No. _____

In The
Supreme Court of the United States

DAVID R. CUMMINS,
Conservator for C.A.P., a minor child,

Petitioner,

versus

BIC USA, INC. and BIC CONSUMER PRODUCTS MANUFACTURING COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this product liability action involving the child-safety feature of a cigarette lighter, the trial court permitted the product manufacturer to introduce testimony that the Consumer Product Safety Commission had never investigated, expressed concern about, taken any enforcement action with respect to or found the particular cigarette lighter in question non-compliant with a consumer product safety rule, even though the Consumer Product Safety Commission had never even been provided information about the particular cigarette lighter design and product defect involved and thus never had an opportunity to test, investigate or take any action against the manufacturer relative to the product defect claimed.

Three questions are presented:

1. Whether the prohibition of 15 U.S.C. § 2074(b) against introduction of evidence of "inaction" by the Consumer Product Safety Commission with respect to the safety of a consumer product in litigation under common law or state statutory law is inapplicable where the Consumer Product Safety Commission has only generally considered a consumer product, even though the specific product design or the alleged defect in that consumer product has never even been specifically considered by the Consumer Product Safety Commission.

QUESTIONS PRESENTED – Continued

2. Whether evidence that the Consumer Product Safety Commission has never investigated, expressed concern about, taken any enforcement action with respect to or found a particular consumer product non-compliant with a consumer product safety rule is relevant at all under F.R.E. 401 and 403 in product liability litigation where the specific product design or the alleged defect in that consumer product has never even been considered by the Consumer Product Safety Commission.

3. Whether, upon finding that the trial court erred in admitting evidence of "inaction" by the Consumer Product Safety Commission, the appropriate standard for measuring whether the trial court's error was harmless is whether the error caused a different outcome at trial, as adopted by the Sixth Circuit Court of Appeals below, or whether the appropriate standard calls for reversal when the appellate court lacks a "fair assurance" that the outcome of the trial was not affected by the evidentiary error.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit whose interest and position may be affected by further review of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David R. Cummins, Conservator for CAP, a minor child, respectfully prays that a Writ of Certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit, entered on August 14, 2013.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is reported at *Cummins v. BIC USA, Inc.*, 727 F.3d 506 (6th Cir. 2013), and is reprinted in the appendix hereto, at App. 1-App. 22. The Sixth Circuit affirmed the Order of the United States District Court for the Western District of Kentucky which denied the Petitioner's Motion for a new trial. A copy of that Order is reprinted in the appendix hereto at App. 24. The pre-trial Memorandum Opinion of the United States District Court for the Western District of Kentucky relevant to the issues raised herein is not publicly reported but may be found at *Cummins v. BIC USA, Inc.*, 2011 WL 2633959 (W.D.Ky. 2011), and is also reprinted in the appendix hereto at App. 25-App. 38.

JURISDICTION

An order of the United States Court of Appeals for the Sixth Circuit was entered on August 14, 2013,

affirming the order of the United States District Court for the Western District of Kentucky which denied Petitioner's Motion for a new trial. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULES INVOLVED

15 U.S.C. § 2074(b) provides:

"The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law related to such consumer product."

16 C.F.R. § 1210.3(b)(4) provides:

"The mechanism or system of a lighter subject to this part 1210 that makes the product resist successful operation by children must:

. . .

(4) Not be easily overridden or deactivated."

F.R.E. 401 provides:

"Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence;

and

(b) the fact is of consequence in determining the action."

F.R.E. 403 provides:

"The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

This is an action filed against a cigarette lighter manufacturer on behalf of CAP, a minor child, by his court-appointed Conservator to recover damages under Kentucky products liability law and for violation of a consumer product safety rule pursuant to 15 U.S.C. § 2072. The lawsuit was originally filed in Kentucky state court but was removed to the United States District for the Western District of Kentucky pursuant to 28 U.S.C. §§ 1332 and 1441.

The circumstances giving rise to this action occurred on December 17, 2004, when CAP, then less than four years old, returned to his mother's apartment in Greensburg, Kentucky, after having visited with his father overnight. Prior to his return home, CAP found a black, BIC model J-26 cigarette lighter in the rear floorboard of his father's truck and put it

in his pocket. His possession of the lighter went unnoticed by CAP's step-mother and his mother when he arrived home that day. Upon his arrival home, CAP went immediately to his upstairs bedroom. Within minutes CAP's mother heard him scream. She ran to the foot of the stairs, finding to her horror that CAP was standing at the top of the staircase, nearly completely engulfed in flames from his waist up. At trial, CAP explained that after he went upstairs, he had difficulty unbuttoning his shirt and decided to use the lighter to burn the buttons off. CAP successfully operated the BIC cigarette lighter, and ignited the shirt he was wearing.

Upon discovering her burning child, CAP's mother ran to the top of the stairs, attempted to extinguish the fire, scooped CAP in her arms and ran out of the apartment screaming for help. CAP was flown from Greensburg to the Shriner's Burn Center in Cincinnati where he underwent extensive treatment and grafting of his burns over a four-week period. He is permanently disfigured and will require ongoing medical attention for the remainder of his life.

A black BIC model J-26 cigarette lighter was found at the scene and delivered to Greensburg Police Chief John Brady. BIC acknowledged that the subject cigarette lighter was manufactured by BIC in the 26th week of 2004. The child resistant feature on the cigarette lighter recovered by Chief Brady and later introduced in evidence at trial had been removed.

The 2004 version of the BIC model J-26 cigarette lighter used by CAP replaced an earlier design wherein the metal guard or spring serving as the child-resistant mechanism was part of a single one-piece head design. The Petitioner conceded that the prior BIC model J-26 one-piece cigarette lighter design met the safety requirements of 16 C.F.R. § 1210.3(b)(4), requiring that the child safety mechanism chosen by a cigarette lighter manufacturer, "not be easily overridden or deactivated."

As opposed to the older one-piece design, the 2004 version of the BIC model J-26 cigarette lighter separated the metal guard or spring from the rest of the lighter head and inserted the metal guard as a separate piece. When BIC phased the two-piece design into production in approximately 1998, and phased the one-piece design out of production by 2000, no analysis was performed by BIC or the CPSC to determine if the child resistant feature of the two-piece design was more easily deactivated or overridden than the one-piece design. In fact, BIC contended that no internal corporate documents exist from the transition period describing the purpose of the change in design, any benefits of the proposed change or any concerns with the proposed change.

Despite the requirements of 16 C.F.R. § 1210.3(b)(4) that the child resistant feature chosen by BIC for its cigarette lighters not be "easily overridden or deactivated," BIC acknowledged that it was aware that many of its adult consumers purposely remove the metal guard or spring serving as the child resistant

mechanism from its two-piece model J-26 cigarette lighters.

At trial, the Petitioner presented expert testimony as to the ease with which the child safety mechanism could be removed from the BIC two-piece cigarette lighter design. In fact, the evidence showed that no more force was required to remove BIC's child safety mechanism than is required to open a pop-top tuna or soda can. Petitioner's experts offered alternate designs, including BIC's one-piece design, which fully comply with CPSC child safety standards.

The only compelling evidence introduced at trial by BIC was the testimony of former high-level CPSC official Nicholas V. Marchica that the CPSC had never cited BIC, never initiated investigation of the design of BIC's model J-26 two-piece cigarette lighter, and had never requested that BIC modify its two-piece design in any fashion. To support his testimony, and presumably to skirt the prohibition of 15 U.S.C. § 2074(b), BIC introduced test data compiled by an outside testing lab and compliance and inspection reports issued by the CPSC.

However, Marchica was ultimately forced to concede that every one of the reports issued by the CPSC, and upon which he relied, involved ***only*** BIC's ***one-piece*** lighter design, not the two-piece design like the one used by CAP.

Further, BIC admitted that the only document in evidence related to the two-piece lighter design like the one used by CAP was testing data, ***unrelated to***

the requirements of 16 C.F.R. § 1210.3(b)(4), submitted to the CPSC by BIC in 2006. With respect to that testing data, the letter from the CPSC acknowledging receipt of the test data compiled by BIC's private contractor specifically cautioned BIC as follows:

> This acknowledgment of receipt of your reports and its acceptance as being complete pursuant to 16 C.F.R. § 1210.17(b)(1)-(6) is not to be considered by you or any other party as an approval of the lighters or of the reports.

In other words, even though the data was not related to the issues in this case, on the sole occasion that the data from BIC's child resistance testing of its two-piece design was ever provided to the CPSC, the CPSC made it crystal clear that it did ***not*** independently evaluate the lighter design. Rather, the CPSC simply acknowledged receipt of the test data and cautioned that it was not ***approving*** the design thereby.

