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Products Liability - A toddler suffered severe burns when playing with a BIC lighter that he found in his father's truck – his products theory against BIC implicated the failure of the lighter to have a child-resistant feature that disabled the lighter if it was removed – the lighter was child-resistant, but that guard could (and was in this case) easily removed without affecting the lighter's utility

Polley v. BIC USA, 1:08-19
Plaintiff: Joseph H. Mattingly, III and Kaelin G. Reed, *Mattingly & Nalley-Martin*, Lebanon and Jeffrey L. Eastham, Greensburg
Defense: Edward H. Stopher and Jeff W. Adamson, *Boehl Stopher & Graves*, Louisville
Verdict: Defense verdict on liability
Federal: **Owensboro**, J. McKinley, 2-1-12

Colton Polley, then age 3, had been at an overnight visitation with his father (Thor) on 12-17-04. Thor returned Colton to the apartment in Greensburg where he lived with his mother, Amy Cowles. Apparently little Colton retrieved a cigarette lighter (a BIC USA model J-26) from the floorboard of his father's pick-up truck. Neither of his parents noticed the boy had the lighter.

Back at his apartment, Colton was upstairs in his room – his mother was on the ground floor. She suddenly heard him screaming and discovered the boy engulfed in flames.

Colton was taking off his shirt and struggled with the buttons. He made a decision to try to burn them off with the lighter. His shirt ignited. Colton's burn injuries were significant and he was flown by helicopter to Shriner's Hospital in Cincinnati. He underwent extensive treatment over the next month, including skin graft treatments. Now a fifth grader, Colton continues to have a disfiguring injury.

Through his parents, Colton (referred to in the record as CAP) pursued a products liability lawsuit against BIC. The theory focused that while the lighter had a child-resistant guard, it was easily deactivated and overridden with a fork, a knife or a pen. The design, the plaintiff thought, almost invited the guard's removal. [In this case, Thor had apparently removed the guard.]

Thus while the lighter ostensibly met the product safety standards because it had a guard, the guard's easy removal while still permitting the lighter to function was described as a product defect. The plaintiff alleged the lighter should have been equipped with a guard that would deactivate the lighter if it was removed.

The plaintiff's key expert, Tarold Kvalseth, Mechanical Engineer, Minneapolis, MN, suggested an

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alternative design whereby the deactivated guard will disable the lighter. As the case went to the jury, Colton advanced two theories, (1) the lighter's design represented a knowing or willful violation of consumer safety regulations, and (2) a traditional products theory, the lighter being defective and unreasonably dangerous. Beyond compensatory damages, the jury could also award Colton punitives if it found BIC acted with reckless disregard.

BIC's defense had several thrusts to it. The first was that an adult had removed the guard on the lighter and little Colton was permitted to play with it while unsupervised. There was also some dispute that it was actually a BIC lighter that burned the boy. [Plaintiff's proof in this regard came from a local fire reporter.]

BIC also defended its products, describing its stainless steel guard as state of the art – it featured two anchors. The company also explained that the guard couldn't be accidentally removed, the suggestion being that Thor had purposely done so. This tied to proof from a design expert for BIC, Jeffrey Kupson, that regardless of the design, Thor was going to remove the child guard.

A federal jury in Owensboro heard proof for nine days. Its verdict was for BIC on both the knowing violation of consumer safety regulations count and traditional products liability. That ended the deliberations and Colton took nothing.

A defense judgment followed. The plaintiff subsequently moved the court for permission to contact jurors. The motion was granted. Just after that order was entered, BIC objected to the motion and suggested it represented unwarranted badgering of the jury. The court swiftly stayed the contact order upon BIC's motion and the issue of post-trial juror contact remains pending.

Underinsured Motorist - A trucker (age 48) was killed in a chain reaction crash when he struck one vehicle and then a bridge abutment – a Mt. Vernon jury awarded the estate $500,000 for destruction and $750,000 more for the consortium interest of his teenage son

Kelley v. Grange Mutual, 09-138
Plaintiff: Bruce R. Bentley, London
Defense: Whitney Dunlap, III, *Simons Dunlap & Fore*, Richmond
Verdict: $1,250,000 for plaintiff
Court: **Rockcastle**, J. Tapp, 2-22-12

Tommy Kelley, then age 48, was operating a tractor-trailer for Somerset Foods just after midnight on 5-12-08. He traveled on northbound I-75 near Mt. Vernon at mile marker 68. At the same time, Peter Smith traveled southbound.

There was proof Smith clipped a vehicle driven by the elderly Ronald Conlon who was also southbound. This caused Conlon to cross the median – Conlon didn't strike another vehicle and simply came to rest in the northbound lane of I-75.

A third driver (Jason Horne heading northbound) approached the scene at some 35 mph – he was slowing as he went by the disabled Conlon. A moment later Kelley came past Conlon at some 55 mph.

verdict totaling $35,729,567. A consistent judgment was entered.

While NSI skipped the trial, it noticed the judgment that was entered against it. With newly retained counsel (Sean S. Land and John W. Stevenson, *Stevenson & Land*, Owensboro), NSI moved to set aside the verdict. Corporate bigwigs attested that they had not received an order from the court setting the case for trial. The plaintiff replied that NSI simply failed to keep track of the case and noted it had been negotiating with NSI's national counsel (in Atlanta) in the weeks before the trial. It thought there was no excuse, NSI having a duty to keep track of the litigation against it. The court denied the motion and NSI has since appealed.

Medical Negligence - **In this death case, a cardiothoracic surgeon was criticized for his technical performance of a complex aortic valve replacement – the estate's claim was neutered in part, its lawyers failing to submit CR 8.01(2) interrogatory answers before trial**

Hensley v. Imam, 06-816
Plaintiff: Joe Bednarz, Sr. And T. Turner Snodgrass, *Bednarz & Bednarz*, Nashville, TN
Defense: Clay A. Edwards and Benjamin J. Weigel, *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Court: **Pulaski**, J. Burdette, 2-13-12

Wayne Hensley, then age 41, reported chest pain over Labor Day weekend in 2004. He followed up in Somerset with a cardiologist, Dr. Ibraiz Igbal. An EKG indicated that Hensley had severe aortic valve stenosis. Igbal referred Hensley to Dr. Mohammed Iman – he is a board-certified cardiac surgeon also practicing in Somerset.

Imam performed a mechanical valve aortic valve replacement surgery on 10-8-04 at Lake Cumberland Regional Hospital. [It was undisputed that Hensley needed the surgery.] During the surgery Imam discovered that Hensley's aortic valve was more stenotic than originally thought, among other signs of severe heart disease. Because of these intraoperative findings, Hensley remained on an aortic cross clamp for some two hours.

While Imam was able to place the mechanical aortic valve, he was unable to wean him Hensley from the artificial bypass. Imam attempted an emergency bypass in an effort to increase cardiac output. Those efforts failed and a decision was made to transfer Hensley to UK Hospital in Lexington. No helicopter was available and Imam accompanied Hensley in an ambulance. Despite a repair surgery at UK, Hensley's condition did not improve. He died two weeks later.

Hensley's family consented to a chest-only autopsy. [This would be the key issue in the case.] The autopsy (performed by a second-year medical student) indicated Imam had sewn the mechanical valve over the left coronary artery and essentially occluded it. The attending pathologist signed off on the autopsy. The attending also later testified that a cardiac pathologist also reviewed the heart and slides and concurred. [The name of the cardiac pathologist was not disclosed in the autopsy.]

In this lawsuit filed by Hensley's surviving wife, negligence was alleged by Imam in improperly placing the valve such that it occluded blood flow. It was also alleged that when he performed the emergency bypass, he should have done three rather than two arteries.

In developing its case, the plaintiff relied on both the earlier autopsy report and its liability expert, Dr. David Theodoro, Cardiothoracic Surgery, St. Louis, MO. If the estate prevailed, it sought Hensley's pain and suffering as well medicals, the funeral bill and Hensley's destruction. His wife also presented a consortium claim.

Imam defended the case on two fronts. The first was that Hensley suffered a known complication (a so-called myocardial protection injury) of an arrested open heart surgery. He also explained (through his expert, Dr. Creighton Wright, Cardiothoracic Surgery, Cincinnati, OH) that the autopsy findings were simply incorrect and Imam had not occluded the left coronary artery.

The defense also moved for a directed verdict on the wife's consortium claim at the close of proof. Imam cited that Hensley's wife did not file her consortium claim until ten months outside the one-year statute of limitation. Judge Burdette agreed and granted the motion.

Imam also made a *Fratzke* motion and cited that the estate had not filed CR 8.01(2) interrogatories quantifying the prayer for pain and suffering. The estate quickly moved (on the fifth and final day of trial) to supplement those answers. Judge Burdette ruled the supplemented answers were not seasonable and the pain and suffering claim was extinguished.

The case continued to the jury on the merits. The deliberations lasted 35 minutes. The verdict was for Imam on liability and the estate took nothing. A defense judgment was entered.

Ed. Note - *Fratzke* again? Really? Who could not know that rule? As we've seen in the last year, the answer is simple: out of state lawyers.

Dental Negligence - **The plaintiff blamed a cardiac infection (which complicated a prior valve replacement) on the failure of his dentist to use prophylactic antibiotics following routine treatments**

Swartz v. Traxel, 06-64
Plaintiff: Michael S. Curtis, *Curtis Legal Services*, Ashland and Walter J. Wolske, Jr., *Wolske & Associates*, Columbus, OH
Defense: Steven G. Kinkel and J. Christian Lewis, *Fulkerson Kinkel & Marrs*, Lexington
Verdict: Defense verdict on liability
Court: **Mason**, Special Judge Marc Rosen, 8-31-11

Perry Swartz, then age 55 and an employee at an auto parts store, had a history of heart problems and had a prior valve replacement. Because of the risk of infection, Swartz had regularly advised his treating dentist (Dr. John Traxel) to provide him prophylactic antibiotics to guard against the risk of an infection being released into his blood stream during dental procedures. Traxel had abided by that admonition for many years.

However on two dental visits in 2005 (2-24-05 and 3-8-05), Traxel did not give Swartz antibiotics. Thereafter Swartz developed a bacterial endocarditis that affected his cardiac condition. He was required to have an aortic valve replacement and a pacemaker installed. His medical bills totaled $126,629.

Swartz sued Traxel and alleged negligence by him in failing to use antibiotics on these two visits, the error resulting in the development of the heart infection. His liability expert was Dr. John Cheek, Oral Surgery, Columbus, OH. If Swartz prevailed he sought his medical bills and $1,000,000 more for pain and suffering.

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Verdict _________________________

For plaintiff _________________________ (Name, City, Firm)

For defense _________________________ (Name, City, Firm)

Fact Summary ____

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Injury/Damages ____

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Traxel defended on two fronts. The first was that antibiotics were not required. As importantly the defense also challenged whether there was any link between the failure to use antibiotics and the resulting heart infection. Traxel's experts were Dr. Brian Alpert, Oral Surgery, Louisville, Dr. Fares Khater, Infectious Disease, Whitesburg and Dr. Matthew Shotwell, Infectious Cardiology, Cincinnati, OH.

The jury instruction asked if Traxel had violated the reasonably prudent dentist standard. The answer was no by a 9-3 count and Swartz took nothing. A defense judgment closed the case.

Medical Negligence - The plaintiff suffered a fistula injury during a TUMT (microwave therapy) procedure to treat an enlarged prostate – he blamed his treating urologist for improperly placing the device such that it could cause injury

Mattingly v. Hubbard, 07-12014
Plaintiff: Jeffrey T. Sampson, *Sampson & Slechter*, Louisville
Defense: Craig L. Johnson, *Whonsetler & Johnson*, Louisville
Verdict: Defense verdict on liability
Court: **Jefferson**, J. Eckerle, 12-9-11

Thomas Mattingly, then age 68, was suffering an enlarged prostate. The condition caused Mattingly to frequently urinate at night. He also suffered from impotence. A urologist, Dr. John Hubbard, performed a TUMT procedure (transurethral microwave therapy) to relieve Mattingly's symptoms on 12-04-06. The TUMT uses microwaves (and heat) directed at the prostate that cause it to shrink.

Mattingly did not have a good result. Heat from the TUMT was directed not just at his prostate and he sustained a rectal fistula. He used a catheter and a colostomy for a time following this misadventure. Mattingly's medical bills were $81,341 and he claimed $1,000,000 more for pain and suffering.

Mattingly sued Hubbard and alleged negligence by him in several ways. His expert, Dr. Ralph Devito, Urology, Yale University, was critical of Hubbard for (1) improperly placing the device and permitting it to overheat, and (2) not doing the procedure with just conscious sedation so the patient can indicate discomfort.

Mattingly's claim had an additional