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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0228p.06

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 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.

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

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 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 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

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[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 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.

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 J-26 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

[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).

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 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.

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 and/or argument did not cast blame on others. Plaintiff contends BIC's counsel, Charles 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.

Rather, even if § 2074(b) were deemed to have barred some of Marchica's 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.

[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.

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.*

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 mid-stream, 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**.

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v.

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

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

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, David R. Cummins, Conservator for C.A.P., a minor, makes the following disclosure:

A. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

By /s/ *Joseph H. Mattingly III*
JOSEPH H. MATTINGLY III

DATE: February 11, 2013

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Appellant respectfully requests oral argument. The Appellant believes that oral argument would be helpful to the Court in deciding the issues presented because counsel could then more fully explain the issues raised in this appeal and respond to any questions of the Court with respect to those issues.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action on behalf of CAP, a minor child, for recovery of damages under Kentucky products liability law and for violation of a consumer product safety rule pursuant to 15 U.S.C. §2072 was filed by the Appellant, David R. Cummins, Conservator for CAP, in the Green Circuit Court of Kentucky and was then removed by the Appellees, BIC USA, Inc., and BIC Consumer Products Manufacturing Company, Inc. (hereinafter jointly referred to as "BIC"), to the United States District Court for the Western District of Kentucky, invoking that court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441.[1] The Judgment and Order appealed from are a Judgment entered by the district court on February 7, 2012, following a jury verdict finding for BIC, and a

[1]Notice of Removal, RE 1, Page ID# 1-7; Complaint, RE 1-1, Page ID# 9-24. Reference to parts of the Record will be to the specific Record Entry Number, abbreviated as "RE," a short description of the particular item and the page identification number in the Record. Reference to the Transcript of the Jury Trial will be to the specific Record Entry Number of the Transcript, volume number of the Transcript and particular page identification numbers thereof, such as "Transcript, RE 202, Vol. I, at Page ID# ____." Exhibits introduced during the trial proceedings will also be referred to in reference to whether the particular exhibit was introduced by "Cummins" or "BIC," the specific Exhibit Number and the page in the Appendix, if included therein, where the exhibit may be found, such as, "Cummins EX 1; APX ___."

subsequent Order denying Cummins' Motion for a new trial on May 3, 2012.[2] Cummins filed his timely Notice of Appeal on June 1, 2012.[3]

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred by permitting BIC to introduce evidence of "inaction" by the U.S. Consumer Product Safety Commission in violation of 15 U.S.C. §2074(b) in regard to the child safety mechanism on the BIC model J-26 cigarette lighter where it was clear that the CPSC had never even had an opportunity to consider "action" in regard to that child safety mechanism.

2. Whether the trial court erred by denying Cummins' request for a specific instruction to the jury to disregard extraneous, improper and highly prejudicial statements and evidence improperly presented by BIC in an effort to place blame on the minor child's parents for the cause of his injuries, where the parents were non-settling, non-parties.

STATEMENT OF THE CASE

This action arose from a tragic fire which occurred on December 17, 2004, in Green County, Kentucky, resulting in severe burns to CAP, then a three year old child. The lawsuit was filed by CAP's court-appointed conservator against BIC,

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[2]Judgment, RE 184, Page ID# 4167; Order, RE 197, Page ID# 4623.

[3]Notice of Appeal, RE 200, Page ID# 4627.

the company which manufactured and distributed the cigarette lighter used by CAP to ignite his clothing on that occasion.[4] Cummins asserted claims against BIC under Kentucky products liability law and for violation of a consumer product safety rule pursuant to 15 U.S.C. §2072.

Cummins' claims were premised on the contention that the BIC model J-26 cigarette lighter used by CAP is defective and unreasonably dangerous because the child resistant feature incorporated therein is "easily deactivated or overridden" in violation of safety standards promulgated by the United States Consumer Product Safety Commission ("CPSC").

CPSC safety regulations promulgated at 16 C.F.R. §1210.3(a) require that cigarette lighters be manufactured with a child-resistant mechanism capable of preventing successful operation of the lighter by nearly all children under five years of age, based upon a specific test protocol outlined in 16 C.F.R. §1210.4.[5] Additionally, 16 C.F.R. §1210.3(b)(4) requires that the child-resistant mechanism chosen by the manufacturer, "[n]ot be easily overridden or deactivated." While 16 C.F.R. §1210.4 provides a specific protocol for testing the proficiency of the child-resistant feature chosen by the manufacturer to resist operation by children, no

[4]Complaint, RE 1-1, Page ID# 9-24.

[5]16 C.F.R. §§1210.1, 3.

protocol or regimen is suggested for testing compliance with the requirement of 16 C.F.R. §1210.3(b)(4) that the child-resistant mechanism not be easily overridden or deactivated.

The child-resistant mechanism on the BIC model J-26 cigarette lighter is a stainless steel metal guard or spring that is fastened over the spark wheel near the top of the lighter.[6] The guard is anchored in two places, the interior plastic of the lighter body and under the steel hood on the front of the lighter.

Cummins contended that while the BIC model J-26 lighter complies with standards for required child-resistance contained in 16 C.F.R. §1210.3(a), the lighter fails to meet the safety standard articulated in 16 C.F.R. §1210.3(b)(4), requiring that its child-resistant mechanism not be easily overridden or deactivated. In fact, rather than ***not being easily*** deactivated, the metal guard or spring serving as the child-resistant mechanism on the BIC model J-26 lighter ***is easily removed*** within seconds by use of ordinary household utensils like forks, knives, paper clips, pens or nearly any other sharp, rigid object. Cummins claimed that the design of the child resistant mechanism on the BIC model J-26 cigarette lighter actually invites its removal by the gap between the guard and the spark wheel

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[6]Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 82, APX 1. (Copy of the "extended view diagram" of the BIC model J-26 cigarette lighter depicting the lighter and its component parts).

where a sharp object can be easily inserted to pry off the guard.

Unfortunately, the metal guard or spring on the BIC model J-26 cigarette lighter used by CAP had been removed, rendering the cigarette lighter ***not resistant*** to operation by small children such as CAP.[7] Cummins contended that had the metal guard serving as the child-resistant feature on the BIC model J-26 cigarette lighter not been so easy to remove, and the functionality of the lighter left unimpaired by its removal, it is unlikely that BIC's intended adult users would remove the guard.[8] Had the guard been in place on the lighter found by CAP, the three-year old would not have been able to successfully operate the lighter and thus would not have been able to ignite his clothing.

A jury was impaneled on January 23, 2012, to consider this case and heard evidence over nine days. At trial, Cummins claimed that because the child resistant feature of the BIC model J-26 cigarette lighter is so easily deactivated, it violates federal safety standards, is defective and unreasonably dangerous under

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[7]Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 86, APX 2. (Depiction of an exemplar BIC model J-26 lighter with this child-resistant feature in place). Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 80, APX 3. (Photograph of the subject BIC lighter, with no child resistant feature).

[8]BIC's intended adult users believe that removal of the child safety guard or shield from the BIC model J-26 cigarette lighter makes its operation easier or more convenient. (Transcript, RE 203, Vol. II, Page ID# 5047; RE 205, Vol. IV, Page ID# 5307-5308).

Kentucky products liability law.

BIC countered that its model J-26 cigarette lighter is reasonably safe, arguing that if it was unreasonably dangerous, the CPSC would have taken action requiring a recall or design change of the cigarette lighter. BIC blamed CAP's parents for their son's injuries because evidence suggested that CAP's father may have removed the child guard from the cigarette lighter used by CAP and because CAP's mother briefly left him alone prior to the incident.

After its deliberations, the jury returned a verdict finding that BIC's model J-26 cigarette lighter was not unreasonably dangerous and that BIC did not violate a consumer product safety rule in manufacturing and selling the model J-26 lighters. The district court entered its Judgment on the jury verdict dismissing Cummins' claims. Cummins moved the Court pursuant to F.R.Civ.P. 59 to vacate its Judgment and award him a new trial, citing significant errors in the introduction of evidence. That motion was denied and this appeal followed.

STATEMENT OF FACTS

A. The Incident Giving Rise to this Action.

On December 17, 2004, CAP returned to his mother's apartment in Greensburg, Kentucky, after having visited with his father over night.[9] CAP was

[9]Transcript, RE 203, Vol. II, Page ID# 4933-4934, 4955-4956.

transported to his mother's apartment by his step-mother in a pick-up truck purchased days prior thereto by CAP's father.

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.[10] His possession of the lighter went unnoticed by CAP's step-mother or his mother when he arrived home that day. Upon his arrival home, CAP was hungry and his mother began preparing something for him to eat.[11] 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.[12] 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.[13] CAP successfully operated the BIC cigarette lighter, and ignited the shirt he was wearing.

The scene in and around CAP's apartment thereafter was chaos. Upon discovering her burning child, CAP's mother ran to the top of the stairs, attempted

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[10]Transcript, RE 203, Vol. II, Page ID# 4935-4936.

[11]Transcript, RE 203, Vol. II, Page ID# 4935, 4958.

[12]Transcript, RE 203, Vol. II, Page ID# 4958-4960.

[13]Transcript, RE 203, Vol. II, Page ID# 4936.

to extinguish the fire, scooped CAP in her arms and ran out of the apartment screaming for help.[14]

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.[15] He is permanently disfigured[16] and will require ongoing medical attention for the remainder of his life.

B. Investigation by Local Agencies.

Within minutes, EMS personnel arrived at the scene. Moments later, before the ambulance left the scene, members of the Greensburg Fire Department arrived, including Chief Lawrence Gupton and Firefighter Walter Parrott.[17] Shortly thereafter, Greensburg Police Chief John Brady arrived. After the ambulance left the apartment complex to transfer CAP to the local hospital, Chief Gupton and Firefighter Parrott entered CAP's apartment to make sure no fire remained inside.[18] Neither was specifically looking for the source of the fire. However, Firefighter

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[14]Transcript, RE 203, Vol. II, Page ID# 4958-4960.

[15]Transcript, RE 203, Vol. II, Page ID# 4962-4966.

[16]Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 35, 45, APX 4-5. (Photographs of CAP at Shriners Hospital).

[17]Transcript, RE 203, Vol. II, Page ID# 4914-4915.

[18]Transcript, RE 203, Vol. II, Page ID# 4915-4917, 4923.

Parrott recalled a dark-colored slender cigarette lighter at the top of the stairs of the apartment near burn patterns on the carpet.[19]

Police Chief Brady testified that he received the black BIC model J-26 cigarette lighter which is the subject of this case from one of the firemen who also took him to the top of the apartment stairs, and pointed out where the lighter was recovered.[20]

Based on his investigation, Police Chief Brady prepared an official report which concluded that he had retrieved the lighter which was used by CAP to ignite himself.[21] Police Chief Brady retained the lighter in his police "property room" until relinquishing it to Cummins' counsel.[22]

The cigarette lighter recovered at the scene by Chief Brady and later relinquished to Cummins' counsel was a black BIC model J-26 cigarette lighter with the child resistant feature removed, manufactured by BIC in the 26th week of

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[19]Transcript, RE 203, Vol. II, Page ID# 4916-4917.

[20]Transcript, RE 202, Vol. I, Page ID# 4882-4886.

[21]Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 12, APX 6. (Incident Report of Greensburg Police Department prepared by Chief Brady).

[22]Transcript, RE 202, Vol. I, Page ID# 4890-4892.

2004.[23]

C. The BIC Model J-26 Cigarette Lighter.

The 2004 version of the BIC model J-26 cigarette lighter 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 rather than the two-piece 2004 design.[24] Cummins 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) because the child safety mechanism on that design was not easy to deactivate or override.

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 conducted to determine if the child resistant feature of the two-piece design was more easily deactivated or overridden than the one-piece design.[25] In fact, BIC contended that no documents exist from the transition period describing the purpose of the change in design, any benefits of the proposed change or any

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[23]Transcript, RE 202, Vol. I, Page ID# 4884; RE 205, Vol. IV, Page ID# 5236-5237.

[24]Transcript, RE 205, Vol. IV, Page ID# 5239-5242. Exhibit Inventory, RE 216, Page ID# 6221, Cummins Exhibits 55 and 68. (BIC model J-26 lighters with the one-piece head design). Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 86, APX 7. (Photograph depicting one-piece lighter design).

[25]Transcript, RE 205, Vol. IV, Page ID# 5243-5245.

concerns with the proposed change.[26]

Despite the requirements of 16 C.F.R. §1610.3(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 consumers purposely remove the metal guard or spring serving as the child resistant mechanism from its two-piece model J-26 cigarette lighters.[27] Further, BIC's own annual Consumer Return Reports reveal that in 2002, nearly one-third of the lighters returned to BIC by consumers had the child resistant guard removed and in 2004, the year the lighter involved in this case was manufactured, twenty percent (20%) of the lighters returned to BIC had the child resistant guard removed.[28] Astonishingly, the results of BIC's Consumer Return Reports never triggered a product improvement initiative relating to the retention characteristics of the child resistant guard on the BIC model J-26 cigarette lighter.[29]

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[26]Transcript, RE 205, Vol. IV, Page ID# 5243-5247.

[27]Transcript; RE 205, Vol. IV, Page ID# 5259, 5306-5307.

[28]Transcript, RE 205, Vol. IV, Page ID# 5260-5268; Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 61 and Cummins EX 59, respectively, APX 8-14.

[29]Transcript, RE 205, Vol. IV, Page ID# 5269-5271; RE 208, Vol. VII, Page ID# 5813; RE 208, Vol. VII, Page ID# 5835-5836.

STANDARD OF REVIEW

This Court reviews for an abuse of discretion the district court's evidentiary rulings and its denial of Cummins' motion for new trial. *See United States v. Talley*, 194 F.3d 758, 765 (6th Cir. 1999)(evidentiary rulings); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 434 (6th Cir. 2009)(new trial motion). An abuse of discretion occurs when the district court relies on clearly erroneous factual findings, applies the law improperly, or employs an erroneous legal standard. *CareToLive v. FDA*, 631 F.3d 336, 344 (6th Cir. 2011). Reversal is warranted if this Court is left with a "definite and firm conviction that the trial court committed a clear error of judgment." *Nolan v. Memphis City Schs.*, 589 F.3d 257, 264 (6th Cir. 2009).

In this context, this Court reviews *de novo* the legal components of the district court's admission of evidence during a civil trial, such as its admission of evidence of non-action by the CPSC in this case. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 513 (6th Cir. 1998).

Further, this Court exercises plenary review of the correctness of the district court's jury instructions. *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, 180 F.3d 542 (3rd Cir. 1999). A jury's verdict should not be permitted to stand if the jury instructions "**could have** affected the result of the jury's deliberations."

Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 376-377 (6th Cir. 2009)(emphasis added).

This Court's consideration of the district court's denial of Cummins' motion for a new trial is governed by F.R.Civ.P. 59(a), which provides as follows:

> **(1) Grounds for New Trial.** The court may, on motion, grant a new trial on all or some of the issues – and to any party – as follows:
>
> **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in any action at law in federal court;

This Court has interpreted F.R.Civ.P. 59(a)(1)(A) as requiring a new trial, "when a jury has reached a 'seriously erroneous result' as evidenced by [ ] (1) the verdict being against the 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." *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 405 (6th Cir. 2006).

In the context of the case at bar, two separate standards govern the Court's consideration of whether F.R.Civ.P. 59(a)(1)(A) requires a new trial. First, if the district court improperly admitted evidence and a substantial right of the Plaintiff was affected, a new trial is appropriate. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

Second, and equally important in this case, a new trial is warranted where

misconduct by an attorney results in prejudice. *Fuhr v. Sch. Dist. of Hazel Park*, 364 F.3d 753, 759 (6th Cir. 2004). In this regard, a new trial should be granted where an opposing attorney's statements were improper and, "there is a reasonable probability that the jury's verdict was influenced by the improper argument." *Id.*, at 760. Paramount in application of this rule is the well recognized and longstanding maxim that, "counsel should not introduce extraneous matters before a jury or, by questions or remarks, endeavor to bring before it unrelated subjects, and, where there is a reasonable probability that the verdict of a jury has been influenced by such conduct, it should be set aside." *Twachtman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939). The Court must examine, "the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself." *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980).

SUMMARY OF ARGUMENT

The Judgment entered by the district court dismissing Cummins' claims following the jury's verdict for BIC should be reversed and this case remanded for a new trial based on two significant errors by the district court.

First, despite the specific prohibition contained in 15 U.S.C. §2074(b) that inaction by the CPSC with respect to a specific consumer product shall not be admitted at the trial of a products liability claim, the district court permitted BIC to introduce testimony through its corporate representative and a former high-ranking CPSC official that the CPSC had never initiated investigation of the design of BIC's model J-26 two-piece cigarette lighter, and had never requested that BIC modify or recall its two-piece design in any fashion. The introduction of this evidence permitted BIC to argue persuasively to the jury that if the federal agency charged with regulating consumer products had taken no action against BIC with respect to this specific product and the defect claimed by Cummins, it must conclude that the federal agency approved the product as reasonably safe.

However, the evidence proved that the CPSC had never even been provided information about the BIC model J-26 two-piece cigarette lighter design involved in this case prior to the manufacture of the lighter in question. Furthermore, to this day the CPSC has never been provided information related to the specific product defect claimed by Cummins. Thus, the CPSC never had an opportunity to test, investigate or take any action against BIC relative to the product defect claimed by Cummins.

The inaction by the CPSC was clearly precluded by 15 U.S.C. § 2074(b) and

it was error for the district court to permit introduction of that highly prejudicial evidence.

The second basis for reversal of the Judgment dismissing Cummins' claims is BIC's counsel's improper introduction of argument and testimony tending to cast blame for the cause of the incident involved here on CAP's parents, who were non-settling, non-parties, and the district court's refusal to specifically instruct the jury to disregard any evidence or comments by BIC's counsel in this regard.