Thus, despite the thousands of pages of documents identified and relied upon by BIC, the evidence at trial was uncontradicted that ***at no time*** prior to BIC's manufacture of the two-piece lighter used by CAP or even prior to CAP's injury had the CPSC even been provided child resistance test data concerning the two-piece design, and has still never been provided test results or data bearing on whether the child-resistant feature of the BIC model J-26 two-piece lighter is "easily deactivated or overridden" in violation of 16 C.F.R. § 1210.3(b)(4).

Nevertheless, evidence of the CPSC's "inaction" with respect to BIC's two-piece lighter design was admitted. Marchica's testimony extended over portions of two trial days. BIC's counsel emphasized the lack of remedial action taken by the CPSC against BIC in both his opening and closing statements, arguing persuasively that if the federal agency charged with regulating cigarette lighters had taken no action against BIC with respect to this specific product or the defect claimed by the Petitioner, the jury must conclude that the federal agency approved the product as reasonably safe.

After nine days of trial, the jury returned a verdict finding that BIC had not knowingly or willfully violated a consumer product safety rule and that the BIC cigarette lighter in question was not defective and unreasonably dangerous. A judgment dismissing the Petitioner's claims against BIC was entered thereafter.

After the trial court denied the Petitioner's motion for a new trial, an appeal was taken to the United States Court of Appeals for the Sixth Circuit. On August 14, 2013, the Sixth Circuit Court of Appeals affirmed the judgment in favor of BIC.

In affirming the judgment, the Sixth Circuit acknowledged that Marchica's testimony fell short of establishing that the CPSC had ever specifically considered the ease with which the two-piece guard on the cigarette lighter design could be deactivated or overridden. It further acknowledged that BIC's

evidence did not justify an inference that the two-piece guard was approved or was safe. (App. 16-App. 17). However, the Sixth Circuit concluded that the prohibition of 15 U.S.C. § 2074(b) against the introduction of evidence of "inaction" by the CPSC only applies where the CPSC has *completely* failed to engage in activity on a product.

The Sixth Circuit reasoned that since the CPSC had promulgated numerous regulations related generally to cigarette lighters, it had not *completely* failed to act in relation to the cigarette lighter in question, even though it had taken no action specifically in relation to the BIC two-piece cigarette lighter design or the defect claimed by the Petitioner. The Sixth Circuit failed to even address how Marchica's testimony and BIC's evidence of CPSC "inaction," even if not prohibited under 15 U.S.C. § 2074(b), passed muster under F.R.E. 401 and 403. Thus, the Sixth Circuit held the evidence of CPSC "inaction" admissible.

Concluding that the trial court did not erroneously admit evidence of CPSC "inaction" in regard to the cigarette lighter design involved, and that even if erroneous a new trial was not warranted unless the error affected the outcome of the trial, the judgment for BIC was affirmed.

REASONS FOR GRANTING THE PETITION

The decision below establishes important precedent interpreting the Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.*, directly in conflict with the Act's purpose. If left standing, manufacturers of unsafe consumer products will be authorized to powerfully misrepresent that the Consumer Product Safety Commission approves their unsafe products, even when the CPSC has been provided no information about the specific product defect in issue, and thus has not even been given the opportunity to pass on the safety of the products. As the Consumer Product Safety Commission has jurisdiction of over 15,000 consumer products, it is of great practical importance that its activity with respect to a consumer product be accurately represented to a jury in frequently recurring product liability litigation.

Upon determining that the Sixth Circuit's interpretation of 15 U.S.C. § 2074(b) was misguided, and thus the trial court's admission of evidence of CPSC "inaction" was erroneous, this Court could then resolve the split among the circuit courts of appeals, and even within some circuits, on the equally important issue of the appropriate analysis for determining whether a trial court's erroneous admission of evidence in a civil trial was "harmless."

I. The Sixth Circuit Below Has Incorrectly Interpreted An Important Provision Of The Consumer Product Safety Act In Conflict With The Purposes Of That Act, Creating The High Likelihood That Misrepresentation Of The Work Of The Consumer Product Safety Commission Will Recur.

The Consumer Product Safety Commission was created to protect the public against unreasonable risks of injuries associated with consumer products.[1] More than 15,000 consumer products are regulated by the CPSC.[2] In addition to imposing civil fines for violations, the CPSC has the authority to order the recall of unsafe products.[3]

In 2010, an estimated 38,573,000 people sought medical attention for an injury related to a consumer product.[4] An estimated 35,900 deaths related to a consumer product occurred in 2008.[5]

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[1] 15 U.S.C. § 2051(b)(1).

[2] *See* U.S. Consumer Prod. Safety Comm'n, Regulated Products, http://www.cpsc.gov/businfo/reg.html (last visited October 23, 2013).

[3] 15 U.S.C. § 2069 (providing for civil penalties); 15 U.S.C. § 2071 (providing for injunctive enforcement and seizure upon action brought by the Commission).

[4] Schroeder, T. (2012) Consumer Product-Related Injuries and Deaths in the United States: Estimated Injuries Occurring in 2010 and Estimated Deaths Occurring in 2008. Washington, DC: Consumer Product Safety Commission.

[5] *Id.*

As a direct result of the millions of injuries and tens of thousands of deaths related to consumer products annually, products liability litigation in state and federal courts has increased exponentially over the years. From September 30, 2011, to September 30, 2012, more than 43,000 product liability lawsuits claiming personal injury were filed in the federal courts of the United States alone.[6]

It is certainly reasonable to assume that a significant number of the tens of thousands of product liability lawsuits filed in state and federal courts every year involve consumer products regulated by the CPSC. It is equally reasonable to recognize the powerful nature of evidence, particularly testimony from former high-ranking officials of the CPSC, that the very agency in charge of regulating a consumer product has taken no action to require redesign or recall of that product and thus must have "approved" the product as non-defective.

Yet, in instances where the CPSC is completely unaware of a particular design change in a regulated product or has had no opportunity to even consider a particularly claimed product defect, the inference of product approval by the CPSC by evidence of CPSC "inaction" is terribly misleading to the jury. On the one hand, if the evidence of the CPSC's election not to

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[6] Administrative Office of the U.S. Courts, 2012 Annual Report of the Director: Judicial Business of the United States Courts Tbl. C-11 (2012).

take action is based on actual CPSC testing or analysis of the claimed product defect, the evidence is clearly probative of the product defect issue. On the other hand, without product testing or analysis of the claimed defect by the CPSC, the powerful inference of product approval from the agency's inaction is really no more than evidence that the claimed defect is simply something that the agency has been unable to pay attention to, and not relevant to the issues which commonly arise in product liability litigation.

Likely for this precise reason, in passing the Consumer Product Safety Act in 1972, Congress included 15 U.S.C. § 2074(b) which provides that, "[t]he failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law related to such consumer product."

However, the Sixth Circuit Court of Appeals below has completely eviscerated 15 U.S.C. § 2074(b) by holding that it has no application in litigation regarding any consumer product, whether or not regulated by the CPSC, with respect to which the CPSC has taken ***any*** "action."

In this case, the Sixth Circuit candidly admitted that BIC's evidence fell short of establishing that the CPSC ever passed specifically on the ease with which the two-piece guard could be deactivated or overridden and thus did not justify an inference that the two-piece guard was approved or was safe. Despite

this finding, which should have led the Sixth Circuit to hold that BIC's evidence of CPSC "inaction" was inadmissible under 15 U.S.C. § 2074(b), and not even relevant under F.R.E. 401, the Sixth Circuit affirmed the trial court's admission of BIC's evidence and expressly permitted the inference of CPSC approval it had already acknowledged was ***not*** justified by the evidence.

The Sixth Circuit's interpretation of 15 U.S.C. § 2074(b) leads in the illogical result that by simply responding to a consumer's inquiry about a consumer product, whether a product is regulated by the CPSC or not, the CPSC will be deemed to have "acted" and thus opened the gauntlet for introduction of evidence at trial that because the CPSC did not mandate a design change or product recall the jury can infer CPSC approval of the product. Certainly, this could not have been the intent of Congress in including 15 U.S.C. § 2074(b) in the Consumer Product Safety Act.

The incongruity of the Sixth Circuit's decision with the basic purposes behind the establishment of the CPSC becomes clear by reference to a single exhibit introduced by BIC at trial. Presumably to show that the CPSC actually enforces the child safety standards for cigarette lighters promulgated in 16 C.F.R. § 1210, BIC introduced an October 29, 1996, CPSC Press Release announcing the forced recall of certain cigarette lighters that were manufactured and sold with ***no*** child safety mechanisms. (App. 39). The lighters had been sold nationwide for nearly two years prior to the recall.

Applying the Sixth Circuit's interpretation of 15 U.S.C. § 2074(b), had a child been injured or killed by use of one of the dangerous cigarette lighters later subject to the recall, filed a product liability suit against the manufacturer and brought that case to trial within the two-year window prior to the recall, the manufacturer of the unsafe lighter would have been able to present evidence to the jury that the CPSC must have approved the safety of the lighter because up to that point it had not ordered a recall. Clearly, such a result could not have been intended by Congress in adopting 15 U.S.C. § 2074(b), but it is precisely the result required by the Sixth Circuit's opinion below.

Where the factual issue here was whether BIC's two-piece cigarette lighter design was "easily de-activated or overridden," and thus defective and unreasonably dangerous, the fact that the CPSC knew virtually nothing about the design and had thus taken no remedial action toward the design has no tendency to make the operative fact more or less probable. Even under a liberal standard of relevance, evidence of CPSC "inaction" was **not** relevant under F.R.E. 401 and therefore was inadmissible, whether the Petitioner's claim was under common or state statutory law, or brought pursuant to a federal statute.

The Sixth Circuit's decision below was simply wrong, sets a dangerous precedent for existing and future products liability cases and should be corrected by this Court.

II. The Circuits Are Divided Over The Appropriate Standard For Measuring Whether A Trial Court's Error Was "Harmless."

A. This Case Squarely Presents The Conflict.

Upon determining that the trial court erroneously admitted evidence of CPSC "inaction," the question remains as to whether the error was substantial enough to merit a new trial for the Petitioner. In other words, was the trial court's error "harmless." A Federal Rule of Civil Procedure, a Federal Rule of Evidence, and a statute in the United States Code all attempt to define non-constitutional harmless error analysis in civil cases.[7] In each, errors are deemed harmless unless they "affect the substantial rights of the parties." Guidance on harmless error analysis is provided in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), where this Court stated that, "if one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not

[7] F.R.Civ.P. 61 provides that, "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." F.R.E. 103(a) provides that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ." 28 U.S.C. § 2111 provides that, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

affected." However, beyond that statement, the question of general harmless error analysis has been left open for interpretation.

The lack of a decisive interpretation of harmless error analysis for non-constitutional errors by this Court has resulted in several different standards among the circuits, and even in differing standards within some circuits, including the Sixth Circuit.

The Sixth Circuit below cited its prior opinion in *Morales v. American Honda Motor Co., Inc.,* 151 F.3d 500, 514 (6th Cir. 1998), for the proposition that any evidentiary error in this case was harmless, not justifying a new trial, unless the error, "would have caused a different outcome at trial." (App. 6). However, the *Morales* harmless error analysis had already been squarely rejected by another panel of the Sixth Circuit in *Beck v. Haik*, 377 F.3d 624, 634-635 (6th Cir. 2004) *overruled on other grounds by, Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009), which held that the proper harmless error analysis, "calls for reversal when the appellate court lacks a 'fair assurance' that the outcome of a trial was not affected by evidentiary error."

The disparity in harmless error analysis is not limited to the Sixth Circuit's intra-circuit conflict. Rather, as recognized in *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252 n.39 (10th Cir. 1988) *overruled on other grounds as recognized by, Allison v. Bank One-Denver*, 289 F.3d 1223, 1248 (10th Cir. 2008), a sharp conflict among the circuits

exists, noting that, "We recognize that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." The conflict was also noted by the District of Columbia Circuit in *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1023 n.5 (D.C. 1990).

Essentially, three fundamentally different approaches for harmless error analysis have emerged. One such approach holds that errors are not harmless unless it is "highly probable" that they did not affect a party's substantial rights. The "highly probable" analysis was adopted by the Third Circuit in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-927 (3d Cir. 1985).

Another approach provides that an error is harmless if the jury's verdict is "more probably than not" untainted by the error. This "more probably than not" approach is used by the Seventh Circuit (*Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985)), the Eighth Circuit (*McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984)), the Ninth Circuit (*Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)), and the Tenth Circuit (*U.S. Industries, Inc. v. Touche Ross & Co.*, *supra*).

However, recently the Seventh Circuit appears to have shifted its approach, adopting a more demanding analysis, similar to that of the Third Circuit, by finding error harmless only if the aggrieved party can demonstrate that there is a "significant chance" that

the error had a substantial effect on the jury's verdict. *Jordan v. Binns*, 712 F.3d 1123, 1137 (7th Cir. 2013).

The third approach rejects a trial court's error as harmless only where the appellate court can say with "fair assurance" that the judgment below was not substantially swayed by the impermissible introduction of evidence. This seemingly less demanding approach is used by the First Circuit (*Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997)), the Fourth Circuit (*Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (*en banc*) *abrogated on other grounds by*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99 (2003)), the Fifth Circuit (*Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927, 929 n.3 (5th Cir. 1976)), a panel of the Sixth Circuit (*Beck v. Haik*, *supra*), the Eleventh Circuit (*Aetna Casualty and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986)), and the District of Columbia Circuit (*Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1023 n.5 (D.C. 1990)).

While purporting to adopt the "fair assurance" standard of analysis, the Second Circuit adds a twist, explaining that, "We have altered the standard for civil cases, however, by requiring the appellant to show that the error was not harmless, rather than requiring the appellee to show that the error was harmless. Thus, an evidentiary error in a civil case is harmless 'unless [the appellant demonstrates that] it is likely that in some material respect the factfinder's judgment was swayed by the error.'" *Tesser v. Board*

of Educ. of City School Dist. of City of New York, 370 F.3d 314, 319 (2d Cir. 2004).

As the Sixth Circuit below relied upon a harmless error standard which required reversal only if the Petitioner could demonstrate that absent the trial court's error a different outcome would have been achieved, and other panels in the same Circuit have rejected that harmless error standard in favor of the facially less stringent standard upholding a jury's verdict only if it could say with "fair assurance" that the outcome was ***not*** affected, this case squarely presents the conflict among the various circuits in their struggle to apply the appropriate analysis for measuring whether or not trial court error in a civil case is harmless.

B. The Decision Below Reflects Widespread Uncertainty Over The Proper Analysis Of The Harmless Error Standard And This Uncertainty Is Recurring And Of Great Practical Importance.

Few issues are of more practical importance to appellate courts and the trial court bar in general than the appropriate standard for reviewing trial court errors. In fact, the standard of review defines the entire framework for the appellate court's consideration of a trial court's evidentiary error.

As evidenced by the stark conflict among the circuits, and even intra-circuit conflict in some instances, the issue of the appropriate analysis of the

harmless error standard is in disarray. Inexplicably, in a country that champions uniformity in the application of its laws, an entirely different result in similar cases involving identical trial court errors could result in different outcomes simply due to differing views of the appropriate standard for analysis of whether a trial court's error was harmless.

Only a resolution by this Court can lay to rest the clear confusion surrounding harmless error analysis.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted to consider those issues identified herein.

Respectfully submitted,

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November 6, 2013

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID R. CUMMINS, Conservator for C.A.P., a minor, *Plaintiff-Appellant*, *v.* BIC USA, INC. and BIC CONSUMER PRODUCTS MANUFACTURING COMPANY, INC., *Defendants-Appellees*.	No. 12-5635

Appeal from the United States District Court for the Western District of Kentucky at Bowling Green.
No. 1:08-cv-00019 –
Joseph H. McKinley, Jr., Chief District Judge.

Argued: July 25, 2013

Decided and Filed: August 14, 2013

Before: KEITH and McKEAGUE, Circuit Judges; WATSON, District Judge.*

COUNSEL

ARGUED: Joseph H. Mattingly, III, MATTINGLY & NALLY-MARTIN PLLC, Lebanon, Kentucky, for

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* The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

Appellant. Edward H. Stopher, BOEHL, STOPHER & GRAVES LLP, Louisville, Kentucky, for Appellees. **ON BRIEF:** Joseph H. Mattingly, III, MATTINGLY & NALLY-MARTIN PLLC, Lebanon, Kentucky, for Appellant. Edward H. Stopher, Raymond G. Smith, Todd P. Greer, BOEHL, STOPHER & GRAVES LLP, Louisville, Kentucky, for Appellees.

OPINION

McKEAGUE, Circuit Judge. This products liability action stems, tragically, from severe burn injuries suffered by a three-year old boy. After a nine-day trial, the jury returned a verdict for the manufacturer of the cigarette lighter that started the injurious fire. The jury found the lighter was not defective or unreasonably dangerous in a way that causally contributed to the injuries. Plaintiff contends on appeal that the trial was unfair because the court (1) allowed inadmissible evidence, and (2) improperly refused to give a jury instruction concerning misconduct by opposing counsel. Finding no error, we affirm the judgment of the district court.

