

1990

Manufacturer of Board Game Not Liable for Suicide of Player

Elizabeth Barnes

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Recommended Citation

Elizabeth Barnes *Manufacturer of Board Game Not Liable for Suicide of Player*, 3 Loy. Consumer L. Rev. 25 (1990).

Available at: <http://lawcommons.luc.edu/lclr/vol3/iss1/8>

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adopt Ford's argument. Instead, the Third Circuit found that imposing liability on the basis of Ford's failure to install protective netting would not undermine the options under Standard 208. Reasoning that the purpose of the Safety Act was to promote safety, the court determined that neither Congress nor the Department of Transportation intended an all-inclusive schedule which would effectively "freeze" developments and improvements in safety design. Consequently, the court held that Pokorny's claim against Ford for the manufacturer's failure to equip the van with protective netting over the windows was not preempted. The court of appeals remanded the protective netting claim to the district court.

Linda J. Urbanik

MANUFACTURER OF BOARD GAME NOT LIABLE FOR SUICIDE OF PLAYER

In *Watters v. TSR, Inc., a/k/a TSR Hobbies, Inc.*, 904 F.2d 378 (6th Cir. 1990), the United States Court of Appeals for the Sixth Circuit held that a manufacturer of a board game could not be held liable under Kentucky negligence law for the suicide of an avid player of the game. The Sixth Circuit affirmed the lower court's decision to grant summary judgment for the manufacturer of the board game. The court of appeals determined that the manufacturer of the board game had no reason to foresee that certain players of the game would be more susceptible to murder or suicide than non-players.

Background

Sheila Watters ("Watters") brought a wrongful death action against TSR, Inc. ("TSR") for the suicide of her son, Johnny Burnett ("Johnny"). Johnny, a devoted "Dungeons and Dragons" player, died due to a self-inflicted gunshot

wound. Manufactured by TSR, Dungeons and Dragons is a game in which players assume various characters' roles in imaginary ancient world "adventures," as illustrated in the TSR booklets. A player known as the "Dungeon Master" narrates the adventures. Encounters between the players depend on the roll of the dice in conjunction with tables provided in the manufacturer's published materials.

Dungeons and Dragons does not require the players to act out roles physically. The record in the present case did not indicate that the game's materials glorified or encouraged suicide or that the materials alluded to guns. In addition, both schools and libraries used the game as a learning tool and as a means to encourage creativity. TSR's records indicated that the company had sold more than a million games at the time of Watters' wrongful death action. These sales figures did not include sales by other companies which produced and sold similar role-playing games.

According to Watters, Johnny and his friends played Dungeons and Dragons constantly after school and on weekends for several years. Watters claimed that Johnny's continuous exposure to the game caused him to lose control of his will and forced him to kill himself.

District Court

In her complaint, Watters alleged that TSR violated its duty of ordinary care by disseminating Dungeons and Dragons literature and materials and violated its duty to warn that fragile-minded children who played the game might suffer psychological harm and loss of control of their mental processes. In addition, Watters alleged that TSR's actions directly and proximately caused her son's death. In support of her claim, Watters only submitted an affidavit which stated that she had read in many publications about the dangerous propensities of the Dungeons and Dragons game.

After the case was removed to the U.S. District Court for the Western District of Kentucky on the basis of diversity of citizenship, TSR moved for summary judgment on several grounds. First, TSR argued that the first amendment, as incorporated through the fourteenth amendment, precluded a Kentucky court from finding TSR liable on the basis of what the company published. TSR also asserted that it had no obligation to cease distributing the game or to warn players of its possible dangers. Finally, TSR argued that Johnny's suicide was a superseding or intervening cause of his death.

The district court granted TSR's motion for summary judgment. The court rested its decision on first amendment grounds without deciding any of the state law negligence issues including breaches of duty for disseminating the game and for failure to warn of the games' dangerous propensities.

Sixth Circuit Court of Appeals

Based on the general principle that courts will not anticipate constitutional questions, the Sixth Circuit determined it did not need to reach the constitutional arguments in order to decide Watter's appeal. Despite the fact that the constitutional question was the only one argued by the parties on appeal, the court decided that the briefs filed at the district level adequately addressed the underlying common law issues. The court found that although there was no Kentucky case law directly on point, the principles governing the case were sufficiently clear.