ARGUMENT

A. The District Court Erred by Permitting BIC to Introduce Evidence of CPSC "Inaction" When The Evidence Proved that the CPSC Had Never Even Considered "Action" in Regard to the Model J-26 Two-Piece Cigarette Lighter Design.[30]

The only compelling evidence introduced at trial by BIC was the testimony of former high-level CPSC official Nicholas V. Marchica[31] that the CPSC had never cited BIC, never initiated investigation of the design of BIC's model J-26

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[30]This issue was preserved for appellate review by Cummins' pre-trial Motion to exclude the testimony and his Motion *in limine* seeking exclusion. (RE 99, Page ID# 1750-1767 and RE 153, Page ID# 3464-3466, respectively).

[31]Marchica worked for the CPSC for 27 years, admittedly learning everything he knows about product safety during that tenure, and now provides private consulting services for the very same product manufacturers who he previously regulated. (Transcript, RE 210, Vol. VIII, Page ID# 6009-6014).

two-piece cigarette lighter, and had never requested that BIC modify its two-piece design in any fashion.[32] Marchica's testimony[33] echoed the testimony of BIC's

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[32]Transcript, RE 210, Vol. VIII, Page ID# 5991-5992, 5998, 6004, 6007-6008, 6039-6040. Inaction by the CPSC was the point of emphasis by BIC's counsel in both his opening and his closing statements. In his opening statement, BIC's counsel represented to the jury that, "At no time has the CPSC ever advised BIC, you need to redesign, you need to retool, you need to use different materials. From that day until this, the CPSC has always taken the position that BIC's J-26 two-piece meets the requirements of C.F.R. Part 1210." (Transcript, RE 202,Vo. I, Page ID# 4854). In his closing, BIC's counsel argued:

> The CPSC has had more than 17 years to examine, evaluate, analyze, and test the BIC J-26 lighters, both the one-piece and the two-piece. While the instruction given by the court says that the CPSC has never cited BIC for violating those regulations, and that such failure to cite BIC is, quote, not necessarily determinative, there is no evidence to the contrary.
>
> At no time has BIC's product ever been recalled or asked to be redesigned or in any way the subject of any sort of criticism for the design and the effectiveness of the product in the market in this case with the BIC J-26 two-piece since the year 2000.
>
> Mr. Marchica's testimony that the CPSC has not taken any action against BIC to redesign its product or to take it off of the market, which is the burden that the plaintiff must prove in this case, Mr. Marchica's testimony is undisputed.

(Transcript, RE 212, Vol. IX, Page ID# 6150-6151).

[33]Significantly, Marchica admitted that his testimony was not based on information obtained from the CPSC as he had not received any information from the CPSC specific to BIC or its lighters. Rather, Marchica based his testimony only on a limited set of documents attached as exhibits to the deposition transcript of the Plaintiff's expert, Tarald Kvalseth, PhD. (Transcript, RE 210, Vol. VIII,

corporate representative, Jeffrey Kupson, in the same regard.[34] This testimony was admitted over Cummins' pre-trial objections.[35]

Introduction of evidence of "inaction" by the CPSC is specifically prohibited in litigation related to a consumer product by 15 U.S.C. §2074(b), which provides that, "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."

Despite the specific prohibition of 15 U.S.C. § 2074(b) against admission of evidence of CPSC inaction to prove or disprove product defect, the district court ruled that such evidence was admissible in this case based on BIC's pre-trial representation that evidence of the CPSC's actual consideration of its model J-26

Page ID# 6013-6015). Moreover, Marchica testified that he had not been provided with any relevant documents generated after March, 2006, and thus was unable to state whether or not the CPSC had considered any other qualification test results for the BIC model J-26 two-piece cigarette lighter design thereafter. (Transcript, RE 210, Vol. VIII, Page ID# 5980-5981).

[34]Transcript, RE 208, Vol. VII, at Page ID# 5769-5770, 5800, 5848-5849.

[35]Cummins Motion to Exclude BIC's Expert Witnesses, RE 99, Page ID# 1750-1767; Cummins' Motions in Limine, RE 153, Page ID# 3464-3466. During the trial of this action, Cummins' counsel reminded the Court of his pre-trial objections but acknowledged the Court's pre-trial ruling that evidence of the CPSC's inaction would be admitted. (Transcript; RE 210, Vol. VIII, Page ID# 5952).

two-piece design would be introduced,[36] thus documenting a conscious decision by the CPSC ***not*** to initiate enforcement regarding BIC's two-piece design and the "easily deactivated or overridden" requirement of 16 CFR § 1210.3(b)(4). Based on BIC's representations, the district court explained:

> [T]he 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. 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."[37]

At trial, BIC sought to support its pre-trial representations of CPSC "action," and skirt the specific prohibitions of 15 U.S.C. §2074(b), by introducing three sets of "qualification tests" related to its Model J-26 cigarette lighter,[38] a spot

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[36]BIC Response to Motions *in limine*, RE 159, Page ID# 3796-3800.

[37]Memorandum and Order, RE 142, Page ID# 3248 (internal citation to record omitted). As the evidence at trial proved, the district court was incorrect in its assumption that the evaluation and testing it referred to was performed by the CPSC. To the contrary, the test report shows clearly that the testing was conducted by BIC's private contractor and the results simply submitted to the CPSC which did no more than acknowledge receipt of the test report. (Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 302, APX 15-16).

[38]Exhibit Inventory, RE 217, Page ID# 6222, BIC EXS 302, 138 and 159, APX 15-29. "Qualification tests" are required to be performed *by the manufacturer* pursuant to 16 C.F.R. §1210.14 to show that a particular cigarette lighter complies with the child resistance standards of 16 C.F.R. §1210.4. (Transcript, RE 210, Vol. VIII, Page ID# 5966-5980). These "qualification tests" are not required to address the additional requirements of 16 C.F.R. §1210(3)(b), and those separate requirements are not addressed by BIC in any of the three

compliance report by the CPSC,[39] two inspection reports issued by the CPSC following receipt of lighter samples from the Duluth, Minnesota,[40] and Racine, Wisconsin,[41] Fire Departments, respectively, and the results of an "establishment" inspection.[42] BIC argued that these test results and reports proved that the CPSC had considered the model J-26 two-piece lighter design prior to the manufacture and sale of the lighter which was later used by CAP to ignite his clothing.[43]

"qualification tests" submitted as evidence by BIC. A manufacturer is required by 16 C.F.R. §1210.17 to keep a record of these tests and make those test results available to the CPSC upon request.

[39]Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 143, APX 30-36. Spot compliance reports result from collection of cigarette lighter samples by CPSC compliance officers in the market who evaluate the cigarette lighters. There is no defined criteria to guide the compliance officers in this evaluation. (Transcript, RE 210, Vol. VIII, Page ID# 5981-5986).

[40]Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 308, APX 37. An inspection report is issued following submission of a cigarette lighter to the CPSC from an outside agency, such as a police or fire department, after the cigarette lighter is found to have been involved in a fire or other incident. (Transcript, RE 210, Vol. VIII, Page ID# 5986-5992).

[41]Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 292; Exhibit Inventory, RE 216, Page ID# 6221, Cummins EX 87, APX 38-42.

[42]Exhibit Inventory, RE 217, Page ID# 6222, BIC EX 170, APX 42. In an "establishment" inspection, a CPSC compliance officer goes to the manufacturing facility and collects product samples for evaluation before the samples are placed in commerce. (Transcript, RE 210, Vol. VIII, Page ID# 5992-5998).

[43]In his opening statement, BIC's counsel falsely represented to the jury that, "The BIC lighter, as made by BIC, was tested and checked over and over again by

According to BIC, the CPSC's opportunity to consider the model J-26 two-piece lighter design, and the CPSC's election to take no adverse action in relation to that design was not "inaction," but deliberative "action" by the CPSC which resulted in a decision not to impose further design improvements upon BIC.[44] Thus, claimed BIC, its two-piece design must not have violated 16 CFR § 1210.3(b)(4) and was not defective.[45] Otherwise, the CPSC surely would have required re-design or improvement of its child-resistant mechanism.

However, Marchica and BIC's corporate representative were ultimately forced to concede that the CPSC inspection reports from the cigarette lighters provided by both the Duluth, Minnesota, and Racine, Wisconsin, Fire Departments, the spot compliance report and the establishment inspection report introduced in evidence involved ***only*** BIC's ***one-piece*** lighter design, not the two piece design like the one used by CAP.[46] Further, BIC was forced to admit that the

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BIC, and not just BIC, but on numerous occasions by the United States Consusmer Product Safety Commission, the CPSC in Washington." (Transcript, RE 202, Vol. I, Page ID# 4835). BIC's counsel further mis-represented to the jury that, "The BIC lighters are produced and monitored and tested and analyzed by the CPSC." (Transcript, RE 202, Vol. I, Page ID# 4839).

[44]Transcript, RE 210, Vol. VIII, Page ID# 5966-6008, 6039-6040.

[45]Transcript, RE 202, Vol. I, Page ID# 4854.

[46]Transcript, RE 208, Vol. VII, Page ID# 5829-5834; RE 210; Vol. VIII, Page ID# 6032-6034. In his opening statement, BIC's counsel claimed that the

first two of the "qualification tests" it introduced involved one-piece designs, not two piece designs.[47] Finally, BIC also begrudgingly admitted that the third "qualification test" it introduced, the only test involving its two-piece lighter design, was not performed until ***after*** the manufacture of the lighter used by CAP and the test data was not submitted to the CPSC until 2006, well over one year after the incident occurred which gave rise to this litigation.[48] With respect to that final qualification test, 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.[49]

Thus, despite the thousands of pages of documents identified and relied

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lighter submitted to the CPSC by the Racine, Wisconsin, Fire Department was a "BIC J-26 two-piece lighter" and that upon analysis the CPSC determined that the lighter was fully compliant with CPSC child safety standards. (Transcript, RE 202, Vol. I, Page ID# 4853-4854). In light of BIC's own representative's admission that the lighter submitted to the CPSC by the Racine Fire Department was a "one-piece" lighter design, rather than a "two-piece" design, it is clear that BIC's counsel's statement to the jury was flatly false.

[47]Transcript, RE 210, Vol. VIII, Page ID# 6030-6032.

[48]Transcript; RE 210, Vol. VIII, Page ID# 6035-6039.

[49]Exhibit Inventory, RE 217, Page ID# 6221, BIC EX 302, APX 15-16; Transcript, RE 208, Vol. VII, Page ID# 5827-5829.

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 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 CFR § 1210.3(b)(4).[50] 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. Clearly, the scope of the test data submitted by BIC did not even include evaluation of compliance with the requirements of 16 CFR § 1210.3(b)(4). As such, the generalized testimony of BIC's corporate representative and its expert, Marchica, concerning the key issue of whether the CPSC found BIC's model J-26 two-piece cigarette lighter design in compliance with 16 CFR § 1210.3(b)(4) fell squarely within the prohibition of 15 USC § 2074(b).

In the district court's July 5, 2011, Memorandum Opinion and Order,[51] when

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[50]Transcript, RE 210, Vol. VIII, Page ID# 6040.

[51] Memorandum Opinion, RE 142, Page ID# 3244-3254.

the scope of Marchica's testimony was first addressed, the district court relied upon *Morales v. American Honda Motor Co.*, 151 F.3d 500 (6th Cir. 1998), in reaching its decision to allow Marchica's testimony. However, a close reading of *Morales*, and the case from the District Court of Maine that is relied upon heavily therein,[52] reveals that the factual scenarios presented in those cases, while similar, involved entirely different CPSC activities than the evidence of CPSC "inaction" introduced by BIC during the trial of this matter. For this reason, while the standards discussed in *Morales* and *Johnston* are certainly applicable in the instant case, when those standards are applied to the evidence introduced by BIC at trial, exclusion was required.

Johnston v. Deere & Co., 967 F.Supp. 578 (D.Me. 1997), involved a claim arising from injuries suffered when a riding lawn tractor backed over the Plaintiff there. More than twenty years prior to the accident, the CPSC considered the advisability of a "no mow in reverse" ("NMIR") feature for riding lawn tractors, hiring the Consumer's Union to investigate and develop safety standards. Eventually, the CPSC issued a Notice of Proposed Rulemaking to adopt an NMIR requirement, but later withdrew the proposed rulemaking.[53] Both Plaintiff and

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[52] *Johnston v. Deere & Co.*, 967 F.Supp. 578 (D.Me. 1997).

[53] *Id*.

Defendant in *Johnston* sought to introduce evidence concerning this issue.

The Plaintiffs in *Johnston* wanted to introduce evidence that the CPSC gathered information and issued notice of proposed rulemaking to show what "manufacturers knew or should have known at the time about safety concerns, technical feasibility, etc."[54] The Defendant manufacturer, on the other hand, sought to introduce evidence that, after considering the proposed NMIR requirement, the CPSC ultimately rejected it. The CPSC's decision to abandon its proposed rulemaking, argued the Defendant, "supported its own decision not to incorporate an NMIR into its riding lawn mowers."[55] The Plaintiff, invoking 15 USC § 2074(b), sought to have this evidence excluded.

In reaching its conclusion in favor of admitting evidence of the CPSC's action, the Court in *Johnston* reasoned that if the CPSC had actually adopted an NMIR requirement, this fact would unquestionably have come into evidence.[56] Further, if a rule had been adopted and later revoked, this too would be admissible as "action" by the CPSC. Finding that the sequence of events undertaken by the CPSC in the *Johnston* case was not significantly different than an adoption or a

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 580.

revocation of a rule, the Court determined that the efforts by the CPSC to gather information, engage in official rulemaking and, then, decide for articulated reasons not to go forward, but to withdraw the proposal, were evidence of CPSC action and should not be excluded by 15 USC § 2074(b) merely because a decision not to regulate was made.[57] Importantly, the CPSC **action** involved the specific component of the lawn tractor which was alleged to be defective, not simply general safety issues.

Similarly, in *Morales* this Court was asked to determine whether a "report from the CPSC denying a petition to regulate unlicensed two-wheeled motorized vehicles" should have been excluded from a products liability trial.[58] In *Morales*, the Defendant manufacturer denied that its product was defective and had also joined the injured child's parent, alleging negligent supervision and seeking an allocation of fault. The manufacturer sought to introduce evidence (1) that a petition had been filed requesting "design and labeling requirements to address the risk to children under the age of 14 from these off-road vehicles;"[59] and (2) that the CPSC had issued a report declining to address this issue based on the fact that "the

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[57] *Id.*

[58] *Morales v. American Honda Motor Co.*, 151 F.3d at 512.

[59] *Id.*

vast majority of injuries associated with these vehicles are related to the way they are used and not the design characteristics which the [CPSC] could effectively or practically regulate."[60]

In determining that the petition and report should have been allowed into evidence, this Court relied heavily upon the rationale of the *Johnston* court. This Court found that "the **report** in question was not evidence of the CPSC's inaction; rather it was evidence of the CPSC's action in denying the rule-making petition; therefore, admission of the report into evidence was not barred by § 2074(b)."[61] As was the case in *Johnston*, the CPSC report sought to be introduced in *Morales* evidenced CPSC **action** bearing directly on a specific issue involved in the case.

When viewed in the context of the instant case, neither *Johnston* nor *Morales* required admission of the evidence introduced by BIC. Unlike in *Johnston* or *Morales*, BIC did not introduce a report or finding made by the CPSC to show **action** taken concerning an issue in the case, i.e., the "easily deactivated or overridden" standard and the BIC model J-26 two-piece lighter design. To the contrary, the evidence was uncontradicted that the CPSC had never even considered the BIC model J-26 two-piece lighter design prior to the manufacture of

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[60] *Id.*

[61] *Id.* at 513 (emphasis added).

the lighter which was used by CAP or the occurrence of the incident which gave rise to this litigation. For that matter, there was no evidence that the CPSC had ever done anything with respect to the BIC model J-26 two-piece lighter design other than acknowledge receipt of test data from BIC, which did not even address compliance with 16 CFR §1210.3(b)(4).

In short, there was not a single document that BIC introduced to support its claim that the CPSC took any action with regard to the specific lighter design or the regulation at issue. Instead, BIC simply introduced testimony that since there has been **no action** by the CPSC in this regard, the jury must conclude that the CPSC considered BIC's two-piece cigarette lighter design and found it in compliance with 16 C.F.R. § 1210.3(b)(4).

Certainly, something more is contemplated and required in order to prove CPSC approval of a regulated product. The CPSC regulates more than 15,000 consumer products.[62] Surely, Congress must have adopted 15 USC § 2074(b) with the recognition that the CPSC could not possibly evaluate and test every consumer product under its jurisdiction and thus, a manufacturer should not be able to claim CPSC approval of a particular product design where the CPSC had taken no action toward product approval.

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[62]Transcript, RE 210, Vol. VIII, Page ID# 6010.

The very purpose of the Consumer Product Safety Act is to protect the public against unreasonable risks of injury associated with consumer products and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.[63] Prohibiting evidence of non-action by the CPSC in product liability litigation promotes further investigation into the causes of product-related injuries and encourages manufacturers to produce safer products by preventing use of CPSC "inaction" as a shield to liability for manufacturing unsafe products. A contrary interpretation of 15 USC §2074(b) would run directly counter to the purpose of the Consumer Product Safety Act to promote investigation of causes and encourage manufacturers to produce safer products.

Ultimately, pursuant to *Johnston* and *Morales*, in order to prove that the CPSC's failure to take action is something more than inaction, and thus excluded by 15 USC § 2074(b), at a minimum some report, statement or other evidence from the CPSC about the internal machinations and decision-making processes at play is required. Unlike the Defendants in *Johnston* and *Morales*, BIC offered no proof that the CPSC ever even deliberated upon the BIC model J-26 two-piece lighter design at issue. This was simply not enough. There was no evidence from which the district court could find ***action*** taken by the CPSC in regard to the precise issue

[63] 15 USC §2051(b)(1), (4).

or lighter design involved in this case. Even if the district court was correct that threshold evidence showing that the CPSC had at least considered the BIC model J26 two-piece design during the relevant period could make testimony of the CPSC's following "inaction" admissible despite 15 U.S.C. § 2074(b), where BIC failed to introduce the required threshold evidence, its sweeping, generalized evidence of the CPSC's "inaction" was precluded by 15 U.S.C. § 2074(b). Therefore BIC's evidence of CPSC "inaction" should have been excluded.