I. BACKGROUND

The minor victim, referred to simply as "CAP," sustained serious burns on December 17, 2004, when he was three years old. He had just returned to his mother Amy Cowles' home in Greensburg, Kentucky,

after an overnight visit with his father and step-mother, Thor and Tammy Polley. CAP testified in trial that he found a cigarette lighter on the floor in his father's truck (driven by his step-mother) as he returned to his mother's home. CAP used the lighter to loosen a button on his shirt. He said he did not know the lighter would cause a flame. When his shirt caught fire, CAP screamed. His mother responded to the scream. She observed CAP in flames from the waist up, attempted to remove the shirt, and poured water over his chest. She held him until the ambulance arrived and went with him to the hospital. CAP spent three weeks in the hospital, where he received treatment for second and third degree burns to his face and chest and underwent several skin graft surgeries before being released on January 7, 2005.

A black BIC model J-26 cigarette lighter was found at the scene of the fire and delivered to Greensburg Police Chief John Brady. The lighter was admitted in evidence at trial, and Chief Brady identified it as the lighter given to him at the scene. He testified that the lighter was worn, and the child safety guard had been removed from the lighter when it was given to him.[1] Thor Polley denied that the

[1] The testimony as to who found the lighter, and where, is unclear. Defendants argue that the record evidence is so unclear as to be insufficient to support a finding that the lighter delivered to the Police Chief caused the fire or that BIC manufactured the lighter that caused the fire. Defendants contend this evidentiary void represents an independent basis for affirming the judgment, rendering harmless any error the court may have

(Continued on following page)

lighter belonged to him but acknowledged that he usually bought BIC lighters and customarily removed the child-resistant guards from them to make them easier to use.

This action was commenced by David R. Cummins as Conservator for CAP on January 8, 2008 in the Green Circuit Court, Green County, Kentucky. The complaint set forth claims for compensatory and punitive damages based on various theories under state and federal law. Named as defendants were BIC USA, Inc., and BIC Consumer Products Manufacturing Company, Inc. (collectively "BIC"), as manufacturer of the lighter. BIC removed the action to federal court based on the parties' diversity of citizenship.

A jury trial began on January 23, 2012, limited to plaintiff's claims for violation of Kentucky's Consumer Protection Act and violation of the federal Consumer Product Safety Rule. After nine days of trial, the jury deliberated for two hours before finding (1) that BIC had not knowingly or willfully violated the Consumer Product Safety Rule, 16 C.F.R. § 1210.3(b)(4), in a way that was a substantial factor in causing CAP's injuries; and (2) that the BIC model J-26 lighter was not defective and unreasonably

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made in admitting improper evidence or denying a requested instruction. Because we hold the district court did not err in either of the challenged rulings, we need not reach defendants' harmless error argument. For purposes of this appeal, the lighter admitted in evidence is presumed to be the one that caused the fire.

dangerous in a way that was a substantial factor in causing CAP's injuries.

Plaintiff moved for a new trial, contending (1) that the court erred in allowing BIC to introduce evidence of the failure of the Consumer Product Safety Commission to take action concerning the lighter that caused CAP's injuries, in violation of 15 U.S.C. § 2074(b); and (2) that the court erred by permitting BIC's counsel to argue that CAP's parents were to blame for his injuries and refusing to instruct the jury to disregard such arguments. Plaintiff argued that these two errors combined to mislead the jury and deny him a fair trial. The district court denied the motion in a one-sentence order. On appeal, plaintiff challenges this ruling, renewing the same two arguments.

II. ANALYSIS

A. Standard of Review

The district court's denial of plaintiff's motion for new trial is reviewed for abuse of discretion. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 414 (6th Cir. 2012). A new trial is appropriate when the jury reaches a "seriously erroneous result as evidenced by (1) the verdict being against the [clear] weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *Id.* (quoting *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d

398, 405 (6th Cir. 2006)). An abuse of discretion may be established if the district court is held to have relied on clearly erroneous findings of fact, improperly applied the law, or used an erroneous legal standard. *Mike's Train House*, 472 F.3d at 405. The district court will be deemed to have abused its discretion only if the reviewing court is left with "a definite and firm conviction that the trial court committed a clear error in judgment." *Id.*

To the extent the motion for new trial was based on an erroneous evidentiary ruling, the evidentiary ruling, too, is evaluated under the abuse-of-discretion standard. *United States v. Morales*, 687 F.3d 697, 701-02 (6th Cir. 2012). The district court has broad discretion to determine questions of admissibility; an evidentiary ruling is not to be lightly overturned. *Nolan v. Memphis City Schools*, 589 F.3d 257, 265 (6th Cir. 2009). An erroneous evidentiary ruling amounts to reversible error, justifying a new trial, only if it was not harmless; that is, only if it affected the outcome of the trial. *Morales*, 687 F.3d at 702; *Nolan*, 589 F.3d at 265.

Similarly, to the extent the motion for new trial was based on the court's refusal to give a requested jury instruction, the refusal is reviewed for abuse of discretion. *Taylor v. TECO Barge Line, Inc.*, 517 F.3d 372, 387 (6th Cir. 2008). "A district court's refusal to give a jury instruction constitutes reversible error if (1) the omitted instruction is a correct statement of the law, (2) the instruction is not substantially covered by other delivered charges, and (3) the failure to

give the instruction impairs the requesting party's theory of the case." *Id.* (quoting *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 901 (6th Cir. 2004)).

B. Evidence of CPSC's Failure to Take Action

Plaintiff's theory, in support of both tried claims – that the design of the BIC model J-26 lighter that caused CAP's injuries was in violation of federal law, and was defective and unreasonably dangerous under Kentucky law – is based largely on the contention that the lighter was not in compliance with a federal consumer product safety requirement, 16 C.F.R. § 1210.3(b)(4), because the child resistant guard was too easily removable. The regulation provides in relevant part:

> (b) The mechanism or system of a lighter subject to this part 1210 that makes the product resist successful operation by children must:
>
> . . . .
>
> (4) Not be easily overridden or deactivated.

16 C.F.R. § 1210.3(b). Focusing on this requirement, plaintiff relied on evidence that the design of the child resistant guard on the J-26 lighter had been changed in 2004 from a one-piece guard to a two-piece guard. While plaintiff conceded that the one-piece guard was not easily overridden or deactivated, he contended that the two-piece guard removed from the

subject J-26 lighter was too easily removable and did not satisfy § 1210.3(b)(4).

BIC responded with evidence that the Consumer Product Safety Commission had never investigated, expressed concern about, taken any enforcement action with respect to, or found either J-26 model out-of-compliance with, the § 1210.3(b)(4) requirement. This evidence was introduced primarily through the expert testimony of Nicholas Marchica, a product safety consultant who was formerly employed by the Consumer Product Safety Commission ("CPSC") from 1978 to 2005. Anticipating this testimony, plaintiff had made pre-trial motions in limine, asking the district court to exclude Marchica's testimony about inaction by the CPSC as barred by federal law. The motions were based in relevant part on 15 U.S.C. § 2074(b), which provides:

> The failure of the [Consumer Product Safety] Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under state statutory law relating to such consumer product.

15 U.S.C. § 2074(b).

The district court denied the motions in limine, relying on *Morales v. American Honda Motor Co.*, 151 F.3d 500 (6th Cir. 1998). In *Morales*, we construed § 2074(b) as only barring evidence that the CPSC had "*completely* failed to act, as opposed to those instances

where the CPSC engaged in activity that ultimately led to a decision not to regulate." *Id.* at 513 (emphasis in original). The district court was satisfied that Marchica's anticipated testimony would include evidence that the CPSC had examined and tested samples of the BIC J-26 and declined to initiate an investigative action or recall because it concluded that the BIC J-26 complied with § 1210.3. Because the evidence BIC would introduce was in the nature of activity leading to a decision not to regulate, rather than a complete failure to act, the court deemed the evidence not barred by § 2074(b). The court recognized that the challenged evidence of the CPSC's failure to take enforcement action with respect to the BIC J-26 lighter would not be conclusive of liability but would be relevant and not inadmissible.

