stat. § 893.80.

In Swatek v. County of Dane, 192 Wis. 2d 47, 531 N.W.2d 45 (1995), the Wisconsin Supreme Court considered a arrestee's challenge to the medical care he was given after being arrested. Swatek was arrested after appearing in court for a hearing on an unrelated charge. Before the hearing began, he had complained of pain in his side. He chose

to proceed with the hearing, after which he was arrested and taken to the Dane County jail. His complaints of pain were relayed to a jail official, who contacted the jail nurse. The nurse examined Swatek for signs of appendicitis and told a jail official that he did not believe Swatek needed immediate medical attention. The next day Swatek was released, sought medical attention, was diagnosed with appendicitis and had surgery to remove his appendix. Id. at 53-55, 531 N.W.2d at 47-48.

Swatek filed suit, asserting negligence and civil rights claims. In considering his negligence claims, the Wisconsin Supreme Court looked to Wis. Stat. § 302.38(1) as the source of the defendants' duty. The court defined that the scope of that duty by examining the provision's plain language. That language "recognized that although prisoners 'shall' be provided with appropriate medical care, sheriffs have the discretion or 'liberty' as to how to provide that care." Id. at 59, 531 N.W.2d at 50. Examining the care that Swatek received, the court stated that "appropriate" medical care is that which is "especially suitable, fitting or proper." Id. at 61, 531 N.W.2d at 50. Thus, the issue was whether it was "especially suitable, fitting or proper" for the defendants "to have Swatek examined in the Dane County jail by a medical professional from the Monona Grove Clinic, and to subsequently rely on that professional's opinion that Swatek did not need further medical care and could safely remain in custody." Id. at 61, 531 N.W.2d at 50-51.

The court concluded that the jail officials had acted appropriately; they responded to

the plaintiff's complaints of pain immediately and employed the procedures that governed emergency medical care. In light of the discretion given to sheriffs concerning "how to fill the mandate of providing appropriate care and treatment to the inmates in their custody," the court concluded that the jail's guidelines were "sound" and had been followed. Id. at 66, 531 N.W.2d at 52-53.

In the present case, plaintiff's argument that his medical care was inappropriate focuses on the fact that he was not examined by a doctor or nurse, given any diagnostic tests or hospitalized immediately after he was assaulted. Defendants respond by noting that the attention plaintiff received at the jail was consistent with the course of treatment he elected to pursue after he had been released. Moreover, they note that the jail did not have the type of medical equipment on hand that would have been necessary to detect plaintiff's spleen injury. Finally, they argue that no medical professional has told plaintiff that his injuries were exacerbated because he was not transported to a hospital on the night of April 4, 2004.

The undisputed facts indicate that, at the time plaintiff was assaulted, the La Crosse County Sheriff's Department had a policy in place concerning inmate medical care. The policy provided that "emergency medical care shall be provided on a 24-hour basis" and that inmates "shall, if necessary, be transported to a hospital emergency room for such care." Plaintiff was assaulted after 9:00 p.m., on April 4, 2004, which was a Sunday. At the time, the jail nurse and doctor were not present. After the assault, defendant Welander

approached plaintiff in his cell. Plaintiff walked from his cell to a hallway without assistance. He complained of trouble breathing and pain in his wrist, chest and ribs. According to defendant Welander, plaintiff was not bleeding and none of his clothing was torn. Defendants Georgieff and Delap took plaintiff to a medical cell. Again, plaintiff was able to make the trip unassisted. Defendant Georgieff examined plaintiff's abdomen and could not see any physical injuries. Because he did not believe plaintiff had sustained life threatening injuries, he telephoned Dr. Bohlmann, the doctor assigned to the jail. Defendant Georgieff informed Dr. Bohlmann that plaintiff had been assaulted and that he was having difficulty breathing and was complaining of pain in his ribs. Dr. Bohlmann stated that it was possible that plaintiff had a cracked rib; however, he did not instruct defendant Georgieff to take plaintiff to the hospital. Instead, he prescribed ibuprofen and told defendant to monitor plaintiff's condition and contact him if it changed. Defendant Georgieff gave plaintiff ibuprofen and checked on him twice that night. In the morning, a nurse was called to examine plaintiff after he continued to complain about pain. She noted that his abdomen was tender, but it appears that he was released before any further medical care could be provided.

I agree with defendants that plaintiff has failed to raise a genuine issue of material fact concerning the propriety of the medical care he received. If plaintiff had presented evidence that defendants knew that he had sustained an internal injury or that Dr. Bohlmann had

recommended that plaintiff be taken to a hospital, defendants' failure to do so would carry more weight. However, there is no evidence that any of the individual defendants knew the extent of plaintiff's injuries. In fact, it is undisputed that the jail lacked the medical equipment needed to detect plaintiff's spleen injury. Defendant Welander, the first jail official to examine plaintiff after the assault, did not observe any bleeding and defendant Georgieff did not observe any signs of physical injury when he examined plaintiff. Defendant Georgieff consulted Dr. Bohlmann, who did not recommend hospitalization. Instead, he ordered that plaintiff be monitored and given medicine for his pain. The undisputed facts show that defendant Georgieff followed his orders to the letter.

Wis. Stat. § 302.38(1) imposes a duty to provide medical care but confers discretion on sheriffs with respect to how that care is provided. In this case, defendants examined plaintiff, consulted a doctor and followed his orders. Because jail officials are not medical professionals, the discretion conferred by the statute allows them to rely on the opinions of medical professionals with respect to the care provided to inmates. This reliance has long been a part of Eighth Amendment jurisprudence, Bond v. Aguinaldo, 228 F. Supp. 2d 918, 920 (N.D. Ill. 2002) (citing cases), and it is reasonable to import it into this statutory provision.

Plaintiff's argument boils down to nothing more than a disagreement with defendants' decision not to take him to a hospital on April 4. Because there is no evidence that

plaintiff's condition worsened because he was not hospitalized sooner and because defendants consulted a physician and followed his orders in treating plaintiff, no jury could conclude that the medical treatment he received was anything other than suitable, fitting and proper. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's claim under Wis. Stat. § 302.38.

ORDER

IT IS ORDERED that

1. Defendants' motion to strike plaintiff's expert witness is DENIED as unnecessary;

2. The motion for summary judgment filed by defendants County of La Crosse, Mike Weissenberger, Mark Welander, James Georgieff and Tanya Delap is GRANTED;

3. Defendant Health Professionals, Ltd.'s motion for summary judgment is GRANTED; and

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 1st day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge