(ORDER LIST: 592 U.S.)

MONDAY, October 5, 2020

CERTIORARI GRANTED

19-6236 CITY OF NEW TRURO, NEW TEJAS V. KILL-A-BYTE SOFTWARE, INC.

The petition for writ of certiorari is granted limited to the following questions: 1) Whether a party must move for judgment as a matter of law at trial to preserve an argument that the district court rejected in denying summary judgment? 2) Whether state law may impose civil liability on a private party for distributing a product that is later determined to create a public nuisance?

Appendix to
Petition for Writ of Certiorari

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 18-5971

KILL-A-BYTE SOFTWARE, INC.,
Defendant-Appellant,

v.

CITY OF NEW TRURO, NEW TEJAS,
Plaintiff-Appellee.

Filed: March 21, 2020

Appeal from the United States District Court
for the District of New Tejas
(D.C. No. 16-cv-5412)

Before ENYS, DESPARD, and CARNE, Circuit Judges.

OPINION

ENYS, Circuit Judge.

This case involves one of the largest judgments ever to come before this Court. Invoking the public nuisance laws of New Tejas, the City of New Truro received a judgment in excess of $600 million against Kill-a-Byte Software, Inc., for the costs of "abating" the public nuisance of crime caused by video games. Because we conclude that this award violates due process and that Kill-a-Byte preserved this argument, we REVERSE and render a take-nothing judgment in favor of Kill-a-Byte.

Background

The City of New Truro, New Tejas faces a significant budget shortfall. Over the last decade, its violent crime rate has significantly exceeded the national average, its tax revenues have decreased by more than 50%, and the costs of funding its police department have more than doubled. Although one could imagine many possible sources of these ills, the City of New Truro has blamed its injuries on a single purported cause: violent video games.

Between 2003 and 2013, Appellant Kill-a-Byte Software, Inc. distributed and operated "Lightyear," an online, massively multiplayer, science-fiction video game in which more than 1,000 players battle each other (and computer-controlled aliens) to the death using a variety of both primitive and futuristic weapons. The popularity of the game is difficult to overstate: worldwide, more than 300 million individuals created accounts during this timeframe, although a far smaller number played regularly. At trial, experts estimated that, between 2010 and 2013, more than 50% of male residents of New Truro between the ages of 15 and 25 played the game for at least 10 hours every week.

It is undisputed that Kill-a-Byte's sale and operation of Lightyear did not violate any federal or state statute or regulation.

In 2016, after retaining private counsel, the City sued Kill-a-Byte for "absolute public nuisance" under New Tejas common law, alleging that by distributing Lightyear, Kill-a-Byte intentionally created conditions—namely, an undereducated male population with diminished job skills and few employment prospects who are allegedly "trained to kill"—that substantially interfered with public safety. Although New Truro filed

suit in New Tejas state court, Kill-a-Byte removed the case to federal court based on diversity jurisdiction.

Following discovery, Kill-a-Byte moved for summary judgment on numerous grounds, including that imposing civil liability for lawful distribution of a video game would violate due process. The district court denied this motion, holding that imposition of civil liability under state law cannot violate the Due Process Clause. The City did not move for summary judgment on this issue.

The case proceeded to trial, where (over Kill-a-Byte's objection) the City presented expert testimony purportedly establishing a link between violent video games and subsequent criminal behavior. According to Dr. Hugh Armitage, Lightyear had "trained a generation of killers:" "When a child commits thousands of virtual murders, they take that training and apply it in real life. It would be absurd to suggest that a murder simulator like Lightyear could have no effect on developing brains."[1]

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[1] This link—and the causes of the City's admittedly high crime rate—was hotly disputed at trial. Kill-a-Byte's expert, Dr. Elizabeth Valentine, testified that the City's crime rate resulted from several other causes, including the high unemployment rate caused by numerous factory closings, the reduced police budget, and the consequently undersized police force (budget problems that resulted, in part, from the well-publicized 2005 embezzlement scandal for which the former Mayor is now serving a felony sentence in federal prison). Dr. Valentine attributed many of the City's educational problems to the poor quality of its school system and noted that these issues were exacerbated by the 2004 teacher strike.

Following a three-week trial, a jury returned a verdict in favor of the City on liability, finding that: (1) Kill-a-Byte intentionally distributed and operated Lightyear; (2) the increased crime rate constituted a substantial interference with a right to public safety; and (3) the widespread use of the Lightyear software was a substantial factor in the City's increased crime rate.

It is undisputed that Lightyear was not solely responsible for the City's crime rate—the City acknowledges that numerous factors contributed—but the City argued, as a matter of New Tejas law, its public nuisance claims only required findings that: (1) the increased crime rate substantially interfered with the right to public safety; and (2) Lightyear was a "substantial factor" in the increased crime rate.

Because the remedy sought by the City was "abatement" of the public nuisance, an equitable remedy under state law, it was an issue to be decided by the court. Following the jury's liability verdict and after a two-week bench trial limited to the issue of abatement, the district court entered a judgment awarding the City more than $600 million in "abatement" costs. The City did not attempt to identify costs specifically attributed to Lightyear but argued, as a matter of state law, that Kill-a-Byte was responsible for the full cost of abating the nuisance to which it contributed.

Kill-a-Byte appealed to this Court, raising numerous issues under state law related to the viability of the City's theory and the sufficiency of its evidence. Skeptical of the City's liability theory, which appeared to be unprecedented under New Tejas law, we certified these questions to the Supreme Court of New Tejas. In its answer to our questions, in a 5-4 opinion with a heated dissent, the Supreme Court of New Tejas confirmed:

(1) the viability of the City's liability theory; (2) the legal sufficiency of the evidence presented by the City; and (3) that the money sought by the City and awarded by the district court constituted a recoverable amount of "abatement" for purposes of state law. We must, of course, defer to the Supreme Court of New Tejas on questions of state law and thus must now, in accordance with the answers to our certified questions, assume that the judgment is consistent with the law of New Tejas.

Discussion

The question of federal law remains: whether a state's imposition of civil liability in these circumstances offends the Due Process Clause of the Fourteenth Amendment.

Before discussing the merits of Kill-a-Byte's argument, we must first address an issue of procedure: whether Kill-a-Byte preserved its due process argument.

I. Kill-a-Byte Was Not Required to Renew Its Purely Legal Arguments in a Rule 50 Motion.

There is no dispute that Kill-a-Byte argued below that the imposition of civil liability under the City's theory would offend the Due Process Clause of the Fourteenth Amendment. Kill-a-Byte raised this argument in a motion for summary judgment, and the district court rejected it unequivocally.

The City argues, nonetheless, that Kill-a-Byte forfeited this argument by failing to raise it at trial in a Rule 50(a) motion and renew it post-judgment in a Rule 50(b) motion. Fed. R. Civ. P. 50. Because the City did not receive (or seek) summary judgment on the issue, it was not resolved against Kill-a-Byte and thus, the City contends, was a live issue at trial.

Some authority supports the City's position. In *Ortiz v. Jordan*, 562 U.S. 180 (2011), the Supreme Court held (despite the ordinary operations of the merger rule) that a party may not "appeal an order denying summary judgment after a full trial on the merits." *Id.* at 184. "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Id.*

Relying on *Ortiz* and its reasoning, the First, Fourth, and Fifth Circuits[2] have held that a court "has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment . . . only if it is sufficiently preserved in a Rule 50 motion." *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *see also Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010) (holding "that even legal errors cannot be reviewed unless the challenging party restates its objection in a [Rule 50] motion"); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

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[2] The Fifth Circuit's position may be less than perfectly clear—it read the Eight Circuit's position as consistent with the First and Fourth Circuits. *See Feld*, 861 F.3d at 596 (citing *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014)). *But see NY Marine & Gen. Ins. Co.*, 761 F.3d at 838 (stating that its precedent "did not indiscriminately foreclose all appeals taken from the denial of an issue raised at summary judgment" and distinguishing "between the denial of a summary judgment motion involving the merits of a claim and one involving preliminary issues, such as a statute of limitations, collateral estoppel, or standing").

Nonetheless, we disagree and join with the D.C. Circuit, Second Circuit, Sixth Circuit, Seventh Circuit, Ninth Circuit, Tenth Circuit, and Federal Circuit in holding that "a Rule 50 motion is not required to preserve for appeal a purely legal claim rejected at summary judgment." *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *see also Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994).

The Rules begin by directing that they should be "construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Holding that Kill-a-Byte forfeited its arguments by not renewing them in a Rule 50 motion would be fundamentally unjust.

In these circumstances, requiring a Rule 50 motion would be a meaningless formality. The district court did not deny summary judgment because of genuine issues of disputed fact; rather, it expressly and unequivocally rejected Kill-a-Byte's legal arguments. Although the district court's order states that summary judgment in favor of Kill-a-Bye is denied, based on the very same opinion, the district court easily could have stated instead that partial summary judgment in favor of the City was granted. As the Federal Circuit explained in a patent infringement dispute, "[w]hen the district court denied [the defendant's] motion for summary judgment, it did not conclude that issues of fact precluded judgment; it effectively entered judgment of validity to Lighting

Ballast." *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 790 F.3d 1329, 1337 (Fed. Cir. 2015).

Here, the district court effectively entered partial summary judgment for the City. We do not require that it have done so expressly.

Nor do we understand how Kill-a-Byte could have filed a Rule 50 motion directed at the Due Process Clause. By its own terms, Rule 50 concerns the sufficiency of the evidence presented to the jury. *See* Fed. R. Civ. P. 50(a)(1) (allowing a motion to be granted if, *inter alia*, "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). But the jury was not asked—nor would a jury ever conceivably be asked—whether the City's claims violated due process. The question is one for the court, not for the jury. By its own terms, we do not see how Rule 50 could apply or how Kill-a-Byte could have drafted a coherent motion.

For these reasons, we hold that a party need only renew a motion for summary judgment in a Rule 50 motion when the denial is based on genuine issues of fact rather than on purely legal reasons. Kill-a-Byte thus fully preserved its arguments under the Due Process Clause.

II. The Judgment Below Violates the Due Process Clause of the Fourteenth Amendment.

Having determined that Kill-a-Byte's arguments were preserved through its motion for summary judgment, we turn to the merits.

As the court below correctly recognized, the Constitution affords significant deference to the States in their development of their laws, including common-law

development of laws related to tort liability. But this deference, although substantial, is not limitless, and we conclude that this judgment exceeds constitutional limits.

We see two primary errors in the analysis of the court below: (1) the district court failed to give adequate weight to retroactivity; and (2) much like the blind men and the elephant, the district court considered aspects of the City's claims in isolation but failed to consider the effects as a whole.

For example, as the district court notes, strict liability in tort is not a novel invention. *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 102 (2d Cir. 2010) (explaining that "[s]trict liability generally raises due process concerns with respect to criminal, not civil, statutes").

Similarly, the extension of the law of public nuisance from real property to any act interfering with public health and safety, while a relatively recent development, is not unprecedented and is consistent with the Restatement (Second) of Torts. Standing alone, such an extension would not violate due process.

We are more troubled by state law permitting Kill-a-Byte to be held liable for public nuisance without evidence that Kill-a-Byte's actions were a but-for cause of the City's injuries, *i.e.*, the City's injuries would still have occurred in the absence of Kill-a-Byte's acts. The district court (and the Supreme Court of New Tejas, in answering our certified questions) explained that only "substantial factor" (and not "but-for") causation was required.

Such a holding appears to be unprecedented. The Supreme Court has discussed the "substantial factor" standard, explaining that "no case has been found where the defendant's act could be called a substantial factor when the event still would have occurred without it":

> [T]he authors of [the treatise] acknowledge that, even in the tort context, "[e]xcept in the classes of cases indicated" (an apparent reference to the situation where each of two causes is independently effective) "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." [W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 268 (5th ed. 1984)]. The authors go on to offer an alternative rule . . . that "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Ibid.* Yet, as of 1984, "no judicial opinion ha[d] approved th[at] formulation." *Ibid.*, n.40.

Burrage v. United States, 571 U.S. 204, 215–16 (2014). The imposition of liability without a showing of but-for causation historically required by the common law has the potential to significantly expand the scope of civil liability.[3]

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[3] We are also troubled by the conclusion of the New Tejas Supreme Court that the evidence presented by the City at trial was sufficient to establish proximate causation under state law. Under an orthodox analysis of proximate causation, we would readily conclude that the intervening event of an individual's decision to play Lightyear broke the chain of proximate causation between Kill-a-Byte's actions and the City's injuries.

We need not decide whether this causation standard, alone, would violate due process because we find that the various aspects of the state claims violate due process when considered in the aggregate. When all of these aspects of the state claims are considered together, it is clear that the state law does not "approac[h] the problem of cost spreading rationally." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976). Put simply, the New Tejas Supreme Court held that state law permits a claim against any entity that was a substantial factor for the entire cost of abating the City's increased crime rate, without regard to the proportion of the increased crime rate for which the defendant was responsible and without proof that the defendant was the but-for cause of the substantial interference with public safety. This is not a rational way of allocating to Kill-a-Byte the expenses of abating the interference with public safety caused by the City's high crime rate.

Our conclusion is bolstered by the retroactivity of the cause of action. Before the Supreme Court of New Tejas answered our certified questions (making clear that the City's theory and proof of liability were consistent with state law), the laws of New Tejas gave Kill-a-Byte no warning that it might face such an extraordinary liability.

Notably, in the California public nuisance lead paint litigation, state law required a plaintiff to do more than prove that the defendant knew that it was distributing lead paint (all that the law of New Tejas requires)—the plaintiff was required to prove that the defendant knew that the lead paint was injurious to public health. *See People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 529 (Cal. App. 2017) ("By tethering the public nuisance cause of action to affirmative promotion for a

use defendants *knew to be hazardous*, this court necessarily set forth an *actual* knowledge standard."). Here, in contrast, the New Tejas law of public nuisance did not require proof that Kill-a-Byte knew Lightyear to be hazardous when promoting it.

Justice Kennedy's *Eastern Enterprises* concurrence noted the "distrust" of "legislation with retroactive effects." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring). We see no difference between legislation with retroactive effects and the development of common-law liability with retroactive effects. If anything, the procedural protections of the legislative process should mean that legislative judgments are subject to less scrutiny. Due process protects against retroactive imposition of liability:

> [D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Id. at 549. The New Tejas public nuisance claim violates these principles; although there is no need for a mathematical fit between justification and means, judgment in the amount of hundreds of millions of dollars for distribution of a lawful product is too great a disconnect.