Accordingly, the motions in limine were denied, and Marchica was allowed to testify at trial. In relevant part, his testimony included the following points:

> – that the child safety standard for cigarette lighters, 16 C.F.R. § 1210.3, had been in effect since 1994;
>
> – that BIC first obtained "qualification" from the CPSC for the J26 lighter in 1995;
>
> – that there is no published set of specific criteria defining the § 1210.3(b)(4) term, "easily overridden or deactivated";
>
> – that the CPSC was aware in June 1999 (after examining a J-26 lighter used by

a two-and-a-half-year old to start a fire in Minnesota) that the child resistant guard could be removed from the lighter, but that the CPSC did not undertake an investigation and analysis of the ease of its removability;

– that the CPSC had, in February 2001 and February 2002, collected two sets of BIC model J-26 samples for protocol testing;

– that CPSC compliance officials had toured a BIC production facility in the 2002-04 time frame to inquire about quality assurance;

– that the CPSC had broad authority to investigate any product safety problem that came to its attention;

– that the CPSC had issued "dozens upon dozens" of recalls of disposable cigarette lighters that lacked required child resistant safety features;

– that the CPSC had never questioned the design of the child resistant guard on the J-26 and no such recall or request for replacement had ever been issued to BIC;

– that the CPSC had, in May 2006, (1) acknowledged receipt of BIC's report of 2004 child-safety test results concerning the two-piece child resistant guard design change in the J-26 lighter; and (2) confirmed that BIC had complied with the reporting requirements;

> – that the CPSC's May 23, 2006 letter states that it does not constitute CPSC "approval of the lighters or of the reports," but the letter allows BIC to continue to import J-26 lighters for distribution and sale in the U.S., as long as they fully comply with applicable safety regulations; and
>
> – that the May 23, 2006 letter indicates the new information on the BIC J-26 lighter would be added to the CPSC's list of "qualified" lighters (i.e., lighters as to which manufacturers and importers have submitted complete documentation), and that the BIC J-26 remained on the list as of the last time Marchica had consulted it, in 2010.

In relevant part, then, Marchica's testimony established that the J-26 lighter was not unknown to the CPSC and that the CPSC had had occasion to qualify the J-26 and evaluate different aspects of it. His testimony established that the CPSC had not completely failed to act in relation to the J-26; that the CPSC had taken some actions in relation to the J-26; that the CPSC had not found the J-26 to be in violation of any safety rule; and that the CPSC had not exercised its authority to recall J-26 lighters or taken any other enforcement action in relation to the J-26. His testimony was thus allowed notwithstanding 15 U.S.C. § 2074(b).

In connection with both of plaintiff's claims (i.e., for knowing or willful violation of a federal consumer product safety rule, and for design and manufacture of a defective and unreasonably dangerous product

under state law), the district court instructed the jury on the significance of Marchica's testimony. In substance, the court advised the jury that the fact that the CPSC had never cited BIC for violating the Consumer Product Safety rules was not necessarily determinative; that it was a factor to be considered, but was not conclusive.

Aggrieved by the jury's adverse verdict, plaintiff moved for a new trial. Plaintiff's argument is encapsulated in one sentence:

> Thus, the evidence at trial was uncontradicted that ***at no time*** prior to BIC's manufacture of the two-piece lighter used by CAP or even prior to CAP's injury had the CPSC even considered the two-piece design in any fashion, let alone any specific consideration of whether the child-resistant feature of the BIC model J-26 two-piece lighter is "easily deactivated or overridden" in violation of 16 CFR § 1210.3(b)(4).

R. 188-1, Memorandum at 5, Page ID # 4193 (emphasis in original). Focusing on the specific alleged defect at the heart of the instant claims, and the evidence of the CPSC's complete failure to take any action specifically with respect to the ease with which the two-piece child resistant guard on the J-26 can be deactivated or overridden, plaintiff argued to the district court and argues on appeal that *Morales* is distinguishable and that Marchica's testimony should have been excluded.

There is little case law interpreting 15 U.S.C. § 2074(b). The *Morales* decision is the most authoritative ruling. In *Morales*, the trial court was deemed to have erred when it applied § 2074(b) "with wooden literalness" to exclude evidence of a CPSC report explaining why the CPSC denied a petition to regulate motorbikes. *Morales*, 151 F.3d at 512. The court held the report "was not evidence of the CPSC's inaction; rather, it was evidence of the CPSC's *action* in denying the rule-making petition." *Id.* at 513 (emphasis in original).

In so ruling, the *Morales* court followed the lead of *Johnston v. Deere & Co.*, 967 F.Supp. 578 (D. Me. 1997). In *Johnston*, too, the CPSC declined to act after having initially issued notice of proposed rulemaking to regulate operation of riding lawn tractors. In *Johnston*, like *Morales*, the evidence scrutinized under § 2074(b) consisted of the CPSC's "articulated reasons" for withdrawing the proposed rulemaking and deciding not to regulate. *Id.* at 580. The court explained why such evidence was not inadmissible under § 2074:

> [S]ection 2074(b) reflects Congress's recognition that the new Commission it had established would be confronting thousands of consumer products, most of which it could not pay any attention to, at least for a long while. Congress was concerned, therefore, that the creation of the CPSC and its new authority would not impede common law litigation in the states over unsafe products, as subsection (a) directs. The most reasonable

> reading of section 2074(b), therefore, is that it is referring to the complete failure by the CPSC to engage in activity on a product; that failure is not to be introduced into evidence as somehow implying that a particular product is not unsafe. Where the CPSC has engaged in activity, on the other hand, those activities are admissible even if they lead ultimately to a decision not to regulate, just as an ultimate decision to regulate is admissible under subsection (a). They are not "failure . . . to take any action."

Johnston, 967 F.Supp. at 580 (footnotes omitted).[2] This construction was cited with approval in *Morales*.

Plaintiff concedes that the standards discussed in *Morales* and *Johnston* are applicable but contends the instant facts are distinguishable. That is, plaintiff acknowledges that evidence of CPSC *activity* in relation to a product is admissible but maintains that evidence of *inaction* by the CPSC is not admissible. In both *Morales* and *Johnston*, the evidence deemed admissible despite § 2074(b) was evidence of activity – the CPSC's report in *Morales* and the CPSC's "articulated reasons" in *Johnston* – in relation to the subject product's specific alleged defect. Here, in contrast, plaintiff contends that BIC's evidence of CPSC's

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[2] Subsection (a) of § 2074 provides: "Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 2074(a).

involvement with the two-piece guard on the J-26 lighter, specifically, amounted only to inaction and should not have been admitted.

BIC notes in response that Congress, in § 2074(b), made inadmissible evidence of the CPSC's failure to act "with respect to the safety of a consumer product." Consistent with this language, BIC contends, *Morales* and *Johnston* construed § 2074(b) as barring evidence of the CPSC's inaction only where there has been a *complete* failure to engage in activity on "a product." The CPSC has not completely failed to act in relation to the J-26 lighter; rather, it has promulgated numerous regulations, including regulations governing the child resistant guard. *See* 16 C.F.R. § 1210. Because the CPSC has not completely failed to act in relation to the J-26 lighter, BIC contends that § 2074(b), as construed in *Morales*, does not to bar Marchica's testimony on the CPSC's failure to expressly determine the suitability of the two-piece guard. In other words, in view of the CPSC's substantial activity in regulating the J-26 lighter, BIC maintains the evidence that no enforcement action has ever been instituted regarding a particular feature of the product, the child resistant guard, is probative and was properly admitted.

Indeed, BIC's position and the district court's ruling are consistent with the teaching of *Morales* and *Johnston*. Plaintiff maintains, however, that *Morales* and *Johnston* are factually distinguishable. He argues that Marchica's testimony, unlike the evidence allowed in *Morales* and *Johnston*, did not refer

to a report or statement of reasons explaining the CPSC's decision not to take action specifically in relation to the two-piece guard. Yet, § 2074(b), as construed in *Morales* and *Johnston*, does not establish such a specific precondition to admissibility. The "standard" established in *Morales* and *Johnston*, which plaintiff concedes is applicable, recognizes that § 2074(b) is intended "to exclude those instances where the CPSC had completely failed to act, as opposed to those instances where the CPSC engaged in activity that ultimately led to a decision not to regulate." *Morales*, 151 F.3d at 513 (quoting *Johnston*, 967 F.Supp. at 580). The evidence introduced by BIC cannot be fairly characterized as a complete failure by the CPSC to engage in any activity on the safety of the product, the J-26 lighter. And although the evidence does not amount to a report or statement of reasons for deciding not to regulate, it is fairly characterized as evidence of "CPSC activity that led to a decision not to regulate."

Accordingly, we conclude the district court did not abuse its discretion by allowing Marchica to testify concerning the CPSC's activity in relation to the J-26 lighter and its undisputed failure to take any enforcement action in relation to the J-26 lighter and the one-piece or two-piece child resistant guard. The court's application of § 2074(b) was faithful to the governing teaching of *Morales*.