BIC's unsubstantiated claim that the CPSC approved its model J-26 two-piece design permeated the trial. It was a key component of BIC's counsel's opening statement. The damaging testimony falsely claiming approval, introduced through Kupson and Marchica, was the cornerstone of BIC's defense, and its counsel's closing argument placed particular emphasis on the claim that the BIC lighter in question was manufactured with the approval of the CPSC. Although it is impossible to know with certainty what effect the district court's erroneous ruling to admit evidence of CPSC inaction in this case had on the jury's decision as it weighed and compared the evidence, where it ***could have*** affected the jury's decision, the district court's error was not harmless. *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 376-377 (6th Cir. 2009).

As the evidence of CPSC "inaction" was improperly admitted in violation of

15 U.S.C. § 2074(b), was highly prejudicial and affected the substantial right of Cummins to a fair trial, the Judgment dismissing Cummins' Complaint must be reversed and a new trial ordered.

B. The Court Should Grant a New Trial In Light of BIC's Introduction of Extraneous, Improper and Highly Prejudicial Matters to the Jury, and the District Court's Refusal to Instruct the Jury to Disregard those Matters .[64]

Throughout pre-trial discovery, BIC elicited testimony aimed at shifting the blame for the incident which resulted in CAP's serious burn injury from its defective product to CAP's parents. BIC went so far as to hire an expert from California whose primary pre-trial opinion was that lack of parental supervision was to blame for CAP's injury.[65] Yet, presumably to maintain federal diversity jurisdiction, BIC chose never to join CAP's parents as Defendants for apportionment of fault.

Under Kentucky law, a jury cannot allocate fault to non-settling non-parties.

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[64]This issue was preserved for appellate review by Cummins' pre-trial motions to exclude evidence tending to shift the blame for the subject incident to CAP's parents, as well as Cummins' two specific requests during the trial for an instruction to the jury to disregard any such evidence. (Cummins' Memorandum, RE 99-1, Page ID# 1763-1765; Cummins' Motions *in limine*, RE153-1, Page ID# 3575-3577; Transcript, RE 210, Vol. VIII, Page ID# 6086; Transcript, RE 212, Vol. IX, Page ID# 6205).

[65]Cummins' Memorandum, RE 99-1, Page ID# 1763-1765; RE 99-7-8, Page ID# 1872-1896.

KRS 411.182(1); *Barnes v. Owens-Corning Fiberglass Corp.*, 201 F.3d 815, 824-826 (6th Cir. 2000); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 296 (Ky.App. 2009); *Jones v. Stern*, 168 S.W.3d 419, 423 (Ky.App. 2005); *Baker v. Webb*, 883 S.W.2d 898, 900 (Ky.App. 1994). Thus, Cummins argued that BIC's claim that CAP's parents' conduct was the cause of CAP's injury was irrelevant since neither parent had ever been a party to this action.

The district court agreed. The Court rightly excluded BIC's California expert's child supervision opinion because it did not relate to a fact in issue.[66] However, because of the undue prejudice that introduction of any such evidence would have upon Cummins' case and the likelihood that such evidence would tend to confuse and overpower the real issues in the case, Cummins moved *in limine* for exclusion at trial of all evidence tending to cast blame or disparagement upon CAP's parents.[67] The district court's prior ruling in relation to BIC's California expert should have made the Cummins' Motion *in limine* unnecessary. However, despite the lack of necessity, the district court reaffirmed its position and sustained Cummins' Motion, ruling:

> The Court **GRANTS** this motion, limiting questioning regarding the

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[66]Memorandum Opinion and Order, RE142, Page ID# 3250-3252.

[67]Cummins' Motions *in limine*, RE153-1, Page ID# 3575-3577.

> supervision of C.A.P. to what is relevant to the chain of custody issue and as to whether the safety feature is easily deactivated or overridden. Counsel for Defendant indicated at the hearing he intended to address with the witnesses certain warnings given family and friends about leaving lighters around the child and their failure to heed said warnings. Although the fact that there may have been many lighters which the child could have used is relevant, the Court has previously ruled that the fault of others is not. Counsel shall make sure that his interrogation and/or argument does not cast blame on others.[68]

Unfortunately, from BIC's counsel's opening statement, through his closing argument, BIC's counsel made statements and elicited testimony directly implicating CAP's parents in the cause of the horrible incident which resulted in their son's injury.[69] BIC's counsel's trial conduct was not limited to a single, isolated or inadvertent comment. Rather, the improper references to CAP's parents' conduct and his efforts to blame the parents, either directly or by

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[68]Order, RE 170, Page ID# 3989.

[69]In BIC's most blatant effort to subvert the Court's pre-trial rulings, late on the Friday prior to the beginning of the trial on the following Monday, BIC designated numerous portions of the deposition transcript of CAP's father to be played to the jury which were clearly improper in light of the Court's rulings. (BIC Supplemental Deposition Designations, RE 172-1, Page ID# 4057-4059). Cummins' counsel was required to review the deposition transcript during the evenings following the trial sessions to articulate his objections to BIC's brazen effort to undermine the ruling of the Court. (Cummins' Objections to BIC Supplemental Deposition Designations, RE 178, Page ID# 4128-4137). Recognizing BIC's effort, the Court sustained nearly every objection made by Cummins. (Order, RE 179, Page ID# 4138-4141).

inference, permeated the entire trial. In his opening statement, BIC's counsel emphasized the alleged lack of supervision by CAP's mother[70] and criticized CAP's father for alleged indifference to his son's safety for removing the child safety mechanisms from BIC lighters.[71] During BIC's counsel's cross-examination of CAP's mother, he emphasized her failure to discover that CAP had the lighter when he returned home.[72]

In light of BIC's counsel's statements and evidence inferring impropriety on the part of CAP's parents, at the close of the evidence but before closing statements, Cummins requested a specific instruction advising the jury that it would be improper for them to consider the fault of any non-party. That instruction was rejected by the Court.[73]

Undeterred by the Court's rulings and private admonitions to BIC's counsel that blame toward or disparagement of CAP's parents should be strictly avoided,[74]

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[70]BIC's counsel noted three times that in order for the incident involving CAP to have occurred, he had to be left alone. (Transcript, RE 202, Vol. I, Page ID# 4835, 4858, 4866).

[71]Transcript, RE 202, Vol. I, Page ID# 4857-4858.

[72]Transcript, RE 203, Vol. II, Page ID# 4993.

[73]Transcript, RE 210, Vol. VIII, Page ID# 6086.

[74]Transcript, RE 203, Vol. II, Page ID# 4983-4986.

in his closing statement, BIC's counsel again castigated CAP's father, stating:

> 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's 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 his intent –[75]

Whereupon, as Cummins' counsel was rising to object, the Court on its own volition, interrupted BIC's counsel's closing statement and the following colloquy ensued:

> THE COURT: Mr. Stopher, come up.
>
> MR. STOPHER: Yes, sir.
>
> (Bench conference)
>
> THE COURT: I don't know what I have done in not trying to convince you that's not where I want you to go in this case. I don't know how many times do I have to tell you that.
>
> MR. STOPHER: Well, I'm just arguing causation, Judge.
>
> THE COURT: That's what you've always said. And how many times was I specifically clear to you that I wasn't going to allow you to do that?
>
> MR. STOPHER: Well, Judge, I thought I could argue that –

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[75]Transcript, RE 212, Vol. IX, Page ID# 6145.

> THE COURT: I told you that you could argue that someone did it.
>
> MR. STOPHER: Okay. I understand. I will withdraw the Thor remark.
>
> (End of bench conference.)
>
> THE COURT: 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.
>
> Go ahead, Mr. Stopher.[76]

It was disingenuous for BIC's counsel to argue that he misunderstood the district court's prior rulings and admonitions. The district court's prior rulings were crystal clear. BIC's counsel pointed out to the jury that he had been "involved in the judicial trial process for more than 40 years."[77] By his statements, and certainly by reputation, BIC's counsel was more acquainted with the trial process than nearly any other member of the Kentucky Bar. Rather than a misunderstanding, BIC's counsel's conduct was clearly calculated to arouse passion and prejudice against CAP's parents.

Feeling that the Court's vague admonition following BIC's counsel's

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[76]Transcript, RE 212, Vol. IX, Page ID# 6145-6146.

[77]Transcript, RE 212, Vol. IX, Page ID# 6142-6143.

improper comments during his closing statement was insufficient to erase the prejudice to his case, Cummins' counsel once again moved for a specific instruction to the jury directing them to disregard BIC's counsel's efforts to blame and disparage CAP's parents. Cummins' request was again overruled.[78]

BIC's counsel's comments and the prejudicial testimony and inferences he elicited had no relevance to the issues before the jury. It is surely "reasonably probable" that the passion and prejudice aroused by BIC's counsel's improper conduct influenced the jury and entitles Cummins to a new trial.

CONCLUSION

Based on all of the foregoing, the Appellant, David R. Cummins, Conservator for C.A.P., a minor, respectfully requests that the Judgment of the district court be reversed and that this case be remanded for a new trial.

Respectfully submitted,

/s/ *Joseph H. Mattingly III*

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[78]Transcript, RE 212, Vol. IX, Page ID# 6205.

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CERTIFICATE OF COMPLIANCE

Pursuant to 6 Cir. R. 32(a)(7)(C), counsel certifies that the foregoing Brief for Appellant complies with the type-volume limitation of 6 Cir.R. 28.1, as it contains 8,891 words, as calculated by the Correl WordPerfect 12 word processing program utilized by counsel.

By /s/ *Joseph H. Mattingly III*
JOSEPH H. MATTINGLY III

CERTIFICATION OF SERVICE

I hereby certify that on February 11, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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ADDENDUM

APPELLANTS' DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellants, pursuant to 6th Circuit Rules 28(c) and 30(b), hereby designates the following filings in the district court as relevant to the issues in this appeal:

Record Entry #	Description	Page ID#
1	Notice of Removal	1-7
1-1	Complaint	9-24
99	Cummins Motion/Memo to Exclude	1750-1767
99-7/8	Wood Depo and report	1872-1896
142	Memorandum and Order	3248-3252
153	Cummins Motion *in limine*	3464-3466
153-1	Cummins Memo	3575-3577
159	BIC Response to Motion *in limine*	3796-3800
170	Order	3989
172-1	BIC Supplemental Depo. Designations	4057-4059
178	Cummins Objections to Dep. Designations	4128-4137
179	Order	4138-4141
184	Judgment	4167
197	Order	4623
200	Notice of Appeal	4627
202	Transcript, Vol. I	4835, 4839, 4853-4854,

		4857-4858, 4866, 4882-4886
203	Transcript, Vol. II	4890-4892, 4914-4917, 4923, 4933-4936, 4955-4956, 4958-4960, 4962-4966, 4983-4986, 4993, 5047
205	Transcript, Vol. IV	5236-5237, 5239-5247, 5259-5271, 5306-5308
208	Transcript, Vol. VII	5769-5770, 5800, 5813, 5827-5836, 5848-5849
210	Transcript, Vol. VIII	5952, 5966-6015, 6030-6040, 6086
212	Transcript, Vol. IX	6142-6143, 6145-6146, 6150-6151, 6158-6160, 6205

Trial Exhibits

Record Entry #	**Page ID#**	**Description**	**Page In Appendix**
216	6221	Exhibit Inventory, Greensburg Police Dept. Report, Cummins EX 12	6
216	6221	Exhibit Inventory, Photographs, CAP at Shriners Hospital, Cummins EX 35, 45	4-5
216	6221	Exhibit Inventory, Exemplar BIC one-Piece lighter, Cummins EX 55	
216	6221	Exhibit Inventory, BIC Consumer Returns Report, 2002, Cummins EX 59	8-10

216	6221	Exhibit Inventory, BIC Consumer Returns Report, 2004, Cummins EX 61	11-14
216	6221	Exhibit Inventory, Exemplar BIC one-piece lighter, Cummins EX 68	
216	6221	Exhibit Inventory, Photograph of Subject lighter, Cummins EX 80	3
216	6221	Exhibit Inventory, Photograph of exemplar two-piece lighter, Cummins EX 86	2
216	6221	Exhibit Inventory, Photograph of exemplar one-piece lighter, Cummins EX 86	7
216	6221	Exhibit Inventory, December 14, 2001, CPSC Results of sample Analysis Report from lighter submitted by Racine, Wisconsin Fire Department, Cummins EX 87	38-42
217	6222	Exhibit Inventory, BIC Extended View Diagram, one-piece lighter design, BIC EX 82	1
217	6222	Exhibit Inventory, BIC January 4, 1995, Report of Qualification Testing, BIC EX 138	17-24
217	6222	Exhibit Inventory, CPSC February 27, 1995, Spot Compliance Report, BIC EX 143	30-36
217	6222	Exhibit Inventory, BIC May 16, 1997, Report of Qualification Testing, BIC EX 159	25-29
217	6222	Exhibit Inventory, CPSC September 19, 1996, Affidavit - Establishment Inspection, BIC EX 170	43
217	6222	Exhibit Inventory, May 23, 2006, CPSC correspondence acknowledging receipt of BIC Qualification Testing, BIC EX 302	15-16
217	6222	Exhibit Inventory, June 29, 1999, CPSC Results	37

of Sample Analysis Report from lighter submitted by Duluth, Minnesota Fire Department, BIC EX 308

CASE NO. 12-5635
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	)	*Electronically Filed*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY, 1:08-CV-00019-JHM

BRIEF OF DEFENDANTS – APPELLEES

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I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.01, Defendants/Appellees, BIC USA, Inc., and BIC Consumer Products Manufacturing Company, Inc. (hereinafter "BIC"), make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   YES. BIC Corporation is the parent company of BIC USA Inc. and owns 100% of the stock of BIC USA Inc. BIC Corporation is a wholly owned subsidiary of BIC Clichy SAS, which in turn is owned by the BIC Group ultimate parent company Société BIC, a French Société anonyme. Société BIC is a publicly traded company listed on Euronext Paris.[1]

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   YES. BIC Corporation, BIC Clichy SAS, and Société BIC have a financial interest in the outcome of the appeal. BIC Corporation is the parent company of BIC USA Inc., which is the parent company of Appellee BIC Consumer Products Manufacturing Co., Inc. ("BCPMC") and owns 100% of the stock of BCPMC. BIC Corporation in turn is a wholly owned subsidiary of BIC Clichy SAS, which in turn is owned by the BIC Group ultimate parent company Société BIC, a French Société anonyme. Société BIC is a publicly traded company listed on Euronext Paris.[2]

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[1] *See* Document 006111342506, filed 06/19/2012

[2] *See* Document 006111342506, filed 06/19/2012

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IV. STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument will assist the Court in understanding the events at trial and why the Judgment should be affirmed. Appellees, therefore, request oral argument.

V. JURISDICTIONAL STATEMENT

BIC accepts Appellant's Jurisdictional Statement.

VI. STATEMENT OF ISSUES

1. Did the District Court properly allow testimony that the Consumer Product Safety Commission ("CPSC") never took corrective action against the BIC J-26 Lighter when it was undisputed that BIC submitted test results to the CPSC demonstrating that both the one and two-piece child-resistant safety guard on the lighter could "not be easily overridden or deactivated" as required by 16 C.F.R. § 1210(b), and that the CPSC approved the lighter for sale in the United States—and did Cummins waive his argument that the testimony was inadmissible by abandoning it at trial?

2. Did the District Court properly deny Cummins' request for an instruction that the jury should not consider any fault of non-parties when: (a) such an instruction is improper; (b) there were no "highly prejudicial statements and evidence improperly presented by BIC in an effort to place blame on the minor child's parents;" and (c) there was no prejudice to Cummins?

3. Has Cummins preserved any appellate issue for review when the jury may have found under Instructions 1 and 2 that it was not BIC's lighter that was involved in C.A.P.'s injury and such a conclusion by the jury would constitute an independent basis to affirm the judgment, which Cummins has not challenged on appeal?

VII. STATEMENT OF THE CASE[3]

This is a products liability case in which C.A.P., a three-year-old child, sustained severe burns when he attempted to undo a button on his shirt using a lighter. C.A.P.'s court-appointed conservator, David Cummins ("Cummins"), filed suit against BIC USA, Inc. and BIC Consumer Products Manufacturing Company, Inc. ("BIC"). Cummins' complaint alleged that BIC manufactured the lighter, and that the lighter was defectively designed because the lighter's child-resistant guard could be "easily deactivated or overridden," and therefore was both unreasonably dangerous under Kentucky law and violated CPSC regulation 16 CFR § 1210.3(b)(4).

BIC denied the allegations in Cummins' Complaint. It was undisputed that: (1) the BIC Model J-26 lighter allegedly involved in the incident was made in

[3] Reference to the Trial Transcript shall be to its Document Number, witness name, where appropriate, and page number (TE 203, Parrott, Page ID # 6). Reference to a Trial Exhibit shall be whether it was introduced by Cummins or BIC, the Exhibit number and, if the exhibit is included in the Appendix, the Appendix page number (BIC Ex. 1, App., p. ___).

2004; (2) it had been abused and altered by someone intentionally removing the two-piece child-resistant safety guard with which it had been manufactured using a screwdriver or other tool; (3) someone had peeled off the warning label on the lighter;[4] (4) it is impossible to design an "adult proof" lighter; (5) C.A.P. could not have lit the lighter if someone had not intentionally removed the child safety guard;[5] and (6) the specifications of the BIC J-26 lighter allegedly involved in C.A.P.'s injury were approved by the CPSC in 1997 and again in 2006.

BIC contended that the qualities and tolerances of the two-piece safety guard were approved by the CPSC, that its Model J-26 two-piece child-resistant guard could "not be easily overridden or deactivated," and was not defective or unreasonably dangerous. It was BIC's position that of the 259 million J-26 lighters manufactured in 2004, only 115, or 1 in every 2,000,000, were returned to BIC showing evidence that someone had intentionally tampered with the two-piece child-resistant guard.[6]

In addition, there was evidence that the lighter was not manufactured by BIC. C.A.P.'s parents routinely purchased cigarette lighters manufactured by companies other than BIC that did not have a child-resistant feature and to which

[4] TE 207, Lawrence Gupton, Page ID # 5597-5598
[5] TE 202, Cummins' Opening Statement, Page ID # 4833; TE 203, Cowles, Page ID # 5011–5012; TE 207, Thor Polley, p. 141 (Deposition pages 64, 111-112), App., pp. 48, 50-51
[6] TE 205, Kupson, Page ID # 5311

C.A.P. had access.[7] There was evidence that the BIC lighter allegedly involved in the incident was handed to Fire Chief Lawrence Gupton by an unknown man,[8] and no one knew where he had found it.