Indeed, the *Eastern Enterprises* plurality's reasoning (albeit grounded in the Takings Clause rather than due process) closely tracks Justice Kennedy's reasoning. Justice O'Connor explained that legislation might be unconstitutional if it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (plurality op.). This is a perfect description of the City's claims: severe liability on a party who could not have anticipated the liability and to an extent far disproportionate to the parties' experience. Ultimately, such liability violates principles of fundamental fairness. *Id.* at 534 ("The distance into the past that the Act reaches back to impose a liability on Eastern and the magnitude of that liability raise substantial questions of fairness."). Such a result is equally unfair whether the judgment is analyzed based on due process or as a taking.

Finally, the Supreme Court's analysis of due process constraints on punitive damages further confirms our conclusion. The Supreme Court has held that "[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). An award of punitive damages that is "grossly excessive . . . furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.*

It is true, as the district court notes, that the City technically seeks "abatement" rather than damages, and the City seeks to "abate" a concrete injury that it has suffered. Neither *State Farm* nor *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), applies directly, but the

principles of these decisions can be applied in this context.

Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). Here, the City seeks to redress a concrete loss, but in light of the featherweight causation burden under state law, the City's recovery exceeds the loss suffered "by reason of [Kill-a-Byte's] wrongful conduct." The "abatement" remedy awarded by the judgment below includes a remedy for injuries that the City would have suffered even in the absence of Kill-a-Byte's wrongful conduct and for injuries caused by the conduct of others. Under *State Farm* and *BMW*, the monetary recovery ordered by the district court, which is grossly excessive, offends due process, regardless of whether it is characterized as abatement or punitive damages.

We recognize the substantial deference provided to States under the Due Process Clause but nonetheless conclude that the judgment in this case exceeds the outer bounds of permissible liability.

Conclusion

For these reasons, we reverse the judgment below and render judgment that the City take nothing on its claims against Kill-a-Byte.

REVERSED and RENDERED.

DESPARD, Circuit Judge, dissenting.

In procedural matters, there is a value in clarity. Bright lines provide certainty to parties, attorneys, and judges.

One bright line in the Federal Rules of Civil Procedure is Rule 50. When a party intends to ask a court of appeals to render judgment as a matter of law in the party's favor following a jury trial, the party must make the argument during trial in a Rule 50(a) motion and renew the argument in a Rule 50(b) motion. Fed. R. Civ. P. 50. There are no exceptions.

This process is not, as the majority suggests, a "meaningless formality." It ensures that a district judge is fully apprised—and can fully consider—all of the reasons that a party might deserve judgment to be rendered in its favor.

The majority's decision disrupts this orderly process, erroneously holding that there is an implicit "purely legal" exception to Rule 50. No such exception is found in the text of the rule, and there is no reason to create one.

Indeed, the Supreme Court has explained that in "the absence of [a Rule 50] motion," an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006) (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). These limitations find their roots in the Reexamination Clause of the Seventh Amendment. *Compare Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 660 (1935) ("At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the

questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation[.]") *with Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 399 (1913) (stating that when insufficient evidence supported the jury's verdict in favor of the plaintiff, the Seventh Amendment barred a court of appeals from rendering judgment in favor of the defense).[4] Here, with no Rule 50 motion directed at this issue, this Court is "without power" to direct the district court to enter a different judgment.

In the view of the majority, there is no difference between a denial of summary judgment for one party and a grant of partial summary judgment in favor of the

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[4] *Baltimore & Carolina Line* distinguished *Slocum* on the basis that in *Slocum*, "the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter." 295 U.S. at 658. But in the case at hand, rendition of judgment was permissible because "[t]he trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict." *Id.* at 658-59. This distinction is embodied in the modern Rule 50(b), which provides that a Rule 50(a) motion cannot be denied but can only be reserved: "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b). The majority's cavalier treatment of Rule 50 fails to recognize its constitutional significance under the Seventh Amendment.

other. Nonsense. When judgment is entered on an issue, the issue has been resolved. When judgment has not been entered, the issue remains live and unresolved. It does not matter what a judge says—off the record, on the record, or in an opinion—a claim or issue is not decided until the judge actually enters an order deciding it.

If the trial court had granted partial summary judgment in favor of the City on Kill-a-Byte's due process challenge, then under the "merger rule," the interlocutory order would have merged with the final judgment and could have been reviewed on appeal from that final judgment. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). But the Supreme Court makes clear in *Ortiz v. Jordan*, 562 U.S. 180 (2011), that these principles do not apply to denials of summary judgment, which do not merge into a final judgment and cannot be appealed after a jury trial.

