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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5194-10T4

DENNIS MOHR,

Plaintiff-Respondent,

v.

YAMAHA MOTOR COMPANY, LTD., and
YAMAHA MOTOR CORP., U.S.A.,

Defendants/Third-Party
Plaintiffs-Appellants,

and

WOODY'S/INTERNATIONAL ENGINEERING
AND MANUFACTURING, INC.,
and HANOVER YAMAHA,

Defendants/Third-Party
Plaintiffs,

v.

RICHARD KENNEDY,

Third-Party Defendant.

Argued January 8, 2013 - Decided July 19, 2013

Before Judges Reisner, Yannotti and Harris.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2068-07.

Robert J. Kelly argued the cause for appellants (Littleton Joyce Ughetta Park & Kelly, attorneys; Mr. Kelly, Christen E. Moffa, Jason R. Schmitz, and Christine M. Delany, of counsel and on the brief).

Herbert M. Korn argued the cause for respondent (Herbert M. Korn, P.C., attorneys; Mr. Korn, Robert D. Westreich and William E. Reutelhuber, on the brief).

PER CURIAM

Defendants Yamaha Motor Company, Ltd. and Yamaha Motor Corp., U.S.A. (collectively, Yamaha)[1] appeal from a May 17, 2011 amended judgment, incorporating a May 6, 2011 judgment for approximately $2.5 million in favor of plaintiff Dennis Mohr.

Plaintiff suffered the loss of his right leg, after he lifted up the back of his friend's 1995 Yamaha snowmobile, in an effort to clear what he believed was a fouled spark plug. The snowmobile's track broke, striking and partially severing plaintiff's leg. As a result, the leg had to be amputated above the knee. Plaintiff filed a product liability suit against Yamaha, claiming that the snowmobile had a design defect and that Yamaha had failed to provide an adequate warning against lifting the machine while it was running. The jury found no cause on the design defect claim but found liability on the

[1] Yamaha Motor Company, Ltd. (YMC) is based in Japan. Yamaha Motor Corp., U.S.A. (YMCUSA) is YMC's U.S.-based affiliate.

issue of failure to warn.[2] The parties stipulated to $507,000 in medical expenses. The jury returned a verdict of $500,000 for lost wages and $100,000 for pain and suffering. On plaintiff's motion, the judge ordered a $900,000 additur or a new trial on damages for pain and suffering. Defendants rejected the additur. A second jury trial, limited to the pain and suffering issue, resulted in a verdict of $1.5 million.

On this appeal, defendants argue that: (a) the trial judge should have granted their motion for a new trial due to various errors, including the erroneous grant of a directed verdict on whether plaintiff's misuse of the snowmobile was objectively foreseeable; and (b) the judge erred in granting plaintiff's additur motion. Defendants do not challenge the $1.5 million pain and suffering award as excessive. Having reviewed the entire trial record, we find no merit in any of defendants' appellate arguments, and we affirm.

I

The essential facts are recited at length in the trial judge's October 25, 2010 oral opinion on the post-trial motions, and need not be repeated here in the same level of detail. We will further discuss the facts, where relevant, when we address

[2] Plaintiff did not cross-appeal on the design defect issue.

the legal issues. We provide the following summary as background.

At the time of the accident, plaintiff was a fifty-two year old high school graduate, who owned an excavating business. He had considerable experience operating heavy equipment. Due to his training, and the fact that he tended to buy used machines that did not come with owner's manuals, plaintiff typically did not rely on manuals to learn how to use equipment. However, if he had an owner's manual for a machine, he would use it as a reference guide when he had a problem with the machine. Some years before the accident, a friend had taught plaintiff to ride a snowmobile. When plaintiff bought his own snowmobile, he did not read the owner's manual.

On February 5, 2005, he was at the home of Richard Kennedy in upstate New York, for the purpose of riding snowmobiles with Kennedy and several other friends. Plaintiff stored his snowmobile at Kennedy's house, but on this day he borrowed one of Kennedy's machines, a 1995 Yamaha snowmobile, because plaintiff's snowmobile was not working. When plaintiff test drove the borrowed machine, he noticed it was hesitating and concluded that it had a fouled sparkplug. Kennedy suggested that they try to clear the plug by lifting up the machine and revving the engine, a procedure several witnesses testified was

a common practice among snowmobile owners. The snowmobile had a rear handle, placed there for the purpose of facilitating the lifting of the machine.

At Kennedy's direction, plaintiff stood to the left rear of the snowmobile, while Patrick O'Brien stood to the right rear, and each man grasped the rear handle. As they lifted the rear of the machine off the ground, Kennedy stood at the front and revved the engine a couple of times. The second or third time Kennedy revved the engine, the snowmobile's track broke, flew backward, and partly severed plaintiff's leg.[3]

There is no evidence in the record as to whether the owner's manual for the 1995 snowmobile was available on the day of the accident, either aboard the machine or in Kennedy's house. However, among a list of fifty warnings, the manual contained warnings against standing behind the snowmobile while the engine was running and against lifting the rear of the snowmobile while the engine was running. The machine itself contained a printed sticker, near the front windshield, warning users to read the owner's manual before using the machine and offering other advice. But the sticker did not warn against

[3] The track is a wide rubber, metal and fabric band located underneath the snowmobile, which controls its forward motion. When the engine is running, the track rotates from back to front under the snowmobile, moving the machine over the snow.

standing behind the machine or lifting it while the engine was running.

At trial, plaintiff presented expert testimony that the warnings in the owner's manual were inadequate, that a warning about the specific danger of lifting the machine while it was running should also have been placed on the machine near the rear handle, and that at least one other snowmobile manufacturer had placed such a warning on its machines. There was conflicting expert testimony about whether the snowmobile track had been properly maintained, whether it was in good or bad condition, and whether Kennedy had improperly placed studs on the snowmobile tracks.

As a result of his injury, plaintiff underwent multiple surgical procedures, but his leg could not be saved. Due to the loss of his leg and the medication required to treat his constant pain, plaintiff was no longer able to operate heavy equipment. He lost his business and his life savings, his usual recreational and household activities were curtailed, and he suffered ongoing severe pain that could only be mitigated with daily doses of narcotic drugs.

In completing the verdict sheet, the jury answered yes to questions one and two (whether the 1995 snowmobile "failed to contain an adequate warning or instruction" and "whether the

failure to adequately warn or instruct existed before the snowmobile left the control of defendant Yamaha"); question three (whether plaintiff was a "foreseeable user" of the machine); question four ("whether plaintiff would have followed an adequate warning or instruction if it had been provided"); and question five ("whether the failure to warn or instruct was a proximate cause of the accident").

The jury answered "no" to question six ("whether the snowmobile was defectively designed"); question 10 ("whether any of Richard Kennedy's actions was an intervening cause of the accident"); and question eleven ("whether plaintiff voluntarily and knowingly proceeded to encounter the danger of a broken track and debris when lifting the snowmobile by the rear bumper or grip handle with the engine running and the track spinning at an accelerated rate").

Before deliberating, the jury was told that plaintiff's medical expenses were $507,000, and that the judge would add that amount to any monetary award the jury returned. The jury returned a verdict of $500,000 for economic losses other than medical expenses, and $100,000 for pain and suffering. As noted previously, after defendants rejected the additur, a new trial was conducted, limited to plaintiff's claim for pain and

suffering damages. The jury awarded plaintiff $1.5 million on that claim.

II

We review a trial court's decision to grant or deny a new trial motion using the following standards:

> The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge -- whether there was a miscarriage of justice under the law. Bender v. Adelson, 187 N.J. 411, 435 (2006); Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 36-37 (App. Div. 1998). However, in deciding that issue, an appellate court must give "due deference" to the trial court's "feel of the case." Jastram v. Kruse, 197 N.J. 216, 230 (2008); see also R. 2:10-2; Carrino v. Novotny, 78 N.J. 355, 360 (1979).
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> [Risko v. Thompson Muller Auto. Group, Inc., 206 N.J. 506, 522 (2011).]

While we defer to the trial judge's feel for the evidence, we owe no special deference to the judge's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A motion for judgment at the close of the evidence, pursuant to Rule 4:40-1, is considered using the following standard:

> [W]hether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in * * * favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which

> supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.
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> [Dolson v. Anastasia, 55 N.J. 2, 6 (1969) (citations omitted).]

Thus, where a defendant in a product liability action presents no legally competent evidence on an issue and, in light of the plaintiff's evidence, reasonable minds could not differ on the issue, it is appropriate for the court to direct a verdict on that issue. See McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 82 (App. Div.), certif. denied, 196 N.J. 597 (2008), and appeal dismissed, 200 N.J. 267 (2009). On appeal, we employ the same standard as the trial court. Luczak v. Twp. of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998).

A.

Because the main issues in this case pertain to product liability, we next address those pertinent legal principles. The Product Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11, governs claims that a product is defective due to the

manufacturer's failure to provide an adequate warning. See Koruba v. Am. Honda Motor Co., Inc., 396 N.J. Super. 517, 524 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008). A product manufacturer "shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably . . . safe for its intended purpose because it: . . . b. failed to contain adequate warnings or instructions." N.J.S.A. 2A:58C-2(b).

On the other hand, a manufacturer can escape liability due to failure to warn, if the product contains "an adequate warning" or if the manufacturer later provides an adequate warning after learning of dangers the product presents:

> In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used. . . .

[N.J.S.A. 2A:58C-4 (emphasis added).]

Whether a warning is adequate "is to be evaluated in terms of what the manufacturer actually knew and what it should have known based on information that was reasonably available or obtainable and that should have alerted a reasonably prudent person to act." Butler v. PPG Ind., Inc., 201 N.J. Super. 558, 563 (App. Div.), certif. denied, 102 N.J. 298 (1985). "Although the [PLA] does not require that warnings be put in a particular place, in some circumstances, . . . the manufacturer's duty to warn may dictate placing safety warnings directly on the product itself." Koruba, supra, 396 N.J. Super. at 524 (citations omitted);[4] see also Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 402-03 (1982).

To prove that a product is dangerous and thus requires a warning, a plaintiff must address the issue of product misuse, either by proving that the product was not misused, or by proving that the misuse that occurred was foreseeable:

> [A] defendant may still be liable when a plaintiff misused the product, if the misuse was objectively foreseeable. Johansen v.

[4] Koruba involved the lack of a printed warning on an all-terrain vehicle (ATV) about the dangers of using the machine to perform jumps. However, in Koruba, the seller "read aloud" to the plaintiff all the warnings on the ATV's delivery checklist, including a direction to "NEVER attempt to do . . . jumps or other stunts," and required the plaintiff to initial the warning list. Id. at 521-22.

> Makita U.S.A., Inc., 128 N.J. 86, 95 (1992) (citing Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 177-78 (1978), overruled on other grounds by Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150 (1979). . . .
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> The absence of misuse is part of the plaintiff's case. Misuse is not an affirmative defense. Cepeda, supra, 76 N.J. at 177. Thus, the plaintiff has the burden of showing that there was no misuse or that the misuse was objectively foreseeable.
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> [Jurado v. W. Gear Works, 131 N.J. 375, 385-86 (1993) (emphasis added).]

See Ridenour v. Bat Em Out, 309 N.J. Super. 634, 643 (App. Div. 1998) (a warning was required when a patron's misuse of a change-making machine was "objectively foreseeable").

In this case, there was evidence that plaintiff misused the product by lifting up the snowmobile and standing behind it while the track was spinning. However, there was no genuine factual dispute that this type of misuse was objectively foreseeable and, therefore, was a danger presented by the product. See Brown v. United States Stove Co., 98 N.J. 155, 168-69 (1984) (the issue of "objective" foreseeability of misuse must be submitted to the jury "[i]f a factual issue exists"). Plaintiff presented overwhelming and unrebutted evidence on that issue. Defendants' brief does not even mention, much less attempt to explain away, the expert testimony that plaintiff presented. Notably, plaintiff presented Daniel Klemm, an expert

on the use and maintenance of snowmobiles, who testified that it is common practice for snowmobile users to attempt to clear fouled spark plugs or packed snow, by lifting the machine while it is running and the track is spinning. Klemm testified that he had personally observed the maneuver performed "thousands" of times.

Klemm explained that older snowmobile models had handles on the sides, enabling users to lift them while standing to the side of the machine, but the newer models had only one handle, attached to the rear. Plaintiff's engineering expert, Dr. Steven Batterman, also testified that the rear handle was "an invitation to lift" the machine and that lifting a running snowmobile from the rear was a "reasonably foreseeable use."[5] Patrick O'Brien, a lay witness with extensive snowmobiling experience, testified that it was "common" for snowmobile owners to lift snowmobiles from the rear to clear the spark plugs or to clear debris from the tracks. Defendants did not introduce any legally competent evidence on the foreseeability issue.[6] In

[5] Batterman also testified that the snowmobile should have been designed with a switch that would prevent the engine from running while the rear of the machine was lifted off the ground. The jury evidently did not credit that testimony because it rejected plaintiff's claim of a design defect.

