1985 WL 669318 (U.S.) (Appellate Brief)
Supreme Court of the United States.

THE CELOTEX CORPORATION, Petitioner,
v.
Myrtle Nell CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased, Respondent.

No. 85-198.
October Term, 1985.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Respondent

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***i** QUESTIONS PRESENTED

1. Whether a plaintiff who has pleaded a valid tort claim must come forward with admissible evidence supporting her claim in response to a summary judgment motion that is legally deficient on its face because the only undisputed fact even asserted in the motion provides no legal basis for a judgment for the defendant.

2. Whether a plaintiff who has pleaded a valid tort claim and identified relevant evidence she plans to introduce at trial can be required to submit admissible evidence in her response to a summary judgment motion by the defendant that merely repeats the general denials already set out in the answer to the complaint and is based on no evidence whatever.

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*1 STATEMENT OF THE CASE

This is a wrongful death and survival action brought by the widow of an asbestos worker who died in 1979 of a form of cancer known as mesothelioma, which is caused by inhalation of asbestos fibers. The lawsuit was filed in the United States District Court for the District of Columbia on September 2, 1980, against a group of fifteen original defendants--all of them manufacturers of asbestos insulation products.1 The sole issue raised ***2** here is the validity of a summary judgment granted to one of those defendants, petitioner The Celotex Corporation.2

The essential facts can be quickly summarized. The district court granted summary judgment after finding that respondent had failed to make an adequate showing of the decedent's exposure to Celotex products. J.A. 217. At the time of this ruling, respondent had indicated that one of her witnesses at trial would be Mr. T.R. Hoff, an employee of the Anning-Johnson Company in Illinois. She had previously submitted to counsel and the court a letter from Mr. Hoff stating that the decedent worked directly with an asbestos product made by Celotex's predecessor corporation, while he was employed at Anning-Johnson in 1971-72. J.A. 162, 197. This same specific allegation was further corroborated by two other hearsay documents filed by respondent, including a deposition of the decedent himself taken in a prior case. J.A. 164, 195. Finally, the record contained sales records, produced by Celotex, which reflected sales to Anning-Johnson of the relevant asbestos products during the relevant time period by a division of petitioner's predecessor company.3 Petitioner, although aware of these specific allegations and documents, made no effort in its summary judgment motion to produce evidence undermining ***3** or contesting respondent's proposed trial case. Nevertheless, the court granted summary judgment for petitioner, based on the

apparent assumption that respondent had a duty to respond to this unsupported summary judgment motion with "admissible" evidence, such as affidavits from potential witnesses.

In order to place these key facts in proper context, it is useful to review the pretrial proceedings in some detail. According to the complaint, respondent's decedent, Louis Catrett, used asbestos insulation products in all of his work during the period 1957-72.4 J.A. 11. During this time, he was employed by more than a dozen different construction companies, both in the Washington area and around the country, J.A. 31-34, and used a wide variety of different insulation materials. The result was a lawsuit in which the evidence of each defendant's liability was necessarily complex and could not be fully marshalled without a substantial period of pretrial discovery.

During the first four months following the filing of the lawsuit, the defendants, including Celotex, answered the complaint and served a total of nine separate sets of interrogatories and seven requests for production of documents. Respondent then moved for a protective order pursuant to Fed. R. Civ. P. 26(c), asking the court to require that the defendants' discovery begin with a set of joint interrogatories and a joint document request. On February 3, 1981, the court entered an order requiring the defendants to begin their discovery with a joint set of interrogatories.5 The joint interrogatories ***4** were served on February 13, 1981, and, after several extensions of time agreed to by the defendants, J.A. 71-72, were duly answered by respondent on June 29, 1981, J.A. 24.

In these interrogatories, the defendants had asked respondent to identify every person who might have knowledge of the relevant facts, J.A. 50-51 (Interrogatory 26), and give a comprehensive history of Mr. Catrett's exposure to asbestos, including the location of each exposure, the type of product used, the persons supervising the job, any safety devices used, and a variety of other matters, J.A. 62-63 (Interrogatory 51). Because respondent did not yet have the information required to answer all of these questions fully, she promised to supply the requested material when it was available. In this initial answer she did, however, include a complete employment history for Mr. Catrett. J.A. 27-34. In response, the defendants on July 27, 1981 filed a motion to compel discovery or, in the alternative, to dismiss the case. J.A. 64. This motion was never acted on by the district court.

In the ensuing six months, as respondent was attempting to complete preparation of her evidence, she was served with twelve individual sets of interrogatories, and twelve motions for summary judgment. Petitioner Celotex filed such a motion on September 28, 1981, complaining in part that it had not received a response to its own interrogatories, and arguing that respondent had produced no evidence to show the liability of Celotex. J.A. 73. On October 20, respondent answered this motion in several ways. First, she pointed out that no such Celotex interrogatories had ever been served. J.A. ***5** 135-36. Second, she argued that petitioner had failed to offer any evidence to support its motion and that it was unfair, while discovery was still proceeding, to expect her to answer such a motion with admissible evidence of her own. J.A. 141-42. Finally, she submitted the three documents mentioned above, all of which indicated that Mr. Catrett was exposed to Celotex insulation products during the period 1971-72, while employed by the Anning-Johnson Company of Illinois. These documents were (1) a letter to counsel from Anning-Johnson's insurance company indicating that such exposure occurred, J.A. 160, (2) a letter to the same insurer from the Anning-Johnson employee, T.R. Hoff, describing the same facts, J.A. 162, and (3) a deposition of Mr. Catrett taken in a prior workers compensation proceeding against Anning-Johnson, J.A. 164.6

Apparently because of its oversight in failing to serve interrogatories, petitioner withdrew this summary judgment motion on November 9, 1981. It then served interrogatories on November 24, 1981. There followed a December 4 status conference, in which counsel for petitioner indicated that, on the basis of the information produced by respondent, it had investigated Mr. Catrett's exposure to Celotex products while at Anning-Johnson. Counsel represented that Mr. Catrett did indeed use Celotex products during 1971-72, but that he had been advised that the product was "completely enclosed" and thus could not have contributed to Mr. Catrett's disease.7 ***6** He further indicated that he would present evidence of this contention in a renewed motion for summary judgment.8