Under Kentucky negligence law, there is actionable negligence where a duty has been breached, and the breach results in an injury. According to the law, each person must exercise ordinary care and prevent foreseeable injury to others. The court highlighted the fundamental principle that usually liability does not exist without fault. The court noted that no courts had extended the doctrine of strict liability, which allows for liability

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Board Game Liability

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without fault, to words or pictures. Thus, Watters could not recover damages without proof that TSR violated its duty to exercise ordinary care to prevent foreseeable injury.

The court first addressed Watters' argument that TSR was at fault for putting Dungeons and Dragons on the market without attempting to ascertain the mental conditions of prospective players. The court held that TSR did not fail to exercise ordinary care since the only method of guaranteeing that Dungeons and Dragons would not reach "mentally fragile" individuals would be to stop its sales of the game entirely.

Next the court of appeals addressed Watters' contention that TSR breached a duty to warn of the possible consequences of playing the game, including a player's loss of control of mental processes. Under Kentucky law, manufacturers and suppliers have a general duty to warn of dangers known to them but not known to anticipated users of the product. Though it determined that Johnny was one of the class of persons whose use of the game could have been reasonably anticipated, the court found Watters failed to prove TSR could have foreseen Johnny's suicide.

According to the court, TSR's motion for summary judgment required Watters to cite specific facts showing that TSR possessed knowledge of a danger which made Johnny's death foreseeable. In her affidavit, however, Watters admitted only to reading publications which discussed the dangerous propensities of the game. She described her son as well-behaved throughout the period when he regularly played Dungeons and Dragons with his friends. The court reasoned that if Johnny's mother could not foresee the suicide, TSR could not be expected to foresee the boy's death either.

In addition, the court concluded that, based on the content of the materials which accompanied the

game, TSR would not have been able to foresee that players of the game would be more susceptible to suicide than non-players. The court compared the violence and depravity of television and movies to which children are exposed with the "let's pretend" nature of Dungeons and Dragons. The court found that Dungeons and Dragons only required a player to imagine a fanciful world; this mythological world was not based on suicide or cruelty. The court noted that no Kentucky case law existed which placed a duty to warn on television networks and book publishers with respect to creative works which might be linked to anti-social behavior. Furthermore, the only case law on point supported TSR's first amendment argument. Moreover, there had never been a similar claim against producers and publishers for the actions of persons allegedly prompted by watching television shows and reading magazines where there was no direct incitement to act. In the absence of specific facts indicating that TSR's game was in fact dangerous or that TSR had knowledge of any danger with respect to the game and its effect on players, Watters failed to sustain her cause of action.

Lastly, the court of appeals considered Watters' assertion that TSR's manufacturing and sale of Dungeons and Dragons proximately caused her son's death. According to the court, there cannot be liability in a negligence action if the negligence did not cause the injury. The court recognized that under Kentucky law, unforeseeable, extraordinary actions may interrupt the chain of causation. In this case, the court held that Johnny's suicide was an unforeseeable and intervening act.

Although exceptions to the general rule that suicide constitutes an independent and intervening act do exist, such as in the area of worker's compensation or in a situation where someone with suicidal tendencies is placed in the care of a custodian, the court found that Watters failed to present facts suggesting Johnny's suicide fit into either exception. There was no

evidence that Johnny suffered from psychosis or had suicidal tendencies. Thus, the court concluded that whether Johnny would not have shot himself had he not constantly played Dungeons and Dragons was open to speculation.

The Sixth Circuit held that Watters had failed to establish there was a genuine issue for trial under the standards of Kentucky negligence law. Therefore, the court of appeals affirmed the district court's decision to grant TSR's motion for summary judgment.

Elizabeth Barnes

**AN "AS IS" CLAUSE IN
A DEED OF
CONVEYANCE DOES
NOT PROTECT
RESPONSIBLE
PARTIES AGAINST
STRICT LIABILITY FOR
CLEANUP COSTS
UNDER CERCLA**

In *Wiegmann & Rose Int'l Corp. v. NL Indus.*, 735 F. Supp. 957 (N.D. Cal. 1990), the United States District Court for the Northern District of California held that a former property owner who disposed of hazardous wastes on property sold could not rely upon an "as is" provision in the deed to the contaminated property to escape strict liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1982 & Supp. 1988).

Background

On May 23, 1975, NL Industries, Inc. ("NL") sold twenty-three acres of property in California to Wiegmann & Rose Machine Works ("Wiegmann"). In September 1985, Wiegmann sold all of its stock to Wiegmann & Rose International Corporation ("W & R"). NL alleged that the deed conveyed