[6] Osamu Sano, the YMC employee in charge of creating the owner's manual, testified briefly that YMC did not know, in 1994, that (continued)

fact, in a colloquy with the court on the first day of the trial, defendants' attorney essentially conceded that plaintiff's misuse was foreseeable, and the judge restated his understanding that "as Yamaha's counsel now states, there is no contention that this particular hazard or risk was not foreseeable."

Having reviewed the record, which is completely one-sided on this point, we conclude that reasonable minds could not differ on the issue of objective foreseeability. Dolson, supra, 55 N.J. at 6. Hence, at the close of all the evidence, the trial judge properly directed a verdict on the issue of whether plaintiff's misuse of the snowmobile was foreseeable. That ruling correctly allowed the jury to focus on the central issue in the trial, which was whether the warning defendants provided about that particular danger was adequate, i.e., whether it was sufficient to place a warning in the owner's manual or whether a warning should have been affixed to the back of the snowmobile.

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users in the United States routinely lifted up the rear of their snowmobiles while the engines were running. He based that testimony on reports of product research performed by YMCUSA in the United States. However he claimed that YMC destroyed all of those product research reports as soon as the owner's manual was created. As a result, even if the reports could be deemed business records, his testimony about the alleged content of the reports was hearsay.

Whether the average snowmobile user would be likely to read and remember a warning in a manual, as opposed to a warning affixed to the product, is certainly a factor in considering the adequacy of the warning. See N.J.S.A. 2A:58C-4. Plaintiff amply addressed that issue, and defendants provided relatively little to rebut plaintiff's evidence. Instead of addressing the sufficiency of the warning, defendants' appellate argument repeatedly conflates that issue with what they characterize as plaintiff's "misuse" of the product by failing to read the manual. Contrary to defendants' contention, in a failure-to-warn case, a plaintiff's failure to read a product manual, alleged to constitute an inadequate warning, is not relevant to the underlying issue of whether the dangerous use to which the plaintiff put the product was objectively foreseeable. See Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 589-90 (App. Div.), certif. denied, 136 N.J. 295 (1994). Rather, a plaintiff's failure to read the warnings in a product manual is relevant to the "heeding presumption," that is, the presumption that if the defendant had provided an adequate warning about the danger, the plaintiff would have heeded it. See Coffman, supra, 133 N.J. at 603-04; Dixon, supra, 270 N.J. Super. at 590.

Defendants rely on Lewis v. American Cyanamid Co., 155 N.J. 544 (1998), for the proposition that plaintiff must prove that

the entire scenario that occurred in this case was foreseeable "despite the presence of warnings cautioning against such misuse." Id. at 564. However, Lewis did not involve an allegedly inadequate warning. The warning in that case was affixed to the product and was quite specific. The defendants claimed that "the presence of warnings should insulate defendants from liability" against a design defect claim. Id. at 563-64. The quoted language ("despite the presence of warnings") was part of the Court's explanation as to why the presence of a warning is not a defense in a design defect case.[7]

Given that the snowmobile had a handle attached to the back to facilitate lifting; the danger posed by lifting up a running snowmobile; Yamaha's admitted knowledge that "tracks could fail when the rear [of the snowmobile] was lifted and the track was accelerated"; the foreseeability of users engaging in that maneuver; and the expert testimony about the frequency with which consumers fail to read owner's manuals, it is not

[7] Lewis was burned when he returned to check on an insecticide fogger after a few minutes, when the instructions on the package warned not to return for at least two hours. He claimed the product was defectively designed. In that context, the Court held that placing a warning on a product would not insulate a manufacturer against a claim of design defect. Ibid.; see also O'Brien v. Muskin Corp., 94 N.J. 169, 186 (1983) (rejecting the "hypothesis" that "manufacturers, merely by placing warnings on their [defectively designed] products, could insulate themselves from liability regardless of the number of people those products maim or kill").

surprising that the jury found that Yamaha provided an inadequate warning.

Defendants also raise multiple issues about why the track broke (e.g., Kennedy's alleged poor maintenance and improper studding of the track, and the track's cracked condition). However, those issues are red herrings. They simply illustrate reasons why a spinning track may break and, hence, why it is dangerous to lift a running snowmobile and why defendants should have affixed a warning to the back of the machine.