Plaintiff argues that because Marchica's testimony falls short of establishing that the CPSC ever passed specifically on the ease with which the

two-piece guard could be deactivated or overridden, it does not necessarily justify an inference that the two-piece guard was approved or was safe. This is true. In fact, the evidence of CPSC's most recent activity on the J-26 lighter, the May 23, 2006 letter, clearly states that it is not to be considered "an approval" of the lighter. But the question the district court was asked to decide was *admissibility* under § 2074(b). The court was not asked to assess the probative value or weight of the evidence, or the nature and strength of any inference that might reasonably be drawn from it. Such matters were properly left for argument by counsel for the parties and determination by the jury. Indeed, plaintiff's counsel cross-examined Marchica, highlighting the weaknesses in his testimony and undermining its impact. Counsel also argued the significance of the evidence to the jury. And the district court clearly instructed the jury that the CPSC's failure to cite BIC for violating product safety rules was merely a factor to be considered and not determinative in relation to either of plaintiff's claims.[3]

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[3] Section 2074(b), the only asserted grounds for excluding Marchica's testimony, excludes evidence only in relation to state law claims. It does not exclude evidence in relation to a claim under federal law, such as plaintiff's first claim, for knowing or willful violation of a federal consumer product safety rule.

Marchica's testimony regarding the CPSC's inaction was relevant and admissible in relation to plaintiff's federal claim, to show BIC did not knowingly or willfully violate 16 C.F.R. § 1210.3(b)(4). It follows that outright exclusion of the evidence from trial under § 2074(b) was never a proper option. Rather, even if § 2074(b) were deemed to have barred some of Marchica's

(Continued on following page)

Thus, in ruling on the admissibility of the evidence, the district court used the correct legal standard. The court is not shown to have committed a clear error in applying it. Nor has plaintiff shown that admission of the evidence – the accuracy of which is not contested – contributed to a "seriously erroneous result." It follows that the district court did not abuse its discretion in denying the motion for new trial.

C. Refusal to Give Curative Instruction

Plaintiff also contends the trial court erred when it refused to give the jury a curative instruction following BIC's counsel's repeated improper suggestions that CAP's parents were to blame for his injuries. In a pre-trial ruling on one of plaintiff's motions in limine, the district court had ruled that the fault of others was not relevant to the question whether the child resistant guard on the J-26 lighter could be easily deactivated or overridden. The court directed BIC's counsel to make sure that his interrogation

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testimony in relation to the claim under Kentucky law, the most plaintiff could have hoped for was a limiting instruction – a limiting instruction only slightly more limiting than the instruction that *was* given – advising the jury that they could consider the evidence of the CPSC's inaction only in relation to the claim under federal law and not at all regarding the state law claim.

Considering the limited relief § 2074(b) *could* have afforded, the likelihood that the district court's failure to give such a slightly more limiting instruction, even *if* erroneous, contributed to a "seriously erroneous result" warranting a new trial, is negligible.

and/or argument did not cast blame on others. Plaintiff contends BIC's counsel, Edward Stopher, repeatedly violated this directive during trial.

None of the alleged transgressions was flagrant.[4] Yet, at the close of proofs, plaintiff's counsel asked the court for an instruction admonishing the jury not to consider the fault of any person other than BIC. The court denied the request. The court explained that the fact that "somebody" removed the child resistant guard from the lighter was relevant, "but who it was that removed it was not necessarily relevant." R. 210, Trial tr. vol. VIII at 145-46, Page ID # 6086-87. The court ruled it was not inappropriate for BIC's counsel to bring out the former point; as to the latter point, the court observed that BIC's counsel had been successfully kept from "demonizing Thor Polley or Amy [Cowles]." *Id.*

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[4] Plaintiff identifies several instances where he says Mr. Stopher transgressed the court's directive in his opening statement and questioning of Amy Cowles. First, Stopher mentioned that the accident would not have occurred unless CAP had been alone at the time. Second, Stopher alluded to Thor Polley's deposition testimony that he customarily removed the safety guards from his lighters. Third, Stopher elicited testimony from Amy Cowles that she failed to discover that CAP had something in his pocket when he returned from visiting his father. Obviously, none of these instances involved a direct "casting of blame on others." Each represents an allusion to the undisputed facts and circumstances that contributed to cause the tragic accident. None of these instances represents a violation of the court's directive, much less the sort of flagrant misconduct that could be expected to unfairly influence the jury in its deliberations.

Then, during closing argument, Mr. Stopher made the misstep that is the focus of plaintiff's present claim. Plaintiff contends that Stopher "castigated" CAP's father in the following remarks:

> Presumably, if this was the lighter, presumably that lighter was disabled by Thor Polley. He made an intentional adult choice to disable that lighter. And by his testimony, he disabled it not because it is easy to deactivate it or override it, he disabled it because he said it made it easier to light.
>
> It is undisputed that no one can make a fool-proof lighter. No one based on the evidence that we have heard can make a Thor-proof lighter. With this intent –

R. 212, Trial tr. vol. IX at 21, Page ID # 6145. At this point, the district court interrupted Stopher and admonished him for implying Polley was the "fool" who "presumably" removed the guard. The court then turned to the jurors and advised them to disregard Stopher's reference to Polley:

> Ladies and gentlemen, I have in this trial cautioned Mr. Stopher many times not to try to demonize the parents in this accident. An issue in this case is whether or not somebody removed this. We don't know who did it. It doesn't really matter who did it. The fact that matters most to you is that somebody did it.

Id. at 22, Page ID # 6146. Plaintiff's counsel was not satisfied with this admonition. At the end of closing

arguments, counsel renewed his request for an "additional instruction on the jury not being able to blame other parties." *Id.* at 81, Page ID # 6205. Again, the district court denied the request.

It is this refusal that plaintiff now contends was an abuse of discretion so grievous as to warrant a new trial. That is, even though the district court took the unusual measure of *sua sponte* interrupting Mr. Stopher's closing argument mid-sentence, admonishing him in the presence of the jury, and directing the jury to disregard the offending reference, plaintiff contends the court's failure to repeat the admonition in the final jury instructions was reversible error.

Granted, implying that CAP's father was "foolish" for presumably removing the child resistant guard from the lighter that presumably caused the fire was unnecessary and inappropriate. Stopher's argument – to the effect that a lighter manufacturer simply cannot design a lighter that is functional and safe and defies modification by an adult who wishes to disable a safety mechanism – could have been made more discreetly than it was. But Stopher's various comments were neither inaccurate nor inflammatory. And Stopher was duly chastened for his indiscretion by the district court – abruptly and directly. In fact, the district court's sudden interruption of counsel's argument midstream, to scold him in a sidebar and contemporaneously admonish the jury to disregard the inappropriate remark, was arguably more effective than a reiteration of the standard final instruction that lawyers' arguments are not evidence.

Considering the elements plaintiff must meet to merit a new trial based on the court's refusal to give a requested jury instruction, plaintiff's argument falls short. Yes, (1) the district could have given the requested instruction as a correct statement; but (2) the instruction appears to have been substantially and adequately covered by the court's contemporaneous curative admonishment and instruction; and (3) counsel's misconduct was not so grievous that the refusal to give the instruction could reasonably be deemed to have materially prejudiced plaintiff's theory of the case. *See Taylor*, 517 F.3d at 387. The district court's refusal to give the requested instruction was not, therefore, an abuse of discretion. It follows that the district court's denial of plaintiff's motion for new trial on this ground was also not an abuse of discretion.

III. CONCLUSION

Neither of the asserted claims of error presents grounds for disturbing the judgment. Accordingly, the district court's denial of plaintiff's motion for new trial is upheld and the judgment in favor of BIC is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-5635

DAVID R. CUMMINS, Conservator for C.A.P., a minor,

Plaintiff-Appellant,

v.

BIC USA, INC. and BIC CONSUMER PRODUCTS MANUFACTURING COMPANY, INC,

Defendants-Appellees.

Before: KEITH and McKEAGUE, Circuit Judges; WATSON, District Judge.

JUDGMENT

(Filed Aug. 14, 2013)

On Appeal from the United States District Court for the Western District of Kentucky at Bowling Green.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, and for the reasons more fully set forth in the Court's opinion of even date, it is ORDERED that the district court's denial of plaintiff's motion for a new trial and the judgment in favor of defendants are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

ELECTRONICALLY FILED

DAVID R. CUMMINS, CONSERVATOR FOR CAP, A MINOR PLAINTIFF v. BIC USA, INC. AND BIC CONSUMER PRODUCTS MANUFACTURING COMPANY, INC. DEFENDANTS	)	C.A. No. 1:08-CV-00019-JHM-ERG

ORDER

* * * *

Plaintiff's Motion to Set Aside Judgment and for New Trial having been made, Defendants having filed their response thereto and the Court being otherwise duly and sufficiently advised;

IT IS HEREBY ORDERED that Plaintiff's Motion to Set Aside Judgment and for New Trial is **DENIED**.

/s/ Joseph H. McKinley, Jr. [SEAL]
Joseph H. McKinley, Jr., Chief Judge
United States District Court

May 3, 2012

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NO. 1:08-CV-00019

DAVID R. CUMMINS, conservator for C.A.P., a minor, **PLAINTIFF**

v.

