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

MICHAEL PARKS,

Plaintiff,

v.

CHIPPEWA COUNTY, JAMES KOWALCZYK, JOHN DOE 1-10/MAKER OF THE BELT, and JOHN DOE OFFICER OF CHIPPEWA COUNTY,

Defendants.

OPINION & ORDER

16-cv-347-jdp

Plaintiff Michael Parks, a prisoner currently incarcerated at the Columbia Correctional Institution, has filed this proposed lawsuit in which he alleges that he was shocked by a defective restraint belt used during a trial. Plaintiff has paid an initial partial payment of the filing fee for this lawsuit, as previously directed by the court.

The next step in this case is to screen plaintiff's complaint. In doing so, I must dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. Because plaintiff is a pro se litigant, I must read his allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam).

After reviewing plaintiff's complaint with these principles in mind, I conclude that plaintiff may proceed on a Fourteenth Amendment due process claim against defendant John Doe officer, negligence claims against the Doe officer and defendant Chippewa County, and a products liability claim against the Doe manufacturer of the stun belt. I will deny him leave to proceed on the remainder of his claims.

ALLEGATIONS OF FACT

I draw the following from plaintiff's complaint and Wisconsin electronic court records. In November 2015, plaintiff Michael Parks was the criminal defendant in a trial at the circuit court for Chippewa County, Wisconsin. The Chippewa County Sheriff's Office used an electric stun belt to restrain plaintiff. As plaintiff sat with his attorney waiting for the jury to deliberate, the belt "electrocuted" plaintiff. Plaintiff's arm was severely burned. I take plaintiff to be saying that the belt malfunctioned rather than being turned on by officers.

Earlier that day, while he was being transported, plaintiff told defendant John Doe officer (who was transporting plaintiff) that the belt was beeping and that "he thought the belt might go off," but the officer did nothing. After plaintiff was shocked, the officer stated that "the wires were loose."

Plaintiff filed a grievance and was told that the belt was taken out of service. Plaintiff requested more information about the belt from defendant Sheriff James Kowalczyk, but Kowalczyk declined to help him. Plaintiff wrote to other jail administrators but received no response.

ANALYSIS

A. Federal claims

Plaintiff brings constitutional claims against defendants Chippewa County, Sheriff Kowalczyk, and Doe officer for being shocked by the defective stun belt. There are two issues to be addressed regarding the proper standard to apply to these claims.

First, plaintiff states that defendants' actions subjected him to cruel and unusual punishment prohibited by the Eighth Amendment. But from plaintiff's allegations, I infer

that he was a pretrial detainee, not a convicted prisoner, at the time he was shocked by the stun belt. Because plaintiff was a pretrial detainee, his claim falls under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment. The Fourteenth Amendment provides that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

Second, plaintiff's allegations raise a question as to what type of Fourteenth Amendment claim he may bring. Often, claims regarding restraints are considered under the following standard: "The use of bodily restraints constitutes punishment in the constitutional sense if their use is not rationally related to a legitimate non-punitive government purpose or they appear excessive in relation to the purpose they allegedly serve." *May v. Sheahan*, 226 F.3d 876, 884 (7th Cir. 2000) (citing *Wolfish*, 441 U.S. at 561). But I conclude that this is not the proper way to think about plaintiff's allegations. The use of a stun belt is not a Fourteenth Amendment violation per se, and the case is not really about the fact that plaintiff was restrained. Rather, plaintiff alleges that defendants disregarded a dangerous risk of harm caused by the defective stun belt, which makes this case more similar to case involving a prisoner's or detainee's exposure to dangerous conditions.

Historically, courts have borrowed the Eighth Amendment standard in Fourteenth Amendment cases similar to this one, stating that "the protection afforded [pretrial detainees] is functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners." *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013). Under this standard, the plaintiff must show that "(1) 'he is incarcerated under conditions posing a substantial risk of serious harm,' and (2) defendant-officials acted with 'deliberate

indifference' to that risk." *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).[1]

Based on plaintiff's allegations, I conclude that he may proceed on a due process claim against defendant John Doe officer because he has alleged enough to show that he faced a risk of being shocked by the belt and suggest that the officer was indifferent to this risk by doing nothing after plaintiff alerted him to the potentially defective belt. As the case progresses to summary judgment or trial, plaintiff will have to more fully explain why the beeping would reasonably lead someone to think that the belt was going to deliver a shock.

Plaintiff also attempts to bring due process claims against defendant Sheriff Kowalczyk, but he does not raise any allegations suggesting that Kowalczyk's actions were indifferent to the threat of harm. At most, plaintiff alleges that Kowalczyk was not forthcoming about plaintiff's request for information about the stun belt, but by then the belt had been taken out of service, so plaintiff no longer faced any danger.

