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PLAYTEX JUDGMENT REVERSED

ASSOCIATED PRESS, Staff Writer John Jenks contributed to this report.

An \$11.5 million judgment against International Playtex, Inc., returned by a federal court jury in Wichita in a toxic shock syndrome death was overturned by the 10th Circuit Court of Appeals on Tuesday and a new trial was ordered.

The decision said the jury should have been allowed to determine what role the victim might have had in her own death, and whether manufacturers of other tampons might have contributed to it.

A U.S. District Court jury in Wichita held on Feb. 25, 1985, that Playtex was liable, in part, for the 1983 death of Betty O'Gilvie of Wichita. The company appealed the decision.

The new trial will also be in Wichita. A date has not been set.

RECORDS SHOWED that O'Gilvie had purchased and used the Playtex tampon products, became ill and consulted her family doctor, specifically about the possibility of TSS.

He advised her that he did not think TSS was something to be concerned about and diagnosed her condition as scarlet fever and a yeast infection. He prescribed a penicillin-based antibiotic appropriate for scarlet fever, but not effective against TSS.

Her illness had started on March 30, and worsened on March 31. She was rushed to a Wichita hospital and, despite treatment by specialists, was dead by April 2. The cause of death was listed as toxic shock syndrome.

A lawsuit followed, and a jury awarded \$250,000 to O'Gilvie's estate for her pain and suffering, \$1.25 million to her survivors as compensatory damages and \$10 million in punitive damages.

THE PERCENTAGE of fault was allocated 20 percent to her family doctor and 80 percent to Playtex.

The judgment was entered for those amounts, but U.S. District Judge Patrick Kelly subsequently granted a partial change in the punitive damages, reducing them from \$10 million to \$1.35 million.

Playtex later filed a motion for a new trial, claiming the trial court erred by not giving comparative fault instructions about O'Gilvie's conduct, as well as that of other tampon manufacturers.

The woman apparently had used the products of other suppliers after she was stricken.

Playtex also maintains the court's instructions and comments about Playtex's toxic shock warnings misled the jury and that the evidence was insufficient to support punitive damages.

Playtex attorney **Larry Wall** of Wichita was elated with the court's decision.

"We're pleased with that," Wall said. "And I can't comment any further until I've seen the opinion."

Mark Hutton, also of Wichita, the O'Gilvie family's attorney, was unhappy Tuesday night but confident that he would win a new trial. He said evidence that he's discovered while working on a dozen other TSS cases makes for a much stronger case against Playtex.

"I feel extremely confident because the evidence keeps getting stronger and stronger," he said.

"Since the trial of this case, I've been able to uncover the fact that approximately 30 to 40 other woman had died from the same type of tampon Betty O'Gilvie used," Hutton said.

The 10th Circuit decision said in order to compare the causes of a tort, or wrongful action, under Kansas law, the jury must be allowed to consider the doctrine of comparative fault as to all participants in the related series of events.

"The possibility that the user would be misdiagnosed does not negate the possibility that the jury could have found (the woman's) own conduct unreasonable, either in continuing to use the tampons or in delaying her visit to the doctor."