There followed two motions by petitioner. First, on December 14, 1981, Celotex moved for a change of venue to Chicago, based on the fact that respondent was relying on exposure to its products during 1971-72, when Mr. Catrett worked in Illinois for Anning-Johnson.9 Attached to this motion were sales records confirming that the asbestos insulation products allegedly used by Mr. Catrett were in fact sold to Anning-Johnson during the relevant period by "Carey Canadian Asbestos, A Division of Panacon Corporation."10 Celotex had previously admitted that it had assumed the liabilities of Panacon when that company was merged into Celotex in 1972.11

On December 23, petitioner filed its promised second summary judgment motion. In this motion, it first asserted that respondent was delinquent in responding to petitioner's interrogatories.12 Then, without submitting any evidence of its own, Celotex argued that summary ***7** judgment was proper because *respondent* had failed to produce sufficient evidence of exposure to the company's products. In so arguing, however, petitioner explicitly based its motion on the premise that respondent was required to show exposure *in the District of Columbia.* Its motion asserted only that respondent had failed to produce evidence that a Celotex product "was the proximate cause of the injuries alleged within the jurisdictional limits of this Court." J.A. 170.13 Significantly, petitioner omitted any discussion whatever of its own investigation of Mr. Catrett's exposure to its products while at Anning-Johnson. It did not deny that it had sold products to Anning-Johnson during the relevant time period.14 And, contrary to the representations made by counsel just nineteen days earlier, it offered no evidence or assertion that the product involved was sufficiently "enclosed" to avoid any inhalation of asbestos fibers.

In a response to this second summary judgment motion, dated January 4, 1982, respondent again argued that Celotex had a duty to come forward first with some evidence supporting its denials of liability. J.A. 190-91. She also pointed out that exposure in Washington, D.C. was not the legally dispositive question and therefore ***8** simply was not a relevant issue on a motion for summary judgment. J.A. 191-92. Finally, she again attached the aforementioned letters and deposition transcript describing the decedent's exposure to Celotex products while at Anning-Johnson.

Less than a month later, respondent made two additional filings. On February 1, 1982, she filed supplemental answers to defendants' interrogatories in which she designated several trial witnesses--including T.R. Hoff, the Anning-Johnson employee whose letter was already in the record. J.A. 201. Two days later, she made specific reference to this designation of Mr. Hoff in her brief in opposition to the Celotex venue motion.15

Nearly six months then went by before the district court held a hearing on the venue and summary judgment motions on July 21, 1982. At this hearing, counsel for petitioner continued to focus primarily on the absence of evidence of exposure in the District of Columbia. J.A. 211-14. For the first time, however, he commented in passing on the broader issue that was not raised in his written motion for summary judgment: whether the decedent had been exposed to Celotex products *outside* the District. He argued that the letters and deposition were inadmissible hearsay, and thus could not be used to establish exposure to Celotex products by the decedent. J.A. 212-13.

In response, counsel for respondent made reference to the sales records produced by Celotex, as one more indication of the substantial nature of the claims against that company. J.A. 214. Thereafter, although the district ***9** court's questions focused exclusively on whether there was evidence of exposure in D.C., the court nevertheless concluded that there was "no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere,*" J.A. 217 (emphasis added), and granted summary judgment for petitioner on that basis. In so ruling, the court apparently accepted petitioner's argument that the documents submitted by respondent were irrelevant because they would not, themselves, be admissible at trial.

Respondent appealed, and the United States Court of Appeals for the District of Columbia Circuit reversed. The majority concluded that the "defendant's moving papers were patently defective on their face, rendering inappropriate the grant of summary judgment on the record as it stood before the District Court." J.A. 223. Citing a long line of cases, the court held that petitioner was obligated to come forward with some form of evidentiary showing before it could shift the burden to respondent to produce admissible evidence of its liability. The court recognized that it is sometimes difficult for defendants to offer evidence to "prove a negative," J.A. 224, but suggested implicitly that the appropriate showing in such a case is an evidentiary attack on the *plaintiff's* proposed trial case, as revealed in discovery.16 Here, the court noted, the plaintiff had produced evidence (albeit perhaps inadmissible itself) that indicated to the defendants the particular facts that she was seeking to prove at trial. Yet the defendant did nothing to dispute, through its own affidavits or discovery, the validity of this proposed factual showing. As a result, the plaintiff had no obligation to come forward with any affidavits or evidence of her own.

***10** Judge Bork dissented. In his view, when a defendant makes a motion for summary judgment and simply argues that the plaintiff lacks the evidence required to prove the case, it is reasonable to expect the plaintiff to produce admissible evidence of liability. There should be no requirement of a prior evidentiary showing by the defendant, he stated, because summary judgment is analogous to a directed verdict, which a defendant may win at trial simply by pointing to the inadequacy of the

plaintiff's case. J.A. 235-37. Judge Bork also concluded that the production of inadmissible evidence in response to such a summary judgment motion should not be enough to allow the plaintiff to proceed to trial. J.A. 241-42.

The court of appeals denied a petition for rehearing *en banc* on May 7, 1985.

SUMMARY OF ARGUMENT

Petitioner's motion for summary judgment clearly was not sufficient to create any duty on the part of respondent to submit an evidentiary response in order to preserve her right to a trial on her claim. As a result, the court below was correct in holding that the admissibility of the three documents submitted by respondent in her opposition to the motion was irrelevant. Respondent need not have filed any documents at all.

First, the motion only asserted one undisputed fact: the decedent's lack of exposure to Celotex asbestos products *in the District of Columbia.* While accurate, this assertion provided no legal basis for a judgment in favor of petitioner. Respondent's claim was based on alleged exposures outside the District, and petitioner did not, and could not, show that these allegations were somehow immaterial as a matter of law. As a result, the motion was legally deficient on its face.