The majority's approach makes the critically important question of error preservation turn on a lower court's reasoning, not on its judgment. If the district court had entered exactly the same order denying summary judgment but, in its opinion, had explained that there were genuine issues of material fact for trial, then preservation would have required Kill-a-Byte to file a Rule 50 motion. But like the Supreme Court, this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). An opinion rejecting Kill-a-Byte's arguments is no substitute for a judgment on those arguments.

Indeed, the majority's reasoning about "meaningless formality" would appear to apply equally to Rule 50(b). A party must present its arguments for judgment as a matter of law in a mid-trial motion under Rule 50(a). But preservation requires these arguments to be renewed

post-trial in a Rule 50(b) motion. *E.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006) ("[T]he text and application of Rule 50(a) support our determination that respondent may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion."). Under the majority's approach, however, because a party's arguments were fully presented to the district court in its Rule 50(a) motion, requiring renewal in a Rule 50(b) would be an "unjust" "meaningless formality."

Nor am I persuaded that the line drawn by the majority between "purely legal" issues and "fact-bound" issues is tenable. Here, for example, it seems impossible that the majority's due process analysis was uninfluenced by the extraordinary verdict in favor of the City and the City's clarification of its legal theories through the evidence presented at trial. Even if the ultimate conclusion is a question of law for the court, the facts to which the legal analysis is applied will be the facts of what happened at trial. These are thus precisely the circumstances addressed by *Ortiz v. Jordon*, where the Supreme Court held that after trial, legal issues should be evaluated based on "the trial record, not the pleadings nor the summary judgment record." 562 U.S. at 184 (quoting 15A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3914.10, p. 684 (2d ed.1992 and Supp. 2010)).

For these reasons, I conclude that Kill-a-Byte has not preserved its request for rendition of judgment in its favor based on its arguments that the imposition of liability violates the Due Process Clause. I would, therefore, affirm the judgment below and take no position on the merits of its arguments. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW TEJAS

Civil Action No. 16-cv-5412

CITY OF NEW TRURO, NEW TEJAS,
Plaintiff.

v.

KILL-A-BYTE SOFTWARE, INC.,
Defendant.

Filed: May 10, 2017

OPINION AND ORDER

OSBORNE WHITWORTH, Judge.

This matter is before the Court on Defendant Kill-a-Byte Software, Inc.'s Motion for Summary Judgment Pursuant to the Due Process Clause. For the reasons detailed below, the Court denies the motion.

Plaintiff City of New Truro ("the City" or "New Truro") has sued Defendant Kill-a-Byte Software, Inc. ("Kill-a-Byte") alleging that Kill-a-Byte's distribution and operation of its "Lightyear" video game negatively affected the City's citizens and substantially interfered with public safety. The City seeks to compel Kill-a-Byte to "abate" this nuisance in the form of job training, educational opportunities, and additional public safety measures.

In other summary judgment motions, Kill-a-Byte challenged numerous other aspects of the City's claims,

including: (1) the City's statutory and constitutional standing; (2) whether the City's evidence of Kill-a-Byte's intent was sufficient to survive summary judgment; (3) whether the City provided sufficient evidence of causation to survive summary judgment; (4) whether the statute of limitations bars the City's claims (given that Kill-a-Byte ceased distribution of the video game in 2013); and (5) whether the recovery sought by the City constitutes "abatement" available under state law. In other orders, this Court rejected each of these arguments and denied summary judgment in favor of Kill-a-Byte.

In this Order, this Court considers the last of the summary judgment motions filed by Kill-a-Byte, which argues that even if the City's claims are viable as a matter of state law, this expansion of liability violates the Due Process Clause of the Fourteenth Amendment.

Background

For the purposes of this motion, this Court recites the facts in the light most favorable to the non-movant, the City of New Truro, New Tejas.

Defendant Kill-a-Byte Software, Inc. is one of the largest and most successful software companies in the country. Since its founding in 2000, Kill-a-Byte has developed, produced, and distributed a number of video games, many of which met with critical acclaim and commercial success.

By far, the most successful of Kill-a-Byte's games was "Lightyear," a massively multi-player online arena shooter simulation. During the decade of Lightyear's operation (from 2003 until 2013), there were numerous changes and upgrades (such as graphical improvements and adding new skins, weapons upgrades, and additional

world generation options) to the game, but the core gameplay remained essentially unchanged.

After creating a free account and installing the software (either on a computer or on a video game console), the game connects a player to the game's online servers, which group the player together with other players (initially limited to 25 players in a round but eventually rising up to 1,000 players). After selecting a species (such as human, cyborg, android, or one of several varieties of humanoid alien), equipment, and weapons, the players fight each other in a procedurally-generated alien world (with procedurally-generated flora and fauna, which might be either hostile or friendly) until only one player remains.