The jury heard evidence for nine days between January 23, 2012 and February 2, 2012. After retiring for approximately two hours, it found in favor of BIC. Based on the Court's Instructions, to which Cummins did not object, the jury concluded that, if the BIC J-26 lighter was involved in the incident, it was neither unreasonably dangerous nor violated the CPSC regulation, and/or that the lighter involved in the incident was not a BIC lighter at all.

On February 6, 2012, judgment was entered in favor of BIC. Cummins' motion to alter, amend, or vacate the judgment was overruled on May 3, 2012.

VIII. STATEMENT OF FACTS

A. The Fire

C.A.P. spent the night of December 16, 2004 with his step-mother, Tammy Polley, and his father, Thor Polley.[9] Tammy and Thor Polley, as well as C.A.P.'s mother, Amy Cowles, were all cigarette smokers.[10] In addition to purchasing BIC lighters that were made with a child-resistant guard, Thor and Tammy Polley

[7] TE 208, Tammy Polley, Page ID # 5683; TE 208, Thor Polley, p. 141 (Deposition pages 114-116), App., pp. 53-55
[8] TE 207, Lawrence Gupton, Page ID # 5597-5598
[9] TE 208, Tammy Polley, Page ID # 5684
[10] TE 208, Tammy Polley, Page ID # 5680-5681; TE 207, Thor Polley, p. 141 (Deposition page 56), App., p. 47; TE 203, Amy Cowles, Page ID # 4980-4981

purchased other, cheaper foreign brand lighters that did not contain a child-proof guard.[11] Both Amy Cowles and Thor Polley would often place their lighter where it was accessible to C.A.P. and their other children.[12] Thor Polley "most usually" intentionally, with his knife, removed the child-resistant guard on "every lighter [he] purchased" that came with one.[13]

On December 17, 2004, Tammy Polley drove C.A.P. back to his mother's apartment in Greensburg, Kentucky.[14] The truck driven by Tammy Polley had recently been purchased by Thor.[15] According to C.A.P., at some point he found a cigarette lighter on the floorboard and put it in his pocket.[16]

After arriving home, C.A.P. went upstairs to play while his mother and a friend, Carol Parsons, were in the kitchen.[17] On direct examination by C.A.P.'s attorney, Amy Cowles testified that C.A.P. remained upstairs by himself for approximately fifteen minutes[18] and Carol Parsons testified that C.A.P. remained upstairs by himself for between 5 and 10 minutes.[19] On cross-examination, Shanna

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[11] TE 208, Tammy Polley, Page ID # 5683; TE 207, Thor Polley, p. 141 (Deposition pages 114-116)
[12] TE 207, Thor Polley, p. 141 (Deposition page 64), App., p. 48
[13] *Id*. (Deposition page 110)
[14] TE 208, Tammy Polley, Page ID # 5690
[15] TE 208, Tammy Polley, Page ID # 5688
[16] TE 203, C.A.P., Page ID # 4935-4936
[17] TE 203, Cowles, Page ID # 4956-4958
[18] *Id.* at 4959
[19] TE 204, C. Parsons, Page ID # 5093-5094

Parsons, Carol's sister, testified that C.A.P. was alone in his mother's apartment for almost 30 minutes before the incident.[20]

While in the kitchen, Amy Cowles and Carol Parsons heard a scream.[21] Ms. Cowles ran to the steps leading to the second floor, where she saw C.A.P. in flames from his waist up.[22] She ran upstairs and attempted to rip C.A.P.'s shirt off. She then picked up C.A.P. and ran outside while Carol Parsons called EMS.[23] C.A.P. was taken to Jane Todd-Crawford Hospital in Greensburg and then transported to the Shriner's Hospital in Cincinnati, Ohio, where he was treated for his burns.[24]

B. The Fire Investigation

The evidence regarding the investigation into the fire by the Green County Fire Department was conflicting as to whether C.A.P. was using a BIC lighter when the incident occurred. Chief Lawrence Gupton testified that he was the first person from the fire department to go into Amy Cowles' apartment.[25] Chief Gupton testified that he went up the stairs to the second floor and walked across the hallway to make sure the fire was out. Chief Gupton testified that he did not see any cigarette lighter where the fire occurred.[26]

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[20] TE 203, Shanna Parsons, Page ID # 5032
[21] TE 203, Cowles, Page ID # 4958
[22] *Id.*at Page ID # 4959
[23] *Id.* at Page ID # 4960-4961
[24] *Id.* at Page ID # 4962
[25] TE 207, L. Gupton, Page ID # 5592
[26] *Id.* at Page ID # 5593-5596

Chief Gupton testified that after he left C.A.P.'s apartment he went outside to a grassy area in front of the apartment building. While there, a stranger whose identity is unknown handed him a lighter. Chief Gupton did not know where the stranger found the lighter.[27] He later gave the lighter to police Chief John Brady.[28] Chief Brady, on the other hand, testified that after arriving at the apartment he was shown where the fire occurred and he was handed the lighter and C.A.P.'s shirt by firemen Parrott and Steve Gupton.[29]

C. Thor And Tammy Polley Testify That The Lighter Was Not Theirs.

Thor and Tammy Polley testified that they did not believe the lighter that was used by C.A.P. belonged to either of them.[30] However, Tammy Polley testified that after this suit was filed she was asked by one of C.A.P.'s attorneys to be the "fall-guy" and to testify that the lighter used by C.A.P. was hers and came from either Thor's truck or her house.[31]

D. Consumer Product Safety Regulation 16 C.F.R. 1210

In 1994, the CPSC first issued regulations governing child safety features required on lighters sold in the United States. 16 C.F.R. 1210.3(a) mandates that

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[27] *Id.* at Page ID # 5597
[28] *Id.* at Page ID # 5598
[29] TE 202, Brady, Page ID # 4882-4883
[30] TE 207, Thor Polley, p. 141 (Deposition page 172), App., p. 56; TE 208, Tammy Polley, Page ID # 5699-5700
[31] TE 208, Tammy Polley, Page ID # 5699-5700

manufacturers demonstrate that "at least 85 percent" of the children tested in accordance with Section 1210.4 are not able to activate the lighter. Section 1210.3(b) requires that every lighter also satisfy the following criteria:

> (b) The mechanism or system of a lighter subject to this part of 1210 that makes the product resist successful operation by children must:
>
> (1) reset itself automatically after each operation of the ignition mechanism of the lighter,
>
> (2) not impair safe operation of the lighter when used in a normal and convenient manner,
>
> (3) be effective for the reasonably expected life of the lighter, and
>
> (4) not be easily overridden or deactivated.

Once a manufacturer develops a lighter model that meets these standards, the CPSC regulations specify that if the manufacturer develops "another model of lighter that differs from the first model only by differences that would not have an adverse effect on child resistance, the second model need not be tested in accordance with Section 1210.4." 16 C.F.R. 1210.14(a).

Since the CPSC regulations went into effect in 1994, the CPSC has exercised broad supervision of lighters such as the Model J-26.[32] This includes numerous recalls of lighters that do not satisfy the child safety requirements, such as the recall of 110,000 lighters in 1996.[33]

[32] TE 210, Marchica, Page ID # 5998-5999
[33] TE 210, Marchica, Page ID # 6003-6004; BIC Ex. 426, App., pp. 57-59

The CPSC has the authority to make unannounced inspections of lighter manufacturing facilities and did so at BIC on September 19, 1996.[34] On that occasion, the CPSC collected 2 sets of samples of BIC J-26 lighters, totaling 386 lighters, which were sent for testing and analysis to the CPSC.[35] No adverse action ever resulted following the CPSC's testing.

The CPSC has not defined what "not be easily overridden and deactivated" means but instead left it up to each manufacturer to develop qualifying standards and then submit the lighter and test data to the CPSC to show that the regulations are satisfied.[36] It was undisputed that BIC's Model J-26 lighter with the two-piece child-resistant guard complied with 16 C.F.R. § 1210(3)(a) and (b)(1)-(3).

Cummins' only complaint was whether the child safety guard satisfied subsection (b)(4),[37] which required that the safety guard could "not be easily overridden or deactivated." According to Nicholas Marchica, who worked at the CPSC for 27 years and served as its Acting Executive Director on two occasions, the CPSC approved the BIC J-26 lighter with the two-piece child safety guard.[38]

E. BIC's Model J-26 Cigarette Lighter

[34] BIC Ex. 170, App., p. 43
[35] TE 210, Marchica, Page ID # 5992-5993; BIC Ex. 170, App., p. 43
[36] TE 210, Marchica, Page ID # 5983-5985
[37] TE 207, Kvalseth, Page ID # 5470; TE 210, Kupson, Page ID # 5259, 5283
[38] TE 210, Marchica, Page ID # 6006-6009

In 1994, BIC patented the design of its Model J-26 lighter with both a one and two-piece child-resistant safety guard.[39] BIC initially decided to use the one-piece guard and conducted tests to demonstrate that the lighter complied with 16 C.F.R. 1210.3.[40] BIC's tests showed that 90% of the children tested could not operate the J-26 one-piece surrogate lighter.[41]

BIC submitted its Model J-26 lighter and its test data to the CPSC in January 1995 for review and approval.[42] After examining BIC's submission and conducting its own tests, the CPSC approved BIC's Model J-26 lighter, including the specifications for the child-resistant guard. The CPSC expressly noted that the one-piece child-resistant mechanism could not be "easily overridden or deactivated."[43]

BIC then began manufacturing the Model J-26 lighter with the one-piece safety guard at its Milford, Connecticut facility.[44] Because the lighter experienced instances where the flint jammed into the spark wheel, in 1997 BIC made changes to the spark wheel, retested the lighter and submitted its test data to the CPSC, even though it was not required to do so by the regulations.[45]

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[39] TE 208, Kupson, Page ID # 5775-5776
[40] BIC Ex. 138, App., p. 17
[41] TE 208, Kupson, Page ID # 5719
[42] BIC Ex. 138, App., p. 17
[43] BIC Ex. 143, p. 6, App., p. 35
[44] TE 205, Kupson, Page ID # 5238
[45] TE 208, Kupson, Page ID # 5747-5748; TE 210, Marchica, Page ID # 5973-5974

In 1999 and again in 2001, the CPSC examined the BIC J-26 lighter with the one-piece safety guard and confirmed that the lighter complied with CPSC regulations. In June 1999, the Duluth Fire Department sent the CPSC a BIC J-26 one-piece lighter involved in a fire whose safety guard had been removed. The CPSC tested that lighter and concluded that although the lighter in its intentionally modified and altered condition did not comply with the child safety regulations, "it appears that it probably did comply at the time the lighter left the manufacturer."[46]

Similarly, in March 2001, the Racine Wisconsin Fire Department sent another J-26 one-piece lighter to the CPSC whose safety guard and warning were intact. The CPSC examined the lighter and found that it fully satisfied CPSC regulations, including those concerning child safety:

> Cigarette lighters x meets □ does not meet child resistant criteria at 16 C.F.R. § 1210.3(a) and/or 1210.4 …
>
> … This lighter is subject to the Safety Standard for Cigarette Lighters at 16 C.F.R. Part 1210, and also meets the requirements for disposable lighters at 16 C.F.R. § 1210.3. The manufacturer of this lighter also complies with the requirements at 16 C.F.R. § 1219.12(c).[47]

After approximately two years, BIC determined that the low-carbon steel used in its one-piece design resulted in a lack of consistency and reliability with respect to the force required and height of the one-piece guard above the spark

[46] BIC Ex. 308, App., p. 37
[47] Cummins Ex. 87, App., p. 38; TE 210, Marchica, Page ID # 5987-5990

wheel.[48] Jeffry Kupson, BIC's Corporate Quality Manager, testified that because low-carbon steel has to be hardened through tempering, some of the guards were too high above the spark wheel, making it too difficult to light the lighter, and some of the guards were too low, making it easier for children to light the lighter.[49] Because of BIC's "concern…that it could be easy enough that it could be more likely that a young child could be able to activate" the lighter, BIC decided to switch to the two-piece child-resistant safety guard.[50]

The Model J-26 two-piece child safety guard uses stainless steel instead of low-carbon steel.[51] Because of the difficulty in forming stainless steel due to its hardness, a two-piece guard was used.[52] The two-piece design did not cause any change in the deflection and force standards already approved by the CPSC in connection with the test data submitted in 1997.[53] It used barbs and hooks embedded in the plastic to hold the child-resistant feature in place.[54] BIC's Corporate Quality Manger, Kupson, explained:

> A. The barbs embed themselves into the plastic, and the hooks dig into the plastic at the top…

[48] TE 207, Kupson, Page ID # 5669-5671
[49] TE 207, Kupson, Page ID # 5670-5671
[50] TE 207, Kupson, Page ID # 5669-5671
[51] TE 207, Kupson, Page ID # 5659
[52] *Id.* at 225
[53] TE 208, Kupson, Page ID # 5794
[54] TE 207, Kupson, Page ID # 5655

> Q. Would you explain to our jury how the hooks and the barbs work together?
>
> A. Sure. When the guard is inserted down into the pocket of the lighter body that receives it, as it goes down in, those barbs dig into the plastic wall of the backside of the chimney. That's the front wall of the pocket, if you will, so that's where those barbs dig into that material. And they're down at the bottom at the very end of the tail of the guard at the top side.
>
> And when that comes into position, these hooks do a couple of things. They also dig into the plastic in the back of the chimney.[55]

For all practical purposes, the only difference between the Model J-26 with the one-piece or the two-piece safety guard:

> is that the one-piece - - is that the guard is anchored at the top and able to move at the bottom. And in the two-piece, it's anchored at the bottom and it's able to move at the top. But there is no change to specifications that we had on record with CPSC.[56]

Also, in 2004, BIC began testing several other potential changes to the two-piece lighter to make sure they complied with CPSC regulations. The result of the child tests showed that 96% of children could not activate the lighter, which was well above the 85% standard of 16 C.F.R. § 1210.4(a).[57] BIC then submitted this

[55] TE 207, Kupson, Page ID # 5655-5658
[56] TE 208, Kupson, Page ID # 5823-5824
[57] TE 208, Kupson, Page ID # 5723-5725

and other data to the CPSC.[58] BIC began phasing out its one-piece design in 1998.[59]

BIC tests 100% of its lighters before they leave the factory to make sure that each child safety guard is properly installed, correctly positioned, and that it meets the force and deflection standards.[60] In addition, BIC's production facility is ISO 9000 certified, and the J-26 two-piece lighter also meets or exceeds the standards set by the American Society for Testing and Materials.[61] Not only is every lighter checked during the manufacturing process, the machines producing the J-26 also automatically check themselves and selected lighters are manually disassembled and re-checked after production.[62]

Between 1998 and 2004, BIC sold over one billion J-26 two-piece lighters with child-resistant guards.[63] In 2004 alone BIC manufactured 259 million lighters, of which 114, or 1 in approximately every 2,000,000, were returned to BIC with someone having tampered with the child-resistant feature.[64] There was no evidence of any injury to anyone between 1998 and 2004 relating to the two-piece guard.

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[58] BIC Ex. 159, App., pp. 25-29
[59] TE, 205, Kupson, Page ID # 5239
[60] TE 205, Kupson, Page ID # 5292-5293
[61] TE 207, Kupson, Page ID # 5634; TE 208, Kupson, Page ID # 5741-5742
[62] TE 205, Kupson, Page ID # 5294-5295; TE 208, Kupson, Page ID # 5726-5745
[63] TE 205, Kupson, Page ID # 5239
[64] TE 205, Kupson, Page ID # 5311

In 2006, BIC submitted to the CPSC for approval proposed changes to the tolerances of the child-resistant guard. The changes were to reduce the guard force to a minimum of .55 kg from 1 kg and reduce the vertical guard height to .55 millimeters from .66 millimeters.[65] The data included tests performed in 2004 that demonstrated that ninety-six percent (96%) of the children could not operate the lighter with the proposed changes.[66] The CPSC approved the changes on May 23, 2006:

> This is to acknowledge receipt by the Office of Compliance of the specifications and qualification reports for the referenced cigarette lighter models. Your complete reports were received in our office on May 19, 2006. We agree that the reports you provided complies with the reporting requirements of the Safety Standard for Cigarette Lighters at 16 C.F.R. § 1210.17(b) for models J-26.
>
> This acknowledgement of receipt of your reports and its acceptance as being complete pursuant to 16 C.F.R. 1217(b)(1)-(6) is not to be considered by you or any other party as an approval of the lighters or of the reports. It is your responsibility to certify that each shipment of lighters you import complies with all the requirements of the standard. <u>As long as the lighters fully comply with the standard and any other applicable federal regulations and maintain a guard force equal to or greater than the manufacturer's minimum specification of 1.23 pounds of force, you may continue to import models J-26 for distribution and sale in the United States</u>.[67]

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[65] BIC Ex. 297, App., pp. 60-67; TE 208, Kupson, Page ID # 5798-5799

[66] BIC Ex. 297, 307, App., pp. 60-67, 68-92; TE 208, Kupson, Page ID # 5723-5724, 5827 (1.23 pounds is the equivalent of .55 kg, *Id.* 126)

[67] BIC Ex. 302, App., p. 15, emphasis added; TE 208, Kupson, Page ID # 5798-5799, 5827

It is undisputed that the lighter that C.A.P. was allegedly using at the time of the incident on December 17, 2004 exceeded the minimum qualifications of the two-piece child-resistant guard approved by the CPSC in 2006, as well as the force and deflection standards the CPSC had approved in 1997, and that the incident would never have occurred if someone had not intentionally removed the child safety guard with a screwdriver or other tool.

