HILLYER, CHARLES T

VS.

A.O. SMITH WATER PRODUCTS CO.,

SEQUENCE NUMBER : 011

TRIAL DE NOVO

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

Dated: 5/15/15

CK

CYNTHIA S. KERN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOS

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ O

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFER

CHARLES F. HILLYER,

Plaintiffs, Index No.190132/13

-against- **DECISION/ORDER**

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	

Defendant Burnham LLC ("Burnham") has filed the present post-trial motion pursuant to CPLR § 4401 and § 4404 for a directed verdict or an order setting aside the verdict and directing that judgment be entered in favor of Burnham, or in the alternative, for a new trial. In the alternative, it seeks *remittitur* of the verdict.

Decedent Charles Hillyer instituted this asbestos product-liability action. At the time trial commenced, there were three remaining defendants, Burnham, Cleaver Brooks, Inc. and William Powell Company. Plaintiff and Cleaver Brooks Inc. resolved the case during the trial and plaintiff voluntarily discontinued as against William Powell Company before jury deliberations

Company. The jury also found that Burnham was reckless in failing to warn of the toxic hazards of asbestos.

Plaintiff testified at his deposition regarding his exposure to Burnham boilers. He testified that he worked around many Burnham boilers as a steamfitter in the 1970's and that he was exposed to asbestos from Burnham boilers when he worked around Burnham boilers. Tr. at 651-652, 700. He testified that he believed he was exposed to asbestos from Burnham boilers and other boilers when other workers would tear off the insulation from the boilers. Tr. at 700. He testified as follows:

> Again, they would tear off the insulation, we would be taking off valves and that–and I be in the general area that they were working and they were just throwing it on the ground and again, walking in it, creating dust.

Tr. at 700.

Burnham makes a number of arguments as to why the verdict should be set aside. It argues that (1) it is entitled to a directed verdict or a new trial because plaintiff failed to prove that Burnham's failure to warn was a proximate cause of plaintiff's injury: (2) the jury's recklessness findings were not supported by the evidence; (3) the court's instruction on recklessness was improper; (5) it is entitled to a directed verdict or judgment notwithstanding the verdict because plaintiff's expert opinion was insufficient as a matter of law to establish specific causation; and (6) it is entitled to a new trial because the jury's allocation of fault is against the

initiative, a court may set aside a verdict . . . and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence, [or] in the interest of justice." The standard for setting aside a verdict is very high. The Court of Appeals has held that a verdict may be set aside only when "there is simply no valid line of reasoning and permissible inferences" which could have led to the conclusion reached by the jury. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978). The First Department held that a verdict "will not be set aside unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence." *Pavlou v. City of New York*, 21 A.D.3d 74, 76 (1st Dept 2005). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial. *See Motichka v. Cody*, 279 A.D.2d 310 (1st Dept 2001). Where the case presents conflicting expert testimony, "[t]he weight to be accorded the conflicting testimony of experts is 'a matter peculiarly within the province of the jury.'" *Torricelli v. Pisacano*, 9 A.D.3d 291 (1st Dept 2004) (citation omitted); *see also Cholewinski v. Wisnicki*, 21 A.D.3d 791 (1st Dept 2005).

Initially, Burnham argues that it is entitled to a directed verdict or judgment notwithstanding the verdict on the ground that plaintiff failed to prove that he would have heeded a warning if a warning had been provided by Burnham. However, this court has already rendered a decision at the conclusion of the trial denying Burnham's motion for a directed verdict on this issue and sees no reason to revisit this issue. This court specifically held as follows:

that he would have heeded a [warning] if it had been provided to him.

Contrary to the argument made by Burnham, the court did not apply the heeding presumption in making its ruling denying the motion for a directed verdict. Rather, the court found that there was sufficient factual evidence in the record to submit the issue of whether plaintiff would have heeded a warning if it had been provided to the jury, who was entitled to make a credibility determination as to whether plaintiff would have heeded a warning if it had been given.

Moreover, it is well settled that "[o]rdinarily, issues of proximate cause are fact questions to be decided by a jury." *White v. Diaz*, 49 A.D.3d 134, 139 (1st Dept 2008) (internal citation omitted). Indeed, "[w]hile it is appropriate to decide the question of legal cause as a matter of law 'where only one conclusion may be drawn from the established facts', where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." *Id.* (quoting *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980)). Based on these well established principles, it is appropriate under the circumstances of this cause for the jury to have determined the issue of whether the failure to warn was the proximate cause of plaintiff's injuries rather than the court deciding the issue as a matter of law, as it is not clear that only one conclusion may be drawn from the deposition testimony as to whether plaintiff would have heeded a warning.

To the extent that Burnham argues that the court committed an error by not specifically

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