From the beginning, Lightyear's realistic physics engine, gore, and death scenes were popular with players and critics. No matter the weapon—a rock, a bow-and-arrow, a pistol, a rifle, a laser sword, a plasma rifle, or a gravity gun—Lightyear modeled and displayed its effects (most often, quite gruesomely) on the target. If anything was unrealistic about the game, it would have been the excessive amounts of blood and gore.

The variety of possible deaths only increased in 2009, with the addition of "environmental deaths," allowing players to use generated features of the environment to kill their competitors through elaborate traps.

There are no alliances or teams among the players and no room for negotiation. The game embodies the ethos of "every man for himself." In the words of one of the City's experts, "In the end, there can only be one." These ideas are bolstered by in-game "taunts" that players can display to their victims.

With this gameplay model, the City's experts explain, a player's reflexes and hand-eye coordination become exceptionally important. According to these experts, competitive players (or players who seek to play at competitive levels) must develop the reflex to "shoot first."

Perhaps because of its "free to play" model,[1] the game proved to be massively popular. By the time the game ended in 2013 with its grand finale, more than 300 million accounts had been created worldwide. Not all of the accounts turned into regular users, but many did.

According to the City's experts, a surprising number of New Truro youth (particularly young men) regularly played Lightyear for a surprising length of time. According to these experts, between 2010 and 2013, 50% of male residents of New Truro between the ages of 15 and 25 played the game for at least 10 hours every week. The most active 10% of these "regulars" played the game in excess of 35 hours each week. The City's experts refer to these players as "Lightyear addicts," although they acknowledge that the term should not be understood as a formal medical diagnosis.

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[1] Kill-a-Byte was compensated through the sale of downloadable content—such as "cosmetic" features (which might change the appearance of a player or weapons), additional taunts, improved death animations—and of Lightyear-branded clothing and out-of-game products; through sales of optional paid accounts that provide for improved matchmaking and preferable ranking; and through advertising revenue from Lightyear e-sports tournaments.

Kill-a-Byte does not deny that it was fully aware of the amount of time players spent playing its game. Not only did its electronic databases track and record statistics for every player and account, but the information was actively monitored by Kill-a-Byte's employees. Internal documents indicate that the company's primary goal—and the impetus for many of the changes made to Lightyear over the years—was to increase the amount of time (both in the aggregate and individually) players spent playing the game, a figure that almost directly correlated with Kill-a-Byte's revenue. The City's experts note that Kill-a-Byte never limited the amount of time that an individual could spend playing the game on a daily or weekly basis[2] and never questioned whether any players were spending excessive time playing the game, even after publication of accounts of college students failing classes because they spent too much time playing Lightyear.

Taking the facts in the light most favorable to the City, the amount of time that New Truro residents devoted to Lightyear has caused them (and thus the City) significant harm in multiple ways. The first, most obviously, is the opportunity cost. Time spent playing Lightyear is time that could have been spent attending school, doing homework, working at a job, learning a foreign language or a musical instrument, playing sports, or a variety of other productive activities.

The City has presented expert testimony (although controverted by expert testimony presented by Kill-a-Byte) that time spent playing Lightyear (past a minimum number of hours per week) correlates

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[2] It is undisputed that such a limit would have been straightforward for Kill-a-Byte to implement.

negatively with educational achievement, employment, and earnings. Additional calculations then purport to find correlations between poor educational achievement, unemployment, and low earning potential and the likelihood that an individual will engage in criminal activity. Other experts offer opinions, based on their expertise in, for example, social science and video games, that time spent playing Lightyear caused these negative effects, which in turn caused the criminal behavior.

The City's experts also posit a more direct connection between Lightyear and violent criminality. According to neurologists testifying on behalf of the City, exposure to (and, indeed, participation in) violence through video games can affect developing minds, desensitizing them to violence and making them more likely to engage in this behavior in real life.[3] One expert estimated that the typical Lightyear player will have observed thousands (perhaps even tens of thousands) of realistic deaths: "It would be naive to think that players are unaffected by this exposure."

Other opinions identify the specific gameplay of Lightyear as particularly likely to encourage real-world violence: "The game rewards reflexes that respond, unthinkingly and as quickly as possible, with violence. Shooting and killing in the blink of an eye is the only way to 'win.'" Players take these reflexes, the City's experts contend, out of the game and into their real lives, where

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[3] One expert cites to numerous articles on the matter from various news sources, including an APA stance on the issue from 2015, noting that aggression increases in teenagers when they play violent video games. See https://www.apa.org/about/policy/violent-video-games.

they often rely on violence in their interactions with others.

There is no question that the City of New Truro suffers from an unusually high crime rate. The rate of 2,200 violent crimes per 100,000 residents is nearly six times the national average of 381 incidents per 100,000 people. The property crime rate—4,403 property crimes per 1000,000 residents—is similarly above average. The City also suffers from massive unemployment (15%) and high poverty rates (45.3%).