Second, even assuming that petitioner had denied in its motion the decedent's exposure to Celotex products in any ***11** locale, respondent still would not have been required to submit an evidentiary response. By the time of this motion, respondent had told petitioner the specific facts that she planned to prove at trial, as well as the name of an employee with knowledge of these facts. Celotex itself had produced sales records corroborating these allegations. Soon thereafter, respondent designated this same employee as a witness for trial. Yet petitioner in its motion presented no evidence whatsoever to show its lack of responsibility for the decedent's injuries or to undermine the prospective trial case outlined by respondent.

In such circumstances, Rule 56, Fed. R. Civ. P., imposes no obligation on the nonmoving party to respond in any way, because the summary judgment motion itself fails to show the absence of a material dispute of fact. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). A defendant cannot, simply by repeating the general denials of its answer in a motion, impose a burden on the plaintiff to present her case in the form of affidavits or other "admissible" evidence. A party who pleads a legally valid claim or defense, and can point to evidence to be used at trial, has a right to go to trial on that basis alone, absent an evidentiary showing that calls into question the substantiality of her factual allegations.

The duty of the moving party to come forward first with an evidentiary showing is fully applicable even where that party is a defendant, who would not have the burden of proof at trial. *Adickes, supra.* It is also fully applicable where a defendant claims that it is unable to submit evidence to "prove a negative." While a defendant manufacturer may not always be able to prove directly its lack of responsibility for a particular injury, it can, through discovery, obtain a preview of the plaintiff's proposed trial case, and then attempt to put together an evidentiary showing that undermines the significance of the evidence identified by the plaintiff. Where such a showing is made, the burden shifts to the plaintiff ***12** to produce evidence in admissible form and demonstrate that it is sufficient to create a triable dispute of fact. *First National Bank v. Cities Service Co.,* 391 U.S. 253 (1968).

Here, petitioner knew the specific facts that respondent planned to prove, as well as the name of her key witness. It even started to look into these allegations. But its summary judgment motion contained no evidence whatever to indicate that respondent's proposed trial case was insubstantial. The motion simply called on respondent to come forward with evidence, during the pretrial period, in admissible form. This was a demand that petitioner could only make after it had first made its own evidentiary showing.

ARGUMENT

The central issue here is whether respondent forfeited her right to a trial on the merits because she failed to submit admissible evidence in her response to petitioner's motion for summary judgment.17 The resolution of this issue turns on the nature of the motion filed by petitioner and whether it was sufficient to create a duty to submit an evidentiary response. In our view,

respondent, like all plaintiffs, had a duty to be able to *identify,* at a suitable time, evidence that she intended to use at trial, and she did so. But the motion filed here by petitioner was plainly ***13** insufficient to create a further duty to present that evidence in the form of affidavits or other admissible documents.

I. The Grant of Summary Judgment in this Case was Improper Because the Motion Failed Even to Assert a Set of Facts Sufficient to Justify a Judgment as a Matter of Law.

According to petitioner, the issue presented to this Court is whether a plaintiff in an asbestos case should have a duty to come forward with admissible evidence of exposure to a defendant's products, where the defendant has filed an unsupported summary judgment motion that simply denies such exposure. This question is not, however, actually raised on the facts of this case, because the motion filed by Celotex had another, even more fundamental, flaw: it did not even deny that Celotex products had injured the decedent. The motion made only one claim--that "plaintiff ha[d] failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court.*" J.A. 170 (emphasis added).18 Faced with this motion, respondent clearly had no duty to make any sort of factual showing, because the only undisputed fact even ***14** arguably asserted by petitioner was legally insufficient to justify a judgment for Celotex.19

Under Rule 56, Fed. R. Civ. P., a party moving for summary judgment must make two basic showings. He must show (1) "that there is no genuine issue as to any material fact," and (2) "that [he] is entitled to a judgment as a matter of law." These two matters are closely related. In essence, the movant typically asserts that certain facts cannot be disputed, and that any other factual issues are immaterial because the undisputed facts are sufficient to justify judgment for him as a matter of law. *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725, at 93-95.

In the present case, petitioner only claimed, at the very most,20 the existence of one undisputed fact concerning events that caused the death of Mr. Catrett--*i.e.,* the absence of exposure to Celotex products in Washington, D.C. This was not enough. Since it was clear that respondent's case against Celotex was based on allegations of exposure *outside* the District of Columbia, petitioner had a further duty of showing that these other allegations were immaterial. This it did not, and could not, do.

The problem was that there is no legal theory under which respondent's claim can be made to depend on a showing of injury in a certain jurisdiction. As a matter of law, the location of the tort could only have been relevant to matters other than the disposition of the case on ***15** the merits--choice of law, a discretionary change of venue,21 or, conceivably, personal jurisdiction.22 As a result, petitioner's motion, on its face, failed to establish the company's right to summary judgment.

Upon receiving such a motion, respondent would have been well within her rights simply to point out the legal deficiency of petitioner's argument. While making this point, J.A. 191, respondent chose to do more, and submitted the two letters and the deposition transcript to illustrate the substantiality of her allegations of exposure outside the District of Columbia. At that point, it was hardly reasonable for petitioner and the district court to criticize her for failing to go even further and submit sworn affidavits or depositions proving her claim. On the contrary, before any obligation to respond with evidence can possibly arise, a defendant's summary judgment motion must at least *assert* a set of undisputed facts that are legally sufficient for it to prevail. Here, the motion simply missed the point.23

***16 II. The Court of Appeals Correctly Held that Petitioner's Summary Judgment Motion was Facially Deficient Because it Did Not Include Any Sort of Evidentiary Showing.**

The court of appeals in this case decided to treat petitioner's motion as if the motion had, in fact, denied the decedent's exposure to Celotex products in *any* locale. Having done so, however, the court held that the motion was still facially deficient, because it included no evidence whatever supporting petitioner's claimed right to summary judgment. This ruling was neither novel nor controversial. The plain language of the summary judgment rule itself, as interpreted on numerous occasions in this Court and the lower federal courts, provides that when a party files a summary judgment motion calling into question his opponent's factual allegations, he must include a sufficient *evidentiary* showing. Absent such a showing, the

nonmoving party has no duty even to respond.