A consumer's modification of the product will not defeat strict liability unless it was the sole proximate cause of the accident. The manufacturer remains liable if the product defect was "a . . . contributing proximate cause" of the accident, Soler v. Castmaster, 98 N.J. 137, 149 (1984), or if the modification was "foreseeable." Id. at 151. In a failure to warn case, we held:

> Where the original defect [inadequate warning], although not the sole cause of the accident, constitutes a contributing or concurrent proximate cause in conjunction with the subsequent conduct of the purchaser, the manufacturer remains liable. In order to exculpate itself, the manufacturer must prove an intervening superseding cause or perhaps some other sole proximate cause of the injury.
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> [Butler, supra, 201 N.J. Super. at 563-64 (citations omitted).]

There was no dispute on this record that defendants knew consumers installed studs on their snowmobile tracks. Kennedy's modification of the track was therefore foreseeable and did not relieve defendants of the duty to provide a warning about the dangers of lifting the snowmobile while it was running. Further, the jury answered "no" when asked whether any of Kennedy's actions constituted an intervening superseding cause of the accident.[8]

That determination was consistent with Klemm's testimony that the track was not improperly studded and was not visibly defective. Klemm opined that, even if he had inspected the track just before the accident, he would not have replaced it. Klemm also explained that the multiple "pre-ride" inspection steps recommended in the Yamaha owner's manual would take two hours to accomplish and that, in the real world, owners perform those steps once a year during a pre-season inspection rather than before every ride. Defendants presented expert evidence to

[8] The trial judge declined to submit to the jury the separate question of whether the studding of the track caused the accident. We agree with the trial judge that defendants' snowmobile expert, Breen, did not testify that the improper studding caused the track to break. See Soler, supra, 98 N.J. at 149-51. However, without objection, defense counsel argued to the jury in summation that Kennedy's improper studding of the track was one of the causes of the accident.

the contrary. It was for the jury to decide which experts to believe.

Defendants also contend there is no evidence that, had there been a warning on the rear of the snowmobile, plaintiff would have heeded it. See Coffman, supra, 133 N.J. at 602-03. That argument is based on a distortion of the record. Contrary to defendants' argument, plaintiff did not testify that he never read owner's manuals or that he ignored warning labels on machinery. Rather, he testified that he used owner's manuals as reference documents, and read them when dealing with specific problems with his machines. He also testified that he did read the warning labels on the heavy equipment that he used. He testified that, had there been a warning label on the back of the snowmobile, cautioning against lifting it while the engine was running, he would have read the warning and heeded it. Moreover, as previously noted, neither side presented testimony as to whether the owner's manual for the borrowed snowmobile was even available to plaintiff on the day of the accident, either stored in the machine or in Kennedy's house.

B.

We likewise find no merit in defendants' argument that a new trial was warranted because plaintiff's expert, Kenneth R. Laughery, rendered a net opinion. See Scully v. Fitzgerald, 179

N.J. 114, 129 (2004). We review a trial judge's decision to admit expert testimony for abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). We find none here.

Laughery had extensive experience, both academic and practical, in the field of product warnings. He explained in detail why it was not necessary to have expertise specific to snowmobiles in order to determine what warnings were needed to alert users to the possible dangers of using those machines.

Laughery testified, based on his own original research, that fewer than five percent of consumers read owner's manuals in their entirety; rather, most consumers consult the manuals with respect to specific issues. He opined that the handle on the back of a snowmobile was an invitation to lift the machine from the rear,[9] and he considered evidence that it was common practice to lift a machine from the rear, while it was running, in order to clear obstructions. Given the risk of severe injury from that activity, he opined that a warning in an owner's manual was inadequate, particularly when it was one of fifty other warnings in the manual.[10] Hence, a general instruction on

[9] The Yamaha project leader who helped design the snowmobile admitted that the purpose of the handle was to enable the user to lift the rear of the snowmobile.

[10] Laughery noted, on cross-examination, that it would not be reasonable to expect plaintiff, upon borrowing the snowmobile (continued)

the machine's dashboard, directing users to read the owner's manual, was inadequate. Instead, he explained why it was necessary to place a specific warning on the snowmobile, on the rear near the handle. Laughery also opined that a warning label should have briefly and clearly explained the risk that the track would break and cause serious injury.

Based on his review of plaintiff's deposition testimony, stating that he paid attention to warning stickers on machines he was using, Laughery opined that plaintiff would have noticed and heeded a warning label at the back of the snowmobile. Contrary to defendants' argument, the record contained legally competent factual evidence to support that opinion. Laughery pointed out that plaintiff did not testify that he never read owner's manuals. Plaintiff testified that he did not read owner's manuals from cover to cover, but rather used them as reference guides with respect to specific issues. In that respect, plaintiff was similar to the vast majority of consumers, according to Laughery's research. Plaintiff also

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from Kennedy, to have first read "that 96-page manual and the 50 warnings that were in it. . . . I mean, that's not the way the world works." He further explained that even if consumers read the entire manual right after buying a snowmobile, there was little chance that they would remember all fifty warnings "two years downstream when they're using" the snowmobile. Nor could they be expected to re-read the manual every time they used the machine.

testified that he would have seen and followed a warning label on the back of the snowmobile.[11] Hence, Laughery's testimony as to the effectiveness of the proposed warning was not a net opinion.