In 2016, the City sued Kill-a-Byte for absolute public nuisance, alleging that in distributing Lightyear, Kill-a-Byte intentionally created conditions that were a substantial factor in a substantial interference with a right to public safety.[4] The City seeks money from Kill-a-Byte to "abate" the public nuisance by funding job training programs, centers to assist with "video game addiction," increased police presence, security cameras in downtown, and other public safety measures.[5] The City's

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[4] The City does not allege (or intend to prove) that Kill-a-Byte intentionally caused the high crime rate but alleges that Kill-a-Byte intended to (and knew that it would) cause its residents to spend large amounts of time playing Lightyear, the conditions that substantially interfered with public safety.

[5] This lawsuit was filed more than two years after Kill-a-Byte ceased distribution of Lightyear, but as this Court explained in its order denying Kill-a-Byte's Motion for Summary Judgment Regarding Statute of Limitations, no statute of limitations applies to claims seeking the equitable relief of abating an existing public nuisance.

experts estimate that the total cost of these measures would exceed $600 million.

There is a dearth of New Tejas authority regarding the public nuisance cause of action, so this Court has looked to the Restatement (Second) of Torts, as the New Tejas Supreme Court has directed.

Analysis

In this motion, Kill-a-Byte contends that the City's claims against it, even if viable as a matter of state law, would violate the Due Process Clause of the Fourteenth Amendment. Kill-a-Byte emphasizes the following aspects of the City's claims:

(1) The City does not contend that Kill-a-Byte distributed an unlawful product or did so in an unlawful manner.

(2) The City contends that it is not required to prove that Kill-a-Byte intended (or knew) that an injury to public safety would occur as a result of its distribution of Lightyear.

(3) The City contends that it is not required to prove that Lightyear was a but-for cause of the City's increased crime rate and intends to hold Kill-a-Byte liable if Lightyear was a "substantial factor" in the injury to public safety.

(4) The City contends that it can recover "abatement" costs in the amount of any money necessary to abate the public nuisance of reducing the crime rate to the national average, rather than "abatement" in the form of requiring Kill-a-Byte to cease distribution of Lightyear (which Kill-a-Byte has already done).

(5) The City contends that if Lightyear was a "substantial factor" in the interference with a right to

> public safety, then it can recover the full amount of abatement from Kill-a-Byte, regardless of any other causes or responsible individuals or entities.

Kill-a-Byte contends that even if the City were correct as a matter of state law, the Due Process Clause of the Fourteenth Amendment prevents state law from imposing liability on such a theory.

This case thus requires this Court to consider the outer bounds of state tort liability permitted by due process.

Finding little caselaw in this area, I follow the analysis of the Seventh Circuit in *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014), which holds that "economic legislation does not violate substantive due process unless the law is arbitrary and irrational." *Id.* "The question is not whether a law is wise or not; we test only whether the law is arbitrary or irrational." *Id.* A law need only survive rational-basis review "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 637 (1993).

Kill-a-Byte relies on the standard articulated by a Supreme Court plurality, arguing that the City's theory of liability is unconstitutional because it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528–29 (1998) (plurality op.). But five justices—Justice Kennedy in his concurrence in the judgment and the four dissenters (Justices Stevens, Souter, Ginsburg, and

Breyer)—"agreed that regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001). Because the state tort liability "does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest," it cannot constitute a "taking." *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).[6]

I therefore review the theory of common-law liability only to determine whether it is "arbitrary and irrational," keeping in mind that "even more deference is owed to *judicial* common-law developments" than is owed to state legislation. *Gibson*, 760 F.3d at 622.

Assuming that the City's theory of liability is consistent with state law, it survives rational-basis review. Although the City's claims may, perhaps, be an aggressive use of public nuisance law, its liability theories are a natural outgrowth of existing precedent and not so irrational as to violate due process.

The definition of a public nuisance is straightforward: "A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B. "The defendant is held liable for a public nuisance if his interference with the public right was intentional[.]" Restatement (Second) of Torts § 821B.

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[6] Kill-a-Byte also contends that the state tort liability violates the Ex Post Facto Clause but acknowledges that this argument is foreclosed by current precedent. *Eastern Enterprises*, 524 U.S. at 538-39 (Thomas, J., concurring).

It is true, as Kill-a-Byte notes, that public nuisance has historically and ordinarily involved real property. But the trends of the past do not limit the cause of action in the modern era: "Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts § 821B, cmt. h; *see also Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) ("Although we have often applied public nuisance law to actions connected to real property or to statutory or regulatory violations involving public health or safety, we have never held that public nuisance law is strictly limited to these types of actions.").

Nor is the application of public nuisance law to products, such as Lightyear, unprecedented. As the Ohio Supreme Court explained, "[U]nder the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." *Beretta*, 768 N.E. 2d at 1142. Public nuisance actions have been brought against entities such as gun manufacturers and sellers of lead paint.