A. Respondent Had No Duty to Respond to Petitioner's Motion in Any Way.

Even if petitioner's motion had addressed the material issue of fact in this case--*i.e.,* the decedent's exposure to Celotex products in any location--the motion would still have constituted nothing more than a repetition of the general denials already contained in the company's answer to the complaint. Petitioner's basic position here is that it was entitled to repeat these denials in the form of a motion, and thereby force respondent to come forward with admissible evidence to support her claim. Celotex makes this argument even though, at the time of its motion, it (1) had been given specific information about the exposure respondent planned to prove at trial, as well as the name of an employee with personal knowledge of the relevant events, and (2) had itself produced sales records documenting its sale of the relevant asbestos product to the decedent's employer during the relevant time period. Soon thereafter, and months before the court ***17** acted on the summary judgment motion, respondent specifically designated the previously identified employee as a witness for trial and so informed the court.24 *See* J.A. 201; p. 8, *supra.* The gist of the Celotex position is that, having received this information about its opponent's prospective trial case, it could produce no contrary evidence of its own and still force respondent to go to the trouble of submitting affidavits or other admissible evidence to show the validity of her case before trial.

This position is wholly without merit. It is black letter law that where a party's motion for summary judgment seeks to contest an opponent's allegations, but fails to include a sufficient *evidentiary* showing that calls those allegations into question, the opposing party has no duty to respond to the motion in any way whatsoever. In this case, respondent, like any other plaintiff, had an obligation to respond to reasonable requests from the defendant or the court for an *identification* of the evidence she intended to use at trial to establish each essential element of her claim.25 But, having done so, she had every right ***18** to go to trial on her claim, unless petitioner came forward with some evidentiary showing indicating that her case was without merit.

This basic principle is specifically incorporated in the governing rule itself. To be sure, Rule 56 provides that a proper motion for summary judgment creates a duty on the part of the opponent to submit a response that "by affidavits or as otherwise provided in this rule, ... set[s] forth specific facts showing that there is a genuine issue for trial." Rule 56(e). But a motion only creates such a duty when it is "made *and supported* as provided in this rule," *id.* (emphasis added)--*i.e.,* when it contains some evidence that goes beyond the movant's own mere allegations of fact.

Even if this language were somehow ambiguous, the accompanying Advisory Committee note would resolve all doubts. The committee emphasized that the rule does not require an evidentiary response by the nonmoving party in every case. On the contrary, "[w]here the *evidentiary matter* in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56, *reprinted in* 6 *Moore's Federal Practice* ¶ 56.01[14], at 56-22 (emphasis added).26

***19** The courts have not been hesitant to follow this clear rule. The most prominent decision in this area is *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970), where this Court reversed a grant of summary judgment for a defendant on the ground that its motion had failed to include sufficient evidence contradicting the allegations made by the plaintiff. The case involved an alleged conspiracy between a store and a police department to deny service to a customer for racially discriminatory reasons. The defendant, in moving for summary judgment, had offered some evidence to counter the conspiracy claim, but had failed to contradict one factual allegation that could be seen as supporting the claim--*i.e.,* the allegation that a policeman was present in the store at the time of the incident. In response, the plaintiff relied solely on unsworn or inadmissible evidence.27 The Court ruled for the plaintiff on the ground that the moving party has "the burden of showing the absence of a genuine issue as to any material fact." *Id.* at 157. Because the defendant's initial evidentiary showing failed to contest one of the factual bases of the plaintiff's claim, the deficiencies of her responsive showing were irrelevant: the plaintiff simply "was not required to come forward with suitable opposing affidavits." *Id.* at 160.28 *See also Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620 (1944).

***20** Similarly, despite petitioner's efforts to show otherwise,29 the courts of appeals are unanimous in their recognition of the moving party's duty to come forward first with some evidence in support of his summary judgment claim, before the

opponent can be required to produce any evidence or respond in any way.30 And the leading treatises ***21** on federal procedure acknowledge the rule as well.31 *Moore's Federal Practice* ¶ 56.04, at 56-74 ("if a defendant ***22** moves for summary judgment ... he has the burden of clearly establishing the lack of any triable issue of fact *and must take the initiative of marshalling a record so showing*") (emphasis added); *see also id.* ¶ 56.15[3], at 56-480; 10A C. Wright, A. Miller & M. Kane, *supra,* § 2727, at 131, 143 ("The party moving for summary judgment cannot sustain his burden merely by denying the allegations in the opponent's pleadings.")32

The reasons for requiring such an initial showing are not difficult to discern. They stem from the fundamental premise that any litigant who pleads a legally valid claim or defense has a right to have that claim or defense tried, absent a showing that is sufficient to call into question the substantiality of his factual case.33 That right ***23** would be burdened significantly if litigants were routinely required first to go to the trouble and expense of producing affidavits, depositions and the like in order to convince the court that they have a substantial case. Until a contrary showing is made, the representations of counsel about the witnesses and evidence he has ready for trial should be enough to preserve a party's right to a full hearing.34

In the instant case, respondent (1) pleaded a valid claim, (2) listed a person with direct knowledge as a trial witness, and (3) identified the sales records supplied by Celotex as documents that substantiated the witness's proposed testimony. Having done all this, she certainly had no obligation to come forward with any kind of evidence to defeat petitioner's wholly unsupported motion for summary judgment. Yet she chose to do more--submitting three documents that corroborated the allegations she planned to prove at trial. In a sense, it was the generosity of this response that caused respondent trouble in this case, since it somehow led the court to focus on the "admissibility" of these documents themselves. But this perverse chain of events hardly provides a valid basis for the district court's conclusion that respondent had failed to meet a burden imposed on her by Rule 56.

***24 B. Petitioner Has Presented No Valid Argument for an Exception to the Usual Rule in this Case.**

Petitioner offers two arguments for recognition of an exception to the prevailing rule. Neither argument is substantial.

