

<b>Cavalieri v A.O. Smith Water Prods. Co.</b>
2018 NY Slip Op 34298(U)
March 15, 2018
Supreme Court, Erie County
Docket Number: Index No. 814293/2016
Judge: Deborah A. Chimes
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At a Civil Special Term, Part 33, of  
the Supreme Court, held in and for  
the County of Erie, State of New  
York, on the 15 day of March 2018

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT : STATE OF NEW YORK  
EIGHTH JUDICIAL DISTRICT

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In Re: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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SUSAN CAVALIERI and ANTHONY CAVALIERI,

Plaintiffs

vs.

DECISION AND ORDER  
Index No. 814293/2016

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

Defendants

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Defendant A.O. Smith Water Products Co. (A.O. Smith), a boiler manufacturer moves for summary judgment pursuant to CPLR §3212.

In support of its motion, A. O. Smith submitted its Notice of Motion dated October 31, 2107, the Affirmation of Counsel in Support of Christopher B. Bladel, Esq., with attached exhibits, dated October 31, 2017.

In opposition to defendant A.O. Smith's motion, plaintiffs submitted the Affirmation in Opposition of Matthew Tarasoff, Esq., with attached exhibits, dated November 10, 2017.

Plaintiff Susan Cavalieri is 62 years old and suffers from mesothelioma, caused, plaintiffs claim, by exposure to asbestos brought into her home on her husband, Anthony Cavalieri's, person and clothing.

Plaintiffs allege that Anthony Cavalieri was exposed to asbestos when he worked as a plumber for Sal's Plumbing and Heating Service in Buffalo from 1982-1986.

Defendant contends that Anthony Cavalieri's deposition testimony shows that the only reason that he removed boiler covers (also called jackets) which resulted in his exposure to asbestos insulation, was so that metal from the boilers could be scrapped. Based on its view of the testimony, defendant moves for summary judgment, contending that Appellate Division, First Department decision, *Hockler v The William Powell Co.*, 129 AD3d 463 (2015) relieves it of liability and mandates dismissal of this action against it.

In *Hockler*, plaintiff alleged that he was injured when exposed to asbestos-containing valves manufactured by defendant The William Powell Company (Powell) (*id.*, at 464). Plaintiff was working in vacant buildings, dismantling and salvaging metal from steam systems, at the time of his exposure.

*Hockler* reversed the trial court's denial of summary judgment to Powell. It based its decision on §402 A of the Restatement (Second) of Torts, and three out- of- state cases: *Wingett v Teledyne Indus., Inc.* (479 NE2d 51 [Ind 1985], *overruled on other grounds Douglass v Irvin*, 549 NE2d 368 [Ind 1990]) ; *High v Westinghouse Elec. Corp.* (610 So 2d 1259 [Fla 1992]

;and *Kalik v Allis- Chalmers Corp.* (658 F Supp 631 [WD Pa 1987]).<sup>1</sup>

*Hockler*' s analysis began with the proposition that " 'A manufacturer who sells a product in a defective condition is liable for injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose' , *Lugo v LNJ Toys* , 75 NY2d 850, 852 (1990) "

(*id.* at 464) However, the court found that plaintiff's salvage work was not a "reasonably foreseeable use" of Powell's valves, adopting the holding in *Winget* (*id.* at 464-465). Next, following *High*, the court found that "dismantling is not an intended use of a product" and that "dismantling and processing ... was not a reasonably foreseeable use" of the manufacturers' products, adopting *Kalik*. The court concluded that the complaint, sounding in strict liability and negligence, should have been dismissed, because plaintiff did not use the valves "...in a reasonably foreseeable manner and his salvage work was not an intended use of the product..." (*id.* at 465).

Plaintiffs assert that this case is totally distinguishable from *Hockler*. In addition, plaintiffs contend that *Hockler* should be restricted to its peculiar facts. Finally, they assert that in accordance with established precedent, disassembly and removal of boilers and other asbestos-containing products

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<sup>1</sup> The court explained its reliance upon 402A of the Restatement (Second) of Torts, although it has been superseded by the Restatement (Third) of Products Liability: " ... because it had been cited by other courts in determining whether salvaging and demolishing constitute foreseeable uses of a product" (*Hockler* at 464.) The court also noted that Restatement (Second) of Torts § 402A had been cited by the Court of Appeals in *Sprung v MTR Ravensburg*,( 99 NY2d 468, 473 [2003]) after it had been superseded.

as performed by plaintiff husband constitutes a foreseeable and intended use.