Precedent also supports recovery for public nuisance even though the defendant did not know (or intend) that its acts interfere with the public health or safety: "Intentional, in this context, means not that a wrong or the existence of a nuisance was intended but that the creator of it intended to bring about the conditions which are in fact found to be a nuisance." *Angerman v. Burick*, 2003 WL 1524505 (Ohio App. 2003). Liability is, in this sense, strict: "Where the harm and resulting damage are the necessary consequences of just what the defendant is

doing, or is incident to the activity itself or the manner in which it is conducted, the law of negligence has no application and the rule of absolute liability applies." *Taylor v. City of Cincinnati*, 55 N.E.2d 724, 727 (Ohio 1944). Here, Kill-a-Byte cannot seriously deny that it intended for its game to be successful, popular, and regularly played, and if the jury credits the City's evidence that the necessary consequences of the game's popularity were the injuries to public health and safety in the City, then the City can recover.

Nor is Kill-a-Byte correct that the abatement requested by the City is "radical" and "unprecedented." California courts have rejected the suggestion that the availability of an abatement remedy depends on whether the defendant is "in a position to abate the nuisance": "Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. App. 2006). It is similarly irrelevant whether the costs of abating the nuisance are "reasonable." *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 550 (Cal. App. 2017).

Kill-a-Byte also complains that due process would be offended by the "substantial factor" test for causation and by the failure to allocate responsibility for the City's injuries to other actors. Neither challenge is material. First, "substantial factor" causation is reflected in the Restatement: One actor's conduct "is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm[.]" Restatement (Second) of Torts § 431; *see also id.*, cmt. b (if the actor's conduct "had

any effect in producing" the harm but there were other causes in addition, then the actor is liable if the actors' conduct "ha[d] a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm").

Second, Kill-a-Byte identifies nothing in Due Process Clause jurisprudence that precludes a state from adopting innovative schemes of causation and responsibility. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 624 (7th Cir. 2014) (noting "common-law developments in tort schemes where causation-in-fact is not required for recovery and liability is instead premised in some way on the defendants' contribution to the risk of injury").

Finally, Kill-a-Byte's reliance on punitive damages jurisprudence, such as *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is misplaced. These cases concern constitutional limits on the award of punitive damages. The Supreme Court took pains to distinguish between compensatory damages—which "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct"—and punitive damages—which "are aimed at deterrence and retribution." *Id.* at 416. Here, the City seeks "abatement" rather than "damages," and more importantly, the remedy it seeks is focused on redressing the concrete loss the City alleges that it has suffered by reason of Kill-a-Byte's conduct. *State Farm*'s limitations on punitive damages are inapplicable.

At the end of the day, the City contends that Kill-a-Byte's actions have caused it injury and, through its public nuisance claim, seeks to recover redress for its injuries from Kill-a-Byte. This claim is the essence of tort law and is the opposite of arbitrary or irrational. The

nuances of the City's claim—the precise burden of proof that the City carries on issues such as intent, causation, or apportionment—are questions of state law that do not rise to the level of constitutional significance.

If the City's evidence is credited by the jury (and if I am correct that the City's liability theory is consistent with state law), then the Due Process Clause does not bar the City's recovery.

Conclusion

For the foregoing reasons, Kill-a-Byte's motion for summary judgment is DENIED.

DATED this 10th day of May 2017.

BY THE COURT:

/s/ Osborne Whitworth
Osborne Whitworth
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW TEJAS

Civil Action No. 16-cv-5412

CITY OF NEW TRURO, NEW TEJAS,
Plaintiff.

v.

KILL-A-BYTE SOFTWARE, INC.,
Defendant.

Filed: March 2, 2019

FINAL JUDGMENT

OSBORNE WHITWORTH, Judge.

This Court presided over a jury trial, which following the conclusion thereof, the jury rendered a verdict. This Court then conducted a bench trial on the issue of damages. This Court now enters judgment on the jury's verdict and, having considered the parties' briefing, evidence, and argument before this Court, enters judgment on the damages issue for the reasons stated by this Court at the conclusion of the bench trial. This Court, therefore, enters judgment as follows:

1. Kill-a-Byte is liable for the City's claim of public nuisance.

2. The Court finds that the cost of abatement of the public nuisance equals $613.2 million and orders that Kill-a-Byte shall pay the judgment of $613.2 million in abatement costs to the City.

3. The Court finds that no reason exists for delay in ordering final judgment, and the Clerk is hereby directed to enter this judgment forthwith.

DATED this 2nd day of March 2019.

BY THE COURT:

/s/ Osborne Whitworth
Osborne Whitworth
United States District Judge

APPENDIX D

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 50 provides in pertinent part:

> (a) Judgment as a Matter of Law.
>
> > (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
> >
> > > (A) resolve the issue against the party; and
> > >
> > > (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
> >
> > (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.