1. ***The Burden-of-Proof Argument.***

First, petitioner points to the fact that the moving party here was a defendant, who would not bear the burden of proof at trial. Pet. Br. 16. Based on this fact, Celotex suggests that it is only fair to expect the party who bears the trial burden to be the party that comes forward with evidence first at the summary judgment stage. This argument does not withstand analysis. To begin with, it simply ignores the governing law. It is well-established that even when the party seeking summary judgment would not have the burden of proof at trial, he still must make a prima facie evidentiary showing before shifting the burden of producing admissible evidence to his opponent. *Moore's Federal Practice* ¶ 56.15[3], at 56-480.35 Indeed, all of the principal cases cited in this brief--including *Adickes* and every case cited in note 30 *supra*-- involved summary judgment motions by *defendants,* who were nevertheless required to include a sufficient evidentiary showing in their summary judgment papers.

***25** Even if the law were not so clear, there would be no justification for petitioner's suggestion that the trial burden of proof should control at the summary judgment stage. Petitioner's argument is based on a confusion of two quite different matters: (1) the obligation of the plaintiff in every case to identify the evidence he plans to use at trial, and (2) the obligation of a plaintiff, when responding to a valid summary judgment motion, to put this evidence in admissible documentary form. It is always reasonable to expect the party bearing the burden of proof at trial to *identify*--after a suitable period for discovery--the witnesses and other evidence that he intends to use to prove each key element of his claim. There is no reason, however, to impose a further burden on plaintiffs to present this evidence in every case in "admissible" form.36 Instead, it is quite appropriate to require the first evidentiary showing from the party seeking to cut short the proceedings and deny his opponent a full hearing--*i.e.,* the party moving for summary judgment.

2. ***Petitioner's Lack of "Access" to the Relevant Facts.***

The second argument raised by petitioner is that a defendant should be able to file an unsupported motion in a case where it is unable to prove its innocence because it lacks sufficient access to the evidence needed to "prove a ***26** negative."37 This argument, however, is based on a misunderstanding of what it means to require the moving party to make an evidentiary showing. "There are essentially two methods by which the moving party can discharge his burden." Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L.J. 745, 750 (1974). In some cases, a defendant can simply submit an affidavit by a witness with personal knowledge of the facts, denying the factual basis of the plaintiff's claim. But in other cases, as petitioner suggests, this may not be possible. An asbestos company, for example, may not know which of its products were ever used by a given individual. Nevertheless, there is still a way for such a defendant to make the requisite showing. "[T]hrough discovery he can obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden." *Id. See also* 6 *Moore's Federal Practice* ¶ 56.15[5].

In other words, even where the defendant lacks access to direct evidence to refute a plaintiff's claim, he can use discovery to force the plaintiff to reveal the facts and evidence on which he plans to rely at trial. This information, in turn, can provide the basis for a proper motion for summary judgment. In some cases, the defendant can simply rely on the plaintiff's response and argue that the plaintiff's proposed trial evidence is insufficient to prove the case as a matter of law. In other cases, he may choose to depose the plaintiff's witnesses to test their actual knowledge of the relevant facts. Or he may be able to respond to the plaintiff's prospective case with affidavits or documents of his own that undermine the purported significance of the plaintiff's evidence.

***27** When such a showing is made, the burden shifts to the plaintiff to reduce his evidence to admissible form, and demonstrate to the court that it is sufficient, as a matter of law, to create a triable issue of fact. Thus, in *First National Bank v. Cities Service Co.,* 391 U.S. 253 (1968), the defendant had prevailed on a motion for summary judgment by determining through depositions what circumstantial evidence the plaintiff intended to use to prove his case, and then supplying affidavits which "conclusively showed that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them." *Id.* at 289. This Court affirmed, holding that the plaintiff could not, in the face of an evidentiary attack on his own prospective case, rely simply on the defendant's failure to *disprove* its liability conclusively. *Id.*

Here, by contrast, petitioner made no effort whatever to contest the significance of the evidence that respondent had outlined for potential use at trial. It attempts now to excuse this failure by arguing that it could not do more because respondent never gave it the requisite "preview" of her trial case in answers to interrogatories.38 But this argument ignores the substance of what occurred below. Well before the dispositive summary judgment motion was filed, respondent had revealed the details of her case against Celotex by submitting the two letters and the deposition transcript in conjunction with her opposition to an earlier summary judgment motion that was later withdrawn. J.A. 160-64L. The parties then proceeded with these facts in mind. Petitioner, for example, moved for a change of venue to Chicago based on the fact that respondent's allegations of exposure involved an Illinois company. Thus, even if respondent should have put more of these specifics into her formal interrogatory responses, there is no doubt that petitioner had more than enough ***28** notice of what she planned to prove at trial to allow it to investigate respondent's case and prepare a contrary evidentiary showing.

Indeed, the record makes clear that Celotex did begin such an investigation here. First, it searched its own records to see if they reflected sales to Anning-Johnson, and found numerous sales records. Next, petitioner tried to put together evidence to show that the products used by the decedent were "enclosed" so that there was no real exposure to asbestos fibers. *See* p. 5, *supra.* But this effort apparently led nowhere. Ultimately, Celotex filed its motion for summary judgment without submitting any kind of a defense through affidavits, and without even trying the most obvious means of testing respondent's case--*i.e.,* deposing her key witness concerning the decedent's exposure at Anning-Johnson.39

In any event, even if petitioner did have a valid complaint about the incompleteness of respondent's answers to interrogatories, the proper response was to file a motion to compel and, eventually, to seek the sanctions provided for in such cases. *See* Fed. R. Civ. P. 37. Faced with such a motion to compel, the court could have used its discretion to set appropriate deadlines for respondent to complete her description of the pertinent facts and witnesses as requested by the defendants, or it could have considered other appropriate actions.40 Clearly, in a case ***29** where the discovery period set by the court has expired and a plaintiff still cannot point to any evidence that will be used at trial, a dismissal or summary judgment becomes appropriate.41 In the present case, by contrast, petitioner filed its unsupported motion before the close of discovery, in the

apparent hope that respondent might not respond with evidence in admissible form. In so doing, it overlooked its own duty to come forward first with an evidentiary showing sufficient to call into question the validity of the plaintiff's prospective case.