This court agrees that *Hockler* is inapplicable here.

In *Smith v A.O. Smith Water Products Co.* 2015 WL 5703100 (Sup Ct, NY County, September 25, 2015), plaintiff alleged injury from exposure to asbestos from boilers. Defendant boiler maker, Cleaver-Brooks, Inc. sought summary judgment in light of *Hockler*. Judge Heitler, who had decided the motion later reversed in *Hockler*, wrote:

"I agree that by its very language *Hockler* is framed narrowly to shield product manufacturers from product liability claims brought by salvage workers whose interactions with their products are entirely unrelated to their intended use and functionality. While the First Department may have framed the issue broadly, i.e., 'whether dismantling constitutes a reasonably foreseeable use of a product,' its definitive holding was unmistakably limited, that "plaintiffs salvage work was not a reasonably foreseeable use of the valves manufactured by Powell'. *Hockler*, 129 AD3d at 464-65 (emphasis added). At no point did the appellate court pronounce that plaintiffs who disassemble products during routine maintenance or in connection with renovations cannot recover from product manufacturers in strict liability".

The court observed that plaintiff, a plumber, disassembled and removed boilers in order to replace them and restore heating systems' function. In contrast to the plaintiff in *Hockler*, Smith was a skilled worker, not a salvager, carefully using plumber's tools with the boilers, rather than "ripping, cutting, breaking and smashing" the product as did the plaintiff in *Hockler*. The Judge wrote "I believe that the First Department intended for

*Hockler* to affect the claims of salvage workers only".<sup>2</sup> The court held that whether plaintiff's exposure to asbestos from defendant's boilers was foreseeable presented a triable issue of fact and denied the motion.

In *Harrison v A.O. Smith Corp.*, 2016 WL 540701 (Sup Ct, NY County, February 11, 2016), the court, like the court in *Smith*, read *Hockler* narrowly. Plaintiff was a day laborer engaged in commercial and residential construction and demolition. He alleged injury from exposure to asbestos from valves "ripped out" during demolition. In denying summary judgment to defendant valve manufacturer, the court held that *Hockler* did not stand for the proposition that all demolition activities were unforeseeable, its holding should be limited to use of valves by a salvager who demolished them. The court noted that *High* and *Kalik*, relied on in *Hockler*, both involved salvage work.

Defendant fails to consider the entirety of Anthony Cavalieri's testimony. A review of the testimony shows there is no distinction between plaintiff husband's work and that of the plaintiff-plumber in *Smith*. Further, his work was unlike that of the plaintiff in *Hockler*. Plaintiff husband worked for Sal's Plumbing and heating which was in the business that its name indicated(tr at 67<sup>3</sup>). Part of his work, in furtherance of that business, was to

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<sup>2</sup> Citing testimony from defendants's corporate representatives, the court also found that defendant knew that its boilers had limited lifespans, and would be removed and replaced, that asbestos "would likely be disturbed" if the boilers were removed in more than one piece.


<sup>3</sup> References are to the deposition transcript of Anthony Cavalieri, taken June 6 and 7, 2017, Ex. D to the Affirmation of Christopher B. Bladel, Esq.

replace existing boilers with new ones. (tr at 153, 178-179, 278) . He stated that he tore down existing boilers "to get them out of the room." (tr at 78). It was in connection to that work at both commercial and residential properties that plaintiff husband alleged exposure to asbestos from the disassembly of boilers, including A.O. Smith boilers. (tr at 80-81; 161-164; 166; 169-170; 178-179; 190-201.) In addition, plaintiff testified that he used hand tools, including wrenches in disassembly of the boilers. (tr at 165).

*Hockler* does not bar the relief sought herein. The facts here "do not fit within the narrow framework articulated by the First Department in *Hockler*" (*Harrison*). Anthony Cavalieri was in no sense a salvager. The motion is denied.

SO ORDERED

DATED: Buffalo, New York  
March 15, 2018

  
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**HON. DEBORAH A. CHIMES**  
Justice of the Supreme Court