F. BIC's Expert Testimony

During the trial, BIC introduced the testimony of Dr. Christine Wood, a human factors expert, and Dr. Sandra Metzler, a mechanical and bio-mechanical engineer. Both Dr. Metzler and Dr. Wood explained at length why the BIC J-26 two-piece child-resistant guard "is not easily overridden and is not easily deactivated."[68]

BIC's Quality Control Manager, Kupson, demonstrated to the jury how quickly the child safety features of each lighter that Cummins claimed was better than BIC's could be "easily overridden or deactivated."[69] And, Nicholas Marchica, who worked at the CPSC for 27 years, including as the Commission's Acting Executive Director, explained the CPSC procedures for approving lighters, including BIC's J-26, and that in fact the CPSC had approved the J-26 two-piece lighter.

[68] TE 208, Wood, Page ID # 5865; TE 210, Metzler, Page ID # 6055-6061
[69] TE 208, Kupson, Page ID # 5781-5791

G. Cummins' Expert Testimony

Cummins called several experts at trial, including Tarald Kvalseth, whose specialty is human factors engineering. Kvalseth testified that "to deactivate or override any and all of the different devices [lighters] that you have discussed this morning, that it requires an adult and a tool of some sort."[70]

IX. SUMMARY OF THE ARGUMENT

At trial, Cummins abandoned—and thus waived—his argument that the District Court erred by allowing testimony that after approving the BIC J-26 lighter, the CPSC never took corrective action against it. Thus, the judgment may be reversed only if the District Court's evidentiary ruling constituted plain error.

Even if Cummins did not waive his argument, the District Court did not abuse its discretion in allowing the challenged testimony. For a number of reasons—each of which are independently sufficient to affirm—the testimony was not barred by 15 U.S.C. § 2074(b). First, § 2074(b) does not apply where, as here, the CPSC has engaged in regulation of the consumer product in question. Second, the testimony was evidence of BIC's compliance with CPSC regulations—precisely the kind of evidence Congress *expected* would be admissible. Third, the testimony was evidence of CPSC "action"—specifically, the decision of the CPSC to regulate the manufacture of lighters and the approval of BIC's design of the J-

[70] TE 207, Kvalseth, Page ID # 5532

26. Lastly, even if the District Court's evidentiary ruling was error, it was harmless.

The District Court properly denied Cummins' request for an instruction that the jury should not consider any fault of non-parties. There was no need for a curative instruction. BIC's counsel did not engage in misconduct. The evidence and arguments that BIC's counsel presented relating to C.A.P.'s parents were relevant and entirely proper. Nor was there any prejudice to Cummins. Not only did Cummins introduce evidence that C.A.P.'s parents failed to supervise him adequately, but the District Court also gave the jury a prompt and specific admonition that is presumed to be effective. The instruction that Cummins proposed was unnecessary and an incorrect statement of Kentucky law.

Moreover, Cummins cannot demonstrate that the result of the trial would have been different but for the purported errors. There was ample evidence for the jury to conclude that Cummins failed to prove that the lighter used by C.A.P. was manufactured by BIC—an element which Cummins bore the burden of proving. Because the District Court denied BIC's request for a special verdict on the issue of who manufactured the lighter used by C.A.P., and Cummins' counsel did not object to the Court's instruction, it is impossible to know that this was not the basis of the jury's verdict. Since the jury's verdict would not be affected by the purported errors if it found that Cummins failed to prove that BIC manufactured

the lighter used by C.A.P., Cummins cannot demonstrate that the alleged errors were other than harmless.

X. STANDARD OF REVIEW

This Court reviews the denial of Cummins' motion for new trial based upon an abuse of discretion standard. "Reversal is only warranted if the Court has a 'definite and firm conviction that the trial court committed a clear error of judgment.'" *Nolan v. Memphis City Schools*, 589 F.3d 257 (6th Cir. 2009).

This Court reviews the trial court's decision not to give an instruction under an abuse of discretion standard. In making that determination, this Court "considers the jury instructions as a whole to determine whether they fairly and adequately submitted the issues and applicable law to the jury." *Id*. The test is not, as Cummins suggests, whether an omitted instruction "could have affected the result of the jury's deliberations."[71]

The District Court's ruling that evidence of the CPSC's failure to take adverse action against BIC was not barred by § 2074(b) is reviewed de novo, and if the evidence was erroneously admitted then the District Court's refusal to grant a new trial is reviewed under an abuse of discretion standard, and "a new trial will not be granted unless the evidence would have caused a different outcome at trial." *Id*; *Morales v. Am. Honda Motor Co., Inc*., 362 F.3d 500 (6th Cir. 1998).

[71] Cummins Principal Brief, p. 12

Assuming, arguendo, that there was any misconduct of counsel, the standard on review is that a new trial is only appropriate "where there is a reasonable probability that the verdict of a jury has been influenced by such conduct." *Twachtman v. Connelly*, 106 F.2d 501 (6th Cir. 1030).

The standard on review as to whether an un-appealed, independent basis exists to affirm the judgment of the District Court, is whether enough evidence existed from which the jury could find that the lighter involved in C.A.P.'s incident was not manufactured by BIC. *Whipple v. Royal Ins. Co.*, 1994 U.S. App. LEXIS 29590 (10th Cir. 1994).

XI. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Allowing Testimony That After Approving The BIC J-26 Lighter, The CPSC Never Took Corrective Action Against It.

The District Court held on two different occasions that testimony that the CPSC never took corrective action against the BIC J-26 lighter was admissible.[72] Cummins asserts that this constituted an abuse of discretion.[73] According to Cummins, the District Court was required to shield the jury from the undisputed

[72] RE 142, District Court's Opinion & Order of 07/05/11, pp. 5-6; RE 153-1, Memorandum in Support of Plaintiff's Motions *in Limine* and Objections to BIC's Proposed Witnesses and Exhibits, pp. 11-17; RE 170, District Court's Opinion & Order of 01/06/12, pp. 1, 3

[73] Cummins' Principal Brief, pp. 14-31.

fact that the CPSC never took corrective action against the BIC J-26 lighter by virtue of § 2074(b).[74] § 2074(b) states:

> 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.[75]

The District Court did not err by allowing the challenged testimony. To the contrary, it would have been error for the court not to allow this testimony given the evidence that the CPSC approved the BIC J-26 Lighter.

1. **Cummins Waived Any Objection To The Challenged Testimony.**

During the cross-examination of one of Cummins' experts, counsel for BIC asked several questions similar to the following:

Q. And over the past 16 years, from 1995 to the beginning of 2012, has the CPSC ever asked BIC to redesign its lighter or its child-resistant features?

A. A. Not that I'm aware of.

Q. Has it ever issued a recall?

A. No.

[74] *Id.*
[75] 15 U.S.C. § 2074(b)

Cummins' counsel then agreed that this line of questioning was proper but asked the Court to admonish the jury that the CPSC's purported lack of action was not determinative of whether BIC's lighter complied with the regulations:

> Mr. Mattingly: Now, I don't have an objection to this specific line of questioning …So while I think that what Mr. Stopher has elicited is certainly proper, I think it is also proper at this point that the Court admonish the jury …[76]

"When a defendant raises an argument by motion but then abandons the argument before the district court, the defendant has waived the argument[.]"[77] That is precisely what occurred here. As Cummins has waived his argument that the challenged testimony was inadmissible, the judgment may be reversed only if the District Court's evidentiary ruling constituted plain error.[78]

2. **The *Morales* and *Johnston* Decisions.**

Morales v. American Honda Motor Co., Inc.[79] is the only Sixth Circuit decision addressing § 2074(b). In *Morales*, this Court squarely decided the meaning of § 2074(b), and adopted the District Court of Maine's interpretation of

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[76] TE 207, Page ID # 5544-5545

[77] *United States v. Collins*, 683 F.3d 697, 701 (6th Cir. 2012) (citing *United States v. Denkins*, 367 F.3d 537, 544 (6th Cir. 2004); *see also United States v. Beard*, 2010 U.S. App. LEXIS 18468 (6th Cir. 2010) (unpublished).

[78] *See Rogers v. Norfolk Southern Ry.*, 126 Fed. Appx. 694, *7 (6th Cir. 2005) ("Counsel's failure to make an objection at trial results in a waiver of the objection advanced on appeal, and the jury verdict can be reversed only for plain error.") (internal citation and quotation marks omitted) (unpublished); *see also* Fed. R. Evid. 103(e).

[79] 151 F.3d 500, 514 (6th Cir. 1998)

the statute in *Johnston v. Deere & Co.*[80] Under both *Morales* and *Johnston*, the challenged testimony was admissible.

In *Johnston*, the defendant in a products liability action sought to introduce evidence that the CPSC had initially issued a notice of proposed rulemaking to adopt a "no mow in reverse" requirement for riding lawn tractors, but later withdrew it.[81] The plaintiff opposed introduction of this evidence on the ground that it was barred by § 2074(b).[82] The *Johnston* Court, however, held that the evidence was admissible.[83]

In its analysis, the *Johnston* Court noted that the language of § 2074(b) created the following ambiguity:

> Does 'failure…to take any action' mean utter failure to act—i.e., total absence of any action at all on the part of the Commission? … Or does 'failure to take any action' mean failure to do something effective in a legal sense, like failing to promulgate a rule or standard?[84]

To resolve this ambiguity, the court turned to the legislative history of § 2074, which the court emphasized confirmed that compliance with an adopted CPSC rule would be admissible as evidence:

> Section 2074(a) provides that compliance with an adopted CPSC rule "shall not relieve any person from liability at

[80] 967 F.Supp. 578 (D. Me. 1997)
[81] *Id.* at 579.
[82] *Id.*
[83] *Id.* at 580
[84] *Id.* at 579

> common law or under State statutory law." *The legislative history for this subsection confirms that it was expected that such compliance—i.e., the action of the CPSC adopting the rule and the action of the manufacturer complying with it—would be admitted as evidence, but would not be determinative of the outcome.*[85]

In light of § 2074's legislative history, the court concluded:

> 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."[86]

The *Johnston* Court held that the evidence in question demonstrated action rather than inaction, and was therefore admissible.[87] The court reasoned that, if the CPSC had adopted the proposed rule and then later revoked it, that fact would have come into evidence; therefore, the fact that the agency considered the proposal but ultimately rejected it should not cause a different result.[88]

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[85] *Id.* (internal citations omitted) (emphasis added). The *Johnston* Court further noted that "[c]ommentary reflects the same understanding[.]" *Id.* at 580 ("Typical products liability litigation will henceforth involve an additional fact that may be argued to the judge or jury--that is, the defendant's compliance or noncompliance with an applicable federal standard…") (quoting Bureau of National Affairs, The Consumer Product Safety Act 12 (editors' analysis))

[86] *Id.* at 580 (emphasis added)

[87] *Id.*

[88] *Id.*

This Court decided the meaning of § 2074(b) in *Morales*. In *Morales*, defendants in a products liability action appealed a district court's ruling prohibiting them from introducing a report from the CPSC denying a petition to regulate unlicensed two-wheeled motorized vehicles.[89] As in *Johnston*, the plaintiffs argued that this evidence was barred by § 2074(b).[90]

This Court rejected the plaintiffs' argument, agreeing with *Johnston* that "'the most reasonable reading' of [§ 2074] 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 had engaged in activity that ultimately led to a decision not to regulate.*"[91] This Court also agreed with *Johnston* that "the legislative history behind [§ 2074] confirms that *it was expected that … compliance [with an adopted CPSC rule] would be admitted as evidence*, but would not be determinative of the outcome."[92] Thus, this Court held that the evidence in question was not that of inaction, but rather "of the CPSC's *action* in denying the rule-making petition[;]"[93] hence, it was admissible.[94]

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[89] *Morales*, 151 F.3d, at 512
[90] *Id.*
[91] *Id.* at 513 (emphasis in original and emphasis added)
[92] *Id.* (emphasis added)
[93] *Id.* at 514 (emphasis in original)
[94] *Id.*

3. **Cummins' Argument That The Challenged Testimony Was Barred By § 2074(b) Is Without Merit.**

Cummins' argument that the challenged testimony was barred by § 2074(b) fails for multiple reasons. First, a necessary premise of the argument—that § 2074(b) is even applicable when the CPSC has engaged in regulation of a consumer product—is incorrect. *Morales* and *Johnston* make clear that the phrase "failure to take … any action" refers only to "the complete failure by the CPSC to engage in activity *on a product[.]*"[95] *Morales* and *Johnston* further recognize that § 2074(b) reflects "Congress' 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,* and that the limitations of the new Commission should not impede common law litigation."[96]

In short, *Morales* and *Johnston* recognize that § 2074(b) is inapplicable when the CPSC has engaged in regulation of the consumer product in question. Here, the record could not be clearer that the CPSC has engaged in regulation of the BIC J-26 lighter. Indeed, the CPSC has promulgated 14 different regulations applicable to the lighter—spanning some 25 pages—including regulations

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[95] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580 (emphasis added); *see also* § 2074(b) ("The failure of the Commission to take any action…with respect to the safety of a *consumer product* shall not be admissible in evidence in litigation…) (emphasis added)

[96] *Morales*, 151 F.3d, at 513 (quoting partially *Johnston*, 967 F.Supp., at 580) (internal quotation marks omitted) (emphasis added)

governing the child-resistant guard.[97] Thus, the District Court did not err in allowing the evidence.

Cummins' argument also fails because it ignores that, as recognized in *Morales* and *Johnston*, "the legislative history behind [§ 2074] confirms that *it was expected that … compliance [with an adopted CPSC rule] would be admitted as evidence*[.]"[98] Here, the challenged evidence was of BIC's compliance with the CPSC's safety standard for disposable lighters.

It is undeniable that the BIC J-26 lighter was (and is) subject to substantial regulation by the CPSC. It is undisputed that: (1) BIC was required by CPSC regulations to perform rigorous qualification testing of the BIC J-26 lighter before being permitted to distribute it in commerce,[99] and in fact performed such testing on three separate occasions;[100] (2) BIC was required by CPSC regulations to submit written reports to the agency including, *inter alia*, a detailed description of the BIC J-26 lighter, its child-resistant features, BIC's qualification testing of the lighter, and a prototype or production unit of the lighter,[101] and in fact submitted such reports on three separate occasions;[102] (3) the CPSC is authorized by law to

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[97] *See* 16 C.F.R. 1210
[98] *Morales*, 151 F.3d, at 513 (emphasis added); *Johnston*, 967 F.Supp., at 579-80
[99] *See* 16 C.F.R. §§ 1210.4 & 1210.14
[100] BIC Ex. 138, p. 1; App., pp. 17-24; BIC Ex. 159, p. 2; BIC Ex. 307, p. 2;
[101] 16 C.F.R. § 1210.17(b)
[102] BIC Ex. 138, p. 1; App., pp. 17-24; BIC Ex. 159, p. 2, App., pp. 25-29; BIC Ex. 297, p. 1, App., p. 60

enter BIC's manufacturing facility for purposes of inspecting the BIC J-26 lighters,[103] which the CPSC in fact did in 1996;[104] and (4) the CPSC may order BIC to stop distributing the BIC J-26 lighters at any time[105]—a step which the CPSC has in fact taken against other manufacturers.

In light of this evidence, it cannot seriously be argued that the challenged testimony was not evidence of BIC's compliance with CPSC regulations.[106] Because the testimony was evidence of "compliance with an adopted CPSC rule[,]"[107] it was not barred by § 2074(b), and the Court need not even reach the issue of whether it was evidence of CPSC "action" or "inaction."[108]

Cummins' argument also fails because the challenged testimony was precisely the type of evidence held admissible in *Morales* and *Johnston*: evidence that the CPSC had "engaged in activity … lead[ing] ultimately to a decision not to regulate"[109]—specifically, a decision not to take corrective action against the BIC J-26 lighter. *On three different occasions*, the CPSC gathered information

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[103] 15 U.S.C. § 2065
[104] BIC Ex. 170, p. 1; App., p. 43
[105] 15 U.S.C. § 2064(c)(1)(a)
[106] Because the CPSC no longer issues documents formally approving disposable lighters, *see* TE 208, Kupson, Page ID # 5827-5828, testimony such as that in question here was one of the only ways, if not *the* only way, for BIC to prove its compliance with CPSC regulations.
[107] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580
[108] *See U.S. v. Hughes*, 308 Fed. Appx. 882, (6th Cir. 2009) ("[E]vidence which is not admissible for one purpose may be relevant and admissible for another.") (unpublished) (citing *U.S. v. Abel*, 469 U.S. 45, 56 (1984))
[109] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580

concerning the BIC J-26 lighter in order to determine whether the lighter complied with CPSC regulations,[110] *and on two different occasions formally approved the lighter's specifications.*[111] For instance, on May 23, 2006, the CPSC sent a letter to BIC: (1) confirming receipt of BIC's reports regarding the BIC J-26 two-piece lighter; (2) agreeing that BIC's reports complied with the reporting requirements of 16 C.F.R. § 1210.17(b); and (3) stating, "As long as [BIC's] lighters fully comply with the standard and any other applicable federal regulations *and maintain a guard force equal to or greater than the manufacturer's minimum specification ... of 1.213 pounds of force, [BIC] may continue to import models J-26 for distribution and sale in the United States.*"[112]

Additionally, BIC sent a letter to the CPSC on May 16, 2006,[113] which makes clear that: (1) BIC and the CPSC had discussed BIC's written reports

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[110] Cummins' assertion that the CPSC was "never … provided [testing data] bearing on whether the child-resistant feature of the BIC … J-26 two-piece lighter is 'easily deactivated or overridden[,]'" *see* Cummins' Principal Brief, p. 23, is false. 16 C.F.R. § 1210.14(b) provides, "Before any manufacturer … of lighters distributes lighters in commerce…, *surrogate lighters of each model shall be tested in accordance with [16 C.F.R.] § 1210.4 … to ensure that all such lighters comply with the standard.*" The "standard" referred to in § 1210.14(b) is the CPSC's safety standard for disposable lighters—promulgated throughout 16 § C.F.R. 1210—and *encompasses* the "easily deactivated or overridden" requirement.

