

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 25, 2005

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Buckley, P.J., Mazzairelli, Ellerin, Williams, Sweeny, JJ.

5523-

5524

In re: New York City Asbestos
Litigation

Index 107416/04

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Theodore Klopsis, et al.,
Plaintiffs-Respondents,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

The Goodyear Tire & Rubber Company,
Defendant-Appellant.

Flemming, Zulack & Williamson, LLP, New York (Cathi A. Hession of
counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Stephen J. Riegel of counsel),
for respondents.

Order, Supreme Court, New York County (Helen E. Freedman,
J.), entered on or about August 25, 2004, which denied defendant
Goodyear's motion for summary judgment, and order, same court and
Justice, entered November 22, 2004, which granted Goodyear's
motion to reargue but adhered to the prior ruling, unanimously
reversed, on the law, without costs, the motion granted and the
complaint dismissed as against Goodyear. The Clerk is directed

to enter judgment in favor of Goodyear dismissing the complaint as against it.

The motion court's decision rested solely on testimony by a deponent who has since died, in a case to which Goodyear was not a party (see CPLR 3117[a][3][I]). Evidence that would not be admissible at trial may be considered in opposition to a summary judgment motion only "as long as it does not become the sole basis for the court's determination" (see *Oken v A.C. & S. [Robert A. Keasbey Co.]*, 7 AD3d 285 [2004]).

The Decision and Order of this Court entered herein on March 3, 2005 is hereby recalled and vacated (see M-1526 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 25, 2005

Catherine O'Hagan Wolfe

CLERK