CONCLUSION

For these reasons, the decision below should be affirmed.

*1A APPENDIX

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Footnotes

* Counsel of Record

1 Federal jurisdiction was premised on diversity of citizenship.

2 The district court ultimately granted summary judgment to thirteen of the defendants, dismissed the case against another one for improper service of process, and dismissed the case against the final one for lack of personal jurisdiction. In addition to the Celotex order, respondent appealed the orders in favor of defendants Armstrong World Industries and Turner & Newall. These other appeals were discontinued after the parties reached monetary settlements. J.A. 221 n.1.

3 Celotex Motion for Change of Venue (December 14, 1981) (Exhibit D) (Record Document 129). An example of these sales records is appended to this brief. The record in this case is not consecutively paginated. The document numbers used here correspond to the numbering on the district court docket sheet.

4 It subsequently became clear that the decedent's exposure began even earlier than 1957. *See* J.A. 142 (plaintiff's response to first Celotex motion for summary judgment) (decedent worked "for approximately twenty-five years as a plasterer with extensive exposure to asbestos products ... at approximately forty-seven (47) different worksites throughout the country").

5 Record Document 46A; *see* J.A. 65-66. It is therefore misleading for petitioner to complain, at page 3 of its brief, that respondent never responded to an October 17, 1980 document request filed by Celotex. As *petitioner* flatly stated in the district court, under the protective order, "plaintiff was relieved of her obligation to respond to Celotex's first set of interrogatories *and request for documents*." J.A. 76 n.2 (emphasis added).

6 All three documents referred to Mr. Catrett's use of a product known as "firebar," which was distributed by the patent holder, Universal Firebar, Inc., but manufactured in Canada by Carey-Canadian Asbestos, a division of Panacon Corp., which was later merged into Celotex. *See* notes 11 & 14 *infra.*

7 Tr., 12/4/81, at 11 ("There was a product used while he was employed, but it was not something to which he was exposed. That is the information I have.... It was a completely enclosed product, and there was no possible exposure.") Counsel made this representation even though, in his deposition transcript, the decedent had described the product he used--"firebar"--as a powder that was mixed into a liquid and then *sprayed* on surfaces to fireproof them. J.A. 164A-64C, 164G-64I.

8 Tr., 12/4/81, at 11 ("That is the information I have right now, and I am writing it down.")

9 Record Document 129.

10 *Id.* (Exh. D) (an example is appended to this brief).

11 J.A. 115 (Celotex Response to Plaintiff's Interrogatories, October 2, 1981). In numerous other cases, Celotex has not contested its liability for exposure to Panacon's products, arguing instead only that it should be insulated from *punitive* damages stemming from the predecessor corporation's conduct. *See, e.g., Krull v. Celotex Corp.,* 611 F. Supp. 146 (N.D. Ill. 1985); *In re Asbestos Related Cases,* 566 F. Supp. 818 (N.D. Cal. 1983).

12 In fact, these interrogatories had only been filed 29 days prior to the filing of the motion. J.A. 168. Respondent's answers were

filed five days later, on December 28. J.A. 178.

13 In the accompanying brief, petitioner explained that an essential element of respondent's case is a showing that Celotex caused the decedent's injuries, and then simply stated that "[t]he record is totally devoid of any such evidence within the jurisdictional confines of this Court," J.A. 175.

14 Indeed, the sales records attached to petitioner's own motion for change of venue would have conclusively contradicted such a claim. It was only on appeal that petitioner began raising the issue whether the products sold to Anning-Johnson might have come from a subsidiary for which it was not legally responsible. See Pet. Br. 5. Even if this suggestion were not conclusively contradicted by the sales records' reference to "Carey Canadian Asbestos, *A Division* of Panacon Corporation," (emphasis added), this would simply be one of many factual issues that petitioner could have, but did not, raise in the district court.

15 Plaintiff's Opposition to Motion of Defendant Celotex Corporation for Change of Venue, at 4 (February 3, 1982) (Record Document 164) ("[Plaintiff] intends to call Terry R. Hoff, Assistant Secretary of Anning-Johnson Company to establish that plaintiff's deceased husband was employed by Anning-Johnson Company to spray asbestos products manufactured by defendant.")

16 The court noted that where the defendant's difficulties of proof stem from a plaintiff's failure to comply with discovery requests, the appropriate response is to seek sanctions under the discovery rules. J.A. 227 n.12.

17 "Admissible" evidence in this context means either (1) affidavits or depositions reflecting the testimony that a live witness could give at trial, (2) properly authenticated exhibits that could be introduced at trial, or (3) statements made by the opposing party in pleadings, admissions, interrogatory answers, etc. *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §2722. Affidavits, of course, would not themselves typically be admitted in evidence at trial.
While there may be arguments that one of the documents submitted by respondent--the sworn deposition of the decedent in a previous workers compensation proceeding--should be deemed admissible at trial under the catch-all authority of Fed. R. Evid. 804(5), we do not press this issue here.

18 This same limited claim was then repeated in petitioner's brief in support of summary judgment, J.A. 175, and the accompanying "Statement of Material Facts as to Which There is No Genuine Issue," J.A. 171. Petitioner's contrary description of the motion, Pet. Br. 21 n.3, is simply inaccurate.
At the oral argument on the motion, counsel for petitioner, for the first time, appeared to call into question respondent's ability to prove exposure outside Washington, D.C. J.A. 212. However, this ambiguous comment obviously came far too late to provide respondent notice that Celotex intended to contest this issue. *Cf.* note 34 *infra* (when *court* is considering a *sua sponte* grant of summary judgment, it must give sufficient notice to party of his duty to produce evidence supporting his claim).

19 The inadequacy of petitioner's factual claims was asserted by respondent both in her response to the summary judgment motion, J.A. 191, and in her brief in the court of appeals, Appellant's Br. at 21-22.