BIC USA, INC. and BIC CONSUMER PRODUCTS MANUFACTURING COMPANY, INC. **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on a motion by Plaintiff to exclude or limit the testimony of Defendants' expert witnesses [DN 99] and a motion by Defendant BIC USA, Inc. and Defendant BIC Consumer Products Manufacturing Company, Inc. (collectively "BIC") to exclude Plaintiff's expert Crystal Zemenski [DN 102]. Fully briefed, the matters are ripe for decision.

I. FACTUAL BACKGROUND

This case involves the tragic combination of a child and a cigarette lighter. On December 17, 2004, three-year-old C.A.P. was dropped off at his mother's apartment by his step-mother, and immediately went upstairs to his bedroom. A short while later, C.A.P.'s

mother, Amy Cowles, heard him scream. She found him at the top of the stairs engulfed in flames from the waist up; he had, apparently, used a BIC Model J-26 lighter to ignite his McKid's t-shirt. No one seems to know where the lighter came from, but the parties agree that the child-resistant guard (the metal band that a consumer must depress before rotating the spark wheel in order to generate a flame) had been removed. Plaintiff brought this products liability suit against BIC as the manufacturer of the lighter.

II. STANDARD OF REVIEW

Both Plaintiff and Defendants have moved to exclude expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Fed. R. Evid. 702. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702, the trial judge acts as a gatekeeper to ensure that expert testimony is both reliable and relevant. *Mike's Train House, Inc. v. Lionel,*

L.L.C., 472 F.3d 398, 407 (6th Cir. 2006) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)). In determining whether certain testimony is reliable, the focus of the Court "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. In *Daubert*, the Supreme Court identified a non-exhaustive list of factors that may assist the Court in assessing the reliability of a proposed expert's opinion including: (1) whether a theory or technique can be or has been tested; (2) whether the theory has been subjected to peer review and publication; (3) whether the technique has a known or potential rate of error; and (4) whether the theory or technique enjoys "general acceptance" within a "relevant scientific community." *Id.* at 592-94. This gatekeeping role is not limited only to expert testimony based upon scientific knowledge, but, instead, extends to "all 'scientific,' 'technical,' or 'other specialized' matters within" the scope of Rule 702. *Kumho Tire*, 526 U.S. at 147-48. Whether the Court applies the *Daubert* factors to assess the reliability of the testimony of an expert witness "depend[s] on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* at 150 (quotation omitted). Of course, *Daubert* is a flexible test and no single factor is dispositive. *See Kumho Tire*, 526 U.S. at 151-52; *Smith*, 215 F.3d at 719.

III. DISCUSSION

Plaintiff contends that the BIC J-26 lighter at issue was defective because it was not manufactured

in accordance with 16 C.F.R. § 1210.3(b)(4) which requires that a lighter be equipped with a child safety device that cannot "be easily overridden or deactivated." Both parties agree that "easily deactivated or overridden" is not defined by the regulations. Therefore, Defendants have listed several experts who are prepared to offer testimony that the BIC J-26's child safety mechanism was not easily overridden or deactivated. In response, Plaintiff has moved for exclusion of Defendants' experts on various grounds. Similarly, Defendants seek exclusion of Plaintiff's expert Crystal Zemenski who has offered testimony as to the value of C.A.P.'s medical bills. The Court will discuss the admissibility of each expert in turn.

A. Defendants' Experts Roy Deppa and Nicholas Marchica

Both Deppa and Marchica are former employees of the Consumer Product Safety Commission ("CPSC") who are prepared to testify that: (1) the "easily deactivated or overridden" language of 16 C.F.R. § 1210.3(b)(4) refers not to adults, but to children under the age of five; and (2) the BIC J-26 is not defective because the CPSC has not taken any investigative or corrective action against the child resistant feature. Plaintiff claims that both opinions are inappropriate expert testimony.

Turning first to Deppa's and Marchica's testimony that the language "easily deactivated or overridden" of § 1210.3(b)(4) refers to actions of children

under the age of five rather than adults, Plaintiff argues that experts can not testify as to interpretations of law. The Court agrees. "The interpretation of federal regulations is a matter of law for the court to decide." *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 656 (E.D. Mich. 2000) (citing *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994) ("The meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court.")). *See Nemir v. Mitsubishi Motors Corp.*, 2006 WL 322476, at *1 (E.D. Mich. Feb. 10, 2006) ("[I]nterpretation of federal regulations presents a question of law for the Court; not a question of interpretation for experts or a question of fact to be resolved by the jury."). Therefore, opining that § 1210.3(b)(4) was not intended to apply to adults would be inappropriate because "[i]t is the function of the trial judge to determine the law of the case [and] [i]t is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." *U.S. v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984) (citing *Stoler v. Penn Cent. Transp.*, 583 F.2d 896 (6th Cir. 1978) (expert witness prohibited from testifying because testimony would have amounted to a legal opinion)).

The Court finds that the language of 16 C.F.R. § 1210.3(b)(4), which requires the child resistant safety mechanism to "not be easily overridden or deactivated" refers not only to the efforts of children under the age of five, but also to the efforts of anyone.

Deppa's and Marchica's deposition testimony regarding their interpretation of § 1210.3(b)(4) is neither supported by the plain language of the regulation or their expert report. One of the concerns noted in their report was CPSC's knowledge that some adults would intentionally remove the safety device if they could do so. Another realization was that any determined adult, using enough force, could disengage the safety no matter the design. Thus, while acknowledging the difficulty of defining the terms, the CPSC chose to write the regulation to require that the mechanism not be easily deactivated or overridden.

Given the known concerns of adults removing safety devices, it makes little sense to believe that the CPSC would only direct its regulation at the efforts of children under the age of five. Under the Defendant's expert's interpretation, a lighter would be in compliance with the regulation even though its safety feature could be easily deactivated by anyone over five years of age, as long as those under five years old found it somewhat difficult. The idea behind the regulation is that lighters have a safety feature in place at all times. Manufacturing a lighter with a safety device which could be easily deactivated by anyone over the age of five does not achieve the purpose of the regulation. Therefore, the Court is of the opinion that the regulation requires a lighter to possess a child resistant safety feature which is not easily deactivated or overridden by anyone, regardless of age.

As to the evidence concerning the CPSC's failure to take any investigative or corrective action against the BIC J-26, Plaintiff seeks exclusion pursuant to 15 U.S.C. § 2074(b) which provides: "The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product." The Court in *Morales v. American Honda Motor Co.* stated that "the most reasonable reading of . . . section [2074(b)] leads to a conclusion that Congress sought to exclude those instances where the CPSC had *completely* failed to act, as opposed to those instances where the CPSC engaged in activity that ultimately led to a decision not to regulate." 151 F.3d at 513 (6th Cir. 1998) (quotation omitted). Here, however, the CPSC has not completely failed to act, but has in fact examined and tested samples of the BIC J-26 in an effort to enforce their regulations. This included taking force measurements of the striker wheel, child safety mechanism, and the gas lever. (*See* DN 99, Ex. 3 – Deppa & Marchica Expert Report, ¶¶ 71-90.) Based on their analyses, the CPSC concluded that the BIC J-26 complied with § 1210(3) and never initiated an investigative action or a recall. *Id.* Although not conclusive, this evidence will be relevant in determining whether the BIC J-26 was defective. *See Morales*, 151 F.3d at 513 ([T]he legislative history behind . . . section

[2074(a)][1] confirms that it was expected that such compliance would be admitted as evidence, but would not be determinative of the outcome.") (quotation omitted). Accordingly, Deppa's and Marchica's testimony is not barred by § 2074(b).

B. Defendants' Expert Sandra Metzler

Metzler seeks to testify that the J-26 is not easily overridden or deactivated based upon her four-factor test and by comparing the lighter's safeguard to other child safety products such as electrical outlet covers. Plaintiff contends that this testimony would amount to an improper legal conclusion and the comparison is too dissimilar to support her opinion. The Court disagrees.

Unlike the testimony of Deppa and Marchica, Metzler's testimony will not result in an improper legal conclusion. Pursuant to Fed. R. Evid. 704(a), "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Although Metzler will be providing her expert opinion as to what constitutes easily removable, it will nevertheless be for the jury to decide whether the lighter's safety was easily removable – a question of

[1] 15 U.S.C. § 2074(a) provides: "Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person."

fact. Thus both parties will be permitted to put on expert testimony as to the ultimate issue in this case – whether the BIC J-26 child safety device is "easily overridden or deactivated." This would include comparing the lighter's child safety device to other products that the jury may be familiar with such as toilet seat locks, electrical outlet covers, etc. to assist the jury in determining whether the BIC J-26 complies with federal safety regulations. Accordingly, Metzler's testimony will be allowed.