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[1] A recent Supreme Court decision calls into question whether it is appropriate to adopt wholesale the Eighth Amendment approach in pretrial detainee cases. In *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015), the court concluded that in the excessive force context, the defendant's subjective state of mind was irrelevant; rather, the "pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." The *Kingsley* Court did not expressly state that this holding should be applied to pretrial detainee cases outside of the excessive force context, and the Court of Appeals for the Seventh Circuit has generally declined to do so. *See Burton v. Downey*, 805 F.3d 776, 784 (7th Cir. 2015) (Fourteenth Amendment prohibits "deliberate indifference to [a pretrial detainee's] serious medical needs," and that "[t]his standard is essentially the same as the Eighth Amendment's prohibition against cruel and unusual punishment, which applies to convicted prisoners."; *see also Riley v. Kolitwenzew*, No. 15-1137, 2016 WL 1077168, at *3 (7th Cir. Mar. 18, 2016) ("Riley was a pretrial detainee, but we evaluate this claimed denial of due process using the same deliberate-indifference standard governing Eighth Amendment claims from convicted prisoners."); *but see Davis v. Wessel*, 792 F.3d 793, 801 (7th Cir. 2015) ("There was great debate between the parties as to whether *Kingsley*—which originated from our circuit—controls in this case. Although *Kingsley* was an excessive force due process case, unlike Davis's case, its discussion is instructive to our due process analysis." (original emphasis)). The parties are free to raise this issue as the case proceeds.

Finally, plaintiff names Chippewa County as a defendant. However, he does not allege that his treatment was the result of a county-wide policy or custom, *see Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978), so he does not state a due process claim against the county.

B. State law claims

1. Negligence

Alternatively, plaintiff alleges that defendants' actions were negligent. A negligence claim under Wisconsin law includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. I will allow plaintiff to proceed with a negligence claim against defendant Doe officer for the same reason I am allowing him to proceed with his due process claim. I will also allow him to proceed against defendant Chippewa County under the theory of respondeat superior. *See Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548, 551 (Wis. 1984) (holding "cities and other governmental units can be held liable in damages for the negligence of their employees under the doctrine of respondeat superior"). I will not allow plaintiff to proceed on a negligence claim against defendant Kowalczyk because he does not allege that Kowalczyk's actions harmed him in any way.

2. Products liability

Plaintiff names "John Doe 1-10\Maker of the belt" as defendants. Plaintiff alleges that the manufacturer of the stun belt provided a defective belt to Chippewa County. "Wisconsin case law allows plaintiffs to seek recovery from a manufacturer for the defective design of a product under a strict liability theory and/or a negligence theory." *Morden v. Cont'l AG*, 2000 WI 51, ¶ 42, 235 Wis. 2d 325, 611 N.W.2d 659.

Under a strict liability theory, "manufacturers of defective products can be liable for the injuries their products cause, regardless of the care taken by the manufacturer or the foreseeability of the harm[.]" *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶ 27, 319 Wis. 2d 91, 768 N.W.2d 674. To prevail on a strict products liability claim, a plaintiff must demonstrate that: (1) the product was defective when it left the seller's possession or control; (2) the product was unreasonably dangerous to the consumer; (3) the defect caused the plaintiff's injuries or damages; (4) the seller engaged in the business of selling the product; and (5) the product was one which the seller expected to and did reach the consumer without substantial change in its condition. *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 23, 245 Wis. 2d 772, 629 N.W.2d 727 (quoting *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 63 (1967)).

Under a negligence theory, plaintiff would need to demonstrate: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." *Morden*, 611 N.W.2d 659, ¶ 44.

At this point, it is unclear what theory of recovery plaintiff intends to pursue. That may be because plaintiff does not yet know exactly why he was shocked. Plaintiff alleges that he has sought information about the stun belt from Sheriff's Office officials but has not received it. As part of the discovery in this case, he should be able to learn more about the incident, the cause of the stun belt malfunction, and the name of the manufacturer. For now, I will allow him to proceed on a products liability claim against a Doe manufacturer.

C. Doe defendants

At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiffs to use discovery to identify the name of the Doe defendants and to amend the complaint to include the proper identity of those defendants.

ORDER

IT IS ORDERED that:

1. Plaintiff Michael Parks is GRANTED leave to proceed on the following claims:

    - A Fourteenth Amendment due process claim against defendant John Doe officer.

    - Wisconsin negligence claims against defendants Doe officer and Chippewa County.

    - A Wisconsin products liability claim against defendant Doe stun belt manufacturer.

2. Plaintiff is DENIED leave to proceed on the following claims:

    - Due process claims against defendants James Kowalczyk and Chippewa County.

    - A negligence claim against Kowalczyk.

3. Defendant Kowalczyk is DISMISSED from the case.

4. I am sending copies of plaintiff's complaint and this order to the United States Marshal for service on defendant Chippewa County. Plaintiff should not attempt to serve defendants on his own at this time.

5. For the time being, plaintiff must send defendants' attorneys a copy of every paper or document that he files with the court.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered July 12, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge