EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

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WALTER MILLER,

Plaintiff,

Index No.190087/2014

AMENDED DECISION/ORDER

-against-

BMW OF NORTH AMERICA, et al.,

Defendants.

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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.....	

The Decision/Order of this court dated April 25, 2016 is hereby amended as follows:

Plaintiff Walter Miller instituted this asbestos product-liability action. He testified that he was exposed to asbestos through his work as an auto mechanic. He claims that he was exposed to asbestos containing dust from new drum brake linings that he and his fellow mechanics would grind using a brake grinding machine manufactured by Ammco. Plaintiff testified at trial that the brake grinding machine generated dust. Defendant Hennessy Industries, Inc. ("Ammco") has brought the present post-trial motion pursuant to CPLR § 4401 and § 4404 and CPLR § 5501 seeking entry of judgment notwithstanding the verdict, a new trial, or in the

alternative, remittitur of damages.

Defendant Ammco was the only remaining defendant when the trial of this action commenced. The jury rendered a verdict in favor of plaintiff and against defendant Ammco in the amount of $25 million, consisting of $10 million for past pain and suffering and $15 million for future pain and suffering. The jury allocated 86% percent of liability to Ammco and 14% to other entities. The jury also found that Ammco was reckless in failing to warn of the toxic hazards of asbestos.

Plaintiff, a mechanic, testified at trial regarding his exposure to Ammco grinders. He testified that over a three and a half year period, he used an Ammco grinder to grind brakes which contained asbestos. He claims that he was exposed to asbestos-containing dust while grinding the brakes and that this exposure was a substantial factor in causing his mesothelioma.

Ammco makes a number of arguments as to why the verdict should be set aside. It argues that (1) it did not owe plaintiff a legal duty to warn about the dangers of asbestos in automobile brakes, which was a product that it did not manufacture; (2) the evidence offered at trial was insufficient to establish general or specific causation under New York law; (3) the improper comment by plaintiff's counsel during opening statement that at the close of the case, plaintiff was going to ask for $50 million, warranted a mistrial: (4) it was entitled to a directed verdict on plaintiff's claim that it acted in reckless disregard of the safety of others and that the court's instruction on recklessness did not comport with controlling law; (5) the jury's allocation of fault is against the weight of the evidence; and (6) the evidence offered at trial was insufficient to support the jury's finding that plaintiff used an Ammco grinder and that Ammco failed to exercise reasonable care by marketing its grinders without an adequate warning. In the

alternative, it argues that it is entitled to a new trial or a remittitur because the jury's award of damages was excessive.

Section 4404(a) of the CPLR provides that "upon a motion of any party or on its own 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)

Ammco initially argues that the verdict must be set aside on the ground that it had no duty to warn about the dangers of asbestos in brakes manufactured by third parties because it had no role in placing these asbestos-containing brakes in the stream of commerce. Before the trial commenced, Ammco moved for summary judgment, arguing that under *Rastelli v. Goodyear Tire & Rubber Co,* 79 N.Y.2d 289 (1992), it had no duty to warn plaintiff about dangers from

asbestos-containing brakes produced and sold by third parties. The motion for summary judgment was denied by Justice Moulton before the trial commenced. The court found that Ammco fell far short of demonstrating that it should prevail as a matter of law based on evidence presented by plaintiff and plaintiff's testimony that he and other mechanics used Ammco's product to grind asbestos-containing brakes; that the machine generated dust when it was used; that defendant knew of the dangers of the dust created by its machine by the early 1970's; and that it created a new attachment to better collect the dust in 1975, which it referred to in some of its advertisements as an "asbestos dust collector". The court held that these "allegations create a triable issue of fact as to whether defendant is liable for failing to warn of the dangers of using its brake-arcing machine to grind asbestos-containing brake linings." The court distinguished *Rastelli* on the ground that the tire and rim in *Rastelli* were meant to operate in a complementary fashion where, in the instant case, "defendant's instrumentality was used to alter the composition of asbestos-containing products, and in doing so, it generated dust allegedly containing asbestos."

To the extent that Ammco is challenging the determination made by Judge Moulton denying its motion for summary judgment and rejecting the argument made by Ammco that there is no duty to warn as a matter of law and that this case should never have been sent for trial, its remedy is to appeal the denial of summary judgment.

With respect to Ammco's argument that the use of the term foreseeable in the jury charge was improper as it did not manufacture or sell asbestos products, the court finds that any argument that the use of the term foreseeable was improper is waived as defendant never objected to the use of the foreseeability language in the jury charge. *See* CPLR section 4110-b ("No party may assign as error the giving or the failure to give an instruction unless he objects

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