20 It is not altogether clear that petitioner made any assertion of fact whatever with regard to the underlying merits of the case. The motion was primarily addressed, not to the merits, but to respondent's level of compliance with defense discovery requests. J.A. 170 *et seq.* As we discuss *infra,* this is a matter that is properly addressed through a motion to compel, not a motion for summary judgment.

21 As we have noted, petitioner requested just such a transfer of the case in a motion filed nine days before its summary judgment motion.

22 It is doubtful that Celotex could have raised a substantial issue of personal jurisdiction in this case. Celotex has a certificate to do business in the District of Columbia, J.A. 86, and its predecessor-in-interest distributed asbestos products on a national basis. Moreover, the cancer that killed the decedent only formed years after the exposure, when he had returned to Washington. J.A. 25, 33-34, 37-40. *Cf. World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98 (1980). *See also* D.C. Code Ann. § 13-423(4).
In any event, lack of personal jurisdiction would not have justified a merits ruling like that entered here--exculpating Celotex from liability for all injuries to the decedent in all locales. Instead, the appropriate outcome would have been a transfer to another federal district. *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 465-67 (1962).

23 In light of these facts, the Court may wish to consider entering an order dismissing the writ of certiorari in this case as improvidently granted.

24 In view of these facts, there is no basis for petitioner's implicit suggestion that respondent's answer to the summary judgment motion demonstrated that her case was meritless. Certainly it is hard to see how *amicus* Motor Vehicle Manufacturers *et al.* can assert that respondent "in substance *admitted* that she possessed no competent evidence." Br. at 20. The record contains no such admission.

25 Such requests from opponents typically come in the form of interrogatories. The court typically asks for an outline of the plaintiff's case at a pretrial conference convened pursuant to Fed. R. Civ. P. 16.
In addition, any party has a duty to respond to a request for production of relevant documents. But compliance with such a request is again quite different from going to the trouble of incorporating such documents in a formal evidentiary response to a properly supported summary judgment motion. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722, at 58-60 (exhibits, to be considered on motion for summary judgment, must be authenticated by an accompanying affidavit).

26 Several years before the language quoted here was added to the rule, the same language was proposed but not adopted. At that time, the committee explained that it wished to make it clear that "*where the motion for summary judgment is supported by depositions or affidavits,* the opposing party must make a similar presentation to show the existence of a genuine issue of fact." Advisory Committee Note on Proposed 1955 Amendment to subdivision (e) of Rule 56, *reprinted in Moore's Federal Practice* ¶ 56.01[[9], at 56-19 (emphasis added).
The issue, when this language was being considered, was whether a nonmoving party, even in responding to the evidentiary showing of a moving party, could rely simply on the "well-pleaded" allegations of his pleading. *See id.* ¶¶ 56.01[9], [14], .11, at 56-232. The amendment made it clear that a party must meet an evidentiary showing with some evidence of his own. But it never even occurred to anyone at the time that a nonmoving party might be required to make an evidentiary showing where the moving party had not done so.

27 The plaintiff relied on a hearsay statement in her own deposition and an unsworn statement by a store employee. *Id.* at 159 & n. 19.

28 Petitioner's effort to distinguish *Adickes* is based on the misleading assertion that the plaintiff in that case did come forward with "circumstantial evidence to support her theory" in response to the motion for summary judgment. Pet. Br. at 14. This assertion misses the point. As we have noted, all of the evidence put forward by the plaintiff, be it "direct" or "circumstantial," was inadmissible and/or unsworn. 398 U.S. at 159 & n. 19. The Court did not find this to be a problem because it held that the district court would have been required to deny summary judgment *even if the plaintiff had produced no response whatever. Id.* at 160-61. In the instant case, of course, while the documents submitted by respondent were hearsay, she also pointed to *direct* evidence of her claim--the testimony of Mr. Hoff--that she planned to offer at trial.

29 The cases cited by petitioner do not relate to the issue at hand, because they involve the quite different situation where a defendant *has* come forward with some sort of evidentiary showing, and thereby shifted the burden of production to the plaintiff. A good example is *In Re Japanese Electronic Products,* 723 F.2d 238 (1983), *cert. granted,* 105 S. Ct. 1863 (1985) (No. 83-2004), cited in Pet. Br. at 17. In that case, summary judgment was granted only after the parties had submitted what the district court called "one of the most complete summary judgment records ever put before any court." 513 F. Supp. at 1143.

30 The duty of a moving party to come forward with evidence has been recognized in every circuit. *Lee v. Flintkote Co.,* 593 F.2d 1275, 1281-82 (D.C. Cir. 1979) ("the party opposing summary judgment need not present any evidentiary matter unless the movant has made a prima facie showing that the case is completely free from any significant question of fact"); *Mack v. Cape Elizabeth School Board,* 553 F.2d 720, 722 (1st Cir. 1977) ("defendants could not, by filing incomplete affidavits, impose a burden on plaintiff"); *Patrick v. LeFevre,* 745 F.2d 153, 160 (2d Cir. 1984) (where evidentiary matter submitted by defendant is insufficient, " 'summary judgment must be denied even if no opposing evidentiary matter is presented' ") (quoting 1963 Advisory Committee note); *DeLong Corp. v. Raymond International, Inc.,* 622 F.2d 1135, 1142 (3d Cir. 1980) ("if [[defendant] submits evidentiary material which indicates that there is 'no genuine issue of material fact,' " it "becomes the responsibility of the opposing party to introduce its own evidentiary material"); *Terry's Floor Fashions v. Burlington Industries,* 763 F.2d 604, 610 (4th Cir. 1985) ("the burden is on the plaintiff to produce evidence of an alleged conspiracy when the defendant has produced evidence conclusively showing that the facts on which the plaintiff relies ... are not susceptible of the interpretation which plaintiff attempts to give them"); *Impossible Electronics Techniques v. Wackenhut Protective Systems,* 669 F.2d 1026, 1031 (5th Cir. 1982) ("the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly carried its burden"); *McDonnell v. Michigan Chapter # 10, American Institute of Real Estate Appraisers,* 587 F.2d 7, 9 (6th Cir. 1978) ("Until the deficiencies of the defendants' affidavits are remedied, [the plaintiff] is not required by Rule 56 to supplement his pleadings with 'significant probative evidence' that his allegations are true."); *Yorger v. Pittsburgh Corning Corp.,* 733 F.2d 1215, 1222 (7th Cir. 1984) ("defendant did not discharge its burden of showing that no genuine issue of material fact exists ...; therefore plaintiff should not be penalized for failure to attach an affidavit in his response"); *Brown v. Trans World Airlines,* 746 F.2d 1354, 1358 (8th Cir. 1984) ("To be entitled to summary judgment, [defendants] were required to show, *by admissible evidence,* that there is no genuine issue ....") (emphasis added); *ALW, Inc. v. United Air Lines, Inc.,* 510 F.2d 52, 55 (9th Cir. 1975) ("Once the allegations of conspiracy made in the complaint are rebutted by probative evidence ... if the plaintiff then fails to come forward with specific factual support of its allegations ... summary judgment for the defendant becomes proper."); *Bankers Trust Co. v. Transamerica Title Insurance Co.,* 594 F.2d 231, 235 (10th Cir. 1979) ("When a motion for summary judgment is made and supported by depositions and documents, ... the adverse party may not rest upon the mere allegations ...."); *Clemons v. Dougherty County,* 684 F.2d 1365, 1369 (11th Cir. 1982) ("the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with