[111] BIC Ex.138, App., pp. 17-24; BIC Ex. 159, App., pp. 25-29; BIC Ex. 299, App., p. 93; RE 195-4, Ex. D to BIC's Response to Cummins' Motion to Alter, Amend or Vacate, pp. 10-11

[112] BIC Ex. 302, App., pp. 15-16 (emphasis added)

[113] RE 195-4, Ex. D to BIC's Response to Cummins' Motion to Alter, Amend or Vacate, pp. 10-11. This letter was not admitted into evidence at trial. However, it

regarding the BIC J-26 two-piece design and the reasons for them; (2) during one of these conversations, the CPSC *requested additional material* concerning the BIC J-26 two-piece design "which the [CPSC] ha[d] never requested before … *and which [was] not required by 16 CFR 1210*"—specifically, three exemplar pocket lighters and a child-resistant lighter qualification test dated August 2004; (3) BIC was honoring the CPSC's request for additional information; and (4) BIC representatives had met with CPSC representatives in December 2004, after which "there was an understanding *and a verbal agreement in principle as to what was being proposed and what [BIC] hoped to achieve [with the BIC J-26 two-piece design*.]"[114]

Clearly, the challenged testimony was evidence that the CPSC had "engaged in activity … lead[ing] ultimately to a decision not to regulate."[115] This testimony permitted an inference that the CPSC had made a conscious decision *not* to take corrective action against the BIC J-26 lighter—which, under *Morales* and

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is nonetheless properly before this Court because it was filed as an exhibit to BIC's Response to Cummins' Motion to Alter, Amend, or Vacate *See* Fed. R. App. P. 10(a)(1)

[114] That BIC and the CPSC had agreed in principle to the two-piece design is also reflected by BIC's March 3, 2006 Qualification Reports to the CPSC. *See* BIC Ex. 297, p. 1, App., pp. 60-63

[115] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580; see also *Winstanley v. Royal Consumer Information Products, Inc.*, 2006 U.S. Dist. LEXIS 44702 at *3-46 (D. Ariz., June 27, 2006) (unpublished) (noting that the CPSC had "taken action" by "initiating and continuing correspondence with Defendant and by suggesting a recall.")

Johnston, constitutes "action"[116]—because the CPSC had *already approved* the lighter's specifications.

Morales and *Johnston* do not require that evidence of CPSC action be direct or indirect in order to be admissible—only that it exist. Because it certainly did here, there was no error.

4. **Cummins' Remaining Arguments Are Without Merit.**

Cummins also contends that the challenged testimony was barred by § 2074(b) because: (1) there was insufficient foundational evidence that the CPSC actually considered whether the BIC J-26 lighter satisfied 16 C.F.R. § 1210.3(b)(4); and (2) allowing the testimony was contrary to the purpose of the Consumer Product Safety Act.[117]

Cummins' first argument is based on the following assertions: (1) the CPSC was not provided testing data concerning the BIC J-26 two-piece lighter until after the lighter's manufacture and C.A.P.'s injury; (2) "[o]n the sole occasion that [testing data concerning the] two-piece design was ever provided to the CPSC, the [agency] made … clear that it did not independently evaluate the … design[,] … [but rather] simply acknowledged receipt of the test data and cautioned that it was not approving the design[;]" and (3) in order to prove CPSC action, "at a minimum some report, statement[,] or other evidence from the CPSC about the internal

[116] *Id.*
[117] *See* Cummins' Principal Brief, pp. 16-31

machinations and decision-making processes at play is required[.]"[118] Cummins' argument does not withstand scrutiny.

First, it is based upon a false premise: that the challenged testimony was only admissible if it was evidence of CPSC action on *solely* the BIC J-26 two-piece design. *Morales* and *Johnston* make clear that the phrase "failure to take … any action" in § 2074(b) refers to "the complete failure by the CPSC to engage in activity *on a product.*"[119] The record is clear that the BIC J-26 lighter is, and always was, "one product." Indeed, not only were the differences between BIC J-26 one-piece and two-piece designs minor,[120] *the CPSC formally approved the force and deflection standards for the one and two-piece lighters in 1995 and 2006.*[121] Thus, the test is not whether the CPSC acted on the lighter's two-piece design, but rather whether it acted *on the lighter itself.* There is no question but that it did.

Second, Cummins' complaint that the CPSC was not provided testing data on the BIC J-26 two-piece lighter until after the lighter's manufacture and C.A.P.'s injury is misplaced.[122] That the CPSC did not specifically consider the two-piece lighter until after its manufacture and C.A.P.'s injury has no bearing on the

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[118] *See Id.* at 22-23
[119] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580 (emphasis added)
[120] TE 208, Kupson, Page ID # 5823-5824
[121] BIC Ex. 143, App., pp. 30-36; BIC Ex. 302, p. 1, App., p. 15
[122] *See* Cummins' Principal Brief, pp. 27-28

admissibility of the challenged testimony. *Morales* and *Johnston* make clear that § 2074(b) applies only to "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.*"[123] Thus, what is dispositive with respect to the admissibility of the challenged testimony is that the CPSC in fact considered the two-piece design in 2006 when BIC submitted its qualification reports, *and approved specifications that were less than the 1997 specifications which the lighter allegedly involved in C.A.P.'s injury satisfied.*[124]

Third, Cummins' reliance on a single sentence in the CPSC's May 23, 2006 letter stating that the agency was not approving the two-piece design is also misplaced.[125] The test for admissibility is not whether the CPSC formally "approved" the BIC J-26 lighter, but rather whether it took any action whatsoever on the product—a test which is clearly satisfied.[126] Cummins ignores the CPSC's statement that "[a]s long as [BIC's] lighters fully comply with the standard and any other applicable federal regulations *and maintain a guard force equal to or greater than the manufacturer's minimum specification...of 1.213 pounds of force, [BIC] may continue to import models J-26 for distribution and sale in the United*

[123] *Morales*, 151 F.3d, at 513
[124] *See* BIC Ex. 297, App., pp. 60-63
[125] *See* Cummins' Principal Brief, p. 23
[126] *Morales*, 151 F.3d, at 513; *Johnston*, 967 F.Supp., at 580

States."[127] Lastly, the letter does not, as Cummins asserts, make "crystal clear" that the CPSC did not independently evaluate the two-piece design.[128] To the contrary, Marchica testified that the BIC J-26 lighter was in fact on the "approved list" maintained by the CPSC.[129]

Next, Cummins' asserts that in order to prove CPSC action "at a minimum some report, statement[,] or other evidence from the CPSC about the internal machinations and decision-making processes at play is required."[130] *Morales* and *Johnston* do not require that evidence of CPSC action take any particular form to be admissible, much less require "some report, statement[,]" or particular document from the CPSC.[131] But, even if such a statement was required, the CPSC's May 23, 2006 letter to BIC *does* constitute "evidence from the CPSC" regarding its decision-making process, and fully satisfies Cummins' own unsupported standard. Moreover, the record establishes that the CPSC no longer issues documents formally approving disposable lighters for distribution;[132] thus, under Cummins' theory, a lighter-manufacturer could arguably *never* prove conclusively that the CPSC made a conscious decision not to take corrective action.

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[127] BIC Ex. 302, p. 1, App., p. 15 (emphasis added)
[128] *See* Cummins' Principal Brief, p. 23
[129] TE 210, Marchica, Page ID # 6008-6009
[130] Cummins Principal Brief, p. 29
[131] *See Morales* and *Johnston, supra*
[132] TE 208, Kupson, Page ID # 5827-5828

Cummins' final argument—that allowing the challenged testimony was contrary to the purposes of the Consumer Protection Act[133]—also fails. Allowing evidence that a manufacturer of a product subject to intense regulation by the CPSC has never been cited by the agency *promotes* the Act's purposes by encouraging manufacturers to keep their products safe and in compliance with CPSC regulations. It is Cummins' unsupported standard that runs counter to the Act's purposes.

It is significant that Cummins has not cited—and BIC could not find—one single decision in which a court has held that evidence such as that in question was barred by § 2704(b). § 2704's legislative history makes clear that Congress expected that compliance with an adopted CPSC rule would be admissible as evidence and that § 2704(b) would not apply when the CPSC had engaged in regulation of the consumer product in question. It would be unfair and prejudicial to prevent a manufacturer who has been sued for violating a CPSC regulation from disclosing to the jury that the agency never took any corrective action against it.

5. **Any Error By The District Court Was Harmless.**

Even assuming that Cummins could show that the District Court's evidentiary ruling was error, he nonetheless has failed to demonstrate that the outcome of the trial would have been different but for the introduction of the

[133] Cummins' Principal Brief, p. 29

challenged testimony.[134] Cummins cannot make this required showing because the District Court properly instructed the jury that although the fact that the CPSC had never cited BIC for violating CPSC regulations was a factor it could consider in reaching a verdict, that fact was not conclusive.[135] The court issued this instruction not only with respect to Cummins' federal law claim, but also his state law products liability claim.[136] Juries are presumed to both understand and follow instructions from the court.[137] Accordingly, Cummins cannot meet his burden of showing that the outcome of the trial would have been different but for the District Court's evidentiary ruling.

Cummins also took full advantage of the opportunity to point out to the jury that the CPSC did not test the BIC J-26 two-piece lighter prior to the incident. He referenced the same CPSC reports that he has referenced in his appellate brief during his cross-examination of multiple witnesses.[138] He pointed out to the jury on multiple occasions that the CPSC's sample analysis report of December 14,

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[134] *Morales*, 151 F.3d at 514 (noting that even if the trial court made a mistake regarding the admission or exclusion of evidence, "a new trial will not be granted *unless the evidence would have caused a different outcome at trial*.") (emphasis added)

[135] *See* RE 180, Jury Instructions, 2/2/2012, p. 6, App., p. 100

[136] *Id*. at 6-8

[137] *See, e.g., Hill v. Mitchell*, 400 F.3d 308, 325 (6th Cir. 2005); *United States v. Deitz*, 577 F.3d 672, 695 (6th Cir. 2009)

[138] TE 208, Kupson, Page ID # 5825-5834; TE 210, Marchica, Page ID # 6029-6039

2001, did not pertain to the BIC J-26 two-piece design.[139] Indeed, Cummins' counsel examined BIC's corporate representative, Jeffry Kupson, twice during the trial and thoroughly questioned him regarding the various reports issued by the CPSC.[140] Cummins' counsel also vigorously cross-examined BIC's expert, Nicholas Marchica, on the CPSC reports and stressed this issue again during his closing argument.[141]

In light of the foregoing, Cummins cannot credibly argue that he did not have an opportunity to present his arguments regarding the CPSC reports to the jury, and the record reflects that this matter was thoroughly vetted.[142] It was a contested jury issue, and the judgment may not be reversed simply because the jury rejected Cummins' evidence or arguments.

There was an abundance of evidence to support the jury's verdict even absent the challenged evidence. The evidence demonstrated the great lengths that BIC went to produce a lighter that complied with the requirements of 16 C.F.R. §

[139] TE 208, Kupson, Page ID # 5829-5834; TE 210, Marchica, Page ID # 6034-6035; TE 212, Cummins' Closing Argument, Page ID # 6175
[140] TE 208, Kupson, Page ID # 5794-5800
[141] TE 212, Cummins' Closing Argument, Page ID # 6172-6175
[142] Under the District Court's Scheduling Orders [RE 52; RE 140], Cummins had an opportunity to designate an expert to counter the challenged testimony of Messrs. Kupson and Marchica but failed to do so.

1210.3, including exhaustive product testing and routine inspection and analysis of its lighters.[143]

The undisputed trial evidence proved that the BIC J-26 two-piece lighter's child-resistant guard could only be overridden or deactivated with the use of a tool.[144] It was undisputed that the lighter was equipped with a child-resistant guard at the time it left BIC's manufacturing facilities, and that someone had intentionally ripped it out with a tool.[145] Finally, there was no evidence at trial of a safer alternative design—BIC demonstrated to the jury how every alternative design suggested by Cummins' experts could be deactivated within minutes with a simple household tool.[146] In short, the outcome of the trial would not have been different but for the purported errors.

Also misplaced is Cummins' emphasis on the testimony and argument that the CPSC approved the BIC J-26 lighter.[147] For the reasons noted *supra*, this was clearly a permissible inference for the jury to draw. Just as importantly, however, Cummins waived any objection to this testimony and argument by failing to raise it

[143] Kupson, TE 208, Page ID # 5794-5800; Kupson, TE 205, Page ID # 5239-5245, 5249-5256
[144] Kvalseth, TE 207, Page ID # 5501-5504, 5507-5509
[145] TE 207 (1/30/2012), Kvalseth, Page ID # 5521; TE 207, Kupson, Page ID # 5652-5653; Kupson, TE 208, Page ID # 5712
[146] TE 208, Kupson, Page ID # 5781-5791
[147] *See* Cummins Principal Brief, at pp. 28, 30

to the District Court.[148] Indeed, the only question Cummins has preserved for review is whether the District Court erred by allowing testimony that the CPSC never took corrective action against the BIC J-26 lighter—*not* whether the District Court erred by allowing testimony and argument that the CPSC *approved* the lighter.

B. The Trial Court Correctly Denied Appellant's Motion For A New Trial Based On Allegations Of Attorney Misconduct.

Cummins' sweeping accusations of attorney misconduct amount to little more than unwarranted personal attacks which are unsupported by the evidence and arguments presented to the jury. Cummins alleges that BIC improperly elicited testimony and improperly argued that the jury should apportion fault to C.A.P.'s parents, rather than BIC. Cummins further alleges that "the improper references to C.A.P.'s parents' conduct and [BIC's counsel's] efforts to blame the parents, either directly or by inference, permeated the entire trial."[149] There is no support in the record for these accusations.

BIC's counsel never asked the jury to apportion fault to C.A.P.'s parents. BIC's counsel never told the jury that C.A.P.'s parents were negligent. BIC's

[148] *See* RE 99, Cummins' Motion to Exclude BIC's Expert Witnesses; RE 153-1, Cummins' Memorandum in Support of Motions in *Limine* and Objections to BIC's Proposed Witnesses and Exhibits; TE 202, Cummins' Opening Statement, Page ID # 4833-4867; TE 212, BIC's Closing Argument, Page ID # 6142-6169; TE 208, Kupson, Page ID # 5769-5770, 5800, 5848-5849; TE 210, Marchica, Page ID # 5991-5992, 5998, 6004, 6007-6008, 6039-6040

[149] Cummins' Principal Brief, p. 33 (electronic stamp p. 40)

counsel never accused C.A.P.'s parents of failing to provide adequate supervision. All of BIC's arguments and questions relating to C.A.P.'s parents were related to relevant issues that the trial court had expressly deemed admissible. The trial lasted nine days and twenty-five witnesses testified. During the course of the entire trial, Cummins made just three objections to testimony relating to C.A.P.'s parents that was actually presented to the jury.[150]

Where a party moves for a new trial based on allegedly improper comments made by counsel, the Sixth Circuit analyzes:

> the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself.[151]

If the Court determines that counsel made improper comments, the Court may set aside the verdict only "if there is a reasonable probability that the verdict of the jury has been influenced by such conduct."[152] The Sixth Circuit affords a "high level of deference to the trial court in determining whether improper comments prejudiced the jury."[153] The basis for the deference is the Sixth Circuit's

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[150] TE 203, Cowles, Page ID # 4983-4984; TE 207, Thor Polley, Page ID # 5585-87; TE 208, Tammy Polley, Page ID # 5685

[151] *Mich. First Credit Union v. CUMIS Ins. Soc'y, Inc.*, 641 F.3d 240, 249 (6th Cir. 2011) (internal quotations omitted)

[152] *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998) (quoting Peter Kiewit Sons', 624 F.2d at 756) (internal alteration and quotation marks omitted).

[153] *Balsley v. LFP, Inc.*, 691 F.3d 747, 762 (6th Cir. 2012)

recognition that "The trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record."[154]

In this case, the District Court correctly held that Cummins was not entitled to a new trial based on allegations of misconduct. There is no reason for this Court to reverse that decision now.

1. Neither BIC Nor BIC's Counsel Engaged In Misconduct At Any Point During The Trial.

The testimony that BIC elicited with respect to C.A.P.'s parents and other relatives was relevant and admissible and does not constitute misconduct. Although BIC was not entitled to an apportionment instruction with respect to the negligence of C.A.P.'s parents, the acts and omissions of C.A.P.'s parents were directly relevant to liability and causation. In any products liability action, Kentucky law requires proof that the product at issue was "in a defective condition unreasonably dangerous to the user or consumer or to his property"[155] and (2) that the product's defective condition was the legal cause of the subject injury.[156] Accordingly, the District Court held that BIC could introduce evidence relating to C.A.P.'s parents if the evidence was: (1) relevant to the issue of product

[154] *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d. 749, 756 (6th Cir. 1980)
[155] *Worldwide Equip., Inc. v. Mullins*, 11 S.W.3d 50, 55 (Ky. Ct. App. 1999) (quoting Restatement (Second) of Torts § 402A (1965))
[156] *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 77 (Ky. 2010)

identification and/or (2) relevant to the issue of the adequacy of the child safety feature on the subject lighter.[157] Cummins does not challenge the correctness of the District Court's ruling on appeal.

Rather than contesting the District Court's ruling, Cummins accuses BIC's counsel of misconduct for introducing evidence that C.A.P.'s parents left C.A.P. alone on the day of the accident. Cummins' argument fails to acknowledge the obvious relevant purpose of this evidence. Since C.A.P. was alone, no one old enough to be cognizant of the make and model of a cigarette lighter witnessed the accident. Therefore, no one could definitively testify that a J-26 two-piece lighter manufactured by BIC was the cause of the accident.

The evidence that C.A.P. had been left alone is also relevant to the adequacy of the child safety feature on the J-26 two-piece lighter. Under Kentucky law, a product is not unreasonably dangerous if the manufacturer acted prudently in placing the design into commerce.[158] In *Byler v. Scripto-Tokai Corp.*,[159] the Sixth Circuit recognized that a caregiver's failure to supervise a child who injures himself with a cigarette lighter is directly relevant to—and in fact dispositive of—the defectiveness of the cigarette lighter itself:

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[157] RE 170, Order of 1/6/2012

[158] *See, e.g., Nichols v. Union Underwear Company*, 602 S.W.2d 429 (Ky. 1980)

[159] *Byler v. Scripto-Tokai Corp.*, Nos. 90-6112 & 90-6113, 1991 U.S. App. LEXIS 22277, 1991 WL 181749, at *3-4 (6th Cir. Sept. 17, 1991) (applying Kentucky law)

> An accident can happen to a child, like Sammy Lee only through the combination of many factors; inadequate adult supervision, the availability of lighters, and the child using the lighter to burn something rather than simply as a light. There is a risk that these factors will coincide, as this case tragically demonstrates, but it is not high.

The present case is indistinguishable and, accordingly, the parents' failure to keep lighters away from C.A.P. was relevant to the issue of liability.

BIC's counsel did not engage in misconduct when he argued in closing that Thor Polley disabled the child safety guard on the subject lighter. During the closing, BIC's counsel inferred that "presumably" Thor Polley disabled the safety feature on the lighter that allegedly burned C.A.P. BIC's counsel then argued that "no one can make a fool-proof lighter. No one can make a Thor-proof lighter."[160] The child-safety device on the J-26 two-piece BIC lighter could not be deactivated unless an adult made an intentional decision to deactivate it with a tool.

Although the Court rebuked BIC's counsel for making the comment, the District Court had permitted BIC to introduce evidence that Thor Polley intentionally removed the child safety devices from other disposable lighters. [161] The District Court held that "Thor Polley's practice of removing the child-resistant feature … is relevant to the issue of the ease of removal [of the child-resistant

[160] TE 212, Page ID # 6145

[161] RE 179, Order on Plaintiff's objection to Defendants' designations of the deposition of Thor Polley

feature] as well as to the identity of the lighter in question..."[162] BIC's counsel's comments in closing were consistent with this ruling.

The District Court did exclude portions of Thor Polley's deposition that tended to identify the person that disabled the child-safety guard at issue. [163] However, by that point in the trial, the jury had already heard evidence that Thor Polley disabled the subject child safety device. In response to Cummins' question, C.A.P. testified that he found the lighter that he used in Thor Polley's truck.[164] Tammy Polley, who was driving the truck, testified that her lighter was pink indicating that the black lighter that C.A.P. found in the truck was not hers.[165] And without any objection from Cummins, Thor Polley testified that he removed the child-resistant guard on almost every lighter he purchased that came with one:[166]

> Q. So if this accident with your son occurred on December 17, 2004, how long had you known about taking a pocket knife and prying the child-resistant guard off?
>
> A. I'd say two or three years prior.
>
> Q. And would you do it on every lighter that you purchased?
>
> A. Most usually.
>
> Q. So you started just doing it regularly?

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[162] *Id.* at p. 2
[163] *Id.*
[164] TE 203, C.A.P., Page ID # 4935-4936
[165] TE 208, Tammy Polley, Page ID # 5699-5700
[166] TE 207, Thor Polley, p. 141 (Deposition pp. 113-114), App., pp. 52-53

A. Yes.

Q. And why again would you do it?

A. Just it's more simple to light it.[167]

Therefore, the argument that Thor Polley removed the child-proof guard on this lighter was a reasonable inference from the evidence admitted without objection.

An attorney is entitled to ask the jury to make a reasonable inference from evidence admitted without objection.[168] Nevertheless, as soon as the Court objected *sua sponte* to counsel's argument, BIC's counsel withdrew the comments and never mentioned Thor Polley again.

2. Even If This Court Finds That BIC's Counsel Made An Improper Argument, Appellant Did Not Suffer Any Prejudice As A Result.

If the court determines that counsel made improper comments, the court may set aside the verdict only "if there is a reasonable probability that the verdict of the jury has been influenced by such conduct."[169] In this case, Cummins did not raise a single objection at trial to the specific instances of alleged misconduct forming the

[167] *Id.* (Deposition p. 110), App., p. 49. See, RE 174 and the Court's Order ruling on Appellant's Objections, RE 179

[168] *Bedford v. Collins*, 567 F.3d 225, 234 (6th Cir. 2009) (an attorney can ask the jury to make a reasonable inference from evidence admitted without objection"); *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996) (attorneys "must be given leeway to argue reasonable inferences from the evidence")

[169] *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998) (internal alteration and quotation marks omitted)

basis of his appeal. The failure to object to the allegedly prejudicial comments at trial "raise[s] the degree of prejudice which must be demonstrated in order to get a new trial on appeal."[170]

Cummins is incapable of showing this high level of prejudice. Even if BIC's counsel had never mentioned C.A.P.'s parents, the jury would have heard direct evidence of the lack of supervision in the household. Indeed, C.A.P.'s counsel introduced direct evidence of "sloppy supervision" when he played the video deposition of Dr. Joseph Cresci. In response to Cummins' questions, Dr. Cresci testified that "a lot of kids who are burned with lighters is secondary to – and I'm not saying that's the case here – but secondary to sloppy supervision."[171] He suggested that the accident happened because C.A.P. lacked sufficient stimuli in the home: "One wonders if this child, in particular, was stimulus hungry, looking for some kind of action, excitement, attention. I don't know."[172]

Cummins' counsel also elicited testimony that allowing C.A.P. to access a lighter potentially constituted criminal neglect. Cummins' counsel asked Fire Chief Lawrence Gupton why he gave the lighter to the police chief at the scene of the accident. Chief Gupton responded that, "If somebody else was going to be charged with some type of charges against the people who had the lighter or

[170] *Id.*
[171] TE 203, Dr. Joseph V. Cresci, Page ID # 5066, Deposition p. 37, App., p. 110; TE 203, p. 160
[172] *Id.*

whatever. Like care and custody, you normally wouldn't let a child play with a lighter. That's not my job to tell them not to. That's his job to tell them not to." The only direct accusations of parental neglect came in response to Cummins' own questions.

Moreover, the District Court immediately cured any prejudice by issuing curative instructions to the jury. It is presumed that a jury will understand and adhere to curative instructions.[173] Accordingly, this Court has routinely held that a timely curative instruction cures the effect of improper arguments by counsel.[174] In this case, the court instructed the jury that "arguments and statements by lawyers" and "questions and objections by lawyers" are not evidence.[175] The Sixth Circuit has held that this instruction, taken alone, is sufficient to cure fundamental misconduct.[176]

Additionally, during BIC's closing argument the District Court *sua sponte* issued a strong rebuke to defense counsel and a stern admonition to the jury not to consider the identity of the person who removed the child-resistant shield:

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[173] See *Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996)
[174] *Gandy v. Sullivan County*, 24 F.3d 861, 866 (6th Cir. 1994); *United States v. Galloway*, 316 F.3d 624, 633 (6th Cir. 2003)
[175] TE 212, Jury Instructions, Page ID # 6130-6142, App., pp. 96-97; The District Court made a similar verbal admonition during the trial at TE 207, Page ID # 5586-87
[176] *Michigan First Credit Union v. CUMIS Ins. Soc'y, Inc.*, 641 F.3d 240, 249 (6th Cir. 2011)

> The Court: Ladies and gentleman, 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. The fact that matters most to you is that somebody did it. Go ahead, Mr. Stopher.[177]

The District Court could not have been any clearer or any more emphatic in instructing the jury not to consider whether Thor Polley deactivated the lighter in question. The jury is presumed to have understood that admonition. Although Cummins requested an additional written instruction that the jury not consider the fault of non-parties, the District Court correctly found that no further instruction was necessary.

Cummins' proposed written admonition was not only unnecessary but also it was an incorrect statement of the law. Cummins asked the District Court to admonish the jury that "they are not to consider the fault of any other party other than BIC in this case."[178] The refusal to give requested instructions is error if and only if Cummins can show, *inter alia*, that "the omitted instructions are a correct statement of the law."[179]

Even though C.A.P.'s parents were not named parties to the lawsuit, the jury had every right to consider evidence that C.A.P.'s parents (1) left C.A.P. alone at the time of the accident; (2) did not prevent C.A.P. from gaining access to lighters;

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[177] TE 212, Page ID # 6146
[178] TE 211, Page ID # 6086
[179] *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d. 445, 449 (6th Cir. 2000)

and (3) intentionally removed the child-resistant feature from their cigarette lighters. Accordingly, it would have been error for the District Court to instruct the jury to ignore evidence of "fault" that was directly relevant to liability and causation. Therefore, the omission of Cummins' proposed instruction is not reversible error.

C. Because There Was Evidence From Which The Jury Could Have Concluded That BIC Did Not Manufacture The Lighter Involved In C.A.P.'s Incident, There Is No Basis To Reverse The Judgment.

For Cummins to prevail on appeal he must demonstrate that the outcome of the trial would have been different but for the purported errors he has raised on appeal – i.e., that the error was not harmless. One of the issues during the trial was whether the BIC Model J-26 lighter was actually the lighter that caused C.A.P.'s injuries. There was evidence that other lighters were regularly placed in his parents homes where C.A.P. had easy access to them.[180] There was also no evidence that the lighter handed to Fire Chief Gupton had any connection to the fire. Counsel for BIC argued that the lighter involved in the fire was not a BIC lighter, and counsel for C.A.P. argued that it was.[181]

[180] TE 207, Thor Polley, (Deposition p. 64), App., p. 48
[181] TE 212, Page ID # 6158, 6179-6182

Counsel for BIC asked the court for an instruction requiring the jury to specifically decide whether it was a BIC lighter.[182] The Court disagreed and told BIC's counsel that Instructions 1 and 2 covered the issue:

> THE COURT: Well, I'm not going to do that. I think the record is clear on that. And, you know, I think the first thing out of your mouth should be, if you don't think it's our lighter, then mark no both times and come back real quick.
>
> MR. STOPHER: Well, the problem with that is that neither one of those first two interrogatories to the jury ask the question.
>
> THE COURT: Well, yeah it does. Is the BIC J-26 a substantial factor in causing his injuries, and the answer from you would be no, because it wasn't even a BIC J-26.
>
> MR. STOPHER: … It's not at all clear to the jury …
>
> THE COURT: I am certain that you can make that perfectly clear to the jury …[183]

Counsel for Cummins agreed with the Court's position because he never told the Court a separate instruction was needed and never objected to the Court's stated position.

Because the jury returned a general verdict, it is simply impossible to know the basis of the jury's decision. The evidence regarding who manufactured the lighter used by C.A.P. – an element which Cummins bore the burden of proving[184]

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[182] TE 210, Page ID # 6115-6117

[183] *Id.*

[184] *See, e.g., Smith v. Wyeth, Inc.*, 657 F.3d 420, 423 (6th Cir. 2011) ("A threshold requirement of any products-liability claim is that the plaintiff assert that the

– was conflicting, and certainly sufficient for the jury to conclude that Cummins failed to prove that BIC was the manufacturer of the lighter. If this was the basis of the jury's verdict, then *none* of the purported errors raised by Cummins had *any* effect on the outcome of the trial. By definition, therefore, Cummins cannot prove that the purported errors were not harmless.

Whipple v. Royal Ins. Co., 1994 U.S. App. LEXIS 29590 (10th Cir. 1994) (unpublished) is directly on point. In *Whipple*, an insurance company raised three affirmative defenses during a jury trial regarding whether it owed any further amounts under its insurance policy: (1) that the plaintiff had caused or procured his own loss; (2) that he had failed to adequately complete a proof of loss; and (3) that he had intentionally misrepresented material facts.[185] After the jury returned a general verdict for the defendant, the plaintiff appealed on the ground that the trial court should have instructed the jury that any material misrepresentation on his part would not operate as an affirmative defense unless the defendant could demonstrate prejudice.[186]

The Tenth Circuit affirmed, holding that any error was harmless.[187] In its analysis, the court noted that the defendant had advanced three distinct affirmative

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defendant's product caused the plaintiff's injury.") (applying Kentucky law) (internal citation omitted)

[185] *Whipple v. Royal Insurance Co.*, at *3

[186] *Id.* at *1-3

[187] *Id.* at *3

defenses, and that the jury's general verdict shed "no light on which, if any, of the affirmative defenses were relied on by the jury in reaching its decision."[188] The court also noted that the plaintiff argued only that the prejudice instruction was relevant to the defendant's misrepresentation defense.[189] Accordingly, the court reasoned, "if there is sufficient evidence in the record to support a jury determination that [the plaintiff] caused his own loss, any error resulting from the omission of a prejudice instruction will be harmless."[190] The court ultimately held that "even in the face of contrary evidence, … there was enough evidence from which the jury could have determined that [the plaintiff] caused or procured his own loss[,]" and therefore "any failure by the district court to tender a jury instruction on prejudice was harmless error."[191]

The same analysis applies here. There was more than enough evidence to support a jury finding that Cummins did not meet his burden of proof regarding who manufactured the lighter used by C.A.P. Cummins cannot, as a matter of law, demonstrate that the outcome of the trial would have been different but for the purported errors.

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[188] *Id.* at *4
[189] *Id.*
[190] *Id.*
[191] *Id.* at *5

XII. CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the Type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,681 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word program in 14 point Times New Roman font.

/s/ Edward H. Stopher Dated: March 19, 2013
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

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ADDENDUM

CASE NO. 12-5635
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	)	*Electronically Filed*

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ADDENDUM OF PERTINENT

STATUTES AND REGULATIONS

15 U.S.C. § 2064

(c) Public notice of defect or failure to comply; mail notice.

(1) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, or if the Commission, after notifying the manufacturer, determines a product to be an imminently hazardous consumer product and has filed an action under section 12 [*15 USCS § 2061*], the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(A) To cease distribution of the product.

15 U.S.C. § 2065. Inspection and recordkeeping.

(a) Inspection. For purposes of implementing this Act, or rules or orders prescribed under this Act, officers or employees duly designated by the Commission, upon presenting appropriate credentials and a written notice from the Commission to the owner, operator, or agent in charge, are authorized - -

(1) To enter, at reasonable times, (A) any factory, warehouse, or establishment tin which consumer products are manufactured or held, in connection with distribution in commerce, (B) any firewalled conformity assessment bodies accredited under section 14(f)(2)(D) [*15 USCS § 2063(F)(2)(d)*], or (C) any conveyance being used to transport consumer products in connection with distribution in commerce; and

(2) To inspect, at reasonable times and in a reasonable manner such conveyance or those areas of such factory, firewalled conformity assessment body, warehouse, or establishment where such products are manufactured, held, or transported and which may relate to the safety of such products. Each such inspection shall be commenced and completed with reasonable promptness.

(b) Recordkeeping. Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this Act, or to determine compliance with rules or orders proscribed under this Act. Upon request of an officer or employee duly designated by the Commission, every

such manufacturer, private labeler, or distributor shall permit the inspection of appropriate books, records, and papers relevant to determining whether such manufacturer, private labeler, or distributor has acted or is acting in compliance with this Act and rules under this Act.

(c) Identification of manufacturers, importers, retailers, and distributors. Upon request by an officer or employee duly designated by the Commission - -

(1) Every importer, retailer, or distributor of a consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act) shall identify the manufacturer of that product by name, address, or such other identifying information as the officer or employee may request, to the extent that such information is known or can be readily determined by the importer, retailer, or distributor; and

(2) Every manufacturer shall identify by name, address, or such other identifying information as the officer or employee may request - -

(A) Each retailer or distributor to which the manufacturer directly supplied a given consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act);

(B) Each subcontractor involved in the production or fabrication of such product or substance; and

(C) East subcontractor from which the manufacturer obtained a component thereof.

(d) Inspection and recordkeeping requirement. The Commission shall, by rule, condition the manufacturing for sale, offer for sale, distribution in commerce, or importation into the United States of any consumer product or other product on the manufacturer's compliance with the inspection and recordkeeping requirements of this Action and the Commission's rules with respect to such requirements.

15 U.S.C. § 2074. Private remedies

(a) Liability at common law or under State statute not relieved by compliance. Compliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person.

(b) Evidence of Commission's inaction inadmissible in actions relating to consumer products. 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.

(c) Public information. Subject to sections 6(a)(2) and 6(b) [*15 USCS § 2055(A)(2)* and (b)] but notwithstanding section 6(a)(1), [*15USCS § 2055(a)(1)*] (1) any accident or investigation report made under this Act by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects, demonstration projects, and other related activities shall be public information.

16 C.F.R. § 1210.1 Scope, application, and effective date.

This part 1210, a consumer product safety standard, prescribes requirements for disposable and novelty lighters. These requirements are intended to make the lighters subject to the standard's provisions resistant to successful operation by children younger than 5 years of age. This standard applies to all disposable and novelty lighters, as defined in § 1210.2, that are manufactured or imported after July 12, 1994.

16 C.F.R. § 1210.3 Requirements for cigarette lighters.

(a) A lighter subject to this part 1210 shall be resistant to successful operation by at least 85 percent of the child-test panel when tested in the manner prescribed by § 1210.4.

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

(1) Reset itself automatically after each operation of the ignition mechanism of the lighter,

(2) Not impair safe operation of the lighter when used in a normal and convenient manner,

(3) Be effective for the reasonably expected life of the lighter, and

(4) Not be easily overridden or deactivated.

16 C.F.R. § 1210.4 Test protocol.

(a) Child test panel. (1) The test to determine if a lighter is resistant to successful operation by children uses a panel of children to test a surrogate lighter representing the production lighter intended for use.

(2) The test shall be conducted using at least one, but no more than two, 100-child test panels in accordance with the provisions of § 1210.4(f).

(3) The children for the test panel shall live within the United States.

(4) The age and sex distribution of each 100-child panel shall be:

(i) 30 +or- 2 children (20 +or- 1 males; 10 +or- 1 females) 42 through 44 months old;
(ii) 40 +or- 2 children (26 +or- males; 14 +or- 1 females) 45 through 48 months old;
(iii) 30 +or- 2 children (20 +or- 1 males; 10 +or- females) 49 through 51 months old.

Note: To calculate child's birth date from the test date.

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2. Multiply the difference in years by 12 months.

4 years X 12 months = 48 months.

3. Add the difference in months.

48 months + 2 months = 50 months.

4. If the difference in days is greater than 15 (e.g. 16, 17), add 1 month.

If the difference in days is less than -15 (e.g., -16, -17) subtract 1 month.

50 months – 1 month = 49 months.

If the difference in days is between -15 and 15 (e.g., -15, -14, … 14, 15), do not add or subtract 1 month.

(5) No child with a permanent or temporary illness, injury, or handicap that would interfere with the child's ability to operate the surrogate lighter shall be selected for participation.