C. Defendants' Expert Christine Wood

Wood is also a human factors expert who is prepared to testify that the J-26 safety device is not easily deactivated or removed and that the accident could have been prevented had C.A.P.'s mother limited her child's access to lighters. Plaintiff argues that Wood's testimony would be improper. For the same reasons that Metzler's testimony is admissible in regards to her opinion that the BIC J-26 safety device is not easily overridden or deactivated, so too is Wood's expert opinion.

As to her opinions related to parental supervision, the Plaintiff argues that they are not relevant since the jury will not be apportioning fault to the mother. However, Defendants cite *DeStock No. 14, Inc. v. Logsdon* for the proposition that "'once causation is found the trier of fact must determine and apportion the relative degrees of fault of all parties and *nonparties*.'" 993 S.W.2d 952, 958 (Ky. 1999)

(emphasis added) (quoting *Zuern ex rel. Zuern v. Ford Motor Co.*, 937 P.2d 676, 682 (Ariz. Ct. App. 1996)).[2] As an initial matter, the *Destock* case was concerned with the interpretation of K.R.S. § 413.241, Kentucky's Dram Shop Act, which is separate and distinct from Kentucky's comparative fault statute, K.R.S. § 411.182. *Destock* did not apply § 411.182 because the court concluded that § 413.241 controlled the outcome of the case. Furthermore, the parties never sought to introduce the fault of a "non-party." Rather, the issue was whether a settling party's fault should be considered under § 411.182 or § 413.241. Therefore, the *Destock* court was never forced to consider whether the fault of a true non-party was admissible. Lastly, the language cited by Defendants is quoted from Arizona's comparative negligence statute, A.R.S. § 12-2506(c), which states in relevant part: "The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and *non-parties*, shall be determined and apportioned as a whole at one time by the trier of fact." (Emphasis added). However, Kentucky's comparative negligence statute does not include explicit language allowing a jury to apportion fault to a non-party. Thus, the *Destock* decision is not persuasive.

It is well-settled that Kentucky's "comparative negligence statute . . . preclude[s] the adjudication of

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[2] The Court notes that in the 12 years since the *Destock* decision, no court has cited this case for the proposition advanced by Defendants.

liability of persons or legal entities who are neither before the court nor are settling tort-feasors." *Copass v. Monroe Cnty. Med. Found., Inc.*, 900 S.W.2d 617, 620 (Ky. Ct. App. 1995). C.A.P.'s mother does not fall within either category. The court in *Baker v. Webb*, 883 S.W.2d 898 (Ky. Ct. App. 1994), made clear that the trial court's decision to instruct the jury on the duties of a non-party was error. The *Baker* court reasoned:

> [T]he thrust of KRS 411.182, considered in its entirety, limits allocation of fault to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement. When the statute states that the trier-of-fact shall consider the conduct of "each party at fault," such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large.

Id. at 619-620. *See Bass v. Williams*, 839 S.W.2d 559, 564 (Ky. Ct. App. 1992) (appellate court finding error with trial court's decision to instruct the jury as to the duties of a non-party because "KRS 411.182 applies to persons named as parties, regardless of how named, and those persons who bought their peace from the litigation by way of releases or agreements"), *overruled in part on other grounds by Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004). Because C.A.P.'s mother is not a party to this lawsuit, the jury will not be asked to apportion damages.

Even though the jury will not be asked to apportion damages in this case, evidence that the child was alone and the amount of time he was alone is admissible as it relates to the chain of custody issue and to whether the safety feature is easily deactivated or overridden. However, under Fed. R. Evid. 702, expert testimony is admissible only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony may assist the jury in understanding whether the safety issue is easily deactivated but it will not assist the jury in understanding the fact that C.A.P. was not supervised at the time of the incident. Accordingly, Christine Woods opinions related to parental supervision are excluded.

D. Plaintiff's Expert Crystal Zemenski

Zemenski is a medical auditor who has been tasked by Plaintiff to assign a value to the medical services C.A.P. received at Shriners Hospital. Defendants first claim that Zemenski's testimony should be excluded as unreliable. Despite Defendants' contentions, Zemenski does have sufficient experience in order to create a hospital bill from medical records. While employed as a hospital bill auditor for five years, she has familiarized herself with hospital charging practices. This will allow Zemenski to provide reliable testimony as to what C.A.P.'s hospital bill would have been based upon his medical records.

Defendants also contend that Zemenski's use of various Charge Description Masters ("CDM"), a

published manual outlining a hospital's pricing for a specific medical procedure, was inappropriate. Defendants argue that Zemenski's testimony would be unreliable because Shriners provides its services free of charge and therefore do not use a CDM. However, referencing the CDM of several comparable hospitals would be the most practical and reliable way of deducing Shriners' potential pricing scheme. Defendants' disagreement with the "science" of medical auditing and Zemenski's use of comparable CDM's can be adequately addressed at trial because "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

Lastly, Defendants argue that Zemenski's testimony is irrelevant because Shriners provided its services to C.A.P. free of charge and therefore medical damages are not recoverable. The Court agrees that medical damages cannot be awarded here. Although Plaintiff does not seek compensation for medical damages, the value is nevertheless relevant for computing damages related to pain and suffering. In *Thomas v. Greenview Hospital, Inc.*, the court stated that medical bills that had been written off are nevertheless entitled to be presented to the jury because "reducing the medical expense evidence by the amount written-off by [the hospital] would have unfairly prejudiced [plaintiff's] claim for pain and suffering by affecting the perception of the extent of treatment accorded [patient], and necessarily the potential for pain and

suffering." 127 S.W.3d 663, 675 (Ky. Ct. App. 2004), *overruled in part on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005). *See Rideout v. Nguyen*, 2008 WL 3850390, at *1 (W.D. Ky. Aug. 15, 2008) (same). Accordingly, Defendants' motion to exclude the expert testimony of Zemenski is denied.

CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Plaintiff's motion to exclude or limit the testimony of Defendants' expert witnesses [DN 99] is **GRANTED IN PART AND DENIED IN PART**. It is **GRANTED** as to the testimony of Deppa and Marchica stating that 16 C.F.R. § 1210.3(b)(4) applies only to children under the age of five and it is **DENIED** as to their testimony stating that the CPSC has not taken any investigatory or corrective action against BIC. It is further **GRANTED** as to Wood's opinions related to parental supervision. It is **DENIED** as to Metzler's and Wood's testimony concerning their interpretation of "easily removable" under 16 C.F.R. § 1210.3(b)(4). It is further ordered that the motion by Defendants to exclude Plaintiff's expert Crystal Zemenski [DN 102] is **DENIED**.

/s/ Joseph H. McKinley, Jr. [SEAL]
Joseph H. McKinley, Jr., Chief Judge
United States District Court

July 1, 2011

DEFENDANT'S EXHIBIT 426

U.S. Consumer Product Safety Commission

Office of Information and Public Affairs

Washington, DC 20207

FOR IMMEDIATE RELEASE

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CPSC and NBO Group Inc. Announce Lighter Recall

WASHINGTON, D.C. In cooperation with the U.S. Consumer Product Safety Commission (CPSC), NBO Group Inc. of Santa Fe Springs, Calif., is recalling approximately 110,000 refillable novelty and disposable cigarette lighters that do not comply with CPSC safety standards. The lighters, which operate with push-button electronic ignition mechanisms to produce the flame, do not have safety devices that prevent young children from igniting the lighters.

CPSC and NBO are not aware of any injuries involving these lighters. This recall is being conducted to prevent the possibility of injury.

Most of the lighters are silver-, copper-, or gold-tone metal with relief figures of birds, dragons, crocodiles, or other animals on the casing. Other styles include lighters that resemble revolvers and dragons.

The lighters were sold individually or from display trays nationwide from September 1994 to March 1996 for $5 to $10 by small retailers of every type.

Consumers should stop using the lighters immediately and return them to the place where purchased for a full refund. For more information about this recall, consumers can contact Patty Pany of NBO Group toll-free at (800) 716-0100.

U.S. Customs alerted CPSC to this hazard.

CPSC is still interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. Please tell us about it by visiting https://www.cpsc.gov/cgibin/incident.aspx

The U.S. Consumer Product Safety Commission is charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of consumer products under the agency's jurisdiction. The CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. The CPSC's work to ensure the safety of consumer products – such as toys, cribs, power tools, cigarette lighters, and household chemicals – contributed significantly to the decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

To report a dangerous product or a product-related injury, call CPSC's Hotline at (800) 638-2772 or CPSC's teletypewriter at (301) 595-7054. To join a CPSC e-mail subscription list, please go to https://www.cpsc.gov/cpsclist.aspx. Consumers can obtain recall and general safety information by logging on to CPSC's Web site at www.cpsc.gov.