sufficient evidence").

31 To be sure, as Judge Bork noted in dissent, J.A. 239, Rule 56 does specifically authorize a party to move for summary judgment "with *or without* supporting affidavits." Fed. R. Civ. P. 56(a), (b) (emphasis added). But this does not mean, as he suggested, that such an unsupported motion can force the nonmoving party to produce admissible evidence. If a motion is made "on the basis of the pleadings alone," it becomes "functionally the same as a motion to dismiss for failure to state a claim or for a judgment on the pleadings." 10 C. Wright, A. Miller & M. Kane, *supra,* § 2713, at 594. In such a case, "the movant admits the truth of his adversary's well-pleaded allegations but denies their sufficiency as a matter of law." *Moore's Federal Practice* ¶ 56.11, at 56-198. In order to "pierce the pleading allegations," by contrast, the movant must offer some *evidence* that contradicts them. *Id.* at 56-199.

32 The two main law review articles cited by petitioner also recognize that the present federal rule requires as evidentiary showing by the moving party. *See* Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72, 77-79 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L.J. 745, 749-50 (1974). Moreover, one of these commentators argues for a retention of this requirement in every case, albeit in a somewhat less stringent form in cases where the moving party would not have the burden of proof at trial. *Ibid.*

33 Thus, in *Weinberger v. Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609, 620-22 (1973), the Court did uphold an *administrative* procedure requiring every party seeking approval of a new drug first to submit a full-blown written presentation of relevant studies and data as a condition of avoiding a summary denial of the claim. But in so doing, the Court was careful to state that if "this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment." *Id.* at 621-22. The Court then noted that "[u] nder the Rules of Civil Procedure the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact." *Id.* at 622 n. 18.

34 Judge Bork suggested below that, in some cases, the court itself may grant summary judgment *sua sponte* if it first gives the party adequate notice and an opportunity to show the existence of material factual disputes. But whatever the power of the court to issue a pretrial demand for substantiating evidence in an unusual case where it has reason to suspect a litigant's good faith, it is quite another matter to argue that *defendants* should have the power to demand an admissible evidentiary showing routinely in every case.

35 As Professor Moore puts it:
The operation [of the directed verdict and summary judgment rules] is ... somewhat different where the motions are made by the opponent of the party with the trial burden.... On motion for directed verdict the party resisting the motion, *i.e.,* the plaintiff, has had to and has presented his evidence, which is then scrutinized by the motion. *On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence, of the necessary certitude, which negatives the opposing party's (plaintiff's) claim.*
Id. (emphasis added).

36 This distinction was entirely overlooked by Judge Bork in his dissent below. He stated that "[t]his case is just like one in which, after discovery, the judge holds a pre-trial conference, asks the plaintiff how he intends to prove each element of his case, and learns that the plaintiff has no admissible evidence of an indispensable element of that case." J.A. 241. In fact, however, respondent here plainly did indicate that she had admissible evidence--including a witness--available for use at trial. The pretrial conference analogy hardly can support some further duty on her part to substantiate this prospective case through affidavits. No court, to our knoweldge, requires a party to produce affidavits at a pretrial conference indicating what his witnesses will say.

37 Pet. Br. 22. *See also* Pet. Br. 13 ("It is of course impossible for any defendant in the position of Celotex to provide such proof--which would logically require an accounting of each day of decedent's career.").

38 Pet. Br. 21.

39 To be sure, even without Mr. Hoff as a witness, we would argue that the existence of a triable issue of fact could have been established solely on the basis of the sales records indicating that a Celotex predecessor corporation had sold asbestos insulation products to the company where the decedent worked.

40 As we noted above, a motion to compel was filed in this case by all the defendants immediately after respondent submitted her first response to the defendants' joint interrogatories. J.A. 64. The court never ruled on this motion, however, apparently because it began almost immediately granting summary judgment to various defendants whenever respondent could not produce specific evidence of the decedent's exposure to their products.

41 Indeed, that is essentially how asbestos cases are routinely handled now in many federal courts. The court enters a pretrial order specifying a period of discovery, after which the plaintiff is required to submit a filing identifying the witnesses he intends to use to establish exposure to each of the defendants' products. The defendants are then given a fixed period of time in which to depose

these witnesses. Where the plaintiff is unable to identify witnesses with respect to a given defendant, that defendant is dismissed from the case. *See generally Rabb v. Amatex Corp.,* 769 F.2d 996 (4th Cir. 1985); *Barwick v. Celotex Corp.,* 736 F.2d 946 (4th Cir. 1984). But even in these situations, the plaintiff need only identify the witnesses, not produce affidavits from them, unless the defendant makes an evidentiary showing sufficient to call into question the case that the plaintiff has outlined for trial.

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