Laughery further testified that the danger posed by the spinning track was not open or obvious to a user, thus making it even more important to put a warning label on the product. That opinion was within his general area of expertise concerning ergonomics, human factors, and warnings, even if he was not an expert on snowmobiles. He did not render a net opinion. Moreover, even if it was error to permit that testimony, we conclude it was harmless. The defense played a video for the jury depicting a snowmobile running while lifted from the rear. The jury had the opportunity to see and hear the snowmobile and to decide for itself whether the danger was open and obvious.

Defendants' further arguments on the warning issue are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

III

Defendants' arguments on the issues of additur and a new trial are likewise without merit. During the trial, defense

[11] O'Brien, who lifted the snowmobile with plaintiff, likewise testified that he would have read and heeded a warning affixed to the back of the snowmobile, had there been one.

counsel did not cross-examine any of plaintiff's witnesses on the issue of pain and suffering and the defense presented no witnesses on damages.[12] In arguing the post-trial motions, defense counsel did not explain how $100,000 could possibly be an adequate pain and suffering award in this case. Rather, as the trial judge accurately noted, defendants essentially conceded that the pain and suffering award was inadequate. They argued that the inadequacy was proof of a compromise verdict on liability and thus should be the basis for a new trial on all issues. Because defendants are raising issues on appeal that they did not present to the trial court, we need not consider them. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973). However, even if we consider their contentions, they are without merit.

Based on our review of the record, in light of the deference we owe to the trial judge's feel for the case, we find that the award of $100,000 for pain and suffering was so low as to shock the judicial conscience.[13] See He v. Miller, 207 N.J.

[12] The defense likewise presented no witnesses at the re-trial on damages.

[13] In support of his motion, plaintiff submitted reports of verdicts and settlements in other cases involving the loss of a leg. After a detailed discussion of the evidence in this case, the judge carefully considered each report and explained why he (continued)

230, 254-55 (2011); Kozma v. Starbucks Coffee Co., 412 N.J. Super. 319, 325 (App. Div. 2010). We affirm the judge's decision on this issue and on the new trial motion, substantially for the reasons he placed on the record on October 25, 2010. We add the following comments.

Plaintiff lost his leg after suffering a horrifying wound. He described the intense burning pain of the injury as similar to placing his leg in a furnace. Moreover, both plaintiff and his testifying expert explained the "phantom pain" that plaintiff suffers. His medical expert explained the basis of "phantom pain," where due to nerve damage a patient feels as though he has pain in his foot and leg even though they have been amputated. Plaintiff takes synthetic morphine and an anti-seizure drug daily for the pain. The side-effects of the medication cause him to suffer cold sweats and clouded thinking, and prevent him from working. As a result, plaintiff lost all of his life savings, lost his excavation business, and could no longer operate heavy equipment, an activity that had been one of the great joys of his life.

Further, plaintiff testified that, without the daily doses of synthetic morphine, he experiences severe pain, equivalent to

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did not find it helpful in this case. We find no basis to second-guess his decision not to consider the reports.

the pain caused by the original injury. He also experiences "breakthrough" pain when he engages in any significant physical exertion, such as mowing the lawn. Plaintiff takes non-synthetic morphine for "breakthrough" pain when the synthetic morphine and the anti-seizure drug do not work. He testified that this happens with increasing frequency.

In short, plaintiff lost a limb, was rendered unemployed and disabled for life, and will suffer lifelong pain that renders him dependent on narcotic painkillers. We agree that $100,000 was a shockingly inadequate award for his pain and suffering. We find no abuse of the trial judge's discretion in granting the additur motion. We also agree that a new trial on damages-only was appropriate. A new trial on all issues was not required. See Fertile v. St. Michael's Med. Ctr., 169 N.J. 481, 498-99 (2001) ("[T]here is no logical reason why the size of a damages award, standing alone, should invalidate an otherwise sound liability verdict."). Defendants' arguments do not warrant further discussion. See R. 2:11-3(e)(1)(E).

Affirmed.