(6) Two children at a time shall participate in testing of surrogate lighters. Extra children whose results will not be counted in the test may be used if necessary to provide the required partner for test subjects, if the extra children are within the required age range and a parent or guardian of each such child has signed a consent form.

(7) No child shall participate in more than one test panel or test more than one surrogate lighter. No child shall participate in both child-resistant package testing and surrogate lighter testing on the same day.

(b) Test sites, environment, and adult testers. (1) Surrogate lighters shall be tested within the United States at 5 or more test sites throughout the geographical area for each 100-child panel if the sites are the customary nursery schools or day care centers of the participating children. No more than 20 children shall be tested at each site. In the alternative, surrogate lighters may be tested within the United States at one or more central locations, provided the participant children are drawn from a variety of locations within the geographical area.

(2) Testing of surrogate lighter shall be conducted in a room that is familiar to the children on the test panel (for example, a room the children frequent at their customary nursery school or day care center). If the testing is conducted in a room that initially is unfamiliar to the children (for example, a room at a central location), the tester shall allow at least 5 minutes for the children to become accustomed to the new environment before starting the test. The area in which the testing is conducted shall be well-lighted and isolated from distractions. The children shall be allowed freedom of movement to work with their surrogate lighters, as long as the tester can watch both children at the same time. Two children at a time shall participate in testing of surrogate lighters. The children shall be seated side by side in chairs approximately 6 inches apart, across a table

from the tester. The table shall be normal table height for the children, so that they can sit up at the table with their legs underneath and so that their arms will be at a comfortable height when on top of the table. The children's chairs shall be "child-size."

(3) Each tester shall be at least 18 years old. Five or 6 adult testers shall be used for each 100-child test panel. Each tester shall test an approximately equal number of children from a 100-child test panel (20 +or- 2 children each for 5 testers and 17 +or- 2 children each for 6 testers).

Note: When a test is initiated with five testers and one tester drops out, a sixth tester may be added to complete the testing. When a test is initiated with six testers and one tester drops out, the test shall be completed using the five remaining testers. When a tester drops out, the requirement for each tester to test an approximately equal number of children does not apply to that tester. When testing is initiated with five testers, no tester shall test more than 19 children until it is certain that the test can be completed with five testers.

(c) Surrogate lighters. (1) Six surrogate lighters shall be used for each 100-child panel. The six lighters shall represent the range of forces required for operation of lighters intended for use. All surrogate lighters shall be the same color. The surrogate lighters shall be labeled with sequential numbers beginning with the number one. The same six surrogate lighters shall be used for the entire 100-child panel. The surrogate lighters may be used in more than one 100-child panel test. The surrogate lighters shall not be damaged or jarred during storage or transportation. The surrogate lighters shall not be exposed to extreme heat or cold. The surrogate lighters shall be tested at room temperature. No surrogate lighter shall be left unattended.

(2) Each surrogate lighter shall be tested by an approximately equal number of children in a 100-child test panel (17 +or- 2 children).

Note: If a surrogate lighter is permanently damaged, testing shall continue with the remaining lighters. When a lighter is dropped out, the requirement that each lighter be tested by an approximately equal number of children does not apply to that lighter.

(3) Before each 100-child panel is tested, each surrogate lighter shall be examined to verify that it approximates the appearance, size, shape, and weight of a production lighter intended for use.

(4) Before and after each 100-child panel is tested, force measurements shall be taken on all operating components that could affect child resistance to verify that they are within reasonable operating tolerances for a production lighter intended for use.

(5) Before and after testing surrogate lighters with each child, each surrogate lighter shall be operated outside the presence of any child participating in the test to verify that the lighters produce a signal. If the surrogate lighter will not produce a signal before the test, it shall be repaired before it is used in testing. If the surrogate lighter does not produce a signal when it is operated after the test, the results for the preceding test with that light shall be eliminated. The lighter shall be repaired and tested with another eligible child (as one of a pair of children) to complete the test panel.

(d) Encouragement. (1) Prior to the test, the tester shall talk to the children in a normal and friendly tone to make them feel at ease and to gain their confidence.

(2) The tester shall tell the children that he or she needs their help for a special job. The children shall not be promised a reward of any kind for participating, and shall not be told that the test is a game or contest or that it is fun.

(3) The tester shall not discourage a child from attempting to operate the surrogate lighter at any time unless a child is in danger of hurting himself or another child. The tester shall not discuss the dangers of lighters or matches with the children to be tested prior to the end of the 10-minute test.

(4) Whenever a child has stopped attempting to operate the surrogate lighter for a period of approximately one minute, the tester shall encourage the child to try by saying “keep trying for just a little longer.”

(5) Whenever a child says that his or her parent, grandparent, guardian, etc., said never to touch lighters, say “that’s right – never touch a real lighter – but your [parent, etc.] said it was OK for you to try to make a noise with this special lighter because it can’t hurt you.”

(6) The children in a pair being tested may encourage each other to operate the surrogate lighter and may tell or show each other how to operate it. (This interaction is not considered to be disruption as described in paragraph (e)(2) below.) However, neither child shall be allowed to operate the other child’s

lighter. If one child takes the other child's surrogate lighter, that surrogate lighter shall be immediately returned to the proper child. If this occurs, the tester shall say "No. He(she) has to try to do it himself(herself)."

(e) Children who refuse to participate. (1) If a child becomes upset or afraid, and cannot be reassured before the test starts, select another eligible child for participation in that pair.

(2) If a child disrupts the participation of another child for more than one minute during the test, the test shall be stopped and both children eliminated from the results. An explanation shall be recorded on the data collection record. These two children should be replaced with other eligible children to complete the test panel.

(3) If a child is not disruptive but refuses to attempt to operate the surrogate lighter throughout the entire test period, that child shall be eliminated from the test results and an explanation shall be recorded on the data collection record. The child shall be replaced with another eligible child (as one of a pair of children) to complete the test panel.

(f) Test procedure. (1) To begin the test, the tester shall say "I have a special lighter that will not make a flame. It makes a noise like this." Except where doing so would block the child's view of a visual signal, the adult test shall place a 8 ½ by 11 inch sheet of cardboard or other rigid opaque material upright on the table in front of the surrogate lighter, so that the surrogate lighter cannot be seen by the child, and shall operate the surrogate lighter once to produce its signal. The tester shall say "Your parents [or other guardian, if applicable] said it is OK for you to try to make that noise with your lighter." The tester shall ask the successful child to remain until the other child is finished.

(2) The adult tester shall observe the children for 5 minutes to determine if either or both of the children can successfully operate the surrogate lighter by producing one signal of any duration. If a child achieves a spark without defeating the child-resistant feature, say "that's a spark – it won't hurt your – try to make the noise with your lighter." If any child successfully operates the surrogate lighter during this period, the surrogate lighter shall be taken from that child and the child shall not be asked to try to operate the lighter again. The tester shall ask the successful child to remain until the other child is finished.

(3) If either or both of the children are unable to successfully operate the surrogate lighter during the 5-minute period specified in § 1210.4(f)(2), the adult tester shall demonstrate the operation of the surrogate lighter. To conduct the demonstration, secure the children's full attention by saying "Okay, give me your lighters now." Take the lighters and place them on the table in front of you out of the children's reach. Then say, "I'll show you how to make the noise with your lighters. First I'll show you with (child's name)'s lighter and then I'll show you with (child's name)'s lighter." Pick up the first child's lighter. Hold the lighter approximately two feet in front of the children at their eye level. Hold the lighter in a vertical position in one hand with the child-resistant feature exposed (not covered by fingers, thumb, etc.) Orient the child-resistant mechanism on the lighter toward the children. [This may require a change in your orientation to the children such as sitting sideways in the chair to allow a normal hand position for holding the lighter while assuring that both children have a clear view of the mechanism. You may also need to reposition your chair so your hand is centered between the children] Say "now watch the lighter." Look at each child to verify that they are not exaggerate operating movements. Do not verbally describe the lighter's operation. Place the first child's lighter back on the table in front of you and pick up the second child's lighter. Say, "Okay, now watch this lighter." Repeat the demonstration as described above using the second child's lighter. Note: Testers shall be trained to conduct the demonstration in a uniform manner, including the words spoken to the children, the way the lighter is held and operated, and how the tester's hand and body is oriented to the children. All testers must be able to operate the surrogate lighters using only appropriate operating movements in accordance with the manufacturer's instructions. If any of these requirements are not met during the demonstration for any pair of children, the results for that pair of children shall be eliminated from the test. Another pair of eligible children shall be used to complete the test panel.

(4) Each child who fails to successfully operate the surrogate lighter in the first 5 minutes is then given another 5 minutes in which to attempt the successful operation of the surrogate lighter. After the demonstrations give their original lighters back to the children by placing a lighter in each child's hand. Say "Okay, now you try to make the noise with your lighters – keep trying until I tell you to stop." If any child successfully operates the surrogate lighter during this period, the surrogate lighter shall be taken from the child and the child shall not be asked to try to operate the lighter again. The tester shall ask the successful child to remain until the other child is finished.

(5) At the end of the second 5-minute test period, take the surrogate lighter from any child who has not successfully operated it.

(6) After the test is over, ask the children to stand next to you. Look at the children's faces and say: "These are special lighters that don't make fire. Real lighters can burn you. Will you both promise me that you'll never try to work a real lighter?" Wait for an affirmative response from each child; then thank the children for helping.

(7) Escort the children out of the room used for testing.

(8) After a child has participated in the testing of a surrogate lighter, and on the same day, provide written notice of that fact to the child's parent or guardian. This notification may be in the form of a letter provided to the school to be given to the parents or guardian of each child. The notification shall state that the child participated, shall ask the parent or guardian to warn the child not to play with lighters, and shall remind the parent or guardian to keep all lighters and matches, whether child resistant or not, out of the reach of children. For children who operated the surrogate lighter, the notification shall state that the child was able to operate the child-resistant lighter. For children who do not defeat the child-resistant feature, the notification shall state that, although the child did not defeat the child-resistant feature, the child may be able to do so in the future.

(g) Data collection and recording. Except for recording the times required for the children to activate the signal, recording of data should be avoided while the children are trying to operate the lighters, so that the tester's full attention is on the children during the test period. If actual testing is videotaped, the camera shall be stationary and shall be operated remotely in order to avoid distracting the children. Any photographs shall be taken after actual testing and shall simulate actual test procedure(s) (for example, the demonstration). The following data shall be collected and recorded for each child in the 100-child test panel:

(1) Sex (male or female).

(2) Date of birth (month, day, year).

(3) Age (in months, to the nearest month, as specified in § 1210.4(a)(4)).

(4) The number of the lighter tested by that child.

(5) Date of participation in the test (month, day, year).

(6) Location where the test was given (city, state, country, and the name of the site or a unique number or letter code that identifies the test site).

(7) The name of the tester who conducted the test.

(8) The elapsed time (to the nearest second) at which the child achieved any operation of the surrogate signal in the first 5-minute test period.

(9) The elapsed time (to the nearest second) at which the child achieved any operation of the surrogate signal in the second 5-minute test period.

(10) For a single pair of children from each 100-child test panel, photograph(s) or video tape to show how the lighter was held in the tester's hand, and the orientation of the tester's body and hand to the children, during the demonstration.

(h) Evaluation of test results and acceptance criterion. To determine whether a surrogate lighter resists operation by at least 85 percent of the children, sequential panels of 100 children each, up to a maximum of 2 panels, shall be tested as prescribed below.

(1) If not more than 10 children in the first 100-child test panel successfully operated the surrogate lighter, the lighter represented by the surrogate lighter shall be considered to be resistant to successful operation by at least 85 percent of the child test panel, and no further testing is conducted. If 11 through 18 children in the first 100-child test panel successfully operate the surrogate lighter, the test results are inconclusive, and the surrogate lighter shall be tested with a second 100-child test panel in accordance with this § 1210.4. If 19 or more of the children in the first 100-child test panel successfully operated the surrogate lighter, the lighter represented by the surrogate shall be considered not resistant to successful operation by at least 85 percent of the child test panel, and no further testing is conducted.

(2) If addition testing of the surrogate lighter is required by § 1210.4(h)(1), conduct the test specified by this § 1210.4 using a second 100-child test panel and record the results. If a total of no more than 30 of the children in the

combined first and second 100-child test panels successfully operated the surrogate lighter, the lighter represented by the surrogate lighter shall be considered resistant to successful operation by at least 85 percent of the child test panel, and no further testing is performed. If a total of 31 or more children in the combined first and second 100-child test panels successfully operate the surrogate lighter, the lighter represented by the surrogate lighter shall be considered not resistant to successful operation by 85 percent of the child test panel, and no further testing is conducted.

Table 1. - - Evaluation of Test Results - - § 1210.4(e)

Test Panel	Cumulative Number of Children	Successful Lighter Operations		
		Pass	Continue	Fail
1	100	0-10	11-18	19 or more
1	200	11-30	-----	31 or more

16 C.F.R. § 1210.14 Qualification testing.

(a) Testing. Before any manufacturer or importer of lighters distributes lighters in commerce in the United States, surrogate lighters of each model shall be tested in accordance with § 1210.4, above, to ensure that all such lighters comply with the standard. However, if a manufacturer has tested one model of lighter, and then wishes to distribute another model of lighter that differs from the first model only by differences that would not have an adverse effect on child resistance, the second model need not be tested in accordance with § 1210.4.

(b) Product modifications. If any changes are made to a product after initial qualification testing that could adversely affect the ability of the product to meet the requirements of the standard, additional qualification tests must be made on surrogates for the changed product before the changed lighters are distributed in commerce.

(c) Requalification. If a manufacturer of importer chooses to requalify a lighter design after it has been in production, this may be done by following the testing procedures at § 1210.4.

16 C.F.R. § 1210.15 Specifications.

(a) Requirement. Before any lighters that are subject to the standard are distributed in commerce, the manufacturer or importer shall ensure that the surrogate lighters used for qualification testing under § 1210.14 are described in a written product specification. (Section 1210.4(c) requires that six surrogate lighters be used for testing each 100-child panel.)

(b) Contents of specification. The product specification shall include the following information:

(1) A complete description of the lighter, including size, shape, weight, fuel, fuel capacity, ignition mechanism, and child-resistant features.

(2) A detailed description of all dimensions, force requirements, or other features that could affect the child-resistance of the lighter, including the manufacturer's tolerances for each such dimension or force requirement.

(3) Any further information, including, but not limited to, model names or numbers, necessary to adequately describe the lighters and any child-resistant features.

16 C.F.R § 1210.17 Recordkeeping and reporting.

(a) Records. Every manufacturer and importer of lighters subject to the standard shall maintain the following records in English on paper, microfiche, or similar media and make such records available to any designated officer or employee of the Commission in accordance with section 16(b) of the Consumer Product Safety Act, *15 U.S.C. 2065(b).* Such records must also be kept in the United States and provided to the Commission within 48 hours of receipt of a request from any employee of the Commission, except as provided in paragraph (b)(3) of this section. Legible copies of original records may be used to comply with these requirements.

(1) Records of qualification testing, including a description of the tests, photograph(s) or a video tape for a single pair of children form each 100-child test panel to show how the lighter was held in the tester's hand, and the orientation of the test's body and hand to the children, during the demonstration, the dates of the tests, the data required by § 1210.4(d), the

actual surrogate lighters tested, and the results of the tests, including video tape records, if any. These records shall be kept until 3 years after the production of the particular model to which such tests relate has ceased. If requalification tests are undertaken in accordance with § 1210.14(c), the original qualification test results may be discarded 3 years after the requalification testing, and the requalification test results and surrogates, and the other information required in this subsection for qualifications tests, shall be kept in lieu thereof.

(2) Records of procedures used for production testing required by this subpart B, including a description of the types of tests conducted (in sufficient detail that they may be replicated), the production interval selected, the sampling scheme, and the pass/reject criterion. These records shall be kept until 3 years after production of the lighter has ceased.

(3) Records of production testing, including the test results, the date and location of testing, and records of corrective actions taken, which in turn includes the specific actions taken to improve the design or manufacture or to correct any noncomplying lighter, the date the actions were taken, the test result or failure that triggered the actions, and the additional actions taken to ensure that the corrective action had the intended effect. These records shall be kept for 3 years following the date of testing. Records of production testing results may be kept on paper, microfiche, computer tape, or other retrievable media. Where records are kept on computer tape or other retrievable media, however, the records shall be make available to the Commission on paper copies upon request. A manufacturer or importer of a lighter that is not manufactured in the United States may maintain the production records required by paragraph (a)(3) of this section outside the United States, but shall make such records available to the Commission in the United States within 1 week of a request from a Commission employee for access to those records under section 16(b) of the CPSA, *15 U.S.C. 2065(b).*

(4) Records of specifications required under § 1210.15 shall be kept until 3 years after production of each lighter model has ceased.

(b) Reporting. At least 30 days before it first imports or distributes in commerce any model of lighter subject to the standard, every manufacturer and importer must provide a written report to the Division of Regulatory

Management, Consumer Product Safety Commission, Washington, D.C. 20207. Such report shall include:

(1) The name, address, and principal place of business of the manufacturer or importer,

(2) A detailed description of the lighter model and the child-resistant feature(s) used in that model,

(3) A description of the qualification testing, including a description of the surrogate lighters tested, the specification of the surrogate lighter required by § 1210.15, a summary of the results of all such tests, the dates the tests were performed, the location(s) of such tests, and the identity of the organization that conducted the tests,

(4) An identification of the place or places that the lighters were or will be manufactured,

(5) The location(s) where the records required to be maintained by paragraph (a) of this section are kept, and

(6) A prototype or production unit of that lighter model.

(c) Confidentiality. Persons who believe that any information required to be submitted or made available to the Commission is trade secret or otherwise confidential shall request that the information be considered exempt from disclosure by the Commission, in accordance with *16 CFR 1015.18.* Requests for confidentiality of records provided to the Commission will be handled in accordance with section 6(a)(2) of the CPSA, *15 U.S.C. 2055(a)(2),* the Freedom of Information Act as amended, *5 U.S.C. 552,* and the Commission's regulations under that act, 16 CFR part 1015.