

2017 WL 4413042  
Supreme Court, Appellate Division,  
First Department, New York.

In re NEW YORK CITY ASBESTOS LITIGATION

Walter Miller, Plaintiff–Respondent,

v.

BMW of North America, LLC, et al., Defendants,

Hennessy Industries, Defendant–Appellant.

No. 4599.

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Index No. 190087/14.

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Oct. 5, 2017.

#### Attorneys and Law Firms

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for appellant.

The Karst & Von Oiste Law Firm, New York (Kyle A. Shamberg of counsel), for respondent.

#### Opinion

\*1 Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 13, 2016, after a jury trial, awarding plaintiff \$5 million for past pain and suffering and \$4 million for future pain and suffering, unanimously affirmed, without costs.

In this asbestos litigation arising from plaintiff's use of a grinder manufactured and designed by defendant

Hennessy Industries' subsidiary, Ammco, plaintiff's expert testimony was sufficient to establish that plaintiff's use of that grinder on automobile brake linings caused his exposure to asbestos dust in sufficient quantities to cause his mesothelioma (*see Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 808, 28 N.Y.S.3d 656, 48 N.E.3d 937 [2016]; *cf. Matter of New York City Asbestos Litig. [Juni]*, 148 A.D.3d 233, 236, 48 N.Y.S.3d 365 [1st Dept2017] ). Moreover, because the asbestos-laden dust was created by plaintiff's use of defendant's grinder and defendant knew its grinder would be used on asbestos-containing products, defendant had a duty to warn plaintiff of the latent danger arising from the foreseeable use of its product (*see e.g. Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297, 582 N.Y.S.2d 373, 591 N.E.2d 222 [1992] ).

We find the damages award, as reduced by the trial court and stipulated to by plaintiff, to be appropriate. Moreover, based on the evidence adduced at trial, the jury properly apportioned 86% of the fault to defendant (*see* CPLR art 16).

We have considered defendant's remaining arguments and find them unavailing.

ACOSTA, P.J., RENWICK, WEBBER, OING, MOULTON, JJ., concur.

#### All Citations

--- N.Y.S.3d ----, 2017 WL 4413042 (Mem), 2017 N.Y. Slip Op. 06982